ABA Section of International Law
Your Gateway to International Practice

Immigration & Naturalization Committee Newsletter

A quarterly newsletter of the ABA's Section of International Law's Immigration and Naturalization Committee

Contents

If you wish to contribute to the next edition of the I&N Newsletter, please contact Poorvi Chothani at poorvi@lawquestinternational.com or Melanie Glover at melanie.m.glover@gmail.com

ABA Section of International Law
Your Gateway to International Practice

Editor's Note

Dear Members,

We are excited to present the Immigration & Naturalization Law Committee's newsletter (the I&N Newsletter), the second one for 2014-2015. The I&N Newsletter is your portal to share updates from your jurisdiction with Committee members from around the world.

We invite you to publish updates, articles and practice pointers for your jurisdiction in this publication. Your contributions are very valuable to our readers, and we hope that you find the information shared here to be useful in your practice.

This issue contains an article entitled *"Evaluating an EB-5 Investor from a Regional Center's Perspective"* by Christian Triantaphyllis and Catharine Yen, and two articles entitled *"Express Entry: Opportunities for Permanent Residence To Canada"* and *"New Employer Compliance Work Permit Regulations for Canada"* by Jacqueline Bart. In addition, Poorvi Chothani has written an article on *"India Becomes More Welcoming! - Electronic Visas or Electronic Travel Authorization."*

We extend our thanks to all of the contributors to this issue.

We would be delighted to enhance this publication and welcome your comments and suggestions on ways to do so.

Editors
Poorvi Chothani (LawQuest, Mumbai)
Melanie Glover (Amway Corp., Grand Rapids)

Chapter-Chair's Column

Dear Members,

We are delighted to present to you the second edition of our Committee Newsletter for this year. These three articles are insightful and present timely topics on the subject of global immigration.

We warmly welcome all members to fully participate in the Committee by

- Posting any questions or comments relating to U.S. or global migration to our listserve – intimmigration@mail.americanbar.org – we have a wealth of collective knowledge – utilize it!
- Contributing articles to our next newsletter
- Participating in our monthly committee calls
- Joining our committee during the upcoming Spring Meeting in Washington, D.C.

If you would be interested in participating in any of these areas, please let us know at nklug@balglobal.com or mjacobson@fragomen.com.

Enjoy the newsletter!

Co-Chairs
Michelle Jacobson (Fragomen, Del Rey, Bernsen & Loewy, LLP, Chicago, IL)
Noah Klug (Berry Appleman & Leiden LLP, Dallas, TX)

Evaluating an EB-5 Investor from a Regional Center's Perspective

By: Christian Triantaphyllis and Catharine Yen

Under the Fifth Preference Category of Employment-Based Immigration, USCIS allows foreign investors to invest $500,000 or $1 million USD, depending on the location of the project, into a business to create jobs for at least ten U.S. workers per EB-5 investor in exchange for the opportunity to apply for a green card. The EB-5 investor must make an at-risk investment in a new commercial enterprise that undertakes for-profit activities. USCIS will designate regional centers to manage or sponsor the new commercial enterprise that is undertaking its EB-5 project. The primary advantage for regional center designation is that the regional center can count the indirect and induced jobs, in addition to the direct jobs, created by its EB-5 projects towards the job requirement.

In the realm of EB-5 immigrant investment, the relationship between the EB-5 investor and the USCIS designated regional center is a complex one. Often times, the development of the relationship between the two sides focuses on how the EB-5 investor selects a regional center project in which to make his or her $1 million or $500,000 investment. Factors considered by the EB-5 investor when selecting a regional center project involves both evaluating the investment opportunity and EB-5 immigration compliance issues within the project documents. Conversely, the flipside of this relationship involves determining how the regional center should decide which potential EB-5 investors to accept as an investor in the project.

For this selection process, the authors have identified three categories that regional centers should examine when accepting potential EB-5 investors into a project: securities laws, national security issues, and immigration history and circumstances. The authors write this article to provide an overview of the types of questions and concerns that regional centers should evaluate when accepting investors for its projects.

Securities Law and National Security Concerns and their Overlap with EB-5 Immigration Law

Qualifying as an Accredited Investor

An aspect of raising EB-5 funds that a regional center must be acutely aware of is the securities law involved, particularly whether the EB-5 investor qualifies under the cover of Rule 506 of Regulation D of the Securities Act. Under Regulation D, an EB-5 investor is considered to be an "accredited investor" if:

- The EB-5 investor's earned income exceeded $200,000 (or $300,000 together with a spouse) in each of the prior two years, and reasonably expects the same for the current year, OR
- The EB-5 investor has a net worth over $1 million, either alone or together with a spouse (excluding the value of the person's primary residence).[1]

The concept of being an accredited investor is mentioned not to give guidance on securities law, as the authors are certainly not securities attorneys, but rather to point out that the $1 million minimum investment requirement pertaining to EB-5 immigration law fits nicely with the "net worth over $1 million" aspect of the being an accredited investor. Therefore, depending on whether the regional center undertakes an EB-5 project that requires $1 million or $500,000 investments from the EB-5 investors, the regional center should understand the amount resources it will need to dedicate to this issue. In a perfect world, an EB-5 investor who can make a $1 million investment means that the EB-5 investor likely has a net worth of over $1 million, thereby qualifying him or her as

1 http://www.investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors

an accredited investor. Of course, facts vary on a case by case basis.

National Security Concerns

Regional centers should also be focused on making sure that it is accepting investment funds from EB-5 investors who will actually be able to become lawful permanent residents if the I-526 immigrant petition is approved. This is particularly important for regional centers because of competitive market that exists in the EB-5 world. With over 600 regional centers in existence, many of them claim to have a high rate of success and approvals of getting investors their green cards. In an effort to keep up with the competition, regional centers must strive to do business with investors who are not only eligible for the EB-5 program, but who also have a high chance of obtaining the immigration benefit of becoming a green card holder that's involved with the EB-5 program. Therefore, regional centers should be diligent in not getting involved with potential investors who are bound for years of administrative processing, or worse, are designated by the United States as being a threat to national security.

Regional Centers can be diligent with regards to vetting clientele by entering each potential investor's name into the Specially Designated Nationals List managed by the Office of Foreign Assets Control. It lists individuals, groups, and entities, such as terrorists and narcotics traffickers. Their assets are blocked and U.S. persons are generally prohibited from dealing with them, and thus, are not the type of investor candidate to consider. Another example that stresses the importance of the regional center to review the background of potential investors deals with administrative processing. By setting up proper vetting systems, a regional center operator should be able to determine whether investors have a problematic travel history and thus perhaps should first address their issues through traveler redress channels before beginning the EB-5 immigrant process.

By proactively performing background checks on potential investors, the regional center facilitates its goals of doing business with EB-5 investors who will have an opportunity to make an investment and obtain a green card as fast at the EB-5 program permits.

Vetting Prominent Immigration Concerns

Notably, it is important to ensure the regional center is transacting with the right type of potential immigrants. There are several immigration factors and issues for the regional center to consider:

- **Evaluate the family for any age-out children**. Pursuant to the Child Status Protection Act, certain children who are derivative beneficiaries of an immigrant visa petition are to be classified as a "child" even if the child has already reached age 21. With an impending EB-5 cut-off date for Chinese investors (Mr. Oppenheim predicts it will happen Summer 2015), it is imperative that the immigration attorney evaluate the family to determine whether a child is likely to age out even if the I-526 petition will be filed shortly. In the event that the child is likely to age out, another strategy would be to file two I-526 petitions: one with the parent as the petitioner and another with the child as the petitioner. An age-out issue could be avoided in this way.
- **Understand the investor's previous criminal history (i.e. fraud, crimes, etc.)**. This is important because even though the EB-5 investor may be able to demonstrate a lawful source of funds, the EB-5 investor may be inadmissible to the U.S. anyway due to his past crimes.
- **Ascertain the types of visas (approved and denied) that the investor has applied for in the past**. The regional center will want to ensure that the investor has not violated

status, overstayed his previous visas or accumulated any inordinate amount of unlawful presence that would significantly delay or prevent the individual from being admitted to the U.S. Particularly, if the investor has previously been denied U.S. visas, the regional center should inquire as to the reasons for the denial and whether that will affect the investor's EB-5 application. These inquiries also apply if the investor has ever had a U.S. visa cancelled or revoked. **The same due diligence should apply to the investor's spouse**. Even though the investor's spouse may not be the petitioner of the I-526 petition, the regional center should also evaluate the investor's spouse to confirm that the spouse's potential immigration or criminal concerns will not raise issues for immigrating in the future.

- **Due to the impending EB-5 visa retrogression for China, pay special attention to Chinese national cases**. USCIS policy currently requires that at least ten jobs be created within 2.5 years of the approval of the EB-5 investor's I-526 petition. [2] This approach allowed for approximately two years to pass after obtaining conditional residency to show job creation. This is consistent with the two years requirement to file the I-829 Petition to Remove Conditions. However, if the EB-5 investor incurs significant delays while trying to obtain the EB-5 visa at the U.S. Consulate, then several years could pass before the EB-5 investor could even obtain the EB-5 visa and become a green card holder, to the point that the timing of the 2.5 year rule for receiving credit for job creation could have expired years ago. Thus, the EB-5 investor may not be able to demonstrate job creation 5-6 years in the future, rather than approximately 2.5 years in the future. This concept will also become a significant factor once EB-5 visa retrogression occurs for mainland born Chinese nationals, because visa retrogression will elongate the time between date the I-526 petition is approved and when the investor obtain his or her conditional green card through consular processing or adjustment of status. That delay in time will likely cause the EB-5 investor to reach the I-829 petition stage much later, perhaps as long as three to five s years later, than the more typical two to three years it takes now to get from I-526 approval to the I-829 stage. Therefore, regional centers should be aware how their mainland born Chinese EB-5 investors may affect the project and investment timeline.
- **Get a comprehensive summary of the EB-5 investor's lawful source of funds**. According to USCIS Regulations at Section 204.6(j)(3) [3], "[i]n the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing, capital obtained through lawful means within a regional center… ." Therefore, it is important for the regional center to obtain the proper understanding of the potential EB-5 investor's source of funds background before moving forward with accepting investment funds. The regional center should request the EB-5 investors to describe any funds or assets

2 USCIS Memorandum from Donald Neufeld to Field Leadership (HQ70/6.2, AD 09-38) (December 11, 2009).

3 8 C.F.R. §204.6(j)(3)

that are intended to be dedicated towards the investment. For example, USCIS Regulations list that the EB-5 investor should provide the USCIS with copies of their personal income tax returns for the last five years to prove that the investor's funds were lawfully obtained. This obligation varies according to the income tax rules of the EB-5 investor's country of tax residency, and USCIS tends to understand that the tax rules of each country are different, yet this is a standard request for all EB-5 visa cases. Thus, if the regional center can determine whether that standard is unlikely to be met by an EB-5 investor, then that individual may not be the right candidate for the project.

Best Practices and Conclusion

Regional centers can review these issues through a strict protocol of utilizing due diligence checklists or developing a comprehensive questionnaire in order to vet these types of issues. The EB-5 program can offer one of the fastest ways for a foreign national to become a lawful permanent resident, and eventually a U.S. citizen in five years after becoming a conditional green card holder. However, without the proper vetting process and safeguards in place, both the regional center and EB-5 investor are in for a much longer immigration process full of delays if immigration issues or other factors are not addressed early on in the process.

****

Express Entry: Opportunities for Permanent Residence to Canada

By: Jacqueline Bart

In January of 2015, the Canadian Government rolled out a new permanent residence application management process called Express Entry (EE). This new immigration procedure involves a two-step process which, according to the government, is designed to match Canadian employers with foreign workers and to streamline the application management process. The changes are also intended to enable Canadian employers to recruit foreign workers permanently to Canada through a job bank matching process. The government has promised that it will process the majority of applications within six months. However, substantial planning and various pre-application processes must be completed in advance of the permanent residence application process.

Applicants who qualify under the immigration programs for Federal Skilled Workers (FSW), Federal Skills Trades (FST) and Canada Experience Class (CEC) are now required to apply under the new two-step system and can no longer apply to the government directly for permanent residence to Canada.[4] These applicants are subject to a new ranking system. Provincial Nominee applications may be processed either based on the status quo or through the EE process and the provinces will be provided larger immigrant quotas.

The EE system involves two steps:

4 Citizenship and Immigration Canada, "Ministerial Instructions for the Express Entry Application Management System", 28 November 2014, http://www.cic.gc.ca/english/department/mi/express-entry.asp, s. 2 [MI, Nov. 28, 2014].

1) Potential candidates must complete an online EE profile to be placed in a pool;[5]
2) Once in the pool, the highest-ranked candidates will be invited to apply for permanent residence.[6]

Both steps of the EE program utilize an online application procedure, which in appearance is innocuous. However, without extensive immigration planning, in most cases this will result in the immediate disqualification of an applicant, at stage 1, without an immigration strategy. The information requested at the first stage of the application procedure will be subject to a full documentation government audit during the second stage. Applicants will need language test results and an Educational Credentials Assessment process (ECA) prior to applying—a process which currently takes approximately 4 months.

At the first stage of the application process, generally, an applicant must have obtained at least one year of employment experience in a National Occupational Code 0, A or B to qualify and must possess an approved LMIA. Alternatively, if qualifying under FSW, FST or CEC, the applicant must achieve a sufficiently high rank, as otherwise, an LMIA may still be required for greater certainty.

Once a candidate's EE profile is submitted, that candidate is assessed and scored utilizing a Comprehensive Ranking System (CRS). [7] The factors that will be assessed under the CRS, include skills, work experience, language ability, education, as well as Canadian work experience and education. The CRS allows for a total of 1200 points.[8]

Once in the pool, applicants under the EE system will be invited to proceed to the second stage to apply for permanent residence if they:

- Have a Labour Market Impact Assessment (LMIA) from a Canadian Employer and a job offer;
- Have received an approved nomination from the immigration program of a province or territory; or
- Are one of the highest-ranked candidates who qualify under one of the three Federal Programs (FSW, FST or CEC) under EE.

To date, there have been four sets of invitations issued to applicants under the EE system:

- 779 invitations issued on February 1, 2015 to foreign nationals assigned a total of at least 886 points under the CRS;[9]
- 779 invitations issued on February 8, 2015 to foreign nationals assigned a total of at least 818 points under the CRS;[10]
- 849 CEC invitations issued on February 21, 2015 to foreign nationals assigned a total of at least 808 points under the CRS;[11] and
- 1187 invitations issued on February 28, 2015 to foreign nationals assigned a total of at least 735 points under the CRS.[12]

---

5 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 10.1(3) [*IRPA*].
6 *Ibid*., s. 10.1(1).
7 MI, Nov. 28, 2014, *supra* note 1, s. 8(1).
8 *Ibid*., s. 8(2).
9 Citizenship and Immigration Canada, "Ministerial Instructions Respecting Invitations to Apply for Permanent Residence Under the Express Entry System #1", 31 January 2015, http://www.cic.gc.ca/english/department/mi/ita.asp.

10 Citizenship and Immigration Canada, "Ministerial Instructions Respecting Invitations to Apply for Permanent Residence Under the Express Entry System #2", 7 February 2015, http://www.cic.gc.ca/english/department/mi/ita.asp.

11 Citizenship and Immigration Canada, "Ministerial Instructions Respecting Invitations to Apply for Permanent Residence Under the Express Entry System #3", 20 February 2015, http://www.cic.gc.ca/english/department/mi/ita.asp.

12 Citizenship and Immigration Canada, "Ministerial Instructions Respecting Invitations to Apply for Permanent Residence Under the Express Entry System

The LMIA process must be undertaken by the Canadian employer and involves a substantial cost and time expenditure. The employer must demonstrate that Canadians and permanent residents are not available for the position. In order to demonstrate this, an employer must advertise the position in three credible venues, including the Service Canada Job Bank, and demonstrate the "genuineness" of the employment of the foreign worker. The advertisements have specific requirements and advertising periods, and the employer must provide proof of substantial recruitment efforts, employment documentation and compliance with additional employment standards and reporting obligations. Employers are also subject to warrantless on-site investigations and audits. They must prepare an extensive transition plan, when applying for an LMIA, setting out various required activities and preparing recruitment projections, based on these activities, for the hiring of Canadians and permanent residents for the occupation to be filled by the foreign worker.

In addition, Express Entry applicants are required to conform to the NOC lead statement and a substantial number of main duties, and all essential ones, for NOC 0, A or B, furnish acceptable proof of having met these requirements in a manner compliant with the NOC, and ensure that the position matches the NOC without a finding of collusion, misrepresentation or fraud based on the employment offer.

Any inconsistencies in information could render the applicant subject to a 5 year ban from Canada, if determined as 'misrepresentation' by Citizenship and Immigration. [13] In addition, employer non-compliance with the LMIA requirements could result in extensive fines or jail terms for the officers of the company,[14] in addition to placement on a public employer non-compliance list and a bar from utilizing the temporary foreign worker program for two years.[15]

Without a carefully prepared immigration strategy, EE applicants could face immediate disqualification or eventual disqualification after completion of the secondary/audit process. The new system is neither transparent nor facile and it places a greater burden on employers who already shoulder the brunt of the corporate immigration program in Canada.

****

New Employer Compliance Work Permit Regulations for Canada

By: Jacqueline Bart

In addition the EE process, Citizenship and Immigration Canada ("CIC") has also introduced a new employer compliance form under the International Mobility Program. Based on the new regulations, employers are now required to file employment confirmation information prior to filing a foreign worker work permit application.[16] The regulations were introduced on February 11, 2015 and came into force on February 21, 2015.

This shift in law and policy was a shock to employers, foreign workers and their counsel. It has effectively resulted in the refusal of hundreds of work permits at visa offices, ports of entry and inland applications and renewals, for those unprepared for this substantive change in Canadian law.

Based on the new rules, applying for a work permit requires a two-step process:

#4", 27 February 2015, http://www.cic.gc.ca/english/department/mi/.

13 *IRPA*, *supra* note 2, s. 40(2).

14 *Ibid*., ss. 124-128.

15 *Ibid.*, ss. 203(2), 209.91.

16 *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 209.11 [*IRPR*].

1. An employer immigration compliance filing in Canada; and
2. The employee work permit application, supported by the employer's in-Canada application filing.

This new procedure applies to Labour Market Impact Assessment Exempt (LMIAE) work permits. These include intra-company transfers, trade agreement work permits (such as NAFTA, GATS and Canada's free trade agreements with Peru, Columbia, Chile and South Korea) reciprocal agreements, spousal work permits, open work permits, significant benefit exemptions, provincial/territorial agreements, and others.

This new employer work permit compliance filing process requires employers to provide employment information directly to CIC when hiring foreign nationals under the International Mobility Program. The information provided by employers will form the basis of future compliance assessments when employers are inspected.

Specifically, employers are now required to provide the following information:

- Name, address, contact information;[17]
- Business number (if applicable);[18]
- Relevant employment information and information supporting use of the LMIA-exemption;
- Offer of employment using the form made available by CIC;[19] and
- $230 fee payable by employers for each LMIA-exempt employer-specific work permit application, including renewals, unless exempt by policy.[20]

The $230 fee and employment information must be submitted by the employer before a foreign national makes an application for a work permit. If employers do not meet the above requirements when hiring foreign nationals under employer-specific LMIA-exemptions, officers will refuse the work permit application by the foreign national.[21]

Aside from the government revenue generation of this new program, it is designed to ensure that the government receives information directly from the employer regarding the employment position. This enables the government to verify compliance with the International Mobility Program regulatory requirements. The Regulatory Impact Analysis Statement from the government indicates that the information will be utilized for government employer compliance processes.[22] The government seeks to bolster their enforcement authority in employer compliance inspections. These regulations will enhance CIC's legislative authority to inspect employers. The government will conduct on-site inspections without a warrant.[23] At employer on-site inspections, CIC will require employers to provide documents that demonstrate compliance with the job offer, [24] including payroll and taxation documentation, time sheets, foreign worker activities and responsibilities, location of employment and other types of government and non-government documentation. CIC may also interview foreign workers or Canadian employees to determine employer compliance.[25] The regulatory penalties for employer non-compliance with immigration filings can include jail terms and fines.[26]

17 *Ibid*., s. 209.11(a).
18 *Ibid*., s. 209.11(b).
19 *Ibid*., s. 209.11(c).
20 *Ibid*., s. 303.1.
21 *Ibid*., s. 200(3)(f.1).
22 Regulatory Impact Analysis Statement (Regulations Amending the Immigration and Refugee Protection Regulations (International Mobility Program)), (2015), C Gaz 2015 II, 555-566.
23 *IRPR, supra* note 1, s. 209.8(1).
24 *Ibid*., s. 209.7(1).
25 *Ibid*., s. 209.8(2)(a).
26 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 124-128.

****

India Becomes More Welcoming! - Electronic Visas or Electronic Travel Authorization

By: Poorvi Chothani

Foreign nationals of several countries may now obtain an Electronic Travel Authorization (ETA) and travel to India using the Visa on Arrival facility for recreation, sight-seeing, casual visits to meet friends or relatives, short duration medical treatment or casual business visits. This is commonly referred to as Tourist Visa-on-Arrival (TVoA). The name unfortunately can be misleading on two aspects – (1) the visa has to be obtained before arrival in India and that too only at designated airports and (2) it can be used for numerous activities other than tourism.

An ETA must be obtained within 24 days of the date of travel. If the ETA is granted it allows a maximum stay of 30 days in India from the date of arrival and this status cannot be extended. The TVoA facility can be used only twice during a calendar year.

Passport holders of the following countries are eligible for ETA allowing travel on both ETA: ***Australia, Brazil, Cambodia, Cook Islands, Djibouti, Fiji, Finland, Germany, Indonesia, Israel, Japan, Jordan, Kenya, Kiribati, Laos, Luxembourg, Marshall Islands, Mauritius, Mexico, Micronesia, Myanmar, Nauru, New Zealand, Niue Island, Norway, Oman, Palau, Palestine, Papua New Guinea, Philippines, Republic of Korea, Russia, Samoa, Singapore, Solomon Islands, Thailand, Tonga, Tuvalu, UAE, Ukraine, USA, Vanuatu, Vietnam.***

The designated airports, which have facilities to receive travelers on TVoA, are Bengaluru, Chennai, Cochin, Delhi, Goa, Hyderabad, Kolkata, Mumbai and Trivandrum.

Business Travel on TVoA:

The Indian Ministry of Home Affairs (MHA) has not clarified by way of a notification or guidelines as to what constitutes a "casual business visit." Additionally there is no comprehensive list of what activity would qualify as "casual business."

As per business visa guidelines published by the MHA, by way of FAQs, a business visa holder can carry out the following activities. There is a school of thought that if the activity is not specified in this list it could constitute "casual business." However this list should not be confused as guidelines for "casual business" when traveling on TVoA:

i. Foreign nationals who wish to visit India to establish industrial and/or business venture or to explore possibilities to set up industrial and/or business venture in India;
ii. Foreign nationals coming to India to purchase and/or sell industrial products or commercial products or consumer durables;
iii. Foreign nationals coming to India for technical meetings and/or discussions, attending Board meetings or general meetings for providing business services support;
iv. Foreign nationals coming to India for recruitment of manpower;
v. Foreign nationals who are partners in the business and/or functioning as Directors of the company;
vi. Foreign nationals coming to India for consultations regarding exhibitions or for participation in exhibitions, trade fairs or business fairs;
vii. Foreign buyers who come to transact business with suppliers and/or potential suppliers at locations in India, to evaluate or monitor quality, give specifications, place orders or negotiate further supplies,

relating to goods or services procured from India;

viii. Foreign experts and/or specialists on a visit of short duration in connection with an ongoing project with the objective of monitoring the progress of the work, conducting meetings with Indian customers and/or to provide technical guidance;

ix. Foreign nationals coming to India for pre-sales or post-sales activity not amounting to actual execution of any contract or project;

x. Foreign trainees of multinational companies and/or corporate houses coming for in-house training in the regional hubs of the concerned company located in India;

xi. Foreign students sponsored by AIESEC for internship on project based work in companies and/or industries; or

xii. Foreign nationals coming as tour conductors and travel agents and/or conducting business tours for foreign nationals or business relating to it.

Conclusion:

Any business activity not listed above would not automatically fall within the purview of a "casual business visit." In our opinion, a foreign national who is on a TVoA may undertake a business activity that is incidental to his other, primary purpose of travel. For example a TVoA holder may visit a factory on business.