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Practices: Immigration

CBP TO SEND OUT I-94 EXPIRATION REMINDERS TO VISA WAIVER PROGRAM TRAVELERS

On January 5, 2018, the U.S. Customs and Border Protection (CBP) announced two new traveler compliance initiatives, making it easier for Visa Waiver Program (VWP) travelers to check the status of their stay in the U.S. A new feature added to the I-94 website allows VWP travelers to check their admission date, inform them regarding how many days they have remaining in the U.S., and how many days they have remained beyond their expiration date. In addition, to prevent an overstay, the CBP now sends an email reminder 10 days prior to the expiration alerting the VWP traveler who remains in the U.S. that his I-94 will expire. These new features are available under the “View Compliance” tab on the I-94 website. Travelers should expect to receive email notifications from Staycompliance-donotreply@cbp.dhs.gov, and CBP warns that any email not originating from this address may be fraudulent or a phishing scam.

BALCA REVERSES DENIAL OF LABOR CERTIFICATION

On January 16, 2018, the Board of Alien Labor Certification Appeals (BALCA) reversed a denial of an Employer’s labor certification. After filing an Application for Permanent Employment Certification (PERM Application) to sponsor a foreign national for permanent employment in the U.S. for the position of “Mathematics Teacher,” the Certifying Officer (CO) denied the PERM Application finding the word “interested” for three candidates on its recruitment results chart was a generalized statement that does not reveal the specific lawful job-related reason for rejection. It was uncontested that the Employer offered multiple positions for the job opportunity.

Under 20 C.F.R. 656.1(a)(1), the CO may only certify a PERM Application if at the time of the application, there are not sufficient U.S. workers who are able, willing, qualified and available. The employer must certify that the job has been and is clearly open to any U.S. worker and the U.S. applicants were rejected for lawful job-related reasons. Focusing in this case on whether the Employer provided lawful job-related reasons for rejection, BALCA cited cases where the employer made it clear from the outset that multiple positions were involved. In such cases, where qualified applicants were hired in addition to the foreign national, the Board ordered a grant of certification. It then cited to 20 C.F.R. 656.17(g)(1), establishing that an employer may hire U.S. workers and still have the need for foreign labor certification. Considering the Employer’s recruitment report, BALCA found the Employer did not reject the three applicants’, and even if these applicants were hired there would still be a need to hire more applicants. Thus, by denoting “interested,” the Employer did not violate the regulations.

THE INTERNATIONAL ENTREPRENEUR ROLE

On January 17, 2017, the Department of Homeland Security (DHS), under the Obama Administration, announced an International Entrepreneur Rule (IER) which would become effective on July 17, 2017. Subsequently, however, the Trump Administration delayed the implementation of the rule until March 14, 2018. After litigation over its implementation ensued, the U.S. District Court for the District of Columbia in *National Venture Capital Association v. Duke* vacated the DHS' final rule to delay the effective date forcing the Trump Administration to implement the rule immediately. While the DHS is abiding by a Federal Court Order to implement the rule, it is simultaneously seeking rescission of IER. The DHS has stated that "... the rule is not the appropriate vehicle for attracting and retaining international entrepreneurs and does not adequately protect U.S. investors and U.S. workers."

Currently in effect, IER permits foreign entrepreneurs to obtain parole status in the U.S. Under the IER, DHS may "use its parole authority to grant a period of authorized stay, on a case-by-case basis, to foreign entrepreneurs demonstrating their stay in the U.S. would provide a significant public benefit through their business venture and that they merit a favorable exercise of discretion."

Entrepreneurs eligible under the rule and granted parole will be eligible to work only for their start-up business. The spouses and children of the foreign entrepreneur may also be eligible for parole. Spouses may apply for work authorization once present in the United States as parolees. However, dependent children are not eligible to work. IER parole may be granted for up to three entrepreneurs per start-up entity.

Eligibility

Entrepreneurs applying for parole under this rule must demonstrate that they:

- Possess a substantial ownership interest in a start-up entity created within the past five years in the United States that has substantial potential for rapid growth and job creation.
- Have a central and active role in the start-up entity such that they are well-positioned to substantially assist with the growth and success of the business.
- Will provide a significant public benefit to the United States based on their role as an entrepreneur of the start-up entity by showing that:
 - The start-up entity has received a significant investment of capital from certain qualified U.S. investors with established records of successful investments;
 - The start-up entity has received significant awards or grants for economic development, research and development, or job creation (or other types of grants or awards typically given to start-up entities) from federal, state, or local government entities that regularly provide such awards or grants to start-up entities; or
 - They partially meet either or both of the previous two requirements and provide additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.
- Otherwise merit a favorable exercise of discretion.

A spouse or child of an entrepreneur applying for parole under this rule must demonstrate that he or she:

- Is independently eligible for parole based on significant public benefit or urgent humanitarian reasons; and

- Merits a favorable exercise of discretion.