GONZALEZ SAGGIO HARLAN

The GSH 60-Second Memo

Sponsored by the GSH Employment Group

October 29, 2008

Hugo P. Rojas, Esq.

www.gshllp.com

(414) 277-8500

Want more Information on this topic?

CLICK HERE!

The Whens and Whys of Helping Your Employee Obtain a Green Card

By: Hugo P. Rojas, Esq.

Jose Plomero, a Honduran national living in Milwaukee, is an engineer at Acme, Inc., a locally-based biotech engineering firm. Jose is in the United States with a temporary work visa. He is a model employee who has become very valuable to his company. He is responsible for several inventions that have led his company to achieve a national presence. In fact, his boss is so pleased with his work that she would like to offer Jose a promotion that would move him into a management position, on track to become a firm shareholder. However, there is one issue that Acme must deal with: Jose's work visa will expire within the next year. Is there anything the company can do to keep Jose in the United States as an employee? Companies like Acme may be able to help employees like Jose obtain their "green card" or become legal permanent residents, and potentially U.S. citizens, by taking advantage of employment-based immigration.

Generally, there are three stages involved in the employer-initiated green card process. First, an employer usually has to apply for a labor certification with the U.S. Department of Labor (DOL). After the labor certification is approved, the employer can

file a petition for an immigrant visa (a form I-140). Once approved, the employer may file an application for adjustment of status (form I-485) for the worker (and, if applicable, his non-citizen dependent family members) to become a lawful permanent resident with the U.S. Citizenship and Immigration Services (USCIS). This last stage results in the issuance of an employment-based immigrant visa number and an alien registration card, also known as a green card.

At the outset, the employer must assess the qualifications of the worker, as Congress has established programs for admitting immigrants on the basis of occupational credentials under certain circumstances. Most employment-based immigration is possible under one of three preference categories: (1) EB-1; (2) EB-2; or (3) EB-3.

The first category, EB-1, is reserved for immigrants with extraordinary ability, such as musicians of great fame (think rock stars), professional athletes and professors and scientists who are outstanding in their fields, such as Nobel Prize winners or their equivalent. The regulations define "extraordinary ability" as "a level of expertise indicating that the individual is one of a small percentage who have risen to the very top of the field of endeavor." Certain multinational executives and managers may also immigrate under this preference. This category does not require a job offer in order for an applicant to be eligible.

If the worker is not David Beckham or a Nobel laureate, there is still hope. Professionals holding an advanced degree (masters degree or higher) or their equivalent and those "who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States" may qualify under the EB-2 category. Finally, immigrants performing certain skilled or unskilled labor for which qualified U.S. workers are not available fall under the EB-3 category. Categories EB-2 and EB-3 generally require that the employee have both a job offer pending from a United States employer and a labor certification.

Whether an employee is eligible under the EB-1, EB-2 or EB-3 category will determine whether the employee will be able to apply for an alien registration card (commonly referred to as a green card) right away or will be forced to wait. According to the U.S. Department of State's Visa Bulletin for November 2008, the EB-1 category is current for all countries, meaning there is no waiting period to apply for permanent residence. Workers in the EB-2 category also may apply right away, except for natives of China and India. EB-3 applicants, however, are likely in for a long wait; for natives of most countries, the USCIS is now reviewing I-140 applications filed before May 1, 2005. For natives of China, India and Mexico, the backlog under EB-3 is even greater - October 2001 for workers from India.

Despite the backlog, it may be possible for employees pending under an EB-2 or EB-3 application to remain in the country. Pursuant to the American Competitiveness in the Twenty-first Century Act of 2000 (commonly referred to as AC21), Congress has provided relief for natives of countries with significant wait periods

as the AC21 allows employees to obtain permission to work and live in the United States while their cases are being adjudicated.

After determining whether an employee fits best under an EB-2 or EB-3 category, the employer then most likely must seek a labor certification. Most EB-2 petitions and all EB-3 petitions must start with a labor certification issued by the DOL. The labor certification process is designed to assure that an immigrant's employment will neither displace nor otherwise disadvantage a United States worker. By approving a labor certification request, the DOL certifies that there are no U.S. workers who are able, willing, qualified and available to accept the job at the prevailing wage for that position in the geographic location of intended employment, and that hiring the foreign worker will not adversely affect the wages and working conditions of similarly-employed U.S. workers.

The labor certification process requires active participation from the employer. In order to complete a labor certification filing, an employer must:

- Complete specific recruitment activities designed to test the local labor market;
- Request a prevailing wage determination from the applicable state workforce agency to demonstrate that the employer is not undercutting local U.S. workers' wages;
- Complete Form 9089 - Application for Permanent Employment Certification (PERM), including detailed job duties and requirements on education, work experience, training/certification, and specific capabilities. A statement of the applicant's qualifications is also required;
- File the application electronically through DOL's designated website;
- Retain all supporting documentation and records for five years. This documentation is not required in the application, but it must be available in case of an audit or otherwise requested by a certifying officer; and
- Receive an approval.

Once the labor certification is approved, the employer has 180 days to file a "visa petition", also known as an I-140 for the worker. At this stage, the employer must demonstrate its ability to pay the offered wage from the date the labor certification was filed, via the submission of tax returns, W-2 forms, pay stubs or the like. At the next stage, filing the adjustment of status, form I-485, the worker must show that he or she is not excludable on any ground (criminal record, fraud, health, etc.) and that has or she has not fallen out of status or worked without authorization for more than 180 days since his or her last entry to the United States.

This process may seem overwhelming, but the results can be rewarding for employers, employees and their families. Some tips

to keep in mind:

1. Plan ahead. There are many things that can cause a delay in the process. Random audits, clerical errors, requests for additional supporting documents by USCIS all can lead to delays in the processing of applications.

2. Become actively involved in the process. The process can be cumbersome and complications often arise that require the employer's attention. Employers need to work closely with their counsel to navigate the process.

3. Be patient. The process takes time. The entire processing can take as long as two years. However, so long as the employer and employee have followed the rules, the employee may continue to work here legally while his or her case is being adjudicated. Thousands of companies and their employees successfully go through this process every year. It can be done!

GONZALEZ SAGGIO HARLAN

Office Locations:

Illinois
Indiana
Iowa
Nevada
New York
Ohio
Washington D.C.
Wisconsin

www.gshllp.com