Foster Garvey

Duff on Hospitality Law

Immigration and the Hospitality Industry – What's expected for 2013?

on 11.15.12 | Posted in Employment Law

Now that the election is over and we know who's running the country for the next few years, is it too much to think that we might get some kind of comprehensive immigration reform? It seems that the time is right for a big change. Presidents Bush and Obama were not successful in getting Congress to take action. President Obama recently instituted some controversial but popular reforms on his own without waiting for Congress. The fact that those actions may have helped him get re-elected has not gone unnoticed by Congressional representatives, who are likely to take action. But the question is when.

The federal government does not move at the speed of business. So it's important to plan based on current law, not on what might get through Congress next year or even later. The legislative process can take months, and laws enacted won't go into effect until even later, after regulations have been drafted and vetted. It's important to understand your current options and the timelines associated with them while you urge Congress to fix the broken immigration system in the future.

Here are some ideas about options the hospitality industry can expect to have available for 2013. The letter and number designations in the sections below are the government's codes for particular employment-based classifications.

TN Status: Canadians and Mexicans in some professions can get employment authorization quickly

The North American Free Trade Agreement (NAFTA) provides options for quick (often approved on-the-spot in less than an hour), inexpensive (as little as $50 in government fees), and long-lasting employment (up to three years at a time) of citizens of Canada or Mexico. The candidate must satisfy the minimally-described educational requirements for a limited group of professions, such as accountant, computer systems analyst and hotel manager. Management consultants are also possible, but don't call someone a consultant just because there isn't a NAFTA profession for the service you need.

L and EB-1 Status: Executives and Managers can be transferred from related businesses

The government makes it relatively easy to transfer a person from one related business entity outside the U.S. to another in the U.S. That person must have worked in an executive, managerial, or specialized knowledge capacity for that entity outside the U.S. for at least one year within the past three, and be coming to the U.S. to work in one of those capacities. The two businesses must be related, either in terms of corporate relationship or ownership by the same person or group of people.

This process can be used for temporary positions, approved for up to seven (7) years, or "permanent" employment, which many people call a "green card." It requires a mail-in filing for most people, taking from two weeks (if an expediting fee of $1,225 is paid) to several months for review, except for Canadians, who can present them at a border or port of entry for an on-the-spot decision. Initial filing fees total $825 and, for everyone but Canadians, a visa must be applied for and issued at a U.S. consulate outside the country.

E-3 and H-1B: Occupations that require a degree or equivalent can be filled, with some limitations

"Specialty Occupations" present another great option for U.S. employment of transferred employees or new hires. The general rule for these jobs is that the job requires a particular kind of college degree or the equivalent of that degree based on education and/or experience, and the person has that degree or equivalent. Classically, this applies to jobs such as accountants, engineers, and computer professionals, among others. It can be difficult to get approval for jobs that some people (and the government) don't normally associate with a particular degree, such as Sales Managers, Market Research Analysts, or Public Relations Specialists. But it can be worth exploring.

The current challenge with the H-1B classification is you can only hire people who already have that classification; a person who has not already been approved for employment with that classification can't get it until October 2013. Anyone hoping to be considered for one of the H?1B's to be allocated at that time should plan to submit the filing on April 1, 2013, the first day on which filings will be accepted. Only 65,000 new H-1B's are available for each fiscal year, and they can all be allocated within as little as a few days or weeks. Fortunately, Australian citizens have a virtual equivalent to the H-1B in the form of the E-3 status, which is open for applications year-round.

Both of these classifications require multiple government filings and approvals, with government-charged filing fees starting as low as $825 for an E-3, and $1,575 for an H-1B. Visa fees add to those charges. Approval of an E-3 is for two years, but renewable indefinitely, whereas the H-1B can only be approved for as many as six years, in three year increments.

You can expect that the H-1B classification will be the subject of great debate in Congress. Many employers claim that businesses are suffering because of the lack of available, highly educated U.S. workers and the restriction on the number of new H-1B approvals. Don't be

surprised to see higher government-charged fees in exchange for an increase in the numbers.

E-2: Foreign-owned businesses in the U.S. might have another option

It might be possible to open an additional employment-based immigration option if the business operating in the U.S. happens to have significant (50% or more) foreign ownership or investment. The U.S. has treaties with many countries that make it possible to hire citizens of the foreign country, whether they are still in that country or already in the U.S., to provide executive, managerial, or "essential" services.

The E-2 process may involve a filing at a U.S. consulate overseas and/or a mail-in petition in the U.S. Government-charged filing fees at consulates start at $270, with the possibility of additional fees associated with the particular country. Mail-in filings in the U.S. have a $325 filing fee. Mail-in filings can take one month or more for review, and visas can take that long or longer, depending on the availability of appointments.

F-1 and J-1: Foreign students and exchange visitors can help in a pinch

Remember those days when you were performing an internship while in school, working during summer vacation, or in that first job after graduation? Options may exist for you to employ foreign students in almost any kind of job, but you must be very careful to follow the rules. Employment of F-1 students during the school year is limited, but many students approved for "curricular practical training" or "optional practical training" can be available for up to a full year of full-time service. J-1 "exchange visitors" have come under more challenging protocols, but if one is authorized to work for you, such as at a seasonal resort, it can be an excellent option for students interested in summer work/travel.

Everybody's still talking about EB-5 and Regional Centers

Many in the hospitality industry have identified a source of significant funds through the EB-5 program, which includes Regional Centers as one variant. Investors can get a "green card" for themselves and qualifying family members if their investment of at least either $500,000 or $1 million results in the employment of at least 10 U.S. workers. The investor *must* be engaged in the management of the U.S. business, either through the exercise of day-to-day managerial control or through policy formulation.

Don't forget – the Form I-9 is for Everybody, not just "foreign" employees

Everything I've noted above is employment, which means that you must complete a Form I-9 for all of them, just like you do for every single employee in your workforce. Government audits are becoming more common, but less widely publicized, and fines for "paperwork" violations can be surprisingly large.

Some of you are registered in the E-Verify program. I would not be surprised if E-Verify, or some version of it, becomes a requirement for all employers as a part of comprehensive immigration reform. But until then, it is optional for most employers except certain federal contractors and their subcontractors. State and local legislation, such as in Arizona, have imposed E-Verify registration, too, so be sure you understand the requirements established by the federal *and* state or local governments in whose jurisdiction you operate.

How about transfers from the U.S. to provide services elsewhere or simply providing management services to entities outside the U.S.?

It certainly makes business sense to "export" your knowledge base to improve the bottom line of a foreign entity, whether corporately related or simply as a matter of selling your expertise. But a word of caution is due, including for work to be done in countries like Canada and the U. K., where it's easy to get into the country for months at a time without a visa. Don't forget – these are different countries, with different laws, including immigration, employment and tax laws. The fact that it's easy to talk on the phone or work together over the internet does not mean that you might not be required to navigate time-consuming procedures and get government approvals in advance of entering the other country.

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Conclusion

Business moves quickly – government bureaucracy does not. Don't expect much change to actually take place this coming year. But be prepared to let your Congressional representatives know what you need in terms of changes to our immigration laws. Other than that, the best things that you can do are to plan well in advance and to understand the current rules, timelines and costs required to meet your needs for 2013.

Tags: EB-5, Form I-9, immigration, NAFTA