

Immigration Insights (December 2010)

December 29, 2010

Export Control Question Delayed for L-1, H-1B and O-1A Visa Cases

On December 22, 2010, U.S. Citizenship and Immigration Services (USCIS) announced that employers will not be required to complete Part 6 of the Form I-129 Petition for Nonimmigrant Worker form containing export control/ITAR compliance questions, until February 20, 2011. The decision to delay requiring answers to these questions comes after USCIS consulted with stakeholders, including the Commerce Department, who recommended that employers be given additional time to establish internal processes to answer the questions correctly. Although employers must use the Form I-129 petition that bears the November 23, 2010 revision date, USCIS will not require the Part 6 questions to be completed.

December Update on H-1B Cap Count

As of December 17, 2010, USCIS had received approximately 53,900 H-1B cap-subject petitions. Additionally, USCIS had received 19,700 H-1B petitions for beneficiaries with U.S. advanced degrees. Current projections suggest that USCIS may reach the H-1B limit as early as late January 2011, so it is important that employers identify and initiate any H-1B cap subject petitions *now*. Once USCIS reaches the limit, it will not accept new H-1B cap subject petitions until April 1, 2011, and those petitions may not seek an employment start date earlier than October 1, 2011.

Reminder for Permanent Residents Undertaking Temporary Assignments Abroad

Just because a lawful permanent resident (LPR) holds a valid, unexpired permanent resident or "green" card, the card does not guarantee an LPR's re-admission to the U.S. after foreign travel. Each time an LPR re-enters the United States, U.S. Customs and Border Protection ("CBP") scans the LPR's passport and permanent resident card and can examine a wealth of information about the LPR, including his or her comings and goings, plus information about the LPR's immigration, residential, and employment history.

Each request for re-admission to the U.S. by an LPR gives CBP an opportunity to determine whether the LPR has abandoned his or her permanent resident status. This is true even if the permanent resident has a valid and unexpired permanent resident card and has been outside the U.S. for less than 365 days. [Common, and mistaken, immigration lore has it that presentation of a permanent resident card upon attempted re-entry within 365 days of one's last departure guarantees re-admission.]

For LPRs who have undertaken a temporary work assignment and residence abroad and who may be abroad for more than 180 days, there is an escalating risk that the foreign absence may trigger a CBP determination that the LPR has abandoned his or her intention to reside permanently in the U.S. CBP may

confiscate the LPR's permanent resident card and threaten the LPR with the prospect of returning abroad on the next outbound flight unless the LPR signs a written abandonment of his or her rights as an LPR. Further, even if CBP does not challenge the LPR's immigration status, absences of 180 days or longer can impact the LPR's eligibility for U.S. naturalization.

Therefore, both the employer and the employee should take protective steps in advance if the LPR truly will be abroad only temporarily (even if "temporarily" may mean a period of several years) and wishes to retain permanent resident status. These steps include:

- filing a re-entry permit application and completing the required biometrics *before* U.S. departure—this can take a month or longer to complete
- filing IRS 1040 U.S. resident income tax returns during the entire period of the foreign assignment
- keeping as many ties to the United States (such as a home, bank accounts, financial accounts, investment accounts, credit cards, recreational, social, religious and business memberships, U.S. driver license) as reasonably practical
- ensuring the foreign assignment agreement contains language affirming the temporariness of the foreign assignment and the foreign national's intention to resume U.S. residence after the assignment concludes
- determining the impact of the foreign assignment on eligibility for U.S. naturalization.

It is wise to plan months in advance for a foreign assignment to preserve permanent resident status and naturalization eligibility. However, even where the foreign assignment arises suddenly, protective steps can often be implemented even after the foreign assignment has started, particularly where the LPR has been absent from the U.S. for fewer than 180 days and can return for sufficient time to apply for a re-entry permit. For further information, please see our more expansive article on this topic at immigration website at: http://immigration.dinslaw.com/pre_per_res_stat.aspx.

U.S. Citizens Abroad to be Required to File I-130 Relative Petitions with USCIS in the U.S.

Historically, a U.S. citizen living abroad with a foreign national spouse could file an I-130 Relative Petition with a USCIS office abroad and then, upon approval of the I-30 petition immediately have the foreign national spouse complete his or her "consular processing" at the U.S. consulate abroad. The U.S. citizen would re-establish domicile before the U.S. consulate interview (if that had not already been done earlier in the process). This approach often avoided long delays associated with filing an I-130 Petition with USCIS in the United States and waiting for the I-130 petition approval to wend its way to the U.S. consulate abroad. USCIS recently has indicated that it may end this practice in 2011.

Year End Immigration Check Up for Foreign Nationals

It is important for all foreign nationals working and studying in the U.S. to ring in the New Year with their immigration status in good order. Here is our 10 Resolutions checklist that foreign nationals in temporary visa statuses may find useful:

1. Have I started the renewal process if my passport will expire within the next six months?
2. Do I have a valid visa in my passport if I will need to travel abroad soon or do I need to plan for a visa application at a U.S. consulate outside the United States?

3. Is my I-94 departure card valid and, even though unexpired, have I placed a reminder on my calendar to consider taking action six months in advance?
4. Have I moved and not yet filed a Change of Address notification with USCIS online and kept a copy of the bar code confirmation for my permanent records?
5. If employed, has my job title, duties, or location changed and, if so, has my employer determined whether action needs to be taken?
6. If employed, are there any changes contemplated in 2011 regarding my job title, work location, or other material aspect of my employment that I have not yet discussed with immigration counsel?
7. Am I about to add a family member in 2011 and, if so, have I determined what actions, if any, need to be taken?
8. Have I been arrested for or convicted of any offense and, if so, have I consulted an immigration lawyer regarding the impact of the arrest or conviction on my immigration status?
9. Have I calculated when my temporary immigration status will reach its ultimate limit?
10. If I am in the midst of the permanent residence process, have I checked my online INSZoom website record to better understand the current status of my case?

Happy New Year to all of our clients and friends!