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SPECIAL EMBASSY PROGRAM
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SUBJECT: P.L. 104-208 Update No. 13: INA 212(a)(5): Labor Certification Changes REF: (A) State 210953, (B) State 208799, (C) State 219622, (D) State 227459, (E) State 226596, (F) State 225256, (G) State 225321, (H) State 229819, (I) State 232219, (J) State 239978, (K) State 245754

Summary

1. This cable is the thirteenth in a series providing information on the recent immigration act which was part of the omnibus legislation signed by the president on September 30. The following provides the text of the revised INA 212(a)(5) and new INA 204(i) and a discussion of their impact on consular processing. End Summary.

Text of INA 212(a)(5) as amended by section 343 of Pub. L. 104-208

2. Revised statutory language is set forth below. 212(a)(5) Labor Certification and Qualifications for Certain Immigrants.

(A) Labor Certification. -

(i) In general. - any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the secretary of labor determined and certified to the Secretary of State and the Attorney General that

(I) There are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (i) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule for purposes of clause (i)(1), an alien described in this clause is an alien who

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or arts;

(iii) Professional Athletes

(I) In general - a certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) Definition - for purposes of subclause (i), the term “professional athlete” means an individual who is employed as an athlete by

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed \$10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(B) Unqualified physicians. - an alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the secretary of education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a state on January 9, 1988, and was practicing medicine in a state on that date.

(C) Uncertified foreign health-care workers. - any alien who seeks to enter the United States for the purpose of performing labor as a health care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, in verifying that

(i) the alien’s education, training, license, and experience

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant’s ability to speak and write; and,

(iii) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds. - the grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of INA 203(b).
Discussion of Above Changes

3. 212(a)(5)(A)(iii) - Professional Athletes The purpose of this amendment is obviously to allow professional athletes in the major leagues to move among the teams of that same league without requiring the employing team to file a new petition on behalf of the beneficiary athlete. The major leagues' practice of moving athletes among the teams through free agency and frequent trades is now reflected in and facilitated by U.S. immigration law. This law contemplates a situation where a player has changed teams subsequent to the filing of the labor certification but prior to a new visa application. No formal instructions have yet been formulated by INS; but in the interim, if a consular officer encounters such a situation, he/she has at least two options. First, the consular officer may accept a letter from the new employer/team verifying that the applicant athlete is now in their employ and that the employing team is either a team in a qualifying league of a minor league team affiliated with a major league team in a qualifying league. On the other hand, if the consular officer is unsure of the applicability of this provision, submit the case to VO/L/A for an advisory opinion. The Department will seek to devise a procedure with the INS, so that the record/file will clearly reflect that this provision applies, thus, avoiding not only any need for the officer to investigate further but, also, any delay in processing of the immigrant visa.

4. 212(a)(5)(C): Foreign Health-Care Workers This section renders ineligible all foreign health care workers coming for the purpose of performing labor as a health care worker unless the alien "presents to the consular officer, or in the case of an adjustment of status, the Attorney General" a certificate from the CGFNS (Commission on Graduates of Foreign Nursing Schools) or an independent certifying agency approved by the Attorney General and verifying compliance with the several requirements listed in the statute (above). The conference report leaves no doubt about congressional intent on the issue. The report states: "Notwithstanding any international trade agreements or treaties a health care worker subject to prescreening under this section should include any alien seeking an immigrant or nonimmigrant visa as nurse, physical therapist, occupational therapist, speech-language pathologist, medical technologist and technician, and physician assistant." The definitional list is left to the agencies to identify in the regulations.

212(d)(3)(A) and (B) Waivers for Nonimmigrants Ineligible under INA 212(a)(5)(C)

5. The majority of affected visa applicants will be applying based upon INS approved petitions: Immigrant petitions in the EB2 and EB3 categories, and, if found applicable to nonimmigrants, H-1B, J, perhaps L, and Mexican TN's. Canadian TN's do not need visas but may seek visa issuance. The Canadian TN category may be the only nonimmigrant visa classification not requiring a petition that is affected by the new law. As this ground of ineligibility became effective September 30, 1996, the agencies charged with administering the new law have not had adequate time to establish implementing guidelines. In order to provide sufficient time to devise operating procedures and the selection of one or more certifying organizations, the

Department and INS have agreed to waive ineligibility under INA 212(a)(5)(C) pursuant to INA 212(d)(3)(A) on a blanket basis for nonimmigrant aliens until further notice. INS will also provide a blanket waiver of 212(a)(5)(C) ineligibilities under INA 212(d)(3)(B) for visa-exempt Canadians applying for admission as TN's. Alien health care workers who receive waivers for INA 212(a)(5)(C) ineligibilities should be issued visas limited to single entry with six-month validity.

INA 212(a)(5)(C) as it applies to Immigrant Visa Applicants

6. Per the above, aliens who are seeking to enter the United States as immigrants for the purpose of performing labor as health-care workers are required to be certified as set forth in 212(a)(5)(C). Since a certification process does not now exist (other than for physicians and nurses), alien health care workers who are applying for immigrant visas based upon offers of employment in the health care field should be refused under INA 212(a)(5)(C) pending the implementation of the required certification procedure. Posts should make every reasonable effort to identify and notify those immigrant health care workers who: (1) have been issued visas on the basis of offers of employment in the health care field since September 30, 1996, (2) lack the required health care certification, and (3) have not already traveled and been admitted to the United States. Since the Immigration and Naturalization Service has no legal authority to admit immigrant alien health care workers without an appropriate certification, visas for health care workers who have not already been admitted, and who are lacking certification, should be revoked in accordance with INA 221(i) (See also 22 CFR 42.82) until such time as an appropriate certification program has been established and the applicant presents the required certification. Absent a technical correction to P.L. 104-208 that would move INA 212(a)(5)(C)'s effective date into the future, developing and implementing a certification program may well be protracted as it necessarily requires coordination among State, INS, Education, and Health and Human Services. The field will be informed as soon as implementing procedures have been established.

Treaty Obligations

7. The Department will be working with other interested agencies not only to develop the necessary implementing procedures, but, also, to find a way to address the concerns raised by the potential conflict with certain U.S. International Treaty obligations apropos nonimmigrant visa issuance.

8. Minimize Considered

Talbott