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The 2020 Election and U.S. Immigration

There's little doubt that U.S. immigration policy will be a central theme of the 2020 Presidential election. While illegal immigration continues to grab headlines, it's the too often overlooked legal immigration system that also provides virtually unlimited opportunities for improvement. At all levels of the economy, there is dramatic room for improvement in the hiring and retention of foreign labor. To date, the employment-based immigration system in the United States has strongly favored professionals and other highly skilled workers. With record low unemployment across the economy, employers simply need more, not fewer, immigration options.

There are very limited options with respect to the employment of unskilled and semi-skilled labor. The H-2B category is limited to 66,000 visas each year (33,000 for winter and 33,000 for summer) and only addresses the needs of temporary or seasonal help. Moreover, this visa category is so highly regulated by three (3) separate federal agencies – U.S. Department of Labor, U.S. Department of Homeland Security and U.S. Department of State (DOL, DHS and DOS) – that many employers simply lack the resources necessary to pursue this limited option. Consistently the quota is reached each season leaving many employers behind in the pursuit of this limited option. For those employers with the stamina and resources to engage in this process, they are navigating a U.S. Department of Labor (DOL) market test proving no U.S. workers are qualified and available for the seasonal work, meeting a prevailing wage for the occupation and providing all visa fee and travel costs associated with relocation of the foreign labor to the United States. They also are complying with filing requirements and obligations of U.S. Citizenship and Immigration Services (DHS) and, then finally, the H-2B worker must sufficiently satisfy a U.S. Consular agent (DOS) that the worker will return home upon conclusion of the seasonal work. Again, many employers simply do not possess the resources or wherewithal to navigate the complexities of this system no matter how desperate they may be for quality labor.

It is possible to pursue permanent residence (or "green card") for unskilled labor. However, like H-2B, it also requires a labor market test to prove no U.S. workers are qualified and available to perform the work. In addition, unlike H-2B which allows for multiple workers to be included in a single labor certification application, each green card sponsorship is limited to one (1) prospective employee and overall processing takes two to three years. Upon successful issuance of green card, there is no requirement for the foreign worker to work for the sponsoring employer for a certain period of time. With a green card, the foreign worker is permitted to work for any employer.

For those currently unlawfully present in the United States and without immigration authorization, they may have immigration options available to them (via labor certification described above or perhaps a family-based immigration solution). However, as a result of their unlawful status/ presence, most are subject to a ten (10) year bar from admission to the United States before they can access such immigration solutions.

Waivers of the bar exist in very limited circumstances (not based on offers of employment) and as a result, even those with potential access to an immigration solution do not pursue them for fear of the 10-year bar.

The remaining immigration solutions are limited to foreign professionals and other highly-skilled workers who meet certain regulatory restrictions. Such options include the temporary H-1B, L-1, E-1 and E-2 visa categories, as well as temporary visa options available through our free trade agreements with Mexico, Canada, Chile, Singapore and Australia. Generally speaking, these temporary visa sponsorships are limited to positions that require a minimum of baccalaureate level education (H-1B and free trade), specialized knowledge (L-1) or essential skills (E-1/E-2). The free trade and E visa options have further limitations related to the foreign worker's country of birth/ citizenship, and the L-1 category requires a minimum of one year of qualifying employment abroad with an entity legally related to the sponsoring U.S. employer. The H-1B visa category has a numerical quota associated with it, which is consistently exhausted on the initial day of filing resulting in it being unavailable to employers for the balance of the fiscal year. The Trump administration has placed further restrictions on the H-1B and other employment-based visa programs through the Buy American, Hire American ("BAHA") Executive Order resulting in significant processing delays and much higher than normal issuance of requests for further evidence questioning the qualifications and eligibility of the benefits being sought.

Glaringly absent from the immigration scheme altogether are options for foreign entrepreneurs. In fact, the Obama administration had promulgated a proposed rule to provide interim employment authorization to certain qualifying entrepreneurs in the absence of Congressional action on this topic. However, the Trump administration has formally proposed to remove the rule from further consideration leaving no pathways for immigrant entrepreneurs since the existing options do not permit self-employment.

There are options for foreign nationals with extraordinary ability, outstanding researchers and professors and multinational executives and managers. The threshold for these "priority workers" is an unquestionably high bar and for those who meet it, it's a relatively smooth path albeit with greater backlogs and delays than has been historically present. Most U.S. employers, however, are not in need of extraordinary; instead they are in need of workers who will show up, pass a drug test and work hard. Our existing immigration system is simply not keeping pace with that very basic reality.

In the absence of options, some of our best workers are coming to the workplace outside the employment-based system and instead through family-based options, Temporary Protected Status (TPS) and even the diversity lottery. The family-based system permits U.S. citizens to immigrate spouses, parents and unmarried children (under 21 years of age). Other limited options exist under the family-based immigration system, however, subject to significant backlogs as a result of various numerical quotas. TPS is temporary permission to remain in the United States and access employment authorization by virtue of challenging home country conditions. TPS is granted and terminated by the U.S. Attorney General and various country designations are currently under close examination by the Trump administration with many programs permanently ending in the coming months. The diversity lottery is a green card application requiring a rigorous online application process and limited to countries with low numbers of immigrants in the United States. Following years of processing, typically abroad, diversity lottery winners immigrate to the U.S. with green card and are immediately eligible for employment without employer sponsorship. In the absence of employment-based immigration solutions, our family-sponsored system, TPS and diversity lottery have been filling this critical void for labor.

For those of us interested in immigration reform, we will be focused on candidates who are aware of the needs across all spectrums of our economy including new visa pathways for both unskilled labor and entrepreneurs, as well as addressing the severe limitations of our existing visa options for professionals and highly-skilled workers.

To further discuss employment-based immigration options, please contact Jenifer M. Brown, Christl Glier and/or your regular immigration point of contact at Ice Miller LLP.