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Annual “NSEERS” Special Registration Deadlines Approaching/ New Rule Will Suspend Some Registration Requirements

Anyone who was subject to “special registration” at either a port of entry or at a local office as part of “call in” special registration, is subject to ongoing registration requirements. Subject aliens must re-register every year within ten days of the anniversary of the initial registration or admission. Willful failure to comply with these requirements can lead to criminal penalties, removal proceedings, and denial of immigration benefits. The American Civil Liberties Union has put together an excellent memo on re-registration requirements and deadlines. The memo is available online at <http://www.aclu-wa.org/ISSUES/otherissues/INS%20%20Annual%20Special%20Registration%20Reminder.pdf>.

As various news agencies have reported, the Department of Homeland Security has published a Rule in the Federal Register that will modify Special Registration requirements. Most re-registrations have been cancelled, but the requirement does still exist. An explanation may be found at www.aila.org.

Under NSEERS, specified groups of foreigners have been required to be photographed, fingerprinted, and interrogated upon their arrival at a U.S. port of entry and, for those already in this country, at a designated immigration office. Under this program, these individuals (most of them males from Muslim countries) also have been obligated to follow re-registration requirements after one year, or, in some cases, thirty days.

Under the new guidelines, the one year and thirty day re-registration requirements will be suspended. However, registration at the border, departure requirements and a “case-by-case” imposition of registration requirements, at DHS’s discretion, continue.

It is wonderful news that some of the most cumbersome aspects of “Special Registration” will be cancelled. We will be sending out more information as it is available.

Department of Homeland Security Policy Infringes on First Amendment Rights of U.S. Religious Organizations

Religious organizations in the United States frequently hire spiritually gifted ministers or other religious workers from abroad to work at a church or other religious organization in the U.S. Recognizing this fact, Congress created the R-1 “temporary religious worker” category in the Immigration Act of 1990. The purpose of the R-1 category is to bring religious workers into the country for a period of up to five years. The Act, which became effective in 1991, also created an EB-4 “permanent religious worker” category to bring religious workers into the U.S. as permanent residents (or “green card” holders). Prior to the implementation of this change, only religious workers coming to fill a professional position requiring a Bachelor’s Degree were admitted to the U.S. on a temporary basis. Only ministers could be admitted for permanent residence without proving to the U.S. government that no U.S. workers were available and qualified to fill the position.

Congress chose to include a “sunset” provision for all non-minister permanent religious worker visa categories so as to monitor the use of the visas. That is, every two to five years, the law permitting their entry to the U.S. as permanent residents expires and Congress must renew it. The law last sunsetted on September 30, 2003, and was not renewed until October 15, 2003, leaving a two-week period when there was no such thing as a permanent religious worker visa for non-ministers. The new “sunset” date is September 30, 2008.

A U.S. church or religious organization must file a petition with the Department of Homeland Security in order to bring someone to the U.S. as a permanent religious worker. Temporary workers who are currently in the U.S. in another nonimmigrant status or who would like to extend R-1 nonimmigrant status in the U.S. may opt to file change of status or extension of stay petitions. However, temporary workers are not required to file petitions. Instead, an alien may choose to file an application directly with the U.S. Consulate in his or her home country; or, if the alien is a Canadian citizen, he may file a petition at the U.S./Canada border.

The requirements for both temporary and permanent religious work visas are very similar. The U.S. religious organization must prove that it is eligible for tax exemption under section 501(c)(3) of the Internal Revenue Code; it must describe the religious work that it is hiring the alien to perform, and the qualifications that an alien must have in order to fill the position. The position must either be classified as a (1) minister, (2) religious profession, or (3) other religious worker. The organization must also prove that it has the funds with which to compensate the alien for work performed, usually in the form of audited financial statements or bank records.

The religious worker must in turn prove that he/she has been a member of the denomination to which the U.S. organization belongs for at least two years immediately preceding the filing of the petition. The worker must also prove that he/she is qualified

to act in the capacity described in the petition. If the job is for a (1) minister, the alien must prove that he/she is licensed and/or ordained; that he/she has any required experience in the job, and that he/she meets the educational requirements of the denomination. If the job is for a (2) religious professional, then the employer will have to prove that the job requires a degree, and the alien will have to prove that he/she has the appropriate degree, and any other pre-requisites. And finally, if the job is for (3) an “other religious worker,” it may be either (a) a religious vocation, or (b) a religious occupation. Religious vocations are usually for nuns, monks, friars, or other people who take vows and dedicate themselves to 24-hour a day, 7-days a week observance of religious life. The emphasis for religious vocations is on the religious dedication and lifestyle of the alien, not on the duties to be performed. Religious occupations, on the other hand, are jobs related to traditional religious functions, such as preaching, counseling, etc. In addition to these requirements, if the worker is coming to the U.S. on a permanent basis, he/she must also prove that he/she has two years of paid, full-time work experience in a similar position during the two years immediately preceding the filing of the petition.

Congress created the religious worker visa categories in recognition of religious organizations’ rights to be ministered to by the persons of their choosing. The First Amendment to the Constitution protects U.S. religious establishments from any laws “prohibiting the free exercise” of religion. Congress was protecting the First Amendment right of religious organizations when it created the religious worker visa categories. Therefore, under the First Amendment and in keeping with the religious worker visa categories created by Congress, no law should unduly interfere with the right of U.S. religious establishments to hire spiritually gifted individuals to fill jobs in their organizations, regardless of whether or not those people are U.S. citizens.

In the past, the Immigration and Naturalization Service has been reluctant to interpret existing laws in ways that might interfere with the free exercise of religious organizations in hiring religious workers from abroad. However, in the wake of September 11th, the need to observe First Amendment rights has been balanced against the need to enhance national security. The Department of Homeland Security, in its interpretation of regulations governing religious worker visas, has erred on the side of infringing on the free exercise of religion. The result is that many gifted religious workers from foreign countries are being prevented from coming to the United States.

For example, immigration regulations require an applicant for a religious worker visa to have been a member of the religious denomination to which the U.S. church belongs for two years prior to making the application. In a case I recently worked on, one of our clients had obtained membership in a Baptist church in the U.S. on a previous visit to the U.S. in the 1990’s. However, he had been back to Nigeria in that time and had attended another church. Nevertheless, he had maintained his membership with the Baptist church, which is all the law requires. Furthermore, the Immigration and Naturalization Service, before it was absorbed by the Department of Homeland Security, had a long-standing policy of allowing religious workers to come to work at U.S. churches if the U.S. church shared a belief system similar to the one held by the applicant’s church abroad. We would typically prove the commonly shared beliefs by providing copies of

the Statement of Faith, or similar document, for each religious organization. Because many Protestant churches share very similar beliefs, this evidence was always sufficient.

Unfortunately, the Homeland Security Department is now adopting very restrictive views of immigration requirements for religious workers, many of which force intending immigrants to prove things far beyond what the law requires. For instance, religious organizations bringing in a foreign religious worker must prove that their organizations are eligible for tax exempt status under section 501(c)(3) of the Internal Revenue Code. Almost every church and non-profit religious organization could qualify under 501(c)(3). However, the Homeland Security Department is now stating that not only must the religious organization prove its eligibility for tax exemption; it must also prove that it is classified as a certain kind of religious corporation under the Internal Revenue Code. This requirement, which is an invention of the Homeland Security Department found nowhere in law or regulation, limits the religious worker category to employees of churches only, and excludes employees of non-profit religious organizations, whom the law expressly permits to enter the U.S.

In addition, the Department of Homeland Security is inflexible in its definitions of religious jobs, in spite of evolving needs of churches. For example, many larger protestant Christian churches in recent years have been hiring full-time Music Directors to oversee times of worship. The Department of Homeland Security has determined that a full-time Music Director at a church is not a “religious worker” for purposes of obtaining a visa, because the education required for a Music Director position is not theological in nature. Even if the alien has a theological background, the Department of Homeland Security views that background as unrelated to the position. This determination is in contradiction to immigration regulations specifically authorizing “cantors” to enter the U.S. as religious workers, and further stating that a religious occupation is any occupation that relates to a traditional religious function. Obviously, praise and worship are traditional religious functions. Again, the Department of Homeland Security is creating extra-legal requirements for people seeking to enter the United States as religious workers.

The Department of Homeland Security is not creating these new, extra-legal immigration requirements for religious workers without reason. The religious worker category has been terribly abused. It is used in fraudulent schemes by intending immigrants and is therefore regarded with suspicion by immigration authorities. A former employee of the Immigration and Naturalization Service recently reported in an online forum that the overwhelming majority of religious worker applications at the office where he worked were fraudulent. Some churches brought in foreign nationals as “religious workers” when they were really the friends and relatives of the church’s employees, and did not intend to do religious work in the U.S. Some of the organizations trying to bring over “religious workers” are not religious organizations at all, but a storefront made to look like a church. He reported that in one case, the churches were being used to sell dope. It is not surprising, then, that the Department of Homeland Security is giving extra scrutiny to religious worker visa applications.

While the Department of Homeland Security must crack down on fraudulent schemes involved in religious worker visa applications, they must also continue to observe the

immigration laws governing religious workers. Honest, spirit-filled religious workers must be able to continue entering the country, wherever and whenever God calls them to do so. The Homeland Security Department's creation of extra-legal standards for religious workers infringes on the First Amendment rights of U.S. churches and religious organizations. If the immigration laws that are currently in place are properly enforced, they will curtail fraudulent use of the religious worker category. The Homeland Security Department does not need to make up new requirements in order to accomplish this goal. These new, restrictive requirements do not do anything to enhance national security. Instead, they infringe on the rights of U.S. religious establishments, and keep honest people out of the country.

There is no way for religious workers who enter the U.S. in a permanent capacity to get around the Department of Homeland Security's application process. Their prospective U.S. employers must file their petitions by mail within the U.S. However, there is some hope for temporary religious workers to avoid the arduous, and sometimes arbitrary decisions of the Homeland Security Department. Canadian citizens may present their R-1 applications at a land port of entry along the U.S./Canadian border. While the border is staffed by employees of the Homeland Security Department, they belong to a different branch of the Department (Customs rather than Immigration) and tend to use a plain reading of the law when adjudicating immigration applications. Citizens of all other countries may apply for R-1 status at U.S. Consulates in their home countries, which are run by the Department of State rather than the Department of Homeland Security. The Department of State has its own set of rules in the Foreign Affairs Manual, which interprets immigration laws rather liberally. Consular officers therefore tend to more readily grant R-1 status than the current Department of Homeland Security does. The option for Canadians to apply at the border and for all other aliens to apply for R-1 status at consulates in their home countries is therefore much better in many instances than applying through the Department of Homeland Security in the U.S.

I wish that I could end this article on a more positive note. But unfortunately, this is a problem that churches, religious organizations, foreign workers, and immigration attorneys are still struggling with. It is a product of current national attitudes toward immigration and of widespread abuse of the religious worker visa. Understanding the source of the problem does not excuse it, nor does such understanding remedy the hardships caused to individuals and religious organizations who are being punished because other people's wrongdoing. I encourage you to visit <http://www.house.gov/writerep/> to find out who your local congressional representatives are, and how to contact them. They need to hear about these issues from their constituents before anything can be done to remedy the situation.

Correction of I-94 Arrival/Departure Cards

Anyone who receives an improperly notated (e.g. wrong expiration date) I-94 Arrival/Departure card on an I-797 Approval Notice from U.S.C.I.S. may file the form I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, at

his or her local U.S.C.I.S. office. This form is downloadable from the U.S.C.I.S. website at: <http://uscis.gov/graphics/formsfee/forms/files/i-102.pdf>.

If an incorrect I-94 is issued at a land port of entry, one can usually take the I-94 back to that same border crossing for correction. However, U.S.C.B.P. (U.S. Customs and Border Protection), the agency responsible for issuing I-94 cards at land ports of entry, reports that it will soon promulgate instructions on its uniform policy for correction of incorrect I-94 cards. Currently local U.S.C.I.S. offices cannot correct any I-94 cards issued at land ports of entry for shorter than usual time periods, because it cannot determine that the border officer granted the short term in error or for some other legitimate reason.

Zero Tolerance Policy Rescinded

In March of 2002, then-INS Commissioner James W. Ziglar issued a memo announcing a “Zero Tolerance” policy to then-INS employees. The thrust of Ziglar’s memo was that there would be no tolerance for failure to follow agency procedures. The memo created an atmosphere of fear among INS employees and forced them to err on the side of denying, rather than approving petitions and applications for immigration benefits.

The new Deputy Director of the U.S.C.I.S. issued an agency-wide e-mail on September 8, 2003 stating that the “Zero Tolerance” policy is no longer in effect. This is a very positive step towards a return to normalcy in immigration policy.

Update on PERM

The U.S. Department of Labor has been promising the implementation of new regulations to govern Labor Certification applications for many, many months. The regulation, which was published in the Federal Register as a proposed rule in 2002, is known as PERM. The American Immigration Lawyers Association has been advised that the PERM regulation may still be published by early 2004, with implementation scheduled for 120 days thereafter—possibly in April, May or June 2004.

Canadian Landed Immigrants Without Visas Cannot Use Automatic Revalidation

Department of State regulations permit holders of expired visas to reenter the U.S. after travel to a contiguous territory, provided the following conditions are met: (1) the alien has a valid I-94 card and IAP-66 (if required); (2) the alien is applying for readmission after an absence not exceeding 30 days solely in contiguous territory; (3) has maintained and intends to resume nonimmigrant status; (4) is applying for readmission within the authorized period of initial admission or extension of stay; (5) is in possession of a valid passport; (6) does not require a 212(d)(3) waiver; and (7) has not applied for a new visa while abroad. The expired visa in the alien’s passport need not be in the same category as his current nonimmigrant status.

This provision does not extend to aliens from countries that the Department of State deems “state sponsors of terrorism.” Currently North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya are “state sponsors of terrorism.”

The Chief of Advisory Opinions for the Department of State recently issued an opinion that Canadian permanent residents in the U.S. who have not obtained nonimmigrant visas (as they now must do) and who subsequently return to Canada cannot take advantage of the automatic visa revalidation provisions. This is a common-sense assertion that if you don’t have a visa, there is nothing to revalidate. Therefore any Canadian Landed Immigrants who entered the U.S. without visas, cannot leave the U.S. and expect to return before obtaining a U.S. visa from a consulate abroad.

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