

New Indian Immigration Regime for Foreign Nationals in India

**By Poorvi Chothani, Esq. and Madhooja Mulay, Associate*

Recently, the Ministry of Commerce and Industry (the MCI), India announced that business visas cannot be granted to foreign nationals to work on projects or specific contracts in India. The formal announcement requires all foreign nationals on such visas to leave India and return on appropriate business or employment visas. Initially they were required to leave before the end of September 30, 2009, but the deadline was later extended till October 31, 2009.

Hundreds of foreign nationals have received letters from the Indian Government asking them to leave the country before the deadline and return on appropriate employment visas. This announcement has also created a great amount of confusion amongst major IT and other business entities that employ foreign nationals in India or host them on deputation for foreign clients. These companies are concerned as most of the foreign nationals are currently posted in India on business visas and are expected to remain in India for a short period of time primarily to train local personnel, hold meetings and supervise the working of the Indian affiliate.

Generally, business visas were issued with a validity of six months or longer, and were issued with a longer validity to foreign national business persons from specific countries or to those who have set up or intend to set up business ventures in India. Such individuals were generally granted long term business visas that facilitate stays of longer duration in the country. Additionally, business visas were also issued to individuals who want to visit India on business for short term assignments. Intra-company transferees often use the business visas on short term basis for training, supervision, execution of projects, migration of work to outsourcing service providers and other activities. The short term business visa permitted a foreign national to remain in India for not more than 180 days.

Now, the new announcement states that business visas may be granted to individuals seeking to (1) establish industrial or business ventures in India; (2) explore possibilities to establish industrial or business ventures; or (3) purchase or sell industrial products in India.

Additionally, Employment visas may be granted to individuals according to the strict provisions of the Employment Visa Manual that specifies that visas can be granted to (1) skilled or qualified professionals; or (2) persons employed by an Indian entity at senior levels requiring technical expertise or at managerial posts. The announcement emphasizes that employment visas should not be granted for jobs in positions where large numbers of qualified Indians are readily available. Also, employment visas should not be granted to individuals who will be employed in secretarial or clerical jobs in India. Further, the MCI's announcement confirms that Indian companies engaging foreign nationals shall be responsible for the conduct of the employees and for their departure from the country.

Finally, the announcement also sets out specific procedures for the issue of employment visas to Chinese nationals, which are briefly described here.

Employment Visa Applications for Chinese Nationals

An Application has to be submitted to the Indian Mission in China by an Indian or Chinese company to obtain security clearance for the grant of an employment visa. Such an application should include a description and/or documentary evidence of the individual's educational qualifications and present job as well as a description of the job duties in India. A copy of employment visa application should also be sent to the Foreigners Division under the Ministry of Home Affairs (the MHA), which will adjudicate the application within 60 days of receipt of the application and may either approve or reject the application. The procedure does not mention a process where additional information may be requested and/or offered. As part of the process the MHA will forward copies of the application to the Intelligence Bureau (the IB) and the Ministry of Labor (MoL) in India. The IB will adjudicate the application within 15 days of receipt of the application and forward its determination to the MoL, which will either approve or reject the application within 45 days from the date of receipt.

In addition, the Ministry of External Affairs will be compiling details of all business visas, issued to Chinese Nationals in the past, for the execution of projects or contracts in India with effect from January 1, 2008. This information will be forwarded to the IB to determine whether such personnel are in India beyond the validity of their business visas.

Violations

Individuals and/or employers found in violation of the visa regime will face penalties, which currently include monetary fines, blacklisting of the employers, deportation, ban on re-entry for the individual, and/or imprisonment. The enforcement authorities exercise wide discretionary powers when determining penalties.

Conclusion

These stipulations will have a significant impact on foreign nationals wanting to visit India on short term assignments. As per the announcement these individuals will now require an employment visa as opposed to a short term business visa. Further, the issuance of a business or employment will continue to depend upon the discretion of the consular officer. The change in the visa category would definitely have tax and social security ramifications for the foreign nationals and their employers during their stay in India. Additionally, these changes may also generate corporate tax ramifications in rare cases.

It is important that companies seeking to assign foreign nationals to India on a short term basis should assess their projects to identify and comply with visa requirements. Companies should also review these short term projects in order to comply with the tax (individual and corporate) structure in India. In the interim companies seeking to assign

foreign nationals should conform to the new regime. It is expected that the outcome of a business or employment visa, which will be based on evidence submitted at the time of application will be subject to severe scrutiny to determine the caliber of the applicant and the nature of the job in India.

The article was compiled based on an August 20, 2009 notification issued by the Ministry of Commerce and Industry, information gathered through personal and client experiences, communications addressed to clients and reports in the media. The authors have neither examined the Employment Visa Manual and Ministry of Home Affairs announcements referred to in this article. All information pertaining to these is based on medial reports.

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