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The Government of India recently released guidance on the permissible use of Business Visas (BV) and Employment Visas (EV) by foreign nationals visiting India that will pose significant operational and logistical challenges to many multinational companies. Companies that need to send employees to India on short-term assignments, or that already have such employees in the country, should conduct an immediate review of these projects to ensure compliance.

India Guidance on Its Visa Regimes May Create Major Change for Companies Doing Business in India

By Ian R. MacDonald

As reported on Littler's Global Immigration Counsel Blog on November 5, 2009, the Government of India's (GOI) Ministry of Home Affairs (MHA) released guidance on permissible use of Business Visas and Employment Visas by foreign nationals visiting India. This development has significant implications for multinational corporations (MNCs) sending employees to India on short-term assignments. This article provides an update regarding this uncertain legal development based on feedback from companies whose employees have been directly affected by this situation.

Background

The GOI, in response to concerns that the BV program is being widely misused by foreign nationals visiting India, recently issued guidance and clarification on permissible use of the BV program. Specifically, the Indian Ministry of Commerce and Industry (MCI), Department of Industrial Policy and Promotion issued a letter dated August 20, 2009, outlining visa requirements for foreign nationals engaged in projects or specific contracts in India. This was quickly followed with additional clarification by the MHA on September 25, 2009, in the form of Frequently Asked Questions (FAQs). While the FAQs' somewhat relaxed the restrictive definitions outlined in the previous letter by the MCI, the GOI clearly intends to curtail improper use of the BV program and to increase use of the EV program.

Permissible Business Activities Under the BV Program

The BV program was historically used by companies to transfer temporary foreign nationals to India on short-term assignments for periods of up to 180 days. Companies have used the BV program extensively to send intracompany transfers and key professionals to India on short-term business assignments. Typically, Indian Consulates around the world issued BVs with validity dates of 180 days, and even longer for nationals of certain countries or for individuals coming to the United States to establish

a new business operation. It has always been relatively easy to obtain a BV at an Indian Consulate.

Based on the recent GOI guidance, however, many companies are confused as to what is now considered permissible activity under the BV program, particularly with respect to information technology-related assignments. Many of these companies have foreign nationals in India pursuant to a BV and are required to keep them in the country for short periods of time to train and supervise local personnel, execute key projects, transition work to third-party vendors, attend important business meetings and oversee the operation of an Indian affiliate. The FAQ make it clear that the BV program should not be used for employment or work.

Based on guidance from the GOI, to qualify for a BV an individual must now meet the following criteria:

- visiting India to establish an industrial or business venture/company;
- exploring business opportunities in India;
- purchasing or selling industrial products in India; and/or
- attending short-term business meetings.

If an assignment is considered to fall outside of this criteria, then an EV will be required. All currently pending BV applications that mention that the purpose of a trip is to execute a project or contract will be returned unadjudicated. Whether or not an assignment meets the BV criteria is completely at the discretion of the Indian Consulate having jurisdiction over a particular matter. Obviously, this may lead to inconsistent standards being applied by different Indian Consulates. So far, the only guidance issued by the GOI to Indian Consulates with respect to adjudicating BV applications is that Consulates should not approve BV applications for foreign nationals who will be visiting India to execute projects or contracts. It is anticipated that specific guidelines associated with adjudication standards, along with examples, will be issued by the GOI to all Indian Consular Posts.

What Action Should Be Taken?

Companies should conduct an immediate assessment of their foreign staff in India to determine status and whether action should be taken. The GOI is now requiring all foreign nationals with BVs in India who are working on projects or specific contracts in India to depart the country immediately and to return with the appropriate EV or BV. Affected individuals cannot change their status while in India – they must leave the country. The GOI set a deadline of October 31, 2009, for all affected foreign nationals to leave India. The GOI has provided no indication that this deadline will be extended. Companies have reported that foreign nationals have received letters from the GOI requiring them to exit the country prior to the deadline and return once an EV is secured. Consultation with legal counsel is highly recommended if an employee receives such a letter from the GOI. It should be noted that the FAQs clearly indicate that BV holders who are in India performing permissible business activities are not required to depart India.

What If an Employment Visa (EV) Is Required?

The FAQs outline a number of important changes to the EV program. As with many other countries, the GOI is tightening the belt on immigration in an effort to protect the local workforce, while also being very conscious of encouraging foreign investment by allowing highly skilled professionals and senior managers to enter the country to perform essential work. To this end, the movement away from allowing the BV program to be the catchall category for all foreign workers seeking admission to India, and the push towards increased use of the EV program, clearly shows an intent by the GOI to protect the local job market, in particular those positions where there is a large pool of qualified local workers or which are administrative or clerical.

From a procedural standpoint, all foreign nationals who need to obtain an EV must now file applications within their country of citizenship. This rule has a retroactive effective date of September 16, 2009 (the rule does not apply to BV applications). EV applicants can no longer apply in their country of residence. As a practical matter, this development is creating processing headaches and significant

project interruptions for companies that require the services of key personnel who are presently residing in a country other than their country of citizenship. For example, a French citizen who is working in the United States pursuant to an H-1B visa will have to process their application at the Indian Consulate in Paris before being able to enter India on an EV. As such, companies should plan well in advance and assess logistic requirements thoroughly on all India-based projects. Time for in-person interviews should also be built into any projected timeline.

In its August 20, 2009 letter, the GOI reiterated that it will continue to apply the legal standards outlined in the Employment Visa Manual when assessing whether an individual qualifies for an EV. Specifically, only the following applicants will be considered for EVs:

- skilled and qualified professionals; and/or
- individuals who are being engaged or appointed by a company, organization, industry, undertaking, etc., on a contractual or employment basis at a senior-level skilled position (such as technical expert) or senior executive/managerial position.

The GOI made it clear that the following category of applicants would not qualify for EVs:

- positions for which a large number of qualified Indians are available; and/or
- positions that are administrative, secretarial or clerical in nature.

Companies should assess staffing needs for upcoming projects in India carefully, as the ability to transfer certain employees to India may now be compromised. As noted above, with the GOI instructing Indian Consulates to strictly interpret the BV program, it is anticipated that several foreign nationals being sent to India will neither qualify for a BV nor an EV. For example, if a company selects a software technician or tester from its U.S. operation to assist in the execution of an important IT project, it is unlikely under the new guidance that the employee would qualify for a BV as it involves a project. Furthermore, obtaining an EV is unlikely to succeed as most software technician or tester positions do not require a bachelor's-level education, nor do most employees in this position hold bachelor's degrees. Finally, there are clearly a large number of qualified Indian workers available for this type of IT position.

The GOI also put companies on notice that the sponsoring entity in India will be responsible for the conduct of EV holders while they are in India, and for ensuring that EV holders leave the country prior to expiration of their status. Companies should ensure that adequate guidance is given to all EV holders prior to commencing an assignment in India, thereby putting employees on notice and providing a level of corporate protection should any employee conduct problems arise. Furthermore, employers should institute a tracking system that captures and alerts the expiration dates of all EVs. This can be done in-house or through outside counsel.

Special Procedures for EVs Involving Chinese Nationals

In addition to the procedures outlined above, Chinese nationals applying for EVs must go through a security clearance procedure. This change is welcomed as it brings a level of procedural transparency to EV applications for Chinese nationals. Previously, relevant Indian government agencies only knew that the security clearance process for Chinese nationals was in effect. Cases subjected to this process were delayed significantly (in some cases indefinitely) and were extremely difficult to get approved.

Now, all EV applications for Chinese nationals must be filed by the sponsoring entity at the Indian Mission in China and a copy must be filed with the Foreigners Division of the MHA in New Delhi. The Indian Mission then endorses the application with the MHA, and the MHA in turn forwards copies of the application to the Intelligence Bureau (IB) and the Ministry of Labour (MOL). The IB will take 15 days to process the application and forward its determination to the MOL, which will take up to 45 days to make a decision. These agencies then make a recommendation to the MHA, which then informs the Indian Mission of the final decision. This whole process is expected to take approximately 60 days to complete.

As part of this initiative, the Indian Ministry of External Affairs is compiling information about all BVs issued to Chinese nationals since January 1, 2008, to determine who has overstayed their status. This information will be taken into consideration by the IB when reviewing an EV application.

Penalties for Violations

Any individual and/or employer found to be violating India’s visa regime will be subject to discretionary penalties, which include monetary fines, blacklisting of the employer, removal of the employee from the country and a ban on returning in the future, and possible imprisonment. It is too early to assess how broadly this discretionary power will be applied by Indian authorities following the GOI’s guidance on employment-based immigration.

Conclusion

Companies wanting to send employees to India on short-term assignments, or that already have such employees in the country, must do an immediate review of all personnel relating to these assignments. Outside counsel can assist in assessing whether categories of personnel working on particular projects will qualify for BVs or whether EVs will be required. Companies should anticipate a heightened level of scrutiny on BV and EV applications. Project timelines may need to be adjusted to incorporate processing delays associated with expected backlogs created by closer examination of visa applications by Indian Consulates. Also, companies should consider logistics when sending a foreign national who is residing in a country other than the one where they are a citizen, as they will have to apply in their home country. An assessment of tax and social security ramifications will need to be conducted when an employee is required to change status from a BV to an EV. Corporate tax considerations should also be assessed.

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