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William J. Kovatch, Jr.,
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provides a wide array of
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William J. Kovatch, Jr. is an experienced litigator, with eight years experience litigating cases for the Federal Government. He has litigated complex cases before U.S. courts, NAFTA panels, and the World Trade Organization.

William J. Kovatch, Jr. is a member of the American Immigration Lawyers Association.

This newsletter is meant for informational purposes only, and not meant to constitute legal advice. Quality legal advice requires a thorough look at the facts and circumstances surrounding your situation.

IMMIGRATION LAW NEWSLETTER

Business Professionals from Canada and Mexico: The TN Visa

Citizens from Canada and Mexico may apply for temporary admission to the United States to engage in business activities at a professional level. This is known as the TN non-immigrant classification.

The TN visa is a result of the North American Free Trade Agreement (NAFTA). Appendix 1603.D.1 of Annex 1603 of the NAFTA provides a list of professional activities that are eligible for TN classification. Generally, the professional activities require a bachelor's degree or higher. Among the professionals listed are lawyers, engineers, accountants, computer systems analysts, teachers and graphic designers.

The visa is initially issued for a three year period. It is a multi-entry visa, which means that the visa holder may travel to and from the United States during the three year period without applying for a new visa. The visa holder may apply for an extension while in the United States. Extensions can be granted in up to three year intervals.

Canadian citizens may apply at a U.S. port of entry. A citizen of Mexico must apply at a U.S. consulate in Mexico. To apply, the applicant must show proof of citizenship, and a letter from the prospective employer stating the applicant's professional capacity, the purpose of the stay, the length of stay, and the applicant's educational qualifications. The applicant may also need to provide credential evaluations.

There are no limits on the number of extensions that a person may apply for. However, the U.S. Government must be convinced that the proposed stay is temporary. That is, the applicant must show that the work will end at a predictable time, and that the applicant will return to his or her country once the work is completed. ■





LITIGATION UPDATE

Malonga v. Mukasey, Ct. No. 07-3443 (8th Cir. November 3, 2008).

Malonga, a native of the Republic of Congo (“RC”) and a member of the Lari ethnic group of the Kongo tribe, applied for asylum or withholding of removal claiming a fear of persecution on account of his membership in a particular social group. The Immigration Judge found that the Kongo tribe, which constituted 48% of the population of the RC, were a “substantial minority.”

The Judge continued, “Simply being a member of that group does not place the respondent in any greater risk than any members of the rest of that group which comprise almost half of the population.”

The Court of Appeals for the Eighth Circuit reversed, holding that the Lari ethnic group was a particular social group. The court found that members of the Lari ethnic group were identifiable by their accent, dialect, home region, and surnames. The court further stated that whether a group qualified as a “particular social group” did not depend on size alone, as the court had recently held that Somali women were a particular social group because they were subject to female genital mutilation, despite the large percentage of women in the Somali population.

Zuh v. Mukasey, Ct. No. 06-2050 (4th Cir. November 25, 2008).

The Court of Appeals for the Fourth Circuit reversed a denial of asylum based on the Immigration Judge’s consideration of discretionary factors. First, the court held that while sworn affidavits may deserve greater weight than simple letters, evidence presented in an immigration hearing, such as a letter, does not need to be sworn. The court then went on to offer a non-exhaustive list of factors to consider in deciding whether to grant discretionary asylum relief. The following factors should be weighed in favor of the applicant: (1) any ties to the United States; (2) any hardship to the alien and his family if deported to any country, or if denied asylum, such that the alien cannot be reunited with family members (as derivative asylees) in this country; (3) evidence of good character; (4) general humanitarian reasons, such as age or health; and (5) evidence of severe past persecution and/or a well-founded fear of future persecution. The following factors should be weighed against the applicant: (1) nature and underlying circumstances of any applicable ground of exclusion; (2) significant violations of immigration laws; (3) a criminal record, including the nature, recency, and seriousness of that record and the presence of recidivism; (4) lack of candor with immigration officials; and (5) other evidence that indicates bad character or undesirability for permanent residence in the United States. The court urged the BIA to recommend to the Chief Immigration Judge that the case be reassigned to a different Immigration Judge on remand. ■

The Recession, Lay-Offs and Labor Certifications

As a result of the current economic downturn, the Department of Labor has signaled that it will take a close look at certain applications for labor certifications. In order to apply for an employment-based immigrant visa, the first step is usually to seek a certification from the Department of Labor that there are no qualified, willing, able and available U.S. workers to fill the position. In addition, the foreign worker cannot displace a U.S. worker. A U.S. employer, therefore, cannot seek to hire a foreign worker if the employer has recently experienced a lay-off.

The Department of Labor has indicated that it will focus its attention on companies in industries that are adversely affected by the current economic situation. The agency stated that it would review media reports and other information available to it to provide extra scrutiny for labor certifications in these cases. ■