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**PCWA: Immigration Session Content Outline**

Speaker: Elizabeth S. Van Arkel, Immigration Attorney

1. **Determining the Immigration status of your client**
   1. Immigrant vs. Non-Immigrant
      1. An “immigrant” is someone coming to the U.S. (legally or illegally) to remain permanently
      2. Immigrant categories
         1. **Family Based Immigration**
            1. Marriage as a basis for Immigration

Does not happen automatically. A procedure must be undertaken, which is different depending on where the couple - or either spouse - lives (in the U.S. or abroad).

Fiance(e) visa is available for those intending to marry within 90 days of entry to the U.S. if the parties have met in person in the last 2 years and are otherwise eligible to marry

Permanent residence will be conditional if the marriage has existed for less than 2 years at the time of immigration. An application is then required to remove the condition (I-751).

Same sex marriage is allowed as a basis for immigration

* + - * 1. Other Family Sponsorship

Most categories of family sponsorship are limited to a certain number (quota) each year. Those not limited are **spouses and minor children of U.S. citizens, and parents of U.S. citizens if the U.S. citizen child is over 21 years old.**

The rest are divided into the following categories or “preferences”. The date indicated on the following chart shows when the U.S. citizen or permanent resident relative would have had to start the application for the person to be able to come in December 2016

**First**: (**F1**) Unmarried Sons and Daughters of U.S. Citizens:  23,400 plus any numbers not required for fourth preference.

**Second**: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents:  114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (**F2A**) Spouses and Children of Permanent Residents:  77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (**F2B**) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents:  23% of the overall second preference limitation.

**Third**: (**F3**) Married Sons and Daughters of U.S. Citizens:  23,400, plus any numbers not required by first and second preferences.

**Fourth**: (**F4**) Brothers and Sisters of Adult U.S. Citizens:  65,000, plus any numbers not required by first three preferences.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Family- Sponsored** | **All Chargeability  Areas Except Those Listed** | **CHINA-mainland  born** | **INDIA** | **MEXICO** | **PHILIPPINES** |
| F1 | 01DEC09 | 01DEC09 | 01DEC09 | 15APR95 | 15SEP05 |
| F2A | 22FEB15 | 22FEB15 | 22FEB15 | 15FEB15 | 22FEB15 |
| F2B | 08MAY10 | 08MAY10 | 08MAY10 | 15OCT95 | 01MAR06 |
| F3 | 15FEB05 | 15FEB05 | 15FEB05 | 08DEC94 | 15AUG94 |
| F4 | 22DEC03 | 01OCT03 | 01APR03 | 15MAY97 | 22MAY93 |

* + - 1. **Employment Based Immigration**
         1. The employment-based immigration system is keyed to the level of skill (education, training or experience) necessary to do the job.
         2. Before an employer can sponsor an immigrant, it must show that there are no U.S. workers available - typically by going through a procedure through Dept. of Labor called “PERM”.

**EMPLOYMENT-BASED PREFERENCES**

**First**:  Priority Workers:  28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

**Second**:  Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability:  28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

**Third**:  Skilled Workers, Professionals, and Other Workers:  28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "\*Other Workers".

**Fourth**:  Certain Special Immigrants:  7.1% of the worldwide level.

**Fifth**:  Employment Creation:  7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of Pub. L. 102-395.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Employ- ment based** | **All Charge- ability  Areas Except Those Listed** | **CHINA- mainland  born** | **EL SALVADOR GUATEMALA HONDURAS** | **INDIA** | **MEXICO** | **PHILIPPINES** |
| 1st | C | C | C | C | C | C |
| 2nd | C | 22SEP12 | C | 01FEB08 | C | C |
| 3rd | 01JUL16 | 01JUL13 | 01JUL16 | 15MAR05 | 01JUL16 | 01JUN11 |
| Other Workers | 01JUL16 | 01NOV05 | 01JUL16 | 15MAR05 | 01JUL16 | 01JUN11 |
| 4th | C | C | 15JUL15 | C | 15JUL15 | C |
| Certain Religious Workers | C | C | 15JUL15 | C | 15JUL15 | C |
| 5th Non-Regional Center (C5 and T5) | C | 22MAR14 | C | C | C | C |
| 5th Regional Center (I5 and R5) | C | 22MAR14 | C | C | C | C |

* + - 1. **Asylee/Refugee**
         1. Must not be able to return to your home country because of your nationality, ethnicity, religious beliefs, political opinion or membership in a particular social group. See INA § 101(a)(42)(A). Economic hardship or even disaster is not grounds for refugee resettlement.
      2. **Diversity Lottery**
         1. Section 203(c) of the INA provides up to 55,000 immigrant visas each fiscal year to permit additional immigration opportunities for persons from countries with low admissions during the previous five years
         2. “diversify” our immigration pool
    1. **Non-Immigrant categories**: temporary stays in the U.S., technically these are “nonimmigrant status” that will end at a date certain or upon fulfillment of a condition (such as graduating from school or completion of allowed employment period).

B-1/B-2 - visitor (no work authorized)

F-1 - student (only available for full-time studies and can work only if part of program or internship)

J-1 - exchange visitor/intern (18/12 month limit)

H-1B - professional worker (six year limit) - 65,000 + 20,000 (Master’s degree) new ones/year

Singapore and Chile trade agreements - not numerically limited

H-2A - unskilled seasonal worker - agriculture (less than one year)

H-2B - unskilled seasonal worker - non-agriculture (less than one year) (numerical limit)

L-1 -intracompany transferee (5/7 year limit depending on type)

O-1 - extraordinary ability (must be top of the field of expertise)

P - performer or athlete (proof of national or international acclaim)

Q - cultural exchange (public demonstration required - “Disney” visa)

TN - NAFTA Schedule 2 - Mexico & Canada only

E-3 - Australia (like H-1B) - no numerical limits

E-1 & E-2 - Substantial trade and investment

K-1- fiancé(e) (must marry sponsor within 90 days) (K-2 for children)

K-3 - spouse temporary visa (K-4 for children)

* + 1. **Lawful Permanent Resident**
       1. If the immigration process is completed lawfully, the person is a “lawful permanent resident” or LPR.
       2. LPR status can be lost if the person is outside the U.S. too long or commits certain crimes.
    2. **Naturalization and Citizenship**
       1. A permanent resident may become a citizen after 5 years (3 years if married to a US citizen for 3 years) if certain requirements are met
       2. Children under 18 automatically gain U.S. citizenship upon entry to the U.S. if one of their parents is a U.S. citizen under the Child Citizenship Act.
       3. A child born in the United States is automatically a U.S. citizen
       4. A child born to U.S. citizen parents while abroad is usually a U.S. citizen
       5. A child born to one U.S. citizen parent abroad is often a U.S. citizen
       6. It is very important to check if your client is really an immigrant!
          1. If your client is accused of a crime that is a deportable offense and the government thinks he/she is not a citizen, removal proceedings could be commenced in addition to the criminal proceedings. U.S. citizenship is a complete defense to removal.

1. **Agencies involved with Immigration**
   1. Department of Homeland Security
   2. CIS – Citizenship & Immigration Service
      1. Grant or deny immigration applications
   3. ICE – Immigration & Customs Enforcement
      1. Enforcement arm of DHS
   4. CBP – Customs and Border Protection
      1. Decide whether a person can enter the U.S.
   5. Department of State – Consulates & Embassies
      1. Decide who gets a visa to apply for entry to the U.S. if a visa is required for entry
   6. Department of Labor
      1. DOL determines when a job being offered to a foreign worker actually cannot be filled by a U.S. worker and certifies such to CIS so that the foreign worker can immigrate. It is also involved in some temporary work visa applications (H-1B, H-2A and H-2B).
   7. Executive Office for Immigration Review (EOIR-Immigration Court)
2. **Representing Immigrant clients in Court**
   1. Court Proceedings
      1. Immigration status does not restrict access to the court system
         1. Immigrants present in the United States have equal protection under the laws at both the federal and state level. See Yick Wo v. Hopkins, 118 U.s. 356 (1886); Kaoru Yamataya v. Fisher, 198 U.S. 86 (1903); Plyler v. Doe, 457 U.S. 202 (1982).
      2. Immigration status of a party or witness could affect the outcome of your case
         1. Court under no obligation to report the immigration status or lack thereof to any government authority, anyone can report suspicions regarding an immigrant’s status to the U.S. Citizenship & Immigration Service (USCIS)
   2. **Family Law Court Proceedings**
      1. Juvenile Court
         1. SIJS: Special Immigrant Juvenile Status (See INA Sec. 101 (a)(27)(J))
            1. The applicant must be under the **jurisdiction of the court** or other juvenile proceeding
            2. The applicant must have been deemed eligible for **long term foster care**
            3. The court or some administrative agency must rule that it is **not in the child’s best interest** to be returned to his/her home country
            4. The court should make clear that it made its findings and orders based on **abuse, neglect or abandonment** of the child
            5. The juvenile court should sign an order making the above findings
            6. Juvenile court must retain jurisdiction, applicant must be under age 21 and unmarried
      2. Dissolution of Marriage/Child Custody
         1. Spousal Support: (I-864 Affidavit of Support)
            1. Obligations for financial support under Form I-864

This form is signed by a U.S. citizen or permanent resident sponsor of a family member or in some cases an employee as part of the immigration process. Although the I-864 creates a contract with the federal government regarding financial support of the immigrant being sponsored, it has been used to create support obligations in marriage dissolution and other contexts. (See <https://www.uscis.gov/i-864>). (See also Erler v. Erler, 2013 U.S. Dist. LEXIS 165814 (ND Cal Nov. 21, 2013) and *Affidavit of Support (i-864) Enforceable Despite Pre-nup, Divorce and Potential Marriage Fraud per California Court* (March 27, 2014), <http://www.davisbrownlaw.com/iowa-immigration-law-blog-article.aspx?id=1912> ; also Greg McLawsen, *Suing on the I-864 Affidavit of Support*, 17 Bender’s Immigr. Bull. 1943 (Dec. 15, 2012)).

* + - 1. International travel for child?
      2. I-751 Removal of Conditions to LPR
         1. Foreign national spouse will initially receive only a two-year residence if the couple has been married for less than two years at the time the immigrant visa is granted.
         2. Dissolution of the marriage before the two-year period is over or during the time the application to obtain permanent residence is pending will require that the foreign spouse take additional steps to continue U.S. residence.
      3. Pending Family Relative Petition issues (I-130/I-485/I-765)(Abandoned upon dissolution of marriage)
      4. Non-Immigrant dependents (H-1B, F, and J status)(loss of status)
    1. Chapter 236: Civil Protective Orders-Domestic Violence
  1. **Criminal Law Court Proceedings**
     1. Failure to advise a client of the deportation risks of a guilty plea will provide a basis for challenging the conviction for ineffective assistance of counsel. (Applies if the defendant is not a U.S. citizen). See Padilla v. Kentucky, 559 U.S. 356 (2010).
  2. Understanding your client (or witness) and making sure your client (or witness) understands you.
     + - 1. Iowa law requires an interpreter be used in court or in administrative proceedings. See Iowa Code Ch. 622A and Iowa Court Rules Ch. 47.
         2. Admissions made and recorded in the process of litigation could later affect your clients (or witness’s) immigration process. Besides concerns about ineffective assistance of counsel in and potential immigration consequences of criminal proceedings, government agencies can and will access court records when reviewing an immigration application.
  3. Your client or witness – or that of an opposing party – could disappear if deported from the U.S.
     1. Impact of charge and/or conviction
        1. Analyze client’s past criminal history
           1. Convictions that would have very little effect on the life of a U.S. citizen can be devastating to a lawful permanent resident (“green card” holder) or a non-immigrant (temporary resident). Any finding of guilt, including a deferred judgment or one that has been expunged is counted as a conviction for immigration purposes.
        2. Analyze client’s immigration history (i.e. detained at border, bounce back, prior Order for Removal)
        3. Conviction for Immigration Purposes?
           1. A noncitizen who makes a formal admission to officials of all of the elements of a CIMT is inadmissible even if there is no conviction.
           2. This does not apply if the case was brought to criminal court but resolved in a disposition that is less than a conviction (e.g., charges dropped, conviction vacated).14 Counsel should avoid having clients formally admit to offenses that are not charged with. (See, e.g., Matter of CYC, 3 I&N Dec. 623 (BIA 1950) (dismissal of charges overcomes independent admission)
     2. Crimes of Moral Turpitude (CIMT)
        1. A crime involving moral turpitude (“CIMT”) has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a “reprehensible act” with a mens rea of at least recklessness. (See *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)).
           1. \*Petty offense exception in *certain* situations for noncitizens

If a noncitizen (a) has committed only one moral turpitude offense ever, (b) the offense carries a potential sentence of a year or less, and (c) the “sentence imposed” was less than six months, the person is automatically not inadmissible under the CIMT ground. (See11 8 USC § 1182(a)(2)(A)(ii)(II)).

* + 1. Aggravated Felony in Immigration Law
       1. Crimes that are not considered particularly serious under State law can be considered “aggravated felonies” under federal immigration law, and result in the inability of a person to ever immigrate or to even lose permanent resident status. The most common example is domestic abuse, but others include child endangerment or any “crime of violence” as defined in federal law.
          1. Crime of Violence (imprisonment term of at least 1 yr) (See INA 101(a)(43)(F)
  1. Representing Immigrant victims of crimes of violence or domestic abuse
     1. VAWA (Violence Against Women Act)
        1. Violence Against Women Act of 1994 (VAWA), Pub.L. 103-322, 42 U.S.C. §§ 13701-14040.
     2. U Visa (Victim of Qualifying Crime of Violence) (INA Sec. 101(a)(15)(U)
     3. Watch out for misconceptions:
        1. The fact that a person is in the United States legally does not mean that he/she is authorized to work.
           1. Many people (millions) enter the U.S. legally but on temporary visas that do not allow them to work.
           2. Foreign students can work in certain situations, but not in others (the work must be authorized by the foreign student advisor and can be no more than 20 hours per week when school is in session).
           3. Holders of work visas can only work for the sponsoring employer.
           4. Some spouses of holders of work visas do not have authorization to work
        2. A person does not need a Social Security number to obtain a driver’s license (but must be lawfully present).
  2. Iowa law allows any person legally present in the United States and a resident of Iowa to obtain a drivers license or non-driver I.D. A Social Security card is issued only if a person is authorized to work. There are many people legally present who are not authorized to work, as discussed above.

1. **Post-Election: Potential changes in Immigration law**
   1. See <http://cis.org/A-Pen-and-a-Phone-79-immigration-actions-the-next-president-can-take>
      1. DACA (Deferred Action for Childhood Arrivals)
      2. TPS (Temporary Protected Status)
      3. Non-Immigrant skilled and unskilled workers
      4. Worksite Compliance
      5. Enforcement and Removals