

## **Foreign nationals' employment in India- Deadline for return home comes to an end today**

**IN** a major development having widespread ramifications, the Ministry of Commerce and Industry issued Circular No. 6 (29)/2008-BE dated August 20, 2009 imposing new restrictions on foreign nationals working in India on project based assignments.

As per this Circular, all foreign nationals holding business visa and working on projects or contracts in India should return to their home countries on expiry of their visas or by October 31, 2009 (today), whichever is earlier. It has also been clearly mentioned that the Indian Consulates and High Commissions will be issuing business visas only to those applicants who meet the guidelines issued in August 2009 by the Ministry of Commerce and Industry. Going forward, **foreign nationals working on projects and/or contracts will have to obtain an employment visa before they come to India.** The Indian Consulates across the world have been given instructions not to grant business visas to foreign nationals coming to work on projects or contracts in India, and special care is to be taken in case the foreign national was issued a business visa in some other country.

As a further move aimed at restricting the nature of activities eligible for issue of business visa, the Ministry had further issued an advisory on September 25, 2009 confirming that the business visas will only be issued where there is a 'bonafide business purpose' and the conditions provided in the guidelines are to be satisfied. Some of the 'business activities' specifically listed are : establishing an industrial/business venture, exploring possibilities to set up industrial business ventures and purchasing /selling industrial products in India.

The guidelines issued by the Government require strict adherence to the visa manual for grant of employment visas. As per these guidelines, the visa applicant should file for an employment visa in his/her country of citizenship. Employment visas are to be granted only to managerial, senior level or highly skilled applicants. The guidelines also state that the Indian Companies engaging foreign nationals for project related or contractual work in India would be responsible for the conduct of these foreign nationals and their departure from India, in terms of these guidelines. In addition, specific procedures have been laid down for Chinese nationals applying for employment visas to work in India. Chinese nationals are required to furnish additional details in respect of their educational qualifications, their present job and the nature of job proposed to be performed in India in the application required to be submitted to the Indian Missions/Posts in China. The guidelines also provide the relevant timelines to be met by the various authorities functioning within the Government, including the Indian Embassies and Consulates, the Ministry of Home Affairs and the Ministry of Labour.

The motive behind these developments would seem to be the Government's interest in protecting the employment prospects of India's huge population of unskilled and semi-skilled workers and to allow only highly skilled foreign nationals to work in India. Notwithstanding this noble objective, these new guidelines are likely to create a lot of problems on the ground.

It is an open secret that many companies and especially MNCs or MNC Affiliates have employed foreign nationals on business visas, on short to medium employment assignments, irrespective of the nomenclature of the agreements. With the new requirement that these national foreign nationals would need to leave India for their home countries and return to India with business visas issued by the Indian Missions, these assignments/projects could suffer and may even have to be abandoned, as there is no guarantee that these foreign nationals would be issued employment visas by the Indian Missions, given the new stiff guidelines. It would perhaps have been more appropriate, if the Government had imposed the new guidelines on a prospective basis, without requiring the foreign nationals working on business visas to leave India not later than October 31, 2009. It is not clear as to how the Indian Companies can guarantee the conduct of the foreign nationals during their stay in India and also ensure that the foreign nationals depart upon expiry of employment visas. Further, it is not clear as to the provisions that are applicable to a case, wherein, a foreign national in India on an employment visa quits the employment and stays on, looking for another employment.

Under these new guidelines, the prime condition for being issues with an employment visa is that, the foreign national should be a skilled and qualified professional or should be a person who is being engaged or appointed by an entity in India, or on a contract or employment at a senior level or should be a skilled technical person or should be a person who can fill in a managerial position. It's clear now that employment visas would not be granted to foreign nationals in respect of jobs for which a large number of qualified Indians are available or for jobs that are routine, ordinary or secretarial or clerical in nature. Now, these attributes which would form the basis for issue of employment visas are highly subjective and one would wonder, how uniformity can be achieved in terms of the process to be followed, at the various Indian Missions located across the globe.

There is a lot of ambiguity even in respect of issue of business visas in as much as, the business visas are to be issued only for 'bonafide business purposes'. In the absence of a clear understanding on what would constitute a 'bonafide business purpose', there could be little uniformity in the views taken by the various Indian Missions, in terms of handling applications for business visas. Issues can arise on account of various interpretational issues. Can a foreign national coming to India for the purpose of participating in a conference or a training session or for general discussions with a bunch of Indian Companies without a specific immediate business objective be treated as coming to India for a 'bonafide business purpose'? It would be very useful if the Government can publish examples of what would constitute bonafide business purposes, so that, the applicants can be reasonably sure of getting visas. The guidelines also don't talk specifically of any documentation to be provided by the visa applicants.

There could also be cases a visit could neither fulfil the requirements set for issuance of business visas nor for employment visas. One example which comes to be mind would be the hypothetical visit of a foreign national for attending, let's say, a Board Meeting or for a training session. There are no clear guidelines as to how this case could be handled.

There could be additional issues, terms of the new guidelines which insist that employment visa is a must for employment, in terms of income tax, provident fund, etc. I would presume that, the grant of an employment visa could lead to the amounts paid to the foreign national to be taxed in India and consequently, attract TDS provisions. There could be an additional implication on account of PF also. Since he contracts normally provide for a net take home/net amount to be paid to the foreign nationals, the Indian Companies signing on these foreign nationals could be required to meet the additional expenditures.

It would also be a challenge to introduce standard operating procedures at the various Indian Missions. As such, surveys conducted by Trade Bodies like ASSOCHAM have been pointing out India is yet to emerge as a 'hospitable country' with most of the blame being pinned on the Indian Missions. One wonders how effectively the additional responsibility of issuing visas under the new guidelines would be discharged by the Indian Missions.

It is quite ironical that India has come out with completely new guidelines for foreign nationals aspiring to work in India, even as bodies like NASSCOM have been crying hoarse on a pending legislation in the US aimed at restricting the hiring of foreign workers (read, Indian techies) by the US Companies. We shout from our roof top that any restrictions placed by the US on hiring of foreign workers by US Companies would affect the competitiveness of the US Companies. Won't that logic apply to the Indian Companies, as well?

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