



NEW INDIAN IMMIGRATION REGIME FOR FOREIGN NATIONALS IN INDIA

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Recently, the Ministry of Commerce and Industry (the MCI), India announced (the MCI Announcement) that business visas cannot be granted to foreign nationals to work on projects or specific contracts in India. The formal announcement also requires all foreign nationals on such visas to leave India and return on employment visas. Initially they were required to leave before the end of September 30, 2009, but the deadline was later extended by the Ministry of Home Affairs by way of a clarification (the MHA Clarification), till October 31, 2009. Individuals who are in India on business visas in connection with investments, joint ventures or buying and selling industrial products can continue to remain in the country. Both the government communications also state that going forward business visas will only be issued for activities specified in their circulars. However, since the circulars were rather ambiguous the Ministry of Home Affairs published a set of frequently asked questions on October 29, 2009 (the FAQs). These provide some clarity but have not resolved all ambiguities.

Companies and expatriates in India are concerned as many of these foreign nationals are currently in India on business visas and are expected to remain in India for short periods usually to train local personnel, hold meetings or supervise the working of the Indian affiliate.

In addition, hundreds of expatriates have received letters from the Indian Government asking them to leave the country before the deadline and return on appropriate employment visas. Even individuals who have not received such letters but are here on project or contract work were required to leave the country. It is important to note that the Indian company or organization that

has engaged foreign nationals to execute projects or contracts will be held responsible for the conduct of the foreign national during his or her stay in India and for the departure of such a foreign national.

Business Visas

In order to highlight the impact of these recent changes this article provides background information about the older system.

Generally, business visas were issued for short term visits or for long term stay depending on the individual's circumstances. Short Term Business Visas is a term used in this article to differentiate it from the business visas that permitted an individual to remain in India for long periods, which are referred to, here, as Long Term Business Visas.

Short Term Business Visas were issued with a validity of six months or longer while permitting a stay of a maximum of 180 days on each visit. Short Term Business Visas were also issued to individuals who wanted to visit India on business for short term assignments. Intra-company transferees often used the Short Term Business Visas to remain in India for training, supervision, execution of projects, migration of work to outsourcing service providers and other activities. Since a Short Term Business Visa permitted a foreign national to remain in India for not more than 180 days, individuals who wished to remain in India for longer periods would depart from the country and return after a brief absence enabling them to stay for additional periods of 180 days. Some companies rotated the deputation of their representatives in India to avoid a stay of 183 days, which would establish an individual as a resident in India for tax purposes. Indian residents are required to pay income tax in India on their world wide income.

Long Term Business Visas were issued with a validity of periods up to 10 years to foreign nationals from specific countries or to those who have set up or intend to set up business ventures in India. Individuals on a Long Term Business Visa were permitted to stay for extended periods without any limitations per visit or on the cumulative period in India.

The MCI Announcement states that business visas may be only granted to individuals in connection with the following activities and in strict compliance with the Visa Manual for Business Visas.

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.

Since individuals who seek to travel to India in connection with a project or contract do not meet the above mentioned criteria they are ineligible for a business visa and are required to apply for employment visas. This in effect eliminates the Short Term Business Visa.

Summary of FAQs Regarding Business Visas

The FAQs published by the MHA confirm that Business Visas may be granted to individuals who wish to establish or explore the possibility of establishing an industrial or business venture in India or wish to purchase or sell industrial products in India. Additionally, the FAQs provide that a Business Visa can be granted subject to a set of criteria including the financial standing and relevant expertise of the applicant. It cannot be granted to an individual who wishes to come to India in connection with money lending or petty trading or to undertake full time employment in India.

The FAQs also specify that the grant of Business Visas will be subject to any instructions that may be issued by the government of India, based on reciprocity with foreign countries.

The FAQs also provide an indicative list of situations where applicants may be granted a Business Visa. Some of the situations are described below:

1. Foreign nationals coming to set up or explore the possibility of setting up a business or industrial venture in India.
2. Foreign nationals coming to India for technical meetings or attending board meetings or other general meetings for business services support.
3. Foreign experts/specialists coming on a short duration in connection with an on-going project with the objective of monitoring progress, conducting meetings or providing high level technical guidance.
4. Foreign national trainees of multinational companies or corporate houses who wish to attend in-house training conducted at the regional hub of the company located in India.
5. Foreign nationals coming to India to purchase/sell industrial products or commercial products or consumer durables.
6. Foreign nationals coming to India to recruit manpower.
7. Foreign nationals who are partners in a business or are on the Board of

Directors of an Indian company.

8. Foreign nationals who wish to participate in, or render consulting services with regard to exhibitions, trade fairs, business fairs, etc.

9. Foreign buyers who come to transact business with suppliers, potential suppliers or to evaluate or monitor quality, provide specifications, place orders, negotiate further supplies etc., in connection with goods or services procured from India.

10. Foreign nationals coming to India for pre-sales or post-sales activity not amounting to actual execution of any contract or project.

11. Foreign students sponsored by AIESEC as interns on project based work in Indian companies or industries.

Employment Visas

The MCI Announcement specified that Employment Visas should be issued in “strict conformity with the Visa Manual” and described its salient points, briefly set out below. Employment Visa will be issued only to:

1. Skilled and qualified professionals; or
2. Persons employed by an Indian entity, including a company, organization, industry or undertaking on contract or employment basis at senior level, skilled positions in the capacity of:
 - a. Technical experts;
 - b. Senior executives; or
 - c. Managerial positions.

The MCI Announcement emphasized 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 routine, ordinary, secretarial or clerical jobs in India.

Further, the MCI Announcement requires all consular missions abroad to return Business Visa applications in connection with project or contract work in India requiring the applicant to reapply for an employment visa.

Summary of FAQs Regarding Employment Visas

The FAQs confirm what the MHA had specified in its earlier announcement that Employment Visas can only be granted to skilled and qualified individuals to undertake non-routine, ordinary, secretarial or clerical jobs for which there are already a large number of qualified Indians.

Additionally, the FAQs clarify that a foreign company that does not have a base in India, in the form of a project or branch office, a subsidiary or a joint venture, cannot sponsor an applicant's Employment Visa. Indian companies that have awarded a contract to a foreign company can sponsor an applicant's Employment visa. It is important to note that according to the FAQs, if an Indian company sponsors an applicant on an Employment Visa, the Indian company is not necessarily the employer of the foreign national.

The FAQs also provide an indicative list of situations where applicants may be granted an Employment Visa. Some of the situations are described below:

1. Foreign nationals coming to execute a project or contract irrespective of the duration of the visit.
2. Foreign nationals on short visits to customer locations to repair plants or machinery as part of a warranty or maintenance contract.
3. Foreign experts coming to impart training or to provide technical support/services or to take up employment as coaches in India.
4. Foreign nationals coming as consultants for a fixed remuneration.
5. Self-employed foreign nationals providing skilled services like engineering, medical, accounting, legal or such other highly skilled services as independent consultants.
6. Foreign, interpreters, teachers, chefs and artists employed in hotels, clubs or other organizations.
7. Foreign engineers or technicians coming to India for installation and commissioning of equipment, machines or tools that have been supplied under a contract.
8. Foreign personnel traveling to India in connection with technical support, technical services or transfer of know-how for which the Indian company pays fees/royalty to the foreign company.
9. Foreign sportsmen under time bound contracts with local clubs or organizations.

A foreign company or organization that does not have any Project Office, subsidiary, joint venture or branch office in India cannot sponsor a foreign national as an employee of a foreign company for employment in India.

An Indian company or organization which has awarded a contract for execution of a project to a foreign company, which does not have any base in India, can sponsor an Employment Visa for an employee of that foreign company.

Where to Apply

A very important stipulation in the MCI Announcement stated that employment visas could only be obtained in the applicant's country of origin. Earlier, consular posts issued visas to third country nationals who could prove that they were residents of the host country where they were applying for the visa. The MCI Announcement would have posed an immense burden on long term residents who would need to travel to their country of nationality to obtain an Indian Business or Employment Visa. Thankfully, the FAQs have solved this problem and applicants who have resided in a country for two years or more can now apply at an Indian Consular Post in the host country.

Miscellaneous Provisions

It is important to note that the MCI Announcement makes Indian companies engaging foreign nationals responsible for the conduct of the employees and for their departure from the country. Additionally, individuals and/or employers who violate 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.

A foreign national will also have to comply with all statutory requirements and pay taxes.

Indian Consular Posts may grant an 'X' or dependant visas to the family members of a foreign national granted who has been issued a Business Visa or Employment Visa at their discretion, subject to usual security checks provided the family members are otherwise eligible for such visas. 'X' Visas granted in conjunction with a principal applicant's Employment Visa is likely to be issued to co-terminate with the principal visa. In some instances it may be granted for a shorter duration.

The FAQs also provide a list of documents that should be presented in support of each of the categories and indicates the duration of each type of visa.

It is important to note that the MCI Announcement also prescribes specific procedures for the application and issue of employment visas to Chinese nationals.

Conclusion

We have been advising our clients that all foreign nationals who are still present in India on a Business Visa, and the purpose of their visit does not conform to the stipulations of the FAQs, should depart from India on or before 31 October 2009.

These new stipulations will have a significant impact on foreign nationals wanting to visit India on short term assignments. As per the announcement some of these individuals will now require an Employment Visa as opposed to a Short Term Business Visa. Further, the issuance of a Business or Employment Visa 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, depending on the nature of the individual's activities in India.

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 and tax implications. 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 or business in India.

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The contents of this publication are not a comprehensive consideration of the subjects discussed and are designed to provide preliminary, general information. The Business and Employment Visa Manuals are not available for public inspection. Readers should not conclusively rely on the information as legal advice and should seek independent counsel before any action is taken with respect to these or other specific issues.