



# VISA SOLUTIONS

An Update from the Immigration Practice Group



Summer 2010

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## Coming This Fall! Free Seminar for HR Professionals and Small Business Owners

Specifically designed for the HR professional and the small business owner, this seminar will focus on employment-based immigration and compliance. See the Fall issue of Visa Solutions or visit [www.ftwlaw.com](http://www.ftwlaw.com) for further details.

FLETCHER, TILTON & WHIPPLE, P.C.  
C O U N S E L O R S A T L A W  
The Meadows | 161 Worcester Road, Suite 500 | Framingham, MA 01701  
[www.ftwlaw.com/immigration](http://www.ftwlaw.com/immigration)



Fletcher, Tilton & Whipple, P.C.



## Immigration Practice Group

Kirk A. Carter, Esq.  
Practice Group Chair  
(508) 532-3514  
[kcarter@ftwlaw.com](mailto:kcarter@ftwlaw.com)

Isabel I. Rybalnik, Esq.  
(508) 532-3512  
[irybalnik@ftwlaw.com](mailto:irybalnik@ftwlaw.com)

Alyssa Lubin,  
Administrative Assistant  
(508) 532-3513  
[alubin@ftwlaw.com](mailto:alubin@ftwlaw.com)

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## The Immigration Practice Group

FRAMINGHAM  
The Meadows  
161 Worcester Road, 5th Floor  
(508) 532-3500

WORCESTER  
Guaranty Building  
370 Main Street, 11th Floor  
(508) 459-8000

CAPE COD  
171 Main Street  
Hyannis, MA

[ftwlaw.com](http://ftwlaw.com)

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## A MESSAGE FROM THE PRACTICE GROUP CHAIR

By Kirk A. Carter, Esq.

Welcome to our first newsletter from the Immigration Practice Group at Fletcher, Tilton & Whipple, P.C. For more than 40 years, FTW and our late partner, Alex Drapos, have served the immigration needs of Central Massachusetts, and we dedicate this newsletter to his memory.

My associate Isabel Rybalnik and I welcome the opportunity to dialogue with you about the important issues and developments in immigration, and hope that we can help shed some light on this complex and misunderstood area of the law.

No issue is more pressing at the moment than that of Immigration Reform. Unfortunately, it is on the table because of its polarizing effects. With 12 to 15 million undocumented immigrants, high unemployment, and those in border states bearing the brunt of immigration - immigrants, legal and otherwise, have become targets and scapegoats for what is wrong in society. This viewpoint is unfair in many ways because the immigration system itself is broken, and has contributed to the problem of undocumented immigration. Unfortunately, our elected officials have not mustered the political will to deliver the comprehensive reform that is desperately needed to resolve this problem.

Over the past 20 years, the U.S. immigration system has become a modern day version of prohibition. When there is no workable legal system, when employers and employees find ways to get around the law and the system doesn't make sense to anyone, people choose to ignore

it and break the law. When people are faced with 10 to 15 year waiting lists to sponsor relatives, when companies go through a costly process known as labor certification to establish that there is a shortage of available American workers only to be forced to wait an additional 6 to 8 years to hire that employee legally, why would anyone follow the legal system?

Bi-partisan efforts were made several years ago under President Bush, with the support of most Democrats and Republican Senators John McCain and Lindsay Graham, as well as several other brave Republicans who sought to wipe the slate clean: to negotiate immigration reform along the lines of what President Obama is seeking today. Unfortunately, they weren't successful.

The President's current proposal is to establish a social security card with biometric identifiers which will prevent employers from hiring undocumented workers in the future. Then to secure the borders with additional manpower and technology. Lastly he would allow the undocumented to get at the end of the line behind those who played by the rules after making them prove that they paid their taxes, learned English, and have health insurance. Can this happen this year? I hope so, but in an election year, it's a real long shot. Can it happen in 2011? It depends on the outcome of the November elections. Stay tuned...

If you would like to communicate with me on any immigration matter, please feel free to contact me at (508) 532-3514 or [kcarter@ftwlaw.com](mailto:kcarter@ftwlaw.com).

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# Dangers of Plea Bargaining



By Isabel I. Rybalnik, Esq.

(508) 532-3512 • irybalnik@ftwlaw.com

Criminal charges can pose serious immigration consequences

for the unwary. Many, including some criminal defense attorneys, do not realize that a plea arrangement can result in the deportation of not only an illegal alien, but also those aliens legally present in the U.S. with a green card.

Aliens become subject to deportation if they are convicted of a crime involving moral turpitude (CIMT). Green card holders risk being deported from the U.S. if they are convicted of a CIMT within 5 years of admission or are convicted of two unrelated CIMT's at any time. Green card holders may also be deported if at any time they are convicted of an aggravated felony (AF). To constitute an AF, a sentence of 1 year or more must be imposed. However, for a CIMT the length of sentencing is not relevant (unless the maximum punishment does not exceed 6 months in prison, in which case the crime falls under the "petty offense" exception to the CIMT rule).

A common misconception is that a continuance without a

finding (CWOFF) with less than 1 year of probation will not result in any negative immigration consequences. This is simply not so. A "conviction" for immigration purposes is any formal adjudication of guilt where a judge has ordered some form of punishment such as a fine,

probation (regardless of duration), or a suspended sentence. Thus an admission of sufficient facts or "nolo contendere" which ultimately results in a dismissal may constitute a conviction for immigration purposes.

Once a non-U.S. citizen has been convicted of a CIMT or AF, the only way to avoid deportation in most cases is to vacate the conviction on the ground that an "alien warning" was not given. However, judges in Massachusetts are becoming more and more

diligent with respect to ensuring that the "alien warning" is both given and acknowledged on the record in writing.

Thus, the best solution for non-U.S. citizen criminal defendants is to avoid pleading guilty to any crime that may constitute a CIMT or AF. Pleading to a lesser

offense that would fall under the "petty" offense exception should be considered, as should pre-trial probation. As a last resort, it may be best to take a case to trial where there may be a chance, no matter how remote, that the defendant may be found not guilty.

When in doubt it is always advisable to consult with competent immigration counsel before entering into a plea arrangement. ●

**"A common misconception is that a continuance without a finding with less than 1 year of probation will not result in any negative immigration consequences."**

# Visas Through Investing



By Kirk A. Carter, Esq.

(508) 532-3514 • kcarter@ftwlaw.com

Obtaining a visa to live and work in the U.S. can be a daunting task, particularly if you don't

have a employer or a close relative to sponsor you. However, by investing in a U.S. enterprise, it is possible under certain circumstances.

On the temporary or non-immigrant visa side, individuals from countries who have bi-lateral investment treaties with the U.S. may be able to obtain an E-2 treaty investor visa. So long as the investment is substantial (typically anywhere between \$100,000 and \$250,000 depending upon the nature of the business) the individual

**"On the temporary or non-immigrant visa side, individuals from countries who have bi-lateral investment treaties with the U.S. may be able to obtain an E-2 treaty investor visa."**

is actively engaged in managing the investment, and the business is not marginal (one that only supports the investor and his family) this visa can be obtained on a nearly indefinite basis, so long as the business remains viable.

Similarly, an individual who is a national of a country with a bi-lateral trade agreement with the U.S. may be

able to obtain an E-1 treaty trader visa. The trader must engage in substantial trade between the treaty country and the U.S. and he/she obtains the same benefits as the E-2 Treaty Investor, which includes spousal work authorization.

The E-1 and E-2 visa can also be used by companies, rather than by individual investors, to transfer managers, executives and essential staff who are nationals of the same country as the treaty company. Thus a German company could open a U.S. sales office to sell its products here in the U.S. and transfer a sales representative with special knowledge

of their products to the U.S. as an "essential employee" provided that person is German. If the employee were not German, he might still be eligible to be transferred under the L-1 intra-company transferee program which allows managers, executives and specialized knowledge employees, regardless of their nationality, to be transferred from a foreign company

to a related company, so long as the individual has worked for that company abroad for at least one year out of the last three years.

On the permanent or immigrant visa side, a "green card" can be obtained through the Employment Creation Visa (EB-5) Program by making an investment of \$1,000,000 (\$500,000 in designated areas of high unemployment) in a business enterprise which creates a minimum of ten jobs for US workers over a two-year period of time. While the EB-5 Program requires active management, the overwhelming majority of those who participate in this program do so as limited partners in one of the many pre-approved Regional Centers. Nearly all of these Centers are located in high unemployment areas, and have proven track records in obtaining visas for their clients. The investors thus avoid the risk of trying to operate their own business and create and sustain the necessary jobs over a two-year period of time, which is critical to retaining the green card which is issued on a conditional basis.

Our office has assisted hundreds of clients over the course of the past twenty plus years in obtaining visas through various types of investments and would be happy to assist you or your client in doing so. ●

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