

## W E L C O M E

### A message from Laurent S. Drogin



*Laurent S. Drogin*

What makes our law firm unique among others is our vision of bringing together top legal talent and delivering superior results at a reasonable cost. At 35 lawyers, we are smaller than the “mega-firms” in numbers but not in stature. It is with great pride and pleasure that TKD announces that six of our attorneys, Partners Aaron Abraham (Construction), Scott S. Markowitz (Bankruptcy and Corporate Restructuring), Richard L. Steer (Labor and Employment), William W. Weisner (Real Estate) and Eric Zipkowitz (Real Estate); and Counsel Joann T. Palumbo (Trusts and Estates), have been named as *Super Lawyers* in the magazine published by the Thomson Reuters, Legal division. The recognition of these TKD attorneys by the legal community is further acknowledgment that our firm, which is not quite 10 years old, continues to establish itself and its attorneys in their important place in the New York metropolitan area legal marketplace. While we intend to continue to expand in order to offer additional practice areas to our clients, as we do, we will stay true to our goal of providing talent that is “best in class.”

Laurent S. Drogin

*Partner*

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## FOREIGN INVESTMENTS HELP FUND COMMERCIAL DEVELOPMENT

*By David J. Pfeffer and Andrew S. Koerner*



*David J. Pfeffer*



*Andrew S. Koerner*

In the wake of the financial meltdown and subsequent signs of economic recovery, opportunities are becoming more prevalent for those looking to diversify and expand their investments. However, it continues to be exceedingly difficult for developers and entrepreneurs to secure funding from banks and other lending institutions. Lenders are still wary about taking gambles with their loans leaving many with great ideas, but limited access to the necessary funding, without the capital to jump-start a potential project. Luckily, there are various ways to acquire funding for development projects that are both available and underutilized.

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## FOREIGN INVESTMENTS HELP FUND COMMERCIAL DEVELOPMENT

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Recently, Tarter Krinsky & Drogin (TKD) added a Business Immigration Practice Group to its already diverse group of practice areas. Now TKD can offer its clients in-house advice regarding international sources of funding for domestic developers and businesspeople. The Employment-Based visa program is one such tool, particularly the EB-5 visa category. In utilizing the program, real estate developers can acquire substantial funding from foreign investors with relative ease.

One of the five Employment-Based visa programs is the Immigrant Investor Pilot Program. This program enables businesses to procure funding from international investors. In order to benefit from the investor pilot program, the business or developer must apply for designation as a regional center through the U.S. Citizenship and Immigration Services. The role of the regional center is to promote economic growth by increasing export sales, improving regional productivity, creating jobs, or increasing domestic capital investment. If a developer succeeds in achieving designation as a regional center, the potential for foreign capital investment is enormous.

Once a developer receives designation as a regional center, the developer serves as a facilitator that creates a commercially

viable business idea and coordinates everything from business plans to site location to construction and the securing of tenants. A regional center applicant should be a newly formed entity, created for the purpose of taking advantage of the program, and can take various forms (e.g., an LLC, partnership, etc.). The developer does not have to own the land on which the proposed development will be sited, there is no specific size requirement for the proposed development, and there is no minimum amount of capital required before filing with the program.

Immigrants who participate in the EB-5 visa program will be able to invest in the proposed development plan. The minimum immigrant investment depends on the area in which the proposed development is to be located; it could be as low as \$500,000.

While participation in the EB-5 visa program is a substantial undertaking, TKD will guide you through the process. This program not only infuses the U.S. economy with capital, it also provides your project with funding.

There are currently 10,000 visas put aside annually for those interested in participating in the EB-5 visa program; however, only about 1,000 per year (at most) actually utilize the program.

Opportunities like this are underutilized by developers who are unaware that they can likely procure substantial funding this way. More information about the EB-5 program is readily available, and developers/entrepreneurs interested in taking part in the program should research and determine whether their project will satisfy the requirements outlined above. The EB-5 visa program is essentially a win-win proposition for everybody involved: the developer secures funding and exercises dominant control over the venture, the immigrant secures a green card and avoids a significant amount of immigration red tape, and a business that is required to produce jobs helps to reduce the country's rampant unemployment situation and improve the economy.

*TKD Summer Associate Jared Wachtler assisted in the preparation of this article.*

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### **About David J. Pfeffer, Partner**

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### **About Andrew S. Koerner, Counsel**

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# EXPANDED PERSONAL JURISDICTION: THE HIDDEN COST OF INTERACTIVE ONLINE SALES SITES

By Gregory J. Skiff



Gregory J. Skiff

The Internet allows businesses from around the world to tap into New York's marketplace, with relatively few upfront costs. A recent federal appeals court decision, *Chloé v. Queen Bee of Beverly Hills, LLC*,<sup>1</sup> paved the way for courts in New York to hold accountable businesses that sell goods or services to New York consumers online but have no physical presence in this state. This is the first time that an appellate level federal court has opined on when businesses operating interactive websites that are more than mere advertising, but do not involve uploading and downloading of files, are subject to suit in New York.<sup>2</sup>

Five years ago, Chloé, a French design house, discovered that Queen Bee, an online retail designer incorporated in Alabama, was selling counterfeit versions

of Chloé's luxury handbags through Queen Bee's website. Chloé's New York law firm carried out a "sting" operation during which one of its paralegals bought a knockoff bag through the website and had it delivered to her New York home. After the bag was determined to be counterfeit, Chloé filed suit against Queen Bee and its principal in federal court in New York for trademark infringement and unfair competition. Queen Bee's principal sought to have the court dismiss the suit for "lack of personal jurisdiction," meaning that its lack of physical presence in the state meant that it could not be subject to suit in New York State. The Court agreed and dismissed the case, finding that the single sale of a counterfeit bag did not constitute sufficient contact with New York State, and that Queen Bee's website alone could not be used to support the suit in New York because it did not target New Yorkers specifically. Chloé appealed, and won. The Second Circuit Court of Appeals

reversed the lower court's decision and held that the lower court did have jurisdiction over Queen Bee's principal because there was sufficient contact and presence in New York where: (1) the counterfeit Chloé bag was shipped to New York; (2) the website which offered Chloé bags for sale to consumers located in New York, permitted those consumers to purchase those bags through a "click here" hyperlink, and facilitated the shipment of the bags to New York; and (3) evidence found at Queen Bee's headquarters revealed another 52 transactions in which the defendant shipped its merchandise to New York.

Putting aside the obvious lesson about not selling products that violate the law, the *Chloé* decision and the likelihood that it will be adopted by other federal courts around the country should be taken under advisement by businesses seeking to expand via a "highly interactive" Internet website allowing consumers around the country and around the globe to purchase and arrange for shipping of their merchandise. Those businesses should perform a cost/benefit analysis that takes into account the fact that such a website may well subject them and their principals to suit in states other than where they are incorporated and other than where they do what they likely consider substantial business.

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<sup>1</sup> *Chloé v. Queen Bee of Beverly Hills, LLC*, Docket No. 09-3361-cv, 2010 WL 3035495 (2d Cir. Aug. 5, 2010).

<sup>2</sup> See *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000) (discussing spectrum of businesses' usage of the Internet).

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About Gregory J. Skiff, Law Clerk

Gregory is a Law Clerk at Tarter Krinsky & Drogin LLP, pending admission to the New York and New Jersey Bars. He focuses on litigation in the areas of labor and employment, corporate and commercial law. Gregory can be reached at [gskiff@tarterkrinsky.com](mailto:gskiff@tarterkrinsky.com).

## YOUR BEST EMPLOYEE HAS ONLY TWO YEARS LEFT IN H-1B STATUS. WHAT ARE YOUR OPTIONS?

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altogether, and in many cases become permanent residents in a matter of months. If your employee is an individual of extraordinary ability, in accordance with USCIS regulations, it would be a good idea for you to explore an O-1 visa as a way to gain some time before you file for the employee's permanent residence.

It may also lead to a more direct route to permanent residency.

If your company is not ready or willing to file for permanent residency status on behalf of the employee, there may be other non-immigrant visa options that can extend the amount of time your

employee is authorized to work in the U.S. If your company is owned by a majority of individuals from a country that is a signatory to a treaty with the U.S. and the employee whose H-1B visa is about to expire is a national of that country, the employee may be eligible for an E-1 treaty trader visa or an E-2 treaty investor visa, to name some examples. The E-1 and E-2 visas do not have any time limits and may be continually extended in two-to-five year increments as long as the underlying requirements for the visa are met.

If none of the above options are appropriate for your employee, and you have an office abroad, there is another option. If you transfer the individual to an office overseas where he remains in your or your affiliate's employ, and stays out of the U.S. for one year, you may subsequently transfer that individual back to the U.S. as an executive, manager or employee of specialized knowledge in L-1 visa status. This intra-company transfer visa also offers, for some, an expedited route to permanent residence.

As a last resort, having exhausted other options, you may want to recommend that your employee leave the U.S. and remain abroad for one year. After one year abroad, he will be eligible for six additional years in H-1B status.

### SECURITIES TICKER: 'NON-ACCELERATED FILERS' EXCUSED FROM ATTESTATION REPORT

*By James G. Smith*



The SEC recently adopted amendments to conform its rules with Dodd-Frank's elimination of the requirement that the annual report of a company that is a "non-accelerated filer" must include an attestation report of its registered public accounting firm on internal control over financial reporting.

These amendments become effective for annual reports filed with the SEC for fiscal years ending on or after June 15, 2010.

A "non-accelerated filer" is a reporting company that is neither an "accelerated filer" nor a "large accelerated filer." An accelerated filer is an issuer that had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of the issuer's most recently completed second fiscal quarter. A large accelerated filer is an issuer that had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter.

Although non-accelerated filers will no longer be subject to the attestation report requirement, they will still be required to include in their annual reports a report of management on internal control over financial reporting.

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#### About James G. Smith, Partner

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# YOUR BEST EMPLOYEE HAS ONLY TWO YEARS LEFT IN H-1B STATUS. WHAT ARE YOUR OPTIONS?

By Andrew S. Koerner



Andrew S. Koerner

One of your best employees is nearing the expiration of his eligibility to work in the United States in H-1B<sup>1</sup> status. How do you protect both your company and your investment in this employee?

First, you should begin planning for this day in your foreign national employee's career as early as possible. An employer may petition for an employee in H-1B status for three years. In most instances, only a second three-year petition may be filed. If, for example, you hire a recent college graduate, employ him for three years, and subsequently renew his visa, you should start the process of determining whether this is someone you would like to retain permanently immediately after the renewal. If you decide that you would like to retain him, you then have two or three years to start the employment-based

immigrant petition before his H-1B visa expires. That kind of lead time enables you to navigate the complex, and, in many cases, unfriendly system for obtaining permanent residency for an employee.

If it is not possible to begin the process early, either because your foreign national H-1B employee joined you well into his fourth or fifth year or because it was not possible to assess earlier whether your company would require his or her services on a permanent basis, there are both immigrant and non-immigrant (temporary) options available.

One of the few ways that the United States Citizenship and Immigration Services (USCIS) allows for H-1B visas to be extended for a seventh year, and beyond, is if the employee has had either a PERM labor certification application or an I-140 employment-based immigrant petition pending at the Department of Labor for more than 365 days. Due to backlogs, the Department of Labor regularly takes

over 12 months to adjudicate a labor certification application. When this occurs, you are permitted to file for a one-year extension.

Other issues to consider are the requirements for the job itself. Depending on the level of education and experience required for the position for which you are retaining this individual, it is possible that the employee may fall into a preference category for which there are no immigrant visas available. While the employee waits for an immigrant visa number to become available, you are permitted to extend the H-1B visa for consecutive three-year periods.

There are more immediate options for those rare employees who have risen to a level that is far above others in their field, who qualify as individuals in the "National Interest," as "Exceptional" or as "Extraordinary." Such individuals may bypass the labor certification process

<sup>1</sup> H-1B refers to a non-immigrant visa program that allows U.S. employers to employ foreign workers in specialty occupations on a temporary basis.

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# GETTING TO KNOW... ERIC ZIPKOWITZ



## When did you know that you wanted to be become a lawyer?

When I was in my late teens, and I sat in on a family member's real estate closing.

## What do you find most satisfying about the practice of law?

The need to think creatively, act decisively, solve seemingly "unsolvable problems" and bring closure to transactions that hopefully benefit everyone involved.

## What has been your proudest professional moment?

When a notoriously demanding real estate developer granted me full power of attorney to close a deal on his behalf "on such terms as I deemed to be fair and reasonable."

## What was your most memorable legal assignment?

Closing a very complicated (and initially controversial) public financing transaction

in Peoria, IL, accompanied by seven international clients who weren't fluent in English, yet managed to make eloquent and moving speeches at public hearings.

## If you weren't a lawyer, what would you be?

A novelist or an English professor.

## What is your favorite book?

John Steinbeck's *Of Mice and Men*.

## What are your colleagues and clients most surprised to learn about you?

That I love jigsaw puzzles, can dance pretty well and can carry a tune on karaoke night.

## What are your hobbies?

Photography, creative writing and tropical plants.

## Which historical figure do you most admire, and why?

Ben Franklin because he was both brilliant and crafty.

## What is your favorite city in the world, and why?

New York City – because like me, it never sleeps and is always moving forward.

## About Eric Zipkowitz, Partner

*Eric represents real estate developers, not-for-profit entities and corporate clients in the acquisition, financing, construction and development of commercial, residential and mixed-use projects throughout the United States. Much of his practice focuses on representing owners and developers in large-scale construction projects and sophisticated financing transactions. Eric can be reached at [ezipkowitz@tarterkrinsky.com](mailto:ezipkowitz@tarterkrinsky.com).*

## F I R M N E W S

### TKD SEMINARS

Recent seminars given by Tarter Krinsky & Drogin attorneys have included:

**Financing and M&A in the Middle Market** – Partners Peter Campitiello and James G. Smith joined forces with Kildare Capital, Inc. to host a breakfast meeting that focused on what middle market companies can do to stand out and increase their chances of success for a sale or financing event.

**Written Performance Evaluations: Best Practices and Avoiding Legal Pitfalls** – Addressing managers and supervisors at one of the nation's top CPA and advisory firms, Partner Laurent S. Drogin discussed the problems that can result from an incomplete or inconsistent evaluation if it becomes part of the record in an employment dispute.

### OFFICE EXPANSION

This summer we completed the first phase of our office expansion, adding another 2,400 square feet on the 12th floor of 1350 Broadway. In 2009, after signing a 13-year lease renewal and expansion to provide space to meet our strategic objectives, we added more than 2,000 square feet on the same floor.

### NEW ASSOCIATES

TKD recently welcomed two associates, **Jonathan Grippo** in the Construction and Real Estate Practice Groups, and **Lisa M. McIntyre** in the Bankruptcy and Corporate Restructuring Practice Group.

*The information contained in The TKD Advisor is of a general nature and does not constitute legal advice. Consultation with our personnel is recommended before taking action based upon any of this information. Under the rules of certain jurisdictions, this material may be considered attorney advertising. Prior results do not guarantee a similar outcome.*

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