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The GT Business Immigration Observer

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DEC 2001 State Department Visa Bulletin Link:
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INS Actions Impact Foreign Nationals when Traveling

We take this opportunity to offer basic reminders given the changes that have already been implemented. These basic measures could help avoid confusion, additional delays, and even being placed in removal proceedings.

INS officers are asking foreign national passengers, even on domestic flights, about their immigration status to make sure that they are complying with the terms and conditions of their status. If individuals are found to be in violation of status, they could be placed in removal proceedings. Therefore, foreign nationals and their employers must take precautionary measures to ensure that they are in status and that they can prove it if requested by an immigration officer. Changes in job titles, job duties, and job location could cause individuals to be in violation of their nonimmigrant status. Consequently, employers should make sure that petitions to amend their employees' status are filed promptly. Also, when traveling, employees should carry with them complete copies of nonimmigrant petitions filed by their employers to show that they are in status.

It is also likely that the Immigration & Naturalization Service will subject all cases to additional scrutiny and err on the side of caution by requesting additional evidence. Such requests, also known as "kickbacks," cause delays in processing cases. Therefore, employers may wish to provide additional documentation upon filing initially to avoid "kick backs" and delays. Obtaining the additional documents may take a few more days, but could save weeks and even months in the long run.

Equally important, citizens and non-citizens should anticipate delays at airports and ports-of-entry due to additional security measures. Thus, plan accordingly and arrive well before your flight is scheduled to depart. Also, if you are asked questions by a law enforcement agent, be sure that you understand the question before responding. It is critical to avoid confusion and misunderstandings.

Practice Areas:

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Department of Labor's Statements Regarding Recruitment for Labor Certificaiton Cases Raise Additional Questions

The downturn in the economy and the announcements of lay-offs will cause labor certification cases to become more difficult. The recent spate of announcements by national and regional Department of Labor offices confirms that the availability of U.S. workers is a critical issue for the agency. This article addresses DOL's sense that there may be qualified U.S. workers in the labor market and processing delays at local and regional DOL offices.

Only a month ago, the Department of Labor Region I Office in Boston announced that it would impose new advertising requirements for all labor certification applications in which a request for expedited processing is made under the Reduction in Recruitment program. As reported by Greenberg Traurig, Region I intended to double the advertising requirements necessary to demonstrate that an employer has made a good faith effort to find qualified U.S. workers. However, in an unexpected announcement during the week of November 19, 2001, Region I rescinded its new rule. Moreover, without any elaboration, Region I stated that it would not specify how many ads an employer must place prior to filing a labor certification application.

Region I is responsible for labor certifications for positions in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. However, it is clear that other DOL regional offices will modify their rules regarding recruitment in the context of labor certification applications. For example, effective January 1, 2002, the Atlanta regional office will require employers to place at least three newspaper advertisements during the six month period immediately prior to filing the labor certification application. Currently, employers filing labor certification applications for jobs within the jurisdiction of the Atlanta regional office only have to publish one ad in the local newspaper of general circulation. By contrast, the Dallas regional office informed Greenberg Traurig that it will wait for guidance from the DOL national office.

In addition, the DOL national office confirmed that it would encourage all Regional Certifying Officers to inquire about the availability of U.S. workers if it has been reported that a sponsoring employer has laid off workers while its labor certification application has been pending. In recent remarks, the DOL made the following important statements that clearly depart from their policies regarding RIR cases:

> [I]f a certifying officer is aware that an employer is laying-off in the same occupation in the same geographic area, it is reasonable and should be expected that the certifying officer will ask for evidence that the lay-offs were not in the same occupational categories as the job offered in the labor certification, or that the laid-off workers were offered the opportunity to apply for the position offered. [I]t is the position of DOL that a certifying officer must review the case in the context of the job market as it stands on the day of review, and not on the day of filing. DOL disagrees with the concept that for an RIR, the appropriate scope of review is the six-month period of recruitment. With respect to laid-off US workers in similar occupations, DOL takes the position that the job opportunity must somehow have been offered to such workers in order for the application to be certifiable. (emphasis added)

DOL's announcements reflect a reactionary mode in the wake of news regarding the jump in unemployment rates. It may take months to obtain a clearer perspective as to DOL's requirements for RIR and traditional labor certification cases. In the meantime, employers are reassessing whether to file labor certification applications under the traditional method or the RIR process. Under either method, employers and their workers must be prepared to encounter longer waiting periods for the DOL to process cases. In recent months, processing times have slowed at DOL offices around the country. This slow-down is due, in part, to the flood of labor certification applications received prior to May 1, 2001, a significant date for individuals who entered at an undesignated location on the border or overstayed their period of authorized stay. Additionally, based on the DOL national office statements to Regional Certifying Officers, if lay-offs occur within a company in similar types of positions as the one described in the labor certification application, terminated workers should be contacted to determine if they are qualified for the position. Failure to contact these individuals could cause the labor certification to be denied.

Guest Worker Essential Worker Immigration Still Needed

EWIC is a coalition of businesses, trade associations, and other organizations from across the industry spectrum concerned with the shortage of both skilled and lesser skilled ("essential worker") labor.
Greenberg Traurig Shareholder Laura Reiff is a co-chair of the coalition.

For more information see www.EWIC.org.

Major Immigration Initiatives

The full impact to U.S. immigration resulting from the September 11th attacks on the United States is unknown. Needless to say, the breakdown in communication between the intelligence community and the INS and Department of State, which enabled terrorists to obtain visas and legally enter the United States must be addressed. However, there is no doubt that some anti-immigrant groups are using the CIA's and FBI's failures to relay information as a subterfuge to launch a xenophobic campaign against immigrants and the immigration laws that have contributed to the longest period of economic growth in U.S. history. This edition of the Immigration Observer explores the Congressional and administrative activities that could impact employers, their workers, and families.

The tragic events of September 11, 2001 have placed the United States immigration system in the spotlight on Capitol Hill. In response, Congress and the White House have announced measures to defend the country from foreign terrorists, which directly impact foreign nationals, their employers, and their U.S. citizen and permanent resident family members. These measures include the enactment of the USA Patriot Act of 2001, an executive order regarding military tribunals, administrative restructuring announcements, and proposed legislation. This attached articles summarizes these initiatives starting with the USA Patriot Act, the only piece of legislation that has been passed to date.

FALL 2001 MAJOR IMMIGRATION-RELATED INITIATIVES

ENACTED LEGISLATION

The USA Patriot Act of 2001

On Friday, October 26, President Bush signed into law the USA PATRIOT ACT. This legislation contains provisions that provide relief to foreign nationals whose family members were victims of the September 11th attacks in New York, Washington, D.C., and Pennsylvania. The final version also contains provisions that expand the definition of terrorism and terrorist activity for the purposes of holding individuals to be inadmissible to the United States and for removing individuals from the United States. The USA Patriot Act provides for the mandatory detention of aliens whom the Attorney General suspects have engaged in terrorist activity, and limits judicial review in these types of cases. While the USA Patriot Act contains these broader powers, it is less restrictive than the Bush Administration's initial legislative proposal to Congress, which would have granted uncontested power to the Attorney General to detain individuals suspected of terrorist activities indefinitely without an opportunity for an immigration judge to review the Department of Justice's actions.

EXECUTIVE ORDER

November 13, 2001 Executive Order Regarding the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

President Bush authorized the Secretary of Defense to immediately detain and try any non-citizens before a military tribunal if they are believed to be or have been in the past members of the Al Qaeda terrorist network, or have engaged in, or aided and abetted, or conspired to commit terrorist acts, or knowingly harbored members of Al Qaeda or other terrorists.

ADMINISTRATIVE ANNOUNCEMENTS

Department of State Announces New Procedures and Application Form for Arab and Muslim Men

Effective immediately, the State Department now requires new security clearances at US consulates worldwide for some nonimmigrant visa applicants. Individuals between the ages of 16 to 45 from countries with a high concentration of Arabs and Muslims are subject to these security clearances, which take 20 days at a minimum to complete. Nonimmigrant visa applicants who are in possession of a valid I-94 card, have not had a visa denied for any reason, and are renewing their visas with the same employers may return to the U.S. while the application is pending. All other nonimmigrant applicants must wait to seek admission until the visa is approved.

Citizens, nationals and permanent residents of the following countries are subject to the additional clearance process: Afghanistan; Algeria; Bahrain; Djibouti; Egypt; Eritrea; Indonesia; Iran; Iraq; Jordan; Kuwait; Lebanon; Libya; Malaysia; Morocco; Oman; Pakistan; Qatar; Saudi Arabia; Somalia; Sudan; Syria; Tunisia; Turkey; the United Arab Emirates; and Yemen.

Significantly, the Department of State originally announced the cancellation of all nonimmigrant visa interviews at the U.S. Consulates in Canada and Mexico for all third country nationals (individuals who are not residents of Canada or Mexico), including those for individuals who are not from the countries listed above.

INS Reorganization

On November 14, 2001, the Department of Justice announced a plan to restructure the Immigration & Naturalization Service into two distinct bureaus, one to provide service and the other for enforcement. Attorney General Ashcroft stated yesterday that "[the] President is concerned that the INS has been hindered by the current structure of the agency to perform its responsibilities of welcoming new immigrants and protecting our borders by enforcing immigration laws." Officials estimate that the plan will be in effect by fiscal year 2003. It does not require Congressional approval. Interim measures, including the Commissioner's appointment of a Director of Restructuring, will occur immediately. Also, the District Director and Regional Director positions will be eliminated

to streamline the chain of command within the agency.

Department of Justice Plans to Interview 5,000 Foreign Nationals

According to an email sent to the American Immigration Lawyers Association (AILA) from the Department of Justice (DOJ), the Department plans to interview approximately 5,000 foreign nationals in connection with the investigations of the September 11 terrorist incidents. The interviews will be coordinated through the DOJ's Anti-terrorism Task Forces with U.S. Attorneys in each district and will include the assistance of local law enforcement officials. Each task force is receiving a list of individuals to interview.

PROPOSED LEGISLATION

Enhanced Border Security Act - S.1618/H.R. 3205

These bills would require the INS, Department of State, and Central Intelligence Agency to work together to develop an information-sharing plan, which the INS and the State Department would use to screen visa applicants and applicants for admission (permanent residence applicants). In addition, if passed and signed by the President, this legislation would mandate the implementation of an entry/exit system utilizing a technology standard to confirm identities and use biometric identifiers with arrival departure records, visa and other immigration documents. The legislation also mandates the INS to conduct reviews of educational institutions authorized to accept foreign students and the Department of State to perform similar audits of exchange visitor programs.

Visa Entry Reform Act of 2001 – S.1167/H.R. 3229

This legislation's objectives are similar to S.1618/H.R. 3205 in that it calls for government agencies to work together to share information and to develop a database to screen visa applicants. This legislation would require certain government-issued identification cards to have biometric information regarding the individual. Citizens and non-citizens would be required to carry these new forms of identification.

Reduction in H-1B Visas - H.R. 3222

This bill would limit the number of H-1B nonimmigrant visas issued in any fiscal year. At this time, there is not a companion bill in the Senate.

Moratorium on F-1 and J-1 Visa Issuance - H.R. 3221

This proposed legislation calls for a temporary moratorium on the issuance of student (F-1) and exchange visitor (J-1) visas, as well as to change the reporting requirements for universities authorized to accept foreign students. The Senate has not introduced a similar bill.

INS Reorganization – H.R. 3231

This bill calls for the reorganization of the Immigration & Naturalization Service. It lacks a companion bill in the Senate at this time.

Vermont Service Center Congressional Liaison Comments on 245(I) Versus"Grandfathering," Temporary Protected Status, and Waivers for J-1 VISA Holders

In light of the fact that it is unlikely Congress will resurrect Section 245(i) of the Immigration & Nationality Act, Donna K. Kane of the INS Vermont Service Center discusses the option of "grandfathering." The term "grandfathering" refers to the practice by employers of using a pre-existing approved labor certification application for an employee, other than the one identified in the application. If certain conditions are met, an individual who entered without inspection or overstayed the duration of authorized stay by more than 180 days could be eligible to apply for adjustment of status through the INS by paying a penalty fee of $1000. Ms. Kane explains what are the conditions to grandfather an employee and other important issues, including when the two-year foreign residence applies to exchange visitors and how to obtain a waiver. Importantly, the summary does not point out that foreign medical graduates who are subject to the two-year foreign residence requirement are not eligible for a waiver based on a no-objection statement from their government. They are, however, eligible for a waiver based on a recommendation from an interested government agency, or upon establishing that their U.S. citizen or permanent resident spouse, parent, or child would suffer exceptional hardship if they fulfilled the two-year residence requirement, or if they would suffer persecution in their home country, or if they receive a recommendation from a State Department of Health based upon their commitment to provide primary care in an area that is recognized as medically underserved. For a copy of the VSC Congressional Newsletter contact us at imminfo@gtlaw.com

Tax Strategies for International Assignments: Minimizing Worldwide Costs for U.S. Expatriates

By: Ann Truett

Ann Truett serves as Of Counsel in the Greenberg Traurig Boston Office. She frequently works with the Business Immigration Group. She works with companies and individuals to limit the global tax impact of international assignments. In this first of two articles, Ann focuses on minimizing worldwide costs for U.S. citizens working outside the United States. In the second article, she will address key pre-immigration tax strategies for foreign nationals entering the United States.

International assignments bring a whole new level of complexity to human resource decisions. Strategic goals must be weighed against financial considerations prior to sending an employee abroad. On average, the employer's cost of sending an employee on an international assignment is three to five times his or her U.S. compensation. Therefore, tax planning is an important factor when structuring the assignee's compensation package.

The reason for high tax costs is twofold. First, the foreign tax rates are often higher than they are in the U.S. (the income and social tax rates combined can exceed 70%). Second, as both an enticement to employees and to keep them "whole", compensation packages are expanded. Incentive allowances can include a foreign service premium or bonus, a mobility premium, and hardship or danger pay. Balance sheet allowances to keep employees "whole" can include a housing differential, a cost of living allowance (also known as either "COLA" or a goods and services allowance), relocation costs, tax reimbursements, education expenses, a spouse allowance, home leave, automobile expenses, and fitness/recreation expenses. These may be taxable both in the U.S. and in the foreign country. Both the added incentives and the taxes paid by the company are included in taxable income, often in the home and host countries. This has a pyramiding effect: the taxes increase the taxable income which increase the taxes. As a result, tax reimbursement can become the most costly element of a relocation package.

Tax planning cannot be done in a vacuum. The tax techniques to follow cannot be considered without also evaluating their effects for the corporation. For example, in determining the most tax effective duration of a foreign assignment, one must consider the purpose of the assignment. Although it can be most tax effective to limit a foreign assignment to six months in a treaty country, the additional costs of a longer assignment may be dwarfed by the long-term financial gains to the corporation.

This article addresses the U.S. expatriate assignment, although the strategies listed here can be applied to most international assignments.

Tax Reimbursement Methods

Most tax reimbursement policies are designed to ensure that the assignee will not have to pay combined U.S. and foreign country taxes in excess of the tax that would have been owed had the assignee remained in the U.S. ("hypothetical tax").

Under a tax protection plan, the company reimburses the assignee for any taxes in excess of the hypothetical tax. In practice, the assignee pays both the U.S. and foreign taxes and requests a refund. If the assignment is in a foreign country where there are no taxes, such as Saudi Arabia, the assignee may get a windfall.

Under tax equalization, the company generally pays the assignees' actual U.S. and foreign taxes and withholds the hypothetical tax from salary. The purpose of tax equalization is to keep the assignee "whole". The company, not the assignee, realizes any tax savings. The majority of companies that adopt tax reimbursement use this method.

Tax Strategies

Tax planning for foreign assignments requires a careful analysis of each transfer to determine which techniques work best in each country. The strategies outlined below should be reviewed in every situation to determine whether savings opportunities might result.

In conjunction with the evaluation of each of the following techniques, cost projections should be prepared so that management can evaluate the impact of alternative salary packages on local tax liabilities and restructure the terms to reflect the most effective tax planning alternative. It is essential to consider the relevant tax issues prior to finalizing the compensation package.

Determining the Assignment Period

Strategic planning of the arrival and departure dates can result in significant tax savings. This can be achieved in a number of complimentary ways. First, most industrialized countries such as the U.S., have progressive tax rates, and by effectively splitting income between two countries, one can take advantage of the lower tier tax rates in both. Savings can be maximized if the assignee spends half of each tax year in each country. In addition, a short delay in the transfer date may be the difference in qualifying for the generally lower non-resident tax rate. Another reason to avoid tax residency is that residents are generally taxed on worldwide income, while non-residents are taxed only on income generated in that country. However, being non-resident is not always an advantage. Tax residents in Venezuela, for example,

are taxed at progressive rates between 6 and 34%. Credits and deductions are allowed. Non-residents are taxed at a flat 34%. No credits and deductions are allowed.

Second, the internal tax rules of the home and host countries should be reviewed for potential tax benefits. For example, in the United States, a foreign earned income exclusion ($80,000 in 2002) and certain exclusions for foreign housing costs are available for all expatriates who meet either the physical presence test or the bona fide residence test. To satisfy the physical presence test, the employee must be outside of the United States for 330 days during a consecutive twelve-month period. The bona fide residence test requires that the employee be a bone fide resident of a foreign country for a period which includes one entire calendar year.

Several countries include tax provisions that exempt income earned by expatriates during certain time periods. For example, Hong Kong does not tax income earned by an employee, if they are present in Hong Kong for less than 60 days during the tax year. In Japan, an inhabitant's tax of up to 15% is levied on all individuals who are a resident of Japan on January 1 of the following year. This would be avoided if an employee leaves Japan prior to January 1. It is important to revisit the special treatment provisions for expatriates to keep pace with the ever-changing tax laws worldwide.

Timing of Payments

Payments can be shifted from a resident period and possibly higher tax rates to a lower, non-resident tax rate period, or even shifted outside of the host tax jurisdiction entirely. Typically, this requires the company to accelerate or defer income (such as bonuses) to a pre- or post-assignment year. If a payment is made prior to or subsequent to the assignment, it should relate to services performed outside the host country, so that it may possibly avoid foreign taxation. It is important to note that, in general, income earned in a country will be taxed by that country, regardless of where it is paid.

Special attention should be paid to timing for assignments to certain countries such as the United Kingdom, Australia and Hong Kong (where the tax years end on April 5, June 30 and March 31, respectively).

An important timing issue relates to stock options. Countries may impose tax at grant, vesting or exercise of the option and/or upon sale of the underlying stock. A U.S. expatriate may be taxed on the same options in the Netherlands at vesting and in the U.S. upon exercise. If the company is obligated to pay all additional taxes under tax reimbursement, the results can be catastrophic. The highest German tax court recently issued a ruling making it clear that expatriates will be subject to German tax upon exercise of a stock option based on the time between grant and exercise that the individual was a German resident, regardless of resident status at grant or exercise. As such, expatriates are now required to report stock option income on a German return in the year of exercise, which may be years after departing Germany.

Payroll Delivery

The company has a number of options in determining how compensation will be delivered. Significant savings can be achieved in some countries by shifting payments offshore. If pay is remitted outside the United Kingdom (U.K.), for example, it is possible to reduce taxable income allocable to non-U.K. workdays. Split payroll arrangements can also be advantageous. Employees working throughout Europe are often able to take advantage of the treaty network through multiple payrolls.

Tax liabilities can be minimized through the use of dual contracts in countries, such as India, where generally, during the first nine years of residency, residents are taxed only on compensation relating to services performed in India.

Character of Payments

As stated earlier, expatriates can receive favored tax treatment in many countries for various allowances and benefits, such as autos, housing, moving expenses and children's education. By recharacterizing the payment of these amounts, the employee might not be subject to tax in the host country, thereby saving the company money without sacrificing any benefits to the employee. For example, instead of increasing an employee's salary for a housing allowance, the company might directly provide housing for that employee (the company signs the lease) or specifically designate a portion of the cash payment as a housing allowance. In Singapore, a cash housing allowance is fully taxed, but a company-provided apartment is taxed on a portion of the actual rent. To minimize U.S. taxes, regular compensation may be substituted with tax-effective items such as stock options or retirement benefits.

A number of countries, such as the Netherlands and Belgium, offer tax concessions to foreign nationals. In the Netherlands, upon approval of the tax authorities, up to 35 % of salary can be paid tax free. In Belgium, certain expatriates are considered as 'non-resident' and come under a special taxation regime. They are liable to pay Belgium tax only on income connected with professional duties carried out in Belgium.

Income Tax Treaties and Totalization Agreements

The United States has entered into bilateral income tax treaties with approximately 55 countries. The income tax treaties govern the taxation of compensation earned in a non-resident country. Typically, the treaties

provide a tax exemption where the employee is in the host country for 183 days or less and compensation is not paid or borne by an entity in that country. In addition to this tax exemption, the expense reimbursements for such items as housing, automobile, and meals received by the employee would not be taxable in the U.S., provided that they qualify as regular business traveling expenses for assignments less than one year. It is important to note that any reimbursed expenses incurred by the spouse would be taxable to the employee in the U.S. Relief is also often provided from taxation of investment income, pensions, and annuities. Bilateral tax treaties should be reviewed carefully prior to any short-term assignment.

The United States has entered into social security totalization agreements with 18 countries which are designed to prevent expatriates from being subject to social security tax in both countries. Where the employee is transferred to a foreign country for a "temporary period" (usually up to 5 years), he or she can remain on the home country system and qualify for exemption from the host country system by remaining on the home country payroll and by obtaining a Certificate of Coverage.

Some Corporate Considerations
When sending employees overseas, a corporation can unwittingly create a "permanent establishment" for itself and thereby expose itself to taxation in the host country. In general, if an employee paid by the company goes to a foreign country and performs services for, and acts on behalf of his or her employer, a permanent establishment can be created. This can occur even when the company has an affiliate in the host country.

Normally deductible corporate expenses may not be deductible when an employee is sent abroad. For example, a local company would not be entitled to a deduction for the expatriate employee's salary if the local company is not directly benefiting from his services. The local company must charge its foreign affiliate for the compensation and then the foreign affiliate would be entitled to the deduction. Also, it is important to remember that in any cross-border transactions with foreign affiliates, one must treat the transaction as if it were an arms-length transaction so as to avoid transfer pricing exposure.

Conclusion
This article provides a framework for considering a number of key tax planning strategies available to reduce international assignment costs. Because tax laws are always subject to change, these techniques must be reviewed and analyzed in light of home and host country rules and treaties, as updated. Both, individual and corporate tax ramifications must be considered together when designing the most tax efficient foreign assignment.

Update on Department of Justice's Plans to Interview 5,000 Foreign Nationals

INS recently indicated that when INS agents are not present at the interviews of approximately 5,000 foreign nationals who fit the criteria listed in the November 9, 2001 memo (summarized in Greenberg Traurig's November 19th Alert) and the interviewer suspects that a particular individual is in violation of his or her status, the Department expects the law enforcement officials to refer the case to the INS. According to INS sources, local INS managers have been instructed to provide agents at various locations to ensure that an INS agent can immediately respond if a state or local law enforcement officer suspects an immigration law violation.

The Justice Department's memorandum on interviewing certain foreign nationals in connection with the September 11 attacks can be found on the website of the Detroit Free Press at:
http://www.freep.com/gallery/2001/interviews/index.htm

Chief Immigration Judge Instructs Immigration Courts on how to Handle Deportation Cases that Require Additional Security

In a September 21, 2001 memo to all immigration judges and immigration court administrators, the Chief Immigration Judge discussed the procedures that courts must follow when the Department of Justice requires special arrangements. Specifically, immigration judges and their staff are instructed that they may not discuss the details of these cases with anyone. In addition, immigration courts that are hearing these cases are to closed to the public. This ban includes family members and the media.

Liaison Meetings with Government Offices

INS advised Greenberg Traurig Shareholder Martha Schoonover during a teleconference that it plans to implement an internet tracking system that will give employers, their foreign workers, and attorneys updates regarding immigration cases.

The INS has contracted Price Waterhouse to develop and implement the system, which is scheduled to be operational by February 2002. The new system would replace the automated telephone inquiry system currently utilized by INS. To maintain confidentiality, the Service will require an account to be set up by an attorney, employer, or foreign national. Attorneys must submit a G-28 at the time of setting up the account, while employers must provide their taxpayer identification number and foreign nationals will be required to give their dates of birth and mother's maiden names. After the account has been activated, the Service will send e-mail status updates while the case is being processed.

Undocumented Workers & New *Rico* Claims

A class action suit, between two cleaning companies, was recently reinstated by the U.S. 2nd Circuit Court of Appeals. *Commercial Cleaning Services vs. Colin Service Systems*, No. 00-7571. Commercial Cleaning Services filed a class action against its competitor Colin Service System, Inc. claiming that Colin illegally hired undocumented workers reducing its costs and allowing the company to underbid its competitors. The claim alleges that Colin's practices constitute unfair competition pursuant to the Racketeering Influenced and Corrupt Organizations statute (RICO). Other industries, including the agriculture and meat packing industries, may now encounter similar suits.

One of the key factors noted by the court will be Commercial Cleaning's ability to allege that Colin had *actual knowledge* that the illegal aliens hired by the company were *specifically brought into the country* in violation of the RICO statute. This nexus appears to be imperative to a claim filed under RICO when the claim alleges unfair competition as a result of a company's hiring practices that violate state and federal laws delineated in the RICO statute. As a result, a company's practices in hiring the undocumented alien and the manner in which the company complies with its obligations pursuant to the employer sanctions provisions of the Immigration and Nationality Act are likely to be scrutinized.

Negligence in failing to complete I-9, Employment Eligibility Verification Forms accurately or not in "good faith" may also subject the employer to potential claims under RICO. While an employer cannot specify what documents an employee can provide to comply with I-9 requirements, it is to the employer's benefit to ensure that originals of all documents are properly reviewed at the time of hire and I-9 documents are completed appropriately for all employees within the required timeframe.

This decision may allow more companies to allege an injury under RICO when a valid claim can be made that abuse of the immigration system has lead to unfair competition. In 1996 RICO was expanded to include immigration-related crimes. Specifically "racketeering activity" now includes any act which is indictable under several sections of Title 18 of the United Sates Code. Pursuant to RICO, the following sections may apply in cases involving employment of undocumented aliens:

- Section 1028 relating to fraud and related activity in connection with identification documents.
- Section 1425 relating to the procurement of citizenship or nationalization unlawfully.
- Section 1426 relating to the reproduction of naturalization or citizenship papers.
- Section 1427 relating to the sale of naturalization or citizenship papers.
- Section 1542 relating to false statements in applications and use of passports.
- Section 1543 relating to forgery or false use of passports.
- Section 1544 relating to misuse of passports.
- Section 1546 relating to fraud and misuse of visas, permits, and other documents.

These additions in combination with the court's validation of this class action could be the beginning of additional efforts made in the private sector to catch companies employing undocumented workers and filing claims under RICO.

Immigration news

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