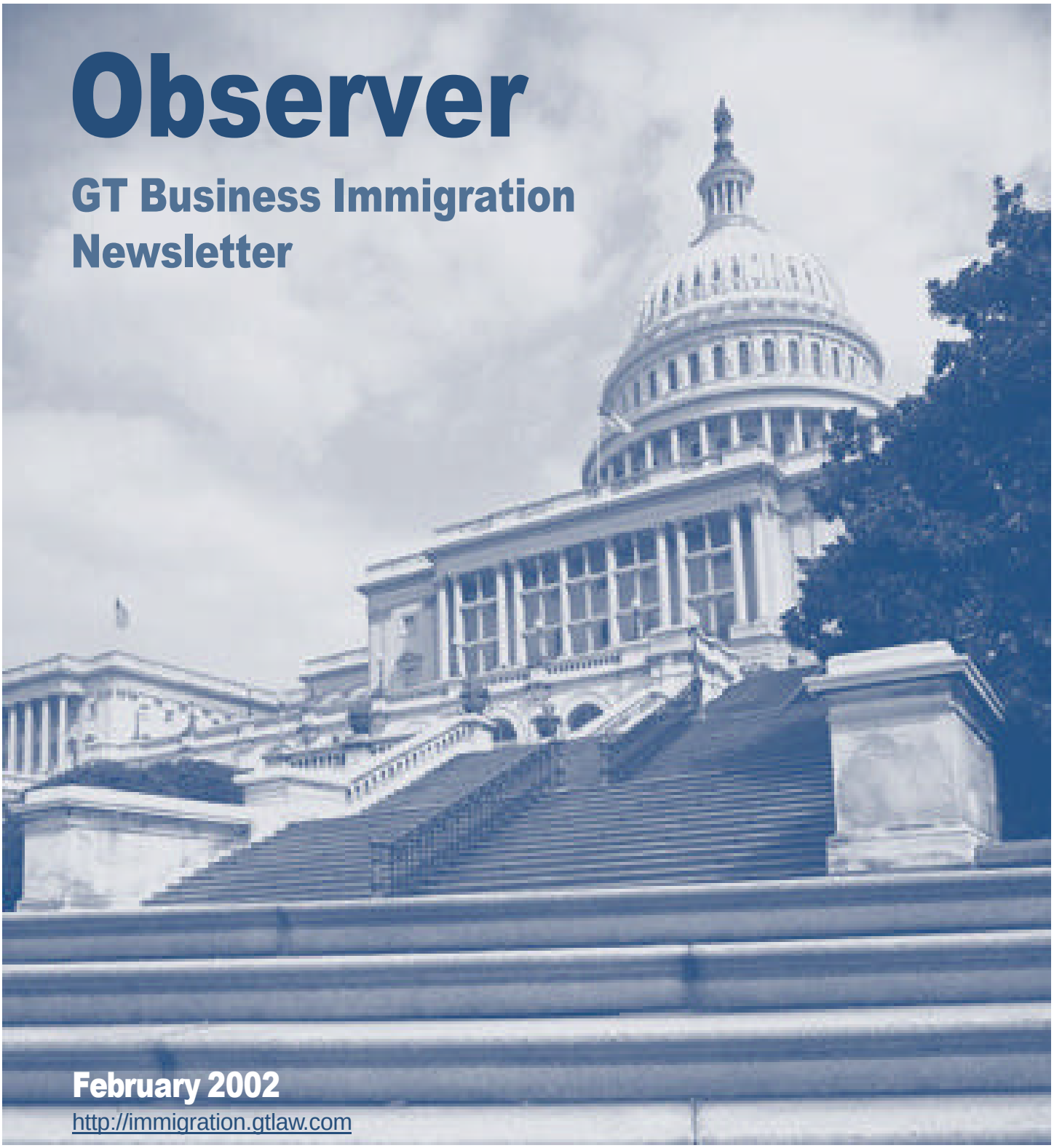
GREENBERG
ATTORNEYS AT LAW
TRAURIG LLP

Observer

GT Business Immigration Newsletter



February 2002

http://immigration.gtlaw.com

This newsletter is sent only to subscribers or to friends of Greenberg Traurig. If you no longer wish to receive The GT Immigration Observer follow the unsubscribe instructions at the bottom of this newsletter. If you are having problems, contact millerna@gtlaw.com.

Observer

February 2002

This month we have a special spotlight article on visas for those in the entertainment industry- O and P's. GT represents entertainers, musicians, athletes and models and the companies that employ them. Our clients included some of the leading figures in music, sports, modeling and entertainment.

In this issue:

February 2002 RESOURCES

February 2002 State Department Visa Bulletin Link:
http://travel.state.gov/visa_bulletin.html

Service Center Processing Times
Vermont: http://immigration.gtlaw.com/processing/ins/vermont.htm

California: http://immigration.gtlaw.com/processing/ins/california.htm

Texas: http://immigration.gtlaw.com/processing/ins/texas.htm

Nebraska: http://immigration.gtlaw.com/processing/ins/nebraska.htm

Department of Labor Regional Processing Times:

http://immigration.gtlaw.com/processing/dol.htm

State Employment Agency Processing Times:
http://immigration.gtlaw.com/processing/sesa.htm

The GT Business Immigration Observer is published by the business immigration practice group at Greenberg Traurig http://www.gtlaw.com/about/overview.htm. GT Of Counsel, Dawn M. Lurie serves as the Editor of the Observer. The newsletter contains information concerning trends and recent developments in immigration law. Moreover, the authors analyze and report on relevant immigration related issues as well as legislative issues.

Finally, the GT Observer serves as an invaluable resource to individuals, and human resource managers, recruiters and company executives who must keep current on these matters.

SPREAD THE WORD
If you have enjoyed reading this newsletter and have found useful information in it, we'd greatly appreciate your help in spreading the word about it. You can do this by forwarding a copy to your friends and professional peers and telling them about it.

SUBSCRIBING / UNSUBSCRIBING
To subscribe or unsubscribe, go to:
http://immigration.gtlaw.com/newsletter/subscribe/subscribe.htm

GENERAL INFORMATION
Questions or comments? Please send email to: imminfo@gtlaw.com
Want to schedule a consultation? Contact us at immconsult@gtlaw.com

DISCLAIMER
The materials contained in this newsletter or in the Greenberg Traurig Web site are for informational purposes only and do notconstitute legal advice. Receipt of this email newsletter or with the Greenberg Traurig Web site does not establish an attorney-client relationship.

Copyright © 2001 and 2002 Greenberg Traurig
All Rights Reserved.

Do Illegal Immigrants have Workplace Protection?

Supreme Court justices heard arguments this month over whether illegal immigrants have the same rights as U.S. Citizens if they are mistreated at work.

U.S. citizens are entitled to back pay if wrongly fired, and the Bush administration argued that individuals who are in the country illegally deserve the same protections and recourse. At issue is whether the labor laws that guarantee back pay for wrongful termination ought to apply to those working illegally in the U.S. The Bush administration argued that the laws do apply equally. The claim is that if illegal aliens are not entitled to the same protections in the workplace, then workers are open to exploitation and worse. Those in opposition on the other hand, argue that such a stand appears to reward those who work without proper authorization. The case, Hoffman Plastic Compounds v. National Labor Relations Board, is not expected to be decided until late spring. GT attorneys will follow this and report on the decision once it is announced.

Student and Exchange Visitor Information System Update (SEVIS)

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.

2000 Census Finds an Estimated 115,000 Illegal Aliens from Middle East Countries

As most have read, it has been determined that several of the Sept 11 attackers were illegal immigrants. The individuals involved with the 1977 bombing of the New York City subway as well as the 1993 attack on the World Trade Center are also reported to have been in the U.S. illegally. The INS and the Department of State are trying to work together to carefully scrutinize visa applications from Muslim countries. Hopefully this scrutiny will be fairly implemented and not discriminatory. However, in light of the Sept 11, 2001 terrorist attack, the fact that an estimated 115,000 middle eastern individuals are currently in the U.S. in illegal status is disturbing to those at INS charged with enforcement. In the coming months we expect to see many plans to reduce this number of individuals and later in on this newsletter we report on the Department of Justice's most recent initiative.

Justice Department Goes After Illegal Middle Eastern Men

On February 8th , the Washington Post reported that it had obtained an internal DOJ memo stating that Federal agents will soon begin apprehending and interrogating thousands of illegal Middle Eastern immigrants who have ignored deportation orders, seeking ways to prosecute any who have ties to terrorism and compiling the results of interviews in a new computer database. Moreover, the memo apparently instructs agents to look for ways to detain aliens on possible criminal charges rather than just expelling them. It is estimated that there are 314,000 individuals in the US who have ignored court orders to leave the US. The DOJ will focus on 6000 foreign nationals who are from countries with Al Queda strongholds. Approximately 1000 persons will be targeted next week. Civil Libertarian and Arab American groups, including the ADC, have expressed concern over the apparent profiling and "selective enforcement".

To Link to the Washington Post Article, http://www.washingtonpost.com/wp-dyn/articles/A42330-2002Feb7.html

Bush Administration Announces Plan to Improve Permanent VISA Processing with Revenues Received from H-1B Employers

The Bush Administration proposes to eliminate several DOL administered programs, including H-1B Training Grants and the Migrant and Seasonal Farmworkers' programs. The savings generated from eliminating these programs are earmarked for the reduction of processing backlogs in permanent resident applications.

Congress created H-1B training grants in 1997 as a compromise measure. At that time, only 65,000 H-1B visas were available for each fiscal year. Year after year, U.S. companies used all 65,000 H-1B visas well before the end of the fiscal year for highly skilled professionals. The shortage of H-1B visas created a crisis for employers who would have to wait 5 or 6 months to fill vacancies. Additionally, their prospective employees were left in an immigration limbo after many graduated from U.S. universities, but were unable to change their nonimmigrant status from student to specialty worker. Congress understood the needs of industry to employ highly skilled professionals to spur further development and to avoid inflation resulting from a tightening employment market. However, to quell anti-immigrant special interest groups, legislators required most employers to pay a $500 fee for each H-1B petition filed at the INS. In 2000, the fee was increased to $1000 when U.S. employers continued to face shortages of certain professionals and the number of H-1B visas was increased to 195,000 for three years.

The purported purpose of the fee was to establish a fund to train U.S. workers for shortage occupations. However, in making the announcement that the Bush Administration intended to eliminate these training grants, DOL Assistant Secretary of Labor Emily DeRocco pointed out that the program "never has filled and has no prospect of filling these labor shortages." Underscoring this point, the DOL assessment noted that these funds have been used to train workers "at decidedly low-tech jobs," such as cable installers or licensed practical nurses.

Acknowledging that the proposal may face resistance within Congress, Assistant Secretary DeRocco expressed hopes that legislators will understand that eliminating H-1B training grants is the best solution given budgetary constraints. Given recent Congressional legislation, which set forth a blueprint for the Immigration & Naturalization Service to improve process all requests for immigration benefits within 180 days, it would seem that lawmakers realize the significant problems that exist in the permanent visa system and the profound implications to U.S. economic interests.

E-1, E-2 and L-1 Spouses can Work and L-1 Waiting Period is Cut to Six Months

As reported immediately to our GT Observer subscriber, on January 16, 2002, President Bush signed two laws affecting L and E visa holders. The first allowed the spouses of E-1 and E-2 visa holders to obtain work authorization. The second allowed spouses of L-1 visa holders to obtain work authorization and cut the 1 year qualifying time for L-1 status to six months (applies only to blanket L beneficiaries). For companies using blanket L petitions the waiting time to qualify for L-1 status is now only six months. At this point, the reduction only applies for those companies using L-1 blanket petitions. This reduction will aid companies in bringing people to the United States twice as fast.

The INS has not issued regulations regarding the application process for applying for work authorization for qualifying spouses but the Vermont Service Center is accepting applications for L-2 spouses and will hold them until regulations are issued. The information will be posted on our website as soon as it is available. Our sources have related that regulations should be issued this month.

DOL's New Web-based Certification of Labor Condition Applications

In December 2001, the Department of Labor (DOL) issued a final rule establishing electronic filing of Labor Condition Applications (LCA). The program is now up and running. GT is using the electronic filing system and receiving certifications within minutes. We are very excited to finally see the effects of new developments improving the efficiency and responsiveness of the agencies responsible for certifying, approving and facilitating the employment of much needed foreign nationals by U.S. employers. We hope this is the beginning of new trends within DOL that will spread to other federal agencies.

For more information go to: http://immigration.gtlaw.com/news/alerts/2002/01/23.htm

Department of State Issues Guidance to the Field Regarding Corporate Reorganizations

Almost one full year after the INS opinion letter on corporate restructuring released in March of 2001, on January 25, 2002 the Department of State finally issued a cable to all diplomatic and consular posts, reaffirming its position that a new H-1B petition and H-1B visa are not necessary after corporate reorganizations, in which the new company is a "successor-in-interest."

Court Lacks Jurisdiction over H-1B Denial Pursuant to IIRIRA - A Cautionary Tale

CDI Information Service v. Reno is a recent Sixth Circuit Appeals Court decision involving CDI Information Service ("CDI") and Prakash Vaideeswaran, the company's foreign national employee, who filed a claim with the District Court requesting the reversal of an INS decision to deny CDI's I-129 petition to extend the employee's H-1B nonimmigrant visa. The Service had denied the petition due to its determination that the foreign national "failed to maintain the status previously accorded because *he engaged in unauthorized employment in a state other than Oregon*." (emphasis added) The denial was sparked when an INS officer noticed an itemization of $52.32 on the foreign national's pay stub for moving expenses. No one had expected that $52.32 would lead to the denial of an H-1B visa extension or to the expansion of INS' unreviewable and discretionary authority over the adjudication of H-1B petitions filed by U.S. employers on behalf of foreign nationals. The scenario should serve as a warning to companies who transfer foreign nationals without ensuring that proper steps have been taken to maintain the foreign national's status and employment authorization. It is always important to discuss such changes with competent immigration counsel.

To view this article go to: http://immigration.gtlaw.com/library/gtmemo/2002/01/29.htm

T VISAS to be Issued to Protect Victims of Human Trafficking

The Department of Justice will soon issue T visas, created by the Trafficking Victims Protection Act of 2000 (TVPA) to protect women, children and men who are the victims of human trafficking. The Attorney General signed the T visa regulations on January 24, 2002. This new visa allows victims of severe forms of trafficking in persons to remain in the United States and assist federal authorities in the investigation and prosecution of human trafficking cases. The U.S. government estimates that 45,000 to 50,000 women and children are trafficked into the United States annually, and are trapped in modern-day slavery-like situations.

For more information go to: http://immigration.gtlaw.com/library/govmemo/2002/01/24.htm

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. The US-Mexico talks are back in the news and the White House is once again focusing on efforts to coordinate a guest worker or new H temporary worker program to assist employers in hiring lesser or unskilled workers.

INS Commissioner James Ziglar reported on headway being made on these programs recently at a conference hosted by the National Immigration Forum. He assured the audience of the Administration's continuing interest in the talks and commented on the relationship of this topic to national security. "I believe that one of the best ways to enhance our security, frankly, is by breaking the backbone of this underground, illegal human trafficking," Ziglar said, referring to the estimated 8 million illegal workers currently living in the United States, many of whom are from Mexico. "Bring these folks into the light of day," he said. "Give them a status that makes sense, and that will, in the final analysis, help all of us.

For more information see www.EWIC.org

There's No Business Like Show Business!
Nonimmigrant Options for Sports and Entertainment Professionals

Congress created several unique nonimmigrant categories for artists, entertainers, and athletes coming to the U.S. to create, perform and compete. This article is an overview of the options available to these individuals to enter the U.S. temporarily, as well as other professionals working in the sports and entertainment industries. It also discusses the potential tax consequences of such options.

The O Visa Category

The O-1 visa category was created for individuals who have *extraordinary ability* in the sciences, arts, education, business, or athletics. An U.S. employer *or agent* must file the O-1 petition on behalf of a foreign national who is coming to the U.S. to continue to work/perform/ compete in their field of specialty. Additionally, a peer/labor/ management group consultation regarding the nature of the proposed work and the foreign national's qualifications is mandatory before an O petition can be approved.

To be eligible for O-1 classification as a professional of extraordinary ability, an individual must present evidence of their sustained national or international acclaim. Receipt of a major, internationally recognized award, such as an Olympic medal or a Grammy Award, satisfies this requirement. However, not everyone has to be a Frank Sinatra or Michael Jackson to enter on an O visa; in the absence of such a high honor, the beneficiary may satisfy this standard by documenting at least three of the following:

- Other national or international awards,
- experience judging the work/ performance of others in the field;
- major contributions of original significance;
- the financial success of their work,
- praise of well-respected and well-known peers,
- published material in the media regarding their success,
- high salary/remuneration;
- membership in organizations requiring outstanding achievement;
- other comparable evidence.

We can work with O-1 beneficiaries to ensure that their assistants are also allowed to the United States to work for them in O-2 status.

The P Visa Category

The P visa category is for entertainment *groups*, individual athletes, athletic teams, artists participating in a cultural exchange program, and culturally unique artists. P visa applicants must have "a high level of achievement in the field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well known in more than one country." Generally, eligibility for P status is easier to prove than "extraordinary ability" for O-1 classification.

Individual athletes must be performing at "an internationally recognized" level to be admitted in P-1 status, and athletic teams must be recognized internationally as outstanding. A tendered contract with a major U.S. sports league or team, or a tendered contract with an individual sport "commensurate with international recognition in that sport" is required evidence. In addition to the contract, an applicant must submit evidence of *at least two* of the following:

- Participation in a U.S. major league season
- Participation in international competition with a national team
- Participation in a prior U.S. university-level season in intercollegiate competition
- Statement from a major U.S. sports league official or the sport's governing body detailing the alien's or team's international recognition
- Statement from the sports media or a recognized expert respecting international recognition
- International ranking
- Significant honors/awards in the sport

P-1 visas can be issued to entertainers coming to the U.S. to perform as members of an entertainment group that has been recognized internationally (national recognition can suffice in some circumstances) as outstanding in the discipline for a sustained and substantial period of time. An artistic group's international recognition can be evidenced by documentation of the group's nomination for or receipt of significant international awards or prizes for outstanding achievement in the field, or by a combination of evidence, which confirm a high level of acclaim.

P-2 visas are reserved for artists and entertainers coming to the U.S. to perform individually or as part of a group, pursuant to a reciprocal exchange program that provides for the temporary exchange of artists and entertainers.

The P-3 classification is reserved for culturally unique artists and entertainers, either individually or as a group, coming to the United States to develop, interpret, represent, coach, or teach their particular art or discipline.

U.S. Taxation of Foreign Artists Athletes and Entertainers

As a general rule all compensation for services performed in the United States is subject to U.S. taxation. Even if payment is made in foreign currency, from a foreign country, by a foreign payor, compensation allocable to U.S. workdays is U.S. source income, unless an exception applies.

Foreign artists, athletes and entertainers are subject to the same U.S. tax rules as other foreign nationals temporarily in the U.S.

There's No Business Like Show Business!

continued

Many are unaware of the U.S. tax implications of their presence in the U.S. The IRS has published an IRS audit guide specific to foreign athletes and entertainers. In addition, the IRS issued a new set of regulations effective 2001, for payments to foreign persons. The withholding of tax at the source insures that foreign persons comply with their U.S. tax obligations. Unless an exception applies, the U. S. withholding tax is 30 percent. One exception is wages subject to payroll withholding. Both U. S. and foreign employers are required to withhold federal and state income taxes and social security and Medicare taxes on compensation paid for employment services in the U.S.

Pre-immigration Tax Planning

All pre-immigration tax planning ideas depend on the individual's tax status at the time the idea is implemented. It is important to know how many days the individual may be present in the U.S. and still maintain nonresident status for the year. A key objective is for the foreign national to have the option to choose the most beneficial status, whether nonresident, part-year resident or full-year resident. A nonresident alien would be able to exclude from U.S. tax – the U.S.-paid income that is foreign-sourced. If the individual's foreign residency status terminates upon the transfer to the U.S., the income will likely escape foreign tax. Thus, the income is potentially exempt from all taxes worldwide.

Foreign national entertainers who are due a bonus or deferred compensation payment attributable to services rendered outside the U.S. during the nonresident period should accelerate receipt prior to entering the U.S. or deferring receipt until after the residency period ends. The U.S. taxes on a cash basis. Therefore, if the foreign national is a resident, they will be subject to U.S. tax on distributions earned prior to coming to the U.S. This result can be a extremely onerous.

From a U.S. perspective, if an individual expects to become a U.S. resident as of the date of transfer, then all compensation and bonuses attributable to the nonresident period should generally be paid prior to arrival. However, if the individual expects to be a nonresident all year, then the income should be paid after arrival – with the possibility to escape both U.S. and foreign taxation.

Pre-immigration planning strategies must also be applied to personal and investment assets. Many countries do not recognize tax gains from stock investments and other assets, if certain criteria are met. Investment portfolios and home country tax laws should be carefully reviewed to determine if it would be beneficial to recognize gains or losses prior to establishing U.S. tax residency.

Conclusion

Under U.S. immigration law, artists, entertainers, and athletes have unique opportunities to perform, compete, and work in the United States. Tax planning prior to seeking admission to the United States is critical to these individual's ability to reap the maximum financial benefit from their work in the U.S. Greenberg Traurig's Business Immigration Group offers premier immigration and tax planning services for foreign national artists, entertainers, and athletes, as well as other sports and entertainment professionals, who are exploring employment in the United States.

This article was excerpted from a longer piece on visa options for entertainers.

For a copy of the entire article please e-mail mailto:imminfo@gtlaw.com

Immigration News

Business Immigration Group:

James Alexander 617.310.6031	Boston alexanderj@gtlaw.com	**Mary Pivec** 202.452.4883	Washington pivecm@gtlaw.com
Mahsa Aliaskari 703.749.1385	Tysons Corner aliaskarim@gtlaw.com	**Laura Foote Reiff** 703.749.1372	Tysons Corner reiffl@gtlaw.com
Kristina Carty-Pratt 703.749.1345	Tysons Corner prattk@gtlaw.com	**John Scalia** 703.749.1380	Tysons Corner scaliaj@gtlaw.com
Craig A. Etter 703.749.1315	Tysons Corner etterc@gtlaw.com	**Elliot Scherker** 305.579.0579	Miami scherkere@gtlaw.com
Marti Hyland 703.749.1386	Tysons Corner hylandm@gtlaw.com	**Martha Schoonover** 703.749.1374	Tysons Corner schoonovermgtlaw.com
Oscar Levin 305.579.0880	Miami levino@gtlaw.com	**Brenda Supple** 305.579.0734	Miami suppleb@gtlaw.com
Elizabeth Lewis 703.749.1321	Tysons Corner lewise@gtlaw.com	**Cora Tekach** 703.749.1391	Tysons Corner tekachc@gtlaw.com
Dawn Lurie 703.903.7527	Tysons Corner luried@gtlaw.com	**Shana Tesler** 202.331.3144	Washington, D.C. teslers@gtlaw.com
Elissa McGovern 703.749.1343	Tysons Corner mcgoverne@gtlaw.com	**Carol Williams** 703.749.1376	Tysons Corner williamsc@gtlaw.com

Please write to imminfo@gtlaw.com for more information or you can contact:

Nancy Miller
Immigration Practice Coordinator
Greenberg Traurig, LLP
1750 Tysons Boulevard, Suite 1200
Mclean, VA 22102
703.749.1366

For the latest immigration news SUBSCRIBE TO THE GT BUSINESS IMMIGRATION OBSERVER http://immigration.gtlaw.com/newsletter/subscribe/subscribe.htm