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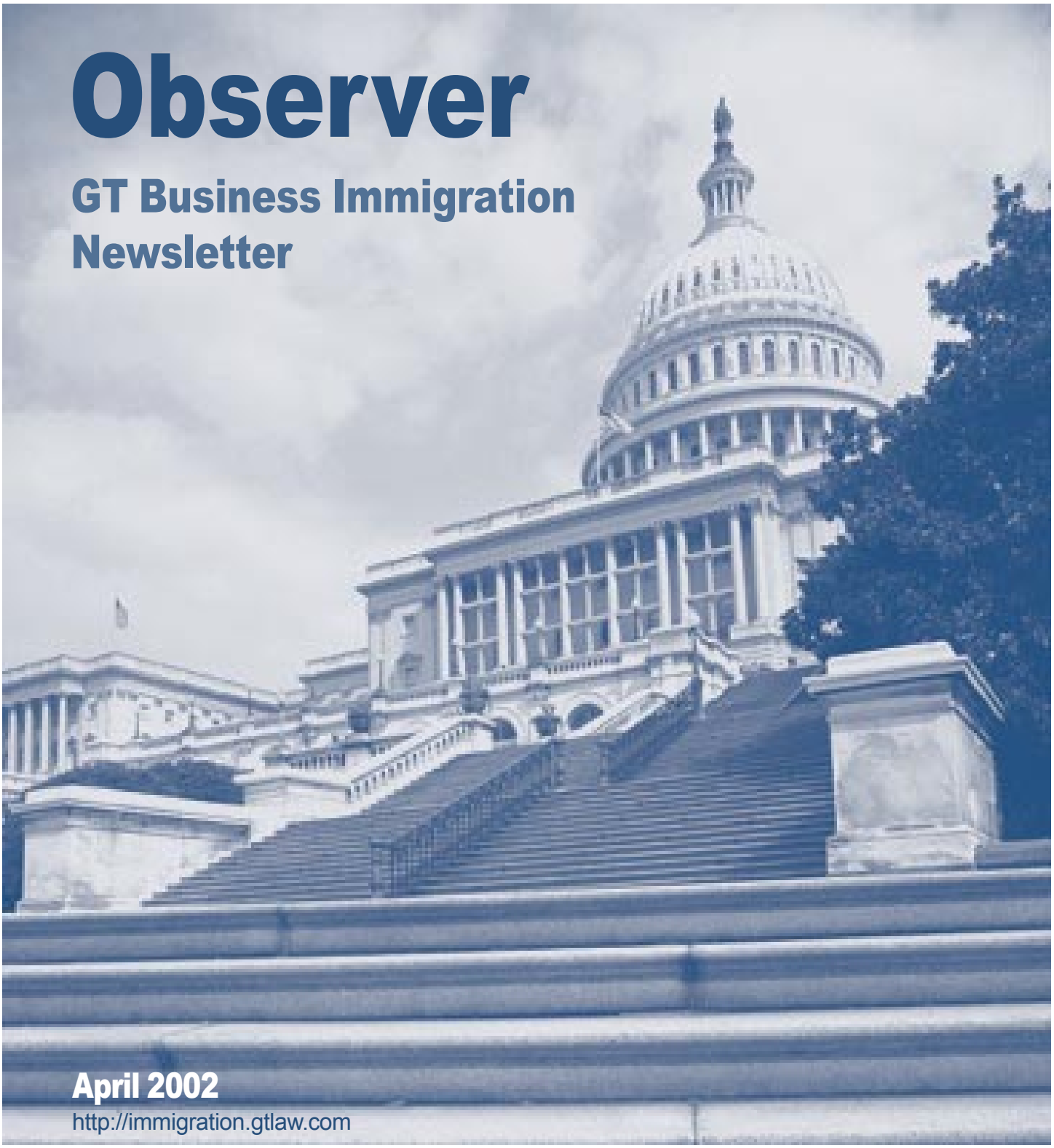

Observer

GT Business Immigration Newsletter

April 2002

http://immigration.gtlaw.com

Observer

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April 2002 State Department Visa Bulletin Link:
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The GT Business Immigration Observer is published by the business immigration practice group at Greenberg Traurig. 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.

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New Rules for Foreign Tourists and Students

The Immigration and Naturalization Service (INS) has moved to restrict the time in which visitors may remain in the United States from six months to 30 days or less in response to the September, 11, 2001 attacks on the World Trade Center and the Pentagon.

Under current practice, the general rule for tourists possessing visitor's visas is to grant a stay of up to six months (tourists who can enter without visas are given up to three months). The INS will require each individual wishing to enter on a tourist visa to explain the purpose for entering the country. At that point, the INS officer at the port of entry will determine the length of time needed to accomplish the purpose of the visit. If the INS inspector cannot make that determination, a 30 day limit will be imposed on the individual. The INS also wishes to limit the stay of business visitors to a total of only six months rather than the one year that is currently possible.

Another change proposed by INS would be to prohibit foreign students from enrolling in classes without first declaring their intent to apply for student status (at the time they enter the US in another status, such as a tourist)) and without also obtaining a INS approval of a change from another status. At the present time, individuals may enroll in universities and colleges and attend classes while they hold visitor status and wait for the INS to process the change of status application (which has up until recently taken months, as illustrated by the issuance of change of status documentation for two of the alleged September 11 hijackers six months after September 11). The INS will also require students to alert immigration officials of their intention to attend school when they enter the US on a non-student visa type.

The INS Commissioner James W. Ziglar stated "These new rules strike the appropriate balance between INS's mission to ensure that our nation's immigration laws are followed . . . and our desire to welcome legitimate visitors to the United States." Commissioner James W. Ziglar further stated, "While we recognize that the overwhelming majority of people who come to the United States as visitors are honest and law-abiding, the events of September 11 remind us that there will always be those who seek to cause us harm." INS is trying to reduce national security concerns and lessen the likelihood that individuals will remain in the US past their authorized stay.

The proposed regulations will go into effect after a 30 day notice and comment period.

DOD Likely to Ban All Non-U.S. Citizens from Unclassifieds Technology Jobs

The Department of Defense is reportedly implementing a new policy which would ban non-U.S. citizens from a large array of technology jobs and computer projects based on security concerns. This policy is expected to apply to unclassified projects that are still of a "sensitive" nature. While there has been no official release of information relating to the new policy, it appears it could be implemented within the next 60 to 90 days.

This new policy could potentially have an enormous impact on thousands of government and government contract employees and their employers. It will effect approximately 1/3 of all federal civilian employees as well as the myriad of private firms and their employees who have contracts with the government for technology projects. Although the Treasury Department has had limited restrictions in place since 1998 and the Justice Department recently instituted some restrictions, this new DOD policy would represent the biggest restriction by the government on foreign workers yet. Industry experts estimate that thousands of jobs could be effected by the new policy. In addition, the restrictions is likely to especially affect industries such as high-tech and consulting that recently had to heavily recruit foreign workers because of the lack of qualified U.S. technology workers.

The restrictions are likely to cause shortages of qualified workers. According to a March 7th LA Times article, even Richard A. Clarke, who is President Bush's top cyber-security adviser, thinks the policy will be ineffective. Clarke stated, " In general trying to restrict the [information technology] professional that we use to American citizens is not going to be an effective approach. The U.S. does not produce enough American citizens who are IT-security-trained to operate our networks." The policy is also likely to prevent smaller firms or foreign owned companies, who may have smaller staffs and less flexibility to restaff projects with U.S. workers, from entering into contracts with the government. In addition, even if a firm or the government has enough qualified U.S. workers on staff, it will be costly to shuffle workers and restaff projects with U.S. citizens. Moreover, the increase in demand for qualified U.S. workers is likely to drive up salaries and increase the costs of entering into government contracts overall for firms. Finally, the DOD's policy will strictly limit the available talent pool and could be cutting off individuals with unique skills merely because they are not a U.S. citizen even though they have not shown any indication that they are a security risk.

If you are interested in voicing your concerns on this issue or in trying to stop the implementation of this new policy, please contact our office and we would be happy to assist in arranging meetings with Congressional and government leaders.

USDA Waiver Program Canceled

The Immigration and Naturalization Act ("INA") requires that many foreign nationals in the U.S. participating in a J-1 educational exchange program (including graduate medical training) must return to their home country for a minimum of two years at the end of their J program before they will be allowed back in the U.S. in H, L or lawful resident status. The Attorney General can grant a waiver of this requirement in many circumstances. Congress authorized certain U.S. government agencies to act as Interested Government Agencies ("IGA") which allows them to request a waiver of the two year foreign residence requirement for a foreign national if doing so would be in the public interest. The U.S. Department of Agriculture ("USDA") is one of the agencies which has been given the authority to act as an IGA.

For many years, there has been a dearth of quality medical care in rural America. In response to this critical need, the USDA has been issuing requests for waivers for foreign medical graduates so that they could work in these medically underserved areas of the U.S. These rural communities have come to rely on qualified foreign physicians to care for their people.

Last fall, the USDA apparently began an internal review of its role in the waiver process and its procedures for requesting waivers. According to a press release issued by USDA in early March, as of February 27, 2002, the USDA will no longer act as an IGA for foreign medical doctors. According to the USDA's press release, the agency did not believe that it had the authority or the funding to screen applicants to its satisfaction, and it felt that it could not rely on other federal agencies to screen applicants for it.

This surprise move has met with resistance and criticism from congressional members who serve rural areas of the country. Several congressmen, who were particularly upset by the lack of notice the USDA provided on this program termination, have been vocal in expressing their resistance to this change, and have requested that the agency review this decision.

The press release also stated that USDA did not intend to even adjudicate the waiver requests it currently has in its system, some of which had been pending for more than six months. Recently, the USDA has indicated that it may reconsider this position, and may ultimately adjudicate all applications that are currently pending. Estimates claim there are 72 applications in the system. While it does not look like the USDA will reconsider their position, individual states will need to fill the need and create state sponsored (State 20 programs) quickly.

Major Immigration Initiatives - Empty 245(i) Extension

On March 12 the House of Representatives passed an extension of Section 245(i) as an amendment to the Enhanced Border Security and Visa Reform Act of 2002. This issue-remerged as President Bush' prepared for his visit to Mexico. It appeared that the President wants present Fox with some evidence of his concern for the Mexican migrant situation. Allegedly President Bush was also trying to court the Latin vote.

Section 245(i) of the Immigration and Nationality Act allows otherwise qualified immigrants (those who have approved family or employment based petitions) who have had technical visa problems, periods of unauthorized employment or failed to maintain a continuous lawful status in the U.S. to apply for green card status without leaving this country. Congress first enacted Section 245(i) in 1994. Congress allowed 245 (i) to "sunset" but the Legal Immigration and Family Equity (LIFE) Act reinstated §245(i) until April 30, 2001.

However as passed by the House in March, 245(i) is an empty extension that will provide little relief to those that need it. The House agree to extend to November 30, 2002, or to a four month period after the INS promulgated regulations, whichever is earlier. But the qualifying relationship, whether employment or family-based, on which the immigrant petition was based must have existed *before* August 15, 2001. Furthermore, for employment based cases, the Labor Certification would have to have been filed prior to the August 15th date. While this extension will clearly help relatively few people, we must consider the positive side: This is among the only favorable legislation for immigrants passed post 9/11 by the House.

As of early April the Senate has not considered a similar extension. We will keep you updated on any new information relating to §245(i).

GT Attorneys Meet with INS Port Director at Dulles International Airport

On February 27, 2002 GT attended a presentation at the Washington Dulles International Airport (DIA) in Virginia where Port Director Valentine Garcia provided useful tips and guidance for foreign nationals traveling on international flights.

The statistics on the number of flights, travelers and the staff shortage the Port Director is experiencing provide a background and to some extent an explanation behind what may appear to an outsider to be an unorganized and perplexing process. For example, according to Port Director Garcia, there are approximately 36 international flights and 4000 individuals who go through DIA on a given day (not counting weekends and holidays). To add to the stress of ensuring proper inspections, the Port Director is required by law to clear each flight within 45 minutes of landing. This gives Primary Inspectors approximately 1 minute to inspect each passenger and determine the purpose of their trip, the authenticity of documents presented and the passenger's bona fide intent.

For passengers who are foreign nationals and are traveling in and out of the U.S. using temporary visas or travel documents, inspections can at times be tedious, but as recent tragic events have shown, they are also very necessary.

The Inspection

On average, most people with proper documentation will only encounter the *Primary Inspector* who has 1 minute to conduct a computer check and verify the authenticity of the documents presented. One program runs names and dates of birth for matches to names posted by various federal agencies (FBI, Department of State, etc). Another program includes photographs, previous deportation orders, Interpol and Department of State data, as well as information regarding overstays. While more detailed information is likely available to the Inspector, Mr. Garcia was not willing to go into more detail.

One of the points stressed by Mr. Garcia was that it is not his agencies responsibility to confirm a foreign nationals status or pending applications with the INS, in fact the primary inspection does not include a check of the INS database to determine if the individual has petitions pending with the INS that would clarify the individual's status or resolve other issues or concerns.

If the Primary Inspector is not satisfied with the passenger's documents, then the passenger is referred to the Secondary Inspector. This would occur if there are concerns regarding the purpose of the visit, eligibility for entry, authenticity of documents or any other issues that will require further inquiry and verification. Some situations are automatically referred to secondary inspection including: anyone entering on an I-551 stamp in their passport (this is the stamp individuals receive when they initial become legal permanent residents and are waiting for the actual permanent residence card to be created and issued); and TN nonimmigrants entering the U.S. from a country other than Canada or Mexico

There is no time limit for the Secondary Inspection. The Secondary Inspector addresses the validity of the visit and the passenger's intentions. A sworn statements is also taken at this time. In addition, more in depth computer queries are conducted, agencies, employers or family members are contacted to obtain information. There is no right to have an attorney present during this process and Mr. Garcia made it clear that the attorney would not be contacted or allowed to be present during the Secondary Inspection.

Port Director Garcia's Recommends for Foreign Nationals

Mr. Garcia was also kind enough to provide us with general tips he believes help speed up the Inspection process while avoiding undue complications. So foreign nationals who are in the U.S. temporarily on a nonimmigrant visa, or one who are legal permanent residents of the U.S. should keep the following in mind when traveling internationally:

- If an individual entered the U.S. utilizing the visa waiver program and overstays, the next time the individual travels to the U.S. a visa should be obtained, otherwise the individual will not be admitted.
- Those in TN status should carry their receipts confirming they have paid the requisite fees.
- Individuals with waivers should carry the written order from the Immigration Judge regarding the cancellation of removal.
- Individuals with criminal records (including DUI or DWI) should carry the certified court disposition. The State databases checked by the Inspectors are not always updated with the relevant information.
- Inspectors and the Port Director no longer have the discretion to issue waivers for lack of proper documentation.
- Previous overstays or individuals who have worked without authorization are automatically placed in expedited removal. They cannot withdraw their applications for entry. *Exceptions:* They may be able to re-enter if there is some sort of family tie and proper steps are taken ***in advance*** to ensure re-admission will be granted.
- If an Adjustment of Status ("green card") application is approved while the foreign national is abroad, then the individual can still be admitted to the U.S. using a valid advance parole document. They will then need to finish processing at the District Office
- Lawful Permanent Residents will not be admitted if they have a conviction for possession of marijuana, this is considered a Crime of Moral Turpitude.

INS Passenger Accelerated Service System

The (INS) Passenger Accelerated Service System (INSPASS) is an automated immigration inspection system that eliminates the live inspection interview for frequent business travelers and significantly reduces traveler processing time. The INSPASS kiosk uses a hand geometry biometric image to validate the identity of travelers, query requisite databases, and record the results of the inspection. Instead of waiting in line to be interviewed by an Immigration Inspector, INSPASS travelers go directly to a kiosk and complete the inspection process within 15-20 seconds. If the identity is validated, a Form I-94/receipt of the inspection is printed by the kiosk, a gate opens, and travelers can proceed. If this check is not successful, a screen message refers travelers to an Immigration Inspector in a nearby inspection booth.

Where is INSPASS Available

INSPASS is currently operational at international airports at: Detroit, Los Angeles, Miami, Newark, New York (JFK), San Francisco, Washington-Dulles, and the U.S. preclearance sites at Vancouver, and Toronto in Canada.

Other North American airports identified to eventually receive INSPASS are: Seattle, Honolulu, Atlanta, Boston, Chicago, Cincinnati, Dallas-Ft. Worth, Detroit, Houston, Minneapolis, Montreal, Orlando, Ottawa, St. Louis, and one location not identified.

Who is Eligible

There is no fee for INSPASS enrollment at this time, the enrollment is valid for one year. Participation in INSPASS is voluntary and open to citizens of the United States, Canada, Bermuda, and Visa Waiver Pilot Program (VWPP) countries who travel to the U.S. on business three or more times a year for short visits (90 days or less). Eligible travelers must enroll in advance at airports where INSPASS kiosks are located.

Citizens of the United States, Canada, Bermuda, legal permanent residents of the United States, most landed immigrants in Canada, and Visa Waiver Pilot Program (VWPP) countries with visa classifications B-1, D-1, TN, WB; and some nonimmigrants in classes A, E, G, and L who travel to the U.S. on business three or more times a year, or who are diplomats, representatives of international organizations, or airline crews from the VWPP nations may voluntarily enroll in the INSPASS Program.

Access to INSPASS is not available to anyone with a criminal record or to aliens who require a waiver of inadmissibility to enter the U.S.

How to Enroll

To enroll in INSPASS, eligible travelers must complete INS Form I-823, which can be obtained from an INSPASS enrollment office or downloaded from the INS website **(http://www.usdoj.gov/ins/forms).** All applicants, including Canadian citizens, must present a valid passport to support their INSPASS application. The completed form and required supporting documents must be returned **in person** to an enrollment center. After appropriate background checks are completed, if approved, the applicant is issued a PortPASS card and instructions on using an INSPASS kiosk.

The PortPASS card is valid only for use in an INSPASS program kiosk, and is not a substitute for valid travel documents that travelers must have to enter the United States, for example, a passport and a visa.

For more information on where to enroll and requirements please visit the INS website at: http://www.ins.usdoj.gov/graphics/lawenfor/bmgmt/inspect/inspass.htm

INS Likely to Limit Visitors Visas

In testimony before a House immigration subcommittee regarding issues with INS performance and INS reforms on March 19, INS Commissioner James Ziglar said the INS was considering changing its current policy to limiting the length of a visitor stay in the U.S. to only 30 days. This could be a significant curtailing of the initial period of stay as a visitor's stay in the U.S. may currently be granted for up to six months. Although nothing official has been implemented, it may be possible to allow visitors to extend their stay beyond the 30 day period. In a meeting attended by Greenberg Traurig attorneys, Efren Hernandez, INS Director of Business and Trade Services Division, stated this change is "very likely" to occur and, in fact, the rule is already in draft form and circulating at the agency – the necessary first step to implementation.

Clearly as a result of the 9/11 attacks, the INS is also looking at changing regulations which currently allow individuals who are in the U.S. and apply for a change to student status, to start school while the change of status application is pending. The INS is considering changing the regulations to require the change of status to be approved before an individual could start school. In order to facilitate such a policy change, the INS is working on reducing the processing times for change of status applications (Form I-539) to thirty days. During an AILA meeting, INS Associate Commissioner Fujie Ohata told GT attorneys that currently 3 service centers were already down to 30 day adjudications and she expects the fourth service center to meet the 30 day adjudications and she expects the fourth service center to meet the 30 day processing requirement soon.

GT will provide updates as they become available.

INS in the Hot Seat - More Proposals for Reorganization & Reform

As a result of an embarrassing incident for the INS, the spotlight is again focused on reorganization efforts for the organization. INS contractors sent out notices confirming the approval of the visas for the deceased terrorist highjackers Mohamed Atta and Marwan Al-Shehhi that were received six months to the day of the terrorist attacks. Spurred on by the recent controversy over the ineffectiveness of the INS, the House Judiciary Committee proposed legislation to split the INS into two divisions.

The legislation proposes dividing the INS into one division charged with enforcement issues and a separate division dealing with processing petitions and benefits. Although the INS would be divided under the proposed legislation, both divisions would remain under the auspices of the Department of Justice. In addition, the legislation creates an associate attorney general for immigration affairs who would be the department's third-ranking officials and each division would have their own separate budget. The Office of Immigration Litigation, along with inspection and detention actions for asylum seekers, would fall under the enforcement division's jurisdiction. The legislation would also create a "Children's Office" to deal with minors under the assistant attorney general's office. Immigration judges would continue to fall under the authority of the deputy attorney general's office while the general counsel's office would fall under the command of the assistant attorney general. This proposed legislation is separate from a recent White House plan which would involve the merger of the INS with the Customs Service.

As a result of recommendations from the President's domestic defense advisors, President Bush is looking at proposing a merger of parts of the INS and the Border Patrol with the Customs Service. This recommendation came from President Bush's domestic defense advisers during a meeting of the Homeland Security Council and is viewed as a way to enforce the borders more tightly. Currently it appears that the recommendation would be to place this new entity under the jurisdiction of the Justice Department although this recommendation may run into opposition from the Treasury Department, who currently has jurisdiction over the Customs Service, as well as from business groups worried about a possible disruption of normal Commerce Service functions caused by a reorganization.

At INS Headquarters there was a shake up of personnel following the incident involving the confirmation of the approval of the terrorists visas. This resulted in four midlevel INS employees being reassigned or replaced as follows: Michael Pearson, the Executive Associate Commissioner for Field Operations has been replaced by Johnny Williams from the INS Western Region; Joe Cuddihy, Assistant Deputy Executive Associate Commissioner for Immigration Services has been replace by Janis Sposato, Special Counsel to the Commissioner; Joe Green, Assistant Commissioner for Inspections has been replaced by Michael Cronin who served most recently as Acting Executive Associate Commissioner for Programs; and finally Jeff Weiss, Acting Director for International Affairs has been replaced by Renee Harris who was Acting Deputy Chief for the Border Patrol. Moreover, as a result of the recent INS controversy, Attorney General John Ashcroft asked Congress for the power to discipline or terminate INS employees for acts of negligence or mismanagement and a bill granting this authority was introduced into the House.

While it remains to be seen exactly what type of reforms or restructuring the INS will go through, it appears there is little doubt that changes are coming based on the general frustration with INS's incompetence.

Supreme Court Rules Illegal Immigrants Ineligible to Receive Pay Back

The Supreme Court in a 5-4 decision concluded that illegal immigrants are ineligible to receive back pay. The case involved a Los Angeles area chemical plant who hired Jose Castro on the basis of a false Texas birth certificate which appeared to verify his authorization to work in the United States. Castro was fired less than a year later, along with three other employees, for participating in a union-organizing campaign. The National Relations Labor Board (NRLB) found the firings violated the National Labor Relations Act (NRLA) and ordered the chemical plant to pay back pay as well as other forms of relief to the terminated employees. In a hearing before an Administrative Law judge to determine the amount of back pay Castro was eligible for it was discovered he was not authorized to work in the United States and the ALJ ruled that NRLB was precluded from awarding Castro back pay. The Court of Appeals enforced the NRLB's order awarding Castro back pay. However, the Supreme Court reversed the Board's order and found that Castro was not eligible to receive back pay.

Chief Justice William H Rehnquist, who authored the majority's opinion, said that illegal immigrants have no legal authorization to work in the U.S. and allowing illegal immigrant to receive back pay would "trivialize the immigration laws [and] also condone and encourage future violations" if the court allowed them to receive back pay for lost work.

Justice Rehnquist was joined by Justices O'Connor, Scalia, and Thomas joined him. Dissenting were Justices Breyer, Stevens, Souter and Ginsburg who were concerned the Court's decision would encourage unscrupulous employers to exploit illegal immigrants.

DOL Issues Memo Dealing with Impact of Layoffs on RIR Labor Certification Applications

Dale Ziegler, Chief of the Division of Foreign Labor Certification for the Department of Labor ("DOL"), issued a memorandum on March 25, 2002 which provides guidance to Regional Certifying Officers ("CO") regarding adjudication of RIR labor certification applications in an economy experiencing layoffs.

The memorandum clarifies that the standards for evaluating RIR applications are not changed by the weak economy. The CO must still examine the adequacy of the recruitment conducted by the employer applicant and the availability of U.S. workers for the occupation involved in the employer's application. The standards still require print advertisement and enough other activities to demonstrate a pattern of recruitment.

According to the memo, application of these standards in the current economic climate involves examining several issues. Specifically, in order to assess the availability of U.S. workers, the CO shall consider the regional offices recent experience in processing non-RIR cases involving the same occupation, shall contact state agencies to obtain information regarding the current labor market, including information on the type and number of workers registered for unemployment benefits, and shall review relevant articles in the media that have appeared in the prior six month period regarding availability of workers in the occupation in the intended area of employment.

The memorandum instructs the RCO to send a letter to the employer-applicant if the CO has reason to believe that the employer-applicant may have, subsequent to testing the labor market, laid off any workers within the last six months. This letter shall ask the employer-applicant if any lay-offs have occurred in the last six months in the occupation in question, and if so, provide the number of workers that were laid off in the occupation and provide documentation of the consideration given to laid off workers for the position for which certification is sought. If U.S. workers were considered and rejected, documentation must be provided to support the lawful job-related reasons each applicant was rejected.

If there are general layoffs in the industry or occupation in the area of intended employment *after* filing, the CO should offer the employer-applicant an opportunity to place an additional advertisement to test the labor market, or to request that the case be remanded to the state for regular processing. The employer-applicant must give potential applicants a minimum of two weeks to respond to the additional advertisement, and the employer-applicant must submit documentation supporting the lawful job-related reasons why applicants were rejected.

If there have been layoffs by the employer-applicant and additionally other employers in the area have laid off workers in the same occupation, the memorandum instructs that the CO should obtain information on the possible availability of qualified U.S. workers through the methods specified above.

Clearly the DOL is keenly aware of the soft employment market and is skeptical of RIR applications in this economy. Therefore, we recommend the following to ensure the success of your application:

- Document a true pattern of recruitment that shows some type of recruitment activity over a *minimum* of a two month period. This means that printed advertisements should be placed at 30 day intervals, and there should be some other type of recruitment done in conjunction with the print advertisement.
- Be proactive in addressing the issue of layoffs. If layoffs have occurred at your company, or in your industry, show how the individuals who were laid off were afforded the opportunity to apply for the position, and why the ones who applied were not qualified.
- Strategize to obtain the long-term goal. It may be better to file a non-RIR application at this time to capture a priority date and conduct advertising at a later time, when the market is presumably better.
- Aggressively pursue options other than labor certification for obtaining permanent residency. Review qualifications of applicant to determine if EB-1 is a possibility.

New Jersey Superior Court Grants Access to INS Record of Detainees

Following a series of secret arrests made by the Immigration and Naturalization Service (INS), the American Civil Liberties Union (ACLU) of New Jersey filed a lawsuit in an effort to determine the names and dates of entry of the detainees, as well as their ages and nationalities. Earlier this week, a New Jersey Superior Court Judge ruled that the INS must provide access to their records of detainees held in jails in Hudson and Passaic counties. The Judge noted that the secret arrests made by the INS were "odious to a democracy." The federal government stated its intention to appeal the ruling, and requested and was granted a 45 day stay so that information would not be released until all appeals are exhausted. A similar case filed by the ACLU is pending in federal court on behalf of detainees nationwide.

Tax Payroll Rules for Nonresident Aliens

U.S. income tax and payroll withholding rules differ significantly depending on an employee's status as either a resident or nonresident. These are tax terms ¾ not immigration terms. Employees entering the U.S. on H, L or J visas may qualify for either status. A foreign national's tax status is determined by their U.S. immigration classification and days of physical presence in the U.S. under complex tax rules.

A. U.S. Tax Status: Resident, Nonresident and Dual

The following rules are general guidelines and the facts and circumstances should be reviewed in each case.

1. A foreign national holding a green card is a resident alien.

2. An F, J or Q student in the U.S. for less than 5 calendar years or a foreign national on a foreign government-related visa, such as A-1 or G-1, is a nonresident alien.

3. A non-student holding a J or Q visa previously in the U.S. on a F, J, or Q status for 2 (sometimes 4) years, in the previous 6 years is a resident alien.

4. A foreign national who meets the "substantial presence test" is a resident alien. The test is met if the foreign national is present in the U.S. for 183 days of the current year or 183 days in the current and prior 2 years based on the formula counting all of the days in the current year plus one-third of the days in the prior year plus one-sixth of the days in the second preceding year.

In addition, special rules may apply which can give the foreign national "dual status" in the first and last years of physical presence in the U.S. A "dual status" alien is a part-year resident and part-year nonresident. Classification of an alien employee as either resident or nonresident can be extremely complicated to determine in their first year of arrival to the U.S. The IRS wage withholding regulations and IRS Publication 515, "Withholding tax for Nonresident Aliens and Foreign Corporations," contain little guidance for employers to determine whether an employee is a nonresident alien or resident alien in the arrival year. In fact, the employee's tax status may not be known until after December 31st of that first tax year.

A nonresident alien may be entitled to a special election to file as a resident alien or to file a joint return. These elections are generally not made until the alien files his or her U.S. income tax return. Depending on the circumstances, these elections can generate significant tax savings. After the first year of entry into the U.S., most non-immigrant aliens on temporary assignment to the U.S. will be classified as resident aliens, unless they travel extensively outside the U.S.

In practice, the burden of claiming resident or nonresident alien status may be placed on the employee. As an added protection in the event of IRS audit, however, the employer may request a written statement from the employee in support of his or her claim of resident or nonresident status.

B. Key Payroll Rules for Nonresidents

The wages withholding rules for nonresident aliens are unique. The key differences from the rules for resident aliens are as follows:

1. Nonresident aliens are only taxable on compensation from U.S. source, which includes wages and salaries allocable to U.S. workdays;

2. they must use single wage withholding tables;

3. they are entitled to only one exemption (there are exceptions for residents of Canada, Mexico, Japan and South Korea);

4. they may claim only certain itemized deductions, not the standard deduction; and

5. an additional $7.60 per week must be withheld.

Technically, if a nonresident performs work outside of the U.S., the employer should not withhold tax from salary allocable to those non-U.S. business days. Most payroll systems are unable to automatically track U.S. and non-U.S. workdays in any single payroll period. However, if the number of days can be accurately estimated at the start of the U.S. employment, a withholding adjustment can be made and a wage withholding "true-up" made at year end.

Certain remuneration for services performed by nonresident aliens within the U.S. may be exempt from wage withholding under the Internal Revenue Code or an income tax treaty. In the case of remuneration paid for services within the U.S. by an employee, the nonresident employee must supply his or her employer with a completed IRS Form 8233 to claim exemption from U.S. tax liability on wages allocable to U.S. work days.

In addition to certain income tax exemptions, both resident and nonresident aliens may be eligible for exemptions from U.S. social security taxes. There is a specific exemption from U.S. social security coverage for nonresident aliens who are in the U.S. under an F, J or M visa. The U.S. has also entered totalization agreements with 18 countries. Where an employee is transferred to the U.S. for a temporary period (usually up to 5 years), he or she can remain in the home country system and qualify for an exemption in the U.S. by obtaining a Certificate of Coverage from the home country.

The rules of taxation are complicated and the liabilities for not following them are heavy. GT has expert attorneys that can assist companies in understanding the intricacies of the law.

Guest Worker Essential Worker Immigration

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

Immigration News

Business Immigration Group:

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