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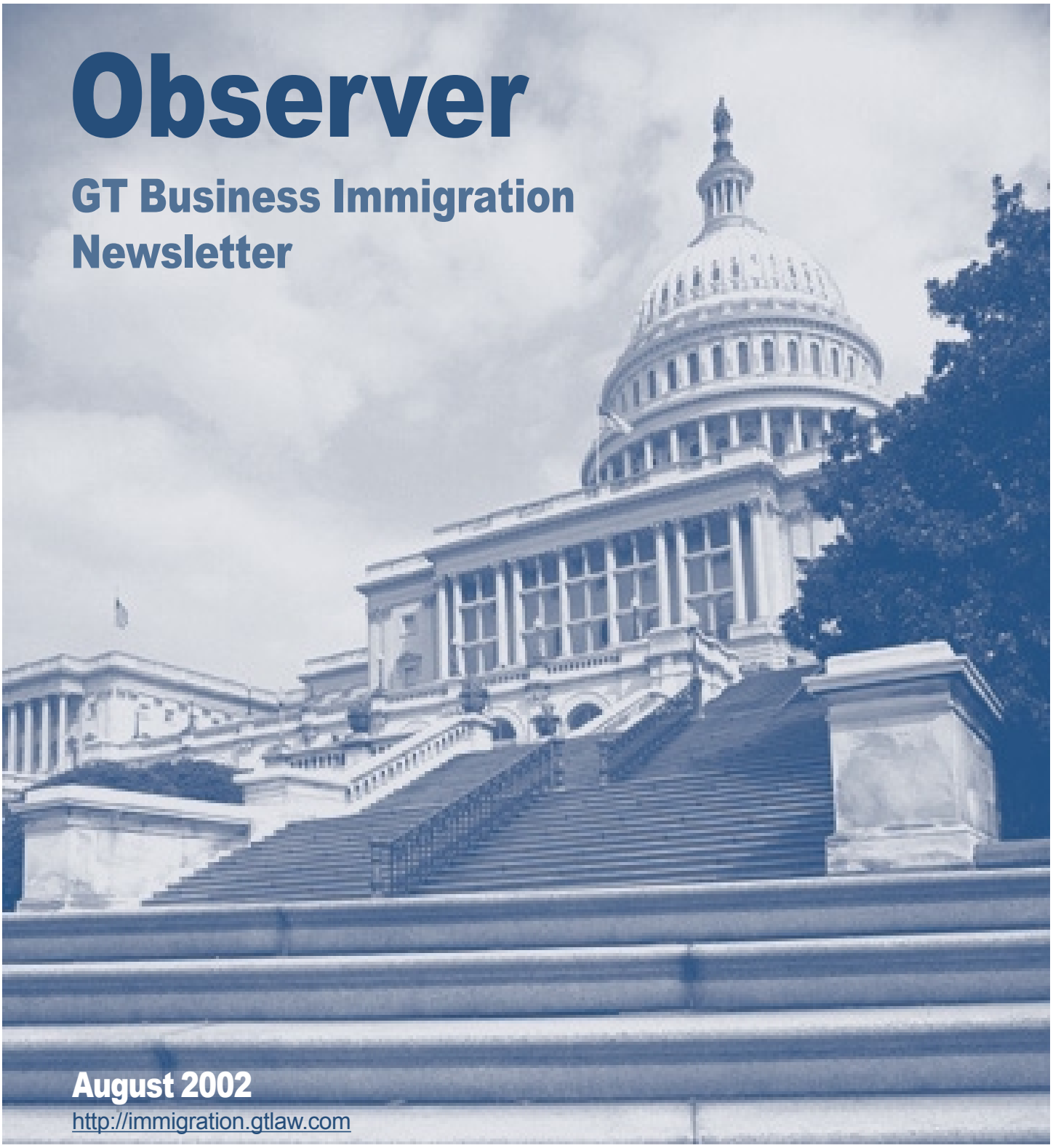

August 2002

http://immigration.gtlaw.com

Observer

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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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Registration and Fingerprinting Requirements for Certain Foreign Nationals

We are continuing to see the aftermath of September 11, as the INS broadens its ability to track non citizens in the U.S. On August 12, 2002, the INS published a final rule "to broaden the special registration requirements for nonimmigrant aliens from certain designated countries, and other nonimmigrant aliens whose presence in the United States requires closer monitoring, to require that they provide specific information at regular intervals to ensure their compliance with the terms of their visas and admission, and to ensure that they depart the United States at the end of their authorized stay." The rule is effective September 11, 2002.

The regulation directs certain nonimmigrant aliens from designated foreign countries be registered, fingerprinted, and photographed by the Service at the port of entry at the time the nonimmigrant alien applies for admission. Some visa classifications, including A (ambassador, public minister, career diplomat) or G (representative or employee of international organizations), are exempt from this requirement.

The registration requirements can also be applied to individuals who are already in the U.S. According to the Federal Register publication, the final rule applies to only a small percentage of the more than 35 million nonimmigrant aliens who enter the United States each year, including:

- nonimmigrant aliens from selected countries specified in notices published in the Federal Register. ***Currently all nonimmigrant aliens from Iran, Iraq, Libya and Sudan are listed as individuals automatically subject to special registration and fingerprinting requirements.***
- individual nonimmigrant aliens who are designated by a consular officer outside the United States or an inspection officer at the port of entry based on information that indicates the need for closer monitoring of the alien's compliance with the terms of his or her visa or admission because of the national security or law enforcement interests of the United States.

In addition, the regulations require certain nonimmigrant aliens to make specific reports in person to the INS at the following intervals:

- upon arrival at the port of entry.
- between 30 and 40 days after arrival at the INS district office with jurisdiction over the individuals' place of residence.
- every twelve months after arrival at the INS district office with jurisdiction over the individuals' place of residence.
- upon certain events, such as a change of address, employment or school, the INS must be notified by mail.
- at the time they leave the United States at the port of departure, the individual must notify the inspecting officer. ***Any individual who fails to do this, and is required to do so as a designated individual, will be considered inadmissible for future entry to the U.S. This only applies to those who have been registered and have been required to register.***

Specifically, if the foreign national in nonimmigrant status remains in the U.S. for 30 days or more, the individual must "appear in person to complete registration by providing additional documentation confirming compliance with the requirements of his or her visa." The proof of compliance can include but is not limited to proof of:

- residence
- employment
- registration and matriculation at an approved school or educational institution

What does this mean in practical terms?

When a foreign national arrives in the U.S., if he/she is from one of the designated countries (listed above), or if the individual is designated by a consular officer outside the United States or an inspection officer at the port of entry that the individual may pose a threat to national security, then the individual is immediately fingerprinted and photographed at the port of entry.

For example, according to a June 5, 2002 Department of Justice Press Release, if the individual has entered the U.S. in H-1B status that is valid for three years, that individual would be subject to the following:

- Secondary inspection at the port of entry where he/she would be fingerprinted and photographed.
- The fingerprints will be run against the IAIFS database of know criminals and a database of known terrorists. They would also run against the INS IDENT database to determine if the individual had previously entered the U.S. under a different name.
- The individual would be asked to provide information regarding his/her plans in the U.S. as well as his/her history and contact information in his/her home country.
- Within 30-40 days of entry the individual would have to report to the INS district office to provide detailed information regarding their stay, residence and employment.
- 12 months after the entry, this information would have to be confirmed at the INS district office.
- Change of address requirements would apply throughout the entire 3 year period the indi-

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Registration and Fingerprinting Requirements for Certain Foreign Nationals

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vidual is in the U.S.
- When departing the U.S., the individual would have to report to an INS station at the port of departure.

These new requirements have been implemented in an effort to provide the government with a more effective tracking system. As it stands, the regulations target individuals who the government deem to pose potential national security risks. The system appears to mirror those already in place in many European countries including Spain, France and the Netherlands. However, the registration system in these countries do not appear to be geared toward specific populations. While it is important that our entry and exit system be reviewed and revised to ensure our nation's security, it is also important to be mindful of the practical application of a regulation that may encourage government officials to target individuals solely on the basis of their nationality, religion, physical appearance or name. The rule appears to target specific minority ethnic groups and members of a specific religion, this may in turn further stigmatize innocent individuals who do not pose a threat to our security. We will continue to report on these new measures.

Department of Labor Backlogs

Many employment-based applications for permanent residency begin with a labor certification application filed with the State Workforce Agency ("SWA") of the Department of Labor ("DOL"). Currently the SWA's are processing approximately 300,000 applications. The volume of applications being processed has caused severe backlogs in the processing times at the SWA's. In those regions with a higher concentration of immigrants, the processing times are longer. It can take anywhere from one to four years, in extreme cases, to process a labor certification application.

The backlogs increased after section 245(i) was extended by Congress. The result was an overwhelming influx of applications with the SWA's. Prior to April 2001 expiration of section 245(i), the applications were being processed in three to four months in some jurisdictions.

Both the traditional and fast track, reduction in recruitment applications are affected by the current backlogs. As a result of the backlogs at the SWA's and the regional DOL offices, employers and individuals must place a greater emphasis on the timing of the permanent residence application. The length of time to process a labor certification application should be factored into the overall immigration strategy for each individual.

Given the lengthy processing times, employers may want to consider filing the labor certification halfway through the six-year period of H-1B status. This will help ensure that the labor certification application is approved and the I-140, immigrant petition is filed before the six years in H-1B status expires. Once the I-140 is filed, the employee will be eligible for a seventh year extension of the H-1B status. This seventh year is only available to those in H-1B status once they clear the DOL and file the I-140 with INS. When it was taking the DOL only a few months to process the labor certification applications, employers could wait until the fourth or fifth year of an employee's H-1B status before filing the labor certification. Waiting this long is no longer advisable.

While H-1B employees have the option of the seventh year extension, those employees in L-1A and L-1B status do not have an option to extend their nonimmigrant status because of DOL backlogs. For this reason for employees in L status, employers may want to consider beginning the labor certification process much earlier than they have in the past, if a permanent need arises for the employer.

The Department of Labor introduced the new PERM program in May 2002. The program is not yet in effect. Comments have been submitted in an effort to improve it viability. Advocates maintain the PERM program will greatly reduce the processing times.

State Department to Perform Review of Visa Issuance Procedures and INS Issues IBIS Memo

The Department of State & Security

The State Department has announced it will be conducting spot checks on the procedures for visa issuance at all of the 207 U.S. Embassy and Consulates around the world. This move by the State Department is believed to be prompted by the scrutiny that visa issuance procedures are undergoing as part of the on-going debate on whether the visa function should be totally given to the proposed Department of Homeland Defense. Some congressmen have expressed concern over some of the current procedures allowed by the State Department, noting in particular that three of the September 11th terrorists took advantage of the Department's Visa Express program.

The Visa Express program allows visa applicants to submit their visa applications through designated travel agencies/agents who then submit them to the U.S. Embassy or Consulate for processing. As part of the review of procedures, they are considering requiring interviews for all adult visa applicants. In addition, special inspection teams are also expected to be sent by the State Department to visa-issuing posts in countries linked to terrorism. Finally, State Department officials have indicated they may be taking steps to eliminate the Visa Express program.

In particular, the Visa Express Program in Saudi Arabia was the focus of some questions and the State Department actually issued a Fact Sheet regarding the program in Saudi Arabia to address the questions and to dispel some misconceptions about the program. The fact sheet stresses the fact that although third parties may be collecting and submitting visa application materials to the Embassy, visa officers are still in charge of adjudicating the petitions and over 45% of Saudi Arabian visa applicants have been interviewed.

For the State Department Fact Sheet see: http://www.state.gov/r/pa/prs/ps/2002/11693.htm

In terms of practical effects, visa applicants should expect that visa issuance procedures and requirements are going to be more stringent and more enforced than they were in the past. Moreover, now that Embassies and Consulates have greater access to databases and are performing more in-depth security checks, individuals should be aware that obtaining a visa may be a lengthy process, taking several weeks at a time. Even in cases where individuals have obtained visas without any issues in the past, they may now face additional scrutiny and waiting times. Individuals may want to factor in these extended processing times for visas as their travel plans are made.

For example, a previous H-1B visa holder was held up recently by additional security checks when he applied for a new H-1B visa. Since this individual worked in the nuclear industry, he was subject to the additional checks even though he had obtained an H-1B visa for the same position previously without issue and was not working in a "sensitive" position. Also, he presented letters from the various applicable government agencies stating that this work is not export controlled. However, he was still subject to additional security checks that considerably lengthened the visa issuance process. As such, individuals going to apply for their visas abroad should be aware that they may face increased checks and processing times and plan accordingly. In addition, individuals may want to look into the option of visa revalidation through the State Department here in the U.S. as another option, though this process is also becoming stricter.

The INS & Security

On the INS side of increased security checks, the INS recently issued a memorandum regarding the Interagency Border Inspection System (IBIS) Records Check. The memo provides guidance on how to handle IBIS checks. IBIS checks are required to be performed within fifteen calendar days of the receipt of an application or petition. However, if 35 calendar days have passed from when an IBIS check was performed, a new IBIS check must be performed before an application or petition is adjudicated and an application or petition will not be adjudicated until all hits are resolved. However, IBIS checks are not required for applicants who are under the age of 14. If there is a positive identification or hit on an IBIS check, the INS office is to first ensure that the hit actually involves the individual(s) in the application or petition. Once this is confirmed, the INS is to notify the appropriate law enforcement agency.

In cases where an IBIS check concerns aggravated felonies, at the Service Centers all hits will be forwarded to the Service Center Enforcement Operations Unit to be resolved. In some of these cases, the Office of the Regional Counsel will be involved. For District offices, they will continue to follow local office procedures for handling aggravated felony hits. If applicable, district offices will consult with the Office of the District Counsel. Overall, it has been our experience that the implementation of the IBIS checks have increased processing times across the board for all petitions and applications.

You Can Not Lose Your Green Card If You Spend A Week In The U.S. Every Year - Myth v. Reality

A returning lawful permanent resident ("LPR") may present a green card at the port of entry after a temporary visit abroad not exceeding one year. In order to qualify as a returning resident alien, a person must:

1. Have acquired LPR status
2. Have retained that status from the time he or she acquired it, and
3. Must be returning to "an unrelinquished lawful permanent residence after a temporary visit abroad."

What is a Temporary Visit Abroad?

Defining a "temporary visit abroad" is one of the most difficult issues in immigration law. Many people erroneously believe that if a person comes back to the United States at least once a year or even within six months, lawful permanent resident status is saved. This is incorrect. In fact, an alien who lives and works in a foreign country, but merely returns to the U.S. for brief visits periodically, may still be found to have abandoned lawful permanent resident status.

A "temporary visit" cannot always be defined strictly in terms of how long it lasts. The most important factor in determining if an alien's stay abroad is a "temporary visit" is the alien's intent. Factors have been set forth by which the immigration courts, the Department of Justice and the Immigration and Naturalization Service ascertain an alien's subjective intent of a temporary visit abroad in abandonment cases. These factors include, but are not limited to, the alien's reason for departing, whether (at the time of departure) the alien expected the visit to end shortly, whether the alien intended to return to the U.S. to live or to work, the country of the alien's ties (job, property or family), and the actual duration of the visit abroad. Other factors that have been considered in determining the intent of a temporary visit have been the length of the absence, owning a home in the U.S., but not living in it as well as only spending a few weeks each year in the U.S.

The INS instructs its officers to evaluate the following factors in determining whether a visit abroad was temporary: arrival via a chartered air carrier where nearly all passengers are nonimmigrants, return to the U.S. with a spouse and/or children who are neither citizens nor lawful permanent residents and who will allegedly be in the U.S. only a short time (usually with nonimmigrant visitors' visas) arrival at a port of entry functioning as a gateway to a resort area, especially where the alien's I-94 card reflects a U.S. address elsewhere, possession of a round trip ticket terminating outside the U.S., either of short duration or on an excursion fair, as well as alleged U.S. address on Form I-94 being a resort, hotel, or simply "in care of." These factors indicate that a LPR is not maintaining a residence in the U.S. and the visits outside the U.S. are not temporary.

The INS will consider the circumstances of a prolonged stay abroad when the delay was caused by reasons beyond the alien's control and for which he or she was not responsible.

How Can You Maintain Status?

It is important that lawful permanent residents maintain their status as permanent residents. In order to determine if an individual who has been granted lawful permanent status has maintained that status, the INS will evaluate many factors including, but not limited to: limited stays outside the United States, ownership of land or property in the U.S. that is actively used by the individual, maintaining active bank accounts, credit cards as well as memberships to organizations (e.g. video store, library, gym, community organizations) in the U.S. In addition, dependent family members should live in the U.S. if they are eligible to do so. The INS can request to see school and medical records in the case of young parents. Further, the manner in which you file U.S. income tax returns is also reviewed.

What is the Reentry Permit?

One method of notifying the INS of the intent to maintain a residence in the U.S. is to apply for a reentry card. A reentry permit is a document that informs the INS that a permanent resident desires to travel for significant periods of time outside the U.S. and does not wish to abandon their permanent resident status. The reentry permit helps a permanent resident demonstrate the intent to maintain residency in the United States. The reentry permit is helpful for those permanent residents who live, work and study abroad and those who travel outside the U.S. for significant periods of time. However, the reentry permit does not preserve or guarantee the physical residency or permanent resident status of an individual for the purposes of naturalization.

The reentry permit is often used as a safeguard to prevent the INS from determining that the LPR has automatically abandoned their permanent residence status after a significant time spent abroad. Without such a permit, the INS will automatically take the position that an individual who remains outside the U.S. for more than one year (with only short trips to the U.S.) has abandoned their permanent residence status. Again, while the reentry permit card does not guarantee the retention of the permanent resident status, it is evidence that the individual did not intend to abandon their permanent resident status. If INS determines that the permanent residence has been abandoned, the individual must reapply for permanent residence

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Social Security No Match Letters

In the July edition of the GT Observer, we reported the Social Security Administration's (SSA) increased vigilance in sending "No Match" letters to employers regarding the social security numbers employers provide the SSA. These letters notify employers that Social Security numbers they provided to the SSA for specific individuals do not match the name in the SSA's data base. While it can happen for any number of reasons, including innocuous name changes, misspellings, etc., the letters reflect an increased enforcement effort in relation to those who work using an invalid or incorrect social security number, in particular those without work authorization in the US. GT Attorneys Laura Reiff and Dawn Lurie recently commented on the no-match letters and their consequences during an interview with the Washington Post. GT discussed the chilling effect such letters have had on employers receiving them and the impact on the workforce of many employers. To view the article refer to the August 8, 2002 GT new alert at http://www.gtlaw.com/practices/immigration/news/2002/08/06.htm.

The increased vigilance in generating no-match letters is likely to drive undocumented workers underground at the very time that our need to enhance national security highlights the importance of maintaining accurate records of foreign nationals in our country.

The No-Match Letter

When the SSA reviews W-2 forms and credits social security earnings to workers, if a name or a Social Security Number (SSN) on a W-2 form does not match SSA records, the Social Security earnings go into a suspense file while the SSA works to resolve discrepancies. In recent years, the SSA has deposited $280 billion dollars in the earnings suspense file as a result of the cumulative effect of these no-matches.

In the past, only employers who reported SSNs that did not match at least 10% of their employees received the no-match letter. Starting in 2002, the SSA changed its criteria. An employer now receives a letter even if only one employee's SSN does not match the SSA's records. This change in practice has resulted in the SSA issuing 800,000 letters, the equivalent of 1 in 8 employers receiving these letters. Roughly 7 million workers have been included on these letters.

The letters provide a list of the names and SSNs of all employees whose records do not match and requests corrected information within 60 days. While the letter specifically instructs employers that the letter, in and of itself, does not provide a basis for taking adverse action against an employee and is not a statement about the employee's immigration status, many employers remain confused and immediately fire individuals on the list. Reactions to these letters have been varied, ranging from employees being terminated immediately if their name appears on the no-match list, being given a limited timeframe in which to correct the inconsistent information, to quitting if they cannot correct the information.

How is the IRS Involved?

The SSA does not have any power to enforce its request for corrected information, however the SSA is required by law to provide the IRS with information on no-match W-2 forms. The IRS, in turn, is authorized by regulation to fine employers $50 for each incorrectly reported social security number. There are reports that the agency will begin fining employers for infractions that take place in 2002 and issuing the fines as early as 2004 once it develops a program for imposing penalties. It is not yet clear if the agency will be able to meet this timeframe.

Current regulations do provide waivers from penalties if the employer acts in a responsible manner and if the events of noncompliance are beyond the employer's control. Current interpretation of the regulations by IRS representatives appear to carve out a number of safe harbors for employers including:

- If less than ½ of 1% or less than 10 of the W-2 forms issued by a single employer do not match SSA records, the IRS will not assess penalties against the employer.

- The IRS will not fine an employer for incorrect information on the W-2 forms if they are based on a duly executed W-4 form and the employer has shown due diligence in trying to obtain the correct information. Due diligence may be shown if the employer solicits correct information from the employee by requesting that he fill out a new W-4 form. Documentation kept in the employer's files of this solicitation should insulate the employer from liability even if the employee doesn't provide the correct information. If the employer does not receive the corrected information from a particular employee, he must re-solicit the information in each succeeding tax year until he receives the correct information.

It is unclear how these safe harbors will change once the IRS develops its new penalty plan and the internet basis Social Security Number Verification System (SSNVS).

What is the SSNVS?

SSNVS is an Internet based system that enables employers to verify that an employee's social security number is correct. The system is in the testing stages and has been implemented as a pilot program for a small group of employers. While the IRS is not requiring that employers use this system, use of the system will be considered within the context

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Social Security No Match Letters (con't)

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of due diligence. An IRS representative has indicated that discontinued use of the system could be a factor in determining that the employer has not satisfied the threshold of due diligence.

There are many concerns regarding the use of the system including:

- Safeguarding employee information from unauthorized verifications.
- Prohibiting employers from targeting select groups for greater scrutiny.
- Compliance with anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA).

Are the INS, IRS and SSA sharing this information?

According to SSA and IRS representatives, neither agency is currently sharing detailed information with the INS. The only information that the SSA shares with the INS is information relevant to investigations between the two agencies and an annual review, required by law, of earnings reported for Social Security numbers that were assigned for purposes other than employment.

The SSA may also be considering a program whereby it would share more information with the INS and possibly grant the INS authority to issue social security numbers (much like a hospital's authority to issue a social security card to new born infants). While the IRS indicates that it does not share any information on no-match letters with any agency, new IRS programs currently under development would include meetings with the INS.

Update on Security Checks and Visa Revalidation by the State Department in the U.S.

Generally visa revalidation is available through the State Department in the United States to individuals who currently are in H, L, O, P, E or I status and currently have a visa in their passport of the same classification as the visa being sought. In addition, the individual's visa must either be expiring within 60 days of applying or have been expired for less than a year. This is an option for qualified individuals who want to get a new visa in their passport but do not want to have to apply at a U.S. Embassy or Consulate abroad when they are traveling. Based on the increase in security checks and concerns, the State Department gave some practice pointers on visa revalidation to the American Immigration Lawyers Association that are summarized below.

In order for the State Department to revalidate a visa, the application must be "clearly approvable". When there is any question about the approvability of the application, the application will be returned to the applicant with a letter informing the applicant that they should apply for a visa at a consular post abroad. For individuals from the list of 26 countries who are automatically subject to special processing, this does not necessarily mean they can not apply for visa revalidation. The State Department reviews these applications on a case-by-case. For the "List of 26" countries, the background check generally takes around 20 business days. Generally, the Visa Revalidation Unit can still process requests from individuals from the "List of 26" after the initial check, unless something else is triggered during the check which requires further review.

However, for <u>any applicant</u> whose DS-157 application form triggers a Visas Condor background check, the State Department will apply a temporary refusal procedure and the applicant must apply abroad for their visa. A DS-157 form is required for all males between the ages of 16 and 45 applying for a visa, and posts can require a DS-157 from any applicant. A Visa Condor check generally can take 30 days to complete the check. Please note that once those individuals go abroad to apply, the Visa Condor will still trigger a further review and while this review typically takes 30 days, it could take longer abroad.

In the event a hit occurs and a check is triggered, the State Department will stop processing the visa revalidation application. The individual will be returned their application packet with instructions that "Under existing guidelines, your application may need further processing at an American Embassy outside the U.S." In the event where an application is temporarily refused under 221(g) for ineligibility to receive a visa because of missing documentation, etc., the application will be returned to the applicant with a letter indicating the deficiencies in the application (this letter is similar to a letter developed and used by posts abroad). For a 221(g) refusal, the applicant's passport is not marked with an "application received" stamp as it would be if the refusal was based on substantive grounds, but please note that this temporary refusal must still be indicated on any other subsequent visa applications on the DS-156.

Visa revalidation can be a good way for qualified individuals to get a new visa and avoid the hassle of applying for a visa at a post abroad. Visa revalidation takes several weeks so interested individuals should plan to apply well in advance of any planned travel. In order to find out if you are qualified to revalidate your visa, contact the GT Business Immigration group to discuss the options.

Social Security Administration and INS Acting as a Team to Reduce Fraud

In recent months, many foreign nationals have been experiencing delays and stricter policies at SSA offices when applying for a social security number. This is due in part to SSA's increased scrutiny and changes in criteria for issuing social security cards. In fact, the SSA may be making plans to initiate an electronic verification process with the INS to verify immigration documents before issuing social security numbers and cards. According to an AP report of statements made by James B. Lockhart III, Deputy Commissioner of the Social Security Administration, prior to this new process, the SSA could not verify immigration documents or the visa status of non-citizens because no system was available to do so within a reasonable amount of time.

According to the AP report, Commissioner Lockhart stated that in June, the SSA started verifying birth records of individuals born in the U.S. over age 1 who were applying for a Social Security number. In addition, the administration is looking into the implementation of a system that will assign Social Security numbers to new immigrants when the State Department approves an immigrant visa at the U.S. consulate or embassy abroad. The SSA's goal is to make it more difficult to obtain valid social security numbers with fraudulent documentation.

Recent statements made by an SSA representative, however, seem to contradict what has been reported with regard to the verification of immigration status, and the final implementation remains unclear. In fact, at a recent meeting at the U.S. Chamber attended by GT attorneys, an SSA administrator stated that what the SSA is working toward with the INS is actually a system to streamline the issuance of social security numbers in tandem with the work authorization or visa benefit, much like the agency now works with hospitals to issue social security numbers to newborns.

It is also interesting to note that the SSA's push to correct its files and increase issuance of no-match letters was put into practice at about the same time as the agency stopped issuing social security numbers to foreign nationals who requested them in order to obtain a driver's license. This policy, implemented in March, has made it difficult for some immigrants to obtain driver's licenses, open bank accounts and use other services for which a social security number is often required.

At this time, to obtain a social security number the following is required:

At least two documents as evidence of your age, identity, and U.S. citizenship or lawful alien status.

1. Age: The SSA prefers to see the birth certificate. Other documents can be accepted, such as a religious record made before 3 months of age. If you were born outside the U.S., your passport will be accepted.
2. Identity: The SSA must see a document in the name you want shown on the card. The identity document must be of recent issuance so that the SSA can determine your continued existence. A birth certificate or hospital birth record is not acceptable. Acceptable documents include:
   - Driver's license
   - Marriage or divorce record
   - Military records
   - Employer ID card
   - Adoption record
   - Life insurance policy
   - Passport
   - Health Insurance card (not a Medicare card)
   - School ID card
3. U.S. Citizenship: Most documents that show you were born in the U.S. are acceptable. If you are a U.S. citizen born outside the U.S., show a U.S. consular report of birth, a U.S. passport, a Certificate of Citizenship, or a Certificate of Naturalization
4. Alien Status: Need to provide an unexpired document issued to you by the U.S. Immigration and Naturalization Service (INS), such as Form I-551, I-94, I-688B, or I-766. The SSA CANNOT accept a receipt showing you applied for the document. If you are not authorized to work in the U.S., the SSA can issue a Social Security card if you are lawfully here and need the number for a valid nonwork reason. Your card will be marked to show you cannot work. If you do work, the SSA will notify the INS. Acceptable nonwork reasons are:
   - a Federal statute or regulation requires that the alien provide his/her SSN to get the particular benefit or service; or
   - a State or local law requires the alien to provide his/her SSN to get general assistance benefits to which the alien has established entitlement.

Effective March 1, 2002, the Social Security Administration will no longer assign Social Security Numbers when the sole reason for needing an SSN is to comply with a State statute that requires an SSN for issuance of a driver's license. Basically, the SSA stopped issuing social security numbers to foreign nationals who requested them in order to obtain a driver's license. This policy change has hindered immigrants without work authorization from getting driver's licenses, opening bank accounts and using other services for which a social security number is required.

For more information on applying for social security numbers and cards please contact the GT Business Immigration group or refer to the SSA's official website at http://www.ssa.gov/.

Concurrent Filings

On July 31, 2002, the INS promulgated an Interim Rule that will permit the concurrent filings of the Immigrant Petition (Form I-140) with an Adjustment of Status Application (Form I-485). This new rule is effective immediately. The concurrent filing will be allowed under most employment-based categories and in cases where an immigrant visa is immediately available for the beneficiary. Please note that this rule does not change the substantive requirements for I-140 petitions or I-485 applications.

Employment authorization and advance parole applications may be filed in conjunction with the adjustment of status application. Under Immigration and Naturalization Service (INS) regulations, an employment authorization application must be adjudicated within 90 days of receipt by the INS. The INS hopes that permitting concurrent filings will improve the efficiency with which the agency is able to provide benefits to these applicants.

Individuals who presently have an immigrant petition pending with the INS may now file an adjustment of status application, as long as they are within the applicable employment-based categories and a visa number is immediately available. The filing of the adjustment of status application must include the receipt notice for the immigrant petition to demonstrate that it was previously filed and received by the INS. Additionally, in cases where an immigrant petition was filed and a visa number was not immediately available at the time of filing, but a visa number is now available, the adjustment of status application may be filed with a copy of the receipt notice for the immigrant petition.

Until the promulgation of this rule, an I-140 beneficiary was required to wait the three to five month period until adjudication by the INS of the I-140 petition, prior to being able to file for adjustment of status. The ability to file an adjustment of status application concurrently with the I-140 can be beneficial in that it enables the beneficiary to (1) obtain employment authorization within 90 days, (2) receive advance parole for travel outside the United States, (3) avoid unlawful presence in some circumstances, and (4) get a head start on the lengthy processing times for adjustment of status applications (they are currently taking between one and two years for processing).

For foreign nationals in deportation or removal proceedings before the Immigration Court, the fees are paid to and receipt obtained from the INS, and the I-485, along with the associated documents and proof of payment of fees, is filed with the Immigration Court. If the foreign national's case is pending before the Board of Immigration Appeals, the I-485, along with the associated documents and proof of payment of fees, is filed with the Board of Immigration Appeals.

The preamble to the Interim Rule specifies, however, that the filing of the I-485, and required evidence, with the Immigration Court or the Board of Immigration Appeals does not stay (or suspend) the proceedings, nor is the filing considered a motion to reopen, motion to reconsider, or any other motion beyond a request to include the adjustment of status application in the file. Furthermore, accepting the I-485 application is not a reopening or reconsidering of the case, nor any other action pertaining to the case. In the event that the I-140 is approved, the beneficiary must affirmatively move the Immigration Court or the Board of Immigration Appeals to consider the adjustment application, or remand the application to the INS for adjudication (only if the INS agrees to such remand).

Several questions remain unanswered. First, the Interim Rule provides no specific guidance with respect to derivative beneficiaries (spouses and minor children of I-140 beneficiaries). Presumably, the INS will include spouses and minor children and permit them to file adjustment of status applications along with the principal beneficiary's application. Nonetheless, we await INS clarification on this issue.

Second, pursuant to section 106(c) of the American Competitiveness in the 21st Century Act (AC21), an individual for whom an I-485 has been pending for 180 days or longer may change jobs, and still obtain permanent resident status with the pending I-485, as long as the new job is in the same or similar classification as the job for which the petition was filed. The new Interim Rule provides no guidance regarding whether one can exercise this ability to change jobs after 180 days of a pending I-485 if the I-140 remains unadjudicated, or what happens if the I-140 is ultimately denied. We anticipate that additional INS guidance will be forthcoming on this issue.

Third, the rule does not address whether the adjustment of status application remains valid if the I-140 is denied, and a timely appeal or motion to reopen or reconsider has been filed with the INS, with respect to the denied I-140. Equity would seem to dictate that the foreign national should be permitted to pursue an appeal or reopening/ reconsideration of a denied I-140 without losing the value of the I-485. This is particularly clear in situations in which the I-140 was denied erroneously.

Comments on this Interim Rule are due on or before September 30, 2002.

Federal Register: Allowing in Certain Circumstances for the Filing of Form I–140 Visa Petition Concurrently With a Form I–485 Application
(PDF/52 kb, 4 pages)

Attorney General to Authorize State or Local Law Enforcement Officers to Exercise Federal Immigration Enforcement Authority

The Immigration and Naturalization Service (INS) published a final rule on July 24, 2002, which sets out the process through which State or local governments can agree to place authorized State or local law enforcement officers under the direction of the INS to exercise the federal immigration enforcement authority. The legal basis for this rule is found in the Immigration and Nationality Act at section 103(a)(8). This final rule applies in times of "a declared mass influx of aliens," and allows the INS Commissioner to enter into advance written "contingency agreements" with State or local law enforcement officials to specify the terms and conditions, including reimbursement of expenses, under which the State or local law enforcement officers can exercise the federal immigration enforcement authority. The rule includes measures for appropriate notifications to Congress and the Administration. The INS instructed that this rule is necessary to ensure that the INS, with the coordination of State or local governments, can respond in an expeditious manner to urgent and quickly developing events during a declared mass influx of aliens, to protect public safety, public health, and national security, while ensuring that performance of duties under this special authorization is consistent with constitutional and civil rights protections. This rule is effective August 23, 2002.

Recapturing Time: Can You? Should You?

The INS was successfully sued last year in California (Nair v. Coultice, 162 F. Supp. 2d 1209 (S.D. Calif. 2001) to require a recapture of time outside the US while in nonimmigrant status. The case dealt with an H-1B employee nearing his sixth year who applied for and was denied an extension that would have equaled the time he had spent outside the U.S. The court held that the time was to be added to his H-1B status. This has given an imprimatur to a long-standing but haphazardly applied INS practice of permitting recapture of time spent outside the U.S. Many have since filed petitions to recapture time outside the U.S. in order to prolong their six years.

However, since the California Decision, we have seen INS requests for information regarding the exact nature of the time spent outside the US. The INS has issued decisions against recapture when the agency felt that the time was not sufficiently interruptive of the employee's H-1B status. For example, vacations to the home country are generally not considered interruptive, even when the vacations were for a considerable length of time (three or four weeks). Overseas assignments of several weeks' length, however, are typically considered interruptive of the status. Each situation is considered on its own facts. Employees nearing the end of their time in the U.S. are advised to seek counsel when considering their options.

Global Immigration Seminars

Greenberg Traurig continues its tradition of providing complimentary presentations to companies on outbound immigration issues as well as discussions on money saving tax strategies for employees as well as employers. GT provides information, guidance and assistance to our clients on visa matters relating to the international relocation of personnel to, and between, countries outside of the United States. Please contact Dawn M. Lurie at (703) 903 –7527 or luried@gtlaw.com for further information.

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

You Can Not Lose Your Green Card If You Spend A Week In The U.S. Every Year - Myth v. Reality (con't)

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status. When INS makes the determination that an individual has abandoned their permanent residence status, it will not matter that the individual may still have the physical green card in their possession. That card will automatically become void when the INS determines that the permanent resident status has been abandoned.

There are special circumstances for clergymen and employees of American companies working abroad that are outside the scope of this article, but should be reviewed.

As a lawful permanent resident, if you plan on spending a significant amount of time outside the United States and would like further guidance, please contact the business immigration group at Greenberg Traurig.

Immigration News

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