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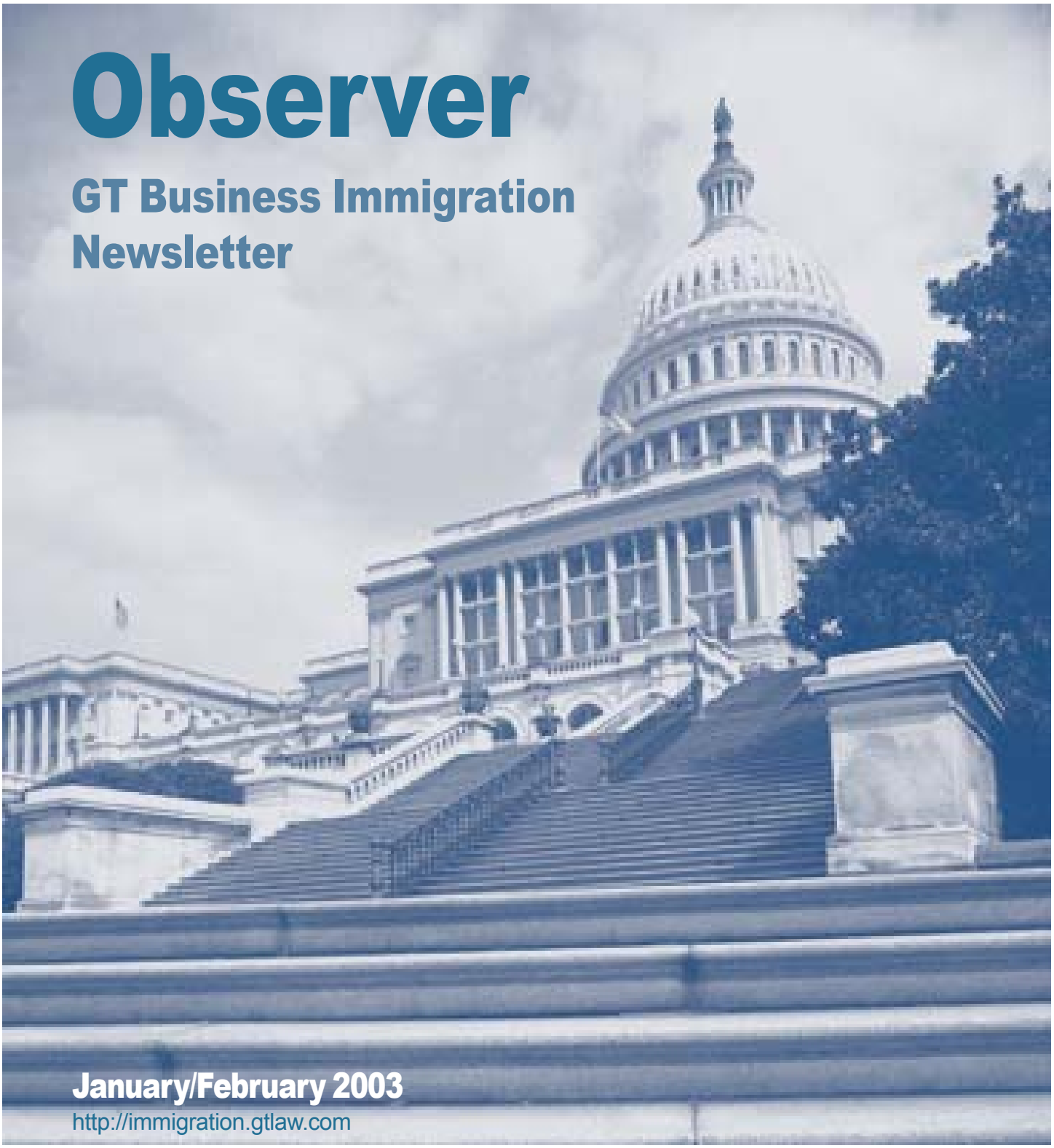
# Observer

## GT Business Immigration Newsletter



**January/February 2003**

http://immigration.gtlaw.com

# Observer

## January/February 2003

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### FEBRUARY 2003 RESOURCES

February 2003 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. 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.

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# Two Special Registration Deadlines Pass: What you Need to Know About the Special Registration Program

The latest group ("Group IV") designated for Special Registration was announced on January 16, 2003. This group includes males 16 years and older who are citizens or naturals of Bangladesh, Egypt, Indonesia, Jordan and Kuwait. The period for registration for this group is from February 24, 2003 through March 28, 2003, inclusive. More details about this registration group, deadlines, and requirements can be found at the GT Business Immigration Group website at GT Business Immigration Group http://www.gtlaw.com/practices/immigration/index.asp.

Another new development in the Special Registration program is the reopening of the registration period for the first two groups, consisting of males who are 16 years or older, and who are citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Qatar, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, or Yemen. The new registration period for these two groups begins on January 27, 2003 and ends on February 7, 2003. More details on this new registration period can also be found on the GT Business Immigration Group website at GT Business Immigration Group.

This article provides summaries of the experiences of registrants around the country in their efforts to comply with the Special Registration program. As noted above, please refer to our website articles for specifics on who must register, when, and where. The rules are very specific, so please review them carefully.

One of the often over-looked requirements of the program is that those who are subject, when departing the United States, must depart by way of the INS-designated airports only. Three general requirements to keep in mind are: (1) the initial registration deadline; (2) the follow-up registration deadlines (depending on one's particular situation); and (3) the designated airports for departure from the United States.

There is also a sometimes confusing aspect of registration for those who are not sure if they are a "national" of one of the listed countries. The program requires that citizens or "nationals" of the listed countries must register. The Immigration and Nationality Act provides a vague, and impractical definition of a "national." The Act defines a "national" to be "a person owing permanent allegiance to a state." It appears that, for the purposes of special registration, the INS is considering a "national" to mean a person "born in" one of the listed countries. There is a caveat to this as well for individuals born in countries where nationality is not necessarily a birth right. For example, an individual who was born in Saudi Arabia to parents who are of U.K. nationality, and who has no other connection to Saudi Arabia, is likely not considered to be a Saudi National by Saudi Arabia. Therefore, an individual in this situation would not be required to register. For those who are not sure about how their country of birth defines their nationals, it is advisable to consult with the embassy directly.

Those with dual citizenship may also be confused by the requirements. Based on the federal register and INS guidance, a person born in one of the designated countries, and who has subsequently obtained citizenship in another country, for example Canada or Germany, would still be required to register.

This first registration program, which included males who are citizens or nationals of Iran, Iraq, Libya, Sudan, and Syria, was characterized by poor notice to the public of the deadline and who was required to register, poor instructions by the Department of Justice (DOJ) to its officers for processing the registrants, and pervasive confusion about what registrants needed to do to comply with the program. To add to the existing confusion and frustration, the DOJ also distributed guidelines to the local INS offices that included severe consequences for failure to comply, making the program a fiasco.

Consequently, as reported by some major newspapers, approximately 500 registrants were arrested in Los Angeles, San Diego and Orange County during this first registration period. Other areas of the country did not experience arrests on any scale like this; nevertheless, arrests were occurring throughout the United States. These massive arrests and detentions caused substantial media attention, public condemnation, and a lawsuit was organized and filed against the U.S. Attorney General, John Ashcroft, and the INS. The lawsuit was brought by the Alliance of Iranian Americans, the American-Arab Anti-Discrimination Committee, the Council on American Islamic Relations, and the National Council of Pakistani Americans.

The lawsuit alleged that the large numbers of arrests were unlawful because: (1) the government did not obtain the necessary arrest warrants; (2) it is unlawful and unjust to arrest and deport people who are eligible to apply to legalize their status based on family relationships or their employment; (3) some individuals with avenues to legalize their status are being detained without bail or bail hearings, and (4) the fear of mass illegal arrests created by these detentions will inhibit compliance by people facing similar registration deadlines in the future. This lawsuit remains pending as of the date of this writing.

By the time that the second registration deadline for "Group II" arrived on January 10, 2003, the INS had taken steps to better organize the program and issued instructions to its offices for the policies regarding detention. It was determined that all

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# Special Registration Deadlines (cont'd)

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registrants who are not currently in a lawful status are to be referred to the investigations section for determination of whether the individual should be placed in removal proceedings. In many offices, referral to the investigations section means the person must be "taken into custody." This could mean the use of handcuffs and separation from an attorney during transit, if necessary. In some offices, a bond is required, and in other offices, registrants are released without the payment of a bond, as long as there are no aggravating factors in the person's history (for example, a criminal offense). Across the nation the bond amounts ranged from $1,500 to $10,000. Additionally, where individuals are taken into custody, many offices are processing those individuals the same day. An office-by-office summary of procedures can be found at http://www.gtlaw.com/practices/immigration/newsletter/012/item01_01.pdf.

Since the first registration period, the INS has made substantial improvements in its handling of registration. The most recent statistics show a reported 24,000 registrants, 1,169 of whom reportedly have been detained. Still, there remain many unanswered questions and there is no consistency between offices regarding what documents are needed. Generally, offices have required presentation of all immigration documents, including all I-20s for students, I-797 notices and/or receipts from the INS, and employment authorization documents. Of course, a registrant must take his passport (if he has one), photo identification, and proof of current residence. Some offices have requested credit card information and asked registrants to show all documents in their wallets. Attorneys have objected to requests for credit card and other such personal and private information, and have found that the INS dropped these requests in some cases.

Questions asked by offices vary, but tend to run among similar lines. Sample lists of questions from different offices can be found at the below websites and were compiled by AILA members:

http://www.gtlaw.com/practices/immigration/newsletter/012/item01_02.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_03.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_03.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_05.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_06.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_07.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_08.pdf
http://www.gtlaw.com/practices/immigration/newsletter/012/item01_09.pdf

While there has been progress in the organization and application of this new registration program, should you have any questions about your immigration status, you should review your case with an immigration attorney prior to going to the INS to register. You may also wish to be accompanied by an attorney in certain circumstances, and if you have any doubt about whether you have maintained status during your stay in the United States, we recommend that you consult with an attorney before going to the INS to register.

# More on SS No-Match Letters

As reported previously by GT , the Social Security Administration began to issue an increased number of no-match letters. This occurred when information regarding social security numbers presented by employees did not match the identifying information in the SSA system.

The IRS is very interested in the no match issue from a taxation standpoint. Although regulations have not been issued yet, it is believed that the IRS will begin auditing companies that have had a significant number of social security number mismatches. A formula will be determined based on the number of employees with mismatched numbers and the percentage of the workforce with problems. It is possible that the audits will begin by reviewing the 2003 and 2004 tax returns.

The IRS claims that the purpose of this program is to educate and encourage compliance. For this reason, penalizing first-time offenders or those violators who are making an effort to remedy problems is not expected to occur.

As more information is available on this issue of IRS audits, Greenberg Traurig will provide updated information.

# Healthcare Update

Recently, INS issued regulations affecting healthcare workers. While it appears that INS' goal was to clear up the confusion surrounding healthcare workers it may have unintentionally added to the confusion.

In a move to add clarity to the murky waters of healthcare workers, INS issued a memorandum that confirmed that most RN positions do not qualify for H-1B status because generally, a bachelor's degree is not required to perform the duties of the job. In the same memorandum, INS noted that certain nursing positions requiring advance knowledge may qualify for an H-1B. Positions specifically mentioned are: advance practice nurses, clinical nurse specialists, nurse practitioners, certified register nurse anesthetists and certified nurse midwives. Nurses in administrative positions, such as upper level managers in hospital administrative positions, may also qualify for H-1B status because these positions often require a bachelor's degree or a graduate degree.

By issuing regulations on December 17, 2002, the INS again attempted to clear up the confusion surrounding the nonimmigrant healthcare visa screen certificate. Unfortunately, the healthcare questions became even cloudier. The visa screen has been waived for all nonimmigrant healthcare petitions to date. There has been a perceived conflict with the NAFTA regulations. However, the visa screen is required for permanent residence applications. Although the December 17, 2002 regulations recognize the conflict, they do not clear up the confusion and apparent contradiction with the NAFTA provisions. To that end, for now, the waiver for the visa screen is still in place for nonimmigrant petitions for healthcare workers.

It is important to note that the visa screen waiver has been discretionary and could be required at anytime for all nonimmigrant healthcare workers. Furthermore, even without a formal end to the waiver of the visa screen, each consulate has discretion on this issue and may refuse to issue a visa without it.

The time it takes to obtain the certifications can sometimes be prohibitive for the nurses and employers. If the policy changes and the certification is required, which will include verification that the visa applicant is proficient in oral and written English, has obtained an education that is comparable to that of an accredited U.S. institution and has received the necessary state licenses, then something must be done to improve the efficiency of the private credentialing agencies to improve processing times and avoid unnecessary delays.

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In other healthcare news, Health and Human Services (HHS) amended its regulations regarding processing of waivers for the two year foreign residence requirement for Physicians. HHS will act as an interested governmental agency requesting a waiver if the physicians agree to practice in a medically underserved area in the country for three years.

# Consulate Closed Temporarily in Nuevo Laredo

On January 30, 2003, the Department of State Closed Nuevo Laredo US Consulate under allegations of illegal visa issuance. A DOS spokesman announced during a press briefing that the US consulate in Nuevo Laredo, Mexico had been closed in order to conduct a thorough investigation of its consulate visa operations in response to allegations that it had issued a number of individuals illegal visas. Spokesman Richard Boucher, stated that "the Diplomatic Security Service, in coordination with the Department of Justice and with the close cooperation of our Bureau of Consular Affairs, is investigating allegations that a number of individuals received visas illegally from this consulate".

# Facts and Figures from the INS for Fiscal Year 2002 -- What do the Numbers Say about the State of Immigration in the U.S.?

The U.S. Immigration and Naturalization Service released their annual report on statistics for the fiscal year 2002 in their Monthly Statistical Report for September 2002. The annual figures are in the areas of Inspection, Southwest Border Apprehensions, Immigration Benefits, Naturalization Benefits, Removals, Investigations and Asylum. Given the uncertainty caused by September 11 and the sudden increased scrutiny on individuals' immigration status, it is enlightening to review the numbers and see where the INS appears to be focusing their attention. Out of the all the statistics, the sharpest increase in applications were for naturalization. In total, the number of naturalization applications filed increased by 40% from FY 2001. This sudden surge in the number of naturalization applications filed could be attributable to the after-effects of September 11, 2001. It appears many individuals may have decided to become U.S. citizens in order to secure their status in the U.S. as well as avail themselves of the full rights of a U.S. citizen.

With the increased scrutiny, the number of denials of immigration benefits was also up an appreciable amount in FY 2002, with a total increase of 34%. Interestingly enough, there were decreases or only small increases in areas where given the increased scrutiny, one might expect there to be sharp increases as the INS reacted to fears of terrorists entering the country. Specifically, there was a decrease in the number of Southwest border apprehensions of 25% in FY 2002, an 18% decrease in the number of removals, and only a small increase of 5% in the number of individuals found inadmissible by the INS in FY 2002. A full summary of the numbers follows below:

**Inspections**

In FY 2002 the total number of inspections, 444,710,152, decreased from 510,583,046 in FY 2001. This represents a 13% decrease in the number of inspections that were performed in FY 2002. The total number of individuals that were found inadmissible went up 5% from 700,807 in FY 2001 to 733,440 in FY 2002. These numbers include individuals who were referred to secondary inspections and who withdrew from applying for entry, individuals who were paroled in, individuals who were refused entry and individuals who were referred to an immigration judge for a removal hearing. Inadmissible numbers also include expedited cases such as those in which an alien could withdraw, received an expedited removal order or was referred for a credible fear interview.

**Southwest Border Apprehensions**

Southwest border apprehensions by the U.S. Border Patrol decreased 25% in FY 2002 from 1,235,717 apprehensions in FY 2001 to 929,809 apprehensions in FY 2002. Voluntary returns were also down in FY 2002 in comparison to FY 2001. They were down 26%, from 1,191,047 in FY 2001 to 884,380 in FY 2002. Efforts were focused elsewhere.

Specifically, apprehensions of Central American individuals decreased 3% in FY 2002, from 22,515 in FY 2001 to 21,750 in FY 2002. Broken down by nationality, 2% of the Central Americans apprehended were Nicaraguan, 25% were Guatemalan, 31% were El Salvadoran, and the largest percent, 41%, were Honduran.

**Immigration Benefits**

The total number of cases for immigration benefits receipted in FY 2002 was 6,217,183, though this number does not include approximately 6,600 I-485s that were filed but for whom data had not yet been entered into the system. The number of immigration benefit cases receipted in for FY 2002 decreased by 15% from FY 2001, when a total of 7,333,338 were receipted in.

With regards to approvals of immigration benefits cases, approvals were only slightly down, from 5,606,705 in FY 2001 to 5,605,962 in FY 2002. This is a less than 1% decrease in approvals for FY 2002. The number of petitions denied increased 34% in FY 2002 from FY 2001, with a total of 615,881 immigration benefit cases denied. At the end of FY 2002, there were 4,332,221 immigration benefits pending. This number of pending cases also does not include approximately 6,600 I-485s that were filed but for whom data had not yet been entered into the system. The number of pending cases increased 6% over FY 2001 where there were 4,083,052 cases pending at the end of the fiscal year.

**Naturalization Benefits**

In FY 2002, 700,649 cases were receipted in compared with 501,646 receipted in FY 2001. The FY 2002 number does not reflect an additional approximately 6,300 naturalization cases that were filed but for whom data had not yet been entered into the system. 589,810 naturalization applicants were approved and took the oath of citizenship in FY 2002, a decline of 4% from FY 2001's total of 613,161. The number of naturalization cases denied dropped from 218,326 denials in FY 2001 to 139,779 denials in FY 2002. This was a 36% decrease. At the end of FY 2002, there were 623,304 naturalization cases pending, though this number does not reflect an additional approximately 6,300 naturalization cases that were filed but for whom data had not yet been entered into the system. This was an increase of 1% from the end of FY 2001, when there were 618,750 naturalization cases pending with the INS.

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# Facts and Figures (cont'd)

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**Removals**
The total number of removals for FY 2002 dropped 18% from FY 2001 to a total of 145,940 individuals being removed. Of those 145,940 removals, 69,580 were criminal removals, which was a decrease of 3% from FY 2001. With regards to non-criminal removals, these dropped 28% from FY 2001's total of 105,445 to a total of 76,360 removals in FY 2002. In particular, expedited removals went down 52% in FY 2002 while other types of removals increased 4% in FY 2002.

The percentage of individuals found deportable and inadmissible also dropped in FY 2002 in comparison to FY 2001. In FY 2002, 44,824 individuals were found deportable, which is down from 46,038 in FY 2001. In FY 2002, 101,116 individuals were found inadmissible, which is down from 131,278 in FY 2001.

**Investigations**
Investigations statistics include the areas of criminal alien category, employer cases, fraud and smuggling cases.

In FY 2002, the number of criminal cases that were successfully completed decreased by 2%. Criminal cases covers individual aliens convicted of a crime and large-scale organizations involved in illegal activity. With regards to employer cases, successful completion of cases was up to 1,113, a 35% increase from FY 2001's total of 823. Employer cases include investigations of employers who knowingly hire or continue to employ illegal aliens. For fraud cases, the successful completion rate of cases decreased by 43% from FY 2001, to 1,050 successful completions. Fraud cases covers instances such as entitlement fraud, marriage fraud, employer sanctions document fraud and immigration benefit fraud. In FY 2002, the successful completion of smuggling cases decreased by 25% from FY 2001. Smuggling cases covered investigations of individuals or entities who bring, harbor, transport or smuggle illegal aliens into and within the United States.

**Asylum**
The number of asylum cases filed in FY 2002 increased by less than 1% from 66,356 in FY 2001 to 66,577 in FY 2002. The number of asylum cases approved in FY 2002 dropped 5% from FY 2001 and the number of asylum cases denied in FY 2002 increased by 21%. Asylum cases that were not denied or approved but otherwise closed increased by 43% over FY 2001 to a total of 35,527. The number of asylum cases that were referred to an immigration judge increased in FY 2002 by 30%, to 18,529. At the end of FY 2002, there were a total of 303,828 asylum cases still pending with the INS, which was a drop of 6% from the number that were pending at the end of FY 2001. Of these pending asylum cases, approximately 86% of these cases are cases that may fall under the Nicaraguan Adjustment and Central American Relief Act of 1997 or the Haitian Refugee Immigration Fairness Act of 1998. The number of asylum cases still pending at the end of FY 2002 that do not fall under these two acts was around 41,400 cases.

# Protection Of Immigrant Workers by the Department of Labor in the Aftermath of Hoffman Plastic when Workers are "Undocumented"

As reported in the September 2002 edition of the *Immigration Observer*, in March 2002 the Supreme Court held that back pay cannot be awarded to undocumented workers, in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, No. 00-1595, 2002 WL 1275. The decision appears to have stripped the Equal Employment Opportunity Commission (EEOC) and the National Labor Relation Board's (NLRB) of enforcement capabilities.

In Hoffman, the Supreme Court held that NLRB lacked authority to order back pay to an undocumented worker who was laid off because of union activities, in violation of the National Labor Relations Act (NLRA). According to the Court, "federal immigration policy . . . foreclosed the NLRB from awarding back pay to [an] undocumented alien who had never been legally authorized to work." Specifically, the Court referenced laws relating to I-9 documentation and an employer's requirement to verify the identity and employment authorization of all employees. I-9 regulations forbid employers from knowingly hiring individuals who do not have employment authorization. In Hoffman, the employee had presented false documents when hired. As a result, the Court concluded that back pay for unlawful termination could not be awarded when the wages could not have been lawfully earned.

A recently released Fact Sheet from the Wage and Hour Division of the Employment Standards Administration of the Department of Labor now provides an explanation of the effect of this decision on the application of some labor laws that the Department of Labor (DOL) is charged to enforce in an effort to protect all workers. According to the Fact Sheet, the Court "only

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# Protection of Immigrant Workers (cont'd)

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interpreted one law, the NLRA." Under this reading, undocumented workers still have rights under labor laws (just not under the NLRA).

"The Department's Wage and Hour Division will continue to enforce the FLSA [Fair Labor Standards Act] and MSPA [Migrant and Seasonal Agricultural Worker Protection Act] without regard to whether an employee is documented or undocumented." The rationale for this determination is that enforcement of these laws relate to back pay for hours an employee has actually worked, under laws that require payment for such work. This is different from back pay that can be required in a claim under the NLRA where back pay is sought for time an employee would have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Basically, this means that the DOL is still willing to step up to the plate when it comes to pursuing claims against employers by any workers seeking pay for work already performed. This is an important interpretation and a victory for foreign workers.

From the DOL's statements in Fact Sheet #48, the FLSA and MSPA "provide core labor protections for vulnerable workers." By that definition alone, it is the undocumented workers throughout the U.S. who need this protection most. This is especially true at a time when the Department of Justice is initiating programs like special registration and providing local and state law enforcement with the authority to enforce federal immigration laws when they come in contact with undocumented immigrants or those who have "fallen out of status." These types of initiatives are likely to lead to fewer crimes and mistreatment being reported by immigrants and a greater fear and mistrust of local, state and federal government officials. It appears that there are not many places or many people within government agencies where an undocumented worker can turn to for protection from abuse. Hopefully, the DOL's commitment to protecting workers will transcend immigration status.

**Related Documents:**

Can The EEOC & NLRB Continue Protecting Alien Workers Regardless Of Their Immigration Status?

Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division http://www.gtlaw.com/practices/immigration/newsletter/012/item04_01.pdf

NLRB Memorandum: http://www.nlrb.gov/gcmemo/gc02-06.html

Rescission Announcement: http://www.eeoc.gov/docs/undoc-rescind.html

Reaffirmation Announcement: http://www.eeoc.gov/press/6-28-02.html

# What is New at GT?

GT Of Counsel Dawn Lurie was interviewed by various news programs including ABC News Tonight for background on the Special Registration Program. She was also mentioned in the *Washington Post*.

Also in the news, was GT Associate Cora Tekach, who currently serves as the Chair of the DC Chapter of the American Immigration Lawyers Association. Ms. Tekach appeared on the Channel 9 News in a story on Special Registration.

Greenberg Traurig's Amsterdam office officially opened in January of 2003. This office serves all of Europe, and GT's Global Immigration practice has expanded significantly with the assistance of our new European partners.

# 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 and 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 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.

# Are Your I-9's Up to Par?

Most employers know what the I-9 form looks like, and most believe they are completing the form and satisfying the regulatory requirements. Sometimes, however, a closer look at I-9 files or a small audit will reveal forms with missing or inaccurate information that can leave an employer vulnerable to fines totaling $10,000 or more. But that is not the only liability faced by employers. Depending on how the I-9 forms are completed and what questions employees are asked during the process, employers could also open themselves up to discrimination law-suits brought by employees for national origin discrimination. In fact, IRCA's anti-discrimination provisions prohibit employers of four or more employees from discriminating against certain protected individuals (including permanent residents, temporary residents, special agricultural workers, refugees, and asylees) with respect to hiring, discharging, recruiting, or referring for a fee.

The information below is intended to serve as a general review of the requirements for employers of all sizes. An internal audit is recommended for those that may have concerns about their I-9 documentation and possible liabilities.

**WHAT IS THE FORM I-9 REQUIREMENT?**
In 1986, the U.S. Congress passed the Immigration Reform and Control Act (IRCA) and enacted the I-9 employment verification requirement. IRCA was designed to discourage employment of undocumented workers and thereby discourage illegal immigration into the United States.

The Form I-9 is used to verify both the identity of all employees hired after November 6, 1986 and their eligibility to work in the United States. Employers must comply with the I-9 requirement every time they hire an employee (defined as "any person who performs labor or services in return for wages or other remuneration"). Failure to comply with the I-9 requirements can subject the employer to a variety of different civil penalties (such as monetary fines), and in some cases, criminal penalties.

**WHAT ARE THE POSSIBLE OFFENSES?**
- Failure to properly complete an I-9
- Knowingly hiring, continuing to employ, or contacting to obtain the services of an unauthorized alien
- Providing or knowingly accepting false social security cards
- Pattern and practice of I-9 compliance failure

**Other Related Offenses**
- Refusal to hire someone because of temporary work authorization
- Not accepting other valid documents that can be used in lieu of certain INS documents

**WHAT ARE THE POSSIBLE SANCTIONS FOR AN EMPLOYER?**
Failure to properly comply with immigration employment laws can result in fines totaling $10,000 or more. It is also important that an employer not demand excessive documentation, since this can lead to the employer being fined or sued for discrimination if it is proven to be intentional.

**WHEN WILL AN EMPLOYER BE REQUIRED TO USE THE FORM I-9?**
Whenever an employer hires an individual (citizen or non-citizen) as an employee, the employer is required to complete the Form I-9.

Certain individuals, however, are exempted from the I-9 requirement:
- employees hired before November 7, 1986, and continuously employed by the same employer
- employees hired for private, casual domestic work on an irregular basis
- independent contractors, for whom the employer has not set work hours, provide tools for the job, or does not have the authority to hire and fire
- individuals provided to employers by entities providing contract services, such as temporary agencies (the agency/contractor would be considered the "employer")

**HOW DOES AN EMPLOYER COMPLY AND COMPLETE THE FORM I-9?**
There are three important sections on the Form I-9 that must be accurately completed in order to comply with the I-9 requirement:

**Section 1:**
The employee must complete Section 1 at the time of hire (no later than the date the employee starts). It is the employer's responsibility to assure that the employee fills in the correct information and signs/dates the form. Failure to provide accurate information on the I-9 can make the employer liable.

Within section 1, employees must indicate their current status, either as citizens/nationals of the U.S., lawful permanent residents ("green card holders"), or aliens eligible to work with temporary work authorization.

**Section 2:**
The employee must present original documents (not photocopies) that establish identity and employment eligibility. The employee may present the necessary documentation in one of two different ways:

(1.) Present one document from List A on the I-9 form, establishing both identity and employment eligibility, OR
(2.) Present one document from List B (establishing identity) and List C (establishing employment eligibility) on the I-9 form.

An employer may not specify which documents an employee is required to present. Such a requirement can

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# Are Your I-9's Up to Par? (cont'd)

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be considered "document abuse" and is an unlawful immigration-related employment practice. After reviewing the employee's documentation, the employer must fully complete Section 2 within three business days of the employee's start date. An employer must accept documentation presented by the employee if the documents reasonably appear to be genuine on their face.

If an employee is hired for less than three business days, both Sections 1 and 2 must be completed at the time of hire.

**Section 3:**
Updating and Reverification
Employers must ensure that the employees maintain employment eligibility by renewing expiring status that the employee indicated in Section 1. Additionally, employees must renew expiring employment authorization documents presented in Section 2. Identification documents, however, do not need to be reverified. The employer must complete 3, Updating and Reverification, before the employee's relevant expiration date.

An employer may be required to reverify employment eligibility for a particular employee when an employee's work authorization document has expired or when an employee is rehired within the retention period of his/her original I-9 form, but the basis of employment authorization has changed or expired. Reverification on the I-9 form must occur before the date of the expiration date.

Reverifying Work Authorization for Current Employees:
An employer can reverify a current employee's employment authorization on the original I-9 form or a new I-9 form, if necessary. If a new form is used, the employer should note the employee's name in Section 1, complete Section 3, and attach the new form with the original I-9.

The employee must present documentation showing an extension of his/her employment authorization or new work authorization.

Reverifying or Updating Work Authorization for Rehired Employees

When an employer rehires an employee, the employer must verify that the employee still possesses work authorization. The employer may complete a new I-9 form or reverify/update the original form by using Section 3.

*Update:* If a rehired employee's basis for employment eligibility has remained the same as indicated on the I-9 form, the employer must perform an update. When updating rehire documentation, employers should record the rehiring date, and sign/date Section 3. If the employer needs to use a new I-9 form, he/she should write the employee's name in Section 1 and attach the new form to the original I-9 form.

*Reverify:* If a rehired employee's basis for employment eligibility has changed/expired, the employer must reverify. In order to reverify a rehired employee, the employer must record the following on the I-9 form: a) date of rehire b) document title, number, and expiration date of reverification documentation from the List A or C originally presented, and c) sign and date Section 3.

*Suggestion:* It is useful to create a system that will remind the employer when an employee's work authorization document is due to expire. Early notice of expiration will give employees adequate time to renew authorization. Employees should reapply for work authorization at least ninety days before the expiration date.

While being aware of this information is helpful in guiding employers to the proper completion of I-9 documents and hopefully limit liabilities, there are many other issues that should be considered during this process including:

What if an employee is unable to provide the documentation within three days of his/her employment start date?

- What I-9 records should an employer keep on file and for how long?
- Should we copy the documents that are provided for verification?
- What can we do if forms I-9 are lost, destroyed, or not maintained to begin with?
- Should we maintain a separate file for forms I-9?

To ensure that all concerns and issues are addressed we also recommend regular audits of files. For Form I-9 processing please contact GT Business Immigration Group at imminfo@gtlaw.com.

The I-9 employment verification process is an integral part of an employer's compliance with U.S. Immigration Laws. As human resource managers recruit and hire foreign employees to meet their companies' needs, they must also ensure that these employees are authorized to work in the United States. The involvement of immigration counsel can generally help employers limit liabilities by providing comprehensive legal advice in order to make the I-9 process easier and more efficient for human resource managers.

# INS Proposes Rule to Collect More Information on Passengers from All Commercial Carriers

As a result of a mandate in the Enhanced Border Security and Visa Entry Reform Act, the INS issued a proposed rule published in the Federal Register on January 3 laying out the requirements for electronic transmission of more in-depth passenger manifests from all commercial carriers entering and departing the U.S. This regulation would apply only to carriers entering and departing the U.S. and not to domestic carriers. However, unlike in the past, the list now includes information on all passengers, including U.S. citizens, U.S. permanent residents and in-transit passengers.

In the past only information on non-immigrants was given to the INS. In addition, the proposed regulation brings up some privacy concerns regarding the required release of this information and the type of information that is requested. In particular, there is no indication how the INS will use this information, who will have access to it, or if this information can somehow be used to track individuals travel patterns. In addition, there is a requirement that airlines would also have to collect "other information" as required by the Attorney General, Treasury Secretary and Secretary of State. This requirement in particular is troublingly vague and open-ended on what type of information a passenger would have to submit in order to be able to board a commercial carrier and travel internationally. According to the INS News Release on the passenger manifest requirements, this information is supposed to "help INS verify the identities of individuals being transported, while ensuring enforcement of U.S. immigration laws," but it is unclear how getting this information, especially from U.S. citizens, would help enforce immigration laws.

Under the current rule, passenger manifests are submitted in the form of individual I-94 forms from each passenger not exempt from manifest requirements. The I-94 card consists of one portion that is collected by the INS at the time of arrival and another portion that the departure carrier completes at the time of departure and submits to the Service. Departing carriers currently have 48 hours to submit I-94 forms to the INS. Currently U.S. citizens, U.S. lawful permanent resident aliens, immigrants to the U.S. and specific in-transit passengers are not subject to the manifest regulations and do not have to complete I-94s. Aircraft and vessels arriving directly from the U.S. from Canada, or departing to Canada, and aircraft and vessels arriving in the U.S. Virgin Islands directly from the British Virgin Islands or departing from the U.S. Virgin Islands directly to the British Virgin Islands, also do not have to submit any information on passengers. Finally, for crew members, arrival and departure manifests may be submitted for vessels and aircrafts.

Under the proposed rule, commercial carriers would be required to submit electronically an in-depth passenger manifest on all passengers and crew members to the INS before arrival to the U.S. regardless of where they are coming from. In addition, except in certain cases, carriers would also be required to provide manifest information before departing the U.S. The following information would be required to be collected from all passengers:

1) complete name
2) date of birth
3) citizenship
4) sex
5) passport number and country of issuance
6) country of residence
7) if applicable, U.S. visa number, date and place of issuance
8) if applicable, alien registration number (A-number)
9) address while in the U.S.
10) other information that the U.S. Attorney General, in consultation with the Secretary of Treasury and the Secretary of State determine necessary.

For arrival manifests, this information would have to be submitted to the INS no later than 15 minutes after an airplane departs from the last foreign port or place while the crew member manifest would have to be submitted in advance of departure. For vessels on a voyage 96 hours or more, they must submit the crew member manifest and passenger manifest at least 96 hours before entering the U.S. port or place of destination. For vessels on voyages less than 96 hours but not less than 24 hours, crew member manifests and passenger manifests must be submitted not less than 24 hours before entering port. For vessels on a voyage less than 24 hours, crew member manifests and passenger manifests must be submitted before departure from the port.

For departure manifests, carriers would have to submit passenger manifests and crew member manifests no later than 15 minutes before the flight or vessel departs the U.S. In cases where additional crew members or passengers board after the original manifests are sent, an updated manifest must be transmitted to the INS no later than 15 minutes after the flight or vessel has departed from the U.S.

INS may impose fines on carriers for submitting incomplete or inaccurate arrival or departure manifests or for refusal or failure to provide manifest information as required. Fines are $1,000 per person for whom inaccurate information is provided or for each person for whom the manifest information is not prepared as described by the regulations. In addition, the INS may impose fines and if manifests are not submitted in a timely manner as prescribed in the regulations.

Interestingly, during meetings with the Washington D.C. area port director, it was confirmed that all passengers arriving on international flights into Dulles currently undergo information checks prior to landing. Full passenger manifests are provided to the Inspections team before arrival. Namechecks are run through various databases which should reveal a criminal history and outstanding warrants, as well as prior immigration history. We assume that this procedure is in place at all U.S. ports of entry.

# Issuance of Social Security Numbers - Not a Precise Science

Beginning September 2002, the Social Security Administration ("SSA") initiated a new procedure to verify the identity and immigration status of applicants with the Immigration and Naturalization Service ("INS"). Following the call for tighter security after the September 11 attacks, national security concerns regarding use of false social security numbers came to the forefront.

As a result, today, before a social security number is issued to a foreign national, their immigration status is checked with INS. A computer system is used by SSA that allows it to check limited information which is provided by INS regarding the status of individuals.

Recent reports indicate that it may take 11 to 13 working days for the information the INS inputs to be available to the SSA after an individual enters the U.S. While this may seem efficient, it has also been noted that the information in the database is not always correct. In April 2002, the Department of Justice admitted that the unreliability of the database continues to be a problem.

When incorrect information has been entered into the database, the SSA has no way of knowing of the data entry error. However, as a result of the incorrect information, SSA will not issue the social security number. Even though the applicant may present an original approval notice, passport, I-94 card, the SSA will not issue the number. Attempts to resolve the problem are quite difficult as SSA has no mechanism with which to verify the information in the database. Incorrect information can include and individual's date of birth, country of birth or the spelling of a first or last name.

The protocol for the SSA when it cannot confirm the immigration status in the database is to check a second database once the individual has been in the country more than 10 days. INS has 20 working days to respond to the second database inquiry. If no response is received after 20 working days, the SSA is instructed to contact the local INS office to verify the immigration status. If the local INS office does not respond, the SSA regional office will contact the INS local office. At this point, the initial application may have been delayed for well over a month.

The implications of incorrect data entry are severe for the individual. Spouses and dependents with work authorization have difficulties complying with employer payroll procedures, companies have difficulties with ensuring tax provisions and deductions are appropriately applied. Outside of the work environment, missing the number also affects the individual's ability to function within the U.S. to the point of not being able to even obtain a driver's license. Individuals have also reported difficulty obtaining apartment leases and mortgages without social security numbers. Still other individuals have indicated difficulty opening personal and corporate bank accounts without social security numbers.

Understandably, the task of collecting and entering data into the database is time-consuming and mistakes occur. However, SSA should develop procedures that do not result in the applicant being punished by a mistake made on the part of INS. When an individual presents valid documents in person when applying and the database contains conflicting information, more of an effort should be made to resolve the situation at the SSA office rather than relying on a flawed electronic system for almost a month.

# Immigration News

**Business Immigration Group:**

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