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GT Business Immigration Newsletter

March/April 2003

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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.

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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URGENT NEWSFLASH.....

The Department of State (DOS) has announced the closure of U.S. embassies and consulates due to security concerns related to the U.S. military action in Iraq. The DOS did not order the closings; the embassies and consulate decided independently at each post. Below please find the list of the cities where embassies and consulates are closed at this time. Please note that it is unclear how long these posts will remain closed to the public; and there is a possibility more U.S. embassies and consulates will be added to the list.

- Almaty, Khazakstan
- Amman, Jordan
- Australia (all posts)
- Bucharest, Romania
- Buenos Aires, Argentina
- Cairo, Egypt
- Caracas, Venezuela
- Damascus, Syria
- Istanbul, Turkey
- Jerusalem, Israel
- Kabul, Afghanistan
- Lagos, Nigeria
- Nairobi, Kenya
- Oslo, Norway
- Pakistan (all posts)
- Paris, France
- Riyadh, Saudi Arabia
- Savanna, Yemen
- Skopje, Macedonia
- South Africa (all posts)
- Surabaya, Indonesia
- Tel Aviv, Israel

GT will continue to monitor the situation and provide updates as they become available.

The End of the INS, the Birth of the BCIS

March 1st marked an important event in history; the Immigration and Naturalization Service ceased to exist and its functions were officially transferred to the Department of Homeland Security (DHS). We have been told that the transition is expected to bring about no immediate changes to the non-immigrant, immigrant, and citizenship application process. The government announced that all visa regulations and immigration services will remain intact. The Services' function of what constituted the INS was transferred to the Bureau of Citizenship and Immigration Services (BCIS). The INS website is no longer active, and immigration services information is now located on the BCIS website at www.bcis.gov or www.immigration.gov. The information found on the new website is presented in very much the same way as the information was presented on the INS website. However, we have noted an enormous amount of broken links on the website and can only hope that these issues will be addressed shortly.

The Acting Director of the BCIS, Eduardo Aguirre, comes to the BCIS from the position of First Vice President and Chief Operating Officer of the Export-Import Bank of the United States. In the new post as Acting Director, Mr. Aguirre will report directly to the Deputy Secretary of the DHS. It is reported that authorization has been given to Mr. Aguirre to institute a pilot program focused on eliminating the application backlog.

A new position included in the BCIS is the BCIS Ombudsman, who will report directly to the Deputy Secretary and will be responsible for assisting individuals and employers that are experiencing problems with the BCIS. This position has not yet been filled.

The enforcement side of the former INS was transferred on March 1st to the Bureau of Border and Transportation Security, which is split into two bureaus: the Bureau of Customs and Border Protection (BCBP) and the Bureau of Immigration and Customs Enforcement (BICE). Asa Hutchinson was sworn in as the Under Secretary for Border and Transportation Security on January 29th. He heads these two bureaus and is responsible for enforcement along the borders as well as aviation security. The BCBP is headed by the Commissioner of Customs, Robert C. Bonne, and will incorporate the border protection and inspection functions of the former INS. The BICE is headed by the Assistant Secretary (designee), Michael Garcia, and will include the investigative and enforcement arm of the former INS. Local directors have also been named.

In an action to work with the new BCIS, the U.S. Department of State initiated a new effort to better communicate changes to U.S. visa procedures. The initiative, titled "Secure Borders. Open Doors" will initially utilize a new web-site and a customizable brochure. Additional materials, to be developed in consultation with U.S. embassies and consulates around the world, will be produced and distributed as needed.

Assistant Secretary of State for Consular Affairs Maura Harty asserts, "We want to ensure that the visa application process is straightforward for people who want to come to the U.S. to study, visit and conduct business and that it prevents the entry of those who would do us harm."

Heightened concerns about security in the wake of the September 2001 terrorist attacks and a subsequent U.S. government reorganization to address homeland security have led to changes in the visa policies.

In general, most visitors to the United States have to obtain a visa. While much of the process remains the same, applicants should allow extra time for the visa clearance process when planning travel to the United States.

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The End of the BCIS (cont'd)

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"Secure Borders. Open Doors" is designed to streamline the visa process for applicants at U.S. embassies and consulates around the world. The initiative's materials, which will be translated into local languages, include step-by-step instructions on applying for a visa, with special emphasis on the three main categories of visitors: business, education and tourism. The materials also include a new web portal containing background, step-by-step instructions on applying for visas, and links to Department of State web pages with updates on policy and procedural changes.

The "Secure Borders. Open Doors." web site is located at:

www.UnitedStatesVisas.gov.

To view the entire article, go to:

http://www.gtlaw.com/practices/immigration/newsltter/013/item01.htm.

What are the Immigration-Related Consequences of Laying Off an H-1B Employee?

In the tough economic environment in which employers find themselves today, many businesses are looking to reductions in workforce or other means to cut costs. For companies that employ foreign nationals, certain measures inevitably impact the immigration processes of a company, as well as affecting the foreign national employee. This month's article focuses on the impact of such workforce reductions on the H-1B employees. Next month's article will address the impact of the reductions on the labor certification and immigrant petition process.

Of initial concern for many employers is what becomes of the H-1B employee if his or her employment is terminated? For an H-1B employee whose employment is terminated, he or she is considered to be out of status upon termination. At the time that a foreign national falls out of status, he or she is normally expected to depart the United States. There are some circumstances, however, in which such a foreign national may remain in the United States.

First, it is important to dispel a common myth about a "ten-day rule." Some people think that a 10-day "grace period" is given to new H-1B employees whenever employment is terminated. In fact, the law provides the 10 days of additional time only at the end of the validity period of the status as granted by the Immigration and Naturalization Service (INS), (now the Bureau of Citizenship and Immigration Services, or BCIS), and as appears on the approval notice and/or I-94 Departure Record (given to every foreign national upon entering the U.S.). Incidentally, the employee may also enter the United States 10 days prior to commencement of employment.

Nonetheless, the BCIS has in the past generally provided a "reasonable period" for the filing of a petition to change to a new employer or to a different visa category when an H-1B employee is terminated. While this "reasonable period" has now almost disappeared under a more frequently utilized policy of "zero tolerance," it is still within the discretion of the BCIS to approve such an application for the foreign national and allow him to remain in the United States. Additionally, the BCIS had indicated in the past that a 60-day period MAY be considered a "reasonable period" for the filing of a new H-1B petition by a new employer for the foreign national. Beware, however, that this 60-day period is not an official regulation and serves as general guidance. Only current domestic conditions coupled with war in Iraq make it appear unlikely such a 60 period will be offered.

In some cases, a foreign national who is unable to find another employer may be eligible to apply for a change to a different status, such as student, tourist, or other classification. Doing so can be a rather complicated process because of the specific and stringent rules governing changing to certain categories, and to the particular requirements of the new classification that is requested. In either case, whether changing to a new classification or seeking a new H-1B petition with a new employer, an H-1B employee should review the specific circumstances of his or her case with a knowledgeable immigration attorney.

An employer that terminates an H-1B employee before the end of the validity period on the approved H-1B petition must pay the employee "the reasonable costs of return transportation" of the foreign national to return abroad. This "reasonable cost of return transportation" obligation does not apply in cases where the H-1B employee's employment is terminated at the end of the validity period. Where an employer is terminating employment prior to the expiration of the validity period, many experienced immigration attorneys counsel their clients to provide an airline ticket for

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What are the Immigration-Related Consequences? (cont'd)

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the employee to depart the United States, rather than providing the employee with a payment. In this way, the employer's records can clearly show that return transportation costs were provided in accordance with regulations. In cases where the foreign national has found another position or does not choose to depart, we suggest the company have the foreign national sign a statement that verifies he or she has turned down the return transport offer.

Additionally, an employer MUST notify the BCIS of termination of the H-1B foreign national's employment. Only when that notification is filed is the employee's employment considered "terminated" according to U.S. Department of Labor (DOL) regulations. Where an H-1B's employment is not considered to be "terminated," the employer is liable to pay the employee the required wage, as attested to in the H-1B petition until termination is established.

Further, an employer cannot "temporarily" terminate an H-1B employee's employment, expecting to hire him or her again when work picks up. That type of situation is considered "benching" by the DOL. If a situation is considered a benching, the employer may be obligated to pay back wages and penalties. Thus, employers must document lay-offs very clearly in company records. Employment must be terminated and the Labor Condition application revoked.

When considering taking these measures, employers must be alert with respect to employment law issues, including the anti-discrimination provisions of Title VII and other state and federal laws. It is recommended that employers consult with employment law counsel. For example, employers must be careful about providing greater or additional benefits to H-1B employees, compared to what is provided to U.S. employees. Additionally, cutting salaries of U.S. workers, but not the salaries of H-1B workers, may result in problems relating to treating H-1B employees more favorably than U.S. employees. The reverse is obviously true. There are strategies and issues to consider regarding the revocation of the actual H-1B petition.

In conclusion, before implementing a reduction in workforce, it is best to consult with your immigration and employment attorneys to develop an appropriate solution. Greenberg Traurig has a top team of such professionals located around the country to assist you.

New Visa Requirements for Landed Immigrants of Canada

On March 17, 2003, a new rule became effective revoking a previous and long-standing regulation that has allowed certain permanent residents of Canada and Bermuda ("landed immigrants") who are citizens of British Commonwealth countries to enter the United States without a passport or visa. Nationals of Ireland and British Commonwealth countries who reside in Canada are affected by this change.

British Commonwealth countries include: Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Cyprus, Dominica, Fiji Islands, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Swaziland, The Bahamas, The Gambia, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, Zambia, and Zimbabwe.

This action is viewed as an effort to heighten security at the U.S. borders. Foreign nationals affected by this change will be required to present a passport and a valid visa when applying for admission into the United States. Canadian citizens and citizens of the Overseas Territory of Bermuda will retain their current privileges and will not be required to present a passport and a visa to enter the United States.

To view the entire article go to:
http://www.gtlaw.com/practices/immigration/newsletter/013/item03.htm

Extension Deadlines for Special Registration Groups 3 & 4

Special Call-In Registration Procedures for Group 3

Attached is the BCIS Fact Sheet for nationals and citizens of Pakistan and Saudi Arabia (Group 3 in the Special Call-In Registration Program). Special registration applies to male nationals or citizens of Pakistan or Saudi Arabia who were inspected by the BCIS and admitted to the United States as a nonimmigrant on or before September 30, 2002, were born on or before January 13, 1987, did not have an application for asylum pending on December 18, 2002, and will be in the United States at least until February 21, 2003. The registration period for nationals and citizens of Pakistan and Saudi Arabia who are subject to the Special Registration program ran from January 13, 2003 until February 21, 2003. If you have not registered but think you should, contact an immigration attorney. For more details on the Special Registration program link to the GT Business Immigration Group website at: http://www.gtlaw.com/practices/immigration/newsletter/013/item04_01.pdf

Special Call-In Registration Procedures for Group 4

Attached is the BCIS Fact Sheet for nationals and citizens of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait (Group 4 in the Special Call-In Registration Program). Special registration applies to male nationals or citizens of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait who were inspected by the BCIS and admitted to the United States as a nonimmigrant on or before September 30, 2002, were born on or before February 24, 1987, did not have an application for asylum pending on January 16, 2003, and will be in the United States at least until March 28, 2003. The registration period for nationals and citizens of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait who are subject to the Special Registration program runs from February 24, 2003 until March 28, 2003. For more details on the Special Registration program link to the GT Business Immigration Group website at http://www.gtlaw.com/practices/

To view the entire article, go to: http://www.gtlaw.com/practices/immigration/newsletter/013/item04.htm.

Tysons Foods Acquitted

On March 26, 2003, Tyson Foods was acquitted of all charges in the case brought against them by the U.S. Government. A federal jury acquitted Tyson Foods and three of its managers of conspiring to bring illegal immigrants from Latin America to work in their poultry plants. Immigration practitioners and labor leaders have closely followed the case as it focused on the recruitment, employment and treatment of illegal immigrants. Many have alleged that many large companies engage in this practice in an effort to meet staffing needs in various industries for hard-to-fill low-skill and low-wage jobs.

The trial against Tyson Foods Inc. opened February 6, 2003 in U.S. District Court with the U.S. prosecutor charging that in the 1990's, Tyson Foods managers knowingly employed illegal workers for low-paying jobs at their processing plants around the country as part of an on-going scheme. The government claimed that Tyson actively imported and hired illegal workers as a way to keep wages low and ensure that their plants had enough workers. In addition to the company, two Tyson managers and a third executive who were co-defendants in the suit, were acquitted. Two other Tyson managers had already pleaded guilty to conspiracy charges and were witnesses for the prosecution.

As part of the case, the government was looking to seize millions of dollars from Tyson, claiming that the company illegally gained from employing illegal workers. The government's claim was based on a rarely used forfeiture claim. Tyson also stood to lose several government contracts. The initial figure touted by some officials was $130 million. If Tyson had been found guilty, in addition to any money that the government seized, the company could have lost government contracts. The individual managers faced jail time and fines if found guilty. Convictions on the charge of conspiring to defraud and obstruct enforcement of immigration laws carries a maximum sentence of five years in prison and a $250,000 fine.

The defense's winning argument appeared to be that none of the evidence linked their client to a crime. While, company officials may have been mentioned by those who pleaded guilty or those who were taped during the investigation, none of them were ever directly implicated and those who pleaded guilty were rogue employees. Tyson also claimed that agents of the Immigration and Naturalization Service (now the Bureau of Citizenship and Immigration Services) utilized entrapment techniques by repeatedly seeking meetings with Tyson officials and insisting that the company strike a deal to bring undocumented workers into the United States. Even before the case went to the jury, Judge R. Allan Edgar dismissed 24 of 36 counts for lack of evidence. The dismissed counts included government claims that Tyson had tried to smuggle workers into the United States.

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The case is significant as it marked the first time such a case had been brought against a large company like Tyson. With a large workforce and very high turnover, Tyson has had a difficult time keeping workers, as have many other companies in similar situations. In the past, the government targeted the smugglers bringing aliens to the U.S. or smaller employers who hired undocumented aliens. The case is also significant based on the large amount of money the government was seeking. The fact that Tyson was acquitted may quell the fear of some larger employer fearing a new trend by the government to turn more of its attention to larger employers in an effort to ferret out other instances where there are indications of an employer knowingly hiring illegal aliens. However, in light of increased security and concerns as our nation continues to battle terrorism fears and the push to enhance security at our borders intensifies, the government may not be giving up so easily.

To view the entire article go to: http://www.gtlaw.com/practices/immigration/newsletter/013/item05.htm

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 Lurie at luried@gtlaw.com for further information.

Essential Worker Information

GT is extremely involved in the legislative and regulatory aspect of changes to current programs and a new guest worker program. GT is working closely with Congressional liaisons and the business community to implement a better program. 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.

What's New at GT?

GT Of Counsel Elissa McGovern appeared on a recent edition of Maryland Public Television's "Nightly Business Report" to discuss increased security measures for visa issuance. This piece aired to 270 PBS stations (yielding approximately 1,000,000 media impressions in the U.S.) and by satellite in 125 countries. Ms. McGovern was also interview in *The Financial Times.*

The Chicago Tribune interviewed Laura Foote Reiff on the topic of how immigration restrictions contribute to a shortage of essential workers in the U.S. Dawn Lurie was interviewed by several Washington Post reporters for background on Special Registration issues. Ms. Reiff also served as the Chair of the American Immigration Lawyers Association (AILA) Mid-year Conference. Finally, she was nominated to run for a position on the Board of Governors for AILA.

Immigration News

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