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E-Filing and Online Services Offered by the BCIS

The U.S. Department of Homeland Security's Bureau of Citizenship and Immigration Services (BCIS), formerly the Immigration and Naturalization Service (INS) is working to implement its latest round of technology initiatives. The BCIS launched a limited electronic filing or "e-filing" program on May 29, 2003. Designed to help facilitate the more than seven million applications received annually by the BCIS, this newly designed technology is currently being tested on applications for employment authorization and applications for the replacement of green cards (forms I-765 and I-90).

Attorneys at GT have taken advantage of e-filing and have commented on several problems in the system including not being able to save information - even when the system is busy and will not accept a filing. Additionally, credit cards are not currently accepted, you must input banking information which makes the process cumbersome for law firms.

This initiative serves as a follow up to last year's successful launch of "Case Status Online" which provides the ability for anyone with a BCIS receipt number to check the status of their pending case online. The BCIS estimates that more than 30,000 inquiries are made through this e-service daily, providing a user-friendly alternative to the long waiting periods and busy signals which historically greet those seeking case status information.

However, this new technology is designed to do much more than simply provide around the clock filing and tracking capabilities. The e-filing program will also include the collection and storage of the applicant's digital signature, photograph and fingerprints allowing the BCIS to produce immigration documents with special security features as well as to store this biometric information for use in verifying the applicant's identity well into the foreseeable future.

The BCIS plans to expand the e-filing initiative to include the following forms over the next few years:

- Form I-129, Petition for Nonimmigrant Worker
- Form I-131, Application for Travel Document
- Form I-140, Immigrant Petition for Alien Worker
- Form I-539, Application to Extend/Change Nonimmigrant Status
- Form I-821, Application for Temporary Protected Status
- Form I-907, Request for Premium Processing

Further news on technical advances-Machine Readable Passport and the Visa Waiver Program

A recently released Department of State (DOS) cable reminds consular posts that beginning October 1, 2003, all Visa Waiver Program (VWP) travelers must present a machine-readable passport in order to enter the U.S. visa-free. This change affects only visa waiver travel. Individuals who are already applying for visas at U.S. consular sections are not required to obtain machine readable passports, regardless of the category of visa being sought. Because many expatriates from VWP countries travel on passports that were issued abroad and are not machine-readable, the DOS expects consular posts to see an increase in the number of nonimmigrant visa applications from VWP nationals who do not have machine readable passports and will no longer be able to travel without a visa.

The DOS has asked all consular posts, including those in non-VWP countries, to develop an outreach strategy to the travel industry, the media, and the VWP traveling public. Consulates in the VWP countries will not have direct contact with the VWP public as they will not apply for visa stamps unless required to do so—or turned back once in the U.S. because their passports are not compliant. Most VWP countries began issuing machine readable passports in the early or mid-1990s. Some countries, notably Switzerland, Italy, and Spain, may find that significant portions of their traveling public will need either a replacement passport or a visa stamp to travel to the U.S. This change includes all categories of passports— tourist, diplomatic, and official. Many diplomatic and official passports currently valid for VWP travel are not machine-readable and the bearers will need a visa after October 1, 2003.

Did You File an Extension or Change of Your Status? Are You Sure You Are Not Accruing Unlawful Presence?

On April 21, 2003, the Bureau of Citizenship and Immigration Services (BCIS) released an internal memo discussing and clarifying its interpretation of "period of stay authorized by the Attorney General" in the context of determining whether a foreign national has accrued "unlawful presence" and the meaning of maintenance of "status" while in the U.S. When or how unlawful presence is accrued is critical due to the fact that time spent in the U.S. unlawfully can potentially bar a foreign national from obtaining any other lawful status in the U.S., as well as from obtaining a visa from a U.S. consulate or embassy abroad to enter the U.S.

Generally, when a foreign national is in the U.S. and his or her status is about to expire, as long as an extension of status or change of status request is filed before the current status expires, he or she may remain in the U.S. while the request is pending without accruing "unlawful presence." Originally, this tolling period was limited by regulation to 120 days. However, due to the fact that BCIS processing times often exceed 120 days, the BCIS implemented a revised policy in March 2000 extending the tolling period from 120 days to the length of time the request is pending at BCIS. It is very important to note that this tolling period applies only to those whose I-94 cards expired while the extension or change of status was pending.

The BCIS memo basically reiterates and clarifies the distinction between maintaining "status" and "period of stay authorized by the Attorney General." This is important because for an extension of status or a change of status to be approvable, the applicant must have maintained his or her "status" prior to filing. An applicant's "status" expires on the date stated on his or her I-94 arrival/departure card issued at the port of entry or issued by the BCIS subsequent to later filed petitions. After the expiration of the I-94 card the individual will be considered to be "unlawfully present" in the U.S. Therefore, when filing an extension or change of status request, it is not enough to prove that the individual was in the U.S. during a "period of stay authorized by the Attorney General," there must be a showing that the request was filed before the individual's "status" expired.

For example, in a typical factual scenario, John Smith a Brazilian citizen enters the U.S. in B-1 status as a visitor for business on January 1, 2003 and his I-94 card is stamped with an expiration date of July 1, 2003. This means that he would have to leave the U.S. on or before July 1, 2003 to avoid accrual of unlawful presence. However, if Mr. Smith finds an employer who sponsors him for an H-1B, if the H-1B petition, with a request for a change of status from B-1 to H-1B, is filed on or before July 1, 2003, Mr. Smith will be authorized to stay in the U.S. until the BCIS makes a final decision. During this time Mr. Smith does not accrue unlawful presence. However, from July 2, 2003, Mr. Smith is no longer "in status." This means from that date he is no longer eligible for a change of status or extension of status request filed after his status has expired. If the BCIS ultimately denies the petition, then Mr. Smith will begin accruing unlawful presence from the date of denial and should depart the U.S. in a timely fashion, there is no grace period. In addition, to avoid reentry bars he should depart before accruing 180 days of unlawful presence.

The importance of the BCIS distinction becomes apparent when the factual scenario becomes more complex. In Mr. Smith's case, for example, if the BCIS issues a request for evidence that signals a possible denial of the H-1B, Mr. Smith may then decide to also file a request to extend his B-1 status just in case the H-1B is denied. If his extension request for the B-1 is filed before July 1, 2003, and the H-1B is later denied he can lawfully remain in the U.S. while he waits for a final decision to be made on this new B-1 extension request. However, if Mr. Smith files the B-1 extension anytime after July 1, 2003 while the H-1B is pending, then he did not file this request while he was in "status." This means that this B-1 extension does not provide him with a tolling period that was provided with the timely filing of the H-1B change of status request. Therefore, when the H-1B is denied, he will begin accruing unlawful presence as of the date of denial regardless of the fact that he has a B-1 extension pending at BCIS.

When strategizing on the filing and timing of petitions, it is very important to understand the distinction between maintaining "status" and "lawful presence." Otherwise, the foreign national may risk filing applications that are not approvable at the time of filing for failure to maintain "status," which in turn could jeopardize his or her eligibility for immigration benefits from the BCIS or the Department of State. Maintaining an open dialogue with immigration counsel while making such decisions is very important to ensure that all parties understand the implications of status expiration dates and requests filed with the BCIS.

Obtaining Social Security Cards for Foreign Nationals

Generally, if a foreign national is in the U.S. in valid nonimmigrant status and in a classification that provides employment authorization, that individual will be able to obtain a Social Security Number (SSN). This includes individuals in H-1B, O, P, L, E or TN status as well as F-1 students who have obtained work authorization. Any dependents of that individual, however, will not be issued a number.

Effective March 1, 2002, the Social Security Administration (SSA) will no longer assign Social Security Numbers when the sole reason for needing an SSN is to comply with a state statute or organizational policy that requires an SSN. This includes issuance of a driver's license, health insurance policies, bank accounts, etc. Basically, the SSA stopped issuing social security numbers to foreign nationals who requested them in order to obtain a driver's license or obtain other benefits. This policy change has hindered immigrants without work authorization from obtaining driver's licenses, opening bank accounts and using other services for which a social security number is 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***: You 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 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.

For those who are not eligible for an SSN, an individual Temporary Identification Number (ITIN) can be obtained for tax purposes. Due to the SSA's policies on who is eligible for a SSN, this number may also assist in obtaining other items and benefits.

What is an ITIN?

An ITIN is a tax processing number only available for certain nonresident and resident aliens, their spouses, and dependents who cannot get a Social Security Number (SSN). It is a 9-digit number, beginning with the number "9", formatted like an SSN (NNN-NN-NNNN).

How do you apply for an ITIN?

Form W-7, IRS Application for Individual Taxpayer Identification Number, is used to apply for an ITIN. To obtain an ITIN, you must complete this form which requires documentation substantiating foreign/alien status and true identity.

The form along with the documents may either be sent by mail to the Philadelphia Service Center, presented at IRS walk-in offices, or processed through an Acceptance Agent authorized by the IRS.

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/.

Global Visa 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

Greenberg Traurig is extremely involved in the legislative and regulatory aspect of changes to current programs and a new guest worker program. Greenberg Traurig 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.

Misuse of L-1B Visa Category?

In the past, the GT Newsletter has discussed the availability of L Visas (intra-company manager or Executive visas). U.S. companies with international operations are eligible to bring foreign workers to the U.S. to perform work either as multi-national managers or executives (L-1A) or as a specialized knowledge employee (L-1B). Recent allegations of misuse of the L-1B visa category not only jeopardizes U.S. workers but also the L-1B visa category.

Specialized knowledge is defined in immigration regulations as special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interest and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures. Further guidance suggests that specialized knowledge is described as a level of knowledge which must be different from or surpass the ordinary or usual knowledge of an employee in the particular filed, and must have been gained through significant prior experience with the petitioning organization. Additionally it is noted that a specialized knowledge employee must possess an advanced level of expertise in his or her organization's processes and procedures or special knowledge of the organization which is not readily available in the U.S. labor market.

The L-1B visa category is now allegedly being stretched by some companies to include foreign workers in the IT staffing industry. Foreign workers are entering the U.S. as L-1B employees and being assigned to IT/software projects at work sites of customers of the transferring company. These offsite projects for customers seemingly have no direct relationship to the specific company or its business and appear to be a simple contract labor arrangement. The L-1B program is potentially enticing to IT staffing companies as there is no prevailing wage requirement as required by the H-1B program, however, such misuse places the category at risk of being attacked by restrictionists.

There are signs that both the Department of State and the Department of Homeland Security are scrutinizing L-1B petitions on the foreign national's specialized knowledge, maybe in part due to the recent publicized misue of the category. This has resulted in a recent flood of Requests for Evidence ("RFE's) as well as delays and denials of pending petitions.

Interviews to be Required for Almost all Nonimmigrant Visa Applicants

Confirming what has long been rumored, the State Department issued a cable officially on May 21, 2003 amending the regulations regarding visa issuance to severely curtail the discretionary issuance of visas without a personal interview. In the past, the regulations granted consular officers discretionary power to waive the requirement for an interview for nonimmigrant visa applicants. The change in the regulations curtails this discretion and allows for a waiver of an interview only for individuals who fall into certain categories outlined in the regulations. The cable directs posts to implement these new regulations as soon as possible but no later than August 1, 2003.

According to the new regulations, an interview can be waived by a consular officer only for individuals who they decide are not a national security risk and if the individual is:

1) a child 16 years of age or under; or
2) is an individual 60 years or older; or
3) qualifies for a N-1, N-2, C-2, C-3, G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6 status and who is seeking such a visa in that status;
4) is an applicant for a diplomatic or official visa; or
5) is an applicant whose previous visa expired within the past 12 months and is applying for a new visa in the same classification at the consular post of their usual residence and for who the officer has no indication of visa ineligibility or noncompliance with US immigration laws and regulations; or
6) is an alien for whom a waiver of the personal interview is warranted in the national interest or because of unusual circumstances such as a medical condition that prevents a personal appearance.

The regulation notes that even if an individual falls into one of the above categories, a consular officer can still require an interview. However, the regulation does allow the Deputy Assistant Secretary for Visa Services to authorize the waiver of an interview of additional applicants or classes of applicants if such a waiver is deemed in the national interest or unusual circumstances exist. Posts can request that particular classes of applicants be authorized for a waiver in some cases such as situations involving natural disasters or political turmoil which would limit posts ability to interview applicants personally. In these requests, the posts must explain how exempting an additional class would be in the US national interest and not negatively impact national security in order to receive approval.

It is estimated that this regulation will result in approximately 90% of nonimmigrant visa applicants being required to appear for a personal interview. The implementation of this regulation is expected to create backlogs in visa processing overall at U.S. Embassies and Consulates as posts work to implement new systems to allow them to interview visa applicants. Individuals who are planning on traveling and will need to apply for a visa to reenter the U.S. should factor this into their travel plans and should allow for extra processing time for their visa applications. Moreover, this change in regulation will result in the Embassies and Consulates increasing their workload but it is not anticipated that they will be given any additional funding to cover this increase. As a result of this change, it is likely that posts will not allow third country nationals to process visas at consulates except in very limited circumstances as the consulates will give priority to processing their own citizens.

With these new regulation in place, individuals who qualify for visa revalidation through the State Department in the U.S. may want to seriously consider utilizing this option. Visa revalidation is available to individuals who hold E, H, I, L, O and P status and visas and are applying for a new visa in the same category they hold. For applicants who qualify for visa revalidation, they may only apply for revalidation of their visa within sixty days of the expiration date of their current visas or within one year after their expiration date. Finally, the applicant's nationality must be the same as they held when they received their original visa.

However, note that the State Department will not revalidate visas for any nationals of Cuba, Iran, Iraq, Libya, North Korea, Sudan, or Syria, which are the seven countries currently identified as state sponsors of terrorism. Nationals of these seven countries must apply for their visas at a U.S. Embassy or consular post abroad.

While visa revalidation may be an option, it is important to note that it is currently taking ten to twelve weeks for the State Department to process revalidation applications. As such, applying for revalidation requires advance planning for travel purposes. In addition, with the new requirement for interviews for almost all nonimmigrant visa applicants, there is a possibility the processing times for revalidation will also increase as more individuals decide to renew their visas in the U.S. For individuals who are planning on traveling, they may want to consider contacting an immigration attorney to discuss how these developments may affect their travel plans and decide on the best strategy to obtaining a new visa.

Labor Certification Made Easier. PERM Final Rule to be Released Soon

The Department of Labor is in the process of amending its regulations regarding the implementation of the PERM program designed to minimize the complications and delays associated with the current procedures for filing of permanent residence applications. The newly revamped system will also reduce the lengthy backlogs from current processing times from as much as three years to less than 21 days.

Under the PERM program, employers will be required to obtain a prevailing wage determination from the State Workforce Agency (SWA) where the foreign national will be employed before the application can be filed under the PERM program. The employer will also be required to place a job order with the SWA which would be processed the same as any other job order placed by employers. Similar to the current regulations, the employer will also be required to post a notice of the filing of the labor certification at the actual worksite where the foreign national will be employed. The employer will also be required to conduct recruitment before filing the applications. Recruitment will involve both mandatory and alternative recruitment steps. Mandatory recruitment requires the placement of two print ads at least 28 days apart. The employer must choose three alternative recruitment steps from a list of six recruitment steps as set forth by the regulations.

After the application and the recruitment is complete the employer will file the application using forms designed for automated processing to minimize manual intervention. The application and the prevailing wage application have been designed to be machine readable or directly completed in a web-based environment. The employer will not be required to submit additional documentation or evidence of recruitment as the new PERM program will rely heavily upon employer attestations. However, the employer should retain all documentation regarding the filing of the application and the recruitment in the event that the employer is audited. If an application is selected for an audit, the employer will be notified and will be required to submit documentation to verify the information stated in the application.

The PERM program, however, will eliminate many current components of the labor certification process. For example, employers will be unable to justify by business necessity specific job requirements which exceed the normal requirements. Most job requirements, other than education and years of experience in the job, offered would not be allowed. In addition, alternative minimum requirements will not be allowed. Employees can no longer use experience gained at the employer or a contractor of the employer. The employer must meet the prevailing wage and will no longer be able to offer salaries that are up to 5% below the prevailing wage. Schedule B and special handling will be eliminated. Schedule B occuptions include those that the DOL feels are not shortage positions.

The DOL has a proposed fee component for filing the applications under the PERM program, however this fee has still been undetermined as is dependent upon Congress passing legislations authorizing the collection of fees for this service.

It may be possible to convert existing cases to the new PERM system enabling foreign nationals to keep their priority date. However, the existing case must meet the PERM advertising requirements. Any old cases that are not convertible will continue to be processed under the current system. There are roughly 300,000 cases currently in the system.

Due to significant delays in the publication of the PERM program, many employers are filing traditional labor certification applications to obtain a priority date. The priority date is critical in the extension of H-1B status beyond the sixth year maximum as set forth in section 106 of the American Competitiveness in the 21st Century Act and the 21st Century Department of Justice Appropriations Authorization Act. Together, these sections amend the Immigration and Nationality Act by providing that H-1B nonimmigrants can extend their H-1B status beyond the six-year limitation as long as a labor certification application or an immigrant petition was filed more than one year prior to the end of the foreign national's sixth year in H status.

It is anticipated that a rule will be released sometime late 2003. DOL is still considering whether the rule will be a final rule or an interim final rule. As further information on the PERM program becomes available, Greenberg Traurig will provide updates both on our internet site and future editions of our newsletter.

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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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July 2003 RESOURCES

July 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