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GT Business Immigration Newsletter

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Can Your Company Really be Subject to Back Wages?

For those who are skeptical of the power and enforcement capabilities of the Department of Labor (DOL) in relation to H-1B regulations, the recent case of *In the Matter of HNC Solutions, Inc.* should be a warning. On Jun. 30, 2003, the Office of Administrative Law Judges approved the terms and conditions of a settlement agreement between HNC Solutions, Inc. and the DOL. While specifics of the violations and the DOL's investigation of the company were not disclosed in the order, it is safe to assume that the DOL fully audited the company's public access files following the submission of a complaint. The settlement included payment of $739,385 in back wages and $79,500 in civil money penalties.

With the continuing changes in immigration processing, the emphasis being placed on enforcement by all federal agencies regulating H-1B employees and the economic slump we continue to experience, many companies are now subjected to a higher level of scrutiny. Often this scrutiny leads to audits which reveal H-1B practices that leave the company vulnerable and subject to payment of back wages, penalties and possible disbarment from using immigration programs in the future. In light of the current environment it is advisable to conduct regular in-house audits of not only Public Access Files for H-1B employees, but also of I-9 records, in an effort to minimize the company's liabilities. GT can assist you with implementing an affordable and efficient program for such in-house reviews. For information on in-house audits and training sessions please contact the GT Business Immigration group at imminfo@gtlaw.com.

Warning to Lawful Permanent Residents Transferred Overseas

Does your company have a large population of International Assignees ("IAs")? Many U.S. companies are unaware of the need for IAs, who are also U.S. lawful permanent residents (green card holders), to maintain their permanent resident status and/or to preserve their ability to file an application for U.S. citizenship. These are issues that are often overlooked when transferring employees and their families overseas.

Maintaining Lawful Permanent Resident Status

Lawful permanent resident ("LPR") status can be lost in several ways, both intentionally and by accident. For those IAs who spend significant time out of the U.S., the most pressing concern is that they do not lose their lawful permanent resident status through what is called "abandonment."

Defining a "temporary visit abroad" is very difficult. Many people erroneously believe that if a person comes back to the United States at least once a year or even within six months, lawful permanent resident status can be maintained. This is an incorrect assumption. In fact, an alien who lives and works in a foreign country, but merely returns to the U.S. for brief visits periodically, will most likely be found to have abandoned lawful permanent resident status. Any time a LPR is outside the U.S. for a period of six months or more, It is the individual's responsibility to prove ties to the U.S. These types of issues need to be considered prior to the LPRs transfer overseas. Many employees may not even realize that they have "relinquished" their lawful permanent resident status unknowingly by working abroad without taking the necessary steps to preserve residence, if in fact this option is available.

Maintaining Residence for Purposes of Applying for U.S. Citizenship

In order for an LPR to become a U.S. citizen, the LPR will eventually need to file a naturalization application but must first satisfy the requirement of maintaining continuous residence in the U.S. prior to filing the application. This means maintaining permanent residence status in the U.S. for at least 5 years piror to filing the application and being physically present in teh U.S. for at least half of that period. It is also important to maintain LPR status as discussed above, however, it is possible for the LPR to maintain LPR status but fail to maintain a "continuous residence in the United States". This can cause a severe delay in the LPR's ability to file for citizenship. Continuous presence issues pop up in the case of IAs or frequent travelers that spend a good portion of their time abroad on business trips. For these types of employees we suggest that the company encourage the maintenance of impeccable travel records including saving airline tickets, boarding passes, frequent flyer statements, restaurant/hotel receipts, etc.

There are many possible strategies that can be implemented prior to transferring employees on international assignments to preserve residence for naturalization purposes or to avoid abadoning one's status.

If any of your LPR international assignees or experts plan on or are required to spend a significant amount of time outside the United States, it is imperative that you consult with an immigration attorney.

Play Ball! But not Without the Proper Visa: The O and P Visa Categories

Although sometimes not considered until the last minute, foreign athletes and entertainers are required to obtain a visa in order to perform in the United States. As representatives of players throughout major U.S. Sports Leagues including the National Football League, the National Hockey League and Major League Baseball, GT can vouch for the importance of proper and timely visa planning. Actors, musicians, music groups and entertainment companies are also bound to the U.S. Department of Homeland Security's Bureau of Citizenship and Immigration Services ("BCIS") regulations.

The visas of choice are the O and P nonimmigrant visa categories:

The P Visa

The P-1 visa is available to athletes who perform at an internationally-recognized level and group entertainers who have been recognized internationally as being outstanding in their discipline. For an applicant to qualify, their skill and recognition must be substantially above that ordinarily encountered. P-3 visas can be utilized for groups coming to participate in a cultural exhange program.

To qualify for the P visa as a professional athlete, the athlete will need to demonstrate that they have a tendered contract with a major U.S. sports league or team and that they have, among other things, participated to a significant extent in a prior season with a major U.S. sports league or for a U.S. college in intercollegiate competition. They may also provide a statement from an official of the governing body of the sport which details how they are internationally recognized or demonstrate their receipt of a significant award or honor in the sport.

To qualify for the P visa as an entertainment group, the group must demonstrate, among other things, that they have been internationally recognized as outstanding for a substantial period of time and that performers have been with the group for at least one year.

The O Visa

In the entertainment area, the O-1 visa is reserved for aliens of extraordinary ability in the arts who have reached a level of distinction which demonstrates a high level of achievement in the field. This level of distinction is evidenced by a degree of skill and recognition substantially above that ordinarily encountered. What does that mean? It means that unless a musician, artist or performer can establish that they are prominent in their field of endeavor or that they have in essence "made it," then they probably do not qualify for the O-1 visa. If they *have* reached a high level of achievement in their field and they can prove it by demonstrating, among other things, that they have been nominated to receive a significant international or national award (i.e., Emmy, Grammy, Academy Award or foreign equivalent), or that they have performed in a leading role in distinguished productions or organizations and/or they have a record of major commercial or critically acclaimed success, then the O-1 visa is probably within their reach.

If a musician, artist, entertainer, athlete or entertainment group appears to qualify for the O or P visa, a petition is prepared and filed with the BCIS. The team or U.S. agent serves as the petitioning sponsor and provides qualifying evidence listed as well as additional information and/or materials including a letter in support of the petition, a schedule of events, concert dates or team schedule and information regarding the organization of the petitioning entity. These visas also require a written advisory opinion from an appropriate union regarding the nature of the work to be performed and the person's qualifications.

Visa Highlights

- O and P visa petitions qualify for the BCIS Premium Processing Program under which the visa petition will be adjudicated within 15 days of receipt by the BCIS for an additional filing fee.
- The length of stay in the United States petitioned for on behalf of the beneficiary can be as short as for performance in one competition, event or show or can be as long as an entire season or the length of an entire contract, up to three years for an O petition and up to five years for a P petition. Extensions of stay can be obtained for both visa categories.
- The P visa includes provisions for continued employment authorization when a professional athlete is traded from one organization to another organization.

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Play Ball! But not without the Proper Visa (cont'd.)

- Although all O and P visa applicants must have a foreign residence which they do not intend to abandon, the regulations permit dual intent - meaning the professional athlete may hold the nonimmigrant P visa and at the same time intend to, and proceed to, obtain permanent residence in the United States.

Clearly the O and P visa categories have been carved out for those who have reached the top of their chosen discipline. Holders of these visas include NFL Football Players, NHL Hockey Players, Major League Baseball Players, PGA Golfers, and top musicians, music groups and entertainers from around the world.

To review a detailed discussion of the O and P visa classifications, including those for individuals who have extraordinary ability in the sciences, education and business, please refer to our article entitled "There's No Business Like Show Business! – Nonimmigrant Options for Sports and Entertainment Professionals" which can be found in our February 2002 newsletter. This article also discusses the potential tax consequences of the O and P visa categories and is available at: http://www.gtlaw.com/practices/immigration/newsletter.archieves/003/item11.htm.

Greenberg Traurig offers premier immigration, sports and entertainment related services for foreign national athletes, artists, and entertainers as well as other sports and entertainment professionals who are exploring employment in the United States.

65,000 H-1B Visas - Will our Economy Benefit or Hurt When the Cap Goes Back Down?

In October, the H-1B cap will revert to 65,000 from 195,000. Employers who utilize the H-1B program extensively will know that this is a huge reduction in availability of the H-1B program for the employment of foreign nationals on a temporary basis in a professional occupation. For the last four years the cap has ranged from 107,500 to as high as 195,000 between FY 1999 and FY 2002. Generally an H-1B approval counts against the cap when the foreign national has not been in H-1B status (with exceptions of course). Given the continuing economic slump, many wonder whether the sharp decrease will even have an impact on the economy. Of course there will be an impact, the more important question is, will it be good or bad?

So, what impact, if any, will the decrease in the H-1B cap have on our economy, U.S. businesses and employers? Initially, the driving factors in the legislative push and eventual success of increasing the H-1B cap was the high demand for IT workers as the high tech industry catapulted itself along with the economy to heights never imagined at a rate never expected. Unfortunately, since March 2001 the down-turn in our economy and the bursting of the dreamlike dot-com bubble has reduced the demand for IT workers and similar computer occupations drastically. Historically, employment of these workers in H-1B status accounted for the majority of H-1Bs granted; therefore, the dramatic drop in employment in this industry is now reflected in the number of approved H-1B petitions for new admissions.

Based on the general economic trends, what do the numbers tell us about the H-1B program, its uses, its users and its impact on the economy? When you look at the statistics released by Legacy INS, the number of H-1Bs actually used each year do in fact mirror the needs of employers based on economic trends. The reports have provided the following account of the filings:

Fiscal Year	Total Petitions Filed	Petitions Counted Against the Cap	Initial Employment	Continuing Employment
2000	299,046	**	164,814	134,232
2001	342,035	163,200	201,543	140,492
2002	215,190	79,100	109,576	105,614

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Will Our Economy Benefit or Hurt (cont'd.)

The significant drop in the number of petitions filed and those filed for individuals obtaining H-1B status for the first time seem to indicate that the H-1B program accurately reflects the needs of employers and the economy. But, should this necessarily mean that lowering the H-1B cap is actually beneficial? How quickly will we be able to increase this number when there is a revival of the high tech sector or other sectors as the economy eventually begins to improve?

Even if the economic slump continues for awhile, what about industries that are and will continue to experience a high shortage of professionals in specialty occupations, i.e. health care? How will employers in these industries cope with only 65,000 visas? In spite of the losses in the high tech industry, U.S. employers nationwide continued to utilize the H-1B program in 2000, 2001 and 2002. In these years, irrespective of the high tech industry, new petitions filed and counted against the cap still exceeded the 65,000 which will be in effect for FY 2003. It is clear that U.S. businesses continue to rely heavily on the H-1B program, moreover, a mere 65,000 visas per fiscal year will not support our economy's current or future needs, which in turn will impact our ability to remain competitive in the increasingly global economy.

Numbers don't lie. In FY 2001, 89,403 of the initial employment petitions filed were for specialty occupations other than computer-related professions. These visas were utilized by other occupations including engineering and architecture, administrative (accountants and sales), education, medicine, life sciences, mathematics, art, writing, legal, and fashion models. In fact, occupations in medicine, health care and education are perfect examples of industries that are suffering from a shortage of workers and which continue to grow and demand the skills of foreign workers to fill vacant and critical positions. These occupations and the numerous others that rely on highly-educated professionals could face extreme competition with each other and with the IT sector in FY 2003 when only 65,000 new visas are available.

Again, numbers don't lie. A July 27, 2003 article in *The Washington Post* titled "Immigrants Fill Workforce Voids" recites the findings of a Northeastern University study and states that "most of the nearly 16 million jobs created from 1990 to 2001 were filled by new immigrants, allowing the nation's labor force to expand by 11.5 percent. Without immigration, the workforce would have increased by only 5%, overall economic growth would have been limited." The top industries for new immigrants included retail trade, manufacturing, professional services, business/repair services and construction. Specifically 50.3% of the 16 million jobs created, that is over 8 million jobs, would have remained vacant if not filled by immigrants.

Even with the $1,000 training fee paid by employers to fund training programs, scholarships and grants, there is still a shortage of U.S. students graduating with advanced degrees who can fill the specialized positions for which there is a high demand. Many of these programs are just starting or have started with students at a young age who have not even begun their undergraduate studies. How long will employers have to wait to fill the openings for scientists, doctors, accountants, pharmacists, analysts, artists, engineers and architects?

Foreign workers have for decades fueled our economy by filling these positions and numerous other positions, creating new advanced technologies, performing ground-breaking research benefiting numerous governmental and research organizations, and enhancing our cultural and economic status. The decrease in the H-1B program cap will have a significant impact on our economy and our ability to compete in the foreign marketplace and further maintain our current health, technology and educational systems that tend to rely heavily on foreign workers with advanced degrees. The numbers don't lie: our economic well-being is dependent on the contributions of foreign nationals. Given the continuing economic slump, will the drop to 65,000 impact our economy? Of course it will.

What Happens if you Don't Register Your Departure from the U.S. but are Required to?

Beginning November 2002, the Bureau of Citizenship and Immigration Services (BCIS), formerly Immigration and Naturalization Service, began implementing a program to register certain foreign nationals in the U.S. The program, referred to as Special Registration, is a system that allows the government to keep track of specified nonimmigrants (B, F, J, H, L, O, P, TN, etc.) entering and currently living in the U.S. Some of the approximately 35 million nonimmigrants who enter the U.S. – and some nonimmigrants who were already in the U.S. when the system was implemented – are required to register with immigration authorities either at a port of entry or at a designated immigration office in accordance with the special registration procedures. These special procedures also require additional in-person interviews at an immigration office and notifications to immigration authorities of changes of address, employment, or school. ***Nonimmigrants who must follow these special procedures will also have to use specially designated ports when they leave the country and report in person to an immigration officer at the port on their departure date***.

Currently, males who are 16 years or older and nationals of one of the following countries are subject to these registration requirements: ***Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, the United Arab Emirates, Yemen, Pakistan and Saudi Arabia***.

U.S. Citizens or Permanent Residents, A or G visa holders, or individuals who applied for asylum on or before the date specified for their call-in group are not subject to these requirements. For more information on this program please refer to our Special Registration summary on the GT website at http://www.gtlaw.com/practices/immigration/index.asp

As this new system begins to take hold of immigration in the U.S., we are slowly beginning to see a disturbing trend of consequences resulting from even minor violations of these special registration requirements.

In particular, University officials and practitioners nationwide are reporting the denial of re-entry to individuals who failed to register their departure from the U.S. The Associate Director of Admissions at one university in Georgia recently reported that a student from Saudi Arabia who "forgot" to register his departure from the U.S. was stopped and not allowed to re-enter when he tried to return at a port of entry in Washington D.C. The student was allowed to call the school to notify them of his situation, but then had to immediately make arrangements to fly back to Saudi Arabia. The student's visa was cancelled and his SEVIS I-20 was invalidated.

Due to his failure to register his departure, the student was deemed inadmissible and barred from re-entry for five years. There are waivers available for such bars for nonimmigrants. In this particular case the student applied and received the waiver from BCIS. Once he had the waiver, he was able to reapply and obtain a new visa and can now attempt re-entry. In the meantime, like many others in his situation who lose a whole semester or whose jobs are in jeopardy, once he returns, this student will have to deal with straightening out his schedule and missed classes. Many are not so lucky. Many of these students will spend months or even years outside the U.S. waiting for the waiver or for security checks to clear.

Unfortunately, this is not the end of the story for this particular student or for any other individual who fails to comply with all of the Special Registration requirements, including registration upon departure from the U.S. The waiver he obtained is valid only for a limited time period. Individuals are required to re-apply for the wavier at various intervals; without the waiver the individual will not be allowed to re-enter the U.S. In addition, as these new requirements and the consequences of noncompliance develop, the impact of noncompliance on the ability of a foreign national to become a legal permanent resident of the U.S. ("green card holder") is not yet clear. While nonimmigrants can generally obtain waivers for bars to re-entry for almost any violation, intending immigrants do not have the same luxury. Should this student from Saudi Arabia decide at some point in the future to become a permanent resident, his innocuous failure to register his departure from the U.S. may mean that he will not be eligible for permanent resident status at any point in time in the future.

Special registration compliance also becomes an issue when individuals who are already in the U.S. apply for a change of status to a new category or an extension of their current status with the BCIS. Most BCIS Service Centers are now requesting documentation verifying compliance with registration. In addition, while unconfirmed, there have also been reports that BCIS Headquarters has instructed service centers that they cannot approve petitions without proof of registration.

As the BCIS continues to implement Special Registration and the new entry/exit procedures take effect shortly, it is very important for all foreign nationals to carefully review and discuss the requirements and obligations tied to their status in the U.S. If you are not sure of what these obligations are, contact your immigration counsel. Obtaining advice from an experienced practitioner may mean the difference between being able to remain in the U.S. and being forced to return to your home country.

Certificates for Certain Foreign Health Workers Now Required

The Department of Homeland Security (DHS) issued a final rule effective September 23, 2003 requiring all non-immigrants coming to the United States for the primary purpose of performing labor as health care workers (other than a physician), including those seeking a change in nonimmigrant status, to submit a health care worker certification in the form of a Visa Screen certificate. These positions include nurses, physical therapists, occupational therapists, speech language pathologists, medical technologists, medical technicians and physician assistants. These certificates will serve to verify that their education, training, licensing, experience and English competency is comparable to that of American health care workers. With this regulation, both non-immigrant and immigrant health care workers are now required to obtain a Visa Screen certificate. Unfortunately, in a time when the shortage of health care professionals is critical, DHS appears to be implementing more barriers for employer's utilizing foreign workers in an effort address the increasing shortage.

Under the revised regulation, an alien seeking to enter the United States for this purpose will be deemed inadmissible unless the alien presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), or an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of the Department of Health and Human Services(HHS). The certificate must verify the following:

(1) The alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States under the classification specified in the application and are comparable with that required for an American health care worker;

(2) The alien has the level of competence in oral and written English considered by the Secretary of HHS, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged;

(3) If a majority of States licensing the profession in which the alien intends to work recognizes a test predicting an applicant's success on the profession's licensing or certification examination, the alien has passed such a test, or has passed such an examination;

Section 212(r) of the Act created an alternative certification process for aliens who seek to enter the United States for the purpose of performing labor as a nurse. In lieu of a certification under the standards of section 212(a)(5)(C) of the Act, an alien nurse can present to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified statement from CGFNS (or an equivalent independent credentialing organization approved for the certification of nurses) that:

(1) The alien has a valid and unrestricted license as a nurse in a state where the alien intends to be employed and that such state verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) The alien has passed the National Council Licensure Examination (NCLEX); andGreenberg 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.

(3) The alien is a graduate of a nursing program that meets the following requirements:

(i) The language of instruction was English; and

(ii) The nursing program was located in a country which:

(a) was designated by CGFNS no later than 30 days after the enactment of the NRDAA, based on CGFNS' assessment that designation of such country is justified by the quality of nursing education in that country, and the English language proficiency of those who complete such programs in that country; or

(b) was designated on the basis of such an assessment by unanimous agreement of CGFNS and any equivalent credentialing organizations which the Attorney General has approved for the certification of nurses; and

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Global Visa Seminars

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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.

Certificates for Certain Foreign Health Workers (cont'd.)

(iii) The nursing program:

(a) was in operation on or before November 12, 1999; or

(b) has been approved by unanimous agreement of CGFNS and any equivalent credentialing organizations which the Attorney General has approved for the certification of nurses.

CGFNS designated the following countries for purposes of this alternate certification: **Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom, and the United States.**

This new regulation will impose delays on the processing of health care worker petitions. It adds steps and documentation to the existing requirements that may not necessarily benefit anyone. The classifications most likely affected are the H, J, O, and TN visa classifications. Furthermore, there are risks that the educational credentials and practical experience of each applicant will not meet the standards as set forth by this regulation. There is also no clear timetable as to how long it takes to obtain one of these certificates.

The DHS says that it will continue to exercise its discretion and allow nonimmigrant health care workers affected by this new requirement sufficient time to obtain the requisite certification. For one year after publication of the final rule, the DHS will admit and approve applications for change of status and/or extension of stay for nonimmigrant health care workers. We will keep you posted on new developments concerning health care workers.

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The GT Business Immigration Observer is published by the Business Immigration practice group at Greenberg Traurig. GT Of Counsel Dawn M. Lurie serves as the Editor of the *Observer*. The newsletter contains information concerning trends and recent developments in immigration law. Moreover, the authors analyze and report on relevant immigration related issues as well as legislative issues.

Finally, the *GT Observer* serves as an invaluable resource to individuals, and human resource managers, recruiters and company executives who must keep current on these matters.

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SEPTEMBER 2003 RESOURCES

September 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