December 2003

gtlaw.com

immigration.gtlaw.com

Greenberg Traurig

OBSERVER

GT Business Immigration Newsletter

AMSTERDAM
ATLANTA
BOCA RATON
BOSTON
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
LOS ANGELES
MIAMI
NEW JERSEY
NEW YORK
ORLANDO
PHILADELPHIA
PHOENIX
TALLAHASSEE
TYSONS CORNER
WASHINGTON, D.C.
WEST PALM BEACH
ZURICH

In this issue: **Page**

Changes to Special Registration Requirements (NSEERS)

NSEERS stands for National Security Entry/Exit Registration System, and was the first step by the Department of Justice and The Department of Homeland Security ("DHS") to comply with the congressionally-mandated requirement to implement a comprehensive program to track foreign visitors in the United States. Certain nationals of Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen are subject to NSEERS.

The DHS has announced two important changes to the Special Registration program which took effect upon the publication of a regulation in the December 2, 2003 Federal Register. The regulation suspends the 30-day re-registration and annual interview requirements for certain non-immigrants. It is important to note that all non-immigrants subject to Special Registration are still required to register at the port of exit when leaving the United States. Also note that those who are subject for the 30-day or annual re-registrations with deadlines prior to December 2, 2003 will still be considered in violation of their non-immigrant status if they fail to comply. Failure to comply can result in grounds for removal from the United States.

It is important to note that the Special Registration program has not ended. The DHS states that the decision to suspend these requirements was made in anticipation of the new system, US-VISIT, which will collect information and biometric data from visitors to the United States in selected ports of entry as early as January 2004. It is believed that the SEVIS system, which is already in place to track international students, together with the US-VISIT system, when fully implemented, will together render NSEERS redundant. US-VISIT is expected to be in place and operating in January 2004.

The changes to the requirements outlined above will be in effect immediately, but the DHS has provided for a 60-day comment period to the rule and it is therefore possible that the requirements can be re-instituted. Furthermore, at the discretion of the DHS, a visitor may still be called to appear for registration if deemed necessary.

The rule also allows registrants to apply for relief from departure registration requirements. Specifically, the rule sets forth a procedure through which a foreign national subject to the NSEERS departure requirements may, prior to his or her departure, seek relief from "an official designated by DHS or from the Customs and Border Protection ("CBP") field office director for the port from which the alien intends to depart." The foreign national must establish that "exigent or unusual circumstances exist" and that a favorable exercise of discretion is warranted. Furthermore, a foreign national who has been registered and who makes frequent trips to the United States may be exempted from future POE registrations upon a showing of "good cause, exigent or unusual circumstances." The application for this exemption is made to the CBP field office director over the port through which the foreign national most frequently arrives in the United States. It is still unclear, however, as to what would constitute such good cause or exigent circumstances.

For additional information and background on the requirements, please refer to our previous alerts. Greenberg Traurig will continue monitoring new developments.

DOL Issues Update on PERM Regulation

In meetings with American Immigration Lawyers Association's Department of Labor ("DOL") liaison committee, the DOL confirmed that it still anticipates publishing the PERM regulation in early 2004 and scheduling the implementation of the program for 120 days thereafter. DOL will schedule four training sessions around the country, prior to the implementation date. GT attorneys have been participating in a DOL working group to review the DOL proposed program.

I-94 Expiration or Visa Expiration - Which One Governs Your Authorized Stay in the U.S.?

Your visa is valid until July 7, 2006 but when you arrive in the U.S., your I-94 Arrival/Departure Record (the I-94 Card) is only valid until February 20, 2005. Which date governs your authorized stay in the U.S.? The two expiration dates have nothing to do with each other. Many foreign nationals and their employers are confused as to when the nonimmigrant status expires. In short, the I-94 Card is the document which governs the foreign national's authorized period of stay in the U.S. This article will provide readers with a detailed comparison of the two documents.

The Visa - Your Travel Document

Most foreign nationals are required to obtain a visa in order to enter the United States. Visas are originally obtained at U.S. Consulates and/or Embassies. Canadians are visa exempt and can enter the U.S. without a visa. Foreign nationals from visa-waiver countries are also entitled to enter the U.S. without a visa as temporary visitors under the visa waiver program provided they do not engage in unauthorized employment in the U.S. Foreign nationals who enter under the visa waiver program are given an authorized period of stay up to 90 days. All other foreign nationals require a visa to enter the U.S. It should be noted that possession of a nonimmigrant visa does not guarantee entry into the U.S. The foreign national must present the visa at the Port-of-Entry, but their actual entry is determined by the Immigration Officer upon review of the documents presented at the time admission is sought. The Immigration Officer at the Port-of-Entry makes the final determination on whether a foreign national can enter the U.S. and how long they can stay for any particular visit (this authorized period of stay is noted on the I-94 Card stapled into the foreign national's passport by the Immigration Officer; see below).

The visa expiration date is printed on the actual visa. The validity period of the visa is the time the visa is issued until the date it expires. The visa can be used to gain entry into the U.S. anytime during the period of validity. Depending upon the nationality of the foreign national, visas may be valid for one entry or for multiple entries during the validity of the visa. For example, Chinese nationals are generally granted visas for only one entry. Each time they want to enter the U.S. they must apply for a new visa.

Foreign nationals should be careful not to overstay their period of authorized stay (expiration date on I-94 card). Overstaying their authorized period of stay can result in cancellation of the visa and may subject the foreign national to a three or ten year bar from re-entering the U.S. Foreign nationals should also be careful to use a visa only for the purpose for which the visa was granted. For example, a visitor visa is issued only for purposes of business visit or personal visit. Foreign nationals cannot engage in productive work or other employment activities under a visitor visa. Violating the terms of the visa by engaging in unauthorized activities after entry into the U.S. can also cause the visa to be cancelled or voided.

The I-94 Card

The I-94 Card is the Arrival/Departure Card which is issued to foreign nationals upon their entry into the U.S. and must be relinquished when leaving the U.S. If admitted into the U.S., a foreign nationals is issued an I-94 card which is then stapled into their passport. This document is extremely important as it evidences the foreign national's authorized entry into the U.S. and sets forth the foreign nationals authorized status and period of stay in the U.S. Greenberg Traurig recommends that foreign nationals make photocopies of their I-94 card. If a foreign national's passport or I-94 card is stolen, they should immediately contact the local police department to obtain a police report.

The I-94 Card is a small white card (foreign nationals from visa-waiver countries are given green I-94W cards). The Immigration Officer at the Port-of-Entry will stamp the card with the date of arrival, the nonimmigrant status of the foreign national, and the expiration of the authorized period of stay. The expiration date is the date by which the foreign national must either leave the U.S. or file an application to extend or change their authorized stay in the U.S. Applications to extend, change, or amend authorized periods of stay are filed with service centers of the United States Citizenship and Immigration Service ("USCIS").

Foreign nationals must carefully review the expiration date of their I-94 card **each** time they enter the U.S. The date shown on the I-94 Card is the official record of their authorized length of stay in the U.S. As mentioned above, even though a visa may be valid for a period of three years, the Immigration Officer may not authorize the full period on the I-94 Card. Therefore, foreign nationals **cannot** use the visa expiration date to determine their authorized period of stay in the U.S. and must always refer to the expiration date as shown on the I-94 Card. If you have any doubts about a period of authorized stay, please contact the Business Immigration Team at Greenberg Traurig and we will

Continued on Page 4

I-94 Expiration or Visa Expiration (cont'd.)

Remaining in the U.S. beyond the period of authorized stay as granted on the I-94 card will cause the foreign national to be out of status and unlawfully present in the U.S. Staying beyond the period authorized is a violation of U.S. Immigration laws and may result in the foreign national being barred from reentering the U.S. in the future. Remaining in the U.S. more than 180 days beyond the I-94 expiration date will cause the foreign national to be barred from reentering the U.S. for a period of three years. Staying more than one year beyond the I-94 expiration date will cause the foreign national to be barred from reentering the U.S. for a period of 10 years.

Guidance on I-140/I-485 Concurrent Filings

Previously, foreign nationals were required to obtain approval of the I-140 immigrant petition before applying for permanent residence by filing the I-485- adjustment of status application ("AOS"). On July 31, 2002, regulations were published which enabled foreign nationals to submit the Form I-140 and I-485 concurrently. This regulation continues to remain in effect.

Under §106(c) of American Competitiveness in the Twenty-First Century Act of 2002 ("AC21"), foreign nationals whose adjustment applications have been filed and remain un-adjudicated for 180 days or more remain valid if a change in the foreign national's employment occurs, provided the new position is in a similar occupational classification as the job for which the underlying immigrant petition was filed. This has been a critical tool for many employees who previously had been forced to remain in positions during the extremely lengthy processing times of the AOS applications.

On August 4, 2003, William R. Yates, the Acting Associate Director for Operations of the U.S. Citizenship and Immigration Services ("CIS") issued a memorandum providing guidance on concurrent I-140 and I-485 filings where the foreign national claims eligibility benefits under §106(c) of AC21.

The memorandum outlines the following scenarios for foreign nationals hoping to continue their adjustment of status application when there is a change in employment:

- If the foreign national of an approved Form I-140 is also the beneficiary of an adjustment of status application that has been pending for 180 days or longer, then the I-140 remains in effect with respect to a new offer of employment.
- If the adjustment application has been pending for 180 days but the Form I-140 is not yet approved within the 180 days, the employer can choose to withdraw the I-140, but it will still remain in effect.
- If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the foreign national's adjustment application has been pending for 180 days, the Form I-140 is no longer valid with respect to the new offer of employment and the adjustment of status application may be denied.

In all instances where the foreign national would like to continue his or her permanent resident application when there is a change in employment, the foreign national must provide proof to the CIS of a new offer of employment and must prove that the new position is similar to the position in the underlying I-140 petition. The foreign national must submit evidence of the new qualifying offer of employment. If the foreign national has not submitted evidence of a new offer of employment, the adjudicating officer may issue a Notice of Intent to Deny the adjustment application. If the foreign national cannot provide evidence of a new qualifying offer of employment within the timeframe set forth to respond in the Notice of Intent to Deny, the adjustment application may be denied.

In all cases, the offer of employment must be a bona fide offer of employment and the employer must have the intent of hiring the foreign national upon approval of the adjustment of status application. Please note, however, that there is no requirement that the foreign national who is listed as the beneficiary on the Form I-140 actually be employed in the position offered until approval of the adjustment application. As such, it is possible that the foreign national can qualify for the provisions of §106(c) of the AC21 even if she has never been employed by the petitioning employer.

SEVIS News

Since August 1, 2003, SEVIS, the inter-agency tracking system of international students and J-1 visitors, has been fully implemented. This means that all persons in F, M and J status (as well as dependents) must be entered into the system, and government agencies are now able to retrieve current information regarding the whereabouts and academic progress of more than half a million international students and J visitors in the United States.

Items of interest for J-1 sponsors and employers hiring F-1 students:

- All F-1 and M-1 students and J-1 visitors must now be in possession of a SEVIS -generated form I-20 or DS-2019 respectively.
- The ISEAS notification program is no longer in place as SEVIS is up and fully operational.
- New incoming F, M, and J visitors may enter the United States as early as 30 days prior to the beginning of their program as stated on the I-20 or DS-2019.
- F-1 students who wish to take advantage of Optional Practical Training ("OPT") must apply prior to the end of their academic program. The window of opportunity for OPT closes after completion of their program.
- U.S. consulates do not have access to SEVIS directly, but are provided SEVIS information that is sent on a regular basis to the DOS Consolidated Consular Database ("CCD"). This process experienced some data transmission problems in July, and caused problems for some visa applicants. The glitch has since been fixed, according to DOS.

SEVIS Fee Collection
SEVIS will be funded through a fee to be paid by incoming F, M and J visitors. The method of fee collection has not been settled or implemented yet. The fee will be approximately $100. Sponsors will be allowed to pay the fee on the visitor's behalf if they wish to do so.

Visa Application Processing Delays

Today most visa applicants have been subject to make an appointment and appear for a personal interview - a policy that has resulted in severe back-logs at many posts.

Schedule an Appointment in Advance
International employees who are traveling across borders and are in need of a new visa should research the availability of appointments at a consular post before making travel plans. When possible, it is a good idea to book an appointment in advance to avoid a longer stay in the country than intended. For a list of U.S. consulates, please visit usembassy.state.gov.

Is Revalidation an Option for You?
Nonimmigrant workers who are in E, H, I, L, O, or P categories may wish to apply for visa revalidation with the U.S. State Department in Washington D.C. to avoid the long lines at a consulate abroad. To be eligible, you must already have a visa in the correct classification that has not been expired for more than one year. You may apply as early as 60 days prior to the expiration date of your current visa. Keep in mind that current processing times are approximately fourteen weeks. For more details on application procedures, please visit Revalidation program.

However, it is important to note that if you are a national of one of the countries found on the list 26 countries, you may want to think twice about revalidating. Although no written policy has been issued by the Department of State ("DOS"), it appears that there are important and unpublished changes to the Revalidation program. Greenberg Traurig has been receiving revalidation denials with broad language stating that there is not enough information to issue a new visa. Passports are returned without visas issued for individuals who are nationals and/or citizens of one of the countries on the list. These include the following: Iran, Iraq, Libya, Syria, Sudan, Bangladesh, Egypt, Indonesia, Jordan, Kuwait, Pakistan, Saudi Arabia, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. DOS again has not issued a formal policy stating they will not accept applications from the list of 26 countries. However, a pattern of denials of applications from nationals of these countries appears to be forming.

Continued on Page 6

Visa Application Processing Delays (cont'd)

Moreover, the State Department has formally confirmed that it will not process any visa revalidation application from an applicant who is a national and/or citizen of one of the seven countries that have been designated as state sponsors of terrorism. These are: Cuba, Iran, Iraq, Libya, North Korea, Syria and Sudan.

The State Department is taking between 10-12 weeks to process revalidations from the time that the application is received and entered into the database at the Visa Office in Washington, D.C. Apparently, it takes up to four weeks to enter such information, making the entire process one which can take up to 18 weeks or longer.

Appointments in Canada and Mexico
It is still possible for citizens of a "third" country to apply for a visa at certain posts in Canada or Mexico. A word of caution before traveling for the purpose of renewing your visa—if your visa application is denied, you may be required to travel to your home country to apply for a visa before you can reenter the United States (see automatic visa revalidation below). Also consider that due to additional security checks, especially for nationals of countries that are state sponsors of terrorism, visa processing may take anywhere from a couple of days to several weeks to several months. Visit http://www.nvars.com/ for more information on available posts and appointments.

Final Rule on Automatic Visa Revalidation
Automatic Visa Revalidation is still available for some non-immigrants. The program allows certain non-immigrants to reenter the United States, despite having expired visas, after visits to Canada or Mexico for less than 30 days as long as they have unexpired I-94 cards. However, if the purpose of the visit is to renew your visa and the application is denied, you must first obtain a new visa from a U.S. consulate in your home country before you may return to the United States. Please note that nationals of countries that are state sponsors of terrorism must always have a valid visa in the appropriate classification to enter the United States and are not eligible for automatic visa revalidation.

Can a Tourist Study? Summary of Change of Status Rules for B-1/B-2 to F-1

With recent changes in the law, there has been some confusion regarding the eligibility of a B-1/B-2 visitor to study. To clarify the situation, here is a quick summary.

- B-1/B-2 visitors for business or pleasure may attend courses that are short-term and incidental to their visit (e.g. a short-term language course, or a recreational dance class is still allowed).
- B-1/B-2 visitors may not pursue a full-time program of study.
- B-1/B-2 visitors may apply for admission to a university, but may not begin studies until they have obtained F-1 status.
- B-1/B-2 visitors who intend to study in the United States should express their intent clearly to the immigration officer at the port of entry. The officer should then make a notation for "prospective student" on the I-94 card. This will facilitate an application for a change of status to F-1 without having to leave the United States first. Others in B-1/B-2 status may apply for a change of status, but chances are an application will be denied and the visitor be required to return to their home country to obtain an F-1 visa before they may begin their program of study.

President Signs Free Trade Agreements with Chile and Singapore

On September 3, 2003, President Bush signed the free trade agreements with Chile and Singapore. According to the terms of these agreements, effective January 1, 2004, Chile will become the first South American country and Singapore the first East Asian country to join in a bilateral pact to end tariffs, eliminate non-tariff barriers, open up financial and other services and protect intellectual property rights. The acts also contain important immigration provisions.

In particular, nationals of Chile and Singapore are now eligible to apply for E-visas as treaty-traders or treaty-investors. In general, to qualify for an E-visa, each visa applicant must be a citizen of the treaty country and the particular company sponsoring the visa applicant must be primarily owned or controlled by nationals of the treaty country.

For Treaty-Traders, the company sponsoring the visa applicant must be engaged in a substantial amount of trade principally between the U.S. and the treaty country. The individual visa applicant must be either a manager or executive (including an owner), or one who has essential skills and E-1 visas are available not only to those whose trade is in material goods, but also to those whose trade consists of services and technology.

For Treaty-Investors to qualify, the investment must be substantial and active. The investment must not be "marginal", i.e., one that supports only the investor's immediate family, and should create jobs in the U.S. Finally, the individual visa applicant must be either an investor who will "develop and direct the investment," a manager or executive, or a specially trained employee necessary for the development of the investment.

In addition, the acts contain provisions that provide for the creation of a new visa category, the H-1B (II). These provisions reserve 1,400 H-1B visa numbers for qualified professionals who are nationals of Chile and 5,400 H-1B visa numbers for qualified professionals who are nationals of Singapore. According to the provisions of the act, the initial period of admission will only be one year for individuals applying under this H-1B (II) category, as opposed to the initial allowable period of admission under the regular H-1B category. Extensions are available for the H-1B (II) category but are only available in increments of one year. Unfortunately, these reserved visa numbers actually will count against the H-1B cap. Given that the number of H-1B visas available per fiscal years has reverted back to 65,000, these provisions will further reduce and complicate the number of H-1B visas available.

H-1B Cap In the News

It has been reported that the CIS is expected to announce within the next four to six weeks that the cap has been reached for Fiscal Year 2004 (October 1, 2003 to September 30, 2004). However, CIS Deputy Director Bill Yates has informed the American Immigration Lawyers Association that "We are not near the cap at this time." Employers, however, should consider that the cap will be reached in the next few months at the latest, and if filings increase (which they are sure to do in response to these widely-circulated reports), the cap could be reached as early as it has been projected—in the January time frame.

Once the cap has been met, no more H-1B cap cases will be accepted during this fiscal year. Official announcements on the cap will be published in the Federal Register notices.

On October 1, 2003, the H-1B cap reverted back to 65,000 from 195,000. 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). Initial H-1B petitions for employment with universities and non-profit research institutions are not subject to the cap. Employers with foreign students working pursuant to practical training or who plan to bring foreign nationals into the U.S. for an initial period during this fiscal year should take such reports into consideration when planning their ability to obtain H-1B visa status.

Congress is contemplating legislation to address the cap issues, but it is unlikely that any legislation will be passed until well after the cap is reached this fiscal year.

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.

What's New at GT?

EXCHANGE VISITOR PROGRAM REINSTATED

GT successfully overturned the revocation of an exchange visitor program. This unprecedented case against the State Department was remanded for additional administrative hearings after a Federal District Court found that the original administrative decision was "Inexplicably Devoid" of Evidence. In November 2001, the State Department began the administrative process to revoke the cultural exchange designation for the client. The client was designated to bring in foreign hospitality professionals to train them in American techniques. After three days of intense revocation proceedings in which the State Department essentially had no outside witnesses, an administrative panel upheld the State Department position. GT appealed to the Federal District Court in Charleston, SC. This was the first of such cases relating to the exchange visitor program. In a decision dated November 26, 2002, the court held that the State Department acted irrationally and without sufficient evidence and remanded to State. In a 52-page decision dated November 19, 2003 the Department of State's Exchange Visitor Program Designation, Suspension and Revocation Board reversed its earlier revocation of the J-1 program for the American Hospitality Academy.

GT DOES DALLAS

GT opened its Dallas, Texas office in November 2003. The office is full-service, but also has immigration expertise.

Business Immigration Group:

Mahsa Aliaskari 703.749.1385	Tysons Corner aliaskarim@gtlaw.com
Kristina Carty-Pratt 703.749.1345	Tysons Corner prattk@gtlaw.com
Craig A. Etter 703.749.1315	Tysons Corner etterc@gtlaw.com
Oscar Levin 305.579.0880	Miami levino@gtlaw.com
Linda Luiks +31 20 301 7323	Amsterdam luiksl@gtlaw.com
Dawn Lurie 703.903.7527	Tysons Corner luried@gtlaw.com
Elissa McGovern 703.749.1343	Tysons Corner mcgoverne@gtlaw.com
James Morrison 703.749.1376	Tysons Corner morrisonj@gtlaw.com
Mary Pivec 202.452.4883	Washington pivecm@gtlaw.com
Laura Foote Reiff 703.749.1372	Tysons Corner reiffl@gtlaw.com
John Scalia 703.749.1380	Tysons Corner/D.C. scaliaj@gtlaw.com
Martha Schoonover 703.749.1374	Tysons Corner schoonovermgtlaw.com
Shana Tesler 202.331.3144	Washington, D.C. teslers@gtlaw.com

The GT Business Immigration Observer is published by the business immigration practice group at Greenberg Traurig http://www.gtlaw.com/about/overview.htm. GT Of Counsel, Dawn M. Lurie serves as the Editor. 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.

SUBSCRIBING / UNSUBSCRIBING

To subscribe or unsubscribe, go to:
www.gtlaw.com/practices/immigration/newsletter/subscribe/subscribe.htm

GENERAL INFORMATION

Questions or comments? Please send e-mail to:
imminfo@gtlaw.com
Want to schedule a consultation? Contact us at:
immconsult@gtlaw.com

DISCLAIMER

The materials contained in this newsletter or in the Greenberg Traurig Web site are for informational purposes only and do not constitute legal advice. Receipt of this e-mail newsletter or with the Greenberg Traurig website does not establish an attorney-client relationship.

DECEMBER 2003 RESOURCES

December 2003 State Department Visa Bulletin Link: http://travel.state.gov/visa_bulletin.html
Service Center Processing Times
Vermont: http://www.gtlaw.com/practices/immigration/processing/cis/vermont.pdf
Texas: http://www.gtlaw.com/practices/immigration/processing/cis/texas.pdf
Nebraska: http://www.gtlaw.com/practices/immigration/processing/cis/nebraska.pdf
California: http://www.gtlaw.com/practices/immigration/processing/cis/california.pdf
National Benefits Center: http://www.gtlaw.com/practices/immigration/processing/cis/nbcprocessing.pdf
Department of Labor Regional Processing Times: http://www.gtlaw.com/practices/immigration/processing/dol.htm
State Employment Agency Processing Times: http://www.gtlaw.com/practices/immigration/processing/swa.htm