Observer

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Greenberg Traurig

GT Business Immigration Newsletter

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Do My Employees Need a Reentry Permit?

Gaining U.S. lawful permanent resident status for employees can be a long and arduous process. Once the employee has his Permanent Resident Card (green card) in hand, holding on to it can be a challenge too if he spends a great deal of time outside of the U.S. for work. Permanent resident status may be lost if status is deemed abandoned. Frequent trips abroad for long periods of time may result in the loss of status. Moreover, absences from the U.S. for one year or more can break the continuity of the required continuous residence in the U.S. for naturalization purposes.

If a U.S. permanent resident employee will be working outside of the U.S. for more than one year, then he should apply for a reentry permit from the U.S. Citizenship and Immigration Services (USCIS) before departure. A reentry permit allows the permanent resident to reenter the U.S. using his green card and is evidence of his intent to return to his residence in the U.S. Without a reentry permit, the employee may need a visa to reenter the U.S. and his green card could be taken away if he is considered to have abandoned his permanent resident status. The employee must be in the U.S. when the application for the reentry period is filed with the USCIS, but may depart the U.S. before a decision is made on the application.

If the employee is unable to apply for a reentry permit and will be outside of the U.S. for more than one year, then there are steps than he can take to protect his status. If the resident's absence abroad was temporary, then residency will not be considered abandoned. Temporary is not defined by elapsed time alone. The following are taken into consideration when determining whether an absence is temporary: purpose of departure, existence of fixed termination date for visit abroad, and objective intention to return to the U.S. as a place of permanent employment or home.

In addition, if the employee intends to become a naturalized U.S. citizen in the future, then he should also review his eligibility to file an application to preserve residence in the U.S. for naturalization purposes. Discussions with Counsel is recommended prior to extended periods being spent outside the U.S.

Line up! Fingerprints and Photos Coming for Visa Waiver Program Travelers

There has been an important change to the U.S. Visit program since our extensive article in the last issue of Business Immigration Observer. Starting September 30, 2004, the US –VISIT program will be extended to include travelers entering under the Visa Waiver Program ("VWP"). The VWP allowed travels from certain countries to enter the U.S. for up to 90 days for business or pleasure using only their passport and without requiring a visa. However, now under US VISIT they will also be subject to fingerprinting and have their photographs taken upon entry. Until recently the U.S. VISIT program applied only to nonimmigrant visa holders who are not subject to the National Security Entry Exit Registration System ("NSEERS special registration").

US-VISIT is the new U.S. entry-exit system with enhanced security to be used at designated ports of entry to and ports of exit from the U.S. As part of this program, the Custom and Border Protection ("CBP") officer will obtain biometrics from applicable nonimmigrant visa holders to verify their identities and to authenticate their travel documents through digital fingerprinting of the visa holders' left and right index fingers and digital photographing. This biometric data and other information is checked against law enforcement and intelligence data to determine whether a nonimmigrant visa holder would pose a threat to national security, public safety, or is otherwise inadmissible. The biometric information is shared with other governmental agencies.

The extension of the US VISIT program to VWP travelers will impact approximately 13 million visitors to the U.S. who enter using the Visa Waiver Program every year. There are

Line up! Fingerprints and Photos Coming for Visa Waiver Program Travelers (cont'd)

currently 27 countries in the VWP program including Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Companies may want to alert foreign clients or foreign employees that are expecting to enter the U.S. under the VWP to expect to be fingerprinted and photographed when they enter the U.S. anytime after September 30, 2004. Overall delays in processing for entry could also occur caused by the sheer amount of visitors that will now be subject to US VISIT. Some individuals may also experience delays that they have not in the past if their data some how triggers something in the system which may result in them being referred to secondary inspection.

EADs to Be Valid for Length of Adjustment Process? What a Concept!

As many companies may be aware, employees who are in the process of obtaining their green card obtain work authorization in one year increments. The work authorization is verified through the Employment Authorization Documents (EADs) valid for one year and renewable in one year increments until the employee becomes a permanent resident. This system causes many issues for employees and employers especially given the ever-changing and ever-increasing processing backlogs at the various Service Centers. If the EAD expires before a new one is received, employees are left without work authorization and have to be taken off payroll causing distress to the employee and disruption of service for the employer. With the service center processing backlogs, it seems almost necessary to file an extension for an EAD as soon as a new card is received to make sure the employee will receive the new EAD before the just-received card expires.

There is a ray of hope though. There is an interim regulation that has cleared the Department of Homeland Security which would make and EAD valid for a period of time appropriate for an adjustment of status to be completed. Although it is not known exactly what "period of time appropriate for an adjustment of status to be completed" means, there is hope that it will be at least a two or three year period. Unfortunately, at this point, the USCIS has advised that the regulation does not address the very similar issue that occurs with advance parole documents that adjustment applicants need for travel nor have they indicated if they will address the advance parole issue in a separate regulation.

At this point, the interim regulation is currently with the OMB for review. The OMB generally has 90 days to review a regulation and then they must either reject or approve it for publication in the Federal Register. We will keep you updated as this matter progresses.

Revamping of Labor Certification Process – Final PERM Program 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 the filing of permanent residence applications and to provide for more consistent adjudications. The newly revamped system will also reduce the lengthy backlogs from current processing times of as much as 3 years to less than 21 days.

The Department of Labor's final PERM regulation was sent to OMB on February 23, 2004. OMB has up to 90 days to review the regulation and can either seek an extension or send it to the Federal Register for publication. If OMB has substantial comments, DOL will need to review and act accordingly before the PERM rule is published. If published in the Federal Register, the new PERM program will take effect 120 days after publication. After the PERM rule is released and prior to implementation, DOL will post information on its website explaining the new process. DOL also plans to hold four public education seminars on PERM in various locations across the country. GT attorneys have been participating in a DOL working group to review the DOL program.

Prior to implementation, the PERM processing centers must be made operational with space secured, systems in place, staffing arranged, and policies established. These operational issues are being worked on in order to ensure the processing centers have procedures in place for implementation. Under the new PERM program, there will be two PERM processing centers – in Atlanta and Chicago.

The State Workforce Agency's will continue to accept cases until the actual implementation date of PERM. After PERM is released, employers will **NOT** be able to file applications under the current traditional filing method or under the Reduction in Recruitment method. After PERM is implemented, the number of cases in the backlog will be fixed. There are roughly 300,000 cases currently in the system. The DOL will implement two new Backlog Reduction Centers in Philadelphia and Dallas to help reduce the backlog of cases filed prior to the implementation of PERM. DOL already has funding for the Backlog Reduction Centers who will be tasked with reducing the backlog while maintaining processing in the order of priority dates. Contractors will play a significant role in the processing of applications at the Backlog Reduction Centers but DOL will make the ultimate decision on cases as applications must be certified by the Secretary of Labor. Several regions have already sent applications to contractors for processing in an effort to reduce the significant backlogs.

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 through the Backlog Reduction Centers.

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.

Electronic Signature and Storage of Your Company's I-9 Forms – Is it Just a Matter of Time?

Here at GT we are often asked the question, "Can my company sign and store our I-9 forms electronically?" The answer is currently no. Unfortunately, the regulations do not anticipate the electronic sophistication of which many companies are currently capable.

Currently, the Employment Eligibility Verification Form I-9 must be retained by an employer or a recruiter or referrer for a fee for the following time periods:

(A) In the case of an employer, three years after the date of the hire or one year after the date the individual's employment is terminated, whichever is later; or

(B) In the case of a recruiter or referrer for a fee, three years after the date of the hire.

Under current regulations, at the time of inspection Forms I-9 must be made available in their original form or on microfilm or microfiche at the location where the request for production was made. If Forms I-9 are kept at another location, the person or entity must inform the officer of the CIS, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor of the location where the forms are kept and make arrangements for the inspection. Inspections may also be performed at a CIS office.

Further, the following standards apply to Forms I-9 presented on microfilm or microfiche submitted to an officer of the CIS, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor: Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral which enables the observer to positively and quickly identify it to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or whole numbers. A detailed index of all microfilmed data shall be maintained and arranged in such a manner as to permit the immediate location of any particular record. It is the responsibility of the employer, recruiter or referrer for a fee:

(A) To provide for the processing, storage and maintenance of all microfilm, and

(B) To be able to make the contents thereof available as required by law.

The person or entity presenting the microfilm is required to make available a reader-printer at the examination site for the ready reading, location and reproduction of any record or records being maintained on microfilm. Reader-printers made available to an officer of the CIS, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor shall provide safety features and be in clean condition, properly maintained and in good working order. The reader-printers must have the capacity to display and print a complete page of information.

Many employers accurately argue that microfilm and microfiche are outdated and seldom used - having been replaced by, among other things, scanners and the storage of documents in Portable Document Format. While this is obviously true, the simple fact is that the law has not caught up to the advancements in the storage of this type of data. Well, perhaps until now.

A new Bill was introduced in the House of Representative on May 6, 2004 which would allow for the electronic signature and electronic storage of the I-9 Form. Although current regulations do not anticipate execution of the I-9 form in any manner other than paper and ink and do not allow for storage other than in original form or on microfilm or microfiche, this new Bill addresses the logical evolution of the signature and storage of the I-9 form. Indeed, many banking and commercial transactions utilize electronic signatures; and the "Electronic Signatures in Global and National Commerce Act" or "E-Sign Act" which

Electronic Signature and Storage of Your Company's I-9 Forms (cont'd)

took effect on October 1, 2000 gives electronically transmitted signatures the same legal standing as signatures written with pen and paper. Additionally, many OSHA and IRS forms can be signed and stored electronically.

While it appears the electronic signature and storage of the I-9 Form is in the near future, companies and employers should continue to store and sign their I-9 forms according to current regulations.

Congressional News

New Bill Calls For L Visa Program Reform

On May 20, 2004, Henry Hyde (R-IL) Chair of the House International Relations Committee introduced an alarming bill "Save American Jobs Through L Visa Reform Act of 2004" to amend the Immigration and Nationality Act regarding the nonimmigrant intracompany transferee visas. Specifically, Henry Hyde(R-IL) proposed the elimination of the "specialized knowledge" basis to obtain a nonimmigrant visa as an intracompany transferee. The bill would only allow intracompany transferee nonimmigrant visas to be available only for managerial and executive positions. Further, Henry Hyde (R-IL) proposes to implement an annual numerical limit on nonimmigrant visas issued to such transferees. Starting with fiscal year 2005, the number of such visas should be limited to 35,000. Henry Hyde (R-IL) also proposed a 7 year limit for admission on nonimmigrant status for intra-company transferee managers and executives.

The bill requires that in order for companies to use this nonimmigrant visa to transfer managers and executives in the United States, they must pay wages that are at least/ or greater of the wages paid to other employees in the company with similar experience and qualifications. Also, the company has to meet the prevailing wage requirement in the area of employment for the sponsored position.

The bill was referred to the Committee on the Judiciary and to the Committee on Education and the Workforce. The L-1 visa program has come under intense scrutiny due to erroneous beliefs that companies take advantage of loopholes in the immigration system to transfer their employees to the United States, forcing American workers out of their jobs. The L-1 visa program provides multinational companies with a convenient way to shift personnel among their offices. This bill fails to take into consideration that foreign companies which invest in the United States need to bring their key employees, and they count on the L-1 visa category to do that. GT will keep you posted on this piece of legislation and anything further in the L-1 debate.

The SOLVE Act of 2004 (Safe, Orderly, Legal Visas and Enforcement Act of 2004) was recently introduced by several key Democratic Members of Congress, including Sen. Kennedy (D-MA), and Reps. Robert Menendez (D-NJ) and Luis Gutierrez (D-IL). Months in the making, SOLVE is intended to rectify some of the more egregious provisions currently on the books for legal immigration. The SOLVE Act was introduced to set a new goalpost regarding the ability of immigrants to reunite with families and reduce illegal immigration.
The legislation calls for a legalization program for those with demonstrated US work histories as well as a new nonimmigrant skilled worker program. It is expected to engender significant controversy as it also calls for repeal of some of the restrictions placed upon immigrants and illegal aliens, such as a repeal of the bars to reentry for those in unlawful status for defined periods. It ties in to the

Congressional News (cont'd.)

President's call for a worker program but does not track the Administration's proposal.

The legislation covers three essential areas of reform: The "earning" of legal permanent resident status for those who can demonstrate defined work periods in the US; increases in family-based immigration to combat continuing backlogs and foster family reunification; and a reconstituted temporary worker program for essential skills.

It is extremely unlikely that the SOLVE Act will see any action this year. However, it provides a new parameter to the continuing debate on immigration reform that will continue to be an issue of Congressional thought and activity into the next session. GT will provide regular updates.

Immigration Law Seminar Series

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

Senior human resource managers, executives, general counsel, and managers across industries, are directly impacted by immigration and tax regulations, the government agencies administering the regulations, and by employment enforcement audits. Join us for these seminars and learn how to strategize and improve your organization's understanding of global transfers and employment of foreign nationals. Please contact Dawn Lurie, conference organizer, at luried@gtlaw.com or Camilla Velasquez at velasquezc@gtlaw.com for more information. You can register on-line at http://www.gtlaw.com/pub/events/index.htm. The next seminar will be held in August.

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The *GT Business Immigration Newsletter* 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 Business Immigration Newsletter* serves as an invaluable resource to individuals, human resource managers, recruiters, and company executives who must keep current on these matters.

SPREAD THE WORD

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JUNE 2004 RESOURCES

June 2004 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
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