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MARCH/APRIL 2005

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IN THIS ISSUE:

H-1B VISA REFORM ACT OF 2004 PROVIDED 20,000 MORE H-1B VISA NUMBERS FOR GRADUATES OF U.S. ADVANCED DEGREE PROGRAMS IN ADDITION TO THE 65,000 H-1B ANNUAL NUMERICAL LIMITATION

Although the H-1B Visa Reform Act has provided 20,000 more H-1B numbers (in addition to the 65,000 annual quota), these provisions have yet to be implemented by the United States Citizenship and Immigration Services ("USCIS"). The situation begs the question, how many visas will really be made available to us before October 1? The process by which the numbers become available is still a mystery. In Fiscal Year ("FY") 2005, H-1B petitions valid for initial employment had an annual ceiling of 65,000. The USCIS is required to adhere to the H-1B numerical limitation. In fiscal years 2002 and 2003, this numerical limit was capped at 195,000, up from the 107,500 limit for FY 2001, and 115,000 limit for FY 1999 and FY 2000. However, this numerical limit was brought down to the pre-FY 1999 limit of 65,000, affecting H-1B employers starting in FY 2004. The Act provided that the new numbers would be available to petitioners on March 8, 2005, however, this has not yet occurred. The overriding question for us at GT this first quarter has been when the numbers would become available and what impact, if any, this would have on April 1, 2005 filings for the new fiscal year beginning in October. The USCIS has indicated that the additional 20,000 numbers would be available to any H-1B applicant, however, there have been conflicting unofficial comments that indicate that these additional numbers could be limited to holders of U.S. advanced degrees.

The March 8th date has come and gone, USCIS issued a press release instructing petitioners to delay filing new petitions until an announcement was published in the Federal Register with specific instructions. As we go to press nothing has been issued. In fact there is a great deal of political maneuvering going on behind the scenes to change USCIS initial statement allowing any potential H-1B holder to file for these additional numbers. So while the discussions go on behind the scenes, we lose precious time and wait it out. The USCIS has also indicated that it inadvertently exceeded the 2005 quota by 10,000 numbers, approving 75,000 new H-1B petitions, rather than the quota mandated 65,000. This discovery has led to further background discussions that the 10,000 numbers may be deducted from the additional allocation and only 10,000 new visa numbers made available for use prior to the new fiscal year. Senator Chambliss sent a letter to USCIS' Director Aguirre reiterating that the Congressional intent was than an additional 20,000 visa numbers be available for this fiscal year, however, the agency has not yet indicated what position they will take on this issue.

The available number of visas for this fiscal year was so low that on October 1, 2004, the first day of FY 2005, that the cap was reached. The FY 2004 cap was hit on February 17, 2004, eight months prior to the start of FY 2004. As noted above, the agency may have overreached in counting last year and may have approved about 10,000 H-1B petitions beyond the quota of 65,000.

The question that remains is when any additional numerical allocation may become available, if the full 20,000 visa numbers will be available, and if all applicants who qualify for H-1B status will be eligible to take advantage of these numbers. We will keep you apprised of further developments on H-1B availability.

Other Highlights of the Act that Affect Your Company

The H-1B Reform Act of 2004 requires that H-1B employers pay 100% of the prevailing wage as opposed to the previous ability to pay 95% of the wage from a governmental or independent wage survey. Further, this provision now mandates that the Department of Labor use or make available to employers a governmental survey to determine the prevailing wage that provides four levels of wages commensurate with experience, education, and the level of supervision. This is good news for most employers because it is reflective of real world practices and takes into account more factors in determining wages.

The bad news is that the American Competiveness Workforce Improvement Act ("ACWIA") training fees were added back into the filing fees and employers are hit with a $1500 fee, $750 for businesses with fewer than 25 employees. More bad news for employers with a significant H-1B workforce is the reinstatement of H-1B dependency provisions.

IMMIGRATION PROVISIONS IN THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

On December 17, 2004, President Bush signed into law the Intelligence Reform and Terrorism Prevent Act of 2004 ("the Act"). The Act includes various important changes to U.S. immigration laws. Below is a summary of the immigration provisions which affects U.S. employers and their foreign national employees.

- **Mandatory in-person interviews of visa applicants:** The Act amends the Immigration and Nationality Act ("INA") to require consular interviews for applicants for nonimmigrant visa applicants between the ages of 14 and 79. Waivers of the interview requirement may be granted in very limited circumstances. As the Department of State ("DOS") has already implemented this in practice, the law simply codifies the current DOS protocol. An interview may be waived by a consular official if: (1) the foreign national is applying for a visa that has expired no more than 12 months ago; (2) the applicant is applying for the same visa classification; the applicant is applying at the consular post located in his or her country of residence; (3) and there is no indication that the foreign national has failed to comply with U.S. immigration laws and regulations in the past. Employers and employees should realize that the mandatory interviews could cause substantial delays in the processing of nonimmigrant visas, thus proper planning is required to ensure that employees are able to meet their employment obligations.

  Visa application requirements. The Act amends the INA to include language that requires foreign nationals applying for a nonimmigrant visa to complete and accurately respond to any request for

information contained in the application. Generally, in the past, USCIS would have issued a request for additional evidence if there was insufficient evidence to adjudicate the matter. However, this new provision could lead to the issuance of denials rather than evidentiary requests. Employers and employees should be aware that they may be requested to provide more documentary support prior to filing which will minimize denials and adjudicatory delays.

- **Additional grounds for removal and deportability:** The Act changes the INA by adding the following grounds for removal and deportation: 1) The revocation of a nonimmigrant visa or other documentation authorizing admission into the U.S. as a nonimmigrant by the Department of State as a ground for removal. Revocation of the visa or other documentation would be reviewable in a removal proceeding if such revocation is the sole ground for removal; 2) Aliens who have received military training from or on behalf of an organization that, at the time of training, was designated a terrorist organization; 3) Aliens who have committed acts of torture or extrajudicial killings abroad; or 4) Foreign government officials who, during their service, were responsible for or directly carried out particularly severe violations of religious freedom. Activities related to these provisions of inadmissibility and deportability committed before, on, or after enactment of this provision shall render the alien inadmissible or deportable from the U.S.

- **Accelerated implementation of a biometric entry and exit system:** The Act calls for the accelerated deployment of the US-VISIT, which is a biometric entry and exit system that helps verify the identities of individuals entering and leaving the U.S. based on identity documents and physical features. As of January 2005, US-VISIT was implemented at the busiest U.S. land and sea ports. It will be expanded to the remaining 115 land ports by the end of 2005.

- **Documents required for entry:** The Act calls for individuals entering the U.S., including U.S. citizens and visitors from Canada and other Western Hemisphere countries, to present a passport or other document sufficient to denote citizenship and identity. This provision will not affect most foreign nationals coming to the U.S., including Mexicans, as many already require a visa, border crossing card, or machine readable passport to enter the U.S.

- **Standards for issuing identity documents:** The Act requires the establishment of federal standards to ensure the integrity of the three basic documents used to establish identity in the U.S.: birth certificates; state-issued driver's licenses and identification cards; and social security cards. The standards will include documents that the applicant must provide for proof of identity. The bill does not mention whether any standards will include proof of legal presence in the U.S.

THE CONSOLIDATED APPROPRIATION ACT OF 2005: ITS IMPACT ON THE H AND L VISA CATEGORIES

On December 8, 2004, Congress passed the H-1 and L-1 Visa Reform Acts of 2004. These reforms were enacted in response to Congressional concerns that the immigration regulations in this country lend themselves to unintended use or fraud, which may hinder the competitiveness of either U.S. workers or U.S. companies.

Overview of H and L Visa Categories

The H-1B visa is in place for companies to employ foreign nationals in the U.S. in specialty occupations requiring at a minimum a bachelor's degree or equivalent professional experience. The L visa permits an employer to temporarily transfer intra-company employees from an affiliate, subsidiary or parent company abroad to the U.S. to work for the U.S. entity in a specialized knowledge or managerial capacity. Workers in L status are meant to perform duties which cannot otherwise be performed by a U.S. worker, without the knowledge of the entity's proprietary products, services or operations. Both of these visa classifications are used extensively by our clients in order to meet the staffing needs of their offices in the U.S. However, recent reforms, passed in response to allegations of fraud have further restricted the use of both of these categories. The changes have been made even though Congress acknowledges the need to maintain these visa classifications for those employers who use these categories legitimately.

Additional Fees

As indicated in our NewsFlash of December 8, 2004, and as discussed above, the training fee was reinstated and raised to $1500 for all but the smallest employees. In addition, a new Fraud Detection and Prevention fee of $500 on all initial H or L applications, including L-1 blanket petitions and petitions for a change of employer, took effect on March 8, 2005. What all of this means is that the filing fee alone for a new H-1B petition adds up to more than $2,000 for regular processing for new petitions and change of employer applications. Given the limited number of H-1B visas available per fiscal year, many employers are opting to file premium processing for initial petitions to have the certainty of an approved petition. Although the agency has stated that numbers are allocated based on date of filing, a premium processing approval that a quota allocation for the new fiscal year is in hand. With the additional fee for premium processing, the total filing fees are more than $3,000 for an H-1B. To minimize the effects of these increased fees, we recommend anticipating future staffing changes, to the extent possible, and creating a legal strategy to maximize effectiveness while minimizing costs.

Other Changes Effective on March 8, 2005

Several sections of the H-1B Visa Reform Act of 2004 were made effective on March 8th. The concept of H-1B dependency has been re-instated as well as a non-displacement attestation on the LCA filed by employers, who are H-1B dependent or who have committed a willful failure or misrepresentation during

the preceding five years. These changes have now become a standard requirement. This means that an employer now needs to maintain statistics, as opposed to merely public access files and immigration files, regarding their use of the H-1B category to determine H-1B dependency at any given time. Given the nature of attestations being made to the Department of Labor and to the Department of Homeland Security (DHS), we recommend that all employers have centralized policies and procedures in place regarding the maintenance and retention of their immigration files, including the withdrawal of H-1B petitions.

As indicated above, the prevailing wage requirement for both H-1B and Labor Certification purposes requires that employers pay 100% of the prevailing wage rather than the "safe harbor" amount of at least 95% of the prevailing wage. The Secretary of Labor, in instances where a government wage survey is provided, is now required to identify four distinct wage levels. We recommend that employers develop a policy for the determination of prevailing wages for positions within their organization and apply these policies consistently. In addition, we recommend that employers maintain accurate actual wage data for positions within their organization.

It is important to note that the permanent LCA attestation requirement, also provide the Department of Labor ("DOL") with investigatory authority where there is reasonable cause to believe that an employer has committed willful failure to meet conditions, has engaged in a pattern or practice of failures to meet conditions, or has committed a substantial failure affecting multiple employees. The Act also calls for a procedure for claim reviews, for notice to an employer, a time limit for the investigation, and a hearing process with time to correct a failure. An employer will not be assessed penalties for failures to pay the prevailing wage if the employer can establish that the manner in which the wage was determined was consistent with recognized industry standards and practices. Congress has intended to provide a mechanism for enforcement of these reforms and requirements, and the DOL and Department of Homeland Security ("DHS") have already intimated that they intend to make full use of this authority. Filing immigration related applications and petitions through the immigration agency or the DOS should not be an ad hoc process within your organization. All organizations should have immigration policies and procedures in place, a point of contact for all immigration issues, and separate, but centralized locations for I-9, public access, and immigration files.

More Changes Effective on June 8, 2005

On December 10, 2004, Greenberg Traurig sent out a NewsFlash alerting our clients of the changes enacted in the L Visa Reform Act, which takes effect in June. Concern that employers were misusing immigration regulations led to a significant change in the L-1 category. The L Visa Reform Act requires that DHS maintain statistics regarding the use of this category; that DHS report to Congress on areas potentially open to abuse; and that a task force be established in Congress to bring about changes based on these reports from DHS. The Act prohibits the use of the category for the purpose of bringing "labor for hire" to the U.S. and specifies that the transfer employees must be stationed primarily at the worksite of the petitioning employer or its affiliate, subsidiary or parent for the purpose of providing a specialized knowledge service directly to the petitioning employer.

In addition to establishing that a qualifying relationship exists between the U.S. and foreign entities, it is more important than ever that a petitioning employer seek counsel when there is any doubt as to whether a qualifying employer-employee relationship exists both abroad and in the U.S., and that it exists for the requisite period of time before filing a petition. The State Department provided further guidance on the appropriate relationship last year indicating that:

> *The essential element in determining the existence of an "employer-employee" relationship is the right of control, that is, the right of the employer to order and to control the employee in the performance of his or her work. This, rather than the source of salary, is the controlling factor. Possession of the authority to engage or the authority to discharge is very strong evidence of the existence of an employer-employee relationship.*

Another important change taking affect within a few short months requires all L-1 applicants, including those applying under a blanket petition, to have worked for the affiliate, subsidiary or parent abroad for a full year. No longer will blanket L applicants be allowed to transfer after only six months of employment with the affiliate abroad.

Given the latest L-1 and H-1 visa reforms affecting wages, conditions, attestations and legitimate employment relationships, we strongly recommend that all organizations with non-immigrant employees conduct an audit for immigration compliance. We are available to provide specific or customized guidance and audit services with respect to these issues.

TAX AND PAYROLL RULES FOR NONRESIDENT ALIENS

Dealing with immigration issues in a vacuum can result in serious tax consequences. U.S. income tax and payroll withholding rules differ significantly depending on an employee's status as either a resident or nonresident. These are tax terms, not immigration terms. Employees entering the U.S. on H, L or J visas may qualify for either status. A foreign national's tax status is determined by their U.S. immigration classification and days of physical presence in the U.S. under complex tax rules.

A. U.S. Tax Status: Resident, Nonresident and Dual

The following rules are general guidelines and the facts and circumstances should be reviewed in each case.

1. A foreign national holding a green card is a resident alien.
2. An F, J or Q student in the U.S. for less than 5 calendar years or a foreign national on a foreign government-related visa, such as A-1 or G-1, is a nonresident alien.
3. A non-student holding a J or Q visa previously in the U.S. on a F, J, or Q status for 2 (sometimes 4) years, in the previous 6 years is a resident alien.

4. A foreign national who meets the "substantial presence test" is a resident alien. The test is met if the foreign national is present in the U.S. for 183 days of the current year or 183 days in the current and prior 2 years based on the formula counting all of the days in the current year plus one-third of the days in the prior year plus one-sixth of the days in the second preceding year.

In addition, special rules may apply which can give the foreign national "dual status" in the first and last years of physical presence in the U.S. A "dual status" alien is a part-year resident and part-year nonresident. Classification of an alien employee as either resident or nonresident can be extremely complicated to determine in their first year of arrival to the U.S. The IRS wage withholding regulations and IRS Publication 515, "Withholding Tax for Nonresident Aliens and Foreign Corporations," contain little guidance for employers to determine whether an employee is a nonresident alien or resident alien in the arrival year. In fact, the employee's tax status may not be known until after December 31st of that first tax year.

A nonresident alien may be entitled to a special election to file as a resident alien or to file a joint return. These elections are generally not made until the alien files his or her U.S. income tax return. Depending on the circumstances, these elections can generate significant tax savings. After the first year of entry into the U.S., most non-immigrant aliens on temporary assignment to the U.S. will be classified as resident aliens, unless they travel extensively outside the U.S.

In practice, the burden of claiming resident or nonresident alien status may be placed on the employee. As an added protection in the event of IRS audit, however, the employer may request a written statement from the employee in support of his or her claim of resident or nonresident status.

B. Key Payroll Rules for Nonresidents

The wage withholding rules for nonresident aliens are unique. The primary differences from the rules for resident aliens are as follows:

- they must use single wage withholding tables;
- they are entitled to only one exemption (there are exceptions for residents of Canada, Mexico, Japan and South Korea);
- they may claim only certain itemized deductions, not the standard deduction; and
- an additional $7.60 per week must be withheld; and
- they are taxed only on compensation from U.S. sources, which include wages and salary allocable to U.S. workdays.

Technically, if a nonresident performs work outside the U.S., the employer should not withhold tax from salary allocable to those non-U.S. business days. Most payroll systems, however, are unable to automatically track U.S. and non-U.S. workdays in any single payroll period. Therefore, if the number of days can be accurately estimated at the start of the U.S. employment, a withholding adjustment can be made and a wage withholding "true-up" made at year end.

Certain remuneration for services performed by nonresident aliens within the U.S. may be exempt from wage withholding under the Internal Revenue Code or an income tax treaty. In the case of remuneration for services within the U.S. by an employee, the nonresident employee must supply his or her employer with a completed IRS Form 8233 to claim exemption from U.S. tax liability on wages allocable to U.S. work days.

In addition to certain income tax exemptions, both resident and nonresident aliens may be eligible for exemptions from U.S. social security taxes. There is a specific exemption from U.S. social security coverage for nonresident aliens who are in the U.S. under an F, J or M visa. The U.S. has also entered totalization agreements with 18 countries. Where an employee is transferred to the U.S. for a temporary period (usually up to 5 years), he or she can remain in the home country system and qualify for an exemption in the U.S. by obtaining a Certificate of Coverage from the home country.

The rules of taxation are complicated and the liabilities for not following them are significant. GT has expert international tax attorneys to facilitate companies in understanding the intricacies of the law and applying.

IMMIGRATION IN THE NEWS

President Bush Reiterates Commitment To Immigration Reform

During a joint press conference with Mexican President Fox and Canada Prime Minister Martin, President Bush said, " I will continue to push for reasonable, common-sense immigration policy with the United States Congress. It is an issue with which I have got a lot of familiarity -- after all, I was the governor of this great state for six years and I dealt with this issue a lot, not only with President Fox's predecessors, but with governors of border states — Mexican border states, Tamaulipas and Nuevo Leon. And I know what — I know the issue well. And I will continue to call upon Congress to be commonsensical about this issue."

So does this mean that a essential worker legislation is still on the table? You bet it is. Indeed it is rumored that bi-partisan legislation to address the President's immigration principles will be introduced as early as April 2005. There are many hurdles to overcome, but the fact of the matter is that for our own national and economic security, immigration reform must be addressed.

Grassroots lobbying and contact with your Senators and Representatives is as important as ever. The U.S. needs immigration reform that includes a temporary visa category for skilled, semi and unskilled workers. GT's National Co-Chair of the Business Immigration practice, Laura Reiff, serves as co-chair of the Essential Worker Immigration Coalition ("EWIC") which 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. EWIC stands ready to work with the Administration and Congress to push forward on important immigration reform issues.

The President has addressed the critical need to fix America's broken immigration system for national security, economic and humanitarian reasons. Specifically, President Bush has said that U.S. employers must have the ability to hire the workers they need to run their businesses. Additionally, he has addressed the need to recognize the millions of undocumented workers in our economy and to create a mechanism to convert them to a legal status.

WAL-MART Settlement

In March, a civil settlement was announced between Wal-Mart Stores and the Department of Justice resolving the investigation of alleged immigration violations. We note that this agreement concludes a four-year investigation into practices involving use of third party contractors and the alleged employment of undocumented employees by those third party contractors.

We are encouraged by this settlement and hope that with the Administration's leadership as well as Congressional initiatives, we can push forward on important immigration reform issues that facilitate the lawful employment of essential workers by U.S. companies and organizations.

GAO Reports on the SEVIS System

The US Government Accountability Office ("GAO") presented testimony to Congress on the Student and Exchange Visitor Information System ("SEVIS"). SEVIS was implemented after 9/11 to monitor students and exchange visitors through an automated tracking system. Many businesses and educational institutions have been under whelmed with the capabilities of the system and have been particularly critical of the customer service and reliability. The GAO, while complimentary of DHS efforts to correct flaws in the program, acknowledged that this system is still replete with errors and that the customer service aspect must be further improved. The SEVIS system was originally introduced with the view to making it a model for other immigrant tracking systems. We can only hope that the bugs will be worked out before this system is applied to other visa applicants.

IMMIGRATION LAW SEMINAR SERIES

Greenberg Traurig's Business Immigration practice continues its tradition of providing complimentary presentations to companies on changes in immigration law, outbound immigration issues as well as discussions on money saving tax strategies for employees as well as employers. Our team 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 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 for more information.

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The Business Immigration Observer is published by Greenberg Traurig's Business Immigration practice. Dawn M. Lurie serves as the editor. The newsletter contains information concerning trends and recent developments in immigration law and legislation analyzed and reported by immigration law professionals.

The Observer serves as an invaluable resource to individuals, human resource managers and recruiters, in-house legal professionals and company executives for whom keeping up with the most current immigration information is a professional imperative.

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April 2005 State Department Visa Bulletin Link:
http://travel.state.gov/visa/frvi/bulletin/bulletin_2150.html
Service Center Processing Times:
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