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BUSINESS IMMIGRATION GROUP OBSERVER

JUNE/JULY 2005

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IN THIS ISSUE:

*Strategic Alliances: Olswang in Brussels and London; Studio Santa Maria in Milan and Rome; **Greenberg Traurig Office/Strategic Alliance: Hayabusa Kokusai Law Offices in Tokyo

RELIEF FOR U.S. BUSINESSES? THE SECURE AMERICA AND ORDERLY IMMIGRATION ACT OF 2005

On May 12, 2005, Senators John McCain (R-Arizona) and Ted Kennedy (D-Massachusetts) introduced a bi-partisan bill that promises enhanced national security balanced with relief for U.S. businesses that rely on a foreign workforce. We are delighted to report that Laura Reiff, the GT Business Immigration Group's national practice group chair and co-chair of the Essential Workers Immigration Coalition (EWIC), was instrumental in the drafting and subsequent negotiations and revisions to this bill.

Relief for Employers and Foreign Workers

Particularly interesting in the proposed legislation is the follow-through on the "guest worker" programs that President Bush highlighted extensively during his presidential re-election campaign. The proposed essential worker program's temporary visa — the H-5A — will allow individuals who are in the U.S., both legally and out-of-status, or who are not yet in the U.S. to apply for a three-year temporary visa to come to work in the U.S.

Unlike the H-1B or L-1 visas that also have a three year duration, the H-5A will not require a specific educational background or an ongoing affiliation with a multinational organization; rather, only a U.S. employer sponsor and a qualified employee will be involved. The educational and experiential qualifications can be limited and will allow for workers to come to the U.S. in both skilled and unskilled positions. The prospective temporary worker will simply need to show a work history, clean criminal record, and proof that they are not a security threat to the United States. Once granted the status, the worker will be authorized to work with other employers, this is different from the existing employer specific H-1B and L categories. However, if the worker is laid off, he/she will need to find new work or leave the U.S. within sixty days. The temporary visa will be valid for an initial three-year period and will be renewable for an additional three year period for a total of six years. Businesses throughout the U.S., particularly those who have been trying to hire for lower skilled and non-degreed positions, will welcome the introduction of this new nonimmigrant visa option.

Upon conclusion of the six year period in H-5A status, the employee will be eligible to apply for legal permanent residency in the U.S. This new option would be available through the new H-5B visa that would not require certification of a job offer through the current labor certification process with the Department of Labor. The proposed H-5B section would even allow individuals who had been in the U.S. illegally to pay a fine to complete the process in the U.S. without returning to their home country. The worker will simply need to demonstrate that they have a future position in the U.S. and will also need to meet additional security and background checks and pay fines (if they had previously been here illegally). Additionally, for those in the country but out of status, a showing of knowledge of English and civics and a payment of any back taxes will be required.

Family Unity and Backlog Reduction are two other key aspects of this legislation that should also be welcomed by U.S. employers and their foreign workforce. Relief for family and employment based immigrants includes eliminating immediate relatives of U.S. citizens from the numerical limit on the number of family based immigrant visas, increasing the total available visa numbers on green cards to clear up the current agency backlogs and increasing the total visa numbers available to employers to hire permanent workers from 140,000 to 250,000 per year.

Improved Enforcement and Compliance Mechanisms

All employers will similarly appreciate changes on the enforcement and compliance side featured in the proposed legislation. The bill mandates the creation of a new electronic work authorization system that will, once the system is fully operational, ultimately replace the current I-9 system that has been in place since 1986. The new system will be applied universally. Undoubtedly, this will be a welcome change for many employers who have been confused about the completion and retention of I-9 forms and may not have understood which documentation was appropriate to use as evidence of work authorization. For more on changes to the I-9, please refer to the article below. Additionally, the bill will provide the Department of Labor with expanded powers to conduct random audits to ensure that workers are protected.

Greater Border Security

On the security side, the bill will require the development and implementation of further border security initiatives that will increase information sharing between the U.S., Mexico and Canada, as well as between federal, state and local agencies. Additionally, the bill addresses federal reimbursement to state and local agencies for the incarceration of undocumented aliens and provides funding for other related criminal justice costs associated with the undocumented aliens. Similarly as part of the enforcement changes, immigration related documents will be upgraded to make them further tamper-resistant and US-VISIT will be similarly updated to reflect increased biometrics for travelers.

Concluding Thoughts

The provisions of The Secure America and Orderly Immigration Act of 2005 clearly and accurately reflect the needs of U.S. businesses by incorporating relief in an area that, to date, has been largely unrepresented — the essential workers. In addition, the bill addresses other significant problem areas within the immigration field including undocumented aliens, significant agency backlogs, visa number quotas and enhanced border security. The business immigration group at GT strongly supports this legislation and is delighted to have been part of this incredible work of practice group chair, Laura Reiff. If you have questions about the bill or the role of the EWIC, please consult with your GT legal professional or Laura Reiff at 703-749-1372 / reiffl@gtlaw.com for more information.

EMPLOYER-FRIENDLY CHANGES IN EMPLOYMENT VERIFICATION COMPLIANCE REQUIREMENTS

Is the U.S. government finally catching up with today's technological advancements? It appears so, in light of the Department of Homeland Security's recent efforts to introduce technology into the employment verification process. Although all employers, regardless of size, are still required by law to verify the identity and employment eligibility of each of its employees, recent changes in the law will permit employers to retain the form necessary to record this information (Form I-9) in electronic format. Better still, should corporate technology permit, employers may now also choose to complete the Form I-9 electronically, making the forms easier to read and search. In spite of these new improvements, employers should know that failure to comply with basic employment verification requirements may still result in either civil or criminal penalties, depending on the type, severity and/or frequency of the violation(s) at issue.

Responsibilities Under the Law: What is the I-9?

Every employer is required to verify each of its employees' identity and work authorization, regardless of whether its staff is comprised entirely of U.S. citizens, entirely of foreign nationals, or contains some mixture of both U.S. citizens and foreign nationals. The instructions provided on Form I-9 require the information provided by the employee be recorded on the form and verified by the person preparing the form. This employment verification process must be completed within the first three days of hiring any employee. If the employee is not retained for more than three days, such information ought to be documented on the first day of hire. Failure to complete any of these procedures can lead to penalties against the employer, should an I-9 audit arise in the future. Once the Form I-9 is completed, it is not filed with the U.S. government but is instead retained by the employer as part of its records for a period of either three years after the employee's initial date of hire, or one year after the employee's date of termination, whichever is later. Employers are not legally required to retain copies of the supporting documents provided by the employee, although company policy on this matter should be reviewed by legal counsel. If an employer chooses to copy identity documentation then it should do so for all of its employees in a uniform fashion.

GT routinely presents seminars on the I-9 process in an effort to assist employers in understanding the form and their specific responsibilities. We were pleased to have government speakers including the Department of Homeland Security (ICE) and the Department of Justice's Office of Special Counsel at our previous seminars.

Difficulties With Compliance to the Regulations

Performing these responsibilities can be tedious, complicated and confusing for employers, especially considering the various types of permissible documentation that may be submitted and the numerous categories of work authorized foreign nationals. Still, since September 11th there has been a renewed interest in the enforcement of employment verification requirements with respect to the security-sensitive industries. Therefore, it is imperative that employers comply with these regulations. In the meantime,

Congress has been working to improve the procedures available to ease the burdens imposed on employers during this process, thereby making it as user-friendly, efficient and cost-effective as possible.

Recent Congressional Assistance

In late 2004, Congress responded to employers' complaints regarding the difficulties imposed on them by these requirements. As a result, it drafted and passed legislation permitting employers to use new methods for verification and document retention. The resulting legislation was signed into law by President Bush in October of 2004 and was assigned an effective date of April 28, 2005. Therefore, preliminary information about the implementation of these new rules regarding storage and signature alternatives has just recently been released by the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") division. Although DHS has not yet produced any final regulations outlining this option, ICE has produced interim guidelines on its website (www.ice.gov) in order to make use of these new electronic alternatives.

In the past, despite more recent technological advancements, the laws governing employment eligibility verification only permitted employers to complete the Form I-9 by hand and to retain its copies in either paper, microfilm, or microfiche format. As a result, abiding by the document retention policies was time consuming, tedious and restrictive, especially in the case of an audit. As a result of this new legislation, employers may now choose to electronically complete, sign, and store copies of the Form I-9. In addition, according to ICE, employers may choose to continue completing these forms by hand, while storing them in an electronic format, or they may choose to complete the forms electronically as well, with the assistance of some type of electronic signature — using either electronic signature pads, personal identification numbers or "click to accept" boxes. ICE also recommends that employers include a quality assurance program and indexing system when upgrading its documentation and retention procedures to prevent or detect any alterations, additions, deletions or eliminations of electronically stored data, and for purposes of easy reference to documents recorded in the new system. It is important for employers to note, however, that at present, no formal regulations regarding this procedure have been issued by the federal government. Therefore, we recommend that employers await further, formal direction from ICE before making any changes to its current practices, as diversion from normal procedures may be costly in the long-run.

What's Ahead?

In time, this technological improvement in the employment verification process is expected to make document retention policies more cost-effective for large employers, improve the employer's ability to search the retained Form I-9s in case of an audit, and reduce the opportunity for error in form completion. ICE's goal is to minimize the inconvenience of this process for employers, thereby providing an incentive for compliance with these regulations and consequently, minimizing the number of unauthorized workers in the United States. However, until these new technologies have been tested for reliability and approved by the U.S. Government, we recommend that employers continue to complete their I-9 forms by hand and retain paper copies of them in order to avoid any subsequent complications in case of an audit.

GOING GLOBAL? PLAN ASSIGNMENTS AHEAD!

Today as companies look to globalize their operations, outsource personnel and meet client's needs around the world it is important to plan international assignments with as much lead time as possible. Local immigration and employment laws throughout the world, look to protect their own labor markets and somehow control the migration of foreign nationals to their territories. Just like in the U.S., work permits, residence permits and visas for many countries have a long list of tedious requirements. In some cases translations, legalizations, authentications, and apostille's will be required. Certain visas also require medical examinations. What is the common thread among most countries? Time. Time to apply and process. It is common to find clients looking to assign personnel "next week." Well, that probably is not going to happen as the "9/11 restrictions on travel syndrome" have reached the farthest corners of the planet.

Collecting the information on local requirements can be a bit complicated if dealing directly with web-sites or finding local counsel in a country. At Greenberg Traurig (GT), we have an Outbound Immigration Team that has vast experience, a worldwide network and valuable relationships with many Embassy's in Washington, D.C. that can assist in making an assignment as smooth as possible.

To contact the GT Outbound Immigration Team E-mail: Dawn Lurie (luried@gtlaw.com) or Richard Villegas (villegasr@gtlaw.com).

STATE DEPARTMENT ANNOUNCES EMPLOYMENT-BASED THIRD PREFERENCE VISA UNAVAILABILITY

The State Department has published the July Visa Bulletin indicating that there will be no visa numbers available in the employment-based third preference category for the month of July. Further, the Bulletin indicates that all visa numbers for the third preference category for both professionals and other skilled workers have been allocated for the entire 2005 fiscal year. Consequently, there will be no visa number availability for third preference based cases until the new fiscal year which begins on October 1, 2005.

As a result of the unavailability of visa numbers, the USCIS and the State Department will be unable to complete processing on any pending permanent residency cases for applicants of any nationality in the third preference category until on or after October 1, 2005. The Bulletin does not include information as to whether retrogression of numbers will be seen when visa numbers become available on October 1, 2005.

An available visa number is required to conclude consular processing or adjustment of status in the U.S. The USCIS and DOS will hold the cases that are otherwise ready for final adjudication in abeyance until a number becomes available. If a worldwide cut off date is announced for October 2005 visa numbers, only those cases that were filed prior to the published date will be eligible for final adjudication.

GT will provide updates on visa number availability as announced by the Department of State.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES PROVIDES UPDATE ON H-1B AND H-2B FISCAL YEAR QUOTA USAGE AND AVAILABILITY AT THE AILA CONFERENCE

Hot off the presses from the AILA conference where GT attorneys served as speakers and mentors to the Bar association:

H-1B UPDATE

For Fiscal Year 2005, USCIS officials indicate that only 8,300 petitions have been approved or filed in connection with the 20,000 new numbers. These are petitions filed by H1B candidates with advanced degrees from U.S. Institutions.

For Fiscal Year 2006, USCIS officials indicate 5,500 out of 20,000 numbers have been used in the Foreign Graduates with Advanced Degrees from U.S. Universities category and 27,300 numbers have been used for foreign nationals in the regular fiscal year numerical limitation of 65,000.

While these numbers are low, it is possible that the cap for the 2006 fiscal year will be reached in October 2006 as it did last year.

H-2B UPDATE

For Fiscal Year 2005, USCIS officials indicate that as of June 21, 2005, 15,000 petitions have been approved or filed out of the additional 35,000 numbers.

For Fiscal Year 2006, information was not provided. GT will continue to monitor the numbers and provide updates.

MACHINE READABLE PASSPORT REQUIRED FOR VISA WAIVER COUNTRIES

Effective June 26, 2005, all travelers from the 27 Visa Waiver Program (VWP) countries must have a machine-readable passport to enter the United States without a visa. The original date of October 1, 2003 as set forth by the Immigration and Nationality Act, was postponed to October 1, 2004 to accommodate 23 of the 27 countries. Officials warn however, that strict enforcement will begin on June 26, 2005. Machine-readable passports include two optical-character, typeface lines at the bottom of the biographic page of the passport that confirms the identity of the passport holder quickly.

The Visa Waiver Program (VWP) under certain circumstances, enables nationals of the following countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

IMMIGRATION SEMINAR UPDATE

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 and 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.

Business Immigration Group

Mahsa Aliaskari
Los Angeles
310.586.7713
aliaskarim@gtlaw.com

Kristin L. Bolayir*
Tysons Corner
703.749.1373
bolayirk@gtlaw.com

Patricia A. Elmas*
Tysons Corner
703.749.1371
elmasp@gtlaw.com

Oscar Levin
Miami
305.579.0880
levino@gtlaw.com

Dawn Lurie
Tysons Corner
703.903.7527
luried@gtlaw.com

Alix L. Mattingly
Tysons Corner
703.749.1325
mattinglya@gtlaw.com

Elissa McGovern
Tysons Corner
703.749.1343
mcgoverne@gtlaw.com

Laura Foote Reiff
Tysons Corner
703.749.1372
reiffl@gtlaw.com

Martha Schoonover
Tysons Corner
703.749.1374
schoonoverm@gtlaw.com

Richard Villegas*
Tysons Corner
703.749.1322
villegasr@gtlaw.com

Peter S. Wahby
Dallas
972.419.1285
wahbyp@gtlaw.com

Not admitted to the practice of law

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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EDITOR: Dawn M. Lurie

JUNE 2005 RESOURCES

July 2005 State Department Visa Bulletin Link:
http://travel.state.gov/visa/frvi/bulletin/bulletin_2539.html
Service Center Processing Times:
Vermont: http://www.gtlaw.com/practices/immigration/processing/cis/vscProcesstimes.pdf
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http://www.gtlaw.com/practices/immigration/processing/dol.htm

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