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Immigration Observer

July/August 2008

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Missouri Governor Signs Tough Immigration Bill

On July 7, 2008, Governor Blunt announced that he signed new legislation intended to address illegal immigration in Missouri that is set to take effect in August 2008. This legislation follows on the heels of his directives to fight undocumented immigration by barring the state from issuing Missouri driver's licenses to undocumented immigrants and imposing criminal penalties for those who assist undocumented immigrants in obtaining driver's licenses.

The new law calls for fines reaching $5,000 for employers who incorrectly classify workers as independent contractors to avoid paying taxes and have five or more employees performing public works. The new legislation also prohibits the creation of sanctuary cities in the state; requires verification of legal employment status of every public employee; allows for cancellation of state contracts for contractors if they hire undocumented workers; requires public agencies to verify the legal status of applicants before providing welfare benefits; and criminalizes the transportation of undocumented immigrants for exploitive purposes. Additionally, the legislation requires citizenship checks on every individual presented for imprisonment.

U.S. Department of Labor Announces Debarment of a Software Provider

On July 9, 2008, the U.S. Department of Labor (DOL) announced that it formally debarred LawLogix Group Inc., an immigration software company, from filing applications for permanent labor certification (PERM). The debarment will be in effect for three years. The press release stated that the DOL determined that the company willfully provided false or inaccurate information when applying for permanent labor certifications and engaged in a pattern or practice of failing to comply with the terms of the application, ETA Form 9089.

In fact, the DOL does not tell the whole story. In 2007, the Department issued final regulations designed to enhance program integrity and to reduce incentives and

opportunities for fraud and abuse. Newer electronic form systems require providers to understand how data will be transmitted through the system. LawLogix is a company that designs and sells immigration software to businesses that utilize the permanent labor certification program. Last year, LawLogix submitted more than 100 applications using the permanent program's online filing system for the sole purpose of testing the parameters of the department's electronic processing system. Unlike other government entities, the DOL made it difficult for immigration software providers to work with the agency to test the software; and it seems LawLogix assumed DOL would clearly identify the test applications as what they were—test applications, and not false applications.

Debarment is one tool in the DOL arsenal utilized to achieve its goals. It is essential to understand that in this case, LawLogix is not debarred from acting as a software provider, but only from submitting DOL PERM applications as an employer.

Continued Worksite Enforcement

On June 25, 2008, the U.S. Immigration and Customs (ICE) Enforcement branch of the Department of Homeland Security office (DHS) raided the Action Rags, USA, factory in east Houston. While immigration agents arrested 166 undocumented workers, no company managers or officials were arrested. Given ICE's track record, employer arrests may soon follow. ICE reportedly began investigating Action Rags, USA one year ago after learning about improper hiring practices from a former employee.

Former employees, usually unhappy ones, are a wonderful source of information for ICE. They are frequently tapped into to initiate investigations. In their annual report, ICE revealed that it secured fines and forfeitures of more than $30 million in worksite enforcement cases during the 2007 fiscal year. ICE also made 863 criminal arrests and 4,077 administrative arrests following in the same year.

We expect to see increased ICE worksite raids during the end of this administration to send a message to employers and force them to reconsider their employment verification policies. In effect, ICE would like employers to police themselves. The IMAGE program is an excellent example of ICE expecting employers to adopt best practices by dangling the carrot. In reality, neither the program, nor an IMAGE certification, has been expanded since the original members were selected in 2007.

GT will continue to provide timely updates on worksite enforcement issues.

DOL Decisions Reflect Crackdown on Compliance

Recent opinions issued by Department of Labor Administrative Law Judges demonstrate DOL's emphasis on H-1B compliance issues. One decision held the petitioning company's owner personally liable for nearly $40,000 in back pay to an H-1B employee. Another decision upheld debarment from the H-1B program and fines issued to a company for willful failure to comply with record-keeping and wage requirements and for failing to cooperate with the investigation. These decisions all resulted from DOL investigations of companies' compliance with the H-1B program. For additional information about H-1B compliance matters, please contact your GT attorney.

New Form I-9 Released

On June 23, 2008, the U.S. Citizenship and Immigration Services (USCIS) released a new Form I-9—the employment eligibility verification form. The new form, dated June 16, 2008, is available at http://www.uscis.gov/i-9, and replaces the previous 2007 edition, which expired on June 30, 2008.

There are no new changes to the form. The new form should be used for all new hires and when re-verifying those individuals with expired work eligibility. In these cases, the employer should place the employee's name in Section 1, and then the employer should complete Section 3 with updated work eligibility. The new I-9 should then be stapled to the older form. In general, employers are required to use Form I-9 to verify the identity and work eligibility of all new employees, including U.S. citizens. Additionally, employers must keep completed Forms I-9 for three (3) years after initial employment or one year after termination, whichever is later. The new Form I-9 may now be completed and stored in hard copy or electronically.

For additional information, please refer to: http://www.uscis.gov/files/form/I-9.pdf.

Ninth Circuit Holds That A No-Match Letter Does Not Constitute "Constructive Knowledge"

On June 16, 2008, the Ninth Circuit held in Aramark Facility Services v. SEIU (Aramark) that a no-match letter from the Social Security Administration (SSA) does not place an employer on notice that it is employing an undocumented worker. The court reasoned that the main purpose of the no-match letters is not immigration-related, but merely to notify the named employees that, due to the mismatch, their earnings are not being posted to their accounts. In fact, the SSA tells employers that the information it provides does not make any statement about the named employees' immigration status. The Court further reasoned that without more information, the letters do not provide employers with constructive knowledge of any immigration violation.

However, businesses should be aware that, under the Immigration Reform and Control Act of 1986 (IRCA), employers are subject to civil and criminal liability if they knowingly employ workers who are not authorized to work in the U.S. Under the regulations, this standard can be met if an employer has constructive knowledge of a worker's lack of work authorization. Constructive knowledge includes what a reasonable person should infer from the totality of the circumstances. Under a rule published by the Department of Homeland Security (DHS), employers would qualify for a "safe harbor" from a positive finding of constructive knowledge based upon receipt of a no-match letter, and thereby avoid liability, provided that they asked employees to provide further documentation

from the SSA within 90 days of receiving the no-match letter. That rule is the subject of litigation and is currently enjoined from taking effect (AFL-CIO v. Chertoff). This case did not involve the no-match rule or the surrounding litigation. In the instant case, the employer received no-match letters from the SSA and gave the affected employees three days in which to return with correct documents showing that they were authorized to work in the U.S. When they could not, they were terminated. The workers brought suit, claiming that the employer had no basis to infer that they were not authorized to work in the U.S. based solely on the receipt of the no-match letter. The Ninth Circuit held that the employees were wrongfully terminated and found that the no-match letter was in fact not sufficient for the employer to conclude that the workers were unauthorized.

The Aramark case highlights the quandary employers face upon receipt of a no-match letter; balancing the potential liability for employing an unauthorized worker with the possibility of a wrongful termination.

GT will continue to provide updates on the SSA No-Match letters and the litigation surrounding them as events develop.

Class Action Lawsuit Against USCIS Filed in California

A class action lawsuit has been filed in the U.S. District Court for the Central District of California on behalf of thousands of immigrant families whose children were wrongfully denied visas. The suit seeks to compel the United States Citizenship and Immigration Services (USCIS) to issue the now-adult children visas in accordance with provisions of the Child Status Protection Act (CSPA).

Congress enacted CSPA to keep children, the derivative beneficiaries of their parents' visa petitions, together with their families. Prior to CSPA, children who reached 21 years of age were no longer eligible to derive immigrant visas from a parent who was the principal beneficiary of an immigrant visa. This is because upon reaching 21, the adult children no longer qualified as "children" according to the definition of a child in the Immigration and Nationality Act (INA). Section 3 of CSPA, codified as INA § 203(h)(3), remedied the problem by allowing children to automatically convert the visa petition and retain their parents' earlier visa filing date, or "priority date."

The suit alleges that although USCIS has granted some visa petitions pursuant to INA § 203(h)(3), there is no uniformity in the application of CSPA by the USCIS. The class action lawsuit seeks to compel USCIS to properly adjudicate all cases filed under CSPA, and uniformly comply with the requirement of allowing children to retain their parents' original priority date in subsequent petitions field by the parents.

Federal Contractors Will Be Required to Use E-Verify

On June 6, 2008, President Bush issued an Executive Order requiring contractors to use an electronic employment eligibility verification system, as designated by the Secretary of the Department of Homeland Security (DHS), to verify the employment eligibility of all persons hired during the contract term and all persons performing work within the United States on the federal contract. The E-Verify system was designated as the selected system by DHS Secretary Michael Chertoff. A proposed rule implementing the executive order was then published in the Federal Register on June 12. A 60-day comment period on the proposed regulations will follow. Both the rule and the order require that employers who enter into covered federal contracts use the E-Verify system for all new hires once the contract begins and for all employees both new and current who perform work on the contract.

For more information on the required use of E-Verify, please refer to our GT Alert: http://www2.gtlaw.com/pub/alerts/2008/0600c.pdf, and our GT Newsflash: http://www2.gtlaw.com/practices/immigration/news/2008/06/24.htm.

Last-Minute Updates to the E-Verify System

The United States Citizenship and Immigration Services (USCIS) announced a series of enhancements to the E-Verify system, which are intended to improve the accuracy of the system's automatic confirmation process. The E-Verify system has been plagued by errors and often returns what is known as a "tentative non-confirmation," meaning that the system cannot verify that an employee is authorized to work in the U.S., when in fact many employees are authorized to work.

Correcting the database is a time consuming task for the affected employee. Although employers are prohibited from firing an employee while such status is tentative, many employers unknowingly (or sometimes intentionally) violate the law by terminating an employee when they still possess the legal right to work. The E-Verify system now includes naturalization data to address the fact that naturalized citizens whose records have not yet been updated with the Social Security Administration (SSA) comprise the largest category of work-authorized persons initially facing tentative non-confirmations when processed through E-Verify. A naturalized citizen who receives an SSA mismatch may resolve the issue by calling USCIS or by visiting a field office in person.

An additional enhancement will incorporate real-time arrival data from the Integrated Border Inspection System (IBIS), which is expected to reduce the number of immigration status-related mismatches for newly arriving workers. Finally, USCIS initiated citizenship status records information sharing with SSA in an effort to enhance E-Verify's accuracy rate.

The E-Verify system has been plagued with issues, including the lack of biometric identifiers that can withstand identity theft. Currently, the phototool software is not limited enough to combat identity theft issues and results in employers hiring employees who pass through the E-Verify system, but, in fact, are undocumented workers. In order for the E-Verify system to be successful, the underlying databases must be updated and maintained. This includes funding the SSA's efforts to update, correct, and maintain its own databases.

Currently, the E-Verify program is due to be reauthorized by Congress. Congressional leaders are considering varied options for funding and/or replacing the program entirely. GT attorneys are participating in the USCIS working groups, which are attempting to transform and improve the e-verify system by providing much-needed practical experience and insight from the stakeholders' perspective. It is extremely important that employers take the time to contact their congressional representatives about the importance of the reauthorization and the inclusion of improvements to the program.

For more information, please refer to the GT "E-Verify Corner," at: http://www2.gtlaw.com/practices/immigration/compliance/eVerify.htm

DHS To Accept Voluntary Electronic System for Travel Authorization (ESTA)

Beginning August 1, 2008, the Department of Homeland Security (DHS) will accept Electronic System for Travel Authorization (ESTA) applications on a voluntary basis. The ESTA program will become mandatory for visa waiver program (http://travel.state.gov/visa/temp/without/without_1990.html#countries) travelers in January 2009.

ESTA is an automated system that determines the eligibility of citizens from VWP countries to travel to the United States. Rather than travel to the U.S. and face a possible finding of ineligibility to enter the U.S. under VWP, VWP nationals will enter their information online before traveling to the U.S. and will not be allowed to board a transport to the U.S. without first receiving clearance. If approved, the authorization will grant holders multiple entries for a maximum of two years, or until the traveler's passport expires; whichever occurs first. Citizens from VWP countries can then travel to the U.S. for a temporary period of 90 days without first obtaining a B1 or B2 visa stamp from a U.S. consulate, as is the case under the current VWP. However, travelers should be aware that Customs and Border Protection (CBP) officers will continue to make admissibility determinations at the U.S. port of entry and will grant each entry for a maximum of 90 days. ESTA approval only grants authorization to board a carrier for travel; it does not guarantee admission into the U.S. The General Accounting Office (GAO) has recently reviewed this change to the VWP and has warned that the result may be a large increase in the number of nonimmigrants from VWP countries forced to obtain nonimmigrant visas in order to travel to the U.S. due to VWP ineligibility. This will result in increased processing times and backlogs at visa issuing posts in these countries.

GT will continue to monitor this process and provide updates as they become available.

Iowa Meatpacking Raid Further Criminalizes Immigration

The May 12, 2008 raid at AgriProcessors, Inc., a meatpacking plant in Iowa, with warrants for almost 700 people and arrests of almost 400, represented the nation's largest "criminal worksite enforcement operation," according to U.S. Immigration Customs Enforcement (ICE) officials. The raid involved agents from 16 federal, state, and local agencies, and takes the record as the largest single-site immigration raid in American history.

AgriProcessors is the nation's largest kosher slaughterhouse. The plant in Postville normally employs approximately 800 workers, the majority of whom come from rural Guatemala. Of the 389 immigrants arrested, 77 pleaded guilty to aggravated identity theft and fraudulent use of Social Security numbers to obtain documents needed to obtain their jobs. Each received five months' imprisonment, followed by deportation, and three years' supervised release in their home countries.

In the past, unauthorized workers were generally detained for civil violations, then rapidly deported. However, the Iowa raid marked a sharp escalation in the crackdown and mistreatment of undocumented workers. Prosecutors brought federal charges for immigration violations and criminal charges including "aggravated identity theft" and "knowingly using a false Social Security number" — apparently against many individuals merely trying to earn a decent living.

Erik Camayd-Freixas, a professor and court interpreter who assisted in the court proceedings of many of these workers, shocked America by breaking the confidentiality code and speaking out on behalf of the slaughterhouse workers. In a personal narrative (http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf), he described how the mostly illiterate Guatemalan workers with Mayan surnames were marched in single-file groups of

ten—shackled at the wrists, waist, and ankles—and criminally charged with working without proper documentation. Ironically, many of the workers had the employment verification documents filled out for them at the plant, because they could not read or write Spanish, let alone speak English. In most cases, these workers did not act "knowingly," or possess the necessary criminal intent of stealing someone's identity, to be found guilty of the charges brought against them. We agree that this was a data "fishing expedition" of sorts and, further, a pilot raid to be replicated elsewhere by ICE.

To date, no charges have been brought against managers or owners at AgriProcessors, but prosecutors may file a case against the company or its managers later. Immigrants pleading guilty were required to agree to cooperate with any future investigation. Often times, this type of cooperation opens doors to further indictments.

GT continues to monitor ICE's activities and assist our clients in protecting their companies from such investigations.

USCIS Settles Kaplan Class Action

On May 15, 2008, the U.S. Citizenship and Immigration Service (USCIS) entered into a settlement agreement in the national class action, Kaplan, et. al. v. Chertoff, et. al., filed in the U.S. District Court of the Eastern District of Pennsylvania. The petitioners consisted of non-U.S. citizens who lost or were on the verge of losing their eligibility for Supplemental Social Security Income (SSI) based on a statutory seven-year limit and were unable to become naturalized U.S. citizens before the loss of SSI benefits.

Under the settlement agreement, USCIS will expedite Applications to Register Permanent Status or Adjust Status (Form I-485) and Applications for Naturalization (From N-400) of current or former SSI beneficiaries, provided their application was pending with USCIS for more than six months. Expedited processing includes USCIS requesting an accelerated FBI Name Check, as well as prioritizing other USCIS internal actions, such as scheduling an interview. USCIS will collaborate with the Social Security Administration (SSA) to identify those individuals who have lost or will lose their SSI benefits within in the next year, and who have an I-485 or N-400 pending with USCIS. USCIS will then expedite the identified cases—even if the applicant has not yet requested expedited processing, and even if the application has not been pending for more than six months.

To learn more about becoming a U.S. citizen or applying for adjustment of status, please contact a GT attorney.

Centralized Labor Certification Proposed

The Department of Labor (DOL) has proposed centralizing the application processing system for foreign labor certification. According to the proposal, each DOL National Processing Center (NPC) will specialize in specific case types, which will effectively permit greater consistency in the adjudication. The Chicago NPC will focus on processing temporary applications, including those related to the H-2A and H-2B programs, and the Atlanta NPC will focus on permanent labor certification (PERM) applications.

In an effort to improve efficiency, the DOL has also proposed eliminating the role of the State Workforce Agencies (SWA) in making prevailing wage determinations for the H-2B, H-1B, and PERM programs. Employers would submit a

request for a prevailing wage determination directly to the NPC. For the H-2B program, the employer would also be required to complete recruitment prior to the filing of an application for labor certification with the NPC.

Businesses should be aware that the centralization efforts, combined with the closing of the Backlog Elimination Centers, signals the DOL's shifting of more resources towards regulatory enforcement. The DOL has recently selected more cases for auditing, including random audits and those targeting specific legal issues. Targeted audits generally focus on issues such as the employers' internal postings, whether stated job requirements are normal for the occupation, and whether the foreign national gained experience with the employer that submitted the PERM application. As expected, audited cases are subject to longer processing times.

EAD Cards Based on Pending I-485 to be Valid for Two Years

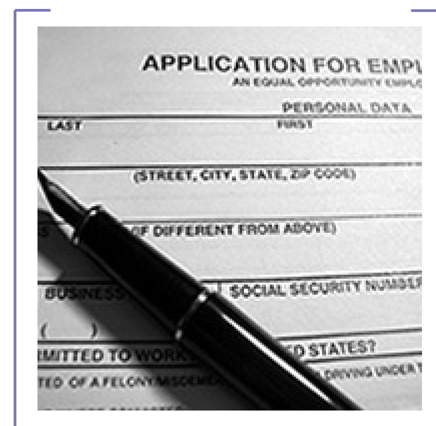
Effective July 1, 2008, USCIS began extending the validity period of the employment authorization documents (EAD cards) issued to individuals with pending I-485 adjustment of status applications. The new validity period is extended to two years, instead of only one year. Homeland Security Secretary Chertoff announced that applicants with pending adjustment applications will begin receiving 2-year employment authorization documents when the adjustment application is expected to remain pending for more than one year.

In order to be eligible for a 2-year employment authorization document, the underlying I-140 petition must be approved. If the I-140 petition is still pending, USCIS will issue a 1-year employment authorization document.

When determining whether or not to grant a 2-year employment authorization document, USCIS will review the I-485 priority date at the time that the employment authorization application is filed. If the priority date is current on the date of filing, but later retrogresses while the application is pending, USCIS has the discretion to review the case again and issue the 2-year employment authorization document.

No details have been provided as to whether this impacts EAD applications already pending with USCIS.

On a related note, the USCIS unveiled a new Form I-765, Application for Employment Authorization. The new form includes additional eligibility codes correlating to the Department of Homeland Security's recent interim final rule on Optional Practical Training (OPT). The interim final rule modifies the conditions and duration of OPT for qualified F-1 non-immigrant students. For more information on the rule, please read our GT Alert.



The USCIS will require all applicants to begin using the new form as of July 9, 2008.

GT regularly assists foreign nationals with filing EAD applications. For further information, please contact your GT attorney.

August 2008 Visa Bulletin

Notably, the August Visa Bulletin shows that immigrant visa numbers are now unavailable for all employment-based third preference (EB-3) categories. The employment-based first preference (EB-1) category remains current for all chargeability areas. In addition, the visa numbers for all employment-based second preference (EB-2) categories for China and India remains at June 1, 2006, while Mexico, the Philippines, and all other chargeability areas are still current.

The availability of numbers are published based on data collected from Consular officers and the U.S. Citizenship and Immigration Services (USCIS). Both are required to report to the Department of State the number of foreign nationals who qualify for immigrant visas in the different categories. The bulletin indicated that the USCIS made allocations for the demand received by July 8, 2008 in the chronological order of the reported priority dates. Where the demand exceeded the available number of immigrant visas for the time period in a particular category, that category was deemed oversubscribed and unavailable. Only applicants who have a priority dates earlier than the cut-off date may be allotted a number; and only these individuals are eligible to complete the permanent residence process through the filing of an I-485 with USCIS or an Immigrant Visa application with the U.S. Consulate abroad.

August cut-off dates for common, employment-based green card categories are shown below. The listing of a date within a category indicates oversubscription. The letter “C” signifies the visa numbers are “current” and available for all qualified applicants.

Category	China	India	Mexico	Philippines	All Other Areas
EB1	C	C	C	C	C
EB2	01-Jun-06	01-Jun-06	C	C	C
EB3	U	U	U	U	U
EB4	C	C	C	C	C
EB5	C	C	C	C	C

*GT continues to partner with industry coalitions and key Congressmen to advocate for immigration relief from these annual quotas on employment-based immigration.

Consular Corner

U.S. Passport Card

Passport card applications are currently being accepted in anticipation of land border travel document requirements. Based on current projections, the Department of State expects to begin production of the passport cards in June. The passport card will facilitate entry and expedite document processing at U.S. land and sea ports-of-entry when arriving from Canada, Mexico, the Caribbean, and Bermuda. However, the card may not be used to travel by air.

Petition Information Management Service ("PIMS") Verification

Consular posts are now required to verify the details of approved nonimmigrant visa petitions (H, L, O, P, and Q) through the Consular Consolidated Database (CCD) through the new "PIMS" (Petition Information Management Service) program. The Kentucky Consular Center (KCC) has ceased e-mailing scanned copies of approved petitions to posts. The electronic PIMS record created by KCC will now be the primary source of evidence to be used in determining petition approval. Since PIMS implementation in late last year, we have seen delays with visa applications.

New DS-160 Electronic Nonimmigrant Visa Application Form

The current nonimmigrant visa form, DS-156, is completed on the Department of State (DOS) web site, but the government system does not electronically collect or retain the data entered in the form. The applicant presents the printed form at the visa interview, and the bar code is scanned, which completes those data fields in the DOS Consular Consolidated Database (CCD), avoiding re-keying by posts and allowing electronic storing and searching by data field. With the new DS-160, an applicant completes the DS-160 and actually submits the data online. The data will then be captured by a government database as a nonimmigrant visa application. Currently, Nuevo Laredo and Monterrey in Mexico are serving as the pilot posts for this program.

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Immigration Observer

July/August 2008

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The Business Immigration Observer is published by GT's Business Immigration & Compliance practice. Dawn M. Lurie serves as the editor. The newsletter contains information regarding trends and recent developments in immigration law and an analysis of legislation reported by immigration law professionals.

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August 2008 DOS Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html
Visa Wait Times: http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php

Service Center Processing Times:
Vermont: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=VSC
Texas: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=TSC
Nebraska: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=NSC
California: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=CSC
National Benefits Center: https://egov.uscis.gov/cris/jsps/NBCprocesstimes.jsp

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