Greenberg Traurig

Immigration Observer

May/June 2007

IN THIS ISSUE:

Greenberg Traurig Recognized for its Collaboration with the American Immigration Lawyers Association

On May 16, 2007, Greenberg Traurig, LLP and GT Shareholder Dawn Lurie received acknowledgement for their outstanding partnership with the AILA DC Chapter. On April 20, 2007, Dawn served as the Chairperson for this year's AILA DC Spring Conference, appropriately titled *Navigating the Complex Waters of Immigration Today*. Julie Myers, Assistant Secretary to the U.S. Immigration and Customs Enforcement, gave opening remarks. Other speakers included savvy practitioners and a star-studded list of government officials. The conference focused on all aspects of business immigration, including consular processing, business visas, employer compliance and national security. In particular, the Immigration Through Investment (EB-5) program was highlighted. GT has filed numerous petitions through this Visa category which requires a $500,000 investment and the creation of 10 jobs. Dawn Lurie, Martha Schoonover, Glenn Reyes, and Laura Reiff all spoke at the conference. Practice group co-chair Laura Reiff presented the keynote address providing an update on comprehensive immigration reform. GT has been a steadfast supporter of DC AILA, devoting time and resources.

Update From Capitol Hill – Immigration Reform Countdown

On June 8, the Senate halted debate on the immigration bill, despite the temporary setback, continued debate may resume. In early May, the issue of comprehensive immigration reform was brought back to the floor of the Senate by Senate Majority Leader Harry M. Reid (D-Nev). Senator Reid appealed to President Bush, an ardent supporter of comprehensive immigration reform, to lend his support to Senate debate. The White House called for a program that would:

- Establish a New Worker Program with a limited opportunity for permanent residence for users;
- Eliminate some family preference categories;
- Adopt a new merit/point system for permanent residence; and
- Provide a program to convert the undocumented workers into a new Z visa category that would ultimately allow them to earn permanent residence.

Eventually a new bill was introduced replacing the contents of S1348.

GT attorneys who have been working around the clock on Capitol Hill to advocate for strong bi-partisan legislation believe that the proposal can be used to formulate comprehensive immigration reform. Any legislation that will be implemented must be workable.

Concerns regarding the merit-based point system are being addressed. The entire employment-based categories may be replaced with a new system. The current Y temporary program provides only two years of employment before the employee must leave for one year's

time. We are also fighting for an increase in the proposed 140,000 greencards per year. As it stands now, the H-1B program as we know it would be destroyed.

We await news on whether immigration debate will resume this month.

Other News from the Hill….

On May 8, 2007, Representatives Leahy (D-VT) and Nadler (D-NY) introduced the Uniting American Families Act. If passed this bill would allow citizens and legal permanent residents (LPRs) who are in sex-same relationships to sponsor their partners for immigration benefits.

GT has learned that House democrats plan to introduce a bill entitled Responsibility to Iraqi Refugees Act that would increase the number of Iraqi refugees eligible for resettlement in the United States by 20,000 in 2007 and 2008. Current regulations allow for 7,000 Iraqi refugees to be processed for entry into the U.S. by year's end. The proposed legislation would also provide 15,000 visas to be issued to "special immigrant status" Iraqis and their families annually for the next four years. Special immigrant status Iraqis are those that have worked with the U.S. government, U.S. contractors or U.S. NGOs in Iraq. The U.N. High Commissioner for Refugees estimates that more than four million Iraqis are displaced as a result of conflict in the country.

GT will continue to provide legislative updates as we continue talks with representatives on the bill.

Exchange Visitor (J Visa) Update

The Department of State issued an update on the J Visa on March 13, 2007. The update stressed the importance of three factors: the residence abroad requirement, competency in English and visa expiration date.

As to the residence abroad requirement, the Foreign Affairs Manual states that the residence abroad requirement for exchange visitor visas is different from the same requirements as the B visitor visas or other short-term visas. The statute clearly presupposes that the natural circumstances and conditions of being an exchange visitor do not disqualify that applicant from obtaining a J visa. It is natural that the exchange visitor proposes an extended absence from his/her homeland. Nonetheless, the consular officer must still be satisfied at the time of the visa application that the foreign national possesses the intent to depart the U.S. at the conclusion of the program. Officers should not assume that a J visa holder would return home just because he/she is subject to the two-year residency requirement under INA 212(e).

Second, the update prompts officers to be sure that an applicant possesses sufficient proficiency in the English language to participate in the program. *See* 9 FAM 41.62 N6.1. The level of English language ability needed to successfully complete a program may vary by the type of program. Officers may still conduct interviews in English, so long as there is no expectation that the applicant speak English fluently. Regardless of the interview, participants in graduate medical training programs must provide proof of English competency.

Third, visas are mandated to expire on the program end date. Posts are encouraged to establish communications with the local universities and Department of Education to set reasonable program end dates. Alternately, posts can survey the most prominent educational institutions and their local Ministry of Education to determine program end dates. Posts have discretion to decide whether they want to allow exceptions to these uniform dates if certain universities, or certain individual university programs, have longer vacation periods. However, they are not permitted to make exceptions for individual students who have individual permission to miss classes. Such a case-by-case process is difficult to verify and cumbersome for posts. Sponsors and recruiters have been warned not to pursue such exceptions.

For further information on this update, please visit: http://travel.state.gov/visa/laws/telegrams/telegrams_3225.html.

Advanced Degree Cap Reached!

On April 30, 2007, the U.S. Citizenship and Immigration Services (USCIS) provided an update on the number of filings for H-1B petitions filed on behalf of foreign nationals with U.S.-earned Masters or higher degrees. According to the USCIS update, the 20,000 cap was reached for the FY 2008 H-1B. Congress mandated that the first 20,000 of these types of petitions be exempt from any fiscal year cap on available H-1B visas.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in fields, such as scientists, engineers and computer programmers. As part of the H-1B program, the Department of Homeland Security (DHS) and the Department of Labor (DOL) require U.S. employers to meet specific labor conditions to ensure that American workers are not adversely impacted, while DOL's Wage and Hour Division safeguards the treatment and compensation of H-1B workers.

H-1B PROCESSING UNDER THE LOTTERY

GT is slowly receiving cases that did not make the H-1B lottery. At this point, GT has notified all clients regarding cases that were selected in the random generator.

ICE Enforcement Operations *(courtesy of www.ICE.gov)*

Over the past month, U.S. authorities arrested and detained at least 750 immigrants in raids across the country. In California, 359 immigrants were detained over a two-week period in late March and early April. Many of the arrests were made after officials from Immigration and Customs Enforcement (ICE) raided private homes. In Maryland, 65 workers were detained in late March during a raid at the Under Armour sportswear company outside of Baltimore. And in Beardstown, Illinois, ICE raided a slaughterhouse owned by Cargill, arresting 62 workers in the process.

The sweeps are part of an ICE program dubbed *Operation Return To Sender*. Michael Chertoff, the Secretary of the Department of Homeland Security, stated that the raids were intended to show Congress the need to adopt the Bush administration's immigration program, which involves the creation of a new guest worker program and an increase in enforcement, both on the border and in workplaces.

In contrast, between 1991 and 2003, fewer than 5,000 employer investigations were completed per year, targeting less than one in a thousand U.S. worksites. While evidence of undocumented employment was found in almost half of these cases, only 10 percent resulted in fines, and an average of just $2.2 million was collected nationwide.

In a letter dated March 1, 2007, Congresswoman Zoe Lofgren requested that Assistant Secretary Julie Myers provide an explanation and clarification on the recent workplace enforcement actions undertaken by ICE. Specifically, Lofgren requested that Myers arrange several briefings on the enforcement actions: a Congressional briefing and various field briefings in the affected areas of enforcement.

While the briefings are pending, the House Judiciary Sub-committee on Immigration held a hearing on April 24. Marc Rosenblum, a University of New Orleans professor, testified that developing a fair and effective system of worksite enforcement requires Congress to strengthen the verification and enforcement procedures. He suggested the solution is to provide employers and employees with clear rules and unambiguous answers during the eligibility verification stage. Stephen Yale-Loehr, a professor at Cornell University, also testified and recommended the implementation of a "workable, efficient and accurate electronic employment verification system," or EEVS. However, it will be difficult to determine at what point any EEVS system will be

reliable enough to impose on all employers. Most employers are willing to play by the rules, and their straightforward compliance with the law under these circumstances will prevent the overwhelming majority of undocumented employment.

These recommendations are in harmony with provisions contained in the *Security Through Regularized Immigration and a Vibrant Economy Act of 2007* (STRIVE ACT, H.R. 1645). For example, the STRIVE Act would require ICE officials to spend at least 25 percent of their time on worksite enforcement. (H.R. 1645 §305(b)). Also, the Act would make it an unfair immigration-related employment practice to terminate an individual based on tentative nonconfirmation notice or to use EEVS to screen an applicant before an offer of employment. Moreover, the bill would require employers to safeguard access to the system.

For more information on ICE, worksite enforcement operations, employer compliance and enforcement please visit http://www.gtlaw.com/practices/immigration/compliance/index.htm

DOL Regulation May 17, 2007: Terminates Substitution on Labor Certification Applications, Introduces New Expiration of Labor Certifications and Bans Sale and Certain Payments of Labor Certifications

On May 17, 2007, the Department of Labor (DOL) published the final regulation which was developed in an effort to reduce fraud and abuse in the permanent labor certification program. Through the regulations, the DOL says it is trying to protect the integrity of the program. The regulation provides three key elements that affect our clients including, elimination of labor certification substitution, introduction of a new 180-day validity period for certified labor certification applications, and a ban on the sale, receipt or reimbursement of certain payments for labor certifications including the payment of attorney's fees and costs involved in the preparation and filing of labor certification applications. The final rule also reinforces existing regulations regarding fraud and establishes procedures for debarment of employees from the use of the permanent labor certification program.

Termination of Labor Certification Substitution after July 16, 2007

Current practice allows for the substitution of alien beneficiaries on pending and approved labor certifications enabling employers to substitute a different or new alien in place of the original alien for whom the case was prepared and filed. The actual substitution typically (or often) occurs at the time the I-140 petition is filed with USCIS. The final DOL regulation prohibits substitution of aliens on labor certification applications, effective for filings made on or after July 16, 2007. This prohibition will not affect any substitutions that are filed and in progress or approved prior to July 16, 2007. Furthermore, any requests to modify pending labor certification applications will not be accepted after July 16, 2007. Coinciding with the DOL ruling, the USCIS, in anticipation of receiving a flood of substitution applications as a result of the DOL's ruling, terminated the premium process service for Form I-140 petitions requesting labor certification substitution, effective May 18, 2007. Substitution applications on Form I-140 can still be filed through July 15, 2007, but employers will not be able to expedite the processing of such petitions using the USCIS's premium processing service.

Expiration of Labor Certifications

Labor Certifications currently do not have an expiration date. In its proposed regulation, the DOL had proposed a 45 day period in which to file the I-140 petition following certification of the labor application. Under the final rule, the DOL requires the filing of an I-140 petition with USCIS within a 180 day period or the labor certification application will expire. Specifically, for labor certifications approved on or after July 16, 2007, the I-140 petition must be filed within 180 days of the labor certification approval. In addition, labor certifications approved before July 16, 2007, will expire 180 days after July 16, 2007, if an I-140 petition is not received on or before January 12, 2008.

Ban on Sale and Certain Payments Relating to Labor Certification Applications

The final regulation bans the sale, barter, purchase and certain "improper" payments for labor certifications. It also prohibits employer practices that require an alien to pay the employer's labor certification costs -- the DOL is taking the position that it is the employer's obligation to bear the expenses incurred for

the preparation and filing of the permanent labor certification application, including any attorney's fees and associated costs for preparing and filing the application. The final regulation states that a foreign national is able to retain and pay for his/her individual counsel to represent their own interests in the labor certification process; however in instances where there is dual representation, when an attorney represents both the employer and the foreign national, the costs associated with preparation of the labor certification must be borne only by the employer. This change applies only to the labor certification application and not the I-140 petition or adjustment of status application. However, the preamble of the regulation is not completely consistent with this provision. Finally, the ruling prohibits an employer from reducing the wages, salary or benefits of the foreign national named on the application to cover the expenses related to the preparation and filing of the application. These inconsistencies are being reviewed and GT will provide further updates as we learn more about the implementation of this major change in the law.

DHS EXTENDS TPS FOR NATIONALS OF HONDURAS, EL SALVADOR AND NICARAGUA

On May 2, 2007, DHS Secretary Michael Chertoff announced his decision to extend Temporary Protected Status (TPS) designations for eligible nationals of Honduras, Nicaragua and El Salvador for an additional 18 months.

Huge Advances in Employment-Based Immigrant Visa Numbers

The much awaited June 2007 visa bulletin was released on May 14 and includes marked jumps in priority dates or visa number availability in all previously backlogged employment-based categories. The visa bulletin sets forth to whom an immigrant visa number is available based on congressionally mandated quotas for U.S. immigration. Immigrant visas, including employment based visas, are numerically limited by preference category and by country of chargeability (which is, in most cases, one's country of birth). From time to time, backlogs occur in certain categories of employment-based visas, for all persons or for persons from certain countries. This occurs when there are more people applying in certain categories from a specific country than there are visa numbers available.

Immigrant visa number "availability" is tied to U.S. "preference" system for permanent residence. The setting of the preference is based upon the position's minimum requirements, not the actual qualifications of the employee. The net result is that persons who have applications whose visa numbers have retrogressed are not able to complete the final processing of their case, the actual "application" for permanent residence, until their priority date becomes current. The priority date is established when an Application for Permanent Employment Certification is filed with the Department of Labor (DOL) for positions requiring DOL certification; or when the I-140 Immigrant Visa Petition is filed with USCIS for positions not requiring DOL certification.

The category enjoying the most movement is the Employment-based 3rd preference category which came forward to June 1, 2005, with other workers category moving forward to October 1, 2001. The Employment-based 2nd preference category for all chargeability areas, Mexican and Philippines nationals remains current and jumps to January 1, 2006, for Chinese nationals and April 1, 2004, for Indian nationals. The June Bulletin also provides movement in most of the family based categories, but the advances are not as significant as the employment-based categories and move forward in some categories by only a few weeks to one month. The eligibility for adjustment of status for those individuals with current priority dates will commence on June 1, 2007.

The DOS' Visa Bulletin is released on a monthly basis at http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html. Greenberg Traurig has continued to partner with industry coalitions and key Congressmen to advocate for immigration relief from these annual quotas on employment-based immigration.

GT continues to prepare I-485, Applications for Adjustment of Status for those eligible to file as quickly as possible. We

first learned of the advancement during the DC AILA Annual Spring conference on April 20 when Charlie Oppenheim, Chief of the Immigrant Visa Control and Reporting Division, Bureau of Consular Affairs at the U.S. Department of State, informed us of the upcoming plans to move the numbers forward. Mr. Oppenheim however warned that there would be a short period of time available for I-485 applications to be filed as the numbers would again retrogress at summer's end. GT attorneys encourage their clients with approved immigrant visa petitions to contact their attorneys and quickly file their adjustment applications GT also encourages clients who were selected in the diversity visa lottery to contact us as quickly as possible, as there is a limited number of immigrant visas available in this category before the numbers are exhausted.

Consular Corner

In planning international travel, all foreign nationals must carefully review their current immigration documentation to make sure that they have all of the appropriate travel documentation required to return to the United States. Individuals in non-immigrant status must have a valid visa in their passport for that category. Advance planning can make the visa application process smooth and relatively painless. Most visa applicants will be required to have an in-person interview at a U.S. Embassy or Consulate abroad. Therefore, we suggest that foreign nationals carefully review the current visa wait times for information on interview appointment availability and timelines for visa issuance at the embassy or consulate. In advance of travel, all supporting documentation should be carefully reviewed. The online application forms, as well as fee payment instructions, should be closely followed to avoid delays.

Remember, some embassies and consulates have significant visa appointment scheduling and issuance delays; advance planning is vital.

UPCOMING DEADLINES

- Substitutions ending July 15, 2007
- 2008 DV Lottery applicants must process for immigration visas by September 30, 2007
- USCIS fees go up on July 30, 2007
- Watch for Visa Bulletin retrogression

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The Business Immigration Observer is published by Greenberg Traurig's Business Immigration and Compliance group. 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.

SPREAD THE WORD

The Observer serves as an invaluable resource to 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.

If you have enjoyed reading this newsletter and have found useful information in it, we would greatly appreciate your help in spreading the word. You can do this by forwarding copies to your friends and colleagues.

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Visa Wait Times:
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