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Immigration Observer

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Social Security No-Match Rule

On Thursday, October 28, 2008, DHS published its final No-Match rule in the Federal Register. The rule can be found at http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf. Even after the legal challenges and concerns expressed by the business community, unions and trade associations the DHS chose to simply republish "the text of the August 2007 rule without substantive change." However, DHS did acknowledged that the rule will not be implemented until the injunction by the U.S. District Court for the Northern District of California district court is lifted. According to court documents, the Department Homeland Security will simultaneously request that the District Court lift the injunction and move for summary judgment following the rule's publication. As of today's date, October 29, 2008, the injunction remains in effect, and therefore businesses are still not subject to the regulation. However, if the injunction is lifted, the Social Security Administration will move forward in sending out over 140,000 no-match letters to businesses along with the DHS insert explaining to employers what their obligations are under the finalized rule. Thus, it is important for businesses stay up to date regarding the pending litigation and to be prepared to resolve any no-match issues according to the procedures outlined in the rule. To this end, GT is issuing a separate alert updating employers on the current status of the No-Match rule. Check the Immigration and Compliance Updates page at http:/immigration.gtlaw.com for further information.

Worksite Enforcement Update

Immigration and Customs Enforcement (ICE) has increased worksite enforcement raids during the end of this administration in an attempt to send a message to employers and force them to reconsider their employment verification policies. This year alone, ICE agents made 1,022 criminal arrests at U.S. workplaces, of which 116 were company supervisors and managers. ICE has also made more than 3,900 administrative arrests for immigration violations. Below are highlights of some of

ICE's most recent workplace raids across the nation and industries.

- ***October 9, 2008***, ICE agents executed a federal criminal search warrant at the Columbia Farms poultry processing plant. The raid was part of an ongoing, ten-month, criminal investigation into Columbia Farm's employment practices, which had already resulted in criminal charges against nine supervisors, four plant employees and one human resources manager. The ICE enforcement action resulted in the administrative arrests of 331 undocumented workers. Of those arrested, 11 face criminal charges for various crimes including re-entry after deportation, aggravated identity theft, counterfeit documents and false statements. All have been transferred into the U.S. Marshal's custody.

- ***September 18, 2008***, ICE, in what it called "an ongoing investigation into possible hiring and alien harboring violations," raided two Chinese Restaurants. In addition to the restaurants, ICE raided three homes in California that allegedly belonged to individuals affiliated with the restaurants. In total, 21 people were arrested and accused of administrative immigration violations. One of the arrestees was released on humanitarian grounds pending a hearing in immigration court, while the remaining 20 were transported to ICE detention facilities where they will remain imprisoned pending hearings before an immigration judge. ICE also indicated that it has targeted a second facility allegedly belonging to one of the restaurants.

- ***September 10, 2008***, more than 60 ICE agents conducted a raid at Palm Springs Baking Co. in Palms Springs, FL. The raid stemmed from an ongoing investigation that began in 2006. ICE officials alleged that managers and supervisors at the company extorted money from undocumented immigrants by guaranteeing them a job in return for a $3,000 payment. As a result of the raid, ICE officials arrested 51 individuals, including a current and former supervisor. Of the 51 arrestees, only 27 were detained. The others were released on humanitarian grounds while they await immigration hearings.

- ***September 4, 2008***, ICE agents arrested 23 workers at the Sun Valley Group, one of California's major wholesale flower growers, in Arcata, CA. The workers were taken into custody on administrative immigration violations. The arrests are the result of an investigation that originated with a call to ICE's tip line. ICE uncovered evidence that some of the workers used Social Security numbers and alien registration numbers that were fraudulent, did not belong to them, or did not authorize employment.

Despite the increase in enforcement raids, ICE's main objective continues to be convincing employers to police themselves. The IMAGE program is an excellent example of an ICE attempt at persuading employers to adopt best practices. Businesses who partake in the program establish a formal partnership with ICE and agree to follow the best hiring practices recommended by the program, train their staff to uphold the high standards required, and to

use the screening tools offered by the federal government to ensure employees are lawfully authorized to work. In a recent ceremony at its new headquarters in Arlington, Virginia, ICE celebrated the addition of 37 companies to the IMAGE program. Despite these newest additions, it is clear that many employers remain hesitant to join. Many potential enrollees' fear that their voluntary enrollment could harm their businesses by attracting ICE's attention. An ICE audit is one of the primary requirements that has made some employers weary to enroll. In an effort to improve enrollment in the program, ICE announced a new type of membership which includes a two year "grace period," otherwise known as "Associate Membership." Employers who choose to join the program as "Associate Members" may defer the requisite ICE audit for up to two years. Of the 37 new enrollees, 26 signed on as full members, while 11 companies joined as "Associate Members."

In light of continued enforcement actions, increased scrutiny and focus on administrative penalties, consideration of the IMAGE program is something to be left to appropriate company decision-makers. Any decision to approach ICE must be considered carefully and should only be a part of a larger overall compliance strategy.

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

New Citizenship Test Began on October 1, 2008

U.S. Citizenship and Immigration Services (USCIS) recently completed a multi-year redesign of the citizenship test. USCIS's goal in redesigning the test, which follows a basic history and civics curriculum, was to make sure that the test accurately determines whether applicants have a meaningful understanding of U.S. government and history. USCIS also wanted to ensure that the test would be administered uniformly nationwide. Alfonso Aguilar, Chief of the Office of Citizenship at the USCIS stated that, "the exam is not harder, only more meaningful." Instead of asking questions requiring rote memorization, such as "how many stars are on the U.S. flag," the new test as asks questions that require conceptualization and critical thinking about civics and history. For example, "what does the constitution do?" and "what is one responsibility that is only for United States citizens?" Despite the stylistic change in questions, the civics test remains an oral test administered by USCIS Officers. Applicants will be asked up to 10 out of 100 possible civics questions. An applicant must answer six (6) out of ten (10) questions correctly to pass the civics portion of the naturalization test. After answering civic questions, the applicant is then asked to read between one and three questions which are paired with answers that must be written to ensure literacy. After attending several interviews where the new test was administered, Greenberg Traurig Attorney, Dawn Lurie said, "the test doesn't appear more difficult, but it certainly feels more lengthy." Dawn Lurie further commented that "the test does appear more meaningful and practical," echoing Chief Aguilar's sentiment.

Determining whether an applicant will be required to take the old or redesigned test is slightly complicated. All applicants whose citizenship interviews were scheduled before October 1, 2008, will still take the old citizenship test. Applicants whose citizenship applications were received by USCIS before October 1, 2008, and whose initial exams were scheduled between October 1, 2008 and October 1, 2009, may choose to take either the old or new test. Applicants whose citizenship applications were received by USCIS after October 1, 2008, will be required to

take the new test, as will applicants whose initial interviews are scheduled on or after October 1, 2009, regardless when their applications were received by USCIS.

EB-5 Investor Program Sunset or New Dawn?

On June 9, 2008, the House of Representatives passed H.R. 5569, which is currently up for debate in the Senate. The debate will focus on the EB-5 Regional Center Program, which allows an Alien to invest $500,000 into a pre-screened, USCIS approved Regional Investment Center, in exchange for an initial 2-year conditional resident status for the investor and his/her dependents. That particular EB-5 Regional Center Program was scheduled to "sunset" on September 30, 2008. However, on September 30, 2008, President George W. Bush signed a continuing resolution extending the EB-5 Regional Center Pilot Program to March 6, 2009. A short extension was required because the Senate remains at an impasse due to some legislators' desire to include more restrictive immigration provisions in the proposed bill. It should be noted that "traditional" EB-5 applications, using a $1 million investment, will not be Program.

Given the current economic crisis and the complexity of the issue, it is unlikely that Congress will address the EB-5 Regional Center Program until the 2009 session. The immigrant investor program has met with great success and many of GT's clients have been pleased with the results and the ease in which their applications were processed. Should you be considering such an investment please contact Dawn Lurie at luried@gtlaw.com or your GT immigration professional. As always, GT will continue to provide you with important updates regarding any EB-5 legislation.

Increased Period of Stay for Trade-NAFTA Professional Worker

U.S. Citizenship and Immigration Services (USCIS) recently adopted a rule change increasing the maximum period of time a Trade-NAFTA (TN) professional worker may remain in the United States before they are required to seek readmission or obtain an extension of stay. The TN nonimmigrant classification is available to Mexican and Canadian nationals who have a job offer, a bachelor's degree or appropriate professional credentials and who work in certain qualified fields outlined in the North American Free Trade Agreement. Under the new rule, TN Workers will receive a three year period of admission, instead of the one year period that was granted under the old rule. Going forward, TN Workers may also receive extensions of stay in increments of up to three years. USCIS changed the rule in hopes of reducing administrative burdens and costs on TN workers, and to benefit U.S. employers by increasing the amount of time they can employ a TN worker without having to seek an extension of status.

Projected Naturalization Processing Times and the Election

United States Citizenship and Immigration Services (USCIS) reduced the backlog for naturalization applications following the 2007 surge in filings. It seems as though USCIS met its goal of decreasing naturalization processing times from an average of 16-18 months to an average of 10-12 months by the end of September. Even with these improvements, USCIS intends to takes steps to further streamline the naturalization process. For example, USCIS implemented an aggressive hiring strategy and expanded work hours for adjudication officers. According to Jonathan Scharfen, acting USCIS director, the Service's goal is to process "all naturalization applications within five months by this time next year." GT attorneys are pleased to see processing already within the five month time frame for many of our clients.

The large backlog in naturalization processing was caused, in part, by a surge in filing during Fiscal Year 2007, which was nearly double the normal annual volume. The surge can be partially attributed to a fee increase that was implemented on July 30, 2007. However, historically, there has often been increases in naturalization during election years. This is due, in part, to legal permanent residents' desire to vote in the upcoming presidential elections. Indeed, studies show that recently naturalized voters have higher voter participations rates than native-born voters. Additionally, many politicians push for an increase in naturalizations because they believe that by increasing the number of potential voters they will increase their chances for victory.

Increasing naturalizations could be an effective strategy, especially for Democrats, because of the tendency for new citizens to vote for the Democratic Party. For example, after the 1996 surge in naturalization, Bill Clinton won 70% of the Latino vote, compared to Bob Dole's 21%. With polls showing a close race between Obama and McCain, potential voters whose naturalization applications are currently pending could have a significant impact on the 2008 elections. This is especially true given that many of the applications mired down in naturalization backlog reside in swing states like Colorado, Nevada and New Mexico. While processing times have decreased, unfortunately, due to the long delays, many resident aliens that were in the system were not sworn in time to meet the voter registration deadlines.

Only time will tell how many naturalizations were completed, and what impact they will have on the upcoming elections.

Potential Comprehensive Immigration Reform under a New Administration

Although the economy is currently dominating political discussions, Immigration continues to be one of the hottest domestic policy issues. Indeed, it has been one of the key issues for the Bush Administration, and both Senators Obama and McCain were leaders in the Comprehensive Immigration Reform debate. So what do we expect from the next Administration? We believe there will be an effort to effectuate significant immigration reform in enforcement, compliance and improved technology, based on the fact that the Obama and the McCain camps both agree that immigration reform is imperative. However, the candidates' timeline for these reforms might be a little different.

An Obama administration plan may move more swiftly through Congress, especially given anticipated gains in Democratic seats in both the House of Representatives and Senate. If the Democrats do gain a substantial number of seats in Congress, an Obama Administration will likely have an easier time pushing its version of comprehensive immigration reform through Congress. Obama's plan focuses on creating secure borders, improving the immigration system, removing incentives to enter the U.S. illegally and working directly with Mexico. Additionally, during an Obama presidency, Unions will most probably play a much larger role in shaping overall policy.

If Senator McCain is elected the next President of the United States, we may see a resurrection of the old McCain-Kennedy bill from the 106th Congress. McCain would probably wait at least a year, if not more, before tackling major immigration reform and may settle for a few smaller changes until he is ready to address immigration issues on a full scale basis. McCain's stated first priority would be securing U.S. borders. Once that is accomplished, McCain's plan would address prosecuting "bad-actor" employers, meeting America's labor needs, addressing undocumented aliens currently residing in the U.S. and eliminating the backlog of family members patiently waiting to rejoin their families who live in the U.S.

The good news is that both candidates are committed to significant immigration reforms. Additionally, they both supported reform from the legislative side, and may fare much better than the current Administration when working with their former colleagues on the Hill.

Updates on State E-Verify Mandates

On September 15, 2008, the Rhode Island Superior Court denied the ACLU's request for a temporary retraining order which would have prevented the State's Department of Administration ("DOA") from enforcing an Executive Order requiring state contractors to participate in the federal employment verification system known as E-Verify. Other similar attempts to prevent states, such as Arizona, from enforcing E-Verify requirements on employers have also failed. *See below*. The Rhode Island Court, relying on limited information, came to the preliminary conclusions that Governor Carceiri's Executive Order did not violate the Separation of Powers Doctrine, or the Contract Clause of the Rhode Island Constitution. Furthermore, the Court found that "at this juncture" it did not believe Governor Carcieri "acted outside the scope of his executive authority." The Court went on to state that the Governor has full authority, through members of his cabinet such as the Chief Purchasing Officer, to design a procurement system that will "increase public confidence in the procurement procedures" and "provide safeguards for a system of integrity." However, the Court also held that it is more likely than not that the DOA "illegally circumvented" the Federal Administrative Procedure Act (APA) by failing to promulgate an E-Verify rule that would have been subject

to notice and public comment procedures. In light of this failure, while denying the temporary restraining order, the Court Order mandated the DOA to promulgate an E-Verify rule pursuant to the process outlined in the APA. Once the final rule is in force, contractors will be required to adhere to the E-Verify certification process. It should be noted that the Court's decision is only preliminary, based on limited information, and only meant to address the request for the temporary restraining order. The merits of the challenge to the Executive Order have not been addressed.

In other State E-Verify news, as predicted by many, on September 17, 2008, the U.S. Ninth Circuit Court of Appeals (the Court) affirmed the U.S. District Court ruling upholding the Legal Arizona Workers Act (LAWA). LAWA took effect on January 1, 2008, and empowers the State of Arizona to suspend or revoke employers' business licenses if they are found to have knowingly or intentionally employed aliens who are not authorized to work in the U.S. LAWA also mandates that all Arizona employers use the E-Verify system to verify employment eligibility of newly hired employees as of January 1, 2008. In essence, the Court determined that the Act is a licensing law does not regulate immigration or employment eligibility and therefore does not preempt federal law or policy. The Court stated, "LAWA does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that LAWA is a 'licensing' measure that falls within the savings clause of IRCA's preemption provision." Through this decision the Court afforded Arizona state courts the authority to suspend or revoke business licenses and in doing so provided the state with an enforcement mechanism not used previously. This is a relatively unprecedented grant of authority for immigration enforcement and should be taken seriously by all businesses. Only time will tell if other States will follow Arizona's lead and attempt to expand their immigration enforcement authority through licensing provisions.

Many questions regarding the legality of state E-Verify requirements may be addressed during next year's congressional debates relating to the extension of the E-Verify program. After an interim extension, E-Verify is currently slated to expire in March 2009. This means that a new reauthorization battle will be fought again with a new President in the White House. Both Presidential camps have acknowledged the E-Verifying issue as a cornerstone of immigration debate.

PERM Updates from the Department of Labor

On September 17, 2008, the Department of Labor (DOL) provided an important update regarding its application of the "consideration rule" to the Foreign Labor Certification application process (the process). This came on the heels of the entire lot of the immigration boutique firm of Fragomen, Del Rey, Bernsen & Loewy's (Fragomen) PERM applications being pulled for auditing. The PERM process, is mandatory for all employers who are sponsoring foreign nationals for permanent residence. Essentially, in order for the DOL to approve the Foreign Labor Certification application, the employer must prove that there are no qualified U.S. workers available to fill the position. The "consideration rule" supplements the process by requiring employers who file labor certification applications to recruit and consider U.S. workers "in good faith." Good faith recruitment requires that "an employer's process for considering U.S. workers who respond to certification-related recruitment closely resemble the employer's normal consideration process." This means that in general, the employer, and not an attorney or agent, must be the first

to review an application for employment. The employer must also determine whether a U.S. applicant's qualifications meet the minimum requirements for the position, unless an attorney or agent routinely performs these functions for positions for which labor certifications are not filed. Attorneys may, however, "provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations, and policies."

Additionally, the DOL confirmed that it will only apply the consideration rule to those applications where the recruitment began after August 29, 2008, the date of the rule's final guidance. Moreover, the DOL stated that it will release and continue processing any applications currently under audit exclusively for concerns related to the consideration rule. This is an important step in reducing processing times and moving back on track. However, it should be noted that, according to an affidavit, Fragomen had 49% of its filings under audit *prior to* the DOL opening its investigation of the firm's practices. The DOL reasoned that the change was necessary because many lawyers incorrectly believed that the attorney for the employer was exempt from the agency's PERM labor certification rule prohibiting consideration of the qualifications of U.S. worker applicants for the advertised job. According to the DOL, the Department received evidence that many immigration attorneys believed that the Department's rule regarding consideration of U.S. workers did not apply to them unless they represented not only the employer seeking the labor certification, but also the alien for whom the certification was being sought.

Electronic System for Travel Authorization Update

On August 1, 2008, the Department of Homeland Security began its pilot of the Electronic System for Travel Authorization (ESTA). ESTA is a program through which non-U.S. citizen travelers eligible for the Visa Waiver Program (VWP) can obtain advance authorization to travel to the United States by plane. The ESTA program replaces the green I94-W card and brief on-line questionnaire that VWP travelers were required complete upon arrival in United States. Since August 1, 2008, more than 100,000 travelers successfully obtained their ESTA. ESTAs are valid for two years and can be renewed in two-year increments for the life of the traveler's passport. Starting January 12, 2009, the U.S. will mandate ESTAs for all citizens and eligible nationals from VWP countries who wish to travel pursuant to the Visa Waiver Program.

New Visa Waiver Countries Added

On October 17, 2008, President Bush announced that the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea have met the requirements for admittance into the United States Visa Waiver Program. In about a month, citizens of these nations will gain the privilege to be able to travel to the United States for business or tourism without a visa. These nations have agreed to share information about threats, use tamper-proof biometric passports, and register with Electronic System for Travel Authorization (ESTA) before traveling.

Global-UK Work Permit Update

Beginning November 2008, the United Kingdom will introduce a new points-based system for those who want to obtain a work or study permit in the United Kingdom. The system will replace most of the U.K.'s existing work-based categories and is modeled after Australia's skilled immigration system. Businesses wanting to employ skilled foreign workers from outside Europe and sponsor their entry to the UK must apply for a license. Global employers seeking to hire foreign nationals in the U.K. should already be planning ahead and registering with the Home Office in the U.K. to ensure that the transfers are timely and coordinated correctly from the onset.

This change only applies to foreign nationals from countries outside the European Economic Area (EEA). Nationals from Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Irish Republic, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and Switzerland are not subject to the new process. Foreign nationals from these countries are permitted to work and reside in the United Kingdom under a different system.

Foreigners are now required to qualify under a points-based assessment test before they are allowed to enter or remain in the United Kingdom. The system will consist of five tiers and each tier has different points requirements. Points will be awarded to reflect the foreigners ability, experience, age and, when appropriate, the level of need within the sector where foreigner will work. It is expected that this new scheme will cut down on processing times and that by April 2009 all work permit applications be resolved in a maximum of four weeks.

For further information on work permits to the UK, the specifics of the point system or any other outbound issue please contact GTs global visa coordinator Gina Carias at cariasg@gtlaw.com.

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