GT GreenbergTraurig

Immigration Observer

November/December 2011

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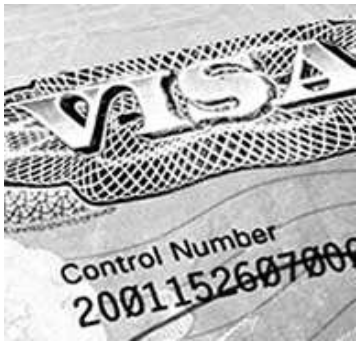

Department of Labor

DOL delays issuance of Prevailing Wage Determinations

In an effort to comply with an order from the U.S. District Court for the Eastern District of Pennsylvania, the Department of Labor (DOL) suspended issuance of new prevailing wage determinations and redetermination requests received after June 15, 2011. The National Prevailing Wage Center (NPWC), issued a formal statement noting that the DOL's Office of Foreign Labor Certification confirmed that all of their resources were focused on complying with a court order requiring them to review and reissue certain H-2B prevailing wage determinations in connection with the underlying lawsuit.

As a result, while the DOL focused its resources on complying with this court order, all prevailing wage determinations and redetermination requests submitted after June 15, 2011, experienced extreme delays in review and issuance. At the height of the delay, determinations were taking three months; practitioners are now reporting a six to seven week wait. There is no doubt that the delay in processing created a significant backlog in formal wage issuance for several months.

This inordinate delay in processing prevailing wage requests negatively impacted many employers and employees. First, for those employers preparing labor certification applications (also known as a "PERM Application") on behalf of foreign national employees, this delay in prevailing wage issuance significantly delayed the filing of the applications and in some instances led to stale recruitment that could not be used. For those who had to wait for a new determination it has meant a loss in recruitment, leading to increased expenses. These delays are not just an inconvenience to employers and sponsored workers; they have meant a loss in hours, an unnecessary increase in expenses and, most importantly, they have gravely impacted the H-1B employees who are nearing the end of their 5th year in H-1B status or who have children who are nearing their 21st birthday and are at risk of "aging-out" from being eligible to obtain permanent resident status through their parents.

The delays also impacted colleges and universities preparing PERM Applications on behalf of their professors using the Special Handling provision of the Department of Labor's regulations. Special Handling allows colleges and universities to use their own recruitment methods to test the labor market, as long as such recruitment was conducted within 18 months of filing the PERM Application. The Special Handling provision is meant to not only help universities and colleges save on the costs of a second recruitment effort, but also to streamline the process of permanently retaining quality foreign national professors. For those positions that are nearing the expiration of the 18 month rule, the delay in prevailing wage determinations will likely render the Special Handling option moot, thereby negating the entire purpose of the regulatory provision.

Employers and employees who are currently invested in the labor certification process are not the only parties DOL's suspension impacted. Employers filing H-1B petitions often choose to obtain a formal wage determination as a "safe harbor" for their underlying petitions. These employers will either have to forego this protection, or wait an indefinite amount of time before filing for new or extended work authorization for their employees - risking a break in continuity of the employment authorization of their foreign national workforce. Additionally, H-2A and H-2B, employers who must meet very strict timelines and complete recruitment efforts prior to filing these petitions, will see detrimental delays in their ability to comply with these recruitment efforts because a wage determination must be issued prior to the initiation of such recruitment.

GT encourages all employers to initiate the labor certification process and any nonimmigrant processes that require a formal prevailing wage determination as soon as possible to avoid any disruptions in work authorization or timing that may result from the DOL's current or future processing delays.

Challenging H-2B Unfair Wage Rules

Greenberg Traurig Obtains TRO in Lawsuit Challenging Unfair H-2B Wage Rules Set to Become Effective on September 30, 2011 — DOL Responds with 60-Day Suspension of Implementation

On January 19, 2011, the Secretary of Labor issued a Final Rule ("Rule") changing the way employers calculate wages for seasonal workers in the U.S. on H-2B visas. Although the Rule was originally scheduled to take effect on January 1, 2012, on August 1, 2011, the Secretary announced that the new wage Rule would become effective on September 30, 2011. Economists, including those in the federal government {i.e., the Small Business Administration's Office of Advocacy ("SBA")}, have determined that the wage Rule would dramatically increase hourly wage rates. Specifically, they project that increases could be as much as 50 percent for many seasonal workers across a variety of industries, including seafood processing, horse training, hospitality, landscaping and agriculture. This would have a snow-ball effect, forcing employers, many of whom are small businesses operating at the margins, to dramatically raise wages for all their employees. Many of these employers believe that if the new regime were to go into effect, they would be driven out of business.

The new Rule at issue is not required by statute and was issued with only a 38-day comment period at the insistence of certain labor unions. These unions sued to force the regulation to take effect three months before the initial effective date (January 1, 2012) set forth by the Department of Labor ("DOL"). Even this three-month phase-in period would have significant adverse consequences for the affected sectors, many of which are already in mid-season and unable to accommodate high wage increases that were unanticipated when their current contracts with customers were originally negotiated. As a result, the Rule has generated strong

bipartisan opposition, as well as criticism from the SBA with respect to both its substance and the process by which it was enacted.

On behalf of the litigants, who include representatives from the landscape, seafood, and horse racing industries, Greenberg Traurig challenged the Rule in the U.S. District Court for the Northern District of Florida and have obtained a temporary restraining order ("TRO") to block implementation while the Court considers the merits of the plaintiffs' case. Plaintiffs believe that the underlying wage Rule is inconsistent with and not authorized by the enabling legislation (the Immigration and Nationality Act), violates the Administrative Procedure Act, 5 U.S.C. § 706, and violates the Small Business Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. Plaintiffs have also challenged the Department of Labor's authority to issue any rules under the organic legislation. The regulatory change is particularly onerous and imperils jobs at a time when federal and state governments are supposed to be doing everything possible to promote the creation and retention of new jobs. The SBA believes that the Rule, if it were to go into effect, would eliminate thousands of H-2B and U.S. jobs.

In response to the TRO, the DOL has issued a Federal Register Notice delaying the implementation of the rule for 60 days. DOL says that this action was taken specifically because the Court issued a TRO in the Florida litigation. http://www.foreignlaborcert.doleta.gov/

Renewal of H-1C Nurses Program

A Benefit for Inner-City Neighborhoods and Rural Areas

On August 1, 2011, the House of Representatives approved H.R. 1933. The bill provides for reauthorization for the H-1C temporary visa program for an additional three years, allowing foreign nurses to work in the U.S. within communities located in inner-city neighborhoods and rural areas. By a vote of 407-17, passage of the bill was praised by House Judiciary Committee Chairman Lamar Smith (R-Texas), the bill's sponsor, who noted that many hospitals serving the poor have a difficult time attracting nurses. With the passage of the bill, hospitals operating in inner-city neighborhoods and rural areas are hopeful that the program will assist in meeting the demand in areas where shortages for high-quality nurses is great.

The H-1C temporary visa program, initially passed by Congress in 1999 as the "Nursing Relief for Disadvantaged Areas Act," expired in December 2009. The Act allowed foreign nurses to stay and work in the U.S. for a period of three years by making 500 visas available each year.

With the recent extension of the program, an employer must meet the following four conditions before petitioning for a foreign nurse:

1) the employer must be located in a health professional shortage area;
2) the employer has to have at least 190 acute care beds;
3) a certain percentage of patients are Medicare patients; and
4) a certain percentage of patients are Medicaid patients.

Additionally, the program protects American nurses whereby a hospital must make every effort to recruit U.S. citizens first; must pay the prevailing wage; and must ensure that the number of foreign-registered nurses employed be limited to no more than one-third of the hospital's nurses.

Neufeld Memo on Employer-Employee Relationship

On January 8, 2010, Donald Neufeld, Associate Director of the USCIS Service Center Operations, issued a memorandum that intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period. The Neufeld memo explains that the USCIS has relied on common law principles and two leading Supreme Court cases in determining what constitutes an employer-employee relationships and the lack of guidance clearly defining what constitutes a valid employer-employee relationship has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.

In considering whether or not there is a valid "employer-employee relationship," the Neufeld memo cited the Supreme Court case *Darden*, the right to control the manner and means by which the product is accomplished and proposed 11 questions to be considered:

1. Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
2. If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?
6. Does the petitioner evaluate the work-product of the beneficiary, *i.e.* progress/performance reviews?
7. Does the petitioner claim the beneficiary for tax purposes?
8. Does the petitioner provide the beneficiary any type of employee benefits?
9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The memo provides four scenarios where a valid employer-employee relationship exists:

1. traditional employer [exercise of actual control];
2. temporary/occasional off-site employer [right to control];
3. long-term/permanent off-site employment [right to control specified and actual control exercised]; and
4. long term placement at a third-party work site [right to control specified and actual control is exercised].

The following scenarios presented in the memo would not present a valid employer-employee relationship:

1. self-employed beneficiaries [no separation between individual and employing entity; no independent control exercised and no right to control exists];
2. independent contractors [petitioner has no right to control; no exercise of control]; and
3. third-party placement/"job shop" [petitioner has no right to control; no exercise control].

Following this memo, practitioners are reporting an increase in Requests for Evidence and denials from the USCIS Vermont and California Service Centers. Given the implications of the memo and USCIS' extensive requests for evidence there have been vigorous complaints, a lengthy (24 pages) and compelling request to USCIS requesting that the entire memo be set aside, and contemplation of lawsuits for clients.

There is some light at the end of the tunnel following a recent lawsuit filed on behalf of GT clients with the U.S. District Court for the District of Columbia, *Broadgate v. USCIS*. In *Broadgate*, the Court held that the USCIS memo is not legally binding. In particular, the Court found that the USCIS memo "was intended to provide only guidance for application of the Regulation, not to establish independent binding rules." *Broadgate v. USCIS*, No. 10-00941 (D.D.C. *dismissed* Aug. 13, 2010) at 10. The Court continued to note that the USCIS memo "establishes interpretive guidelines for implementation of the Regulation and does not bind adjudicators" in their adjudication of H-1B petitions. Id. at 14. As discussions with USCIS officials continue, we hope to see a more practical and business friendly interpretation and application of these standards.

USCIS Initiatives To Increase Investment in the U.S.

USCIS Initiatives to Promote Startup Enterprises and Spur Job Creation

On August 2, 2011, Secretary of Homeland Security Janet Napolitano and U.S. Citizenship and Immigration Services (USCIS) Director Alejandro Mayorkas outlined a series of policy, operational, and outreach efforts to fuel the nation's economy and stimulate investment.

Background

This initiative is a result of Startup America, a White House-led initiative to reduce barriers and accelerate growth for America's job-creating entrepreneurs and of key focus of the President's Council on Jobs and Competitiveness to ensure that America stays at the top of its game in the global investment economy. The President's Council on Jobs and Competitiveness (Jobs Council) was created to provide non-partisan advice to the President on continuing to strengthen the Nation's economy and ensure the competitiveness of the United States and on ways to create jobs, opportunity and prosperity for the American people.

EB-2 National Interest Waivers for Entrepreneurs

Entrepreneurs may obtain an employment-based second preference (EB-2) immigrant visa if they satisfy the certain regulatory requirements. In addition, they also may qualify for a National Interest Waiver under the EB-2 immigrant visa category if they can demonstrate that their business endeavors will be in the interest of the United States. To clarify, The EB-2 visa classification includes foreign workers with advanced degrees and individuals of exceptional ability in the arts, sciences or business. Generally, the EB-2 category requires a job offer from a U.S. employer and a certification from the Department of Labor (DOL) that there are no U.S. workers qualified for the job. This is often referred to as the PERM Labor Certification Process and requires extensive recruitment and review of the local labor force where the job is located. The Attorney General can waive these requirements if the employer demonstrates that approval of the EB-2 visa petition would be in the national interest of the United States. Since the term "national interest" has not been defined in the immigration statute, certain (often subjective on the part of the USCIS reviewing officer) factors are taken into account in determining national interest. These factors include improvement of: the U.S. economy; wages and working conditions for U.S. workers; education; health care; the environment; and housing. An interested government agency request is an added factor that is given considerable weight by the USCIS. Since 1998, the National Interest Waiver has been increasingly more difficult to obtain. The new initiative will likely spur an increase in the National Interest Waiver petition requests. However, the scrutiny level is likely to also remain as high as it has been in the past.

H-1B

Entrepreneurs with an ownership stake in their own companies, including sole employees, may be able to establish the necessary employer-employee relationship to obtain an H1-B visa, if they can demonstrate that the company has the independent right to control their employment.

EB-5

The EB-5 immigrant investor program is also being further enhanced by transforming the intake and review process. In May, USCIS proposed fundamental enhancements to streamline the EB-5 process which include: extending the availability of premium processing for certain EB-5 applications and petitions, implementing direct lines of communication between the applicants and USCIS, and providing applicants with the opportunity for an interview before a USCIS panel of experts to resolve outstanding issues in an application. USCIS has reported that after reviewing stakeholder feedback on the proposal, USCIS is developing a phased plan to roll out these enhancements. On November 9, 2011, USCIS distributed the first memorandum following this announcement.

Created by Congress in 1990, the EB-5 program stimulates the U.S. economy through capital investment and resulting job creation by immigrant investors. The Department of Homeland Security (DHS) has estimated that as of June 30, 2011, the program has resulted in more than $1.5 billion in capital investments and created at least 34,000 jobs.

Expansion of Premium Processing to Multinational Manager Petitions

USCIS also announced the expansion of its Premium Processing Service to immigrant petitions for multinational executives and managers. A multinational executive or manager is an employee that is transferred to the U.S. from a related international employer overseas who is coming to serve in a high-level managerial or executive position where the employer is also offering permanent employment to that employee through sponsorship of permanent residence. The premium processing service allows employers to expedite processing of their petitions for multinational managers and executives. Until now, USCIS allowed premium processing on certain types of permanent residence petitions excluding multinational manager petitions. This has hampered the ability of multinational corporations to seamlessly transfer critical employees.

Feedback from the Public

As always, the announcement of these initiatives has caused a lot of anti-immigration nay sayers to voice their opinion. Most importantly, these individuals feel that any relaxation of U.S. immigration laws has a severe impact on Americans, particularly unemployed Americans. They fail to realize several important considerations: 1) this type of initiative is not a "relaxation" of immigration laws and are only targeted at a few, very specialized, areas of immigration law; 2) investor entrepreneurship programs such as these were created to, and are meant to, spur job creation in the United States; 3) The job creation has a positive impact on Americans as many of these jobs are not and cannot be filled by foreigners with visas.

Further criticism after the announcement of this initiative comes from immigrants currently stuck in the long queue for obtaining permanent residence. Most of these individuals are skilled workers with at least a Bachelor's or a Master's degree whose employers went through an extensive government-mandated recruitment process to ensure there were no U.S. workers qualified for their positions. Many of these individuals have been caught in these backlogs for more than five years. These are not only key IT personnel but also scientists, engineers and others that are critical to their employers and key to maintaining U.S. competitiveness in the global economy.
USCIS has reported that it will continue to solicit input from stakeholders on how USCIS can address the unique circumstances of entrepreneurs, new businesses and startup companies through its policies and regulations in the employment-based arena.

For more information on this initiative, please see USCIS' published Frequently Asked Questions (FAQs).

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Consular Corner & Travel Tips

Visa Applications Abroad

Administrative processing on visa applications can be lengthy and processing times can be unpredictable. The type of administrative check conducted on a visa applicant at a U.S. Embassy or Consular post varies depending on the type of security clearance required for the individual visa applicant. Administrative processing and security checks can only be initiated after an applicant leaves the U.S. and applies for his or her visa. Many clients are now experiencing administrative processing delays for nationals of the following countries: Afghanistan, Algeria, Bahrain, China, Egypt, India, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Russia, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, United Arab Emirate, and Yemen.

In addition to administrative processing, U.S. Embassies and Consulates in China, India and the Philippines have heightened the scrutiny of visa applications in response to high fraud rates. Blanket L and L-1B applications are reviewed closely and applicants must provide thorough evidence regarding the nature of their specialized knowledge. B-1 applications must contain sufficient documentation outlining the proposed meeting/program in the U.S. Senator Charles Grassley (R-Iowa) has recently speared efforts to investigate potential fraud within the B-1 category.

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General Information

Questions or comments? Please send an e-mail Mahsa Aliaskari at: aliaskarim@gtlaw.com

Resources

- USCIS website
- U.S. Embassy's and Consulates
- DOL iCert Portal and Processing times
- USCIS Immigrant Investor Regional Centers -EB-5