April 2012 Immigration Alert

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I. H-1B Nonimmigrant Season Opens for Fiscal Year 2012

As most H-1B employers know, there is an annual quota on the number of new H-1B petitions that can be approved each federal fiscal year. The quota is 65,000 for regular H-1B petitions, plus another 20,000 for H-1B petitions filed for foreign nationals ("FNs") who have obtained a master's degree or higher from an accredited American university. The federal government's fiscal year runs from October 1 through September 30, so fiscal year 2013 will begin on October 1, 2012. Employers were eligible to start filing H-1B petitions toward the fiscal year 2013 quota on April 2, 2012, but they cannot secure a start date prior to October 1, 2012.

On April 9, 2012, the USCIS indicated that it had received approximately 17,400 H-1B cap cases, and about 8,200 H-1B cases that count toward the master's cap. This is almost double what the USCIS received last year during the same period. Last year, the H-1B cap was reached in November 2011. At the present pace, the 2013 cap will be reached substantially sooner this year, so employers planning on filing new H-1B cases should not delay.

II. DOS Confirms China/India EB-2 Regression

On April 4, 2012, the U.S. Department of State ("DOS") confirmed that the Employment-Based Second Preference ("EB-2") classification for mainland China and India will regress to August 15, 2007, effective March 23, 2012. FNs who apply for a United States Permanent Resident Card ("Green Card") based on employer sponsorship are assigned "priority dates" when they file the first step in the Green Card application process. The DOS and U.S. Citizenship and Immigration Services ("USCIS") then accept and adjudicate Green Card applications on a first-come, first-served basis, depending on the FNs' priority date and the number of Green Cards that have been issued within the applicable employment-based preference quota.

In recent months, the quota for EB-2 applicants has been progressing rapidly and reached the cutoff date of May 1, 2010, in the April 2012 Visa Bulletin. Apparently, this has resulted in too many Green Card applications; the DOS estimates that it lacks sufficient Green Cards under the EB-2 quota to approve all the cases. As a result, the DOS has announced that it will "regress" the EB-2 cutoff date to August 15, 2007, and will not approve any Green Card applications after March 23, 2012, that have priority dates later than August 15, 2007. The USCIS has indicated that it will continue to accept EB-2 Green Card applications with priority dates on or before May 1, 2010, through April 2012 but will not adjudicate them or any other pending cases until their priority dates are current.

Employers with FNs who are eligible to apply for a Green Card under the EB-2 classification based on priority dates that occur on or before May 1, 2010, are advised to press for filing these cases in April 2012 so that the employees can secure the benefits associated with a pending Green Card application, and the employer can potentially save the added expense and effort associated with nonimmigrant extensions.

III. Colorado Grand Jury Indicts Long-Term Care Facility Operators on Immigration-Related Charges

On March 1, 2012, a grand jury in Colorado indicted the owners of several long-term care facilities in Colorado on multiple charges related to human trafficking, including forced labor and visa fraud. See *United States v. Kalu*, 12-cr-00106 (D. Co. 2012). The indictment alleges that the individual defendants were involved in a scheme to fraudulently secure H-1B visas for FNs by claiming that they would work in this country as nurse instructors or supervisors at a fictional university. Once the FNs arrived, the defendants would force them to work for the Foreign Healthcare Professional Group, a business that the defendants controlled, which contracted out the FNs to long-term care facilities as staff nurses.

These defendants face 132 counts of mail/wire fraud, visa fraud, forced labor, money laundering, and human trafficking. If convicted, they face between 10 and 20 years in prison, fines up to $500,000, and the forfeiture of their business. There are no charges in the indictment against many of the long-term care facilities where these FNs were placed, but the investigation is continuing.

The *Kalu* case underscores the importance to all health care employers of knowing the immigration details of FNs they seek to hire, even if the FNs are presented by professional staffing agencies. The "Best Practices" issued by U.S. Immigration and Customs Enforcement ("ICE") in connection with its worksite enforcement initiatives indicate that organizations must establish enforceable protocols for all contractors and subcontractors to ensure that they satisfy U.S. employment eligibility requirements.

IV. USCIS Proposes Revised Form I-9

On March 27, 2012, the USCIS published a notice in the *Federal Register* inviting public comment on a revised Form I-9, Employment Eligibility Verification. Comments can be made by visiting www.regulations.gov and are due by May 29, 2012.

The proposed Form I-9 includes extended instructions and a revised and expanded format. It also contains new optional data fields that allow employers to collect an employee's email address, phone number, and foreign passport information (number and country of issuance). The USCIS will announce when the new Form I-9 has been approved and issued, and we will prepare and distribute a Special Alert when that occurs. Until then, employers are advised to use the current version, which is available at www.uscis.gov/I-9central.

V. Houston Businesses Fined $2 Million for Hiring Undocumented Workers

ICE reports that two Houston businesses each agreed to pay $2 million in fines to settle allegations that they knowingly hired undocumented workers. The cases were brought against Champion Windows and Advanced Containment Systems. ICE audited the Forms I-9 of these entities and found a "pattern and practice" of serious violations,

including a high percentage of undocumented workers on their payrolls who were hired based on "egregiously suspect" identification and employment eligibility documents. The companies agreed to pay the fines as part of a non-prosecution agreement under which they also agreed to take corrective actions to address prior immigration violations.

VI. Social Media Affects Immigration Process

The impact of social media has even expanded to the immigration process. U.S. Customs and Border Protection ("CBP") reported that it had detained a FN at an airport after he had posted on Twitter that he was going on vacation to the United States to "destroy" America. During his inspection hearing, the FN explained that the word "destroy" was slang for "party hard," and that he had no intention of harming America. While he ultimately was admitted, the incident serves as a powerful warning to all FNs that they need to be careful in their use of social media because "Big Brother" really is watching.

VII. Eighth Circuit Confirms Employer's Refusal to Support Immigration Applications Does Not Constitute National Origin or Citizenship Discrimination

On March 23, 2012, the U.S. Court of Appeals for the Eighth Circuit issued its decision in *Guimaraes v. SuperValu, Inc.*, No-11-1046 (8th Cir. 2012). In *Guimaraes*, a former SuperValu employee sued, claiming national origin discrimination and retaliation violations of Title VII of the Civil Rights Act and the Minnesota Human Rights Act. According to the plaintiff, she worked in the United States under an H-1B nonimmigrant visa, and her employer agreed to sponsor her for a Green Card. Thereafter, however, she had a series of disagreements with her supervisors about her performance and claimed that the employer discriminated against her by terminating her employment and then refusing to extend her H-1B status or continue with her Green Card process. Conceding for the sake of argument that her employer had refused to continue sponsoring her, the Eighth Circuit found that this did not constitute unlawful discrimination under Title VII. As the Eighth Circuit noted:

> True, a reasonable jury could find the "green card" statement evinces an intent to terminate Guimaraes because she is not yet a permanent resident. The Supreme Court has held, however, that while, "[a]liens are protected from illegal discrimination under Title VII, "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship of alienage. ***Espinoza v. Farah Mfg. Co.,*** 414 U.S. 86, 85 (1973); *see also* ***Lixin Liu v. BASF Corp.,*** 409 Fed. Appx. 988, 991 (8th Cir. 2011) (unpublished)(rejecting Title VII claims where the plaintiff "conflate[d] national origin and alienage. His employment status was terminated because of his immigration status, not his Chinese ancestry." (citations omitted)).

Human resource professionals often express reluctance to inquire into immigration status for fear that this could constitute a Title VII violation. As the Eighth Circuit's decision in *Guimaraes* demonstrates, immigration status is not protected under Title VII, so decisions made by employers that rest solely on their willingness to sponsor FNs, without more, do not violate federal law.

VIII. Putative Class Action Alleges That the Failure to Renew H-1B Visas Violated ERISA

A former employee filed a putative class action against Wells Fargo & Co. in California, alleging that the bank violated ERISA by refusing to renew H-1B visas in order to avoid paying severance benefits. See *Karamsetty v. Wells Fargo & Co.*, 3:12-cv-01364 (N.D. Calif. March 20, 2012). The plaintiff alleges that, following its merger with Wachovia Bank NA, Wells Fargo violated ERISA by instituting a company-wide policy prohibiting renewal of employees' H-1B visas, and then refusing to pay severance benefits because departures resulting from the expiration of immigration status were not covered by the severance benefits plan. The plaintiff seeks class certification, the payment of benefits, prejudgment interest, and counsel fees.

IX. DOL Issues New H-2B Rules That Take Affect April 23, 2012

On February 21, 2012, the Employment and Training Administration ("ETA"), U.S. Department of Labor ("DOL"), issued its final rule on the H-2B labor certification program for the employment of temporary skilled or unskilled nonagricultural workers. See 77 Fed. Reg. 10038 (Feb. 21, 2012). The final rule will apply to H-2B petitions filed on or after April 23, 2012.

The H-2B program is designed to help businesses, primarily in the hospitality, recreational, and health care industries, utilize foreign labor on a temporary basis to satisfy unexpected or seasonal labor shortages. The program is capped at 66,000 visas per year. To obtain an H-2B visa for a foreign worker, the employer must apply to the DOL for certification that there are no U.S. workers available to fill the position and that the employment of foreign labor will not adversely affect the U.S. labor market. Under the current rule, the DOL can issue these certifications based on an attestation in which the employer asserted that it could not locate any qualified American workers and that the foreign workers would be paid wages that equaled or exceeded the prevailing wage for the position.

The new rule makes several major changes to the current system, motivated primarily to reduce the DOL's concerns about fraud and abuse in the program.

First, the new rule bifurcates the H-2B process at the DOL into a registration process followed by the actual application process. Under the registration process, the employer must document the number of positions it intends to fill in the first year, the

period of time these workers are required, and the temporary need for the workers. Under the new rule, a temporary need falls into one of four categories: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. Because the DOL now believes this will be a "fact intensive" process, the rule separated the registration process from the application process to give the agency time to investigate these issues at the outset. The new rule accommodates this need by allowing applications to be filed between 120 and 150 days before the H-2B workers are required.

Second, in a significant change involving the labor certification process, the new rule requires the employers first to file the application and then to conduct the recruitment under DOL supervision. The rule requires employers to file this application and a job order with the State Workforce Agency ("SWA") between 75 and 90 days before the first H-2B worker is required. In the application, the employer must identify the foreign workers it currently employs, as well as all recruiting firms used by the employer to recruit foreign workers. The application also must define the job requirements, necessary worker qualifications, benefits, wages and working conditions, all paycheck deductions, and the location(s) of the proffered employment. Finally, the employer must agree to cover transportation and visa costs, provide all tools or other implements required for the work, agree to provide room and board to the foreign workers if supplied to domestic employees, and establish that it has provided the foreign worker with a copy of the job order containing this information.

Third, the new rule increases the employer's recruiting obligations and keeps the job order open far longer than under the current rule. Employers must notify the bargaining representative or, if there is none, post the job order in two conspicuous locations at every place where foreign workers will be employed. In addition, the SWA must provide the job order to a union, where the occupation or industry is commonly unionized, and send the job order to the DOL for posting on a national job registry. Under the current rule, the job order was effective for only 10 days. The new rule mandates that the job order remain open until 21 days before the first foreign worker is scheduled to start.

Finally, the new rule requires employers to provide "corresponding workers," namely, those domestic workers who perform essentially the same jobs, with the same rights and benefits that the H-2B workers will receive. In this regard, the new rule requires employers to pay all wage, benefits, transportation costs, and other compensation "free and clear" of deductions. If earnings are based on commissions, bonuses, or other contingent compensation, the employer must guarantee to pay at least the prevailing wage. As an additional protection for foreign workers, the new rule largely bans staffing agencies from securing H-2B workers to supply to other employers unless both the staffing agency and the ultimate employer demonstrate the temporary needs required by the rule and agree to satisfy all other requirements. To help ensure compliance, the DOL's Wage and Hour Division has been given authority, in addition to that granted the ETA, to investigate and punish violations in the H-2B program.

The new rule places substantial new burdens on employers seeking to utilize temporary foreign workers to address domestic labor shortages. Moreover, it drastically restricts the ability of U.S. employers to utilize recruiting agencies to help locate and recruit the temporary workers who may be required. Finally, it stretches out the process, forces employers to predict labor shortages before they can be estimated accurately, and places obstacles in the path of employers that need foreign workers to help fill temporary shortages on short notice. Those employers in the hospitality, recreational, health care, and other industries that rely heavily on H-2B workers now must navigate this labyrinth alone, and their success in filling shortages depends on their ability to master these rules within the quota limitations that the H-2B program contains and the strict scrutiny that the DOL promises to provide. Proper long-term planning and attention to the legal details will be essential.

X. Increased Enforcement Activity Against Fraud in the H-2B Program

On February 28, 2012, the president and executive director of International Staffing Solutions, d/b/a Texas Staffing Resources, a staffing business located in Austin, Texas, was sentenced to 41 months in prison for participation in an H-2B visa fraud scheme. *See United States v. Vicharelly*, No. 1:11-cr-259 (W.D. Tex. 2012). According to ICE, the agency responsible for the investigation, the defendants prepared fraudulent H-2B visa applications to obtain FNs for several Austin-based businesses and illegally sold the resulting visa slots to undocumented workers. ICE indicated that it is continuing its investigation into the businesses that used these workers to determine if they were involved in or aware of these unlawful activities.

The DOL also reported that it had directed the Custer State Park Resort ("Resort") to pay $93,000 in back wages and a $65,000 fine for willful violations of H-2B program requirements. The Resort used the Global Employment Agency ("GSA") to locate and recruit foreign workers. According to the DOL, GSA unlawfully forced the H-2B workers to pay fees to secure positions at the Resort. The DOL also charged the Resort with failing to pay overtime to restaurant workers and making material misrepresentations about the job offers in the H-2B applications.

These and other civil and criminal enforcement activities related to the H-2B program underscore the need for vigilance by employers that utilize the program, with respect to both their own actions and those of recruiters that they may use. The DOL's new H-2B rules promise only to exacerbate the risk management challenges in this area.

XI. Global Entry Is Now Available at Pre-Clearance Airports

On March 26, 2012, CBP announced that it was expanding its Global Entry program to four additional airports: St. Paul International Airport (Minneapolis, MN), Charlotte Douglas International Airport (Charlotte, NC), Phoenix Sky Harbor International Airport (Phoenix, AZ), and Denver International Airport (Denver, CO). According to CBP, Global Entry will be available at these airports on or before September 22, 2012.

The CBP established its Global Entry program as a mechanism to streamline the international arrival process for pre-approved travelers. The program, initiated in December 2010, is now operational at 20 major U.S. airports and available to American citizens and U.S. lawful permanent residents. Citizens of the Netherlands may apply under a special reciprocal arrangement that links Global Entry with the Dutch Privium program. Canadian citizens and residents can now participate through membership in the Canadian NEXUS Trusted Traveler program.

Applications for Global Entry must first be submitted online. A non-refundable fee of $100 is collected at that time for a five-year membership. Applicants then must submit to an in-person interview at any Global Entry enrollment center, where fingerprints will also be taken. Once enrolled, Global Entry members may proceed directly to the kiosks in the inspection area, where they insert their passport or Green Card, provide digital fingerprints for comparison, answer a customs declaration, and then present the transaction receipt to the CBP officer. For more information about the Global Entry program, please visit its website at: http://www.cbp.gov/xp/cgov/travel/.

XII. DOS Will Increase Visa Processing Fees on April 13, 2012

On April 2, 2012, the DOS announced that it will increase Visa Processing Fees, effective April 13, 2012. These are the fees that FNs pay to secure both nonimmigrant and immigrant visas, as well as border crossing cards and other consular services.

XIII. DOS Issues April 2012 Visa Bulletin

The DOS issued its Visa Bulletin for April 2012. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. The cutoff dates for the Employment-Based Third Preference category advanced and are as follows: April 8, 2006, for all chargeability, including the Philippines and Mexico; May 1, 2005, for China; and September 1, 2002, for India. The cutoff dates for the EB-2 category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; and May 1, 2010, for China and India. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

As we indicated earlier in this Immigration Alert, the cutoff dates for the EB-2 category for India and China have regressed to August 15, 2007, and are expected to remain regressed for a considerable period. All EB-2 applicants with priority dates current under the April 2012 Visa Bulletin remain eligible to file for permanent residence in April 2012, but their applications cannot be adjudicated until their priority dates again become current.

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