February 23, 2010

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I. Tenth Circuit Court of Appeals finds Oklahoma E-Verify Law Unconstitutional

On February 2, 2010, the U.S. Court of Appeals for the Tenth Circuit upheld a District Court determination that the mandatory E-Verify provisions of The Oklahoma Taxpayer and Citizen Protection Act of 2007 (the "Act") were pre-empted by federal immigration laws.

At issue were Sections 7(B), 7(C) and 9 of the Act, which provided a financial penalty for violations. The Tenth Circuit agreed that these provisions of the Act contained a cause of action that was contrary to, and, thus, not authorized by, federal law, and that the financial penalties on employers in the Act for failure to utilize E-Verify amounted to a punitive tax that also was precluded by federal immigration laws. The Tenth Circuit was unable to decide whether the state could compel companies contracting with the state to utilize E-Verify but refused to lift the portion of the lower court's injunction that prohibited the Oklahoma Attorney General from enforcing that provision. For now, E-Verify remains a voluntary program in the State of Oklahoma.

II. TPS Registration Process for Haitians

In response to the overwhelming destruction caused by the January 12, 2010, earthquake in Haiti, the U.S. Citizenship and Immigration Services ("USCIS") announced that Haitian nationals in this country prior to January 12, 2010, would be eligible to obtain Temporary Protected Status ("TPS"). TPS status will allow them to stay here until the U.S. government considers it safe to return to Haiti. Eligible Haitians have 180 days to register, and the TPS status designation they will obtain will be valid for 18 months. TPS applicants will have to pay the normal filing fees for Form I-821 and any ancillary benefits, such as work and travel authorization, unless they are eligible for a fee waiver.

USCIS also issued instructions for U.S. citizens in the process of adopting Haitian orphans. If adopting parents were in Haiti at the time of the earthquake, they can visit the American embassy to process the adoption application, and the Haitian government will waive the exit visa requirement. Both the Department of Homeland Security ("DHS") and the Department of State ("DOS") are still working on the issues related to adoptions by parents not in Haiti. If the adoptive parents are in the United States, DHS and DOS strongly urge them not to travel to Haiti at this time.

III. H-2B Oil Rig Workers Win Bid To Amend Overtime Action

On January 13, 2010, the U.S. District Court for the District of New Mexico granted the motion by two foreign rig hands to amend their complaint. This lawsuit accuses RigStaff Texas LLC, a staffing service company, and Schumberger, an oil field services provider, of violating state and federal law by denying the rig hands overtime and other compensation due under the federal government's H-2B nonimmigrant visa program. The court allowed these rig hands to add claims of fraud, negligent misrepresentation, and civil conspiracy, as well as claims under the New Mexico and Wyoming wage laws.

The genesis of this litigation occurred in November 2008, when two Indonesian workers were recruited by RigStaff to work on H-2B nonimmigrant visas for Schlumberger in the United States. These workers claimed that RigStaff violated the Fair Labor Standards Act ("FLSA") by not paying them and other H-2B workers the legally required overtime rates, even though they worked for Schlumberger at least 80 hours a week. These workers also alleged that both companies breached their contracts by illegally withholding from and converting funds belonging to H-2B workers, and that the companies were unjustly enriched as a result.

In recent years, the Department of Justice and Immigration Customs Enforcement agency have been investigating and prosecuting criminally abuses of the H-2B program. There also has been an increasing number of civil suits around the country by H-2B nonimmigrants and foreign workers in other visa classifications alleging FLSA and related wage/hour violations. These investigations and lawsuits are particularly prevalent in industries that regularly rely on the H-2B program, such as the hospitality, oil rigging, construction, and related industries. All employers, however, should be vigilant on compliance with all immigration programs because violations can open the door to criminal prosecution, civil litigation, and/or other

federal agency investigations involving Form I-9, OSHA, and wage/hour-related matters.

IV. USCIS Issues Guidance on H-1B Requirements for Employer–Employee Relationship

On January 8, 2010, USCIS issued guidance on how to define the employer-employee relationship required for H-1B eligibility. In recent years, USCIS has become increasingly concerned about the bona-fides of "job shop" employers who seek H-1B classification for workers they will place on client sites. The H-1B regulations require that employers actually employ an H-1B worker. Since March 2007, USCIS has collected an additional $500 fraud fee for each H-1B petition and has used some of these funds to investigate H-1B fraud allegations.

Under the USCIS memo, the issue of who has the "right of control" over the H-1B employee is pivotal to H-1B eligibility. In the traditional employment model, the employee works at a location owned or leased by the employer, reports to the employer on a daily basis and uses the tools and equipment provided by the employer. More difficult questions arise when an H-1B employee is placed off-site for either short- or long-term placement or if an employee is placed at a third-party work site. USCIS is concerned that there is more fraud in these relationships. In its memo, USCIS announced that it will examine the employer-employee relationship with greater scrutiny to ensure that the petitioner/employer has the requisite control over the employee to constitute the bona-fide employment relationship that is required for H-1B eligibility.

V. CBP Implements New Admission Policies at Newark, NJ, Airport to Identify Fraud in Employment-Related Visa Classifications

On January 27, 2010, U.S. Customs and Border Protection ("CBP") announced that a new policy has been instituted at Newark Airport. The new policy involves random checks of traveling foreign nationals returning in H-1B, L-1, or other employment-based visa classifications to ascertain that the foreign national is complying with the terms of his/her visa classification. If the foreign national's admissibility is questionable due to, among other things, the work he/she is doing, the employer for whom he/she is working, the compensation he/she is receiving, etc., he/she will be sent to secondary inspection for further interview. If CBP discovers a discrepancy between what the foreign national is doing and the employer's previously approved petition, the foreign national may be asked to withdraw his/her application for admission into the United States or be subject to expedited removal.

To provide a legal basis for implementing this policy across the country, USCIS has added the following language to the I-797 approval notice:

NOTICE: Although this application/petition has been approved, DHS reserves the right to verify the information submitted in this application, petition, and/or supporting documentation to ensure conformity with applicable laws, rules, regulations, and other authorities. Methods used for verifying information may include, but are not limited to, the review of public information and records, contact by correspondence, the Internet, or telephone, and site inspections of businesses and residences. Information obtained during the

course of verification will be used to determine whether revocation, rescission, and/or removal proceedings are appropriate. Applicants, petitioners, and representatives of record will be provided an opportunity to address derogatory information before any formal proceeding is initiated.

Additionally, CBP announced that it has adopted a mandatory detention policy at Newark Airport for any returning lawful permanent resident ("LPR") who has a post-1998 criminal conviction. If CBP cannot get a copy of the conviction record within 24 hours, the LPR may be released. The only exceptions to this policy involve "humanitarian" reasons or extenuating circumstances, such as when the foreign national is traveling with children and there is no one to pick up the children, or when the foreign national is the sole provider for American or LPR children.

The new CBP policies serve as another reminder that foreign nationals should thoroughly prepare for all trips to the United States and be prepared for inspection upon returning to this country. Foreign nationals should compare their current employment and employer to the information contained in the petition and carry evidence to support their current employment, as well as any discrepancies. They also should be prepared to provide CBP with a contact person at their employer in case CBP, at ports of entry, wants to confirm the employment relationship. Lastly, foreign nationals who have been convicted of crimes since January 1, 1998, should confer with immigration counsel to ascertain the impact, if any, that these convictions might have on their deportability or ability to travel.

VI. CBP Reminds U.S.-Bound Travelers from Visa Waiver Program Countries to Complete Online Travel Authorization

CBP issued a statement reminding U.S.-bound travelers who plan to use the Visa Waiver Program ("VWP") that they first must register and obtain clearance from the Electronic System for Travel Authorization ("ESTA"). ESTA has been mandatory since January 12, 2009, for all nationals of VWP countries traveling to the United States under the VWP. The requirement does not affect U.S. citizens returning from overseas or citizens of VWP countries traveling on a valid U.S. visa.

ESTA applications may be submitted electronically at any time prior to travel. Generally, once approved, they will be valid for up to two years or until the applicant's passport expires, whichever comes first. These authorizations are valid for multiple entries into the United States. To avoid travel delays or disruptions, ESTA applications should be submitted as soon as an applicant begins making travel plans.

The ESTA Web site is available in 21 languages: Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Hungarian, Icelandic, Italian, Japanese, Korean, Latvian, Lithuanian, Norwegian, Portuguese, Slovak, Slovenian, Spanish, and Swedish. Starting January 20, 2010, CBP will engage in a 60-day transition before mandatory enforcement of ESTA compliance for air carriers. Once that period is over, VWP travelers without an approved ESTA will not be allowed to board a U.S.-bound aircraft. For additional information about ESTA, including registration instructions, please visit

www.cbp.gov/ESTA.

VII. DOS Issues March 2010 Visa Bulletin

The DOS recently issued its Visa Bulletin for March 2010. This Bulletin determines who can apply for permanent residence and when. The cutoff dates for the Employment-Based Third Preference are as follows: December 15, 2002, for all charge-ability, including China and the Philippines; July 1, 2002, for Mexico; and July 1, 2001, for India. The cut-off dates for the Employment–Based Second Preference are as follows: Current for all chargeability; February 1, 2005, for India; and July 8, 2005, for China. The monthly Visa Bulletin is available through the DOS Web site at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

For more information or questions regarding the above, please contact:

New York
Robert S. Groban, Jr.
212/351-4689
rgroban@ebglaw.com

New York
Pierre Georges Bonnefil
212/351-4687
pgbonnefil@ebglaw.com

Miami
Hector A. Chichoni
305/579-3270
hchichoni@ebglaw.com

Newark
Patrick G. Brady
973/639-8261
pbrady@ebglaw.com

San Francisco
Jang Im
415/398-3500
jim@ebglaw.com

Houston
Nelsy Gomez
713/750-3136
ngomez@ebglaw.com