Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner & Associates. L.L.C.

This periodic newsletter features current developments in employment-based immigration. It is designed to inform you of changes in immigration law that may affect your business.

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This is the latest installment in our efforts to keep you apprised of the rapidly changing U.S. immigration environment. Some of the most recent changes could have a serious impact on you or your employees, and we urge you to communicate these changes to interested parties. If you have any questions, please do not hesitate to contact us.

U.S. ICE Raids Wal-Mart

On October 23, US Immigration and Customs Enforcement arrested 250 undocumented workers in what is the first large-scale immigration raid in several years. Commentators have noted that, since September 11, the enforcement arm of the Department of Homeland Security has primarily focused on border protection, implementing an intense campaign to prevent terrorists from infiltrating the United States at ports of entry nationwide. The Wal-Mart raid, with its far reaching impact on 21 states and over 60 stores, marks the first comprehensive effort of the Department of Homeland Security to tackle employer violations of U.S. immigration law since 9/11.

Wal-Mart, which denies it was part of any "scheme involving illegal workers," did not directly employ the majority of the undocumented workers arrested in the recent raid. The Company sub-contracted cleaning services, and claims that the third-party contractors were entrusted to hire only workers who are authorized to accept employment in the United States. However, federal officials have indicated that they believe Wal-Mart knew about the widespread use of undocumented workers in their stores. On October 31, Wal-Mart received a "target-letter" from a federal grand jury in Pennsylvania.

Under existing immigration law, employers are under no duty to verify the background of third-party contracted workers where the employer does not set work hours or provide necessary tools to do the job, and where the employer does not have the authority to hire and fire. Although experts are undecided whether the Wal-Mart raid marks a return to the more stringent employment enforcement that marked the late '80s and early '90s, the decision of U.S. Immigration and Customs Enforcement to pursue Wal-Mart's involvement in the employment of undocumented workers despite the use of third-party subcontractors suggests that the government has little tolerance for companies it believes are hiding behind independent contractors to evade immigration laws.

In a related matter, lawsuits have been filed against Wal-Mart by a number of the illegal employees, charging, among other things, that Wal-Mart failed to pay them overtime and discriminated against them on the basis of national origin.

There are lessons to be learned from the unfolding case against Wal-Mart: if your business uses contractors, you may not be as immune from immigration-related and other employment law violations as you might believe, even if you require that your contractors hire only legal workers. We suggest that clients who do use contractors reevaluate their current practices to ensure that inadvertent violations of immigration and employment laws are not occurring. For additional information, please contact Rosner & Associates or your employment law counsel.

I-9 Issues

In the wake of Wal-Mart, it is not unrealistic for employers to expect increased scrutiny of their employment practices and audits of their I-9 records by US Immigration and Customs Enforcement and the Department of Labor.

The I-9 record, which establishes an employee's identity and employment eligibility in the United States, must be maintained for every employee hired after November 6, 1986, subject to certain rehiring exceptions. Despite the deceptively simple appearance of the form, I-9 compliance is a very complicated area that is misunderstood to varying degrees by many employers. Failure to properly complete and maintain I-9 records for every applicable employee can result in substantial paperwork fines and penalties for the employer, even where no unauthorized or illegal employment is found. Therefore, we strongly urge our clients to establish and adhere to a system for complying with the I-9 requirements on an ongoing basis.

If you would like assistance in conducting an internal I-9 audit, or advice on establishing an I-9 system, please contact Rosner & Associates.

NSEERS' One-Year Anniversary

November 15 marked the one-year anniversary of the commencement of Special Call-In Registration for male foreign nationals over the age of 16 from Iran, Iraq, Libya, Sudan and Syria. The Registration requirement, which came to encompass foreign males from twenty-five countries, experienced its initial deadline on April 25, 2003, however, Special Registration did not end on that date.

Special Registration imposes ongoing requirements, which apply both to those who complied with the Call-In requirement and those who were admitted to the U.S. as a nonimmigrant at any time on or after September 11, 2002. Individuals who registered as part of NSEERS Special Call-In Registration must re-register in person every year at an immigration office within 10 days of the Anniversary of their initial registration date. Individuals who registered at a port of entry must report to a designated government immigration office within 30 to 40 days of the date of admission to the United States.

Last weekend, however, USCIS indicated that the NSEERS program may soon be eliminated in view of the implementation of US-VISIT (see below). It remains to be seen which requirements, if any, will exist, but in the meantime, all foreign nationals who are subject to NSEERS must continue to comply with existing requirements.

Failure to comply with current requirements may result in serious penalties, including deportation from the United States. For more information, please visit the American Civil Liberties Union website at www.aclu.org, or contact Rosner & Associates.

National Benefits Center to Process All Family-Based Cases

U.S. Citizenship and Immigration Services (USCIS) has commenced a new program by which all family-based petitions and applications that are filed at certain local offices will be forwarded to the National Benefits Center ("NBC") in Missouri for intake, initial processing, and issuance of Employment Authorization and Advance Parole documents.

This program is currently being implemented by several District Offices, as well as their sub-offices and satellites. Those offices which have not yet implemented the program are expected to do so within the next several months. Applications that were filed with District Offices that have implemented the program have been transferred to Missouri. To date, the following District Offices, as well as their sub-offices and satellites, have implemented the program: Atlanta, Chicago, Denver, Harlingen, Honolulu, Houston, Miami, New York, Phoenix, and St. Paul. Eventually, all family-based cases will be filed directly with the NBC.

Although the National Benefits Center is seen by USCIS as representing the first step in standardizing family based immigration on a national level, the Services' data systems do not yet support a central biometric database that can be used to streamline fingerprint requests and background checks. We will keep you apprised of developments in this area.

US-VISIT: Biometric Data to be Taken at all Ports of Entry

On October 28, the Department of Homeland Security unveiled the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT). The program will implement scanning procedures to collect biometric data at ports of entry into the United States. US-VISIT will supplement the information traditionally available to immigration officers at ports of entry with identifying data, making it much harder for immigration violators to exit and enter the United States without notice.

US-VISIT marks one of a series of strategies implemented by the Department of Homeland Security to heighten security by providing a standardized record of visitors entering and leaving the United States. The program will affect all visitors to the United States requiring a visa. For those who enter on the visa waiver program, biometric data on machine readable passports will be required after October 26, 2004. As the program currently exists, Canadian citizens are the only foreign nationals who may be exempt from biometric requirements.

Congress has mandated that US-VISIT be operational at all air and seaports by December 31, 2003. The 50 most highly trafficked land ports of entry must be operational by December 31, 2004, and by December 31, 2005, all ports of entry must employ the US-VISIT program.

Fast Track Trade Acts and Their Effect on the Availability of H-1B Visas

As you'll remember from our last newsletter, the number of H-1B visas issued for the current fiscal year reverted to 65,000 on October 1, 2003. This H-1B "cap" applies to all H-1B visa applicants except those applying for extensions of stay in H-1B visa status and employees of higher education institutions, nonprofit research organizations and government research organizations.

It is generally agreed by immigration law practitioners that the current H-1B cap will fail to meet the need for H-1B visas in FY2004. For the first three quarters of FY2003, USCIS approved 56,986 H-1Bs which were subject to the cap, and estimated that it would approve an additional 16,000 H-1Bs subject to the cap in the fourth quarter. FY2004 is hampered by two factors that will further limit the availability of H-1B visas. First, the cap must stretch to meet the needs of applications pending since FY2003. Second, "fast track" trade initiatives currently being pushed by the Bush administration will further reduce the number of visas available for H-1B visa applicants subject to the cap.

The first countries to enter into Trade Agreements with the United States under the "fast track" initiative are Chile and Singapore. The United States-Chile Free Trade Agreement Implementation Act and the United States-Singapore Free Trade Agreement Implementation Act both include provisions creating a new H-1B1 nonimmigrant classification for Chilean and Singaporean nationals temporarily entering the United States to perform services in specialty occupations. The Acts allocate 1,400 H-1B1 visa slots to Chileans and 5,400 to Singaporeans, although slots that are not utilized by the end of the fiscal year will revert to general availability.

Rosner and Associates helps corporations to bring foreign nationals to the U.S., and to obtain employment visas for U.S. citizens transferred abroad. We an also assist in obtaining permanent residence (green cards), student and exchange visitor visas, naturalization, and in preventing deportation. Please consider us for your immigration law needs.

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