VEDDER PRICE

Immigration Law Briefing

Summer 2002

INS Reorganization and Repositioning

On April 25, 2002, the House of Representatives voted overwhelmingly to abolish the Immigration and Naturalization Service ("INS"). A similar Senate plan was in the works. The House's bill would split the INS into two separate agencies, one dealing with immigration benefits and the other dealing with immigration enforcement. However, on June 6, 2002, the President proposed to create a new Department of Homeland Security. Under this proposal, the INS would be transferred from the U.S. Department of Justice to the new Department of Homeland Security. We do not yet know what impact this will have on the U.S. immigration laws and system, but we will continue to provide relevant updates.

New Security Checks

The State Department has begun additional security checks for visa applications for nationals of 26 countries. It is expected that it may take an additional 20 days for nationals of those countries to obtain visas. In

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In this Issue

addition, the INS Service Centers are now required to pass all petitions and applications through a security check. The INS reports that this will delay adjudication by at least one month. Premium Processing cases will continue to be processed within 15 days, but if a security check turns up anything, the 15-day "clock" will stop until the investigation has been completed. On June 5, 2002, Attorney General John Ashcroft proposed additional regulations that will initially require visitors from certain Middle Eastern countries to be registered, fingerprinted, and photographed. We will provide further information on this "National Security Entry-Exit Registration System" in our next issue.

Changes in Visa Requirements

The State Department plans to change its regulations to require visas for a group previously exempt from obtaining visas. As a result of this change, citizens of commonwealth countries who are legally resident in Canada or Bermuda will now be required to obtain visas. Commonwealth countries also include India, Pakistan, and New Zealand.

Additionally, visa application fees increased to $65.00 per applicant from $45.00 effective June 1, 2002.

Notification of Change of Address Required for All Aliens If Staying More Than 30 Days

Under the existing provisions of the Immigration and Nationality Act, an alien who remains in the United States for a period of 30 days or more is subject to the requirements for "registration" of aliens. Although this law has been on the books for a number of years, it was rarely enforced. Since 9/11, the INS has been enforcing *all* immigration laws more aggressively—hence this reminder.

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Nonimmigrant aliens register initially when they complete Form I-94, Arrival-Departure Record. However, the obligation to notify the INS of each change of address applies to all aliens (except diplomats)—*nonimmigrant and immigrant*—who remain in the United States for more than 30 days, regardless of whether their continued stay is pursuant to their initial admission or as a result of a change or extension of status. All aliens subject to this law must notify the INS of each change of address within 10 days of the change by submitting Form AR-11 to the INS on behalf of each family member.

INS Accepting EAD Applications for E and L Spousal Work Authorization

As we reported earlier this year, recent legislation now permits spouses of persons employed in the United States in E (Treaty Trader or Investor) or L (Intracompany transferee) status to obtain work authorization in the United States. This wonderful new benefit should be a straightforward, nondiscretionary determination by the INS as long as the documentary requirements are satisfied. INS has now issued guidance on these requirements.

The work authorization benefit is *not* automatically conveyed when the spouse enters the United States. The spouse must apply for an Employment Authorization Document ("EAD"). The filing location for this application depends upon the status of the individual and whether other applications are being filed at the same time. The EAD application generally takes about 60 to 120 days to be processed. One of the primary advantages of this benefit is that the spouse may accept *any* employment in the U.S., including self-employment. The EAD card may be issued for up to two years, but will not be issued for a period longer than the validity of the principal alien's I-94 Form. Please note that this benefit is only available to spouses, *not* children.

As discussed below, the Social Security Administration recently announced that it will no longer issue social security numbers to spouses and dependents of foreign employees solely to obtain driver's licenses. However, once a spouse has obtained an EAD card, he or she may then apply for and be issued a social security number, and may use this number to obtain a driver's license.

Please note that spouse-applicants employed in the United States will be subject to federal and state income taxation on income earned in the United States, and will ordinarily be subject to social security and other withholding requirements, unless exempted by treaties.

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New Blanket L Requirements in Place

Employers with foreign operations are now able to transfer certain employees to their United States branches or headquarters more quickly and easily. Certain intracompany transferees are now eligible to be transferred to the United States after only six months' employment abroad instead of twelve. In order to take advantage of the new six-month timeframe, the employer must qualify for "Blanket L" status. In order to qualify, the employer must have at least one of the following: 10 L visa petitions approved during the past year; annual combined sales of at least $25 million; or a workforce of at least 1,000 employees. If the employer meets these requirements, it can receive pre-approval to have an unlimited number of its executive, managerial and professional specialized knowledge employees apply for L visas without the necessity of filing first with the INS. Please note that the one-year requirement has *not* changed for permanent resident status as a multinational manager/executive.

As discussed above, recent legislation now permits spouses of persons employed in the United States in L (Intracompany transferee) or E (Treaty Trader or Investor) status to obtain work authorization in the United States. Obtaining work authorization will also enable the spouse to obtain a social security number and, subsequently, a driver's license.

"Since March 1, 2002, the Social Security Administration no longer assigns social security numbers when the sole reason for needing a social security number is to obtain a state driver's license."

Change in Social Security Policy Creates New Issues for Employees' Families

Current Social Security Administration policy provides that social security numbers will be issued to foreign nationals only if they have work authorization in the U.S., or if they require a social security number for other government-related reasons. Since March 1, 2002, the Social Security Administration no longer assigns social security numbers when the sole reason for needing a social security number is to obtain a state driver's license. This means that children and spouses of foreign employees can no longer obtain social security numbers in order to obtain driver's licenses or for any other reason, except in very limited circumstances.

As a result of this change in policy, spouses and dependents of foreign employees in many states

(including Illinois and Alabama) will be unable to obtain state driver's licenses, and may consequently be unable to obtain automobile insurance. Certain states will accept individual taxpayer identification numbers (ITINs) in lieu of social security numbers. These ITINs have the same number of digits (nine) as a social security number. *We recommend that employers bring this problem to the attention of their state officials, as state executive or legislative action may be required to resolve this issue*.

"In response to an SSA notice, an employer should perform follow-up activities, such as verifying names and social security numbers by examining its own records, in order to reconcile its records for SSA purposes."

"No-Match" Notices from the Social Security Administration

We have had a dramatic increase in the number of letters from the Social Security Administration ("SSA") notifying employers of a discrepancy between wage reporting information and SSA records with respect to an employee. These "no-match" letters generally state that the employee's name and social security number do not match. Most employers are unclear as to what the legal ramifications and employers' obligations are under such circumstances.

According to the INS, a notice from the SSA of a discrepancy, without more, does *not* constitute actual or constructive notice that the employee may not have lawful status in the U.S. The INS recognizes that there are a number of reasons why there might be such a discrepancy that do not relate to a lack of work authorization. Therefore, an SSA notice is not a basis, by itself, for the employer to take any adverse action against the employee. Any employer using the information in the notice to justify taking adverse action against an employee may violate state or federal law and be subject to legal consequences. Unauthorized employment is a matter that can be determined only on a case-by-case basis.

In response to an SSA notice, an employer should perform follow-up activities, such as verifying names and social security numbers by examining its own records, in order to reconcile its records for SSA purposes. If an employee has been given the opportunity for wage reporting purposes to explain and reconcile a reported discrepancy with SSA records and has failed to do so satisfactorily, the employer may need to take appropriate steps to reverify work authorization.

Legal advice should be sought prior to any further action relating to reverification of the work authorization status of the employee.

New Form Required for Many Visa Applicants (Form DS-157, Supplemental Nonimmigrant Visa Application)

As we reported earlier, all male visa applicants between the ages of 16 and 45 must provide additional information to the U.S. Department of State in conjunction with their visa applications. All male nonimmigrant visa applicants between the ages of 16 and 45, regardless of nationality and regardless of where they apply for their visas, must complete and submit Form DS-157 (Supplemental Nonimmigrant Visa Application) in addition to the usual Nonimmigrant Visa Application. Please note that consular posts may require *any* nonimmigrant visa applicant to submit a DS-157 in conjunction with the DS-156, regardless of their age, gender or nationality. Many posts are requiring that all men *and women* holding Chinese, Cuban, Iraqi, Iranian, Libyan, Russian, Sudanese, Somali, Thai, or Vietnamese passports also complete Form DS-157. (A copy of the new Form is included on page 7.)

New Policy Regarding Automatic Revalidation of Nonimmigrant Visas

Effective April 1, 2002, the U.S. Department of State has prohibited the automatic revalidation of nonimmigrant visas for certain aliens returning from contiguous territories (*e.g.*, Canada) or adjacent islands. Formerly, aliens whose nonimmigrant visa had expired but who still had a valid I-94 form could depart the U.S. for up to thirty days to a contiguous territory or adjacent island and subsequently be readmitted to the United States. Under the new policy, *the alien will not be readmitted if he or she applies for and is denied a new visa*. Until a new visa is issued—which may take up to 20 days for nationals of certain countries, the alien will not be permitted to return to the United States. New provisions will permit consular officers to "collect" Form I-94 from a visa applicant if his/her visa application is denied.

Intersection of Labor and Immigration Laws

On March 27, 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (00-1595) that the federal government may not compel employers to award back pay to undocumented immigrants who were illegally fired for trying to join a labor union.

By a vote of 5 to 4, the court held that the National Labor Relations Board had thwarted a national immigration law goal of preventing the hiring of illegal immigrants when it told Hoffman Plastic Compounds Inc. to pay almost $67,000 to Jose Castro. Castro was an undocumented worker from Mexico who went to work for the company in 1988, then was fired in 1989 for joining an organizing drive by the United Rubber, Cork, Linoleum & Plastic Workers of America.

"Allowing the board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy," Chief Justice William H. Rehnquist wrote in the opinion for the court. "It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."

However, four dissenting justices said that the ruling would actually create more incentives for companies to hire illegal immigrant workers, because they can now violate their right to join a union, at least once, without fear of legal liability.

Labor Certifications: U.S. Department of Labor Region 1 Discourages RIR Filing for Positions in IT Industry; New Regulations

An employer may generally request Reduction in Recruitment ("RIR") processing of a labor certification application if it can demonstrate a six-month pattern of recruitment for the position. This can dramatically reduce the processing time of a labor certification application.

On March 20, 2002, the Division of Labor Certification issued a memo instructing the U.S. Department of Labor ("DOL") certifying officers to consider broader criteria when evaluating RIR requests. As a result of the memo, the DOL Region 1 Office (which has jurisdiction over Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) announced that it is now strongly encouraging and recommending that labor certifications for

"the DOL Region 1 Office... announced that it is now strongly encouraging and recommending that labor certifications for occupations in the IT industry be filed under the regular labor certification process rather than RIR."

occupations in the IT industry be filed under the *regular* labor certification process rather than RIR. Whether other regional offices will make similar announcements to discourage RIR filing for occupations in the IT industry remains to be seen. In May 2002, the DOL published proposed regulations which would change the labor certification process. We will provide further information once final regulations are issued.

INSPASS Program—More Attractive Than Ever!

The Immigration and Naturalization Service Passenger Accelerated Service System ("INSPASS") is an automated system that can significantly reduce immigration inspection processing time for authorized travelers. INSPASS allows preapproved, frequent border crossers faster and easier passage, while freeing inspectors to focus on high-risk entrants to identify and intercept illegal aliens. INSPASS combines automation with a hand-geometry biometric image to validate the identity of an individual.

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INSPASS is currently operational at international airports in Los Angeles, Miami, Newark, New York (JFK), San Francisco, at Washington-Dulles, and at the U.S. preclearance sites at Vancouver and Toronto in Canada. The INS is authorized to install INSPASS at a total of 23 airports, which include the existing INSPASS operational airports plus Seattle, Honolulu, Atlanta, Boston, Chicago, Cincinnati, Dallas-Ft. Worth, Detroit, Houston, Minneapolis, Montreal, Orlando, Ottawa, and St. Louis.

Participation in INSPASS is voluntary and open to citizens of the United States, Canada, Bermuda, and 26 Visa Waiver Program (VWP) countries who travel to the U.S. on business three or more times a year for short visits (90 days or less). Eligible travelers must enroll in advance at airports where INSPASS kiosks are located. The following specific classes of visa holders are regarded as frequent business travelers: B-1, L-1, E-1, E-2, A, G, and WB.

Zero Tolerance

Due to the tremendous pressure being brought to bear on the INS, adjudicators will no longer be exercising discretion in granting benefits to aliens who are out of status. This change in policy may prevent Service Centers from approving extension petitions on a *nunc pro tunc* basis after the I-94 card has expired. Therefore, it is imperative to ensure that both employers and employees are in full compliance with United States immigration laws.

U.S. Department of State

SUPPLEMENTAL NONIMMIGRANT VISA APPLICATION

Approved OMB 1405-0134
Expires 06/30/2002
Estimated Burden 1 Hour*

PLEASE TYPE OR PRINT YOUR ANSWERS IN THE SPACE PROVIDED BELOW EACH ITEM
PLEASE ATTACH AN ADDITIONAL SHEET IF YOU NEED MORE SPACE TO CONTINUE YOUR ANSWERS

1. Last Name(s) *(List all Spellings)*	2. First Name(s) *(List all Spellings)*	3. Full Name *(In Native Alphabet)*

4. Clan or Tribe Name *(If Applicable)*	5. Spouse's Full Name *(If Married)*

6. Father's Full Name	7. Mother's Full Name

8. Full Name and Address of Contact Person or Organization in the United States *(Include Telephone Number)*

9. List All Countries You have Entered in the Last Ten Years *(Give the Year of Each Visit)*	10. List All Countries That Have Ever Issued You a Passport	11. Have You Ever Lost a Passport or Had One Stolen? ☐ Yes ☐ No

12. Not Including Current Employer, List Your Last Two Employers

Name	Address	Telephone No.	Job Title	Supervisor's Name	Dates of Employment

13. List all Professional, Social and Charitable Organizations to Which You Belong (Belonged) or Contribute (Contributed) or with Which You Work (Have Worked).	14. Do You Have Any Specialized Skills or Training, Including Firearms, Explosives, Nuclear, Biological, or Chemical Experience? ☐ Yes ☐ No If YES, please explain

15. Have You Ever Performed Military Service? ☐ Yes ☐ No If Yes, Give Name of Country, Branch of Service, Rank/Position, Military Specialty, and Dates of Service.

16. Have You Ever Been in an Armed Conflict, Either as a Participant or Victim? ☐ Yes ☐ No If YES, please explain.

17. List All Educational Institutions You Attend or Have Attended. Include Vocational Institutions But Not Elementary Schools.

Name of Institution	Address/Telephone No.	Course of Study	Dates of Attendance

18. Have You Made Specific Travel Arrangements? ☐ Yes ☐ No If YES, please provide a complete itinerary for your travel, including arrival/departure dates, flight information, specific location you will visit, and a point of contact at each location.

Paperwork Reduction Act Statement

*Public reporting burden for this collection of information is estimated to average 1 hour per response, including time required for searching existing data sources, gathering the necessary data, providing the information required, and reviewing the final collection. You do not have to provide the information unless this collection displays a currently valid OMB number. Send comments on the accuracy of this estimate of the burden and recommendations for reducing it to: U.S. Department of State, A/RPS/DIR, Washington, DC 20520.

The *Immigration Law Briefing* is published by the law firm of Vedder, Price, Kaufman & Kammholz. It is intended to keep our clients and interested parties generally informed on developments in the business immigration industry. It is not a substitute for professional advice.

 For an electronic copy of this newsletter, please contact Mary Pennington, at her e-mail address: mpennington@vedderprice.com

VEDDER, PRICE, KAUFMAN & KAMMHOLZ

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 200 attorneys in Chicago, New York City & Livingston, New Jersey.

Chicago
Vedder, Price, Kaufman & Kammholz
A Partnership Including Vedder, Price, Kaufman & Kammholz, P.C.
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005
Contact: Robert J. Stucker
Email: rstucker@vedderprice.com

New York
Vedder, Price, Kaufman & Kammholz
805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799
Contact: Alan M. Koral
Email: akoral@vedderprice.com

New Jersey
Vedder, Price, Kaufman & Kammholz
354 Eisenhower Parkway, Plaza II
Livingston, New Jersey 07039
973/597-1100
Fax: 973/597-9607
Contact: Barry J. Bendes
Email: bbendes@vedderprice.com

www.vedderprice.com

The Vedder Price Business Immigration Group

U.S. companies—whether large or small—increasingly hire employees from around the globe. The search for talent within industries such as financial services, bio-medical, high tech, pharmaceutical, automotive, engineering and other key sectors of the U.S. economy is relentless in its intensity. In response to the needs of companies to manage their internationally mobile workforce, the law firm of Vedder Price has created a Business Immigration Practice Group, designed specifically to serve the immigration law and compliance needs of companies throughout the country. In addition, the firm provides counsel and assistance with respect to all types of employment-related immigrant and non-immigrant visa categories.

Specific services include:

- Determining and applying for the most appropriate visa categories for individuals who intend to stay temporarily in the United States for employment or other business-related reasons.
- Preparation and processing of permanent resident visas for executives and other professional employees.
- Due Diligence regarding immigration law issues in corporate mergers, acquisitions, divestitures, and other forms of corporate reorganization.
- Counseling employers regarding compliance with immigration laws (IRCA) in order to avoid civil and criminal penalties.
- Assisting in processing visa applications and resolving other State Department matters in U.S. Embassies and Consulates around the world.
- Assisting employers with their non-U.S. immigration needs through our network of attorneys licensed in other countries.

Practice Group Leader:
Gabrielle M. Buckley
312/609-7626
Email: gbuckley@vedderprice.com