April 2010

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Jang Im Elected President of the Northern California Korean-American Association

We are proud to announce that Jang Hyuk Im, a member of the Immigration Law Group in our San Francisco, California, office, has been elected President of the Korean American Bar Association of Northern California ("KABANC") for 2010-11. Founded in the mid-1980s, KABANC works to encourage and promote the professional growth of the Korean-American legal community, and its current membership totals over 300 local attorneys, DAs, judges, in-

house counsel and law students of Korean descent. KABANC is an active affiliate of the National Asian Pacific American Bar Association, which represents the interests of all Asian Pacific American attorneys throughout the United States. For more information, please go to www.kabanc.org.

I. Arizona Law Criminalizes Undocumented Aliens

On Friday, April 23, 2010, Arizona Governor Jan Brewer signed S.B. 1070, legislation that its supporters call the toughest state anti-immigration law in the country. This follows the "Legal Arizona Workers Act," which that state enacted in 2007 and which mandates the use of E-Verify by Arizona employers, prohibits Arizona employers from knowingly or intentionally employing an unauthorized alien and establishes penalties for those who do. Among other provisions, S.B. 1070 does the following:

- Authorizes an official or agency of the state, county, city, town or political subdivision to stop and determine the immigration status of any person if reasonable suspicion exists to believe that person is an alien unlawfully present in the United States;

- Permits any law enforcement officer to arrest, without warrant, any person if the officer has probable cause to believe that the person is an alien and has committed an offense that would make him or her removable from the United States;

- Prohibits officials or agencies of the state or any political subdivision from adopting or implementing policies that limit immigration law enforcement;

- Expands the definition of a criminal trespass to include any person on public or private land in Arizona who is not in possession of documentation establishing his or her lawful status in the United States;

- Permits the State of Arizona to make a "final determination" of an alien's immigration status if required to enforce S.B. 1070;

- Prohibits any motor vehicle from stopping to hire or hire and pick up any person who will work at a different location;

- Creates a Class 3 Felony for failing to verify employment through E-Verify and/or maintaining records of such verifications; and

- Permits the State of Arizona to maintain information about the immigration status of any person.

Many of the provisions of Arizona's S.B. 1070 encroach on areas covered by the federal immigration laws or, in some cases, conflict with those laws. Under these circumstances, legal challenges to this legislation can be expected before S.B 1070 becomes effective this summer.

II. DOL Directs Software Company to Pay $1.9 Million for Underpaying H-1B

Workers

The U.S. Department of Labor ("DOL") announced on February 18, 2010, that it had ordered Peri Software Solutions, Inc., and its owner to pay $1,456,422 in back wages and a civil penalty of $439,000 because they failed to pay the prevailing wage to 163 computer analysts hired under the H-1B program. The DOL added that Peri Software also faces potential debarment by the Department of Homeland Security ("DHS") from the H-1B program.

III. Maryland Restaurant Owner Arrested for Hiring and Harboring Illegal Aliens

On February 16, 2010, the owner of a Chinese restaurant in Hanover, Maryland, was arrested and charged with hiring and harboring illegal aliens in violation of the Immigration and Nationality Act ("INA"). The Immigration and Customs Enforcement ("ICE") agent in charge of the case stated that "[c]ompanies who knowingly hire illegal aliens are not only breaking the law, they are also creating a magnet that draws foreign nationals to enter the United States illegally." The restaurant owner faces a maximum sentence of three years in prison for employing illegal aliens, and five years in prison for each count of transporting illegal aliens, harboring aliens and harboring aliens for financial gain.

IV. Courts Continue to Apply RICO to Immigration Violations

The federal courts continue to uphold claims under the Racketeer Corrupt Influenced Organizations Act ("RICO") that involve immigration violations. Under RICO, immigration violations now are considered one of the predicate activities that can constitute a "pattern of racketeering activity" under the statute. Civil RICO violations can result in treble damages and an award of counsel fees to the financial exposure from viable RICO claims can be substantial.

The first significant RICO development occurred on April 9, 2010, when the U.S. Court of Appeals for the Eleventh Circuit upheld the right of seven former employees of a Ruth's Chris Steak House franchise in Birmingham, Alabama, to pursue RICO claims alleging that the restaurant's owners knowingly hired illegal aliens and provided them with fraudulent Social Security numbers in order to depress the employees' wages. *Edwards v. Prime Inc. d/b/a/ Ruth's Chris Steak House*, No. 09-11699 (11th Cir. April 9, 2010).

Reversing a federal district court's dismissal of the RICO claim, the appeals panel said that the "plaintiff's allegations that the defendants knowingly supplied illegal aliens with jobs, fake identities and fraudulent Social Security numbers can be construed to violate the immigration law's proscription on 'encouraging or inducing' an alien to enter or reside in the United States with 'reckless disregard' as to whether the alien's conduct is illegal." By alleging that the restaurant owners did so "far more than twice," the Court found that the plaintiffs' complaint satisfies the RICO requirement of a "pattern of racketeering activity."

A second significant RICO development occurred on April 12, 2010, when Mohawk Industries Inc. agreed to pay $18 million to a class of legally authorized hourly workers. *Williams v. Mohawk Indus. Inc.*, N.D. Ga., No. 4:04-cv-00003-HLM (*order of preliminary approval* April 12, 2010). The plaintiffs alleged that their wages at Mohawk's

facilities in Georgia were depressed because the company violated RICO by hiring and harboring illegal workers in violation of immigration laws. The settlement, which Judge Harold Murphy preliminarily approved on April 12, 2010, entitles approximately 48,000 former and current Mohawk workers to claim awards from an $18 million settlement fund. A hearing to consider final approval of the settlement is set for July 22, 2010.

These and other RICO cases involving alleged immigration law violations underscore the significant legal exposure that can exist from an organization's failure to comply with U.S. immigration laws.

V. ICE Expands List of 'Best Practices' on Its IMAGE Web Site

ICE has expanded the list of "Best Practices" on its IMAGE Web site. These "Best Practices" provide guidance for employers seeking to enhance workforce compliance. To the prior list of 10 best practices, ICE has added two new ones.

First, ICE recommends the use by employers of the Social Security Administration's ("SSA") SSNVS system to check Social Security numbers. In this regard, however, care must be taken not to use this system as part of the basic Form I-9 process. Previously, ICE had recommended that employers develop and implement consistent policies and procedures for identifying and resolving "No-Match" letters received from the SSA. Employers must be sure to have such a policy in place before adopting this "Best Practice."

For union worksites, this can become even more complicated as the recent decision by the National Labor Relations Board ("NLRB") in *Aramark Educational Services, Inc., et al.,* 1-CA-43486, et al.; 355 NLRB No. 11 (NLRB February 26, 2010) ("*Aramark*") illustrates. In *Aramark*, the NLRB found that three Aramark subsidiaries had violated the federal labor law by independently implementing a "no-match" policy, and by relying on that policy to suspend 15 UNITE HERE workers at three of their Boston-area locations.

In reaction to the upsurge in worksite enforcement activity, Aramark adopted and implemented a policy that required the company to suspend, and later terminate, any employee who was the subject of a No-Match letter issued by the SSA, DHS or any other government agency. This policy followed the guidelines issued by ICE in its "Best Practices." At that time, Aramark's collective bargaining agreement with UNITE HERE contained ambiguous language about how these No Match situations should be addressed. Aramark raised its proposed changes with the union but implemented them unilaterally when they reached impasse. Thereafter, and pursuant to the new policy, Aramark required all employees subject to No-Match letters to resolve the discrepancy or face termination. When Aramark suspended 15 workers on the basis of this new policy, UNITE HERE filed an unfair labor practice claiming that Aramark had illegally implemented a new policy that should have been a subject for collective bargaining. The NLRB agreed and ordered Aramark not only to offer reinstatement to the 15 workers, but also to make them whole by paying them lost wages and benefits. One of the lessons learned from the *Aramark* decision is that unionized employers first must check their collective bargaining agreements before considering new work site enforcement polices to determine whether these policies must be collectively bargained.

Second, ICE now suggests that employers make a copy of the documents presented by new employees for Form I-9 verification. Under the immigration laws, employers have the option to make a copy of these documents but are not required to do so. Given the growing worksite enforcement activity by ICE, we have recommended that employers use this option for some time. If this is done, however, care must be taken, due to the sensitive nature of the information the Form I-9 contains. With a copy of these documents attached, the Form I-9 may contain all information necessary to accomplish an identity theft. Thus, employers that retain copies must maintain their Form I-9s in a secure location. For additional information on ICE's expanded set of "Best Practices," please visit: www.ice.gov/partners/opaimage.

VI. Comprehensive Immigration Reform

On April 21, 2010, Senate Majority Leader Harry Reid (D-NV) and House Speaker Nancy Pelosi (D-CA) indicated that they might push up congressional debate on comprehensive immigration reform and make this reform the Obama Administration's next legislative priority. This follows a report on March 18, 2010, in the *Washington Post* that Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC) had presented their blueprint for immigration reform legislation to President Obama. The Schumer-Graham blueprint rests on the following four pillars: ending illegal employment through biometric Social Security cards, enhancing border and interior enforcement, managing the flow of future immigration to correspond to economic realities and creating a tough but fair path toward legalization for the 11 million people currently in the United States without authorization.

On April 13, 2010, the Reform Immigration for America coalition ("RIFA") stated that at least 12 senators, including Senate Majority Leader Harry Reid (D-NV), have publicly committed to move a comprehensive immigration reform bill forward in 2010. "I am committed to fixing our immigration system," and it is "one of the most important problems we need to address this year," Senator Reid said at a RIFA rally in Las Vegas. He added that there are currently 56 Democratic senators who would vote for an immigration overhaul package, and challenged Republicans to join them. "I know the Democrats in my caucus are eager to finally push immigration reform over the finish line, but we'll need help from the other side," he said.

VII. Third Circuit Rules that DOL Retains Authority to Punish H-1B Violations

On April 12, 2010, the U.S. Court of Appeals for the Third Circuit held that the DOL retained authority to impose sanctions on a temporary staffing company for violating H-1B visa procedures, even though it acted more than 19 months after the deadline contained in the INA. *Cyberworld Enter. Tech. Inc. d/b/a Tekstrom Inc. v. Napolitano,* No. 09-2515 (3d Cir. April 12, 2010).

The DOL received a complaint that Cyberworld Enterprise Technologies Inc. had failed to confirm with secondary employers that the placement of H-1B workers on their premises would not result in a U.S. workers being laid off or displaced. Nineteen months later, the DOL found that Cyberworld committed 14 legal violations, fined the company $3,400 and barred it from receiving H-1B visas for one year. Cyberworld appealed the decision claiming, among other things, that the DOL's claims were time-barred because the INA requires the

DOL to determine within 30 days if a complaint has a reasonable basis.

Writing for a unanimous panel of the Third Circuit, Judge Marjorie O. Rendell found that this statutory deadline did not deprive [the DOL] of jurisdiction where important public rights are concerned. "Here, … the 'rights' that the Secretary [of Labor] seeks to vindicate are of a 'public' nature, since she is acting to protect the U.S. workforce from displacement by H-1B recipients and to enforce the rules of the immigration system,…" The panel added that it was not unsympathetic to Cyberworld's plight but that neither case law nor congressional intent prevented DOL from punishing the company after the deadline had elapsed. However, the court found that since "Congress did not specifically *prohibit* the DOL Secretary from acting after the deadline had expired, [precedent] dictates the conclusion that the Secretary had jurisdiction to act when she did."

VIII. Koch Foods Fined More than $536,000 for Worksite Violations

On February 12, 2010, ICE announced that Koch Foods Inc. had paid fines totaling more that $536,000 arising from a 2007 raid of its southwest Ohio poultry processing facility. Koch Foods was fined for Form I-9 violations associated with the company's failure to retain or check proof of each employee's legal immigration status at its Fairfield, Ohio, plant.

Brain Moskowitz, Special Agent in Charge of ICE's Office of Investigations, said that "[t]he significant civil fines levied here represent ICE's firm commitment to holding employers accountable." He added that "[f]ines are an important component in ensuring employer compliance." Since the ICE raid, Koch Foods has added training for managers on how to complete Forms I-9 and has established procedures to avoid repeating violations that were uncovered in 2007.

The raid, which was one of the largest in the United States in 2007, was a part of a two-year investigation into Koch Food's hiring practices. Special Agent Moskowitz stated that the raid was part of a broader immigration enforcement effort targeted at employers that are suspected of knowingly hiring illegal immigrants.

IX. CIS Announces Three Measures Designed to Improve E-Verify, Combat Discrimination

On March 17, 2010, the U.S. Citizenship and Immigration Services ("USCIS") announced a number of measures that the agency claims will "strengthen the efficiency and accuracy of the E-Verify system" and combat worker discrimination. First, the USCIS signed a memorandum of agreement with the Justice Department's Office of Special Counsel for Unfair Immigration-Related Employment Practices ("OSC") to streamline the process for addressing potential cases of discrimination and employer misuse of E-Verify. Second, the USCIS announced that it is creating an informational telephone hotline to help employees navigate the E-Verify system. Third, the USCIS indicated that it is issuing two new training videos focusing on procedures, employee rights and employer responsibilities under the E-Verify program.

The employee hotline number, (888) 897–7781, is currently operational. According to the USCIS, the hotline was created to respond to employee inquiries, issues and complaints about

the E-Verify program. The employee hotline will allow workers to obtain general E-Verify information and assistance in completing the I-9 employment verification form and to learn about employee rights under the program. In addition, workers can use the number to file complaints about possible violations of verification policy and privacy laws, contest an E-Verify case or report employer misuse of the E-Verify system.

The two new videos have been designed to explain proper use of E-Verify to both employers and employees. They are as follows:

- "Understanding E-Verify: Employer Responsibilities and Worker Rights," which is aimed at employers and is available in English, CIS said.

- "Know Your Rights: Employee Rights and Responsibilities," which is aimed at employees and is available in both English and Spanish.

Each video is about 20 minutes long and contains reenactments of hiring scenarios where employers and employees work through the E-Verify process together. The videos are available on the DHS Web site and on YouTube.

DHS Secretary Janet Napolitano's statement accompanying these initiatives stated that "[t]he initiatives announced today will provide essential information to workers about their rights and ensure that E-Verify is used fairly while bolstering the Department's efforts to protect critical employment opportunities."

X. Secretary Napolitano Announces Greece's Designation as a Member of the Visa Waiver Program

On March 9, 2010, DHS Secretary Janet Napolitano designated Greece as the newest country enrolled in the Visa Waiver Program ("VWP"). Secretary Napolitano said, "Our efforts to guard against terrorism while enhancing legal travel and trade depend upon close collaboration with our international partners," and "I commend our partners in Greece for committing to strong screening and security standards and enhanced information sharing for travel by Greek citizens to the United States as we work together to protect our citizens and strengthen our economies."

In accordance with the VWP designation process, DHS has determined that Greece complies with a number of important security and information-sharing requirements: enhanced law enforcement and security-related data sharing with the United States, timely reporting of lost and stolen passports and the maintenance of high counterterrorism, law enforcement, border control, aviation and document security standards. Accordingly, qualified Greek citizens will be permitted to travel to the United States for up to 90 days without obtaining a visa.

Greece now joins the 35 nations that already participate in VWP. Like all other VWP travelers from those countries, Greek citizens will be required to apply for an Electronic System Travel Authorization ("ESTA") through the Web-based system before they can travel under the VWP. For more information, visit www.dhs.gov or esta.cbp.dhs.gov.

XI. DOS Issues May 2010 Visa Bulletin

The Department of State ("DOS") recently issued its Visa Bulletin for May 2010. This Bulletin determines who can apply for permanent residence and when. The cutoff dates for the Employment-Based Third Preference are as follows: April 22, 2003, for all charge-ability, including the Philippines; unavailable, for Mexico and October 1, 2001, for India. The cut-off dates for the Employment–Based Second Preference are as follows: Current for all chargeability; January 1, 2005, for India and September 22, 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.

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