September 2011 Immigration Alert

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I. DOL Temporarily Suspends Work on Prevailing Wage Determinations Required for PERM Labor Certification Applications

The U.S. Department of Labor ("DOL") recently announced that its Office of Foreign Labor Certification ("OFLC") has had to temporarily suspend processing applications for prevailing wage determinations ("PWDs"), including requests for redeterminations and Center Director Reviews. Employers seeking to sponsor a foreign national ("FN") employee must secure a PWD as part of the Program Electronic Review Management ("PERM") labor certification process, which is normally the first step in the green card process.

According to the DOL, the OFLC had to stop work on PWDs to comply with a federal court mandate requiring the OFLC to recalculate approximately 4,000 PWDs issued in connection with the H-2B temporary worker program. The U.S. Citizenship and Immigration Services ("USCIS") issued a revised methodology for these calculations on August 1, 2011, and the court directed the OFLC to follow this new methodology in these 4,000 cases. The DOL believes that it will be able to satisfy the court's directive by October 1, 2011. However, it has indicated that it needs to focus all available resources to achieve this goal and, thus, must stop work on other cases, including the PWDs required for PERM applications.

Employers cannot file a PERM application without first securing a PWD. Moreover, in most instances, the employer needs a valid PWD to commence and complete the recruiting required for PERM applications. Thus, the DOL's announcement promises to delay the ability of sponsoring employers to prepare and file PERM applications.

II. H-1B Nonimmigrant Classification Is Still Open 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 FNs who have obtained a master's degree or higher from an accredited American university. On August 26, 2011, the USCIS reported that 29,000 regular H-1B petitions, and 15,800 master's H-1B petitions, had been filed towards the fiscal year 2012 quota.

The federal government's fiscal year runs from October 1 through September 30, so fiscal year 2012 will begin October 1, 2011. Employers were eligible to start filing H-1B petitions toward the fiscal year 2012 quota on April 1, 2011, but they could not secure a start date prior to October 1, 2012. This announcement by the USCIS indicates that the 2012 regular H-1B quota is approximately 50 percent exhausted and that the 2012 master's H-1B quota is approximately 75 percent exhausted. When the quota is reached for the master's H-1B petitions, they will be eligible for consideration under the regular H-1B quota.

III. Important Developments in H-1B Areas of "Benching," Retaliation, "Bona Fide" Terminations, and Prevailing Wages

On August 19, 2011, the U.S. District Court for the Eastern District of Tennessee issued its decision in *Kutty v. U.S. Department of Labor*, No. 3:05-CV-510 (E.D. Tenn. Aug. 19, 2011). In *Kutty*, the federal court upheld a DOL determination that Dr. Kutty had committed multiple violations of the "no benching" and anti-discrimination provisions of the immigration laws, and affirmed an award of over $1.1 million for back pay and civil penalties for the violations.

Dr. Kutty is a medical doctor who had five clinics in rural Tennessee. The DOL alleged that he sponsored 17 FN physicians on H-1B nonimmigrant visas to staff and operate these clinics. When he encountered financial difficulties, however, Dr. Kutty unilaterally reduced the salaries of some of those H-1B physicians. When the physicians hired counsel to contest Dr. Kutty's actions, Dr. Kutty stopped paying them. As a result, they filed a complaint with the DOL,

alleging, among other things, that he had violated the no-benching and antidiscrimination provisions of the immigration laws applicable to H-1B employees.

The complaint was adjudicated by an administrative law judge ("ALJ") with the DOL. The ALJ found that Dr. Kutty had violated the immigration laws by willfully refusing to pay the physicians the wages required by their H-1B petitions and by retaliating against them when they complained. The ALJ assessed back wages of over $1 million and a civil penalty of $108,800. After the DOL's Administrative Review Board affirmed the ALJ's decision, Dr. Kutty sued in federal court to overturn the decision as being arbitrary and capricious. The district court, however, affirmed the ALJ's decision in all respects, concluding that Dr. Kutty had willfully violated the no-benching and anti-discrimination provisions of the immigration laws by refusing to pay the physicians the wage required by their H-1B petitions and then retaliating against them when they sought to contest his actions.

On June 30, 2011, another ALJ with the DOL decided *Limanseto v. Ganze & Company*, OALJ Case No. 2011-LCA-00005 (June 30, 2011). In *Limanseto*, an H-1B employee complained that he had not received the salary promised by the employer in its H-1B petition on his behalf. The employer countered that it was not liable because Limanseto had been discharged and he had received all compensation required up to that date. The ALJ found that while the employer had terminated the employment relationship under state law, it had failed to effectuate a "bona fide" termination of his H-1B status and, thus, was liable for all wages due under the Labor Condition Application ("LCA") filed to support the H-1B petition.

The concept of a "bona fide" termination in the H-1B area is not new but, as this case illustrates, is easily forgotten by H-1B employers. When securing H-1B status for a prospective employee, an employer must file an LCA in which it, among other things, represents that it will pay the employee the prevailing wage or actual wage for the position, whichever is higher, and that it will continue to pay this wage for the duration of the H-1B status. Under the administrative law regarding H-1B nonimmigrants, the DOL has developed a concept called a "bona fide" termination to ascertain when an employee's H-1B status actually ends. According to a series of cases, an employer effectuates a "bona fide" termination by: (1) notifying the employee of the termination as required by contract or state law, (2) providing notice of the termination to the USCIS, and (3) paying the H-1B employee's reasonable transportation costs home as required by both the LCA and H-1B petition. *Under the DOL's "bona fide" termination rule, an employer remains liable for the LCA wages until it completes all three steps*.

In the *Limanseto* case, the employer's failure to effectuate a "bona fide" termination of the employee's H-1B status meant that the employer was liable for $156,425, the wages due under the LCA from the time the employee was terminated until his H-1B status ended. The ALJ refused to allow the employer to mitigate this damage award by showing income that Limanseto earned after the employer terminated him. According to the ALJ, the concept of mitigation did not apply because this was a statutory proceeding, not an action at law for damages. For purposes of the H-1B program, Limanseto remained an H-1B employee until the "bona fide" termination so that the concept of mitigation was inapplicable. At the same time, the ALJ assessed the employer an additional $1,500 to reimburse Limanseto for the legal fee that he paid to secure the H-1B approval. Also according to the ALJ, an employer that files an H-1B petition must pay all

associated legal and filing fees. By forcing Limanseto to pay this fee, the employer violated the DOL rules, and he was entitled to reimbursement. Finally, the ALJ awarded Limanseto both pre- and post-judgment interest.

Finally, the DOL reports that it is devoting additional resources to the scrutiny of wage levels used by employers in the LCAs filed for sponsored H-1B employees. The agency is concerned that H-1B employers may be using wage levels below those actually applicable to the sponsored position and, thus, undercutting the wages of U.S. workers. The DOL has indicated that it will refuse to certify any LCA, or will seek revocation of a certified LCA, wherever it discovers that the employer used a wage level below that applicable to the sponsored position.

The *Kutty* and *Limanseto* decisions, coupled with the DOL warnings on prevailing wage levels for H-1B nonimmigrants, serve as timely reminders to H-1B employers of the additional obligations they incur from H-1B sponsorship. The minimum salary that must be paid to the H-1B employee is defined by the complexity, educational level, and experience required for the sponsored position, and the employer's wage obligation in the LCA remains, and cannot be reduced unilaterally (*i.e.*, "benched") without amending the LCA and the H-1B petition. At the same time, the immigration laws protect FNs, and employers must avoid any retaliation against those who assert their rights to these protections. Finally, an employer could face a substantial and unanticipated liability if it does not properly terminate H-1B employees or requires them to pay legal and filing fees that the law imposes on the employer.

IV. NLRB Rejects Back Pay Claims of Undocumented Workers

On August 9, 2011, the National Labor Relations Board ("NLRB") issued a Supplemental Decision and Order in *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47 (Aug. 9, 2011). Previously, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Supreme Court of the United States affirmed an NLRB decision that refused to award back pay to undocumented workers for violations of the National Labor Relations Act ("NLRA"), where the employers had satisfied their Form I-9 obligations under the Immigration Reform and Control Act of 1986 ("IRCA"), but the workers had misrepresented their status to secure employment. In the *Mezonos* case, the NLRB was required to determine whether the *Hoffman* rule also foreclosed a back pay award to undocumented workers, where the employer had violated the IRCA. The NLRB held that *Hoffman* forecloses an award of back pay to undocumented workers, even if the employer was complicit in the IRCA violation.

In a unanimous three-member decision, the NLRB panel denied back pay to seven illegal immigrants who worked for the Mezonos Maven Bakery, Inc. ("Mezonos"). According to the NLRB, Mezonos had hired these workers without satisfying its Form I-9 obligations under the IRCA. They were then fired after complaining that their treatment by a supervisor violated the NLRA. In November 2006, the ALJ who heard the case rejected the employer's *Hoffman* defense to the worker's back pay claims because the employer, not the workers, had violated the IRCA by failing to require Form I-9 completion. The NLRB reversed, concluding that the Supreme Court's decision in *Hoffman* precluded an award of back pay regardless of whether the employer knew they were undocumented and violated the IRCA. In a concurrence, two members of the panel indicated that, if writing on a clean slate, they would not have reached this

conclusion because it promoted worker abuse and excused violations of the NLRA. However, they reluctantly agreed that the Supreme Court's decision in *Hoffman* mandated the denial of the workers claims.

It remains to be seen what impact, if any, decisions like *Mezonos* will have on the increasing volume of state and federal claims by undocumented workers for damages, including lost wage, personal injury, and related litigations. For example, in June 2011, the New York Supreme Court, Appellate Division, First Department, decided *Angamarca v. New York City Partnership Housing Development Fund Co., Inc.,* Index No. 115471/04 (June 22, 2011). Angamarca was a construction worker hired by a contractor that was aware of his undocumented status. The employer never completed the Form I-9 requirements, paid him in cash, and never deducted wages as required by federal law. After Angamarca was seriously injured on the job, he sued to recover damages, including back pay, medical expenses, and future lost income. The lower court refused to allow the employer to examine Angamarca about his immigration status or the impact that this status might have had on the size of the damages that he claimed. The employer sought to show that Angamarca would have earned less in his home country and would have had to pay less for medical expenses, and that this should be factored into any damage award. The trial court refused to allow the employer to pursue this line of inquiry. The Appellate Division, First Department, affirmed, concluding that the plaintiff's immigration status was "irrelevant" to his damage claims.

We suspect that the NLRB's decision in *Mezonos* may cause state courts, like the one in *Angamarca*, to reconsider the relevance of immigration status to damage calculations in personal injury and other claims brought by undocumented workers.

V. U.S. Supreme Court's *Whiting* Decision Spurs State Immigration Legislation and Related Litigation

In our last Immigration Alert, we reported on the U.S. Supreme Court's decision in *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (May 26, 2011), and suggested that, by upholding the constitutionality of the Legal Arizona Workers Act ("LAWA"), it might spur states to adopt additional immigration legislation. Given the national perception about lax immigration enforcement and the use of the issue as a potent political weapon, the time seemed ripe for state action. According to the National Conference of State Legislatures, 14 states and Puerto Rico enacted 23 employment-related immigration bills in the first six months of 2011, and a record number of immigration-related bills were introduced into state legislatures during the same period.

Several states, including Alabama, Georgia, Indiana, North Carolina, South Carolina, Tennessee, and Utah, have enacted laws specifically aimed at reducing the level of illegal immigrants living in their jurisdictions. Many of these laws contain provisions similar to those of the LAWA and require employers to use E-Verify, the federal government's employee verification system, or risk loss of their business license. However, several of these laws also contain provisions that give state law enforcement officers far more authority over arresting individuals whom they consider illegal aliens, and that enlist localities, and even public educational institutions, in the battle against illegal immigration.

The swift passage of these laws has generated a variety of responses from all sides of the political spectrum. Proponents hail the "get tough" message they say that the laws send. Opponents in the business community decry the additional costs and efforts that small businesses must absorb to comply. Even the agricultural community is upset because the farmers feel these laws are driving out agricultural workers at the worst possible time, and they will have great difficulty harvesting crops. Predictably, those upset with the laws have initiated court challenges. In *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT (N.D. Ga. June 27, 2011), a federal district court in Georgia upheld the E-Verify provisions of the law, but enjoined many of the other provisions on the ground that they conflicted with federal law, which preempted them. A similar challenge has been mounted by the federal government and several private parties against the new Alabama law and, on August 29, 2011, a federal court in Alabama enjoined enforcement of that statute so that it could consider the merits of its various provisions. *See United States v. Alabama,* Case Number 2:11-CV-2484, 2736, 2746 (N.D. Ala. Aug. 29, 2011)(S.J. Blackburn, Chief Judge).

At least two states have bucked the trend of more draconian legislation to enact local "DREAM" statutes. As our readers may recall, Congress almost passed a federal "DREAM" Act this summer. It was designed to create a path to legal residence for undocumented children brought here illegally by their parents. On July 25, 2011, California Governor Jerry Brown signed the California Dream Act of 2011 (A.B. 130). This statute increased access to financial aid for all students attending California universities and colleges, regardless of immigration status, as long as an undocumented student files a sworn affidavit agreeing to seek lawful status as soon as allowed to do so. On August 1, 2011, Illinois Governor Pat Quinn signed the Illinois DREAM Act (S.B. 2185), which creates a private scholarship program for high school graduates of immigrant families who want to attend college.

VI. DOJ Takes New Immigration-Related, Anti-Discrimination Enforcement Actions

With the increase in worksite enforcement activities by the Obama administration, naturally, the focus of employers has been on satisfaction of the Form I-9 requirements to ensure that no undocumented worker is hired. The problem is that employer vigilance in this area has ignored the anti-discrimination provisions of the immigration laws that were adopted as part of the IRCA. Recently, the U.S. Department of Justice ("DOJ") has pressed several anti-discrimination cases that serve as painful reminders of those provisions.

On May 31, 2011, the DOJ announced that it had reached a settlement agreement with the American Academy of Pediatrics ("AAP"), an organization of 60,000 pediatricians based in Elk Grove, Illinois. The settlement followed an investigation into claims of immigration-related employment discrimination. According to the DOJ, AAP impermissibly allowed postings on its job search website for physicians, nurses, and other medical professionals that limited applications to only U.S. citizens and certain U.S. visa holders, even though other work authorized immigrants should have been allowed to apply as well. As part of the settlement, AAP agreed to pay $22,000 in civil fines, train its personnel on the immigration laws, and provide periodic compliance reports to the DOJ for three years.

On August 29, 2011, the DOJ announced that it had settled its discrimination claims against Farmland Foods ("Farmland"), a subsidiary of Smithfield Foods. The DOJ had sued Farmland alleging that it discriminated against non-U.S. citizens by imposing unnecessary documentation requirements upon new employees seeking to establish work authorization. According to the DOJ, Farmland "required all newly hired non-U.S. citizens and some foreign-born U.S. citizens … to present specific, and in some cases, extra work authorization documents beyond those required by federal law." Under the terms of the settlement, Farmland agreed to pay $290,400, the largest civil penalty assessed under the anti-discrimination provisions since they were enacted as part of the IRCA in 1986.

In July 2011, the DOJ sued Mar-Jac Poultry Inc., a Georgia poultry processing plant, and alleged that the plant discriminated against non-citizens by requiring them to provide immigration documents issued by the federal government before considering them for employment, but giving U.S. citizens greater latitude in showing documentation before considering them for employment. On July 21, 2011, the DOJ settled a reemployment discrimination lawsuit with Brand Energy and Infrastructure Services ("Brand Energy"), another Georgia-based company. Brand Energy agreed to pay a fine of $43,560 and back pay of $7,200 to a legal immigrant who was improperly fired when he could not comply with the company's request for specific employment documentation.

The prospect of additional anti-discrimination actions by the DOJ remains significant. The combination of the poor economy, the administration's emphasis on worksite enforcement, and the existence of a DOJ enforcement office that focuses exclusively on these issues should make it clear that these actions will increase in the foreseeable future. Thus, employers looking to avoid liability in this area need to include a thorough review of the IRCA's anti-discrimination provisions in their From I-9 training. Since many of these violations also occur in the recruitment and evaluation of new hires, this training should expand to include all those involved in the recruitment and on-boarding process.

VII. USCIS Announces Initiatives to Promote Startup Firms and Spur Job Creation

On August 2, 2011, Janet Napolitano, the Secretary of Homeland Security ("DHS"), and Alejandro Mayorkas, the USCIS Director, announced a series of initiatives that are designed to stimulate investment by attracting foreign entrepreneurial talent. According to Secretary Napolitano, the "United States must continue to attract the best and brightest from around the world to invest their talents, skills and ideas to grow our economy and create American jobs …." It is questionable whether any of these initiatives, whether viewed singly or together, will achieve these lofty objectives because they all must be accomplished within the confines of existing law.

One of the initiatives' changes involves the EB-2 National Interest Waiver classification. This immigration category was designed to attract foreign workers with advanced degrees and individuals of exceptional ability. To classify for this category, however, the FNs must be sponsored by an employer and secure labor certification unless they can show that their work is in the national interest. These so-called "national interest waivers" have been extremely difficult to secure due to a series of administrative decisions that have narrowed eligibility requirements.

Now, the USCIS proposes that a FN who otherwise qualifies for EB-2 classification will be able to secure a national interest waiver if he or she can show that his or her business enterprise will "create jobs for U.S. workers or otherwise enhance the welfare of the United States."

Another series of enhancements is planned for the EB-5 immigrant classification that is available to those who invest $500,000 to $1 million in an enterprise that creates at least 10 jobs. Under the immigration laws, there are 10,000 visas available annually in this category, but the number of applications has never approached that number of visas due to problems in administration of the program and the availability of options. The USCIS has promised to make major changes in the administration of the program to make it more promising to those who would like to invest in the United States. It is not clear, however, what the USCIS and DHS proposals anticipate as the new inter-relationship between the EB-2 and EB-5 classifications. Why would any FN want to commit the substantial investment required by the EB-5 classification if he or she could secure a green card under the EB-2 classification with a much smaller and more flexible financial commitment?

Another area targeted for change by the new USCIS initiative is the H-1B program. In January 2010, the USCIS issued new guidance that limited the ability of the sole owners of businesses from using their business to sponsor themselves for the H-1B classification. According to the USCIS, a sole owner could not secure H-1B status unless he or she could establish a valid employer-employee relationship as evidenced by an independent "right of control" by the petitioning business over the beneficiary's employment. In the past, this proved impossible in most situations because the sole owners in these cases generally ran the businesses and, thus, could not demonstrate the independent right of control that the guidance required. Now, the USCIS indicates that it will approve these "self sponsorship" applications, as long as there is an accountable board of directors that has the ability to hire, fire, pay, supervise, or otherwise control the H-1B employee. It remains unclear whether this really reflects a change in administrative approach and, if so, how any H-1B sponsor could satisfy it and still retain the independence that most entrepreneurs need to run their businesses.

It is promising that both the USCIS and the DHS recognize the important role that foreign capital and talented FNs have played and can continue to play in developing the national economy. In the absence of comprehensive immigration reform, however, it is hard to see how these modest proposals could attract the foreign capital or talent that is necessary to reach the program's objectives when they still will be administered by a USCIS bureaucracy that most employers and entrepreneurs find frustrating.

VIII. Hospitality Industry Revisits Positions on Immigration Issues

Many of our hospitality clients are revisiting immigration requirements to see if there are any advantages that they have overlooked. One overlooked advantage is the USCIS's E-Verify system. Employers know that the IRCA requires them to satisfy the Form I-9 requirements. Many have found this difficult to implement and have been the targets of worksite enforcement operations by U.S. Immigration and Customs Enforcement ("ICE") that are costly to defend and often result in significant fines. Traditionally, many hospitality employers have looked at the E-

Verify system as something to be avoided due to the time required to learn how to use it and the number of potential employees that the system would prevent them from hiring.

With the expansion in the number of state laws requiring the use of E-Verify and the increasing risks to hospitality and other employers from expensive worksite enforcement actions, many hospitality organizations are revisiting whether it makes sense to use this system before being required by state or federal law to do so. At the same time, the Social Security Administration has resumed sending out "no match" letters when the name and Social Security number of an employee do not match. It can be time consuming to resolve these no-match situations. Moreover, as we have reported in other Immigration Alerts, ICE views employers that fail to resolve no-match letters as candidates for enforcement actions. Employers who use E-Verify generally do not receive no-match letters because the E-Verify system will kick out the no-matches at the outset, so the employee will not be hired. All these factors combine to suggest that hospitality employers may want to revisit their traditional aversion to E-Verify and re-evaluate whether it makes sense in the current regulatory environment to use it.

The government's proposal to streamline the EB-5 program also may make that program attractive to those seeking to develop hotels or other hospitality facilities, for several reasons. First, the primary target of the EB-5 program may now be Chinese investors due to the severe backlogs in the immigration quotas for that country. From an immigration perspective, this makes the EB-5 program more attractive to potential wealthy Chinese investors. Second, hospitality facilities tend to be labor intensive as is the development process. This makes them more attractive for satisfying the EB-5 employment requirements. Finally, the development of regional centers ("RCs") makes the EB-5 program a more convenient vehicle than it has been in the past. These RCs are entities formed to attract and pool investments that qualify for EB-5 consideration. Utilization of an appropriate RC for a hotel development project may facilitate the financing necessary for the project.

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

On August 2, 2011, U.S. Customs and Border Protection ("CBP") announced that Global Entry kiosks were now available at CBP pre-clearance at the Vancouver International Airport and at Ottawa's MacDonald-Cartier Airport, and that they would be available at Montreal's Trudeau and Pierson International Airports by the end of September 2011.

The CBP established its Global Entry program as a mechanism to streamline the international arrival process for pre-approved travelers. The program was initiated in December 2010, with the goal of expanding it to 20 major U.S. airports. It is 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 now can participate through membership in the Canadian NEXUS Trusted Traveler program.

Applications for Global Entry first must 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 also will 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/.

X. DOS Issues September 2011 Visa Bulletin

The U.S. Department of State ("DOS") recently issued its Visa Bulletin for September 2011. The 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 are as follows: November 22, 2005, for all chargeability, including the Philippines and Mexico; April 22, 2003, for China; and July 8, 2002, for India. The cut-off dates for the Employment-Based Second Preference category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; and April 15, 2007, for China and India. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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