April 2013 Immigration Alert

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I. Comprehensive Immigration Reform Debate Begins!

On April 16, 2013, a bipartisan group of eight senators, the so-called "Gang of 8," offered Senate Bill 744 to lay the foundation for landmark immigration reform. Entitled the "Border Security, Economic Opportunity and Immigration Modernization Act," this proposed legislation consumes 844 pages and, if enacted, would radically change almost every important facet of the current immigration process. The sheer size of this bill precludes a detailed analysis at this early stage. An initial review, however, reveals that the bill consists of four basic elements: (1) provisions for increased border security; (2) a path to legalization for illegal aliens, which allows them to remain legally if they qualify for "registered provisional immigrant status" and also permits them to obtain permanent residence once certain border security triggers are achieved; (3) increased employment-based immigration and temporary work visas for H-1B professionals

(subject to additional market test requirements) and a new "W" visa program for lower-skilled workers; and (4) enhanced employer verification that phases in the mandatory use of E-Verify over a five-year period.

The "Gang of 8" proposal follows issuance of a fact sheet by the White House in which the Obama administration outlined the key principles that it felt should be the foundation of comprehensive immigration reform. Like the Senate proposal, the President's proposal includes increased border security; enhanced employer verification with a mandatory, but phased-in, requirement for employers to use E-Verify; and increased employer-based immigrant and temporary work visas. Unlike the Senate proposal, the President's proposal would increase and streamline family-based immigration and create a speedier path to citizenship for illegals.

These proposals frame the immigration debate that will continue throughout the summer. It remains to be seen whether either proposal has the staying power to withstand those who oppose immigration reform of any kind. Also, the Congressional Budget Office has yet to evaluate the cost of these proposals, and this could prove a critical factor as the nation struggles to reduce the deficit and manage the sequester. It would be unfortunate, however, if these laudable efforts are derailed. Many studies indicate that comprehensive immigration reform could provide a significant boost to our sluggish economy by attracting the foreign investment and skilled workforce that will make the United States more competitive in global markets.

Stay tuned!

II. USCIS Reports That H-1B Cap Is Reached in First Week

On April 8, 2013, U.S. Citizenship and Immigration Services ("USCIS") announced that it had received sufficient H-1B petitions to reach the annual quota for fiscal 2014. As most H-1B employers know, the quota is 65,000 for regular H-1B petitions, plus another 20,000 for H-1B petitions filed for foreign nationals ("FNs") who have obtained a master's (or higher) degree from an accredited American university. According to the USCIS, it received approximately 124,000 H-1B petitions during the initial, one-week filing period. The USCIS then used a computer-generated random selection process ("lottery") to choose a sufficient number of petitions necessary to reach the applicable caps. The USCIS will issue receipts for those cases and then proceed to adjudicate them. In addition, the USCIS will return those petitions not selected by the lottery.

Under the "Gang of 8" proposal, the quota for new H-1B petitions would be raised this year from 65,000 to 110,000, and the advanced degree quota would be raised from 20,000 to 25,000. In future years, the quota for new H-1B petitions could be raised to 180,000 based on a statutory formula, but it could not be increased/decreased by more than 10,000 from year to year. At the same time, employers seeking H-1B employees would be required to pay significantly higher wages and to recruit American workers through a U.S. Labor Department ("DOL") website before they could file any new H-1B petitions.

III. New Form I-9 Becomes Effective on May 7, 2013

On March 8, 2013, the USCIS published a notice in the *Federal Register* announcing that it had recently revised the Employment Eligibility Verification form ("Form I-9"), and that employers must start using this new form by May 7, 2013. Employers using prior versions of the Form I-9 on or after May 8, 2013, will violate the law and be subject to worksite enforcement fines and other penalties.

IV. CBP Announces Form I-94 Automation

On March 20, 2013, U.S. Customs and Border Protection ("CBP"), the agency that, among other things, handles admission at U.S. ports of entry, announced that it has automated the Form I-94, Arrival/Departure Record, process and will no longer issue paper Forms I-94 to arriving air or sea travelers. The announcement was contained in an interim final rule that took effect on April 26, 2013. The actual implementation of this change, however, will be phased in at ports of entry across the country from April 30, 2013, through May 21, 2013.

According to the CBP, the change in procedure was necessary to streamline the admission process and save unnecessary expense. The CBP indicates that it already captures the information on the paper Form I-94 from the enhanced security measures implemented after the September 11, 2001, terrorist attacks; thus, the agency does not need to capture the same information in the paper Form I-94 process. The CBP will create an electronic Form I-94 for every traveler arriving by air or sea and will place a CBP admission stamp into the traveler's passport or other travel document.

The CBP recognizes that FNs still need to display paper Form I-94s for many reasons, including during the Form I-9 process and with applications for state driver's licenses. For this reason, the CBP has created a website from which the interested FN can download his or her Form I-94 record. The website address is www.cbp.gov/I94.

V. DOS Permits Access to Consular Visa Records in Judicial Proceedings

On April 4, 2013, the U.S. Department of State ("DOS") announced that it had established a procedure for disclosing certified copies of visa records when a court certifies the need for such information. Previously, the DOS had refused to release these records, claiming that they were confidential under federal law. This change promises to be a substantial help to litigators who may need these records in their cases.

VI. SEC Alleges $150 Million Fraud in EB-5 Immigrant Investor Program

On February 6, 2013, the U.S. Securities and Exchange Administration ("SEC") filed a civil lawsuit against an Illinois man and two of his companies, alleging that they swindled investors out of close to $150 million due to false statements made in connection with the EB-5 investor program. *SEC v. A Chicago Convention Ctr. LLC*, No.

1:13-cv-00982 (N.D. Ill. 2013). Under the EB-5 program, a FN can secure U.S. lawful permanent residence by making certain qualified investments that are at least $500,000 to $1 million.

In its complaint, unsealed on February 8, 2013, the SEC alleges that Anshoo Sethi established two firms to lure principally Chinese investors to invest in what he characterized as the "world's first zero carbon emission platinum LEED certified" hotel and conference center in Chicago. He advised these investors that three prominent hotel chains had signed on to the project, and that construction would begin in the summer of 2012. According to the SEC, none of these representations were truthful. To compound the problem, Mr. Sethi also provided false and misleading information on the investor's behalf to the USCIS in connection with each EB-5 visa application.

Mr. Sethi purportedly collected $500,000 from each immigrant investor, plus a $41,500 "administrative fee" that he represented was refundable if the investor's application was denied. The SEC alleges that Mr. Sethi and his companies spent more than 90 percent of these funds on matters that had nothing to do with the project that the investors provided funds to support. Shortly after the complaint was filed, the court issued a temporary restraining order freezing the remaining $145 million in investor assets that had not yet been misappropriated.

VII. Eleventh Circuit Permits Undocumented Plaintiffs to Recover FLSA Damages

On March 6, 2013, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Lamonica v. Safe Hurricane Shutters Inc.*, No. 11-15743 (11th Cir. 2013). In *Lamonica*, two hurricane shutter installers, both of whom were undocumented aliens, sought compensation for unpaid overtime and liquidated damages under the Fair Labor Standards Act ("FLSA"). The defendants claimed, among other things, that their illegal immigration status barred recovery under the U.S. Supreme Court's decision in *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002). In a 2-1 decision, the Eleventh Circuit upheld the FLSA judgment and concluded that nothing in *Hoffman* overruled Eleventh Circuit precedent that undocumented aliens remain "employees" who can recover damages under the FLSA.

VIII. Justice Department Settles Discrimination Claims

Employers continue to run afoul of the anti-discrimination provisions of the immigration laws as they strive to comply with the Form I-9 and related employment verification process. Under the immigration law, employers commit "unfair immigration-related employment practices" if they, among other things, ask for too many documents, treat employment applicants differently in the application process, or impose any job requirement that discriminates on the basis of citizenship or national origin. These violations are enforced by the Justice Department's Office of Special Counsel ("OSC") in Washington, DC.

On April 9, 2013, Milestone Management Company ("MMC"), a Dallas-based residential property management company, settled discrimination claims by the OSC involving MMC's decision to fire a permanent resident employee who failed to present a new green card when his old one expired. Under the law, permanent residents are not required to re-verify their status once they present a valid green card as part of the initial Form I-9 process. MMC paid a $20,000 civil fine; reinstated the employee; provided him with full back-pay; and agreed to undergo Justice Department training on the law's anti-discrimination provisions.

On March 25, 2013, the OSC announced a settlement with Poulan Pecan ("Poulan"), a Georgia pecan supplier, over claims that the company discriminated against work-authorized employees during its Form I-9 on-boarding process. According to the OSC, Poulan required non-citizens to provide specific documents and more information than required when they completed the Form I-9 process. Under the settlement, Poulan agreed to pay a civil fine, undergo OSC training, and be subject to OSC monitoring of its Form I-9 processes for one year.

On February 8, 2013, the OSC announced a settlement with Avant Healthcare Professionals LLC ("Avant"), a health care staffing company located in Casselberry, Florida, based on the company's Internet-based job postings. According to the OSC, Avant's postings discriminated against U.S. workers by impermissibly preferring individuals seeking permanent residence or H-1B visa sponsorship. Under the terms of the settlement, Avant agreed to pay a civil fine of $27,750; change its internal policies and written procedures to incorporate the law's anti-discrimination provisions; and submit to reporting and compliance monitoring for three years.

IX. IT Consulting Company Indicted for H-1B Fraud

On February 20, 2013, a federal grand jury in Texas indicted Dibon Solutions ("Dibon"), a family-owned information technology company located in Carrollton, Texas, and its principals on charges that they recruited foreign workers and sponsored them for positions at Dibon, when these workers actually provided consulting services to Dibon's clients at other locations. As part of the scheme, Dibon also allegedly violated the terms of the H-1B program by refusing to pay the workers the wage represented to the DOL, instead paying them only for the actual time that they worked. This constitutes unlawful "benching" and is prohibited under federal law. Based on this scheme, the defendants were charged with 11 counts of wire fraud arising out of fraudulent submissions to the USCIS and the DOL. The indictment also seeks forfeiture of all proceeds generated by the defendants' unlawful activities.

X. DOS Issues May 2013 Visa Bulletin

The DOS has issued its Visa Bulletin for May 2013. This 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. On the employment-based side, the May 2013 Visa Bulletin showed that the Second Preference ("EB-2") category for China advanced to May 15, 2008, but India

remained at September 1, 2004. The EB-2 cutoff date for the rest of the world remained current. In the May 2013 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: December 1, 2007, for all chargeability, including Mexico; December 1, 2007, for China; December 22, 2002, for India; and September 15, 2006, for the Philippines. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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