

THE IMPACT OF RECENT CHANGES BY THE DEPARTMENT OF HOMELAND SECURITY AFFECTING EMPLOYERS

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Not since the Department of Defense was formed under President Truman in 1947 has such a significant change occurred in the organization of the United States government as we are now witnessing with the Department of Homeland Security (DHS). This huge reorganization of 22 different government domestic agencies was created in the aftermath of September 11, 2001 by President George W. Bush. As of January 24, 2003 the Department of Homeland Security (DHS) was established with Tom Ridge as Secretary in a newly created Cabinet-level post.

In 1982 John R. Wilson obtained his Juris Doctor degree at the Franklin Pierce Law Center and has been in active practice for the last 20 years. For the last 10 years his firm has maintained offices in Concord, New Hampshire as well as Paris, France, and currently represents U.S. employers throughout the United States in immigration-related matters, including hospitals and other healthcare facilities, manufacturing, high-tech and engineering, and import/export businesses. His office also assists with family-related immigration matters, such as marriage, fiancé visas, and naturalization.

The primary purpose of the DHS is to protect the United States against future terrorist attacks. By combining disparate agencies under the control of one government agency, it is hoped there will be a more efficient transfer of data so that the many agencies will be better able to analyze intelligence, protect airports and respond to any future emergency. The DHS is responsible for determining the “threat level” at any given time within the U.S.

The DHS has five major divisions, each with separate and distinct responsibilities:

1. Border and Transportation Security (BTS) – The BTS is responsible for maintaining the security of the U.S. borders and transportation systems. It is the largest of all Divisions, and within the BTS will be the Transportation Security Administration, U.S. Customs Service, the border security functions of the Immigration and Naturalization Service, Animal & Plant Health Inspection Ser-

vice and Federal law enforcement training.

2. Emergency Preparedness and Response (EPR) – This division assures that the U.S. is prepared for and able to recover from terrorist attacks and natural disasters.
3. Science and Technology (S&T) – This research and development division will primarily be responsible for preparing and responding to terrorist threats involving weapons of mass destruction.
4. Information Analysis and Infrastructure Protection (IAIP) – This is the “thinking” division of DHS, assessing intelligence information regarding threats to the U.S.
5. Management – This division is responsible for personnel issues involving DHS.

Additionally, there is a newly created Bureau of Citizenship and Immigration Services (BCIS), which replaces the immigration services formerly provided by the

Immigration and Naturalization Services (INS). The INS has now been abolished, and is referred to as the BCIS. It is the BCIS with which U.S. employers will have the most contact, and this contact will primarily be made through the regional offices when U.S. employers petition for foreign employees (Vermont, Texas, Nebraska, California, and Missouri). The newly established Bureau of Immigration Customs Enforcement (BICE) serves as the primary investigative section of the DHS and is responsible for investigating violations of the Immigration and Nationality Act (INA).

IMPACT ON U.S. EMPLOYERS

As the need to employ foreign workers continues to increase rapidly with the U.S. workforce becoming more diverse and companies more global, employers and HR personnel are becoming more involved with the immigration process. It is important to note that the process of hiring foreign employees has not changed as a result of the terrorist acts of September 11, 2001. However, challenges have been created, as noted below, but the future outlook is positive. A major complaint of most employers hiring foreign employees is the seeming disorganization of the former INS, which includes confusing applications and procedures, as well as time delays and inordinate expense. A more organized BCIS will, at least, speed the process in hiring foreign employees.

CONSULAR PROCESSING

In May 2002, President Bush signed into law The Enhanced Border Security and Visa Entry Reform Act of 2002, which requires the Department of State to implement enhanced security

measures for the review of visa applications. In so doing, the State Department began requiring interviews for all visa applicants over the age of 16 who are from one of the countries that sponsor international terrorism (Libya, Cuba, Iraq, Iran, No. Korea, Sudan).

Prior to the enactment of the DHS, the processing of foreign nationals at U.S. Consulates was under the auspices of the Department of State. Now, DHS is in control of all processing of foreign nationals needing a visa for entry into the U.S. Foreign employees wanting to work in the U.S. must procure a visa at a U.S. Consulate outside of the U.S. prior to being admitted, unless they were the recipient of a change from one immigration status to another. For example, consider a U.S. company that has employed a foreign national in the U.S. following the completion of college. A student is normally entitled to one year of work authorization following graduation. The company has decided to file applications with the BCIS so that the employee may continue working beyond the one-year period, and is requesting H-1B1 classification. This classification is reserved most often for those with Bachelor's degrees. The employer is successful and the BCIS grants H-1B1 status for three (3) years. After several months, the employee announces the desire to return home for a short visit. How long can the employee be expected to be gone?

Unfortunately, much longer than pre 9/11, as the U.S. Consulate must do a full security check, which at times can take several weeks, before issuing the necessary H visa for the return to the U.S. We are advising employers that they may lose their foreign national employee for a good month, or

more, the first time that the foreign employee leaves the U.S. and needs to secure the H visa before returning. Importantly, the U.S. employer should check with the U.S. Consulate abroad where the foreign employee will be processed to determine what the latest security issues are, and what the normal processing time for a particular type of visa processing might be. Finally, both the employer and employee should expect the unexpected. An employer's or employee's past experiences with processing at a U.S. Consulate should not be used as a guide for the future.

SPECIAL REGISTRATION OF FOREIGN WORKERS

Starting November 6, 2002, the BCIS required those citizens of five countries (Iraq, Iran, Libya, Sudan and Syria) who were in the United States on a temporary visa to register with the Immigration Service. The registration process includes a detailed interview of each person, fingerprinting and photographing. This Special Registration, also known as the National Security Entry-Exit Registration System (NSEERS), requires registrants to respond to questions and register within 30 days of entry at a local immigration office and annually thereafter. It targets individuals based on national origin/racial/religious profiling. It has been the recipient of much criticism but has also received some degree of support. The stated purpose of requiring nationals from certain countries to register is to further national security. Since the inception of the registration program, the number of countries included has grown to twenty-five (25). The deadline for the final registration is April 25th.

As of March 18, 2003, 101,589 individuals from 149 countries have registered, including 47,105 at ports of entry and 54,484 at the district offices.

The question has been raised as to whether a person seeking harm to the national security would voluntarily walk into an immigration office and register. Those foreign nationals of the 25 countries who have been discovered with technical violations of their immigration status have faced detention and subsequent deportation, resulting in allegations of unfair and unequal treatment as compared with the citizens of countries not on the list, such as Mexico or Canada. A recent *Sixty Minutes* segment focused on an individual from one of the 25 countries that was in the United States, married to a U.S. citizen with children, who was detained for months in solitary confinement, with no right to make any telephone calls to his wife or to call an attorney, all based upon a technical violation of having overstayed a visa at an earlier time. Criticism of the Special Registration program seemed to focus on whether the stated purpose of protecting national security is furthered, or whether national security is a cover reason being used to target individuals of certain countries and certain religions.

Whether the stated purpose of Special Registration is real or if all nationalities are being treated equally, the impact on U.S. employers should be nominal. A properly completed I-9 at the time of hire usually reveals whether a foreign national is authorized to work. But importantly all employers need to understand the pressure placed on foreign national employees who are required to regis-

ter. Foreign nationals with absolutely no problems in their past are justifiably nervous, if not scared, to go through the registration process. Many law abiding foreign nationals from one of these twenty-five countries who have been in the U.S. for a number of years, properly authorized to work, having caused absolutely no problems in any community, can be incarcerated for periods of time until the Immigration Service completes a cumbersome security check. It is advisable that employers provide a letter confirming employment of the foreign employee, so that the employee may present this during the registration process to establish his ties to the community. In many jurisdictions, attorneys are allowed to accompany employees to the registration interview, and this is advisable. Finally, foreign employees from these twenty-five countries should be aware that the registration process is not a one-time event, but rather an annual requirement. A list of all countries may be found at the BCIS website.

IMMIGRATION LEGISLATIVE AGENDA

There are several bills pending in Congress, which, if passed and signed by President Bush, will impact many U.S. employers. These proposed laws are most likely to receive greater attention as the focus of Congress returns to the domestic agenda.

Extension of "Life" Act – The Life Act also known as 245(i), expired April 30, 2001. This provision would allow a foreign employee, if petitioned by a U.S. employer, to remain in the United States in resident alien (green card) status, if the violation of im-

migration status was minor. If ultimately approved, a penalty of \$1,000 would be paid to the Immigration Service, in addition to all other application fees. Many U.S. employers, particularly those in manufacturing, took advantage of this law and filed many applications prior to April 30, 2001. Currently, there are two Senate proposals and one House proposal for extending this law, with some being more restrictive than others. President Bush has fully endorsed an extension of this law. Most employers support a permanent extension of the Life Act.

Legislation involving Health Care Workers – The shortage of registered nurses in the United States has now reached critical levels, with over 125,000 full time vacancies today and a conservative projected shortfall of over 500,000 in five to eight years. Currently, most foreign RNs enter the U.S. as green card holders, but this process can take an average of eight to 12 months. The shortage of registered nurses is not unique to the United States, but is global. Many countries have made provisions in their immigration laws which speed the process in the hiring of foreign registered nurses. There are efforts in the Congress to introduce legislation that would speed the process considerably, perhaps to as little as 30 days. All foreign RNs working in the U.S. must pass stringent examinations regardless of their immigration status when they enter the U.S. This important piece of legislation should receive considerable attention this year and if passed, would help ease the national shortage.