

POSSIBLE IMMIGRATION IMPACT OF THE ATTACK ON AMERICA

Obviously, all of us have been changed forever by the terrible events of September 11, 2001, and just one of many changes, as one would imagine, would be heightened scrutiny by the U.S. Immigration and Naturalization Service. As a consequence, HR Departments and in-house legal counsel may wish to encourage F-1 students working for the company on optional practical training to obtain H-1B status if they are going to be traveling internationally. While they could reenter the U.S. in F-1 status with optional practical training, without doubt they will be subject to some greater scrutiny and, by obtaining the H-1B sooner, they would be in a stronger position and less likely to be subject to unwarranted delays.

Advisory on Nonimmigrants Flying Domestically

We have received several reports of nonimmigrants boarding domestic flights being questioned and asked for documentation. In several incidents, the INS officer doing the questioning told the individual that he/she is required to carry his/her passport, Form I-94 and I-797 Approval Notice with him/her at all times, as well as an employment verification letter. We recommend that all of your nonimmigrant employees carry documents showing that they are in status and/or have a Receipt Notice showing that their extension was timely filed.

Stricter Scrutiny at INS Ports of Entry

In light of the recent horrific events, Immigration & Naturalization Service (INS) Inspectors at various ports of entry into the U.S. have again stepped up their scrutiny of claims by various business travelers that they are entering only to undertake a business-related trip for a temporary period, particularly if it appears that their activity is more local employment than business. Risks are becoming higher that a company's employees or prospective employees could be summarily returned abroad without formal hearing or assistance of counsel and worse, could be barred from returning to the U.S. for up to 5 years.

This problem is even more likely to arise when a foreign national employee applies to enter the U.S. on the basis of B-1/B-2 visitor's visa or under the Visa Waiver Pilot Program after a work-authorized nonimmigrant petition has been filed on his/her behalf. While many business travelers have bona fide reasons for a temporary business visit days or weeks ahead of the planned assumption of a new job position in the U.S., INS Inspectors are increasingly suspect of such claims. INS Inspectors often view it as the future employee simply jumping the usual wait for work visa approvals (currently running between 6 to more than 12 weeks), even though he or she is still being paid abroad. The INS Inspector will assess whether the prospective employee is entering as a true business visitor, or intends to undertake the bulk of his duties in the U.S.

A confluence of two factors, increased INS computerization and a dimming view of what constitutes "work" versus "business," has created an environment at the Ports of Entry where a businessman stands a greater chance of review of the particulars of his case, especially if the computer shows a pending application on file at an INS Service Center for H-1B, L-1 or other temporary work authorization.

Under the Illegal Immigration Reform Act and Alien Responsibility Act of 1996 (IIRAIRA) two significant changes were made regarding Port of Entry procedures that may effect your company's overseas employees: First, in order to track "overstays," Congress mandated that the INS create and implement a system whereby the Immigration Inspector at an airport or land border would have available at his computer terminal the immigration history of an individual including the timing and duration of each preceding entry as well as any previous applications for immigration benefits.

Second, IIRAIRA created the new "expedited removal" procedure whereby the employee could be removed from the United States, with a ban from the country for 5 years. Fortunately, it is still more common to allow the individual to withdraw his/her application for entry, stamp the passport to prevent future re-admissions without first obtaining an appropriate H-1 or L-1 work visa, and send the individuals back abroad on the next available flight. Based on the fact that the arriving aliens are held incommunicado during exclusion determinations, intervention by counsel is normally not possible until after the individuals have been returned to the country from which they embarked.

For the reasons explained above, it is our advice that foreign employees with an individual H-1B or L-1 petition pending with the INS should not seek to enter the U.S. until the nonimmigrant petition is approved. If such individuals must enter, which should be the exception based on true emergent circumstances, then they must be able to present appropriate documentation that they intend to return abroad after their temporary visit to the U.S. In appropriate cases, Tindall & Foster can, on a case-by-case basis, assist with the preparation of such documentation.