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## EMPLOYMENT & IMMIGRATION LAW

# Your Vacation Spot May Be Short Staffed this Summer

Immigration reform would help employers who depend on seasonal immigrant labor

By Gregory J. Palakow

It is rare that as busy practitioners, we would take the time to write an article that we hope is somewhat moot by the time it is published and read. At the time I write this article, the United States is struggling with an immigration crisis on many levels, and it directly affects your employer clients. There is no quick fix, and many in state, federal and local government deserve credit for taking the baby steps necessary to make improvements to a system that has been shattered for years.

An estimated 10 million illegal aliens reside in the United States, up about 2.2 million since Pres. George W. Bush first campaigned promising immigration reform six years ago. While Pres. Bush touted immigration reform during the first campaign, it was obviously a spicy hot issue in his campaign for re-election, during which he made a point of regularly speaking to focus groups such as the League of United

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Latin American Citizens.

Focus is set on the Hispanic population because, of the 10 million illegal individuals presently residing in the country, the vast majority are Hispanic, primarily Mexican. The president campaigned with the realistic viewpoint that illegal immigrants are everywhere, stating, "... family values do not stop at the Rio Grande river."

Unfortunately, since re-election, Pres. Bush has knocked immigration reform a few notches lower on his list of priorities, focusing on Social Security and tax reform, counterterrorism, Iraq and comprehensive legal reform. Employers who are desperately in need of unskilled workers are writing their Congressmen and asking where the promises of immigration reform have gone.

There is strong bipartisan leadership for immigration reform. Senator John McCain, R-Ariz., has worked hard, joined by Congressmen Jim Kolbe and Jeff Flake. The three previously penned the McCain-Kolbe-Flake Bill, which proposed a guest worker program with some possibility for permanent residency (green card) status. President Bush

appeared to back the theme of a plan that would not only fill jobs that Americans won't, but provided for improvements in border control and a realistic path to permanent residency and U.S. citizenship for the millions of illegals already here.

There are hardliners who oppose all reform, specifically one large group of legislators who are consistent in their disdain for immigration reform of any kind. Although their opposition is vigilant and well funded, they are offering little in the way of constructive alternatives.

Ignoring the presence of illegal Hispanic workers in this country is like living with blinders on. The estimates of illegals streaming over our borders on a daily basis are alarming, but they are obviously coming here to work. These folks are cleaning our schools, preparing our food, building our landscape walls and running our fiber optic cable. They are contributing to the U.S. economy, paying taxes (albeit often under a false or duplicate Social Security number) and they are putting food on their family's tables. The problem is no longer only affecting California and Texas, the reach is nationwide. Studies

suggest that some employers may be conveniently ignoring the illegal status of a worker who is willing to do a job that no one else will perform.

Business owners contact our office wanting to do the right thing. They often provide me with one of two scenarios. Under the first scenario, they have a worker who originally presented himself as legal, but has either later admitted that he does not have legal U.S. status, or the employer has determined same. Typically, the phrase, "He's the best worker I've ever had ..." is mentioned and they are heartbroken to learn that they must let the employee go.

Under the second scenario, the employer comes to our office describing his seasonal, or labor-intensive work for which he can never find U.S. workers ready and willing to perform the task.

These employers wish to legally sponsor temporary workers and permit them to work without fear of detainment or deportation. Some of these employers have heard horror stories from friends in the industry who have employed illegals only to find B.I.C.E. (Bureau of Immigration and Customs Enforcement) officers at the job site one morning, handcuffing and removing the worker without much explanation. They have heard of the raids upon Johanna Farms and Wal-Mart, and the fines and bad publicity that follows.

For many of these employers, the H-2 Visa category, specifically H-2B visas, although not perfect, are a helpful solution. 8 CFR 214.2(h)(9)(3)(b) permits the issuance of temporary work visas to employers who cannot find employees to perform this work on a temporary basis from our available U.S. workforce. Qualification of position under these categories is governed by the local Department of Labor office requiring labor certification, and compliance with prevailing wage issues. These renewable visas are only issued on a temporary basis, for recurring sea-

sonal needs, intermittent needs, peak load needs or one-time occurrences.

The burden lies with the employer to demonstrate that no U.S. workers are either capable or available to perform these services. This is typically quite easy for the employer to satisfy. They have often been filling the job with a revolving door of "temporary" U.S. workers for years.

The top occupation categories in recent years for H-2B visas have been landscape laborers, forest and tree workers, cleaners, housekeepers, fish and crabmeat processors, stable attendants and horse grooms, kitchen helpers, sports instructors, minor league sports players, grounds keepers, lawn service laborers, deck hands, fishermen, fast food workers, construction workers, amusement park workers and dangerous materials handlers. However, the class is not limited to the above occupations, only by the evidence that it is not a permanent, year-round position.

H-2B workers have saved resort areas' hotels, restaurants and places of entertainment across the country from closing their doors early, or operating at less than full capacity in recent years. Let's face it; these are jobs that if they could have been exported to take advantage of cheaper labor, they would have been exported. Since these particular jobs cannot be exported, the workers must come to them.

Unfortunately, the current H-2B system is inadequate. There is an annual cap of 66,000 H-2B workers that renews every fiscal year beginning Oct. 1 (8 CFR 214.2(8)(i)(c)). In fiscal year 2004, the H-2B cap was reached in March, six months into the fiscal year. In fiscal year 2005, this cap was reached Jan. 3, just three months into the fiscal year. Similar to the H-1B visa cap that limits the number of non-American skilled and technology workers each year, the H-2B visa cap has become antiquated.

While all of us are interested in pro-

tecting American workers, I have never once had a business owner come through our doors indicating that he has American workers ready and willing to do the job for which he seeks a temporary H-2B worker. The H-2B labor certification and USCIS filing is hard work. However, for the 30-year landscaping business owner who finds himself fielding phone calls from angry customers and finds himself cutting their grass on late August evenings, after his summer help has gone back to school, the temporary H-2B visa worker who doesn't have to leave until the season is truly over, is a godsend. To the restaurant owner who should be greeting diners but is instead shucking clams after his school-age employees leave every August for soccer tryouts, the "H" in an H-2B visa really stands for help.

Of the proposed legislation, the most promising bill is the "Save Our Small and Seasonal Businesses Act of 2005" bipartisan legislation that closely mirrors last year's "Save Summer Act of 2004," that did not pass. It offers a temporary fix to increase the H-2B visas available in this fiscal year. More comprehensive ideas are the only way to address the crisis in any realistic way. Legislative reform is the only method to stop the flow of illegal aliens and those who are willing to employ them.

By providing illegal workers some incentive to process paperwork and make themselves legal, or to leave the country, and start all over again by obtaining a legal entry to the U.S. via a guest worker program, we can make our country safer, stronger and sound a bit more in tune with the song "Great American Melting Pot," as opposed to a place where illegal workers fear detainment and deportation on a daily basis. Supporting immigration reform, specifically guest worker programs, will go a long way toward making your business clients happier, and keeping your favorite U.S. vacation spot operating at full capacity. ■