CURRENT IMMIGRATION ISSUES IMPACTING THE HOSPITALITY INDUSTRY

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I. SCOPE OF ARTICLE

In the aftermath of the September 11 terrorist attacks, the U.S. government has taken several actions and has proposed additional changes affecting visa processing, admission/entry procedures and monitoring foreign nationals present in the United States. As an industry dependent upon the free movement and travel of persons both domestically and internationally, the tightening of rules, policies and procedures for travelers can only result in a negative impact upon the U.S. hospitality industry as a whole. Additionally, this labor-intensive industry also has faced more obstacles in hiring and retaining foreign workers, who often serve to satisfy hospitality establishments' critical needs for skilled and unskilled workers.

A. Article Coverage and Primary Points

This article is directed at in-house counsel and executives of hospitality companies, private practitioners who represent hospitality companies in areas of law other than immigration, hospitality law faculty and human resources personnel and managers in the hospitality industry. The goal of this article is to provide an overview of the overall framework of the U.S. Immigration system, the general principles and challenges facing immigration policy in the coming years, to review specific issues impacting hiring foreign national employees such as I-9 issues and the various visa status options available to hospitality employers, and to review some of the actual and proposed changes made after 9/11. Hopefully, the reader will have a basic understanding of specific immigration issues an employer in the hospitality industry might encounter. Another more subtle purpose of this article is to educate the reader regarding current U.S. immigration policy, to remove certain misconceptions about the current system and to hopefully encourage the reader to become a supporter of immigration reform, reform that does not impede travel of persons to the U.S., allows for a controlled immigration system that encourages international commerce and the ability of U.S. employers to meet labor demands and effectively meets the security concerns of everyone after 9/11.

II. INTRODUCTION TO U.S. IMMIGRATION LAW

A. A Brief History of U.S. Immigration Law

From 1776 to 1875, there were essentially no restrictions on immigration to the U.S. Since the enactment of 1875 statutes, which provided for the exclusion of convicts and prostitutes, U.S. immigration law has evolved into a complex and twisted series of laws and regulations controlled by an overburdened bureaucratic system that is virtually in constant flux, depending upon the mood of the country and needs of the day.

B. The Goals of U.S. Immigration Laws

Since the 1875 statutes, immigration laws have been enacted to serve several key policy goals, including: security and control of borders; controlled growth, both in number, origin and characteristics of immigrants; protection of U.S. workers; and enabling international trade and commerce. From policy goals such as these, the current system of immigration has been created.

The 1952 McCarran-Walter Act established the basic structure of today's U.S. immigration law, which can be found in Title 8, U.S.C. Included in the statute were provisions that modified the National

Origin Quota System for limiting the number of immigrants; special racial quotas for Asians; and created/amended the list of grounds of deportation and exclusion and the procedures to follow in deportation proceedings. Over the past 50 years, various statutes have been passed to address specific immigration issues. However, there has been no "overhaul" of the system, an overhaul that many believe is required to meet national immigration goals. Perhaps more than in any other area of the law, the application of the laws is subject to more interpretation and modification by agency policy-makers and individual personnel at Government agencies, rather than by new statutes, regulatory rule-making or case precedents.

C. The Government Agencies

There are three government agencies primarily responsible for carrying out the immigration laws of the country. The Immigration & Naturalization Service (**INS**) is primarily responsible for controlling the admission and length of stay of aliens; The Department of State (**DOS**), through the visa application process at U.S. Consulates and Embassies abroad, pre-screens aliens wishing to enter the U.S.; and the Department of Labor (**DOL**) performs certain workforce protection functions, including assisting the INS with I-9 compliance, administering and auditing employers as part of the Labor Condition Application (LCA) portion of the H-1B process, and administering labor certification programs, both for temporary workers in the H-2 nonimmigrant context and for employment-based permanent resident ("green card") processing.

One of the post-9/11 initiatives affecting the agencies responsible for immigration benefits and enforcement is the creation of the new Department of Homeland Security. Under the law establishing the new Department, many functions presently under the control of the INS and DOS will be transferred to Homeland Security in 2003. This will include INS benefits processing (including nonimmigrant visa petitions such as the L-1 and H-1B) and visa issuance done by the Department of State. Whether or not sharing of information between the INS and DOS, as well as other law enforcement and security agencies such as the FBI and CIA will be enhanced under Homeland Security remains to be seen. If history is any lesson, the change to Homeland Security will be unlikely to enhance processing speed, particularly during the agency conversion period and at INS where delays have reached all-time highs.

III. THE CLASSIFICATION SYSTEM – CITIZENS, PERMANENT RESIDENTS AND NONIMMIGRANTS

A. Definitions of the Major Classifications

U.S. Immigration Law initially classifies all persons into two primary categories: **Citizens**, born in the U.S., born to a U.S. citizen parent, or naturalized as U.S. citizens; and **Aliens**, which essentially accounts for everyone else. The alien group is further divided into two primary segments: **immigrants**, who are aliens coming to the United States permanently or indefinitely (the terms lawful permanent resident and green card holder are the phrases used to describe persons authorized to remain indefinitely (for the remainder of their lives) in the U.S., subject to certain conditions); and **nonimmigrants**, who are aliens coming to the United States for a defined time period (e.g., three years) and for a definitive purpose (e.g., to work as an H-1B professional for a U.S. employer.) (Asylees, Refugees and persons present pursuant to Temporary Protected Status (TPS) are essentially separate categories for aliens authorized to remain due to special circumstances such as a fear of persecution or extraordinary conditions in his/her home country and will not be covered in this article.) The normal admission process for nonimmigrants may involve one, two or even three steps. All nonimmigrants are subject to review at ports-of-entry prior to gaining admission. Except for Canadian citizens, certain Landed Canadian residents and citizens of some 28 countries who are eligible to enter the U.S. for brief visits under the Visa Waiver Program, other nonimmigrants must also apply for a visa at a U.S. Consulate prior to applying for admission at a port-of-entry to the United States. Additionally, certain

nonimmigrant categories require that the individual receive a prior approval before even applying for a visa (e.g., H-1B nonimmigrants.)

Most persons obtain permanent resident status based upon either sponsorship by a close family member (e.g., a U.S. citizen spouse) or based upon an offer of employment from a U.S. employer. As permanent resident status can often take several months to several years to process, most aliens initially enter the U.S. as nonimmigrants.

B. The "Alphabet Soup" of Nonimmigrant Classifications

Nonimmigrant classifications originate from the section of the Immigration & Nationality Act ("INA") defining nonimmigrants. Based upon the outline of section 101 of the INA, numerous alphanumeric, nonimmigrant classifications exist. Those relevant to employers and persons involved in the hospitality industry are set forth below.

1. **B-1 Visitor for Business/B-2 Visitor for Pleasure.** "An alien (other than one coming for the purpose of study or performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or pleasure."

   a. *Key issues for B-1s.* This is the classification for aliens coming to the United States for a temporary business purpose. Typically, the alien will be regularly employed abroad and be visiting the U.S. for meetings, sales calls, conventions, etc.

   b. *Key issues for B-2s.* This is the "tourist" classification used by short-term visitors to the United States to vacation, visit friends or family, etc.

   c. *Duration.* B-1s and B-2s are typically admitted for six months initially, though they may be admitted for up to one year. However, the admitting INS officer may limit the duration of stay. INS recently proposed regulations that would generally limit the period of admission for most B visitors to 30 days. The negative impact this could have on the number and length of stay of visitors to the U.S. may be a significant concern to the hospitality industry.

   d. *Visa Waiver Program (VWP).* Persons with citizenship in 28 enumerated countries (primarily Western Europe) who intend to engage in valid B purposes can enter the U.S. without a B-1/B-2 visa. The person must possess a valid passport, have a round-trip ticket and remain 90 days or less. In addition to Visa Waiver countries, Canadian citizens and certain Landed Immigrants in Canada with Commonwealth country citizenship can also enter the U.S. in B classification without a visa.

2. **E-1 Treaty Trader/E-2 Treaty Investor.** First, a qualifying treaty of trade/commerce must exist between the United States and the subject country. Many countries, including Canada, the United Kingdom, France and Germany, have such a treaty with the United States. The entity wishing to employ the alien must be ultimately owned (50% or more) by nationals of the treaty-country and either: carries on substantial

trade between the U.S. and the relevant country; or have made a substantial investment in a U.S. business. In such instances, entities can employ executive, supervisory and essential skills aliens of the same nationality

a. *Key issues.* A company must establish its "nationality" by showing at least 50% of the company is owned by citizens of a treaty country. Typically, the DOS will accept as proof of ownership the fact that a company's shares are traded on that country's stock exchange. Thus, Accor could be a qualifying E-2 French entity that could employ French persons in E-2 status in the U.S. The employee must serve in a capacity that is executive, supervisory, or involves skills essential to the operation of the employing firm.

b. *Duration.* E visas are typically issued for a period of up to five years and can be extended. Note that each admission to the U.S. is typically made for a period of up to two years.

3. **F-1 Students.** An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for purposes of pursuing a course of study at an approved, established, institution or language program.

a. *Key issues*. Although entering the U.S. to study, students can receive employment authorization during their studies (typically Curricular Practical Training) and typically for one-year after graduation (Optional Practical Training).

b. *Duration.* Typically for the duration of the program (e.g., four years for a bachelor's degree program) plus a period of Optional Practical Training.

4. **H-1B – Specialty Occupation**. An alien coming temporarily to the United States to perform services in a specialty occupation for a U.S. employer.

a. *Key issues.* A specialty occupation is generally defined as a position which requires a bachelor's degree in a specific field or narrow range of fields. The alien must possess a relevant bachelor's degree or the equivalent. The U.S. employer must verify it will offer prevailing wages and working conditions to the alien on the Labor Condition Application, or LCA. Note that the LCA should not be confused with permanent alien labor certification, typically the first step in an employment-based green card process (see below.) Unlike the permanent labor certification, a U.S. employer generally need not demonstrate the unavailability of U.S. workers.

b. *Duration.* An alien is typically limited to six years of H-1B time, though certain exceptions exist for aliens already in the green card process.

c. *Limits on number of admissions.* Currently, the number of new H-1Bs to be granted in a year is limited to 195,000. In 2004, the limit will return to 65,000.

d. *Is it an H-1B position?* Hotel General Managers, Accountants, Systems Analysts are common specialty occupations. Lower-level hotel management positions (Front Office Manager, Sales Manager, Guest Services Manager) and Chefs may be able to use this category as well by demonstrating the need for a bachelor's degree in hotel management or culinary arts. However, the INS sometimes views these positions as non-professional (the bachelor's degree in a specific specialty is not required) making it difficult to obtain approval on these cases.

5. **H-2B Temporary Worker.** An alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.

a. *Key issues*. U.S. employers having a temporary (typically seasonal or "one-time" need) can bring skilled or unskilled labor to the U.S. during such periods. The U.S. employer must demonstrate the unavailability of U.S. workers via a temporary labor certification processed through the DOL. H-2B programs can be effective in the hospitality industry, particularly in seasonal resort areas where large fluctuations in workforce occur.

b. *Duration*. Typically determined by the need. Seasonal needs may be as long as eight to ten months, a one-time need may be longer. Total maximum stay is three years.

c. *Limits on admissions*. There is a statutory limit of 66,000 H-2B nonimmigrants per year.

6. **H-3 Trainee.** An alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee in a training program that is not designed primarily to provide productive employment.

a. *Key issues*. Employers with established training programs, which involve some percentage of classroom training and are not merely designed to provide productive employment, might sponsor aliens for H-3 classification. An employer must also demonstrate the proposed training is unavailable in the person's home country and that the training will benefit to trainee's ability to pursue a career outside of the U.S. The INS carefully scrutinizes this category for abuse.

b. *Duration*. H-3 trainees can typically remain in the U.S for 18 to 24 months.

7. **J-1 Exchange Visitors.** An alien having a residence in a foreign country which he has no intention of abandoning who will be engaged in certain enumerated activities including studying, researching and training.

a. *Key issues*. The J-1 category is designed to promote the exchange of ideas and information between the U.S. and foreign countries. More specifically, students, scholars and trainees can enter the U.S. to participate in an established Exchange Visitor Programs. U.S.-owned companies can establish their own J-1 program or can work through a third-party program to train personnel. This classification is widely used in the hotel industry. The J-1 is more "user-friendly" than the H-3

category as "hands-on" training is more appropriate and classroom training is not required.

b. *Duration*. Typically up to 18 months for trainees.

c. *Special issues*. One shortcoming of the J-1 is that certain aliens, particularly those from locations other than Western Europe, Japan or Australia, will be subject to a two-year residency requirement in his/her home country after spending time in the United States in J-1 classification.

8. **L-1 Intracompany Transferees.** An alien who, within three years of his application for admission into the United States, has been employed continuously for one year (six months in the case of companies with an L Blanket approval) by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily to continue to render his services to the same employer or an affiliate or subsidiary thereof in a capacity that it managerial, executive, or involves specialized knowledge.

a. *Key issues*. The L-1 allows multinational organizations can transfer executive, managerial and specialized personnel to work at the organization's U.S. offices. Such personnel must have worked abroad for the organization in a qualifying capacity for at least one year (six months in the case of L Blanket companies) within the past three years.

b. *Duration*. Specialized knowledge personnel can remain in the U.S. for up to five years while executives and managers can remain up to seven years.

c. *Additional information*. Executives and managers who qualify for L-1 status may also qualify for a green card without the need for an approved permanent labor certification.

d. *Who qualifies for L-1?* The Front Office Manager, General Manager or Food and Beverage Director from the company's hotel in London could be transferred to a company hotel in New York under the L-1 category.

9. **O-1 Persons of Extraordinary Ability.** An alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue to work in the area of extraordinary ability.

a. *Key issues*. This classification is available to persons who have risen to the top of his/her field of endeavor.

b. *Duration.* No top limit on the number of years one might spend in O-1 status. Initial admission is granted for up to three years and extended annually thereafter.

c. *Who qualifies for O-1?* Typically, the O-1 is better suited for persons in the public eye or in a field which includes regular publication of materials about the field of extraordinary ability (e.g., scientific research.) Business persons generally have a

more difficult time qualifying for O-1. Potential O-1 candidates in the hospitality industry might include a renowned Chef or the General Manager of a prestigious luxury hotel.

10. **TN Trade NAFTA Professionals.** Pursuant to the North American Free Trade Agreement (NAFTA), a U.S. employer can employ Canadian and Mexican citizens in one of the enumerated NAFTA professions.

    a. *Key issues*. Typically, the employee must possess a bachelor's degree in a relevant field or, in some cases, a post-secondary diploma plus three years of relevant professional experience.

    b. *Duration.* TN status is granted in one-year increments with no defined limit on the number of TN extensions one may receive

    c. *Who qualifies for TN?* The status is particularly beneficial for Canadians, who are eligible for same-day TN processing. Key NAFTA professions include Accountant, Systems Analyst and Hotel Manager. The Hotel Manager requires the applicant to have a degree in Hotel/Restaurant Management or a two-year post secondary diploma in Hotel/Restaurant Management (from a school in the U.S., Canada or Mexico) and three years experience in hotel/restaurant management. Clearly, a Hotel General Manager with appropriate academic/experience credentials can qualify for TN. A Hotel Controller, Assistant Controller or Property Accountant might qualify under the Accountant classification.

11. **Q-1 Cultural Exchange Visitors.** An alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers.

    a. *Key issues.* The required program must take place in a school, museum, business or other establishment where at least a segment of the public is exposed to aspects of a foreign culture as part of a structured program. The cultural component must be an integral part of the Q visitor's employment or training.

    b. *Duration.* Up to 15 months.

    c. *Who qualifies for Q-1?* One example might be international visitors invited by Disney to participate in the "It's a Small World" attraction. The more formalized the employer's program, the more success the employer can have in sponsoring persons for Q-1 status.

C. Immigrants – Employment-based Green Card Sponsorship

1. **Sponsoring Foreign Nationals for Green Cards**. Although some persons may receive green cards by winning the Diversity Lottery, a claim of asylum or via another special program such as the Legalization program of the 1980s, most aliens receive permanent

resident status via sponsorship by a U.S. citizen or permanent resident family member or by an offer of employment from a U.S. Employer. U.S. Employers can sponsor employees or prospective employees, typically skilled, professional or managerial level employees, for permanent resident ("green card") status. Generally, the process for sponsorship involves **three steps**:

- **Permanent Alien Labor Certification** – The employer must demonstrate the unavailability of able, qualified and willing U.S. workers to perform the offered position at the place of the proposed employment. Currently, this process involves advertising for the position and reviewing U.S. applicants to demonstrate the lack of qualified U.S. workers. The DOL reviews the employer's recruitment and issues a "certification" when it believes that the employer has met its burden in this regard. Certain positions requiring little or nor skills, training or education (e.g., housekeeper) are presently essentially ineligible for labor certification. Labor certification processing presently takes several months to a few years, depending on the type of case and where (which state) the case is filed. A new labor certification program may be implemented by the Department of Labor in the summer of 2003. This program is supposed to offer fast processing, though receiving an approval through this process may be more difficult and onerous than the current system.
- **Immigrant Petition (Form I-140 Petition)** – The employer next files the approved labor certification with a petition with the INS to place the sponsored employee in one of the employment-based green card categories. Note that Immigration laws limit the number of persons who may be admitted to permanent residence in each category by country and by year. For certain employment-based green card petitions, no labor certification is required. Thus, multinational managers or executives (similar to the L-1 nonimmigrant category discussed above) can skip the labor certification and the U.S. employer can simply file the I-140 petition with the INS.
- **Green Card Processing** - This is accomplished by filing either an adjustment of status application (Form I-485) with the INS here in the U.S. or by processing an immigrant visa at a U.S. Consulate abroad. In either case, the applicants must provide birth and marriage certificates, complete a medical exam and undergo a background criminal records check to demonstrate his/her identity and that he/she is not inadmissible to the United States.

2. **"Indentured" employees.** As the green card process can take several years, most persons sponsored for green card by U.S. employers are already present in the U.S. in a nonimmigrant classification (e.g., H-1B or L-1) during the green card process. Generally, after receiving the green card, employees become free agents in the U.S. job market. However, as green card sponsorship is typically company-specific and even position-specific, employees are often "locked-in" to a particular employer while the process is ongoing, at least until the final green card processing stage is reached.

IV. IMMIGRATION COMPLIANCE

A. The Illegal Workforce.

Depending on which source you believe, there are as estimated five million to ten million (or more) illegal aliens present in the United States. Not all of these are criminals, terrorists or undesirables. In fact, some analysts would characterize the typical illegal as a person of Hispanic origin who is employed and pays at least some taxes. These illegal aliens perform many of the low or unskilled positions (such as housekeeping, cooking, dishwashing, landscaping, construction and maintenance) in the hospitality industry.

In many respects, they are an essential component of operating hotels, restaurants and construction companies. Even in a "down" economy with increased unemployment, locating a sufficient number of quality lower-level employees can be a challenge in the hospitality industry.

B. IRCA: I-9 and Anti-discrimination.

By the 1986 Immigration Reform and Control Act (**IRCA**), Congress adopted the compliance/penalty system for employers who hired illegal aliens. The execution of the system is based upon the completion of INS Form I-9 for all new employees. Critics have ridiculed the system, saying it has been largely ineffective particularly in a "booming market of phony documents, the needs of employers to fill job openings, resistance to creating a national identification card and by politics." By 1994, the INS had begun cutting back on workplace raids, instead auditing employer's I-9s and giving the employer the opportunity to fire any unauthorized personnel. Between 1994 and 1996, of the 15,000 cases where INS found employers in violation of the I-9 rules, fines were issued in only one-fourth of the cases. By 1999, the total number of employer fines fell to 178.

Against this backdrop of reduced enforcement, the I-9 anti-discrimination (and other potential employment law liability) provisions may create a more substantial risk for employers than the I-9 itself. Realizing that the I-9 rules might cause employers to avoid certain foreign-looking or foreign-sounding legal employees, Congress passed an anti-discrimination provision in 1990 calling for fines and penalties in the context of I-9 citizenship or national origin discrimination. Thus, if an employer requires a prospective employee to provide specific documents in connection with completing the I-9, or if the employer has a "U.S. citizens-only" hiring policy, the Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices (**OSC**) may sanction and/or fine employers. Injured individuals can also seek back pay and the like by filing a complaint with the OSC. Recently, the Excalibur Hotel and Casino in Las Vegas paid more than $50,000 in civil penalties and fines for requesting specific I-9 documents. In 2001, the Tropicana Hotel & Casino in Atlantic City agreed to pay $75,000 in civil penalties to settle allegations of workplace discrimination.

One must be aware that many illegal workers can successfully complete the I-9 form by presenting a driver's license (which many states issue without proof of legal immigration status) and a social security card (which in many cases is likely a phony card or the card of someone other than the presenter.) However, assuming these documents are facially valid and not obvious fakes, the employer can and must accept them as proof of lawful employment status when completing the I-9. There is no need for the employer to neither be a document "sleuth" nor conduct a further investigation of a newly hired employee under such circumstances. Furthermore, although SSA offers an 800 number to verify the accuracy of SS numbers and plans to offer an internet-based system to employers in 2003, there is no legal obligation to take such additional steps after being presented with facially valid documents. The employer is legally protected from attack under both the I-9 and I-9 anti-discrimination provisions.

C. Social Security "No-Match" Letters.

A more real concern accrues to the employer that receives a so-called **"no-match" letter** from the Social Security Administration (SSA). The letter indicates to the employer that certain of its employees (referenced in the most recent Copy A of Form W-2 or the most recent Quarterly 941 sent to the IRS) have social security numbers that do not match the names in the SSA's records. In 2002, the SSA changed its policies and began sending the 'no-match" letters to all employers with even a single employee SS number that does not match SSA records, rather than to only employers with a higher incidence of mismatches. The result was that approximately 750,000 employers were advised of mismatches in 2002.

D. What to do if you receive a "No-Match" Letter.

Do not summarily dismiss any affected employees. Instead, employers should follow these steps, always being certain to proceed in a consistent, nondiscriminatory fashion to avoid employment/discrimination law liability.

1. Check your own records for a discrepancy in recording the information, comparing the employee's W-4 to the SS number you reported to SSA. Advise SSA of any corrections using Forms W-2c.

2. Provide written notice to the affected employees asking him/her to correct the discrepancy with SSA and advise you of the results. Some employees (perhaps because they used fraudulent Social Security numbers) might depart voluntarily. Others may report corrected information.

3. For any corrections, report them back to SSA.

4. Then, it gets more difficult. If an employee directly advises the employer that he or she is unauthorized, this would seemingly constitute sufficient reason for the employer to conclude that the employee is "unauthorized" and should be dismissed. If the employer receives other credible information that the employee may be unauthorized, the employer likely has an obligation to inquire further and possibly reverify the employee's employment eligibility. With respect to the employees who do not answer at all, INS' General Counsel has indicated that it would be much more likely to consider that the employer violated the I-9 provisions if it continues the employment without taking appropriate steps to reverify work authorization and if the employee is indeed unauthorized. Unfortunately, this guidance is not absolute and the precise steps to take are not 100% clear and must be decided on a "case-by-case" basis. In situations where SSA "no-match" issues are not resolved before getting to step 4, employers should contact immigration counsel.

5. Nevertheless, depending upon the situation, a different tactic might be appropriate, balancing the employer's need to operate its business and the need to comply with applicable laws. Employment counsel should also be contacted prior to taking any adverse action against an employee.

6. Note also that the employer may face liability for incorrectly reporting income to SSA. Although SSA has no enforcement authority in this regard, the IRS can fine employers up to $50 for each incorrect information return, such as a W-2 or 1099, up to a maximum of $250,000 per year. For intentionally disregarding the filing requirements, the fine can be $100 for each instance with no maximum penalty. As such, it would seem prudent for employers to at least document its efforts to notify employees in writing of the discrepancy, asking them to make corrections with SSA and to report the correction to the employer. Employers should follow up at the end of each tax year with employees who fail to make such corrections.

V. STATUS OF U.S. IMMIGRATION LAW AS OF 9/10/2001

A. Immigration Law since 1952 – The "Patchwork" System of Immigration Change.

Among the more significant statutes passed since 1952 is the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986). IRCA established sanctions against employers for hiring unauthorized aliens and the I-9 verification system and established "Legalization" programs for certain persons illegally present in the United States. The Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) and the subsequent Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991) amended the nonimmigrant classification system and altered the employment-based immigration categories. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 279, and The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), contained in Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) added summary exclusion procedures, broadened the list of crimes making a person deportable, and created more stringent penalties for violators of U.S. immigration laws.

More recently, the USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 (Oct. 26, 2001)) enhanced enforcement at U.S. borders by tripling the number of inspectors at the Northern border, expanded the definition of terrorism, requires INS to develop an interagency system that can verify the identity of persons applying for visas/admission to the U.S., and expands the Foreign Student Monitoring Program to include all flight schools, language training schools and vocational schools.

These are but a few of the laws that have been passed over the past 50 years that have had an impact on immigration. There have also been numerous other laws that impacted which foreign nationals can legally enter and remain in the U.S. For purposes of this article, the most notable conclusion to draw from these numerous significant changes is that immigration law is constantly in flux. Additionally, one must be made aware that changes in policy and procedure among the agencies responsible for immigration processing and enforcement occur on an almost daily basis. Staying abreast of changes in agency policy and procedure has become more difficult in recent times as the Government rushes to make changes to develop the public's trust and sense of security and to avoid another 9/11-type event.

B. Status Report on the U.S. Immigration System

Can the current system meet the country's needs and the needs of the hospitality industry? In the opinion of many, including the AH&LA, the answer is most certainly "no". There has been no long-term planning with respect to the needs of American society over the next 10 to 20 years. Instead, individual portions of immigration law have been modified to deal with the perceived needs of the moment. As one commentator wrote:

"Managing America's contradictory attitudes toward the immigrant who have fueled the country's growth has never been easy. Like the INS before it, the Department of Homeland Security will be hampered by immigration policy itself. The laws Congress makes are often contradictory and overreaching. The draconian legislation of 1996, for instance, intended to express how tough on crime the lawmakers could be, led to thousands of deportation cases involving permanent residents who had committed minor crimes years before and gone on to live law-abiding lives and raise American families; the '96 laws also overwhelmed the detention system, which was unprepared to handle the swelling numbers, and cases of abuse shot up. As this series has pointed out, the best intentions of the INS have often been stymied by an ill-informed Congress."

Even though 86 percent of the U.S. workforce is American-born, legal and illegal immigrants accounted for one-half of new wage earners who joined the labor force during the 1990's. Some have asserted that the economic growth of the 1990's could not have occurred but for the addition of immigrant workers. Additionally, depending upon which source is consulted, there is an estimated 5 to 10 million

illegal persons in the U.S., many of them regularly employed. Thus, while there is some debate that foreign workers hold down wages, particularly among the lowest-paid American-born workers, it does seem apparent that the immigrant workforce is already an important part of the U.S. economy. According to the American Hotel & Lodging Association ("AH&LA"), long-term demographic and education trends suggest that the country will face labor shortages, a particularly troubling prospect for the U.S. lodging industry which will need more than 700,000 additional workers by 2010. The AH&LA organized the Essential Worker Immigration Coalition to lobby Congress to address these concerns through immigration reform.

The efforts to make changes to immigration law to address expected worker shortages were gaining strength in 2001, even as the red-hot economy slowed. In early September 2001, President Bush and President Fox of Mexico were continuing discussions regarding the so-called "Guest Worker" provisions that might have expanded the availability of Mexican labor to U.S. businesses. Then came September 11.

VI. U.S. IMMIGRATION LAW AFTER 9/11

A. Summary of Post-9/11 Changes.

The events of September 11, 2001 changed the face of the country and the world. A newfound concern for immigration and foreigners resulted. Changes in the immigration world have been coming at a fast and furious pace. In many cases, there has been little or no change in laws or regulations. Instead, there has been a renewed vigor in interpretation and application of the existing provisions. Below, some of the most important changes will be discussed.

- *Guest Worker provisions tabled* – As many in the hospitality industry know, the real shortage of quality workers in the U.S. exists in lower-level positions. Quality housekeepers, dishwashers, servers and maintenance personnel are difficult to locate. On September 5, 2001, President Bush and Mexican President Vicente Fox met to discuss the proposed "Guest Worker" nonimmigrant classification. These discussions were centered on ways to allow more low-level employees, primarily from Mexico, to work in the United States. However, these talks fell off after September 11.
- *Patriot Act* – This created new grounds of inadmissibility and removal primarily for persons associated with any terrorist organization or activity and gave the Justice Department greater authority to investigate suspected terrorists.
- *New visa application forms* – all male visa applicants between the ages of 16 and 45 are now required to complete an additional form (DS-157) in connection with any nonimmigrant visa application.
- *Consular processing delayed* – nationals of certain countries, primarily Middle Eastern countries, have been subjected to a more intense background check. This delays nonimmigrant visa processing by approximately three weeks.
- *Canada/Mexico visa processing limited* – For persons already in the United States in a nonimmigrant classification, visa processing in Canada and Mexico has long been a valid way to secure a new visa without traveling a great distance home to India, China, etc. A special rule had long existed that allowed such applicants the ability to return to the United States even if his/her visa application was not approved. This provision was curtailed after 9/11. In addition, the U.S. Consulates in Canada and Mexico will now rarely, if at all, process visa applications for persons who are subject to the additional 20-day background check (see provision above.)
- *Operation Tarmac* – As part of government efforts to cleanse airports of suspected terrorists and persons with criminal records, many airport employers have been subject to I-9 audits. Fines have rarely been issued.
- *J-1 program scrutinized* – The American Hospitality Academy (AHA), a foreign exchange program for J-1 trainees, was investigated by the Department of State for alleged program violations. The

primary complaint was that foreign students paid AHA for management training placement at hotels and resorts but instead were placed in menial jobs.

- *Tyson Foods* - Certain executives and employees were indicted for condoning the hiring of illegal workers and aiding and abetting in the procurement of false documents so they could work at Tyson's poultry processing facility.
- *B-1/B-2 visitors potentially restricted* – A recently proposed regulation would limit most visitor entries to 30 days and limit the ability of visitors to extend their stay or apply for a change of status to another nonimmigrant category.
- *Review of the F-1 student visa program* – Congress has held hearings regarding its concerns with abuses under the F-1 student visa category and has made changes the school student reporting requirements.
- *Most INS functions to be transferred to the new Department of Homeland Security* – A restructuring of the INS had been under consideration for many years, but 9/11 seems to have accelerated the process.
- *Stringent case review* – Immigration practitioners have noted an increase in the number of denials and RFE's (Requests for Evidence) from the INS. In addition, labor certification cases are undergoing a more stringent review. Although some of these changes are also attributable to a weaker job market, a post-9/11 attitude also seems to be affecting processing.
- *Alien Registration and Fingerprinting* - INS has recently instituted a registration requirement for certain nonimmigrants arriving in the U.S. or already present in the U.S. Thus far, the requirement has been imposed upon nationals or citizens of certain countries, again, primarily Middle Eastern countries.
- *Reviving the Form AR-11 Change-of-Address Rule* - Attorney General Ashcroft announced he would enforce a long-ignored law requiring non-citizens to notify the INS within 10 days of moving or face fines and potential deportation. There are an estimated 35 million persons subject to the requirement. Since late July, INS has been inundated with the AR-11 forms and has been ill-prepared to receive or record the data.

B. Positive changes since 9/11?

After 9/11, the following seemingly positive changes in immigration law and processing have been initiated:

- Allowing ***spousal employment*** for persons in E and L classifications;
- Reducing the required experience with the petitioner abroad from ***one year to six months*** for Blanket L-1 visa applicants; and
- ***PERM labor certification***, which could reduce processing delays and streamline the permanent labor certification program, seems to be moving towards implementation. Although significantly faster processing is promised, the more stringent rules of the process may ultimately make labor certification processing more difficult.

C. Zero Tolerance and the Legacy of 9/11 Terrorists.

March 2002 media reports regarding the INS' post-mortem approval of 9/11 hijacker Mohammed Atta's student status application (approved so he could attend flight school!) served as an additional impetus for more stringent review. In addition, Attorney General John Ashcroft's summer 2002 pronouncement of a new "Zero Tolerance" policy has invigorated INS review of even seemingly non-threatening petitions and applications. Considering many of the applicants are already in the U.S., INS' stringent review of an H-1B or L-1 petition seems only to injure employers and individual applicants, rather than promote security or other legitimate immigration goals. Although some efforts, such as requiring completion of background

checks during the visa application process seem to promote legitimate post-9/11 security concerns, the close scrutiny of visa petitions, the enforcement of formerly disregarded laws, and the overreaching application and enforcement of certain security initiatives seem again to be driven by "immigration policy for the moment", though at least it is more understandable after 9/11. Hopefully, a well though out review of overall immigration policy will follow and not only insure security aims are met but that the benefits of immigration can be captured as well.

VII. WHAT YOU NEED TO KNOW/CONCLUSION

A. Summary of Things to Remember.

Even if you do not decide to become an advocate of immigration reform by joining the Essential Worker Immigration Coalition or writing your Congressman, here is a brief summary of items that persons involved in the hospitality industry should know about U.S. Immigration:

- The distinction between citizens, permanent residents (green card holders) and nonimmigrants;
- The nonimmigrant classifications available when hiring nonimmigrant workers: H-1B, L-1, O-1, E-1/E-2 and TN categories for professional, specialized and managerial personnel; J-1, H-3 and Q-1 for trainees and exchange visitors; F-1 and M-1 students who have work authorization; and H-2B for temporary (usually seasonal) low-skill positions.
- Immigration processing of virtually all applications has become slower and more strained since 9/11. Plan far in advance if you want to transfer someone from a foreign operation as an L-1 or change an F-1 or J-1 employee to H-1B status.
- When completing I-9s, accept facially valid documents. Checking Social Security numbers is optional, but may be done via telephone or soon on a new on-line system.
- Social Security "No-Match" Letters. If received, do not immediately take adverse action against affected employees. Instead, attempt to correct these issues in a consistent, non-discriminatory fashion. Consult immigration or employment counsel if issues are not easily resolved.

B. Conclusion.

In a globally connected economy, managing immigration issues effectively remain very important in the post-9/11 world. In a labor-intensive industry such as hospitality, locating quality employees and remaining in compliance with immigration laws remains essential to the success of many companies in the industry. Hospitality companies should not shy away from foreign workers. Using foreign workers can assist companies in solving worker shortages, finding the "best and the brightest" young talent and creating an international "feel" to attract a particular clientele. Hospitality companies should use the immigration rules as one part of a broader strategy to employ a stable and effective workforce while steering clear of potential legal liabilities. An isolationist immigration policy is clearly inconsistent with an industry based upon encouraging travel and the movement of persons on a global basis.