IMMIGRATION UPDATE

Provided by Andrew Galeziowski
Ogletree Deakins

TABLE OF CONTENTS

I. SCOPE OF THE ARTICLE

The goal of this article is to provide an update on U.S. immigration policy, law and processing to those concerned with legal issues in the hospitality industry, including legal practitioners and executives/managers in the hospitality industry. This article primarily serves to update the January 2003 article entitled "Current Immigration Issues Impacting the Hospitality Industry." That article provides a more comprehensive overview of U.S. immigration law and its impact on the hospitality industry. Please visit www.hospitalitylaw.com for the full text of the article.

The specific focus herein will be on the changes in immigration laws, processing and enforcement from September 11, 2001 to the present, with a focus on changes occurring in 2003. In addition, some general perspectives on immigration policies and other issues impacting the industry, as well as possible changes coming in 2004, will be discussed.

II. IMMIGRATION DOES AFFECT YOUR BUSINESS! IMMIGRATION POLICY AND EFFECT

A. Immigration affects your business – the visitors

The hospitality industry is uniquely impacted by U.S. immigration law and policy on a direct and indirect basis. From a broad perspective, a generous U.S. immigration policy can allow for the free travel and entry of foreigners for business and tourist purposes. With respect to short-term visitors, it is a virtual certainty that these persons will spend money at U.S. lodging facilities and food and beverage establishments. The more user-friendly the visitor entry system, the more likely the U.S. is to receive short-term visitors. Furthermore, if the general U.S. immigration policy includes provisions to promote investment and business/office establishments in the United States, this will not only encourage the trade of products and services with other countries but inevitably involve the transfer and travel of business personnel who, again, will frequent lodging and restaurant facilities.

The events of September 11, 2001, combined with an already weakening economy, contributed to increased scrutiny of all short-term visitors, professional workers and investors coming to the United States. Hospitality industry officials and analysts opined that such scrutiny decreased visitor entries and corresponding spending in an already damaged industry. Specific examples of the increased scrutiny and its impact on the industry became commonplace – such as the Israeli man who abandoned his planned trip to DisneyWorld in Orlando and instead traveled to Europe due to delays in visa processing. In April 2002, the Immigration and Naturalization Service ("INS") announced proposed regulations that would have limited most visitor entries to 30 days, a move seen by many that could have cost the industry millions. While there is certainly an important national interest in securing borders and preventing the entry of terrorists and criminals, the critical needs of international commerce must be considered as well to avoid the severe negative economic consequences that flow from such laws and policies.

B. Wishing for an immigration system that would assist in filling labor needs

On a more narrow perspective, the U.S. hospitality industry faces continuing challenges in staffing businesses and complying with the legal requirements of 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 American Hotel & Lodging Association ("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 7 to 12 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, legal and illegal, is already an important part of the U.S. economy. According to the 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 effort to make changes to immigration law to address expected worker shortages was 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 and the talks stopped. There have been some renewed efforts to create a Guest Worker provision, but the anti-immigrant sentiment that lingers after 9/11 suggest such a program might not come any time soon.

C. Existing use of immigration programs in the industry.

Many hospitality employers rely upon legal foreign workers to staff operations. However, many of these programs do not allow employers to solve ongoing issues with the lack of quality labor, something a full-fledged Guest Worker provision might resolve. Current legal uses of foreign labor includes: seasonal H-2B workers at resort locations fill housekeeping, engineering, cook and wait-staff positions (though the process involved is somewhat cumbersome); J-1 trainees and Q-1 Cultural Exchange visitors obtain valuable work-place experience and can provide multi-lingual services and an international feel at hotels and restaurants alike; H-1B professional workers can fill key managerial and analytical positions; and L-1 transferees can provide knowledge and experience in a multinational organization's operations at U.S. establishments.

The events of September 11 caused a chain of events that eventually resulted in increased scrutiny of all petitions/applications, making it more difficult if not impossible for workers to be approved to assume U.S. employment even in these classifications. Even when petitions and applications were approved, the slow processing of cases at INS (now CIS) and visa processing at Embassies abroad made the use of such personnel less effective and more problematic. Fortunately, some of

the post-9/11 effects have been reduced in 2003, but issues still remain. Nevertheless, in light of an ongoing need to secure qualified staff, many employers still manage to use the existing system to fill staffing needs, though a better system could yield far more benefits to the industry as a whole.

D. Immigration Compliance

In addition, all U.S. employers face the burden of completing I-9 Employment Eligibility Verification Forms for employees. The I-9 system puts employers at the forefront of preventing illegal immigration. However, the reality seems to be that most illegal workers have no problem obtaining documents that can satisfy the I-9 requirement. Although I-9 enforcement activities are somewhat rare, employers are still faced with the confusion of trying to understand the process and its I-9 obligations and the fear that enforcement may someday become more extensive. As hospitality industry employers struggle to keep staffed with hard-working, competent and low-cost workers to run their businesses, the government's I-9 policy create confusion and shortages and even is considered a joke by advocates of reducing legal and illegal immigration.

The failure of U.S. immigration policy to address I-9 requirements and the ability to utilize foreign personnel effectively has a direct impact on the competitiveness and profitability of the country's hospitality industry. As the emotion of 9/11 fades, let us hope that a well thought-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.

III. RECAP OF U.S. IMMIGRATION

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**, either 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 27 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 (Tourist).** "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) **Visa Waiver Program (VWP).** Persons with citizenship in 27 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 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

3. **F-1 – Students.** For bona fide students 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.

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

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.

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.

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.

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 is managerial, executive, or involves specialized knowledge.

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.

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.

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.

C. Immigrants – Employment-based Green Card Sponsorship

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 no 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 2004. 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/CIS 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/CIS.

- **Green Card Processing** - This is accomplished by filing either an adjustment of status application (Form I-485) with the INS/CIS 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.

D. Immigration Compliance

1. **The Illegal Workforce.** Depending on which source you believe, there are an estimated seven million to twelve 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.

2. **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 reinforced anti-discrimination provisions in 1990 resulting in more 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.

IV. UPDATES – WHAT'S NEW IN 2003-04?

Against this backdrop, we now turn to the most significant developments in U.S. immigration law and policy.

A. <u>INS restructuring</u> - On November 25, 2002, the President signed the Homeland Security Act of 2002 into law. This law transferred INS functions to the new Department of Homeland Security (DHS). Immigration enforcement functions were placed within the Directorate of Border and Transportation Security (BTS), either directly, or under Customs and Border Protection (CBP) (which includes the Border Patrol and INS Inspections) or Immigration and Customs Enforcement (ICE) (which includes the enforcement and investigation components of INS such as Investigations, Intelligence, Detention and Removals). The U.S. Citizenship and Immigration Services (CIS or USCIS) assumed responsibility for processing immigration benefits, including H-1B, H-2B and L-1 petitions as well as most permanent resident ("green card") and naturalization applications.

As of March 1, 2003, the former Immigration and Naturalization Service (INS) was abolished and its functions and units incorporated into the new Department. To some, this might have been seen as a positive, as the INS had been an increasingly overwhelmed, ineffective and inefficient agency. However, the change has seemingly resulted in more problems, as the newly created agencies and bureaus struggled with confusion as to new laws and processes. Among the problems relating to the changes were missed payroll for employees and the general confusion that often led to the question "Who is responsible for what?" At the same time, the agencies were and are in the process of relocating to new facilities. General and anecdotal reports indicate that many former INS lifetime employees were opting for early retirement, seemingly too frustrated to deal with the problematic new structure. Compounding the problems were the limited number of permanent positions the agencies are authorized to hire and the relatively low salaries offered to new employees. Even after an offer of employment is given, prospective employees typically must wait six to nine months for background checks to be completed before starting their new jobs.

In the end, the government handling of immigration processes is still broken. So far, the new DHS organization has failed to make any improvements and, in fact, things have arguably become worse. Processing delays are worse and the agencies seem even more inaccessible. In fact, as of September 2003, there were 26% more applications pending than there were in September 2002. In part, this was due to the INS/CIS' processing over 10% fewer cases than it had the previous year. Nevertheless, hope still exists that the agencies will be able to tackle the problems of their infancy and bring about real improvements in the services they provide.

B. <u>New rules for visitors</u>

1. **Changes to the Visa Waiver Program** – The Visa Waiver Program (VWP) enables citizens of certain countries to travel to the United States for tourism or business for 90 days or less without obtaining a visa. Citizens of 27 countries are currently able to participate. Early in 2003, the government intended to require all persons attempting to enter through the VWP to have a machine-readable passport (MRP) by October 1, 2003. However, the Secretary of State, working with the Department of Homeland Security, has granted a postponement until October 26, 2004, as the date by which visa waiver program

travelers from 21 countries must present a machine-readable passport at a U.S. port of entry to be admitted to the United States without a visa. Five countries will continue with the October 1, 2003 deadline. The Patriot Act legislated the machine-readable passport requirement for visa waiver program travelers and additionally gave the Secretary of State authority to postpone the effective date.

- **Countries With an October 1, 2003 MRP Date** - Four visa waiver program countries, specifically Andorra, Brunei, Liechtenstein, and Slovenia, did not request a postponement of the machine-readable passport effective date, because all or virtually all of their citizens already have machine-readable passports.

  As of October 1, 2003, visa waiver travelers from Andorra, Brunei, Liechtenstein, and Slovenia must present either a machine-readable passport (MRP) or a U.S. visa at the port of entry to enter the U.S. This includes all categories of passports -- regular, diplomatic, and official, when the traveler is seeking to enter the U.S. for business or tourist purposes, for a maximum of 90 days without needing a visa.

- Countries with an October 26, 2004 MRP Date - Travelers from countries granted the postponement can continue to travel, as they have in the past, without a machine-readable passport. On October 26, 2004 a machine-readable passport or U.S. visa will be required at the port of entry, to enter the U.S. without a visa. Countries with the machine-readable passport postponement until October 26, 2004 are:

  Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom.

- Belgium, which is also a visa waiver country, was not eligible to receive this extension. Belgian nationals who wish to travel under the visa waiver program have been required to present a machine-readable passport since May 15, 2003.

2. **US Visit** - In 2004, a person seeking to enter the U.S. at an airport or seaport under a nonimmigrant visa will be required to provide an inkless fingerprint of the right and left index fingers and have a photo taken. This will be in addition to the standard review of travel documents and routine questions regarding the person's eligibility to enter the U.S. The fingerprints and photo will be compared to security databases. The person will then either be admitted or sent to secondary screening. Biometric identifiers must be in effect by October 26, 2004, in countries that participate in the VWP. Land border procedures will not be in place until 2006.

   Additionally, as nonimmigrant foreign nationals exit the U.S. at airports and seaports, they will need to use self-service kiosks to scan their travel documents and submit additional inkless fingerprints. There will be individuals available at the airports and seaports to assist anyone who does not understand the process. This exit information will be added to the foreign national's immigration record.

3. **Visitor regulations still on hold** - B-1/B-2 visitor regulations proposed in April of 2002 that would have limited most visitor stays to 30 days have not been enacted. This is good news for the hospitality industry, which stood to lose millions had such regulations been enacted.

C. Visa processing changes -The U.S. government is implementing new nonimmigrant visa application procedures worldwide. Effective August 1, 2003, almost all nonimmigrant visa applicants will be required to schedule a personal interview with a consular officer. Exceptions to the interview requirement are made for the following applicants:

- children 16 years of age or under;
- adults 60 years of age or older;
- diplomats and those traveling on official government business;
- UK and EU passport holders or those who are permanent residents of the United Kingdom and are applying to renew the same category of visa that has expired within the last 12 months.

Visa applicants who are ineligible to receive a visa and those aged 16 or over who were born in or hold a passport from any of the seven countries designated as state sponsors of terrorism, are required to apply for a visa in person.

These 2003 changes were in addition to other post 9/11 changes that had already slowed visa processing. Changes in 2001 and 2002 included completing an additional visa form (the DS-157) for many applicants and also subjecting male applicants from a list of 26 countries (primarily Middle Eastern countries) to additional background checks that often delayed visa processing for 20 days or more. Thus, virtually everyone needing to apply for a visa faces greater delays and more red tape than they would have in 2000 or early 2001.

D. Changes in INS/CIS Processing

H-1B cap reduced to 65,000 -The number of H-1B visas available in fiscal year (FY) 2004 (October 1, 2003 to September 30, 2004) will drop to 65,000, a decrease of almost two-thirds from the 195,000 available the past few years. Such a low cap may mean that H-1B numbers may run out before the end of FY 2004. If so, that could cause significant problems for U.S. businesses and their foreign national employees.

The reduction stems from the expiration of a federal law that temporarily increased the number of H-1B visas the past few years. With the expiration of this temporary increase, other aspects of the H-1B program also sunset on October 1, 2003, unless and until Congress acts to extend the law

Changes to address problems created by processing delays. Since 2000, Congress has passed several new laws and the INS/CIS has amended procedures to address the slow processing of immigration applications. Among these changes are:

- Green card portability;
- H-1B portability;
- Ability to extend H-1B status beyond the normal six-year limit when a green card process has been pending for one year or more;
- Premium Processing – for an additional $1000 fee, CIS will process certain immigration petitions within 15 days. Thus, H-1B petitions that take four to six months using "regular" processing can now be completed within 15 days. For the most part, this service has functioned well.

Green card processing – Despite the reformulation of U.S. immigration agencies, the delays in processing green cards continues to be extremely slow, if not worse than it was in 2002. The volume of pending green card applications (I-485 permanent resident adjustments) increased by over 250,000 to a total of 1,238,371 in 2003 and the total volume of pending cases increased 26% to 5,510,553 for the 12 months ending September 30, 2003. The increased number of pending cases is arguably due to two primary factors: a steady (or increased) demand for immigration benefits; and the INS/CIS' inability to process cases.

PERM labor certification, which could reduce processing delays and streamline the permanent labor certification program, still appears 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. Most recent commentaries suggest implementation will occur between April and June of 2004.

E. Immigration Compliance/I-9 Updates -The biggest stories of 2003 in the field of I-9s were the Wal-Mart story and the ongoing saga of Social Security "mismatch" letters.

1. **Social Security fines** – Aside from the basic legal compliance issues surrounding completion and maintenance of I-9 Employment Eligibility Verification forms, the related issue of the so-called "no-match" letter from the Social Security Administration (SSA) became a larger issue in 2002. 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. Since many persons complete the I-9 form by using a state-issued driver's license and Social Security card, the mismatching records is suggestive evidence, though not dispositive, that the presenter of the forms is using a fraudulent Social Security card. When an employer is presented with such information from the SSA, the employer could therefore be deemed to have constructive knowledge that the presenter does not have valid employment authorization. Continuing to employ such an individual, without taking appropriate follow-up steps, could potentially result in a charge that the employer continued to employ an unauthorized alien and is subject to I-9 fines and penalties.

   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. One new development in 2003 was that the SSA again returned to a more limited distribution of "no-match" letters. One other significant development was the Sept. 23 letter by the IRS (who has the ability to fine employers for failing to properly report SSA withholdings) that outlines how employers can qualify for a penalty waiver when they have reported

incorrect SSNs on the Form W-2. Reasonable cause for waiving the $50 penalty exists if the employer documents initial or annual solicitation of correct SSNs.

2. **Wal-Mart** - The second major I-9 event from 2003 was the Wal-Mart enforcement action. In October 2003, the government completed its "Operation Rollback" investigation by arresting approximately 300 undocumented workers at 60 Wal-Mart stores across the country. It is important to note that the worker arrested were members of cleaning crews hired by outside contractors and were not direct Wal-Mart "employees." The government also seized boxes of documents from Wal-Mart headquarters in Benton, Arkansas, apparently believing that the documents would contain information indicating that Wal-Mart officials knew or had reason to know that the workers were illegal.

   Analysts and critics from both pro-immigration and anti-immigration sources viewed the action as an isolated incident and as unlikely to be the start of a new comprehensive enforcement strategy. Based upon the sheer volume of illegal persons present in the United States, such widespread enforcement is not only unlikely but probably impossible. For casual followers of immigration and employers, the primary items to be cognizant of in the wake of the Wal-Mart raids are:

   - I-9 enforcement is limited. There were 14,311 employers fined for I-9 violations in 1990. By 2000, there were a mere 178. Government enforcement officials have indicated that their current focus is on criminal and terrorist aliens, leaving virtually no time for I-9 enforcement activities;
   - Although extremely difficult, it is possible for the government to penalize contracting companies such as Wal-Mart for I-9 liability. As an employer, you might insist upon a clause in your agreements with contractors that the contractor represents that its employees are in fact the contractor's employees and that the contractor assumes all corresponding I-9 responsibility;
   - "Don't ask, don't tell" should be the policy of employer representatives dealing with contractors and I-9 issues. An employer does not want to be complicit in any way with the hiring of illegal workers by the company or by company contractors, as is at issue in the Wal-Mart and Tyson Foods (2002) cases.

3. **Guest Worker still on hold** – As many in the hospitality industry would argue, 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.

   In a public meeting in Florida in early December 2003, DHS Secretary Ridge stated that the U.S. government has to address the situation of millions of undocumented workers in the United States, and afford them some legal status. This would seem to be an important step in identifying the 7+ million illegals in the country and assist in curing current and future labor shortages.

V. SUMMARY OF CHANGES

2003 brought more of the same as 2002. The laws governing immigration changed little and the country's immigration policy seems to be impractical and unlikely to satisfactorily improve all traditional goals of immigration policy, including security, protection of U.S. workers and the free flow of persons to assist in continued economic growth and activity. On a positive front, the tendency of the INS/USCIS to find it easier to deny immigration benefits rather than approve them seems to have lessened. However, the overwhelmed government agencies responsible for immigration benefits and enforcement are struggling to provide reasonable customer service to deserving applicants and doing the things that promote economic activity – facilitating travel and investment in the U.S. and enabling qualified workers a legal means to enter the country and assist in the growth of existing U.S. businesses.