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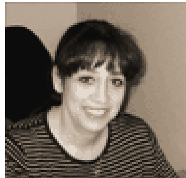
The Nonimmigrant Admission of Attendants, Domestics, and Personal Servants



By Laurie Grossman and David Grunblatt

I. Introduction

This article will describe only those rare circumstances under which the lawful employment of domestic staff in nonimmigrant status is currently permitted within the framework of the immigration law. As these provisions never apply to lawful permanent resident employers, and only in limited circumstances to American employers, they principally benefit employers who are foreign workers temporarily in the United States.

While the current nonimmigrant framework helps facilitate the transfer of certain international personnel and diplomatic staff, it does nothing to alleviate our current crisis in "home care." A dearth of qualified workers willing to provide domestic service, child care and home health care clearly plagues us, and in recent years, the increased incidence of two-worker and single parent families, a burgeoning economy, and an aging population have further swollen the ranks of would-be employers seeking assistance in the home. The employment of undocumented alien workers appears to be commonplace, with high-profile cases (such as the abortive nominations of Zoe Baird and Kimba Wood for Attorney General), occasionally grabbing headlines.

Proposals for legislative change that would alleviate the hardship worked on American families by this shortage have included the suggested creation of a new nonimmigrant category for caregivers within the home.1 However, despite significant protections for U.S. workers contained in this proposal, neither it, nor any other suggested solution, has borne fruit. Although a discussion of the means by which this acute labor need may be met is beyond the purview of this article, it is clear that the need continues to grow and this remains an area ripe for advocacy.

The employment of domestic servants in the A-3, G-5, NATO-7, and B-1 nonimmigrant visa classifications, and some of the nuances of obligations respecting documentation of and tax withholding for those workers, will be discussed below. 2

II. Authorities

A. Statutes

1. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1101, et seq.)

a. INA §101(a)(15)(A)(iii)

The A-3 visa category includes "upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status" under INA §101(a)(15)(A)(i) and INA §101(a)(15)(A)(ii).

b. INA §101(a)(15)(G)(v)

The G-5 category includes “attendants, servants and personal employees” and members of their immediate families, of an alien classified under INA §101(a)(15)(G)(i) through (iv).

c. INA §101(a)(15)(B)

This section defines a visitor as “an alien (other than one coming for the purpose of study or of 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 that he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.”

d. INA §274A

This section renders it unlawful to knowingly employ an unauthorized alien in the United States, or to hire, recruit, or refer for a fee any worker without complying with employer verification system requirements designed to ensure that the worker is authorized to be employed.

2. Internal Revenue Code §§7701(b), 871(b), 3301, 3111; 26 USC 7701(b), 871(b), 3301, 3111.

These sections define who is a “resident” for tax purposes, what will be considered “U.S. source income,” and describe FICA and FUTA obligations.

B. Regulations

1. 8 CFR

a. 8 CFR §214.2(a)

This section describes the requirements for admission and maintenance of status for aliens admitted under the A-1, A-2, and A-3 visa categories.

b. 8 CFR §214.2(g)

This section describes the requirements for admission and maintenance of status for aliens admitted under the G-1 through G-5 visa categories.

c. 8 CFR §214.2(s)

This section describes the requirements for admission and maintenance of status for aliens admitted under the NATO-1 through NATO-7 visa categories.

d. 8 CFR §214.2(b)

This section describes the requirements for admission and maintenance of status for visitors admitted under the B-1 and B-2 visa categories. Note that amended regulations were proposed in 1993, 3 explicating the requirements for B-1 classification, and including a description of the criteria for B-1 domestic or personal servants. However, these regulations have never been finalized.

e. 8 CFR §274a.12(b)

This section describes the categories of nonimmigrant aliens who are authorized for employment with a specific employer incident to status. These include A-3 nonimmigrants, 4 G-5 nonimmigrants, 5 and NATO-7 nonimmigrants. 6 These aliens are not issued employment authorization documents (EADs).

f. 8 CFR §274a.12(c)

This section describes those categories of aliens who must apply for employment authorization, and provides for the issuance of an EAD to a personal or domestic servant who has been admitted under the B-1 category.7

2. 22 CFR

a. 22 CFR §41.21

This section provides the pertinent definitions relating to foreign officials and indicates that the passport validity requirement and most grounds for visa refusal do not apply to A, G, and NATO class aliens, except for their attendants, servants, and personal employees, who remain subject “to all grounds of refusal specified in INA §212.” 22 CFR §41.21(a)(2) defines “attendants;” 22 CFR §41.21(a)(4) defines “servants” and “personal employees.”

b. 22 CFR §41.22

This section describes the criteria for admission of officials of foreign governments under the A-1, A-2, and A-3 categories.

c. 22 CFR §41.24

This section describes the criteria for international organization aliens under the “G” visa category.

d. 22 CFR §41.25

This section describes the criteria for admission of NATO representatives, officials, and employees (NATO-1 through NATO-7).

e. 22 CFR §41.31

This section describes the criteria for admission of temporary visitors for business or pleasure under the "B" visa category. Section 22 CFR §41.31(b)(1) defines "business," specifically excluding "local employment or labor for hire." It does not address the employment of domestic or personal servants.

3. 26 CFR §§301.7701(b), 1.61(a), 1-871-1

The Treasury regulations describe who is a "resident" for tax purposes and describe the tax obligations of tax residents.

C. Instructions

1. INS Operations Instructions (OIs)

a. OI §214.2(a)

OI §214.2(a)(1)(i) sets forth the procedures to be followed for an A-3 alien seeking to extend his or her temporary stay. OI §214.2(a)(1)(ii) provides that A-3 status may not be accorded to an attendant, servant or personal employee if the principal has obtained permanent residence. OI §214.2(a)(10)(i)(G)(4) provides that a violation of status subjects the A-3 alien to Service action without referral to the Department of State.

b. OI §214.2(g)

OI §214.2(g)(1)(i) sets forth the procedures to be followed when a G-5 alien seeks to extend his or her temporary stay. OI §214.2(g)(1)(ii) provides that G-5 status may not be accorded to an attendant, servant, or personal employee of a principal who has obtained permanent residence. OI §214.2(g)(10)(i)(g)(5) provides that a violation of status subjects the G-5 alien to INS action without referral to the Department of State.

c. OI §214.2(b)

OI §214.2(b) allows for the admission of personal and domestic servants of U.S. employers who are accompanying or following to join U.S. citizens who are subject to frequent international transfers and who will be assigned to the United States for less than four years, provided that a prior employment relationship existed abroad for at least six months and that there is an employment contract guaranteeing the prevailing wage and containing other contractual guarantees protecting the worker.

This section also provides for the B-1 admission of personal or domestic servants who are accompanying or following to join nonimmigrants holding B, E, F, H, I, J, or L status provided that either the alien had been in the employer's service for one year or that the employment relationship existed prior to the B-1 application, the employer had employed a personal or domestic servant for several years and the alien has one year of experience.

2. 9 U.S. Dep't of State, Foreign Affairs Manual (FAM)

a. 9 FAM §41.22

This section describes the criteria for the classification of foreign government officials and their attendants, servants, and personal employees.

b. 9 FAM §41.21, Note 6.1-6.5

These notes provide the instructions for issuance of visas to A-3, G-5, and NATO-7 aliens. Of particular importance, 9 FAM §41.21, Note 6.1 reminds consular officers that nonimmigrant intent need not be demonstrated; 9 FAM §41.21, Note 6.2, now substantially revised by State Department Cable 2000- State-23037, sets forth the criteria for employment contracts; and 9 FAM §41.21, Note 6.3 specifies when the consular officer must request an advisory opinion from the Department of State.

c. 9 FAM IV, Appendix C

The Appendix lists reciprocity schedules that may contain restrictions on visa issuance for nationals of certain countries.

d. 9 FAM §41.31, Note 6.3

These notes describe the criteria for issuance of B-1 visas to servants of U.S. citizens residing abroad and servants of foreign nationals in nonimmigrant status. 9 FAM §41.31, Note 6.3-2 sets forth the provisions for servants of U.S. citizens on temporary assignment in the United States. 9 FAM §41.31, Note 6.3- 3 contains the provisions for servants of B, E, F, H, I, J, L and M nonimmigrants (9 FAM §41.53, Note 17 and 9 FAM §41.54, Note 23 also specifically provide for the issuance of B-1 visas to servants of H and L nonimmigrants); and 9 FAM §41.31, Note 6.3-5 provides that the source of payment to a B-1 personal or domestic servant is not relevant.

e. 9 FAM §41.112, Note 7

This section provides that a B-1 visa issued to a personal employee accompanying a nonimmigrant shall not exceed the validity of the visa issued to the employer.

f. 9 FAM §41.113 P, Note 8.20

This section provides that the visa of a B-1 domestic servant must be endorsed with employer's name. It further states that the servant of a U.S. citizen employer may receive a visa that is valid for one year.
g. 9 FAM §41.31, Note 14
This section describes the procedure for issuance of Social Security cards to domestic servants. (Note, however, that in spite of its assertion that B-1 domestic servants might not be considered to be "employed" for immigration purposes, the INS does require B-1 domestics to obtain EADs, discussed infra in this article.)
3. Other Sources
a. Department of State Cable on Employment Contracts for Personal Employees of Diplomats, 2000 State 23037 (Feb. 9, 2000), amending 9 FAM §41.21, Note 6.2 to require submission of contracts for A-3 and G-5 applicants.
b. Letter from John R. Schroeder, INS Assistant Commissioner, Employer and Labor Relations to Atty. Martin J. Lawler, (Sept. 16, 1988) File CO1738-C, reprinted in 65 Interpreter Releases 1231 (Nov. 21, 1988) on I-9 compliance by B-1 domestic employees.
c. "Family Care Givers and Undocumented Aliens: A Proposal to Amend the Immigration and Nationality Act," adopted by The American Bar Association and The New York County Lawyers Association (March 15, 1993), a report of The Committee on Immigration and Nationality Law, New York County Lawyers Association, 1993, David Grunblatt, Chair.
d. Proposed rules 58 Fed. Reg. 58982-58988 (Nov. 5, 1993) and 58 Fed. Reg. 40024-40030 (July 26, 1993) . While never finalized, the proposed INS and State Departments regulations and commentary provided extensive description of the criteria for admission of aliens, including personal and domestic servants, under the B-1 category.
e. AILA/INS Headquarters Liaison Meeting, Draft Minutes, reprinted in 17 AILA Monthly Mailing 507 (May 1998), stating the INS position that EADs continue to be required for B-1 domestic servants.

III. Key Considerations

The nonimmigrant admission of attendants, servants and personal employees of certain foreign dignitaries and international organization representatives is specifically authorized by statute under the A-3 and G-5 visa classifications.8 Other servants are admitted, pursuant to regulation, in order to accompany or follow to join NATO representatives, officials and employees, under the NATO-7 nonimmigrant classification.9 The remainder of those discussed below enter the United States under the B-1 provision of the INA 10 that, despite its prohibition against using the B visitor category for "skilled or unskilled labor," has been interpreted to allow for the admission of personal and domestic servants under carefully delineated circumstances, when such staff is coming to render services to U.S. citizens who are not resident in the United States, or to employers who are themselves nonimmigrants.
A. Servants of Foreign Government and International Organization Representatives
The "A" visa (A-1 and A-2) is reserved for representatives of foreign governments, such as heads of state, officials equivalent to a U.S. cabinet member, presiding officer of a national legislative body, member of the highest court, ambassadors, diplomatic and consular officers and other officials and employees, and members of their immediate family. International organization representatives, officers and employees, such as those working for The United Nations or The World Bank, as well as members of their immediate families, enter the United States under the G-1, G-2, G-3, and G-4 categories. Representatives of NATO, including their accompanying official clerical staff, certain experts and members of a civilian component accompanying NATO forces enter the United States under the NATO-1 through NATO-6 categories.
An alien entering the United States in any of the foregoing visa classifications is permitted to bring, on the basis of reciprocity, his or her attendants, servants, and personal employees as well as members of the immediate families of such staff. As used in INA §101(a)(15)(A)(iii), INA §101(a)(15)(G)(v), INA §212(d)(8) (relating to the waiver of the nonimmigrant visa requirement for certain government officials) as well as under the NATO-7 visa category, "attendants" are defined as:
. . . aliens paid from the public fund of a foreign government or from the funds of an international organization, accompanying or following to join the principal alien to whom a duty or service is owed.11
"Servants" or "personal employees" are defined as:
. . . aliens employed in a domestic or personal capacity by a principal alien, who are paid from the private funds of the principal alien and seek to enter the United states solely for the purpose of such employment.12

Aliens applying for A-3, G-5, or NATO-7 visas are required to demonstrate that they are entitled to the visa classification sought. Accordingly, the consular officer must verify the official status of the employer and the intent of both parties to enter into, or remain in, an employer-employee relationship.13 However, consular officers are reminded that A, G, and NATO aliens are not required to demonstrate that they are not intending immigrants, i.e., that they have a foreign residence abroad that they do not intend to abandon, or that they have compelling ties outside the United States.14

Until recently, employers of A-3, G-5, and NATO-7 aliens were not required to pay minimum or prevailing wage. So long as the consular officer was satisfied that the wage the applicant would receive was a "fair wage comparable to that offered in the area of employment and sufficient to overcome INA §212(a)(4)," 15 the submission of an employment contract was not mandatory, and, according to the FAM, unnecessary in the majority of cases. However, consular officers were permitted to require an employment contract where the applicants' human rights were thought likely to be violated or where there was uncertainty as to the applicants' understanding of employment rights relative to salary, working conditions, duties, and fringe benefits. According to some practitioners in this field, the abuse of domestic staff, including the provision of poor living conditions, underpayment of wages, and requiring the servants' minor children to render services to the employer was reported as being widespread. 16 Indeed, complaints of abuse by foreign servants have recently prompted action in both the Senate and the House of Representatives, where legislation has been introduced that would afford these aliens protection from removal should they pursue legal action against their employers. 17

Pursuant to a State Department cable sent to all consular posts on February 9, 2000, contracts of employment are now required to be submitted for all A-3 and G-5 applicants. Stating its belief that mandatory submission of contracts would "help to assure that conditions for these employees will in fact be fair, and to provide an incentive for personal employees to remain in the required employment," 9 FAM §41.21, Note 6.2 has been amended to require submission of an employment contract, signed and dated by both parties, which:

Guarantees the minimum or prevailing wage, whichever is greater (with no more than a "reasonable" deduction for food or lodging);

Contains a promise by the employee not to accept any other employment while working for the employer;

Contains a promise by the employer not to withhold the employee's passport; and,

Contains a statement indicating that both parties understand that the employee cannot be required to remain on the premises after working hours without compensation.

In assessing the propriety of the wage offered, the State Department Cable suggests that Internet-based reference tools, such as ERI (Economic Research Institute) or individual SESAs (State Employment Security Administrations), may be useful for prevailing wage data. When a contract is not submitted, or does not meet the requirements stated in the revised notes to the FAM, the visa shall be refused under either INA §214(b) or INA §221(g).18

If the applicant is below age 17, is not a domestic employee by background, or is related to the employer, the consular officer must obtain an Advisory Opinion from the Department of State.19 Note that A-3 visas are issued on the basis of reciprocity, so in a particular case it may be important to review the FAM to determine whether any restrictions are placed on the staff of U.S. personnel, to ascertain whether corresponding limitations will apply to the foreign dignitaries' servants.20

Pursuant to INA §102, broad exemptions from certain grounds of ineligibility apply to A and G category aliens, but not to their servants and personal employees. Accordingly, such staff remain generally subject to grounds of inadmissibility under INA §212 despite the fact that their employers are shielded from visa refusals on these grounds. 21

Upon issuing the A-3, G-5, or NATO-7 visa, the consular officer annotates the visa with the name of the principal alien and the place of his or her employment. 22 Upon entering the United States, A-3, G-5, and NATO-7 visa designates are admitted to the United States for an initial period of three years and may be granted extensions of stay in two-year increments. 23

The A-3, G-5, or NATO-7 servant is not required to obtain an EAD and may work immediately, as authorization to accept employment is incident to the alien's status. However, the alien may be employed only by the foreign government official, international organization representative, or NATO officer through whom such status was obtained. 24 The A-3 or G-5 alien does not enjoy the same protections as their employers do should a violation of status occur, and the violation subjects them to INS action without prior referral to the Department of State. 25

It should be noted that pursuant to INA §247(b), the immediate family members of a lawful permanent resident who have an occupational status that would entitle them to hold A, G, or NATO classification may be classified in nonimmigrant status in spite of the principal having acquired permanent residence. 26 However, the permanent resident alien's attendants, servants, and personal employees may not obtain A-3, G-5, or NATO-7 status, but must obtain an immigrant visa for the purpose of working for the employer.

B. Servants of U.S. Citizens Residing Abroad

The B-1 category has long been utilized as a sort of "catch-all" for aliens who "do not fit in any other nonimmigrant classification but whose admissibility as nonimmigrants seemed within the general intent of Congress in distinguishing between immigrants and nonimmigrants." 27 In spite of the clear prohibition in the Act and the regulations, 28 both the FAM and the OIs of the INS cite numerous examples under which B-1 classification may be used for an alien who would appear to be performing "ordinary labor for hire" as opposed to conducting "intercourse of a commercial character" to which the category is ostensibly limited. 29 The proposed rules note a number of such examples, specifically referenced in the Senate Report (No. 1515), which accompanied the 1952 Act, including "an alien domestic servant accompanying his American or alien employer who is proceeding to the U.S. on a temporary visit." 30 Accordingly, qualified servants of U.S. citizens residing abroad are granted B-1 classification on the theory that regardless of the source of their payment, 31 they are not "employed in the United States." 32

In order to bring his or her personal or domestic servant to the United States, the U.S. citizen employer must be subject to frequent international transfers lasting two years or more as a condition of the job, as confirmed by the employer's personnel office, and must be returning to the United States for a stay of no more than four years. 33

The appropriate employment relationship must exist. Either the alien must have been employed abroad by the employer as a personal or domestic servant for six months prior to the date of the employer's admission, or the employer must show that he or she has regularly employed a domestic servant in the same capacity as that intended for the applicant and the applicant must demonstrate at least one year's experience as a personal or domestic servant by producing statements from previous employers attesting to such experience. 34

The B-1 servant must meet specific terms and conditions of employment and must be prepared to present to the INS officer at the port of entry an employment contract, signed and dated by both the employer and employee. The contract must guarantee that:

· The servant will receive the minimum or prevailing wage, whichever is greater, for an eight-hour work day, and other benefits normally provided to U.S. domestic workers in the area of employment;
· The servant will not be required to provide more than two week's notice of intent to leave the employment;
· The employer must provide at least two week's notice of intent to terminate the employment;
· Round-trip airfare will be provided to the servant;
· The employer will provide a private room and board without cost to the servant.

The servant may only work for the U.S. citizen employer, and must demonstrate nonimmigrant intent—i.e., a residence abroad that he or she has no intention of abandoning. A visa may be issued which is valid for one year from the date of issuance and is annotated with the employer's name. 35

The regulations limit the initial admission of a B-1 visitor to a maximum of one year, with six month extensions, 36 so it is important to carefully monitor the expiration of stay of the B-1 domestic servant as recorded on his or her I-94 (Arrival/Departure Record). As further discussed below, coordinating extensions of stay with the required applications for EADs can become a logistical nightmare when representing the B-1 domestic. The INS regulations provide that the B-1 servant must apply for work authorization before commencing employment. 37 And, in spite of a 1998 advisory opinion letter indicating that B-1 domestic servants are not subject to the employer verification system because they are not considered to be "employed" in the United States, 38 the INS officially continues to take the position that B-1 domestic servants require EADs. 39 Note, however, that the Vermont Service Center (VSC) has recently stated that "[u]nofficially HQ indicates they would not hold these domestics to the requirement of waiting for their EADs prior to working and being paid. However, there is no official policy memo on this."40

C. Servants of Foreign Nationals in Nonimmigrant Status

Personal or domestic servants who accompany or follow to join employers who seek admission to or are already in the United States in B, E, F, H, I, J, L, M, O, P, Q, R, or TN 41 nonimmigrant status may be

issued B-1 visas. Similar, but not identical requirements pertain to these servants of nonimmigrants as to servants of U.S. citizens residing abroad. 42

The employee must demonstrate at least one year of experience as a personal or domestic servant. The servant employee must also prove nonimmigrant intent, irrespective of whether the employer's visa status requires such a showing. Where the employer's nonimmigrant visa classification allows for dual intent (i.e. "H," or "L") and the employer is pursuing an application for permanent residence, or where the employer holds "E" classification allowing for a stay of indeterminate length, the domestic servant may have difficulty establishing that his or her intent is to remain in the United States temporarily. 43

A preexisting employment relationship must have existed with the employer. This relationship may have arisen immediately preceding the visa application if the employer can demonstrate that he or she regularly employed (year-round or seasonally) personal or domestic servants over a period of several years 44 preceding the B-1 application. Alternatively, it may be shown that the personal servant has worked for the employer for the prior year.

A signed employment contract is required, guaranteeing the prevailing wage or minimum wage, whichever is greater, free room and board, and that the employer will be the only provider of employment to the servant.

The validity of the B-1 visa issued to the servant may not exceed the validity of the visa issued to the employer and is annotated with the employer's name. 45 As with the servants of U.S. citizens residing abroad, an EAD must be obtained by the domestic prior to commencing employment, 46 and, therefore, the attendant problems of coordinating EAD renewal and extension of the B-1 alien's stay pertain.

IV. Problem Areas

A. EADs/Extensions of Stay

As noted supra,47 the official INS position is that the domestic employee of a nonimmigrant or of a U.S. citizen temporarily in the United States must apply for and obtain an EAD before commencing employment in the United States. This presents a fundamental problem for the employer, as the Application for Employment Authorization (Form I-765) must be submitted to the appropriate INS service center, after entry into the United States in the B-1 visa classification, and supported by proof of admission under the B-1 classification. It is not unusual for it to take in excess of three months for the application to be adjudicated and the EAD received by the domestic employee. When issued, the EAD will be granted for the period authorized on the admission document, Form I-94, which should be one year from the date of entry.48

See how problematic this is by following the sequence of events for a typical family bringing a domestic into the United States as noted in the following example:

John Smith and his wife Jane Doe are both bankers, both transferred to the United States as L-1 intracompany transferees. They bring with them their son Bobby Child, who is a four- year-old hyperactive child, and their employee, Alice Domestic, who has been with them and has been a significant caregiver for this child since he was one-year-old. Alice Domestic has been issued a multiple-entry, three-year B-1 visa as a domestic employee to accompany her employers John and Jane, who have been issued three-year L-1 visas. (Incidentally, none of them is advised at the United States embassy that Alice Domestic requires an EAD upon entry into the United States.)

Upon entry into the United States at JFK Airport on January 1, 2000, John and Jane are issued I-94 forms in L-1 visa classification valid for three years. Bobby is admitted in L-2 visa classification for three years as well. Alice, after some argument, is finally admitted into the United States in B-1 classification for one year. (Often, immigration inspectors unaware of the regulations admit the B-1 domestic for only six months.) Of course, no advice is given with reference to the EAD requirement.

Under current regulations, at this time when the family most needs Alice Domestic in the middle of their relocation to the United States, she must separate herself from the family and provide no service until an application for an EAD is filed, adjudicated, and an EAD issued.

Alice Domestic cannot take care of the child, cannot perform any other duties within the household, cannot apply for and obtain a Social Security number, 49 and consequently in most jurisdictions, would have trouble opening a bank account, applying for a driver's license, and registering for health insurance.

On April 18, she finally receives her EAD and immediately applies for a Social Security number. By May 8, she has finally received her Social Security number and can apply for a driver's license, open a bank account, and be placed on the payroll of her employer.

The cycle starts again almost immediately. In anticipation of her I-94 form expiring on December 31, she must file an application for extension of stay under B-1 visa classification and then request renewal of the

EAD. 50 The cycle will probably repeat itself more frequently, since extensions of B-1 stay are generally only granted for a period of six months, 51 and, of course, that means that inevitably there will be gaps between the expiration of each EAD, requiring her to terminate employment.

Why such an absurd result? The fundamental problem is that this special accommodation to allow for the admission and employment of domestic employees for those coming into the United States temporarily does not easily fit into any category. As noted previously, 52 that which domestics do really is more like "ordinary labor for hire" than "intercourse of a commercial character." It is sort of a hybrid. INS takes the position that an EAD is required, yet at the same time does not treat it as employment for purposes of being subject to the "employer verification" system. 53

Perhaps it could be argued that the problem was overstated in the example above, and that in fact there is no legal obligation for the employee to wait for the EAD to be issued before commencing service to the employer—relying on the INS advisory opinion that B-1 domestic servants are not subject to the employer verification system, and, therefore, their employment in the United States is not in violation of law.

Even if this were the case, it still does not alleviate the problem of significant delay before appropriate documents such as Social Security numbers can be obtained and the problem of the endless sequence of applications for B-1 extension and EAD renewal that are required.

The simple solution to this problem is to amend 8 CFR §274a.12. Take domestic employees out of 8 CFR §274a.12(c)—those categories of employment that require the issuance of an EAD—and place them in 8 CFR §274a.12(b), the section relating to "aliens authorized for employment with a specific employer incident to status," which do not require the issuance of a separate EAD.

In the example above, John Smith and Jane Doe, once admitted to the United States in L-1 classification, can immediately be processed on the employer verification system and can apply for and obtain Social Security documents, without first obtaining an EAD. The same privilege should be extended to their employee, Alice Domestic, by virtue of her admission to the United States under B-1 visa classification specifically noted, "domestic employee."

B. Tax Considerations

It is important to keep in mind that whatever the controversy may be as to whether B-1 domestics are considered to be "employed" in the United States under U.S. immigration law, for purposes of tax law there is no doubt that they are "employed," and the domestic and his or her employer are subject to a whole panoply of federal, state, and local tax obligations.

For income tax purposes, U.S. citizens and resident aliens (and most nonimmigrant employees in the United States for more than 183 days during the course of the year, and sometimes even for less time), will be resident aliens for tax purposes 54 and are subject to tax on gross income, defined as "all income from whatever source derived, unless excluded by law." 55

Even if the domestic employee is not in the United States for a sufficient period of time during the fiscal year to qualify as a resident, he or she would still be subject to U.S. income tax on U.S. source income, and personal services rendered in the United States come within the definition of U.S. source income. 56

The employer is also subject to the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). 57

It is important to note, as well, that state and local income tax, unemployment insurance, disability, and workers' compensation provisions may be applicable to these domestic employees.

V. Procedural Considerations

A. Filing Checklist

1. A-3, G-5, and NATO-7 Servants, Attendants, and Personal EmployeesAlthough the requirement for presentation of a valid passport, various grounds of inadmissibility for a visa and the need to personally appear may be waived for the principal government or international organization representative, these exemptions rarely apply to their servants, attendants, and personal employees in "A" or "G" status. The following should be presented upon a request for visa issuance under the A-3, G-5, and NATO-7 categories:

(a) Passport, valid for six months beyond the date of inspection and admission;

(b) Nonimmigrant Visa Application form (Optional Form 156), signed and dated by the applicant with one passport-sized photograph attached;

(c) Proof of the servant's continued employment and evidence of the employer's status; and,

(d) An employment contract which guarantees the minimum or prevailing wage, whichever is greater (with no more than a "reasonable" deduction for food of lodging); contains a promise by the employee not to accept any other employment while working for the employer; contains a promise by the employer not to

withhold the employee's passport; and contains a statement indicating that both parties understand that the employee cannot be required to remain on the premise after working hours without compensation.

2. B-1 Domestic and Personal Servants of U.S. Citizens Temporarily Residing Abroad

(a) Passport (valid for at least six months beyond the date of inspection and admission);

(b) OF-156 (Nonimmigrant Visa Application Form) signed and dated by the applicant, with one passport-sized photograph attached;

(c) Letter from the U.S. citizen's employer confirming that he or she is subject to frequent international assignments lasting two years or more and that the current assignment will not exceed four years; and,

(d) Employment contract, confirming all details of employment, signed and dated by both the U.S. citizen employer and the servant and specifically providing for:

payment of the prevailing or minimum wage for an eight hour work day, whichever is greater;
vacation and any other benefits normally required for U.S. domestic workers in the area of employment;
free room and board;
payment of round-trip airfare by the employer;
a minimum of two weeks notice to the servant if employment is terminated; and,
requiring no more than two weeks notice by the servant.

(e) Letter from the U.S. citizen confirming that the servant has been employed for at least six months prior to his or her admission to the United States or that the U.S. citizen has regularly employed a domestic servant in the same capacity as that intended for the applicant and that the applicant possesses at least one year of experience as a personal or domestic servant.

(f) If the required six months of preexisting employment between the employer and servant does not exist, the servant must furnish letter(s) of experience documenting one year of prior experience as a domestic or personal servant.

(g) Proof of a foreign residence abroad which the servant has no intention of abandoning.

3. B-1 Domestics and Personal Servants of Nonimmigrants

(a) Passport (valid for at least six months beyond the date of inspection and admission);

(b) OF-156 (Nonimmigrant Visa Application Form) signed and dated by the applicant, with one passport-sized photograph attached;

(c) Employment contract, confirming all details of employment, signed and dated by both the employer and the servant and specifically providing for:

payment of the prevailing or minimum wage for an eight-hour work day, whichever is greater;
free room and board; and,
the employer will be the only provided of employment to the servant;

(Note that, although the requirements are stated somewhat more liberally for employees of nonimmigrants than for employees of U.S. citizens, it is advisable that all elements of the employment relationship, including benefits, vacation, and notice, be addressed in this contract.)

(d) Letter from the nonimmigrant employer confirming that the employer- employee relationship existed for at least one year prior to the principal admission to the United States OR that the employer has regularly employed (year-round or seasonally) personal or domestic servants over a period of several years and that the servant has at least one year of experience as a personal or domestic servant;

(e) It is useful to provide evidence of the nonimmigrant employer's status, such as copies of his or her visa and I-94, and confirmation of his or her employment on temporary assignment if an employment-based visa is held by the nonimmigrant employer; and,

(f) Proof of a foreign residence abroad that the servant has no intention of abandoning.

B. Employment Authorization

1. A-3, G-5, and NATO-7 are authorized to be employed incident to status but only with the employer upon which the admission was based. They do not require EADs.

2. B-1 domestic servants must obtain EADs under current INS regulations.

C. Time Limits/Time Frames

1. A-3, G-5, and NATO-7 aliens are admitted for an initial period of three years and may be granted extensions of stay in increments of not more than two years. Extension requests are filed on Form I-539 with $120 fee and must be accompanied by a statement signed by the employing official stating that he or she intends to continue to employ the applicant and describing the type of work the applicant will perform.

2. B-1 aliens may be admitted for an initial period of one year, but may only be granted extensions of stay in increments of six months. Extension requests are made on Form I-539 with $120 fee and should be

supported by a letter from the employer confirming the employment, copies of employer's visa and Form I-94, and a copy of the alien's Form I-94.

D. Dependents

The term "immediate family" as used in the A, G, and NATO classification includes more than just the "spouse and minor children" who generally enjoy derivative status under other nonimmigrant categories. According to 22 CFR §41.21(a)(3), "immediate family" means the "spouse and unmarried sons and daughters, whether by blood or adoption, who are not members of some other household, and who will reside regularly in the household of the principal alien." As individually authorized by the Department of State, "immediate family" may also include relatives recognized as dependents by the sending government. As defined in 8 CFR §214.2(a), (g), and (s), "dependents" of A-1, A-2, G-1 through G-4, and NATO-1 through NATO-6, aliens may be eligible for employment authorization under bilateral employment agreements and informal de facto reciprocal arrangements. However, the dependents of A-3, G-5, and NATO-7 aliens are not eligible for employment authorization.

Neither the INA nor the regulations address visa issuance to, or admission of, family accompanying a B-1 domestic servant. However, 9 FAM §41.31, Note 11.4 provides that B-2 visas may be issued to dependents of nonimmigrants who are not entitled to derivative status. Accordingly, under appropriate circumstances, a dependent of a B-1 domestic servant should not be precluded from making a B-2 application.