

Immigration Insights

With 2008 underway, here are the hot topics that our clients and friends will want to know about. Additional U.S. immigration-related information is available at <http://immigration.dinslaw.com/>

NEW H-1B FILING SEASON BEGINS (AND PROBABLY ENDS) ON APRIL 1, 2008 – START NOW!

by Douglas Halpert, Esq.

Many of our clients file H-1B (specialty occupation) work visa petitions for foreign national employees in a wide variety of professional occupations and fields. Typical H-1B beneficiaries are graduates of U.S. universities, graduates of foreign universities, and those whose combined education and experience are equivalent to a U.S. bachelor's degree.

If your organization has an employee in F-1 visa practical training status or in J-1 exchange visitor status, or if there are professional candidates you've been considering hiring from another employer or from abroad, now is the time to act. Starting April 1, 2008, U.S. Citizenship and Immigration Services ("CIS") will begin to accept H-1B petitions for Fiscal Year 2009, which begins on October 1, 2009. Last year, CIS received nearly twice as many petitions as there were open slots under in the "regular" quota of 65,000 annual openings, and CIS ran a random lottery to decide which petitioners and beneficiaries would snag a coveted spot. Filing your case with CIS so that you case arrives on April 1, 2008 is imperative.

In addition to the 65,000 "regular" H-1B visas there is an additional allotment of 20,000 visas available to foreign nationals who hold an advanced degrees (master's degree or higher) from U.S. schools. Last year, this 20,000 visa quota was exhausted in less than a month.

Citizens of Singapore and Chile have a special H-1B visa set-aside, and citizens of Australia benefit from a separate E-3 category that operates similarly to the H-1B visa category but has its own quota that thus far has never been reached. Persons who already hold H-1B status and are seeking an extension of H-1B time or a change of employer are not subject to these annual limits.

We suggest that all organizations that have an H-1B candidate they wish to sponsor contact us now to set their case in motion and position it for CIS receipt on April 1st.

TO E-VERIFY OR NOT TO E-VERIFY? THAT IS AN EMPLOYER'S QUESTION

by Lindsay L. Chichester, Esq.

E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment

eligibility of their newly hired employees. U.S. Citizenship and Immigration Services (USCIS) administers the program.

In considering whether an employer participate in the E-Verify program, there are numerous factors that employers should consider before deciding whether or not to participate in this voluntary federal program.

The Pros

The E-Verify program has some notable benefits for an employer. Once an employer registers with the program and signs a Memorandum of Understanding with DHS, the employer then has the ability to electronically verify the name and employment eligibility of newly hired employees. An employer will receive electronic confirmation of the worker's employment eligibility, thereby significantly reducing the likelihood of receiving a "no-match" letter from the Social Security Administration (SSA) or DHS. Furthermore, while the program is currently voluntary, several states have contemplated making participating mandatory, in a stated effort to curb unauthorized employment. Perhaps most importantly, an employer who participates in the E-Verify program and only retains workers who DHS "confirms" are authorized is entitled to a presumption that it has not knowingly hired unauthorized workers, an offense that carries potential civil and/or criminal penalties.

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Led by two Partners who have long been recognized in the field of immigration law by *The Best Lawyers in America* publication, the Dinsmore & Shohl LLP Immigration Group focuses its practice in the area of business immigration law.

The Immigration Group represents a wide range of publicly-traded companies, multi-national corporations, privately-held businesses, universities, research institutions, arts, entertainment and professional sports organizations, professors, and professionals with respect to both work visa and permanent resident (green card) cases.

In addition, the members of the Immigration Group have significant experience in many other areas that companies and other institutions may need help with in regard to the U.S. immigration system, including but not limited to visa applications at United States Consulates, labor certification proceedings before the U.S. Department of Labor, I-9 (Employment Eligibility Verification) compliance, immigration policy formulation, naturalization, family immigration law, and NAFTA immigration issues.

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The Cons

The program also places some significant burdens on the employer. Pursuant to the terms of the Memorandum of Understanding, an employer is limited to accepting for I-9 purposes only those identity documents that include a photograph. Also, if the E-Verify system indicates a final nonconfirmation (a "no match") and the employer continues to employ the worker, there is a reputable presumption that the employer has knowingly employed an unauthorized worker. This fact is particularly concerning in light of the Inspector General to the SSA's December 2006 report which found that 17.8 million discrepancies in the SSA database, with a large number of those errors involving authorized workers. Finally, an employer who participates in E-Verify is obligated to permit the SSA and/or DHS to make "periodic visits" to the employer to review E-Verify related documents, including I-9s.

The Danger of Fraud: The Employer's Continuing Duty to Inspect the Documents Presented

While the E-Verify system may provide an employer with a "match" or "no match" with respect to an employee's name and work authorization, participation in the program does not relieve an employer of its duty to review the documents presented by the new employee and determine (1) if each document appears reasonably genuine on its face and (2) relates to the person presenting it. A growing trend with unauthorized workers is to present a valid social security card and identity document, but the documents do not belong to the worker presenting them. The E-Verify system will likely show a "match," confirming work authorization when in fact the new hire could be an unauthorized worker fraudulent presenting himself or herself as work authorized. Therefore, regardless of participation in the E-Verify program, the employer must remain vigilant to ensure compliance with the laws and inspect the documents presented.

Conclusion

While there is no clear "right" answer, it is important the employers weigh these pros and cons in making a determination regarding participation in the E-Verify program and continue to comply with the legal obligation to review the documents presented by the new employee for sufficiency as part of the employment eligibility verification process.

NEW I-9 FORM IS NOW IN EFFECT

by Lindsay L. Chichester, Esq.

In November 2007, U.S. Citizenship and Immigration Services (USCIS) released a new Employment Eligibility Verification Form I-9 for employers to use in verifying a new employee's employment eligibility. At the same time, USCIS published an updated "Handbook for Employers" that provides instructions to employers in completing the I-9 process. Below are the 9 top things employers need to know about the new Form I-9:

1. THE EFFECTIVE DATE OF THE REVISED FORM IS DECEMBER 26, 2007.

The revised Form I-9 became effective when published in the *Federal Register* on December 26, 2007.

2. THERE ARE NO SUBSTANTIVE CHANGES TO THE FRONT PAGE OF THE FORM

While there were some formatting changes, the text of the front page of the revised I-9 is the exact text of the previous version. To view the revised Form I-9, please [click here](#).

3. THE FORM INCORPORATES PREVIOUSLY-ANNOUNCED CHANGES TO THE LIST OF ACCEPTABLE DOCUMENTS

USCIS has updated the list of acceptable documents to incorporate (1) changes to the list made pursuant to federal regulations aimed at reducing fraud that were published in 1997 but that had not previously been enforced as an act of prosecutorial discretion, and (2) recent versions of USCIS documents.

Five documents that were previously listed as acceptable List A documents have been removed from the Form I-9:

Certificate of U.S. Citizenship (Form N-560 or N-570)
Certificate of Naturalization (Form N-550 or N-570)
Alien Registration Receipt Card (Form I-151)
Unexpired Reentry Permit (Form I-327)
Unexpired Refugee Travel Document (Form I-571)

One document was added to the list of acceptable List A documents:

Newest version of the Employment Authorization Document (Form I-766)

One description of an acceptable List A document was amended:

Replaces "unexpired foreign passport with an attached Form I-94 indicating unexpired employment authorization" with "Unexpired foreign passport with an unexpired arrival-departure record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if the status authorized the alien to work for the employer."

The reason for this change: Certain nonimmigrant visa categories limit employment authorization to a particular employer or category of employers, and the previous language did not make this distinction.

4. EMPLOYERS MAY NO LONGER REQUIRE EMPLOYEES TO PROVIDE A SOCIAL SECURITY NUMBER IN SECTION 1 WITH ONE EXCEPTION

Pursuant to the Privacy Act, employers may no longer require that an employee provide his or her social security number in section 1 of the Form I-9. As an exception to that rule, if an employer participates in USCIS's E-Verify program, the employer may require a social security number. To view the Handbook for Employers which addresses this change and outlines the USCIS's E-Verify program, please [click here](#).

5. PARTICIPATION IN E-VERIFY RESTRICTS THE LIST B DOCUMENTS AN EMPLOYER MAY ACCEPT

If the employer participates in the E-Verify program, then the List B document provided by an employee must bear a photograph of that employee.

6. THE RECEIPT RULES FOR I-9 DOCUMENTS ARE MORE CLEARLY SPELLED OUT

The receipt rules discussed in USCIS's 2005 publication "The Form I-9 Process in a Nutshell" have been clearly set out to apply in three instances:

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Replacement Receipts for Lost, Stolen or Destroyed Documents
Permanent Resident Receipts
Asylee/Refugee Receipts

7. USCIS HAS PROVIDED MORE DETAILED GUIDANCE ON ELECTRONIC RETENTION

USCIS has outlined requirements for electronic storage and retention of Form I-9s and has provided guidance for an employer's obligation with respect to making their electronic records available upon a request by a federal agency to review the retained forms.

8. USCIS HAS PROVIDED MORE DETAILED GUIDANCE REGARDING UNLAWFUL DISCRIMINATION IN THE HIRING AND I-9 PROCESS

USCIS has outlined the various causes of action for employment-based discrimination under the Immigration and Nationality Act and Title VII with respect to recruitment, hiring, and the I-9 process. USCIS has also provided tips to avoid discrimination in those processes.

9. FOR REVERIFICATION, EMPLOYERS SHOULD USE THE REVISED FORM I-9

If an employer must reverify an employee's authorization to work, the latest revised Form I-9 should be used. USCIS recommends taking the revised form, writing the employee's name in section 1, completing section 3, and retaining the reverification with the original Form I-9.

ALERT FOR EMPLOYERS WITH WORKSITES IN ARIZONA

by Douglas Halpert, Esq.

As many readers now, Arizona enacted legislation last year which was to take effect on January 1, 2008 and which instituted perhaps the toughest business-related penalties on any employers in the country. The law gives the state government the power to suspend or revoke the business licenses of companies that intentionally or knowingly employ unauthorized workers. Under the Arizona law, employers must use the E-Verify system that we write about in a separate article in this newsletter. To date, a number of court challenges seeking to block the legislation from taking effect have failed. If your organization does business in Arizona, you should contact your legal counsel to find out more about this new law and what your company should do to ensure that it is in compliance with it.

CONSULAR PROCESSING UPDATE

by Douglas Halpert, Esq.

Our clients should be aware of several important developments regarding the visa application process at U.S. consulates and embassies around the world.

The U.S. Department of State ("DOS") has raised the standard, machine-readable visa application fee from \$100 (U.S.) to \$131 (U.S.).

DOS launched a new Petition Information Management Services ("PIMS"), by which U.S. Citizenship and Immigration Services ("CIS") transmits data on all approved work visa petitions to DOS' Kentucky

Consular Center ("KCC"). KCC then uploads the key information such as the petition, supporting documents, and beneficiary's identification documents into PIMS. When a foreign national later applies for a U.S. visa such as an H-1B or L-1 or O-1 visa, the U.S. consulate or embassy is able to access PIMS and see this data. The idea is to enable consular officers to better spot fraud, violations of status or other adverse information and to make more informed decisions on visa applications. The positive of this new system is that DOS may phase out the requirement to bring the original CIS petition "Approval Notice" as well as supporting documents to a visa interview, although bringing such documents is still necessary at this time. The negative is that delays in uploading data will result in delays in visa issuance. As always, we encourage our clients to plan a visa application months in advance, and leave some "buffer time" after the interview to allow for a modest delay in visa issuance if it occurs so as to still be able to make the planned flight back to the United States.

PERM LABOR CERTIFICATION AUDITS ARE RISING

by Douglas Halpert, Esq.

The U.S. Department of Labor ("DOL") launched the new system of processing labor certifications, known as PERM, in March 2005. After many problems in administering the new system, DOL worked out most of the kinks and the program has functioned relatively well for the past two years. The number of audits was relatively quite modest over the past few years. However, starting in the fourth quarter of 2007, DOL started auditing a much higher volume of cases. DOL has just released statistics showing that 44% of all cases are under audit review. This is a dramatic increase and DOL is obviously testing system integrity and seeking to combat fraud. DOL has the ability to cross-reference cases in its system for an employer quite readily. Therefore, employers should be certain that if they file cases for an occupation with the same location with different skill sets, that there is a justification for doing so, such as markedly different job duties or duties performed at a significantly different level. Employers should also recognize that skill sets that require education and experience beyond the DOL's very "modest" O*Net standards for education and experience are very likely to be audited right now and that DOL will expect to see a business necessity justification.

DHS' NEW BORDER CROSSING PROCEDURES EFFECTIVE ON JANUARY 31, 2008

by Douglas Halpert, Esq.

DHS now requires all travelers who enter the United States through land and sea ports to document their citizenship. This means that United States, Canadian and Bermudan citizens must present evidence of citizenship (such as a passport OR a birth certificate and photo identification) to enter the U.S. Persons, including U.S. citizens, who fail to carry one of these alternate sets of acceptable documents face a possible denial of entry and delay in being able to re-enter the United States.