Immigration Law Update: Winter 2009

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Compliance with I-9 Employment Eligibility Verification
Under the Immigration Reform and Control Act of 1986 (IRCA), every U.S. employer is required to verify the identity and work authorization status of each paid employee through the completion of the I-9 Employment Eligibility Verification form.

The I-9 form has three parts. Section one includes the employee's biographical information and certification that the employee is authorized to work in the United States. In the second section, the employer verifies which documents the employee presented to prove his or her identity and right to work, and confirms that the paperwork was completed in a timely manner. The third section is for employers who must periodically update the form if their workers are not authorized to permanently work in the United States.

Employees must document proof of their identity and work authorization. Some of these documents, such as a U.S. passport or green card, can prove both identity and work authorization. Other documents, such as a driver's license, prove identity only, while others, such as a Social Security card, prove work eligibility (unless the card states the holder is not authorized for employment). Employers cannot tell employees which documents they must present.

Persons transferring within a company are not required to complete an I-9 form, but the easiest practice is usually to complete a new I-9 form rather than having to document that the I-9 form was done previously. Employees rehired by a company need not complete a new I-9 form as long as they resume work within three years of completing the initial I-9 form. Also, it is not necessary to complete a new I-9 after the following:

- An employee completes paid or unpaid leave
- A temporary layoff
- A strike or labor dispute or
- Gaps between seasonal employment

The I-9 process must start the day an employee starts work. The employee must complete the first section of the I-9 form and must provide the supporting documents within three days of the date of hire. If the documents are not presented by that point, the employee must be removed from the payroll. While it is possible to require employees to complete the I-9 form before the first day of employment, employers should be cautioned that the form elicits information about one's national origin, and a decision not to hire a worker could trigger a discrimination claim. To the extent an employer chooses to have I-9s completed before the date of hire, they should only be requested after the employee has accepted the position, and there should be a uniform policy applicable to all employees receiving an offer of employment that they must complete the I-9 ahead of time.

Employers must keep I-9 forms for all current employees. For terminated employees, the form must be retained for at least three years from the date of hire or for at least one year after the termination date, whichever occurs later.

The work status of employees who are not U.S. citizens or legal permanent residents has a specific end date. For these employees, employers must note the expiration of the status on Form I-9 and then must pull Form I-9 before the expiration date and re-verify that the worker's status has been extended.

When businesses merge, in some cases the I-9s for an acquired company are rendered invalid. If the acquiring company does not assume all of the assets and liabilities of the acquired company, then the I-9s likely will not transfer.

Employers should consider adding I-9s to a merger checklist and have all employees of the combined company complete I-9 forms on the day of closing or beforehand. In any case, an immigration lawyer should be consulted in any merger, acquisition or divestiture to ensure that the transaction does not result in immigration problems.

Employers can face stiff penalties for IRCA violations, including fines and being barred from government contracts. Penalties can be imposed for hiring unauthorized workers and for committing paperwork violations, even if all workers are authorized to work. Employers should also be cautioned that knowingly accepting fraudulent documents from employees is a crime prosecuted under immigration law.

Employers can minimize the chances of violating IRCA by undertaking several steps:

1. Conduct an internal audit of I-9 files to see if there are violations.
2. Establish a training program for human resource (HR) professionals regarding I-9 compliance rules.
3. Establish uniform company policies regarding I-9s.
4. Establish a re-verification system to ensure I-9s are checked in a timely manner.

5. Centralize the I-9 record keeping process.
6. Establish a process for HR professionals to check with counsel when there are problems in the verification process.
7. Establish a backup system to ensure timely compliance with I-9 rules when an HR professional is out of the office.

Q-1 Visas for International Cultural Exchange Visitors

The Q-1 nonimmigrant visa is designed for foreign nationals who are coming to the United States to participate in an international cultural exchange program. Under the Q-1 visa, foreign nationals can engage in practical training and employment so long as they are also sharing the history, culture and traditions of their home countries.

The first requirement in obtaining a Q-1 visa is for the employer to obtain approval of its international cultural exchange program from the U.S. Attorney General. To obtain approval, the program must meet the following requirements:

- It must take place in a school, museum, business or similar location where the public, or at least the interested public, can be exposed to aspects of a foreign culture as part of a structured program
- The program must include a cultural component as an essential part of the cultural visitor's training or employment
- The program cannot provide for employment or training independent of the cultural component

Program approval is sought by filing Form I-129 along with the Q Supplement. The application must be accompanied by documentation of the program. There must also be evidence that the employer has designated a management-level employee to administer the program and act as a liaison to U.S. Citizenship and Immigration Services (USCIS). The application should be filed at the Vermont Service Center, but it will be processed at the California Service Center.

The employer must also meet a number of other requirements. It must be engaged in the active conduct of business in the United States. It must also attest that it will pay the foreign national the same wages it would pay a U.S. worker in the area, demonstrate that it has the financial ability to pay the offered wage and attest that it will provide the same working conditions provided to U.S. workers in the area. However, there is no need to file the attestation with the U.S. Department of Labor.

The application for Q-1 visa classification is made simultaneously with the request for program designation. After the program is approved, subsequent applications can be made with a copy of the original program approval. More than one person can be included on the same petition.

Also, substitutions can be made during the program, but the new person's period of stay is limited to the terms of the originally approved petition. A substitution does not need to be filed with the USCIS, but can be done by a letter to the consular office where the replacement will apply for a visa.

The letter must provide all of the pertinent information on the foreign national and include a copy of the original approval notice. The person who will receive Q-1 status must meet the following requirements:

- Be at least 18 years old
- Be qualified to perform the service or receive the type of training listed in the application
- Be able to communicate with the U.S. public about the cultural aspects of his or her home country.

Applicants who have previously been granted Q-1 status must remain outside the United States for one year before again being granted Q-1 status. If the cultural program involves multiple locations, a complete itinerary must be provided. The Q-1 program designation is approved either for the length of the program or 15 months, whichever is shorter. The person is also given 30 days after the expiration of the visa in which to make travel plans for departure from the United States.

People in Q-1 status are allowed to apply for a change of status within the United States. They can also, while remaining in Q-1 status, switch employers by filing a new application. However, the total stay in the United States is still limited to 15 months.

Finally, while there is no derivative status for dependents of people in Q-1 status, the U.S. State Department Foreign Affairs Manual states that dependents should be granted B-2 visas for the duration of the visa-holder's stay in the United States.

The US-VISIT Process

US-VISIT is intended to help secure U.S. borders and facilitate the entry and exit process for foreign visitors, while enhancing the immigration system and respecting the privacy of foreign visitors. With a few exceptions, all visitors entering the United States must submit to the screening process, or they will be denied entry into the United States. This also applies to those traveling under the Visa Waiver Program. Exceptions to the US-VISIT process include

- Visitors admitted on an A-1, A-2, C-3, G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 or NATO-6 visa
- Children younger than 14 years of age
- Persons older than 79 years of age
- Classes of visitors the Secretary of State and the Secretary of Homeland Security jointly determine are exempt

- An individual visitor the Secretary of State and the Secretary of Homeland Security or the Director of the Central Intelligence Agency jointly determine is exempt
- Taiwan officials who hold E-1 visas and members of their immediate families who hold E-1 visas

Canadians are also exempt from US-VISIT, unless they are applying for admission with a nonimmigrant visa, are renewing a multiple-entry I-94 or have dual nationality and use their non-Canadian passport to gain admission to the United States. Those with Canadian permanent residence are not considered to be Canadian citizens and therefore are not exempt from US-VISIT.

US-VISIT works through the collection of fingerprints and a photograph, known as biometrics. When an applicant applies for a visa at a U.S. consulate abroad, electronic fingerprints and a photograph are taken and checked against a database of known criminals and suspected terrorists. Upon arrival at a U.S. port of entry, these same biometrics are collected again and compared to verify that the person entering the United States is the same person who received the visa.

Biometric identifiers are used to protect visitors from identity theft if their travel documents are stolen or duplicated. The identifiers also make the security system more effective than a database of names alone.

According to the Department of Homeland Security, visitors' travel data is securely stored and made available only to authorized officials and law enforcement agencies on a need-to-know basis in order to protect U.S. citizens and visitors from those who intend harm.

V Visas for Spouses and Children of Permanent U.S. Residents

The Legal Immigration Family Equity (LIFE) Act of 2000 established the V nonimmigrant visa category that allows the spouse or child of a U.S. lawful permanent resident (LPR) to live and work in the United States. The spouse or child can remain in the United States while waiting to adjust to LPR status instead of having to wait outside the United States.

A person may seek a V-1 or V-2 nonimmigrant visa if the person

- Is married to an LPR (V-1) or is the unmarried child (younger than 21 years of age) of an LPR (V-2)
- Is the principal beneficiary of a relative petition filed on or before December 21, 2000
- Has been waiting at least 3 years after filing for status as an LPR but is still awaiting resolution of his or her petition
- The derivative child of a V-1 or V-2 nonimmigrant may apply for V-3 visa status.

Applicants outside the United States apply at the consulate or embassy in their home countries. If the applicant is in the United States, he or she files Form I-539, Application to Change Nonimmigrant Status and Supplement A.

The applicant must also submit the appropriate filing fee, which, if the applicant is between 14 and 79 years of age, includes a fingerprinting fee. Applicants must also submit the results of a medical examination on Form I-693. All forms are filed together at U.S. Citizenship and Immigration Services (USCIS), P. O. Box 7216, Chicago, IL 60680-7216.

Persons in V-1, V-2 or V-3 status are eligible to apply for a work permit on Form I-765 (Application for Employment Authorization). Those who obtain a V nonimmigrant visa from a consular office abroad may travel outside the United States as long as they continue to possess a valid V visa and remain eligible for V status. Those who receive V nonimmigrant status in the United States from USCIS need to obtain a V visa from a consular office abroad in order to be inspected and admitted to the United States as a V nonimmigrant after traveling abroad.

**If you have any questions regarding the topics covered in these articles or have other questions related to immigration law, please contact Mark Mathison or Casey Nolan.*