Immigration Law Update: Summer/Fall 2009

September 3, 2009

This Immigration Law Update highlights several recent changes in the area of immigration law.

THE LATEST VERSION OF THE I-9 FORM

Employers should make sure they are using one of the most current Form I-9s for new hires. United States Citizenship and Immigration Services (CIS) announced on August 27, 2009 that they have amended the Form I-9, Employment Eligibility Verification, to reflect a new revision date of August 7, 2009. Employers may use the Form I-9 with the revision date of either Aug. 7, 2009 or Feb. 2, 2009. The revision dates are located on the bottom right-hand corner of the Form.

CIS also recently updated the Handbook for Employers - Instructions for Completing Form I-9. To view this handbook, please visit the USCIS website.

DHS AFFIRMS THE E-VERIFY RULE FOR FEDERAL CONTRACTORS AND BACKS AWAY FROM THE NO-MATCH REGULATION

On July 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced that DHS will soon award federal contracts only to employers who use the E-Verify System to check employees' work authorization. Secretary Napolitano also announced that the Department intends to rescind the Social Security No-Match Rule, in favor of the more modern and effective E-Verify System. For the full press release, please see: http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm.

E-Verify is a free, web-based system operated by the U.S. Citizenship and Immigration Services office of DHS in conjunction with the Social Security Administration (SSA) that compares information provided by the employee on the Employment Eligibility Verification Form (I-9) against records contained in government databases to verify an individual's employment eligibility. Currently, the authority for the E-Verify program is set to expire on September 30, 2009, but it is expected that Congress will extend the program under the final version of the Homeland Security Appropriations bill.

On September 8, 2009, after multiple delays, the federal government is expected to implement an executive order and corresponding amendments to the Federal Acquisition Regulation ("FAR") issued during the Bush administration that require certain federal contractors and subcontractors to use E-Verify. Implementation was initially delayed because of a lawsuit filed by the United States Chamber of Commerce and other labor groups challenging the implementation of the rule, which lawsuit was dismissed by a federal district court in Maryland on August 25, 2009. However, the plaintiffs have now appealed the district court's decision and so it is possible that implementation of FAR may once again be delayed.

FAR will apply to all prime federal government contracts (including contracts for receipt of funds under the American Recovery and Reinvestment Act) that exceed $100,000 except if: (1) the period for performance is less than 120 days; (2) the contract pertains to work that will be performed outside the United States; or (3) it involves commercially available off-the-shelf (COTS) products or related services. Previously awarded indefinite supply or service contracts with more than six months outstanding as of the effective date of the rule will also be affected by FAR if the remaining performance or number of orders under the contract is substantial. FAR will also apply to construction and service subcontracts that are necessary to the performance of a prime federal contract that contains an E-Verify clause if the value of the subcontract exceeds $3,000. Contractors that enter into subcontracts covered by FAR must include the E-Verify requirements in the subcontracts. Within 30 days of the contract award date, covered contractors will need to enroll in E-Verify. The rule allows for a 90 day implementation period for completing the verification process of all current employees who will be working on the contract and to begin using the E-Verify System for newly hired employees. Contractors have the option of verifying employment eligibility of all of their existing employees. However, a contractor that is an institution of higher education, a state or local government or the governing body of a federally-recognized tribe, or a surety acting under a takeover agreement with a federal agency, is limited to using E-Verify only for existing employees assigned to the contract and all new employees.

Secretary Napolitano also made clear in her announcement on July 8, 2009, that the Obama administration intends to abandon the No-Match Rule and instead promote the use of E-Verify. Accordingly, DHS will propose a new regulation to rescind the 2007 No-Match Rule, which was first promulgated in 2007, but was enjoined by a federal district court in California before it was implemented.

Before September 8, 2009, federal contractors should analyze whether an existing or expected federal contract will be subject to FAR and whether any of their current workforce will need to be verified under the rule. In addition, contractors are well-advised to review and revise, as necessary, their I-9 and E-Verify compliance policies and procedures.

IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) ISSUES NOTICES OF INSPECTION TO EMPLOYERS

On July 1, 2009, Immigration and Customs Enforcement (ICE) announced that it has issued inspection notices for 652 businesses nationwide in order to assess compliance with the targeted companies' Forms I-9, Employment Eligibility Verification. These businesses were selected for inspection through investigative and other leads. Issuance of the inspection notices provide further evidence that ICE is executing its plan to investigate employers suspected of knowingly employing illegal workers that it announced in April. ICE declared that their new initiatives illustrate their "increased focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce."

Employers must complete and retain a Form I-9, Employment Eligibility Verification, for each employee hired in the U.S. Employers must review and record the employee's identity documents to confirm their employment eligibility and confirm that the document(s) reasonably appear to be authentic and relate to the employee.

Employers are allowed by law at least three days notice prior to an inspection of their Forms I-9. The notice can be written or oral. Employers may request additional time before the audit. The DHS or DOL may obtain¬ warrants based on probable cause for entry onto the premises of suspected violators without advance notice.

A REVISED J-1 VISA EXCHANGE VISITOR SKILLS LIST IS RELEASED

The Department of State has published the 2009 J-1 Visa Exchange Visitor Skills List, which revises and updates the 1997 Exchange Visitor Skills List. Individuals who enter the United States with a J-1 visa who are engaged in one or more of the fields of specialized knowledge listed on the Exchange Visitor Skills List are subject to the two-year foreign-residence requirement of Section 212(e) of the INA, as amended. This provision mandates that certain J-1 visa holders return to their home country for two years at the end of their exchange visitor program.

The revised list was published in the Federal Register (Volume 74, Number 82) on April 30, 2009 and became effective on June 28, 2009. Exchange visitors who entered the United States on a J-1 visa prior to June 28, 2009 shall continue to be governed by the 1997 Exchange Visitor Skills List, as amended, only if their country remains on the revised 2009 list. If a person is an exchange visitor whose country was removed from the revised 2009 Skills List, he/she is retroactively not subject to the two-year home residence requirement based on the Exchange Visitor Skills List, even if he/she entered the United States prior to the effective date.

Residents of countries who remain on the revised 2009 Skills List and who obtained a J-1 visa based on a previous skills list remain subject to Section 212(e) of the INA. This is true even if his/her country has removed that skill from the revised 2009 Skills List. Exchange visitors are subject, based on the skills list that was in effect when they first obtained the J-1 visa.

H-1B VISA NUMBERS FOR FISCAL YEAR 2010 STILL AVAILABLE

Are you contemplating filing an H-1B Petition for a current or potential employee? On August 14, 2009, USCIS announced that it has received approximately 45,000 cap-subject petitions that were counted towards the 65,000 cap. Additionally, USCIS accepted roughly 20,000 petitions for persons who qualified for the advanced-degree professional exemption. USCIS will continue to accept cap-subject petitions and advanced-degree petitions until the statutory limits have been reached.

TRAVEL ALERT - REASONS FOR OBTAINING AN ADVANCE PAROLE TRAVEL DOCUMENT BEFORE TRAVELING ABROAD

USCIS urges individuals to note that they must obtain Advance Parole from USCIS before traveling abroad if they have:

- been granted Temporary Protected Status (TPS);
- a pending application for adjustment of status to lawful permanent resident;
- a pending application for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA 203);
- a pending asylum application; or
- a pending application for legalization.

In order to receive an Advance Parole Travel Document, individuals must file Form I-131, Application for Travel Document, which may be found under "Immigration Forms" on USCIS' Web site.

Advance Parole grants a person permission to re-enter the United States after traveling abroad. Under current immigration law, certain individuals must apply for a travel document and have Advance Parole approved before leaving the United States. Severe consequences may result if a person attempts to re-enter the United States without prior authorization, as individuals requiring advance parole may be unable to return to the United States and their pending applications may be denied or administratively closed.

Individuals planning travel abroad should plan in advance, since the estimated processing time for an advance parole travel document is about 90 days, depending on the USCIS office location. Instructions for filing Form I-131 provide details on where to mail travel document applications and should be followed carefully to avoid delay.
