GT GreenbergTraurig

Immigration Observer

June/July 2009

In This Issue:

E-Verify

On June 8, 2009, the House Homeland Security Appropriations Subcommittee unanimously approved a fiscal year 2010 spending bill for the Homeland Security Department. This bill includes a provision that would extend the E-Verify program through 2011 and provide the president's requested $112 million. The Senate Appropriations Committee has approved a bill that would give E-Verify the three-year extension that President Barack Obama requested, and $118.5 million. E-Verify is an electronic employment eligibility verification system created in 1996 that allows employers to verify the legal status of employees. Currently the program is scheduled to expire on October 1, 2009, when fiscal year 2010 begins. However, it is anticipated that the program will be reauthorized. A longer extension will be debated and used as a bargaining chip during the upcoming comprehensive immigration reform debates. E-Verify is supported by Secretary of Homeland Security, Janet Napolitano.

Current users of the program recently learned about United States Citizenship and Immigration Services' (USCIS) intention to use a new system to monitor the use of E-Verify. The new system, Compliance Tracking and Management System (CTMS), collects and uses information necessary to support monitoring and compliance activities for researching and managing misuse, abuse, discrimination, breach of privacy, and fraudulent use of USCIS Verification Division's verification programs, the Systematic Alien Verification for Entitlements (SAVE) and E-Verify."[1] To learn more about the new tracking and monitoring by USCIS, please review the full alert, Monitoring and Compliance Stepped Up in E-Verify Program. The decision to enroll in the E-Verify program should not be made lightly. It remains a best practice for those companies that want to take additional steps in verifying the employment eligibility of their employees. It does not however, effectively combat identity

[1] Department of Homeland Security, *Privacy Impact Assessment for the Compliance Tracking and Management System.* May 22, 2009

theft. Remember, prior to participating in E-Verify, an I-9 audit conducted by competent counsel should be completed. All corrections can be made, issues identified and new processes and protocols developed. Remember with the new CTMS in place, employers need to ensure that the house is clean before you invite the government in.

Worksite Raids & the Melting of ICE

Is there really significant change taking place within the Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security, or is the old policy just being repackaged? Recently confirmed as Assistant Secretary for ICE, former federal prosecutor John T. Morton has taken the helm and indicated he intends to move forward with worksite enforcement. Soon after stepping into his new post, Mr. Morton announced a transformed strategy for all future ICE worksite enforcement actions. Rather than raiding worksites and targeting workers, Mr. Morton favors a more comprehensive approach of rigorous civil fines against employers as well as carefully utilizing additional tools to ferret out criminal behavior. For more detailed information on these new ICE worksite strategies, read the GT Alert by Dawn M. Lurie.

Criminal prosecution of employers will continue to be a priority. Recent employer indictments are evidence of this ongoing trend. For example, on May 27, 2009, the Department of Justice announced the indictment of twelve individuals in Kansas City, Missouri, on Racketeer Influenced and Corrupt Organizations Act (RICO) charges involving labor racketeering, forced labor trafficking, immigration and other violations in 14 states. The defendants allegedly used false information to acquire fraudulent work visas for the employees, who worked in hotels and other businesses across the country. Many of the employees were allegedly victims of human trafficking, who were coerced to work, in violation of the terms of their visas, without proper pay and under the threat of deportation.

To view the full indictment, visit: http://www.usdoj.gov/usao/mow/news2009/giantlabor.ind.htm

And earlier this June, two Atlanta individuals pled guilty in federal district court to conspiracy to encourage and induce foreign nationals to reside unlawfully in the United States, to manufacturing immigration and government identification documents, and to making false statements under oath following ICE investigation.

Please read our GT Alert for further details: \\gt-web01\inetpub\gtlaw\practices\immigration\news\2009\04\28a.htm

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The New Face of ICE Introduced at the Offices of GT

On May 28, 2009, Greenberg Traurig hosted "Worksite Enforcement Demystified," an event sponsored by the Washington, DC chapter of the American Immigration Lawyers Association. The speakers included Brett Dryer, Worksite Unit Chief for Immigration and Customs Enforcement (ICE); Kevin Sibley, ICE Special Agent for the Washington, DC SAC Office; Julie Myers, former Assistant Secretary of Homeland Security for ICE, and Dawn M. Lurie, Shareholder at Greenberg Traurig.

The speakers confirmed what GT first reported in its May 5, 2009 Alert: "Employers Beware: DHS Announces Refinements and a Shift in Priorities in its Worksite Enforcement Strategy," that ICE namely will increasingly be working with local federal prosecutors in its investigations of employers to bring criminal charges against company owners and managers. Mr. Dryer stated that ICE criminal enforcement teams, in close cooperation with the DOL, will now spend most of their time focusing on investigating employers. He told the audience to expect an increase in I-9 audits and investigations, as well as H-1B and labor certification fraud inquiries. He reported that ICE, which is responsible for enforcement of I-9 compliance, recently hired additional forensic auditors to aid in investigations of employers' I-9 files. Mr. Dryer also explained that ICE investigations would continue in areas related to critical infrastructure and national security, such as airports, power plants, etc.

Mr. Dryer and Mr. Sibley also discussed ICE's closer cooperation with United States Citizenship and Immigration Services (USCIS). Mr. Dryer noted that while USCIS criminal investigations are not part of the agency's mandate, special investigative units have been set up in each of the four USCIS Service Centers to examine petitions for evidence of fraud. The auditors in these investigative units make referrals to ICE, which will then determine whether to contact the appropriate U.S. Attorney for potential criminal prosecution.

The speakers also explained that ICE was generating investigations based on local trends. Examples included increased scrutiny directed at IT consulting companies and labor leasing or labor contracting companies. ICE believes that there is an increasing number of unscrupulous employers who are attempting to avoid responsibility for verifying the employment authorization of workers by contracting with outside vendors. In these situations, ICE will investigate the employer and the labor contracting company.

Mr. Sibley emphasized that any ICE investigation should be taken seriously and that the involvement of ICE often means that the agency believes that fraud is occurring.

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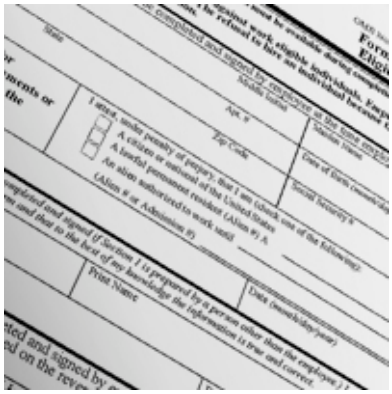
E-Verify Delayed for Federal Contracts - Again!



For the fourth time, the Department of Defense, General Services Administration and National Aeronautics and Space Administration agreed to delay the applicability date of the E-Verify Requirement for Federal Contractors. The new implementation date is now set for September 8, 2009. The Department of Justice had previously delayed implementation of the requirement from January 15, 2009 until February 20, 2009. The date was then pushed back to May 21, 2009, and again to June 30, 2009.

For additional information, please read our GT Alert: \\gt-web01\inetpub\gtlaw\practices\immigration\news\2009\06\01c.htm

DHS Grants Reprieve to Widows of U.S. Citizens

On June 10, 2009, the U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano tackled what is known as the "widow penalty" by granting a two-year reprieve to immigrant widows and widowers of U.S. citizens who were targeted for deportation because their immigration status was not resolved before their spouses died. The affected widows and widowers (and their minor children), who reside in the United States, were married for less than two years prior to their spouses' deaths.

The order is viewed as a welcomed step toward eliminating the widow penalty. However, widows throughout California and the Pacific coastline are already protected by an April 2009 court order in which the Ninth Circuit Court of Appeals sided with the plaintiffs in a ruling that forced the DHS to reopen the cases of certain immigrant widows for whom it had previously denied green cards and sought deportation.

H-1B Cap Numbers Still Available

As of June 19, 2009, approximately 44,5000 cap-subject petitions had been received by United States Citizenship & Immigration Services (USCIS) and counted towards the fiscal year 2010 H-1B cap (October 1, 2009 to September 30, 2010). Approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limits. In past years, the H-1B cap numbers have consistently closed in early April, as the first day for filing H-1B cap petitions for the new fiscal year is April 1st .

This year, USCIS continues to accept H-1B petitions subject to the general cap. Numbers still remain available at this time. However, we recommend filing any new H-1B petitions quickly to ensure that they are filed before USCIS receives the total 65,000 petitions.

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Termination of Foreign Workers: Obligations & Consequences for H-1B Employers

The present condition of the U.S. economy has forced companies to reduce their workforces and undergo restructuring, mergers, and layoffs. As employers experience such adjustments in staff, particular consideration should be given to the termination of foreign workers. It is critical for employers to understand their obligations as well as the consequences for their foreign employees.

What are the Employer Obligations?

The termination of foreign national workers must comply with regulations established by the Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS). Employers of foreign workers should be familiar with their duties and obligations under the law.

The H-1B visa is one of the most commonly used nonimmigrant visas. When H-1B employees are terminated, employers must comply with two important regulations, including mandatory notification to USCIS of the termination, and the offer of return transportation to the employee. Employers should take action immediately upon termination in order to avoid potential penalties or claims against them. Employers should note that although compliance with these two regulations is required, immigration regulations do not provide for sanctions to enforce the provisions against non-compliant employers. The Department of Labor however, can enforce the payment of wages, including back wages for time an employee was not paid while the H-1B and Labor Condition application remain valid.

- Must I Notify the USCIS?

Immigration regulations require an H-1B employer to notify USCIS of "any material change in the terms and conditions of employment" affecting an H-1B employee. A termination would certainly qualify as a material change in the employment relationship, thus requiring the employer to provide USCIS with notification. The employer can satisfy this requirement by sending written notice of the termination to the USCIS office that approved the petition. The addresses for each Service Center can be found on the USCIS website at www.uscis.gov. Following receipt of the notice of termination, USCIS will respond with a notice confirming the revocation of the employee's H-1B petition. This can take several months. Employers should retain these notices as part of the employee's Public Access file. This revocation may pose problems to terminated H-1B employees who remain in the United States to seek other employment.

- What does the Department of Labor Have to do with it?

In addition to USCIS notification, it is recommended that the employer withdraw the Labor Condition Application that was certified by the DOL and filed with the H-1B petition. This does not relieve the company of the requirement to notify the USCIS. DOL regulations require the employer to pay the H-1B employee's wages until notice of a "bona fide" termination is provided to USCIS. In enforcing this regulation, the DOL has taken the position that any evidence of a "bona fide" termination, including a written notice to the employee terminating the employment relationship, is sufficient to end the employer's wage obligation. However, a recent decision by the DOL's Administrative Review Board held that an employer's obligation to pay the offered salary continues through the date the employer provides USCIS with notice of the termination. Employers who do not satisfy the two requirements run the risk of being held liable to provide back-pay and/or front-pay to the employee through the expiration date of the H-1B period of stay.

- You Have to Pay for Return Airfare for the Employee

If an employer terminates an H-1B employee before the end of that employee's period of authorized stay, the employer is liable for the "reasonable costs" of return transportation to the employee's last country of residence. Immigration statutes and regulations suggest that the employer's liability is limited to the reasonable cost of physically returning the H-1B employee to the home country, and does not extend to the employee's family or dependents. More importantly, the liability does not extend to H-1B employees who voluntarily end their employment. A first class ticket to their country of choice is not required.

As with the previous regulations, USCIS lacks the statutory and regulatory mechanism to enforce this obligation. However, it is regarded as a private contractual matter that may be pursued individually by the H-1B worker. Should the terminated H-1B employee elect to remain in the U.S., the statute does not obligate employers to provide costs of return transportation. Yet the DOL considers the payment of these costs to be a normal incident of a "bona fide termination." As a safeguard, employers may wish to provide terminated H-1B employees with a sum approximating the reasonable cost of return transportation and obtain a written release from the employee. Alternatively, an employer may provide the employee with a return ticket within a reasonable period after the termination date. The latter option would evidence the employer's good faith effort to satisfy regulatory obligations. All offers should be made in writing. Again, employers should retain proof (inside the Public Access File) of offering the terminated employee the reasonable cost of return transportation home as part of its records of compliance with regulations.

- What About Re-Hired Employees?

Important implications exist for the H-1B employee who is terminated and then subsequently rehired. An employer may need to rehire an employee when the initial termination was caused by clerical error or other individual circumstances. USCIS takes the position that an H-1B petition is valid until revoked. Thus, a terminated H-1B employee whose petition has not been revoked may immediately return to work for the same employer without filing a new H-1B petition. In contrast, the DOL's position is that failing to file a new petition suggests that no "bona fide" termination occurred, thus making the employer liable for wages covering the entire period between

"termination" and "rehire." Again, employers should maintain careful records of terminations in the event that the DOL questions the timing of the termination.

Consequences & Options for the Employee

The immediate consequence to the terminated H-1B employee is the loss of legal immigration status in the United States. This is because the H-1B classification is employer-specific and employment is only authorized with the approved employer. Consequently, as of the termination date, the employee is no longer considered to be in lawful immigration status.

- No Grace Period

There is no "grace period" for the terminated employee or his or her family and current dependents. Although the USCIS has proposed a 60-day grace period during which an H-1B worker may seek new employment, that proposal has not been approved. USCIS policy is that periods during which an H-1B employee receives severance payments or remains on the employer's payroll without reporting to work are not considered periods of valid status for an H-1B nonimmigrant. There may be room for challenging this position.

- Available Options

The options available to terminated H-1B employees are to immediately find a new employer to sponsor them, obtain a different status, or depart the United States. Technically, H-1B employees who remain in the U.S. after termination without changing status are in violation of their status and thus are not allowed to change, amend, or extend their status. However, USCIS may exercise discretion, on a case-by-case basis, in deciding whether to approve a request to change, amend, or extend the status of an out-of-status nonimmigrant. If the out-of-status period is very short (10 days or less), then a request to change, amend, or extend status will usually be approved. Terminated H-1B employees should consider changing to B-2 (tourist status) to wrap up personal affairs after the loss of their jobs.

- Porting to a New Employer

Portability rules allow an individual in H-1B status to begin working with a new H-1B employer as soon as the new employer files a petition with the USCIS to reflect the new employment. The new petition must be "non-frivolous" and it must be filed before the "date of expiration of the period of stay." USCIS has not clarified exactly when the expiration of the period of stay occurs. Notably, the same language has been interpreted in other contexts to refer to the expiration date on the individual's I-94 form and not when the individual falls out of status.

- Terminated Employees with Pending I-485 Applications

Careful consideration should be given to terminated foreign national employees who have a pending employment-based I-485 Application for Adjustment of Status (AOS). The consequences of the termination can be detrimental,

depending on whether the termination occurred when the I-485 application had been pending for more than 180 days, or for 180 days or less, and whether or not the underlying I-140 petition is pending or approved.

Generally, terminated H-1B employees with a pending I-485 application can port, or change employers, without invalidating their I-140 petition or having their I-485 application rejected, provided that:

- the new position is in the same or similar occupation, and
- the I-485 application has been pending for more than 180 days.

But if the termination or change of jobs occurs when the I-485 application has been pending 180 days or less, then the underlying I-140 and I-485 applications will be denied. Employers should also consider whether the underlying I-140 petition is pending or has been approved. With an appeal, there is a strong possibility that something could go wrong. When faced with such scenarios, employers should immediately contact their immigration attorney to assess the options, obligations, and resulting consequences.

Compliance with immigration law is a complicated but important requirement for companies hiring foreign workers. Employers may be subject to lawsuits initiated by terminated employees rendered out-of-status as a result of the company's failure to properly terminate the employee and submit the necessary documentation to USCIS and the DOL. A thorough understanding of relevant laws and diligent follow-through with terminated employees is essential to reducing a company's exposure to liability.

July 2009 Visa Bulletin

The employment-based first preference (EB-1) category remains current for all chargeability areas. As expected, the third employment-based preference category (EB-3) will remain unavailable for all countries and waiting periods for all other employment-based categories will be unchanged.

The July 2009 priority date cut-offs for the first three employment-based categories are:

EB-1: Current for all countries.

EB-2: China and India – January 1, 2000. All other countries are current.

EB-3: Unavailable for all countries.

If a category is designated as unavailable, the annual quota of immigrant visas has been met and immigrant visas are no longer available in that category. Note that categories may become unavailable in the middle of a month, but it is rare.

The availability of visas is published based on data collected from consular officers and U.S. Citizenship and Immigration Services (USCIS). Both are required to report to the Department of State the number of foreign

nationals who qualify for immigrant visas in the different categories. The bulletin indicated that USCIS made allocations for the demand received by June 8, 2009. Where the demand exceeded the available number of immigrant visas within a category, that category was deemed unavailable. Only applicants with a priority date earlier than the cut-off date may be allotted a visa number. These individuals then become eligible to complete the permanent residence process through the filing of an I-485 with USCIS or an Immigrant Visa application with the U.S. Consulate abroad.

The complete visa bulletin may be viewed at: http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html

Legislative Update

The Obama Administration has been postponing a White House summit on immigration reform, which was originally scheduled for June 8, 2009, then cancelled again. The event is currently scheduled for June 25, 2009 and lawmakers from both parties will attend the meeting. Held as a closed-door session, the summit is intended to identify areas of agreement and efforts needed to achieve broader consensus. At the same time, Congress continues to hold hearings aimed at examining immigration issues. Viewed together, these activities suggest that immigration has moved higher on the legislative and policy agenda.

However, prospects for passage of a comprehensive reform bill remain uncertain. Immigration currently stands behind healthcare and with cap-and-trade as something the Democrats want to accomplish. The center of the debate will be the unions and the coalitions who will argue over temporary worker programs being controlled by "commissions," an amnesty, and a future flow of guest workers. It is critical that while the mistakes of 1986 not be repeated, a solution be found for the 12-18 million unauthorized residents in the United States.

Consular Corner

Prepare Yourself for International Travel

The U.S. Customs and Border Protection (CBP) recently published a booklet titled *Know Before You Go*, intended to prepare U.S. residents for international travel. The guide includes a helpful traveler's checklist and tips on registering items before leaving the United States.

Frequent travelers should review the Global Entry program, which expedites and simplifies re-entry to the United States. U.S. citizens and U.S. Lawful Permanent Residents aged 14 years and older are eligible to apply.

To view the full booklet, visit:
http://www.cbp.gov/linkhandler/cgov/travel/vacation/kbyg/kbyg_regulations.ctt/kbyg_regulations.pdf

U.S. Passport Card:
The Department of State began production of the U.S. Passport Card. This card facilitates entry and expedites document processing at U.S. land and sea ports-of-entry (may not be used to travel by air) when arriving from Canada, Mexico, the Caribbean and Bermuda.

Electronic System for Travel Authorization (ESTA) for Visa Waiver Program (VWP) Travelers:
ESTA is a new, fully automated electronic system for screening passengers before they begin travel to the United States under the VWP. ESTA applications may be submitted at any time prior to travel to the United States, and VWP travelers are encouraged to apply for authorization as soon as they begin to plan a trip to the United States. ESTA became mandatory for VWP travelers on January 12, 2009.

DOS Issues Final Rule on Nonimmigrant Visa Fingerprinting:
Effective August 20, 2009, the Department of State requires "ten print" fingerprint scans for all nonimmigrant visa applicants.

National Visa Center Initiates Online Payment System:
The National Visa Center (NVC) will accept online payments in connection with NVC processing. For details, choose "Online payment" from the NVC web page at: http://www.travel.state.gov/visa/immigrants/info/info_1335.html

International Travel:
In planning international travel, all foreign nationals must ensure that they carefully review their current immigration documentation to make sure that they have all of the appropriate travel documentation required to return to the United States. If in a non-immigrant status, an individual typically must have a valid visa in their passport for that category. Advance planning can make the visa application process smooth and relatively painless. Most visa applicants will be required to have an in-person interview at the U.S. embassy or consulate. Therefore, we suggest that the foreign national carefully review the current visa wait times for information on interview appointment availability and timeline for visa issuance at the embassy or consulate. In advance of travel, all supporting documentation should be carefully reviewed and instructions regarding the on-line application forms and visa fee payment should be closely followed to avoid delays.

As some U.S. embassies and consulates have significant visa appointment scheduling and issuance delays, making advanced planning critical. The current top five U.S. consular posts with the longest visa wait times are: Havana, Caracas, Dhahran, Port-au-Prince and Bogota.

Please consult with your GT attorney for further information and prior to traveling outside of the United States.

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The Business Immigration Observer is published by GT's Business Immigration & Compliance practice. Dawn M. Lurie serves as the editor. Special thanks to Claudia Yerena for her contributions to the current edition. The newsletter contains information regarding trends and recent developments in immigration law and an analysis of legislation reported by immigration law professionals.

SPREAD THE WORD

The Observer serves as an invaluable resource to individuals, human resource managers and recruiters, in-house legal professionals and company executives for whom keeping up with the most current immigration information is a professional imperative.

If you have enjoyed reading this newsletter and have found useful information in it, we would greatly appreciate your help in spreading the word. You can do this by forwarding a copy to your friends and colleagues.

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Resources

July 2009 DOS Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html

Visa Wait Times: http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php

Service Center Processing Times:

Vermont: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=VSC

Texas: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=TSC

Nebraska: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=NSC

California: https://egov.uscis.gov/cris/jsps/Processtimes.jsp?SeviceCenter=CSC

National Benefits Center: https://egov.uscis.gov/cris/jsps/NBCprocesstimes.jsp