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Changes to Naturalization Process

I.  New Form I-9

The U. S. Citizenship and Immigration Services (USCIS) has released a new version of the Form I-9 that expires on June 30, 2009. At this time, no previous editions of the Form I-9 will be accepted. The new Form I-9 did not make material changes to the previous edition that expired on June 30, 2008. That earlier form, however, contained the following changes:

- Five documents were deleted from List A of the List of Acceptable Documents: Certificate of U.S. Citizenship (Form N-560 or N-561), Certificate of Naturalization (Form N-550 or N-570), Alien Registration Receipt Card (I-151), Unexpired Reentry Permit (Form I-327), Unexpired Refugee Travel Document (Form I-571);
• The Unexpired Employment Authorization Document (I-766) was added to List A of the List of Acceptable Documents;

• All Employment Authorization Documents with photographs (I-688, I-688A, I-688B, I-766) were consolidated as one item on List A; and

• Form I-9 instructions were revised to indicate that an employee is not required to provide his/her Social Security number in Section 1 of the Form I-9, unless he/she is employed by an employer who participates in E-Verify.


II. HRSA Proposes New Rulemaking for Designation of Medically Underserved Areas

On July 23, 2008, the Health Resources and Services Administration (HRSA) announced that it would postpone issuance of a final rule regarding the designation of Medically Underserved Populations and Health Professional Shortage Areas. These designations are used by foreign medical graduates, among others, in securing waivers of the two-year J-1 foreign residence requirement that typically accompanies their participation in an American residency program.

The Department of Health and Human Services (HHS) first proposed the rule regarding these designations in February 2008. The comment period was extended on two occasions due to the unusual level of interest in the proposed regulation. On July 23, the HRSA announced that the number and complexity of the issues raised by the commentators would require a number of changes to the proposed rule. For this reason, the HRSA indicated that it would issue another notice of proposed rulemaking to reflect these changes rather than to proceed to a final rule.

III. Ninth Circuit Upholds Award of Reinstatement and Backpay to Employees Subject to No-Match Letters

On June 16, 2008, the United States Court of Appeals for the Ninth Circuit issued its opinion in *Aramak Facility Services v. Service Employees Intern. Union, Local 1877, AFL CIO*, No. 06-56662 (9th Cir. June 16, 2008). The Ninth Circuit upheld an award of reinstatement and back pay to 33 employees who had been fired shortly after their employer received “No-Match” letters from Social Security Administration (SSA) that indicated that the names of these employees did not match the Social Security numbers they had provided to the employer.

Here, the employer here received No-Match letters for 48 of its employees. Suspecting immigration violations, the employer instructed the employees that they had three days to correct the problems or prove that they had started the process of applying for a new Social Security card. Approximately ten days later, the employer fired 33 employees who had not complied in a timely manner. The union representing the employees then filed a grievance claiming that the terminations were without just cause and in violation of the collective
bargaining agreement. The arbitrator upheld the grievance, finding that there was no “convincing” evidence of immigration violations by these employees, because a No-Match letter, by itself, was not evidence that an employee is undocumented. Accordingly, the arbitrator awarded the fired workers back-pay and reinstatement.

The district court in Aramak vacated the arbitrator’s award on the grounds that it had violated public policy, namely, the national immigration law prohibition against the employment of undocumented workers. The Ninth Circuit unanimously reversed and reinstated the arbitrator’s award. According to that court, the primary issue was whether the SSA’s No-Match letter, and the fired employees’ responses, put Aramark on constructive notice that it employed undocumented workers. The Court found that nothing in the No-Match letters or the employees’ failure to resolve the problem within the narrow time-limit allowed by the employer established constructive knowledge of any immigration violations. To the Ninth Circuit, constructive knowledge had to be construed narrowly in the immigration context, and there was nothing in the No-Match letter that put the employer on notice of a worker's undocumented status. To the contrary, the purpose of which the SSA issues a No-Match letter demonstrates that receipt of the No-Match letter, by itself, did not constructive notice that an employee was undocumented.

The Ninth Circuit’s decision potentially might undercut the legal justification for the “Safe Harbor” regulations proposed by the Department of Homeland Security (DHS). As readers of this Alert may recall, the DHS issued an interim “Safe Harbor” regulation last fall that sought to legally impose constructive notice on any employer receiving a No-Match letter and not following the protocol set forth in the regulation. Implementation of this “Safe Harbor” regulation was enjoined by a federal district court, and DHS has appealed to the same Ninth Circuit that issued the Aramark decision.

The Aramark decision clearly complicates an already difficult worksite enforcement dilemma for most employers. Under federal law, employers are required to complete the Form I-9 process for all new employees but are not guarantors of the documents that employees present. Federal law also threatens employers with damages if they discriminate in the application of the Form I-9 process or request more or different documents than the prospective employee wants to provide. This exposes employers to government worksite enforcement efforts if they fail to satisfy the Form I-9 requirements, while simultaneously leaving them at risk for damage claims if they discriminate by pursuing Form I-9 verification too aggressively. If this conundrum was not bad enough, the Aramark decision leaves employers without direction when a No-Match letter arrives. All of this counsels prudent employers to be cautious when these situations develop.

IV. Additional Compensation Under Worker’s Compensation Law Not Available to Undocumented Workers in New York

On June 26, 2008, the New York Court of Appeals, the highest court in New York state, issued its decision in Ronnie Ramroop v. Flexo-Craft Printing, No. 121 (June 26, 2008). In this 5-2 decision, the Court of Appeals held that an undocumented worker was not eligible for additional vocational rehabilitation benefits after receiving a permanent disability award, because his lack of legal immigration status did not allow him to work.
To be eligible for these additional rehabilitation benefits, the Court of Appeals held that a worker not only has to prove loss of earnings but also that the earnings loss was due entirely to his injury. In this regard, the Court found that the worker’s inability to participate in vocational rehabilitation was due to his illegal status not his injury. As the majority concluded:

Even if we assume that the claimant cooperated to the extent he could, his inability to participate was not because rehabilitation was not feasible—the board never made a feasibility determination—but because no rehabilitation program is available to those who are not legally employable,…

The Court also noted that any other conclusion effectively would place the claimant, and others similarly situated, in a more favorable position than claimants who must meet all statutory requirements.

V. Missouri Passes Omnibus Immigration Legislation

On July 7, 2008, Missouri Governor Matt Blunt signed into law H.B. 1549. This bill imposes new limitations and requirements for undocumented aliens on the cities in which they live and the businesses that employ them. The omnibus immigration bill takes effect on January 1, 2009, and includes the following requirements:

- Proof of citizenship or legal presence when applying for food stamps, housing and other public benefits;
- The use of E-Verify for businesses bidding on state contracts;
- A penalty on businesses that knowingly hire illegal immigrants;
- Special immigration law training for the Missouri State Highway Patrol; and
- A bar to Missouri cities that refuse to cooperate with federal immigration authorities.

H.B. 1549 also allows fines up to $50,000 for employers who deliberately misclassify their workers as contractors instead of employees, in order to evade the law’s provisions.

VI. South Carolina Adopts Illegal Immigration Reform Act

On June 4, 2008, South Carolina Governor Mark Sanford signed into law HB 4400, an omnibus immigration bill that requires:

- All employers to verify the identity of new employees by using either a South Carolina driver's license or the federal E-verify system;
- Medical providers funded by the state to deny non-emergency medical care to undocumented adult immigrants;
- Public institutions of higher education to deny admission to undocumented aliens and to refuse to give them state funded scholarships; and
• The Chief of the South Carolina Law Enforcement Division to enter into a memorandum of understanding with the federal government regarding enforcement of federal immigration law.

VII. Arizona Bars Real ID Compliance

On June 17, 2008, Arizona Governor Janet Napolitano signed into law HB 2677, which prohibits Arizona from complying with the REAL ID program. The REAL ID program requires states to issue driver’s licenses and identification documents that conform to uniform federal standards.

In her letter explaining her support for the bill, the Governor noted the tremendous costs of compliance. According to a White House estimate, meeting the REAL ID standards would cost at least $4 billion but the federal government has set aside only $90 million to help Arizona and other states offset those costs. As she noted,

My support of the REAL ID Act is, and has always been, contingent upon adequate federal funding, …. Absent that, the REAL ID Act becomes just another unfunded federal mandate.

By passing this bill, Arizona joins approximately a dozen other states that have refused to take part in a federal campaign for a uniform standard on state-issued driver's licenses and identification cards.

VIII. DOS Issues August 2008 Visa Bulletin: EB-3 Remains Unavailable

The DOS recently issued its Visa Bulletin for August 2008. This Bulletin determines who can apply for permanent residence and when. The results were mixed. The Employment-Based Third Preference (EB-3) category remains unavailable. The Employment-Based Second Preference (EB-2) for Indian and Chinese nationals is available with a June 1, 2006 cut-off date. To view this monthly Visa Bulletin, please visit the DOS Web Site at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

IX. DOS/DHS Issues Passport Cards

On July 22, 2008, the DOS and DHS announced that they had commenced full production of the new U.S. Passport Cards and had started distributing them to the more than 350,000 American citizens who had pre-applied. The Passport Card is a convenient, wallet-sized document for land and sea travel between the United States and Mexico, Canada, the Caribbean and Bermuda. It is not valid for international travel by air. These Passport Cards are much cheaper than passports, costing only $45 for first-time adult applicants and $35 for children under 16. Those who have valid U.S. passports can apply for a Passport Card by mail for $20. For information on how to apply for Passports Cards please also visit the DOS web site at: http://travel.state.gov.

X. Changes to Naturalization Interview
In its recent Memorandum to the Field Leadership, the USCIS announced that it has developed a plan directed at adjudicating the increased number of naturalization applications filed since the Summer of 2007. The Memorandum indicated that the USCIS was committed to hiring and training several hundred adjudicators over the next several months. To accommodate this additional new staff and still maintain quality and consistent adjudications, the USCIS has instructed its managers to ensure greater oversight over new staff specifically with respect to quality decision review and decision reviews in general.

The Memorandum also describes changes that have been, or are in, the process of being implemented regarding the pre-examination check-in process, naturalization testing, testing and the post-examination process. For additional information on these changes or to obtain a copy of the USCIS memorandum, please visit: http://www.uscis.gov.

If you have any questions about these issues or any other development in the immigration area, contact:

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