August 2009

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I. President Obama Begins Immigration Policy Dialogue With Congress

On June 25, 2009, President Obama met with a bipartisan group of 30 senators and representatives, as well as the Secretaries of the Departments of Homeland Security (DHS) and Labor (DOL), to discuss overhauling the nation's immigration laws. The White House designed this meeting to "launch a policy conversation by having an honest discussion about the issues, identifying areas of agreement and isolating areas where we still have work to do." The administration predicts that a draft comprehensive immigration bill will be introduced in late 2009, but that it most likely will not be in position to act on possible passage until 2010.

While Congress and the Obama administration continue to work on immigration reform legislation, the President announced that his administration has begun implementing several administrative changes related to immigration. Foremost among these is the DHS worksite enforcement efforts, including a crackdown on unscrupulous employers who violate their Form I-9 obligations and exploit their work force.

II. Visa Waiver Program Travellers Face New Requirements

As we previously reported, all foreign nationals seeking admission to the United States using the Visa Waiver Program (VWP) on or after July 1, 2009 face new passport and documentary requirements.

All VWP travelers must use emergency or temporary electronic passports to be eligible for entry into the United States. Electronic passports can be identified by a special symbol on the front cover and contain an electronic chip that stores a digitized photograph, biographic data and other relevant information about the true bearer. Alternatively, travelers can apply for a B-1/B-2 visa at a U.S. Embassy or Consulate.

The U.S. Customs and Border Protection (CBP) will waive this requirement only where the applicant is seeking admission for medical or other emergencies in the most emergent circumstances. Any VWP applicants seeking admission to the United States with a non-compliant passport will be denied admission and returned to their home country. In addition, the airline that allowed the passenger to board with a non-compliant passport may be subject to fines.

Remember, all VWP travelers still must present a completed Form I-94W to CBP—even though they have obtained travel authorization via the Electronic System for Travel Authorization (ESTA), when applying for admission to the United States.

III. August 7, 2009 H-1B Cap Count

The U.S. Citizenship and Immigration Services (USCIS) has announced that, as of August 7, 2009, it has received approximately 44,900 H-1B cap-subject petitions and counted them towards the cap. Furthermore, approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. Therefore, the 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.

IV. USCIS Issues Additional Guidance on Academic Qualifications for Certain H-1B Health Care Specialty Occupations

On July 17, 2009, USCIS issued guidance to certain employers who have received an

erroneous denial of a Form I-129, *Petition for Nonimmigrant Worker*, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation. This guidance was necessitated by a series of USCIS decisions denying H-1B petitions for health care specialty occupations. Relying on erroneous information contained in DOL publications, the USCIS wrongly concluded that certain health care specialty occupations required at least a master's degree and then denied the H-1B petitions when the employee beneficiary lacked this degree.

To address this problem, Barbara Velarde, Chief of USCIS Service Center Operations, issued a memorandum, dated May 20, 2009, entitled, "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation." This memorandum clarified the standards for H-1B health care specialty occupations so that USCIS examiners would adjudicate these petitions correctly.

The July 17, 2009 guidance permits employers who have received an erroneous H-1B petition denial to seek additional review from the USCIS instead of filing an appeal. However, the USCIS will not review any case on its own. USCIS will review an H-1B petition denial only if it has received a written request from the petitioning employer/representative. These requests for review may be filed electronically and should include "**PT/OT Service Motion Request**" in the subject line. USCIS will accept requests through August 14, 2009.

Requests for review of H-1B health care specialty occupation petitions adjudicated at the California Service Center should be sent to: csc-ncsc-followup@dhs.gov. Requests for review of H-1B health care specialty occupation petitions adjudicated at the Vermont Service Center should be sent to: vsc.ncscfollowup@dhs.gov. Requests for review need not include a copy of the May 20, 2009 Velarde memorandum, but they must explain how the beneficiary meets the standards set forth in the memorandum. Furthermore, as with any H-1B petition for a health care worker, the evidence must show that the beneficiary is eligible to practice in his or her particular health care occupation in the state of proposed employment.

Remember, this Friday, August 14, 2009 is the last day that USCIS will accept employer requests for review of erroneous denials to H-1B health care specialty occupation petitions.

V. USCIS Schedules Site Visits to Verify H-1B Employment

The USCIS has started sending investigators to the sites of employers who have secured an approved H-1B petition to verify that the facts presented in the petition were accurate and that the employee is being paid what the Labor Condition Application requires. The funds for these investigations come from the $500 Fraud Prevention and Detection fee that must be paid in connection with each new H-1B or L nonimmigrant petition.

The investigations range from the straightforward to the covert. In many instances, the investigators will arrive unannounced, request to speak with the relevant Human Resources representative and review the pertinent facts of the H-1B petition to ensure compliance. In

other instances, the investigator may call the sponsored foreign national directly. The bottom line is that the USCIS seeks to determine if the sponsoring company is a real operating business and whether the foreign national is a "legitimate" employee working in the sponsored position and being paid the required wage. Employers who might have difficulty with such an audit should contact counsel immediately.

VI. ICE Enforcement Efforts Nail Houston Supply Concern

On August 7, 2009, the U.S. Immigration and Customs Enforcement (ICE) announced that Shipley Do-Nut Flour and Supply Company, Inc., headquartered in Houston, Texas, and three of its senior managers were sentenced following guilty pleas to criminal charges that they and the company unlawfully conspired to harbor and employ undocumented workers. Shipley supplies baking materials and logistical support to retail stores and to 200 franchises across Alabama, Arkansas, Louisiana, Mississippi, Tennessee and Texas. Shipley was sentenced to three years' court supervision, a criminal fine of $250,000 and a civil forfeiture of $1.334 million. The three senior managers were sentenced to six months' probation and fined from $1,000 to $2,000. The company owner pleaded guilty last year and was sentenced to the same probationary term and fined $6,000.

During its investigation of Shipley, ICE also arrested 27 undocumented workers who were employed by the company and lived in company-provided housing. The investigation resulted because Shipley failed to respond to 42 No-Match letters it had received from the Social Security Administration.

VII. Court Holds that Title VII Covers Undocumented Workers

On July 14, 2009, the U.S. District Court for the District of Columbia issued a decision rejecting an employer's motion for summary judgment to dismiss a complaint filed by an undocumented black female employee from Nigeria who had been pregnant. The plaintiff alleged violations of Title VII of the 1964 Civil Rights Act and the Civil Rights Act of 1866 (42 U.S.C. §1981) on the grounds of disparate treatment, retaliation and harassment based on race, national origin and pregnancy. Iweala v. Operational Technologies Services, Inc., No. 1-04-cv-2067 (D.D.C. July 14, 2009). In its opinion, the Court rejected the employer's claims that, among other things, the protections of Title VII did not extend to the plaintiff because she lacked legal authorization to work in the United States. Indeed, the Court indicated that the definition of an employee in Title VII "seem[s] to encompass all employees regardless of immigration or visa status, …"

Noticeably absent from the Court's decision was any discussion about what damages, if any, the plaintiff might recover in view of her undocumented status. This has been a subject of great debate in both state and federal courts since the U.S. Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). In Hoffman Plastic, the Supreme Court held that the National Labor Relations Board (NLRB) could not award back pay under the National Labor Relations Act to undocumented foreign nationals, even if they

were discharged for engaging in protected activities. The Court reached this conclusion on the basis of the Immigration Reform and Control Act of 1986 (IRCA), which specifically prohibited such undocumented aliens from working.

Following the Supreme Court's decision in Hoffman Plastic, state and federal courts have struggled to apply its principles to damage claims arising in a variety of different contexts. Compare Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998), cert. denied, 525 U.S. 1142 (1999)(Title VII does not cover undocumented workers because they are not qualified for employment), with Rivera NIBCO, Inc., 364 F.3d 1057 (11th Cir. 2004)(Title VII applies to undocumented workers). Even assuming that these workers can claim statutory protection, there is wide disagreement in the courts as to what damages they are entitled to recover. Compare Flores v. Amigon, 233 F.Supp. 2d 462 (E.D.N.Y. 2002), with Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct., App. Div.), cert denied, 849 A.2d 184 (N.J. 2004).

> One common theme in these cases appears to be the absence of experienced immigration analysis that will assist a court in reconciling the difficult public policy options between denying and granting coverage to undocumented workers. Denying coverage appears to give unscrupulous employers the right to abuse undocumented workers with impunity. Granting coverage to undocumented workers appears to violate the intent of Congress in IRCA. The Immigration Law Group continues to work closely with our Labor and Employment litigators to make sure that EBG clients have the benefit of our collective analysis in these difficult cases.

VIII. The National Conference of State Legislatures Reports that Seven States Enacted Workplace Immigration Measures in the First Half of 2009

On July 22, 2009, the National Conference of State Legislatures (NCSL), a bipartisan research organization that serves state legislators and their staffs, reported that, as of June 30, 2009, seven states had enacted a collective total of 10 laws relating to immigration and employment. These seven states are: Florida, Hawaii, Maine, Montana, Nevada, Tennessee, and Utah. Additionally, two bills were vetoed in Georgia and Minnesota, while three bills in Illinois and one in Oregon were sent to the respective governors—but remain unsigned. Furthermore, legislatures in Georgia and Nebraska have passed omnibus, immigration-related legislation dealing with employment issues as well as other areas.

The NCSL report also indicated that these new state laws include employer sanctions related to the hiring of unauthorized workers and penalties related to the employment eligibility verification requirements. This activity adds to the record expansion of state legislation involving immigration that has developed over the states' frustration with Congress's failure to pass comprehensive immigration reform. At the present time, 46 states have some form of legislation dealing with immigration issues from identification/driver's licenses to employment and education. This means that employers seeking to comply with all immigration requirements also must consult the laws of the states in which they operate or do business.

IX. DHS Announces Mandatory Use of E-Verify for Government Contractors

On July 8, 2009, Homeland Security Secretary Janet Napolitano announced that, beginning September 8, 2009, the Obama administration will implement the stalled regulation that requires federal contractors to use the E-Verify electronic database system. E-Verify is designed to assist registered employers in checking an employee's identity and work authorizations and, in this way, helping them avoid hiring an undocumented worker.

This announcement follows a staggered history of this regulation. It first was proposed in 2008 by the Bush administration, but later suspended by the Obama administration pending a full review. After six months of study, DHS now has decided to implement the regulation and require government contractors to use E-Verify. The regulation will become effective on September 8, 2009.

As indicated in past alerts, we believe that the move to expand the use of E-Verify is part of the Obama administration's overall strategy of increasing employer initiatives and enforcement actions so that it will be in a better position to succeed with comprehensive immigration reform. This is similar to the strategy employed in the 1980s, the last time we had comprehensive immigration reform. The first step was IRCA, which created the Form I-9 process, and for the first time, made it unlawful for employers to hire an undocumented worker. Four years later, Congress passed the Immigration Act of 1990, which provided comprehensive reform of the immigration laws in effect at the time. Thus, there is ample precedent for the Obama administration's current immigration strategy.

X. Helpful Tips for U.S.-Canada Border Travelers during the Summer Holidays

Even though the summer is almost over, it is useful to remind those who still have vacation plans in Canada about the 'Travel Tips' for Americans and Canadians issued by the CBP. These tips include the following advice:

- Travelers should familiarize themselves with the "Know Before You Go" section of the CBP website to avoid fines and penalties associated with the importation of prohibited items. "Know Before You Go" brochures also are available at border ports.

- Travelers should prepare for the inspection process, including having all crossing documents available for the inspection, being ready to declare all items acquired abroad and ending all cellular phone conversations, before arriving at the CBP booth.

- Travelers should consult the CBP website to monitor border wait times for various ports of entry, including Blaine and Sumas, Washington; Sweetgrass, Montana; and Pembina, North Dakota. CBP updates this information hourly and it may be useful in planning trips and identifying periods of light travel – which can translate into shorter wait times.

- During periods of heavy travel, international border crossers may wish to consider

less heavily traveled entry routes.

- Travelers should plan to allot extra time in the event they cross during periods of exceptionally heavy traffic (e.g., Labor Day and the adjacent weekends).

- Know the difference between goods for personal vs. commercial use.

- Do not attempt to bring fruits, meats, dairy/poultry products and/or firewood into the United States from Canada without first checking whether they are permitted.

- CBP officers have the authority to conduct enforcement examinations without a warrant, ranging from a single luggage examination up to and possibly including a personal search. International border crossers should continue to expect a thorough inspection process when they enter the United States from Canada, even during the summer vacation season.

For additional information, please visit the following website: www.cbp.gov

XI. SAVE Legislation Reintroduced in House and Senate

On July 23, 2009, a bipartisan group in the House and Senate reintroduced "The Secure America Through Verification and Enforcement Act" (SAVE), which would require employers to use E-Verify to ensure that their workers are authorized to work in the United States. This SAVE legislation is largely the same as the bill first introduced in Congress on November 6, 2007. According to its sponsors, the SAVE is designed to reduce illegal immigration by gradually phasing in the use of E-Verify and increasing border security with additional border patrol agents and new technology and infrastructure.

The SAVE legislation would phase in the mandatory use of E-Verify by employers over a four-year period, starting with the federal government, federal contractors and employers with more than 250 employees. Smaller businesses would be required to begin using the E-Verify system in a graduated manner. While passage now is uncertain, the reintroduction of the SAVE legislation reflects the public's growing desire for employers to hire and maintain only a documented workforce. Considered in this context, and examined against all the states that have passed legislation requiring the use of E-Verify, employers would be well advised now to become familiar with E-Verify so they can readily incorporate it into their operations when it becomes mandatory at the federal level.

XII. USCIS to Discontinue Issuance of ADIT Stamps

On July 9, 2009, the USCIS rescinded the authorization given to local USCIS offices to issue temporary I-551 ADIT stamps. These "ADIT" stamps provide evidence of permanent residence for those who need it to travel and have not yet received their green card. For security reasons, the USCIS has instructed its local offices not to issue ADIT stamps to every

applicant as a matter of policy. However, the USCIS still may allow local offices to issue ADIT stamps on a case-by-case basis if there appears to be a verified need that cannot be accomplished in another way.

XIII. DOS Issues September 2009 Visa Bulletin:

The Department of State (DOS) recently issued its September 2009 Visa Bulletin. The Visa Bulletin determines who can apply for permanent residence and when. The Employment-Based, Third Preference (EB-3) category remains unavailable for all charge-ability areas, including Mexico, India, Philippines and China. The Employment–Based, Second Preference (EB-2) category for Indian and Chinese nationals is available and the cut-off date has moved up to January 8, 2005 for both countries. The DOS publishes the Visa Bulletin on a monthly basis and it may be viewed at the following website: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

For more information, please contact:

New York	New York	Miami	Atlanta
Robert S. Groban, Jr.	Pierre Georges Bonnefil	Hector A. Chichoni	William Poole
212/351-4689	212/351-4687	305/579-3270	404/923-9035
rgroban@ebglaw.com	pgbonnefil@ebglaw.com	hchichoni@ebglaw.com	wpoole@ebglaw.com

San Francisco	Houston	Newark
Jang Im	Nelsy Gomez	Patrick G. Brady
415/398-3500	713/750-3136	973/639-8261
jim@ebglaw.com	ngomez@ebglaw.com	pbrady@ebglaw.com