



May 2011

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I. USCIS Issues Final Rule on Employment Eligibility Verification

On April 14, 2011, the U.S. Citizenship and Immigration Services (“USCIS”) issued its final rule on the Form I-9 Employment Eligibility Verification process. This final rule adopts, without change, the interim rule that has been in effect since April 3, 2009.

The key changes made to the Form I-9 process by the interim, now final, rule include: (i)

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prohibiting employers from accepting expired documents for completion of Form I-9; (ii) revising the list of acceptable documents by removing outdated documents and making technical corrections; and (iii) adding documentation applicable to certain citizens of the Federated States of Micronesia and the Republic of the Marshall Islands.

The final rule will be effective on May 16, 2011. Employers may continue to use either the current version of Form I-9 (Rev. 08/07/2009) or the previous version (Rev. 02/02/2009). Employers also can use the “Handbook for Employers,” which was updated on January 5, 2011, and is available at: www.uscis.gov/files/form/m-274.pdf.

II. SSA Resumes Issuance of “No-Match” Letters

Effective April 6, 2011, the Social Security Administration (“SSA”) has resumed sending “no-match” letters. These letters advise employers that workers are using a social security number (“SSN”) that does not coincide with the name in the SSA’s database.

Historically, the SSA would send employees a version of the no-match letters if the name and/or SSN listed on the W-2 forms submitted by the employer did not match the information in the SSA database. Prior to 2007, the SSA also sent these no-match letters to the employer. However, the Department of Homeland Security (“DHS”) issued its “Safe Harbor” regulation that year. The SSA stopped sending the employer no-match letter until the litigation challenging that regulation was resolved because the letter contained an insert requested by Immigration Customs Enforcement (“ICE”) that might have been at issue in that litigation. That insert cautioned employers that “failure to act upon receipt of the SSA no-match letter could be construed as constructive knowledge of knowingly continuing to employ unauthorized workers, based on the totality of the circumstances.”

The current version of the SSA no-match letter to employers does not contain the ICE insert or list multiple employee SSNs that the SSA could not match to its database. Citing “Privacy Act” concerns, the current no-match letter addresses only one employee but adds, “[w]e may give this information to the Internal Revenue Service for tax administration purposes or to the Department of Justice for investigating and prosecuting violations of the Social Security Act.” Like the earlier version of the employer letter, however, the current version indicates that there may be many reasons for the no-match, such as typographical errors, name changes, and incomplete information, and advises that the receipt of the letter “does not imply that you or your employee intentionally provided incorrect information about the employee’s name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual.”

Even though the current no-match letter does not contain the ICE warning, ICE still considers an employer’s failure to address a no-match letter as possible evidence that the employer has violated U.S. immigration laws. For this reason, it is important for employers to develop policies and procedures for handling no-match letters when they arrive. Consistent procedures also will help employers avoid charges of discrimination. In its guidance on how to handle inquiries relating to no-match letters, the SSA advises employers to check their records to determine if their information matches the records submitted and ask employees to check their records to ensure that they have accurately reported their name and social security number to the employer. If the employer and an employee are unable to resolve the issue, the employer

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should instruct the employee to contact a local SSA office and give the employee a reasonable amount of time to resolve the discrepancy. If an employee is unable to resolve the no-match or obtain a new SSN, he or she may no longer work for the employer. Whenever there is a termination, the employer should document efforts made to obtain the corrected information and retain the documentation for four years.

For additional information on SSA no-match letters, please visit the following websites: <https://secure.ssa.gov/apps10/poms.nsf/lnx/0900901050>; http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1666/related/1; and <https://secure.ssa.gov/apps10/public/reference.nsf/links/03302011095533AM>.

III. ICE Continues Aggressive Worksite Enforcement Activities

ICE has continued its aggressive worksite enforcement efforts. The most visible enforcement activity involves the Chipotle Mexican Grill restaurant chain (“Chipotle”). What began as a routine Form I-9 audit has turned into a massive criminal investigation of the company. Recently, ICE agents audited 20-25 restaurants as part of this investigation. *The Wall Street Journal* reports that Chipotle has been forced to terminate more than 400 employees in Minnesota and another 40 in the Washington, D.C., area. This presents an extremely difficult challenge to the company as ICE continues to request inspections of Chipotle’s Forms I-9 and interview its employees. Chipotle is required to allow ICE to inspect its Forms I-9 but must simultaneously defend against possible criminal charges arising out of its alleged failure to comply with its Form I-9 legal obligations.

On April 13, 2011, two managers of McDonald’s restaurants and others were indicted and charged with conspiring to sell the stolen identities of U.S. citizens to prospective McDonald’s employees. The two managers also were charged with harboring illegal aliens. The indictment followed an extensive undercover investigation by ICE agents in Savannah, Georgia. Brock Nicholson, the ICE special agent in charge of its Atlanta office, said that the indictment was another example of ICE’s aggressive efforts to “target the criminal networks that use stolen identities and document fraud to skirt U.S. immigration laws and conspire to hire an illegal alien workforce.”

The ICE enforcement activities involving Chipotle and McDonald’s underscore the importance for employers in the restaurant and hospitality industry, as well as all other employers, to make sure that they fully satisfy their Form I-9 obligations.

IV. Justice Department Presses Immigration-Related Discrimination Charges

On April 8, 2011, the U.S. Department of Justice (“DOJ”) announced that it had settled allegations that LF Staffing Services Inc. (“LF Staffing”) had engaged in immigration-related discrimination. According to the DOJ, LF Staffing, a staffing company located in Cedar Rapids, Iowa, had violated the rules applicable to the Form I-9 process by pre-screening job applicants and rejecting valid work authorization documents. The DOJ allegations were that LF Staffing had acted improperly by refusing to allow job applicants to complete the application process until they had presented documents that established their authorization to work, and that the company unlawfully refused to accept a valid employment authorization document (“EAD”) from a job applicant. Under the terms of the settlement, LF Staffing paid a civil fine

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and full back pay to the injured parties.

On April 26, 2011, the DOJ announced that it has settled allegations against Restwood LLC (the owner of several Wendy's restaurants) that the company had engaged in unlawful immigration-related employment practices by refusing to hire individuals it believed were not American citizens. U.S. immigration laws generally prohibit discrimination in hiring based on citizenship status. To settle these charges, Restwood LLC agreed to pay a civil fine and back pay, plus interest, to the victims of its "citizen-only" policy.

Both of these DOJ actions highlight the importance for employers to understand and abide by the anti-discrimination provisions of the U.S. immigration laws at the same time they satisfy their Form I-9 obligations.

V. USCIS Provides Additional Guidance to Hospitals and Other Employers Concerning H-1B Cap Exemptions Based on Affiliation

On March 16, 2011, the USCIS announced that it was reviewing its policy for determining H-1B cap exemptions for nonprofit entities that are related to, or affiliated with, an institution of higher education. This review followed a series of administrative decisions denying an exemption from the H-1B cap to residence programs run by nonprofit hospitals affiliated with medical schools. Most of these programs start on July 1 and, without the cap exemption, foreign nationals ("FNs") could not participate because they would be unable to secure the required H-1B status until October 1. The net effect of these decisions was to foreclose these residency programs to any FN who needed a cap-exempt H-1B classification to participate.

On April 28, 2011, the USCIS published additional guidance for the adjudication of H-1B petitions filed by nonprofit entities claiming a cap exemption based on an affiliation with an institution of higher education. As an interim measure until the USCIS review is completed, the guidance directs adjudicators to give deference to prior cap-exempt determinations made by the USCIS since June 6, 2006. To demonstrate that an H-1B petition falls within this interim policy, the USCIS instructed sponsoring organizations to submit, among other things, a copy of a previously approved H-1B cap-exempt petition, a copy of the I-797 approval notice, or documentation submitted with a prior H-1B cap-exempt petition since June 6, 2006, that established the previous cap exemption.

VI. Labor Department Orders Prince George's County Public School System to Pay \$5.9 Million for Violations of H-1B Wage Requirements

On April 4, 2011, the U.S. Department of Labor ("DOL") found Maryland's Prince George's County Public School System ("PGCPS") in willful violation of the wage requirements that govern the H-1B nonimmigrant visa program. According to the DOL, the PGCPS illegally reduced the wages of 1,044 foreign teachers hired under the H-1B program by requiring them to pay \$4,224,146 in filing and other fees that the law requires employers to assume. Due to what the DOL considered as the willful nature of the violations, PGCPS was ordered to repay the filing fees, was fined \$1,740,000 in civil penalties, and may be debarred from filing new H-1B petitions.

The DOL's enforcement action against the PGCPS represents a painful reminder of the rules

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relating to H-1B petitions. These rules require employers to pay certain fees, unless payment by the H-1B employee would not reduce his or her wages below the amount required by the H-1B program.

VII. Commerce Department Clarifies Export Control Obligations of Staffing Companies

On February 20, 2011, the USCIS implemented the new Form I-129, which asks sponsoring employers to certify that they are in compliance with all export control regulations. On April 8, 2011, the U.S. Commerce Department (“USCD”) issued an advisory that clarified the responsibilities of staffing agencies in connection with the nonimmigrant petition process. Many staffing agencies petition for nonimmigrant workers who are then placed at a third-party client site. In these situations, there is a question as to whether the sponsoring employer or the third-party employer has the responsibility to ensure export control compliance.

The USCD’s guidance indicates that the third-party client is responsible for obtaining whatever authorization is required for the “deemed” export of controlled technology or source code subject to the Export Administration Regulations. The USCD stated that, since the third-party client, not the sponsoring employer, was responsible for allowing the FN access to the technology or source code, the third-party client had to satisfy all export control requirements.

VIII. USCIS Clarifies H-1B “Cap-Gap” Rules for F-1 Students

On April 4, 2011, the USCIS issued a set of FAQs that provide guidance for the “cap-gap” rules that apply to F-1 academic students working in Optional Practical Training (“OPT”). U.S. immigration laws allow F-1 students up to one year of OPT in connection with their degree programs. Most of the F-1 students preserve their OPT for post-graduate work. Their university authorizes the OPT and then the students apply for an EAD to work for an employer. The problem is that the OPT work period generally begins in the summer immediately after graduation and lasts no longer than one year. To extend their work authorization, employers usually seek to sponsor OPT employees for the H-1B visa classification. However, due to the H-1B quota, employers generally cannot file the necessary H-1B petition until April and the H-1B employment cannot begin until October 1. This creates a “gap” between the time when a student’s OPT authorization expires and when his or her H-1B employment can begin. This has been referred to as the “cap-gap”.

In recognition of the hardship the “cap-gap” can cause students and employers, the USCIS adopted rules to protect them. According to these rules, students who are the beneficiary of a timely filed H-1B petition and change of status application are entitled to continue working after their EAD has expired as long as the H-1B petition is pending or approved and the H-1B petition requests a start date of October 1. The cap-gap protection and the work authorization end if the H-1B petition is denied. They also end if the sponsored student leaves the United States (in this event, it will be difficult to return until October 1, after the employer has obtained an approved H-1B petition and the employee has secured an H-1B nonimmigrant visa).

IX. USCIS Issues Update on H-1B Cap Filings

Each federal fiscal year, there is a quota on the number of new H-1B petitions that the USCIS

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can approve. That quota is 65,000 regular petitions and 20,000 additional petitions for FNs who secured at least a master's degree from an accredited university in the United States. The USCIS has reported that, as of April 29, 2011, approximately 9,200 H-1B cap-subject petitions, and 6,600 master's degree petitions, had been filed for fiscal year 2012. This leaves room for approximately 55,800 new H-1B approvals under the 2011 "Regular" cap quota and 13,400 under the 2012 "Masters" cap quota.

USCIS will continue to accept all eligible H-1B cases until a sufficient number of H-1B and H-1B1 petitions have been received to reach the statutory limits. Employers considering an H-1B petition for an existing or potential employee should prepare and file the petition as soon as possible.

X. Ninth Circuit Affirms Injunction Barring Enforcement of Arizona's Immigration Law

On April 11, 2011, the U.S. Court of Appeals for the Ninth Circuit issued a 2-1 opinion affirming a district court decision declaring that several sections of Arizona's immigration law, SB 1070, are preempted by federal law and, therefore, unconstitutional. See *United States v. Arizona*, Docket No. 10-16645 (9th Cir. Apr. 11, 2011). At the heart of the Ninth Circuit's opinion was its conclusion that the professed objective of the Arizona law, namely, "attrition through enforcement," unconstitutionally encroached on the federal government's power to regulate and control immigration. The majority of the Ninth Circuit found that Arizona lacked the constitutional authority "to unilaterally transform state and local law enforcement officers into a state-controlled Department of Homeland Security force to carry out its declared policy of attrition."

XI. Georgia Considers Arizona-Like Immigration Law

On April 14, 2011, the last day of the legislative session, the Georgia House passed GA House Bill 87, which contains provisions similar to Arizona SB 1070 and is intended to crack down on illegal immigration to the state. The bill was sponsored by Representative Matt Ramsey, a Peachtree City Republican, and passed the Georgia House by a largely partisan vote of 113-56. According to Representative Ramsey, "[i]t's up to the federal government to secure U.S. borders and deport illegal immigrants, but Georgia can remove incentives that bring illegal immigrants to the state." Republican Governor Nathan Deal has indicated that he will sign this legislation into law but has not done so to date. If and when he does, litigation based on the Ninth Circuit's decision in *United States v. Arizona* is sure to ensue.

XII. DHS Eliminates NSEERS Registration

On April 27, 2011, the DHS announced that it was eliminating the list of countries whose nationals have been subject to registration under the National Security Entry-Exit Registration System ("NSEERS"). This effectively ends the NSEERS registration process.

NSEERS initially was implemented in 2002, following the September 11, 2001, terrorist attacks, as a temporary measure to track FNs who are from certain suspect countries and might be considered possible security threats. Since NSEERS was implemented, however, the DHS

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has developed and implemented several automated systems at U.S. ports of entry that capture more information than can be obtained by the NSEERS registration process, thus making continued of that process unnecessary at the present time. The NSEERS rules remain in place, however, and the DHS can resume registration without additional regulatory authority.

XIII. DOS Issues May 2011 Visa Bulletin

The U.S. Department of State ("DOS") recently issued its Visa Bulletin for May 2011. The Bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. The cutoff dates for the Employment-Based Third Preference category are as follows: August 22, 2005, for all chargeability, including the Philippines; April 15, 2004, for China; September 8, 2004, for Mexico; and April 15, 2002, for India. The cut-off dates for the Employment-Based Second Preference category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; July 1, 2006, for India; and August 1, 2006, for China. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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