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CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
35th Floor
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, DC 20037-1175
202.861.0900

EBGLAW.COM

IMMIGRATION ALERT

The U.S. Citizenship and Immigration Services ("USCIS") recently announced that it will expand its premium processing service to include certain EB-3 petitions on August 28, 2006. On August 2, 2006, the Immigration and Customs Enforcement ("ICE") announced its new "IMAGE" workforce enforcement initiative. On June 14, 2006, the Department of Homeland Security ("DHS") issued proposed regulations that suggested a safe harbor procedure for employers who receive "no match" letters from either the Social Security Administration ("SSA") or DHS, and interim rules for employers who elect to implement electronic signature and/or storage of Form I-9s. The Transportation Security Administration ("TSA") recently updated the form that passengers can use when they experience travel delays because their name appears on Watch Lists. The SSA announced new guidance regarding the employment authorization of E/L spouses. The U.S. Department of Labor ("DOL") has provided updated information regarding the number of labor certification applications pending at its Backlog Elimination Centers ("BEC"). The USCIS has announced that it will not provide so called "Cap-Gap" protection for F-1 students who have submitted timely applications to change to H-1B status on October 1, 2006. In this *Special Alert*, we shall address these and other recent developments in the immigration area.

1. USCIS Expands Premium Processing Service

On August 18, 2006, the USCIS announced that it would expand its premium processing service to include two employment-based immigration "categories" within the third employment-based ("EB-3") classification. The USCIS premium processing service permits applicants to obtain an expedited adjudication upon payment of an additional $1,000 filing fee. Until this announcement, the USCIS has limited this service to certain nonimmigrant petitions, although it previously announced that it was considering an expansion of this service to certain immigrant petitions. In its August 18, 2006, announcement, the USCIS indicated that it would expand this service to petitions for professional and skilled workers who seek EB-3 classification based upon an approved labor certification.

This expansion will become effective on August 28, 2006, and the USCIS will revise and release a new I-907 Request for Premium Processing form to include these newly designated classifications. According to the USCIS, this new form will be available on its Web site, **www.uscis.gov,** on August 21, 2006. The prior version of the Form I-907 cannot be used for premium processing requests filed on or after August 28, 2006.

2. ICE Announces New "IMAGE" Workforce Enforcement Program

On August 2, 2006, the ICE agency announced a new workforce enforcement initiative. According to ICE, this initiative, called the "ICE Mutual Agreement between Government and Employers" ("IMAGE"), will assist employers in strengthening hiring practices and reducing the employment of undocumented workers. Under the IMAGE initiative, ICE will partner with selected employers in a broad cross section of industries so that they can serve as charter members and act as liaisons to the larger business community. Employers electing to participate in the IMAGE program must adhere to a series of ICE-designated best practices, including use of the USCIS's Basic Pilot Verification Program ("BPVP").

IMAGE program participation imposes several requirements on employers. First, they must allow ICE agents to conduct an audit of their I-9 forms. Second, they must become registered users of the BPVP. Finally, employers must adhere to a series of best practices, including the creation of an internal training program for completing I-9 forms and detecting fraudulent documents, authorization of periodic audits by neutral parties, implementation of protocols for responding to no-match letters from the SSA, provision of a tip line for employees to report violations, and development of a mechanism to self-report violations to ICE.

In exchange, ICE intends to provide training and education on proper hiring procedures, fraudulent document detection, and anti-discrimination laws to IMAGE program signatories. ICE will also share data with these employers on the latest illegal schemes being used to circumvent legal hiring processes. Finally, ICE will review the hiring and employment practices of those that sign up for the IMAGE program, and work collaboratively with them to correct minor compliance issues that might arise.

Employers that comply with the terms of the IMAGE program will be "IMAGE certified," a distinction that ICE expects will become an industry standard. ICE anticipates that participation will result in a reduction of unauthorized employment and serve to minimize identity theft.

3. ICE Proposes "Safe Harbor" Workforce Procedures

On June 14, 2006, ICE issued proposed rules for employers who receive no-match letters from either the SSA or the DHS. No-match letters from these agencies advise the employer that the name of the employee does not match the social security number that he or she provided. There are several reasons why a no-match letter might be issued and it is clear that receipt of one of these letters, by itself, does not provide evidence that the employee is undocumented or otherwise not authorized to work. The proposed rule suggests a procedure that, if followed, would provide the employer with a safe harbor from any enforcement proceeding or criminal prosecution.

To take advantage of this safe harbor provision, the ICE proposes a basic procedure for employers to follow within 60 days of receipt of a no-match letter. An employer first would have to verify its own records to ascertain whether the discrepancy resulted from an internal error. If the discrepancy cannot be resolved internally, the employer then would request the applicable employee to verify his or her own records. If there still is no

resolution, then the employee would be required to resolve the discrepancy directly with the SSA. Should that not eliminate the problem, the employer would be required to reverify the employee's Form I-9 by using documents different from those submitted to satisfy the initial verification procedure.

At this juncture, the rules suggested by ICE currently are merely proposals. Employers should track the progress of this proposal for additional developments. Once the notice and comment period for this proposed rule has expired, ICE is likely to promulgate either an interim or final rule.

4. DHS Implements Standards for Electronic Signature/Storage of Form I-9s

On October 30, 2004, President Bush signed legislation that permitted employers to sign and store Form I-9s electronically by April 29, 2006, or the date when implementing regulations were issued, whichever came first. The DHS did not issue implementing regulations by this date and this left those employers that wanted to take advantage of this legislation in a difficult position because of the lack of governing standards. On June 15, 2006, the DHS published an interim rule that promulgated these standards.

Recognizing that there was no single government-wide electronic recordkeeping standard for private employers, the DHS looked to those electronic recordkeeping standards already promulgated by other agencies. Specifically, DHS looked at the standard promulgated by the Internal Revenue Service ("IRS") in IRS Rev. Proc. 97-22, 1997-1 C.B. 652, 1997-13 I.R.B. 9 (March 31, 1997), and Rev. Proc. 98-25, 1998-1 C.B. 689, 1998-11 I.R.B. 7 (March 16, 1998), which specifies electronic recordkeeping standards for taxpayers. Under these new DHS rules, any employer seeking to take advantage of the laws permitting electronic execution and/or storage of Form I-9s must satisfy these recordkeeping standards or make certain that any vendor hired to support this activity satisfies these standards.

5. TSA Updates Traveler Identity Verification Program

In October 2005, the TSA established a process whereby passengers whose names were similar to those on various government watch lists could contact the TSA and, hopefully, obtain a letter from the TSA that would facilitate future travel. Recently, the TSA updated the Traveler Identification Verification form that must be used to take advantage of this program. Both the form and applicable instructions are available at **www.tsa.gov/assets/doc/TSA_TIVF_Form_2301.doc.** Unfortunately, successful participation in this program will not exempt affected travelers from screening at ports-of-entry or possible deferral to secondary inspection. It should, however, speed up that process.

6. SSA Provides Guidance on Work Authorization for E/L Spouses

The spouses of foreign nationals admitted in either E or L nonimmigrant status have faced difficulties securing the employment authorization they need to work. By law, spouses in E or L status in the United States are permitted to work "incident to status." This means that they should not have to apply for and obtain an employment authorization document to secure a Social Security number or employment. Unfortunately, the SSA did not recognize the immigration rules surrounding the employment eligibility of these spouses, with the consequence that they often had to endure significant delays before they could work.

In July 2006, the SSA issued an update for its Policy Operations Manual System ("POMS"), the guidance for SSA officers in its local offices, which includes L and E spouses among the categories of foreign nationals permitted to work incident to status. This means that all these spouses must do to obtain a social security number is complete an application and then submit it to the local SSA office with a Form I-94 record evidencing their admission in either L or E status, together with proof of the marital relationship to the spouse also in E or L status. In the event of continuing problems these applicants should reference guidance TH 54 (0606), Paragraph C. Policy-Employment Authorization by Class of Admission.

7. DOL Updates Information on BEC's Reduction of Labor Certification Backlog

As our readers know, the DOL established two Backlog Elimination Centers to handle the more than 400,000 traditional or "RIR" applications that were pending when the new PERM process became effective on March 28, 2005. Upon PERM's effectiveness, the two BECs started entering these cases into their database and issuing "45-day" letters asking employers if they wanted to continue these cases. Recently, the DOL announced that it expected to complete entry of these cases into its database by the end of July 2006, and provided a process for locating labor certification applications for which no 45-day letter has been received. This can be found at **http://ows.doleta.gov/foreign.** Despite the DOL's optimistic announcement, many employers have continued to receive 45-day letters throughout August and this can be expected to continue because the DOL clearly has not completed this process.

8. USCIS Announces No "Cap-Gap" Protection for F-1 Students Seeking H-1B Status

The employment authorization of F-1 students working as part of their optional practical training ("OPT") usually lasts one year, and thus expires during the summer following their graduation. This, coupled with the H-1B quota, has created a problem for F-1 students seeking to secure H-1B status once their OPT has expired. Due to H-1B quota problems, they cannot obtain authorization to work in H-1B status until October 1, 2006. However, USCIS policy prohibits granting a change of status to any foreign national who is not in status when the new status is granted. For most F-1 students, this means that the USCIS will not allow them to remain here between the time that their F-1 status expires and October 1, 2006, the date that their H-1B status begins.

In some years the USCIS has exercised its discretion not to enforce this rule and thus allow the foreign students to stay in the United States until their H-1B status becomes effective. In a recent conference call, however, the USCIS announced that it would not exercise that discretion this year. F-1 students are permitted to remain (but not work) for up to 60 days after their employment authorization has expired. Any F-1 student whose authorized stay (employment authorization plus 60 days) falls short of October 1, 2006, can expect approval of the H-1B petition but denial of their application to change from F-1 to H-1B status. This will mean that they must leave the country and secure an H-1B visa in order to return to the United States and work for their petitioning employer in H-1B status. Due to significant delays in visa appointments at American embassies and consulates abroad, we strongly recommend that these students make these visa application arrangements as soon as possible to avoid additional delays.

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If you have any questions about these issues or any other developments in the immigration area, you can contact **Robert S. Groban, Jr.**, the head of our Immigration Law Group, in the **New York office** at 212/351-4689 or **rgroban@ebglaw.com.** You may also contact **Pierre G. Bonnefil** in the New York office at 212-351-4687 or **pgbonnefil@ebglaw.com**; **Elise Healy,** the immigration partner in our **Dallas office,** at 214/397-4345 or **ehealy@ebglaw.com; Leigh Ganchan,** the immigration partner in our **Houston office,** at 713/50-3141 or **lganchan@ebglaw.com; William Poole**, the immigration partner in our **Atlanta office**, at 404/923-9035 or **wpoole@ebglaw.com;** or **Jang H. Im,** the immigration attorney in our **San Francisco office,** at 415/399-6067 or **jim@ebglaw.com.**