EPSTEIN BECKER GREEN immigration CLIENT ALERT

October 2013 Immigration Alert

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I. USCIS Instructs on Immigration Benefits for Same-Sex Spouses

On June 26, 2013, the Supreme Court of the United States ("SCOTUS") held that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. *United States v. Windsor, Executor of the Estate of Speyer*, No-12-307 (U.S. 2013). As we noted in our July 2013 Immigration Alert, the definition(s) of "marriage" and "spouse" developed by the U.S. Citizenship and Immigration Services ("USCIS") and U.S. Department of

State ("DOS") are likely to have a ripple effect beyond the immigration benefits they permit. More areas of law, such as employee benefits, estates and trusts, domestic relations, taxation, personal injury litigation, and others, may feel the effect of the USCIS decision. Remember, where foreign nationals ("FNs") are concerned, it is typically USCIS or DOS that first opines on their status when deciding whether they are qualified to enter the United States based on a marriage. The USCIS decision that an individual qualifies (or does not qualify) as a spouse may influence or control determinations that employers seek to make on the same issue in other legal contexts.

Since the *Windsor* decision, USCIS has instructed U.S. embassies and consulates to adjudicate visa applications based on same-sex marriage in an identical fashion to how USCIS adjudicates applications for opposite-gender spouses. This means that the same-sex spouse of a visa applicant coming to the United States for any purpose will be eligible to receive a derivative visa. In addition, eligible stepchildren acquired through same-sex marriages can also qualify as beneficiaries or for derivative status. Same-sex couples need not live in a jurisdiction where same-sex marriage is legal. To USCIS, the important question is whether the marriage is valid in the jurisdiction where it took place. Only a relationship legally considered to be a marriage establishes eligibility as a spouse for immigration purposes. Therefore, same-sex couples in a civil union or domestic partnership will not have the same privileges as married couples.

USCIS will reopen all petitions and/or applications previously denied on account of DOMA on or after February 23, 2011. USCIS will attempt to notify the filers of those petitions and/or applications of the reopening and request updated information in support of a petitioner's application. Correspondence will be sent to the petitioner's last known address, so it is important for petitioners to update their addresses on the USCIS website if they have moved.

If you filed an I-130 petition that falls within this category, USCIS recommends that you email the agency at USCIS-626@uscis.dhs.gov. In the email, state that you filed an I-130 petition, indicate whether it is pending or, if denied, the date of denial, and provide the receipt number. USCIS will reply to the email by asking follow-up questions. If you had an I-130 petition erroneously denied prior to February 23, 2011, you **must** notify USCIS by *March 31, 2014*, at this email address. State that you believe that your petition was erroneously denied on the basis of DOMA and provide the necessary information.

Once your I-130 petition is reopened, USCIS will consider both the information submitted with the initial petition and/or application and any new information that you provide to address the current eligibility criteria. If the beneficiary's work authorization was denied or revoked based upon the denial of Form I-485, that denial or revocation will be reconsidered, and to the extent necessary, a new Employment Authorization Document ("EAD") will be issued.

Finally, if you believe that you have had any other type of petition or application denied based solely upon DOMA, you should notify USCIS by *March 31, 2014*, at that same email address. There is no fee required to request that USCIS reopen a petition or

application pursuant to this procedure. Alternatively, an individual may file a new petition or application, which includes the payment of applicable fees, if he or she is not willing to await the USCIS process.

At Epstein Becker Green ("EBG"), we have formed a comprehensive interdisciplinary task force designed to assist employers with these issues. Contact your EBG representative, or any of the lawyers identified at the end of this alert, to take advantage of our knowledge and experience in this area.

II. U.S. Consulates Deny H-1B Visa Applications Due to Improper LCAs

U.S. consulates reportedly have been denying H-1B visa applications based on already approved H-1B petitions where the consular officer believes that the certified Labor Condition Application ("LCA") contained an inappropriately low wage level for the sponsored position. As employers that sponsor FNs for H-1B nonimmigrant status already know, they cannot file an H-1B petition with USCIS until they first secure an approved LCA from the U.S. Department of Labor ("DOL"). In this LCA, the employer must attest, among other things, that it will pay the prevailing wage for the position in the geographic area where it is located. The problem noticed by the consular officers in these LCAs is that they contain entry-level wages for more experienced positions.

These reports serve as reminders to employers regarding the importance of satisfying the prevailing wage and other representations required by the LCA. Now is the time when beneficiaries of fiscal year 2014 H-1B petitions are securing the visas that they need to enter the United States. They have waited for six months due to the limitations imposed by the H-1B quota. If the consular officer refuses to issue the visa, employers must secure another approved H-1B petition for their sponsored employees, who may again be subject to the quota. This means that the FNs may not be selected and must wait another year even if they are. Employers must be meticulous in determining the appropriate job classification and prevailing wage for a sponsored employee.

III. Eighth Circuit Awards Undocumented Immigrants FLSA Damages

On July 29, 2013, the U.S. Court of Appeals for the Eighth Circuit issued its decision in *Lucas v. Jerusalem Café, LLC*, No. 12-2170 (8th Cir. 2013). In *Lucas*, several undocumented alien workers sued under the Fair Labor Standards Act ("FLSA") to recover minimum and overtime wages that the employer refused to pay. The Eighth Circuit affirmed a jury verdict of damages and rejected the employer's argument that these damages were barred by the SCOTUS decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 169 (2002).

The Eighth Circuit noted that Hoffman simply stands for the proposition that unauthorized aliens may not receive back pay after being terminated for engaging in union activities protected by the National Labor Relations Act ("NLRA"). According to the Eighth Circuit, *Hoffman* did not authorize the NLRB to award back pay to an illegal alien for work not performed if the employer was not aware that the employee was unauthorized to work. Consistent with every other circuit court that has addressed this

issue, the Eighth Circuit held that the FLSA allows aliens not authorized to work to sue employers that fail to pay the minimum wage or overtime for work actually performed. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219 (2d Cir. 2006); *Lamonica v. Safe Hurricane Shutters, Inc*., 711 F.3d 1299, 1306 (11th Cir. 2013); *c/f Agri Processor Co. v. NLRB*, 514 F.3d 1, 5-6 (D.C. Cir. 2008)(holding that, in passing the Immigration Reform and Control Act of 1986 ("IRCA"), Congress did not intend to repeal the NLRA to the extent that its definition of "'employee' include[d] . . . undocumented aliens").

This serves as another critical reminder to employers that unauthorized aliens are covered under the FLSA's and NLRA's definitions of an "employee," and, thus, are entitled to the statutory mandated wages for work performed. In other words, employers that hire unauthorized aliens still must comply with federal labor and employment laws.

IV. District Court Grants EEOC's Motion to Protect Plaintiffs' Immigration Status

On September 10, 2013, the U.S. District Court for the Eastern District of Louisiana granted a motion for a protective order filed by the U.S. Equal Employment Opportunity Commission ("EEOC") precluding discovery of the plaintiffs' immigration status in a litigation alleging discrimination based on national origin and race. *EEOC v. Signal Int'l, LLC,* Docket No. 2:12-cv-00557 (E.D. La. 2013). In *Signal Int'l*, the EEOC represented approximately 500 claimants who sued to recover unpaid wages and overtime for work performed. In response, the employer sought discovery into the claimants' immigration status, and argued that it was entitled to this information under the Fifth Amendment so that it could impeach the claimants' credibility. The district court acknowledged that the employer had a legitimate interest in the claimants' immigration status but found that it was not relevant to any substantive issue in the case. In this context, the district court found that the minimal probative value of that information was far outweighed by the intimidating effect that it might have on the claimants' willingness to assert protected workplace rights because it might subject them to deportation. *See, e.g., Rivera v. NIBCO, Inc.,* 364 F.3d 1057 (9th Cir. 2004).

Signal Int'l represents the latest federal court decision that places limits on the discovery of immigration-related information where it is not relevant to any substantive issue in the case. The *Signal Int'l* decision underscores the lengths to which courts will go to protect the public interest by refusing to direct the production of information that might have an intimidating effect on an employee's willingness to assert his or her workplace rights and subject such an employee to potential removal.

V. Ninth Circuit Upholds Civil Penalties for Form I-9 Violations

The U.S. Court of Appeals for the Ninth Circuit has affirmed the decision of an administrative law judge ("ALJ") directing Ketchikan Drywall Services ("KDS") to pay a civil penalty of $286,624.25 imposed by Immigration Customs and Enforcement ("ICE") for Form I-9 violations. *Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement,* No. 11-73105 (9th Cir. 2013). In reaching its conclusion, the Ninth Circuit addressed several issues that employers face in trying to satisfy their Form I-9 obligations. First, the Ninth Circuit held that an employer that copies documents cannot

use them to offset fines if the documents are not attached to the relevant Form I-9 when provided to ICE at the time of an audit. Second, the Ninth Circuit found that copying identity and work authorization documents is not a defense to an employer's failure to complete the Form I-9 properly. Third, the Ninth Circuit determined that an employer commits a substantive violation, which triggers automatic fines, if there are errors and omissions in Forms I-9 that interfere with ICE's ability to verify the status of new hires. Finally, the Ninth Circuit confirmed that employers are responsible for mistakes that their employees make in section 1 of Form I-9.

KDS's failure to take its Form I-9 obligations seriously contributed significantly to the substantial fine it received. Over the years, KDS assigned more than a dozen different employees the responsibility for Form I-9 verification but failed to train any of them. This continued despite receiving a Warning Notice after an audit by the legacy Immigration and Nationalization Service revealed significant Form I-9 violations. The Ninth Circuit's decision in *Ketchikan Drywall* thus stands as another important reminder of how critical it is for employers to properly train the employees it charges with the responsibility for Form I-9 verification.

VI. U.S. Government Issues New Pronouncements on Pre-Populating Forms I-9

Beginning in May 2013, senior ICE officials warned that employers should not pre-populate section 1 of Form I-9. Recently, however, these senior ICE officials indicated that ICE no longer takes an official position with regard to pre-filling section 1 of Form I-9, but warned employers to follow the regulations and related interpretations.

The change in ICE's position may have resulted from a Technical Assistance Letter ("TAL") issued by the U.S. Department of Justice's Office of Special Counsel ("OSC") on August 20, 2013. In that TAL, the OSC noted that the instructions for completing the Form I-9 indicate that employees must complete and sign section 1 on the first day of employment. This includes an attestation as to citizenship or immigration status and an attestation that the employee is aware of the penalties for making a false statement. The OSC noted that pre-population increases the likelihood that inaccurate or outdated information could be included on the form. This could occur, for example, if the employer entered information previously obtained during a job interview. Then, the employer might improperly reject documents that the employee presented to prove identity and status for section 2 purposes.

Employers that find it easier to pre-populate section 1 of Form I-9 can avoid these problems if they require the new employee to review the accuracy of the information and then sign and date the pre-populated Form I-9 when he or she starts work.

VII. OSC Cautions Employers on Re-Verifying Conditional Green Cards

On September 5, 2013, the OSC issued a TAL regarding an employer's obligation to re-verify Conditional Permanent Residence Cards ("Conditional Green Cards"). Conditional Green Cards are most commonly issued to the spouses of American citizens who secure permanent residence based on marriages that are less than two years old. Near

the end of the two-year period, the FN must apply to remove the conditional status on the green card by showing that the marriage remains valid or that there is a legal justification for retaining the green card if the marriage is no longer valid. If the FN's application is accepted, then USCIS will issue a Permanent Residence Card ("Green Card"). The TAL was issued at the request of an employer that believed that an employee with a Conditional Green Card residence would not be able to extend it and get a Green Card. The employer was concerned because the expiration of the Conditional Green Card might mean that it had "actual" knowledge of the employee's loss of work authorization.

USCIS's general guidance on Form I-9 completion states that employers should not re-verify a Green Card regardless of whether that card contains an expiration date. In this regard, the current version of the Green Card contains a 10-year expiration date. However, when that Green Card expires, the underlying permanent residence status does not. The question posed by the employer concerned whether this general guidance also applied to Conditional Green Cards, which are limited to two years and expire unless extended by USCIS.

The OSC's guidance is that an employer may not re-verify either a Green Card or Conditional Green Card. In this regard, the OSC rejected the notion that the employer had to assume that the employee would lose his or her work authorization when the Conditional Green Card expired. The OSC opined that the employee could obtain a Green Card or employment authorization on a different basis. As a general rule, the OSC concluded that an employer's obligation to re-verify applied only to an employee with temporary employment authorization. The OSC suggested that an employer has no legal right to re-verify the employment authorization of a Conditional Green Card holder unless the employer had a credible basis for believing that the employee lacked current employment authorization.

The OSC's TAL appears to upset the delicate balance in IRCA between an employer's obligation to perform Form I-9 verifications and its need to conform to IRCA's antidiscrimination provisions. The USCIS prohibition on re-verifying Green Cards makes sense because the permanent residence status does not expire even if the Green Card does. Conceptually, there is no difference between the expiration of a Conditional Green Card and a temporary EAD.

The OSC's TAL removes the "bright line" that employers previously could follow on any employee with employment authorization that expired. Now, employers risk discrimination claims if they re-verify Conditional Green Cards and need to track whatever information they receive that might suggest that the Conditional Green Card holder has lost work authorization. This places an unfair evidentiary burden on employers that the "bright line" Form I-9 requirements in IRCA were designed to prevent.

VIII. OSC Warns Employers to Stop Asking Job Applicants About Citizenship Status

On September 6, 2013, the OSC issued another TAL warning employers not to ask applicants to specify their citizenship during the employment application process because rejected applicants could claim that the employers used that information to unlawfully discriminate against them. In this regard, the OSC again distinguished between inquiries into citizenship, which generally are unlawful, and questions about the need for immigration sponsorship, which are permissible. If an employer will not sponsor any job applicant, the OSC indicated that it should simply state that in its job postings.

IX. OSC Cautions General Contractors Against Re-Verifying Forms I-9 Previously Completed by Subcontractors

On August 13, 2013, the OSC issued a TAL addressing the responsibilities that a contractor has to re-verify Forms I-9 already completed by a subcontractor. Under the "Best Practices" incorporated into its IMAGE program, USCIS announced that contractors must be responsible for the Form I-9 compliance by subcontractors. In the situation confronted by the OSC, a general contractor allegedly required all of the subcontractor's employees to present the original documents that they already had provided to the subcontractor during its Form I-9 verification process before they would be allowed to start work.

The OSC noted that this practice presented a number of problems. First, there was no legal basis for the request because the general contractor was not the employer. Second, it violated the legal prohibition in the IRCA against requiring employees to present more or different documents than the Form I-9 process requires. Finally, it threatened to place the employee in an untenable position due to the general contractor's unlawful actions. Given the passage of time since the employees completed the Form I-9 for the subcontractor, it is possible that the employees may no longer have the documents originally presented. This means that the general contractor's policy might lead it to refuse employment to an individual actually authorized to work.

The OSC's TAL serves as yet another reminder to employers about the delicate legal tightrope that they must walk in balancing Form I-9 compliance against the IRCA's anti-discrimination provisions. While general contractors have an obligation to ensure that subcontractors satisfy their Form I-9 requirements, this does not convert general contractors into employers for Form I-9 purposes. At most, the OSC's TAL imposes a requirement on general contractors to make sure that the subcontractor satisfies its Form I-9 obligations. This can be satisfied in many ways, including contractual provisions that define the subcontractor's obligations and contain warranties that it has satisfied these obligations.

X. DOJ Settles Employment Discrimination Allegations Under IRCA

The U.S. Department of Justice ("DOJ") recently settled allegations that two companies violated IRCA's anti-discrimination provisions. In the first case, the DOJ alleged that Vincent Procaro, Inc. ("VPI"), a Rhode Island company specializing in warehousing, distribution, light assembly, and packaging services, required non-U.S. citizens to produce specific documents during the employment verification process that were not required of U.S. citizens. Under the terms of its settlement agreement, VPI will pay a civil fine of $43,092, undergo DOJ monitoring for two years, train its human resources personnel to comply with the IRCA's anti-discrimination provisions, and create a $30,000 fund to award back pay to individuals who suffered economic harm as a result of the improper employment verification practices.

In the second case, the DOJ settled anti-discrimination allegations against Stellar Staffing, LLC ("Stellar Staffing"), an employment agency based in Birmingham, Alabama. DOJ alleged that Stellar Staffing violated the IRCA by mandating that non-citizens produce different documents than citizens during its employment verification process. Under the terms of its settlement agreement, Stellar Staffing will pay a $2,500 fine, undergo training on the IRCA's anti-discrimination provisions, and be subject to DOJ monitoring for one year.

XI. State Immigration Legislation Is Up in the First Half of 2013

The national debate on immigration continues even as Congress is paralyzed on the issue. State legislatures passed nearly 30 percent more immigration laws in the first half of 2013 as compared to 2012. Lawmakers in 43 states and the District of Columbia enacted 146 immigration-related laws. Only seven states—Delaware, Kansas, Massachusetts, Montana, New Hampshire, Ohio, and Wyoming—did not enact immigration-related legislation in the first half of 2013. Fourteen states enacted employment-related immigration laws. These laws address a variety of topics, including eligibility for unemployment insurance, workers compensation, and the enforcement of work authorization for public employees and contractors.

While federal law is the primary source of immigration law, it is important for employers to remember that they also must comply with whatever state immigration laws govern their operations.

XII. DOS Issues November 2013 Visa Bulletin

The DOS has issued its Visa Bulletin for November 2013. This 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. On the employment-based side, the November 2013 Visa Bulletin showed that the Second Preference ("EB-2") for China has reached October 8, 2008, and India has remained at June 15, 2008. The EB-2 cutoff date for the rest of the world remains current. In the November 2013 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: October 1, 2010, for all chargeability,

including Mexico and China. This means that the EB-3 cutoff date for China now is more advanced than the EB-2 cutoff date for that country. The EB-3 cutoff date for India remains at September 22, 2003, and, for the Philippines, it remains at December 15, 2006. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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