January 2014 Immigration Alert

H-1B Nonimmigrant Season Opens on April 1, 2014, for Fiscal Year 2015

H-1B Petition Amendments May Be Required Due to Changed Job Location

DOL's Administrative Review Board Applies "Bona Fide Termination" Rule to E-3 Worker

Infosys Pays Record $34 Million in Settlement

New York Federal District Court Awards Undocumented Immigrants FLSA Damages

California Passes "Immigrant Friendly" Legislation

OCAHO Provides a Roadmap for Reducing Fines for Form I-9 Violations

OSC Settles Workplace Discrimination Complaint

Supreme Court Amends Federal Rule of Criminal Procedure 11 to Include New Immigration Consequences Warning

New York Requires Trial Judges to Inform Defendants of Deportation Consequences from Guilty Pleas to Felonies

BIA Finds That an E-2 Dependent Is Not Required to Apply for Employment Authorization

Important Recent Changes to USCIS M-274 Handbook for Employers

USCIS Announces Enhancement to E-Verify Program to Help Combat Fraud

ICE Will Not Use Information Obtained Under Affordable Care Act in Civil Immigration Enforcement Actions

DOS Issues February 2014 Visa Bulletin

****

By Robert S. Groban, Jr. and Matthew S. Groban

I. H-1B Nonimmigrant Season Opens on April 1, 2014, for Fiscal Year 2015

As most H-1B employers know, there is an annual quota on the number of new H-1B petitions that can be approved each federal fiscal year. The quota is 65,000 for regular H-1B petitions, plus another 20,000 for H-1B petitions filed for foreign nationals ("FNs") who have obtained a master's degree or higher from an accredited American university. The federal government's fiscal year runs from October 1 through September 30, so fiscal

year 2015 will begin on October 1, 2014. Employers are eligible to start filing H-1B petitions for inclusion in the fiscal year 2015 quota on April 1, 2014, but they cannot secure a start date prior to October 1, 2014. If the U.S. Citizenship and Immigration Services ("USCIS") receives more H-1B petitions than these limited quotas allow, it will conduct a random lottery of all petitions filed on or before a specific date. Last year, the USCIS included all new H-1B petitions filed through April 5, 2013, the conclusion of the first week of filing. If this year's program operates in a similar fashion, the USCIS will accept for inclusion in the lottery all new H-1B petitions received between April 1 and April 4, 2014.

As the U.S. economy improves, the likelihood is that more employers will submit H-1B petitions for inclusion in the 2015 H-1B quota. Last year, the quota was reached on April 5, 2013, the end of the first week. This year, predictions are that there will be significantly more applicants for inclusion in the 2015 quota; thus, the probability for acceptance will be even less than last year. Employers need to assess their workforce requirements, determine what H-1B petitions they plan to file, and get them submitted on or shortly after April 1, 2014. They also need to examine contingency plans on how to handle sponsored employees in the likely event that H-1B petitions on their behalf are not accepted in the quota. Finally, employers recruiting potential H-1B candidates need to assess the challenges that the H-1B program poses in deciding whether to extend employment offers to FNs who might require H-1B sponsorship. As we have noted in prior Alerts, there is no legal restriction on asking questions about immigration status and the need for sponsorship as long as the questions are specific and the answers not used in a discriminatory manner.

II. H-1B Petition Amendments May Be Required Due to Changed Job Location

Most H-1B employers know that their H-1B petitions must be amended when there is a "material" change in the terms and conditions of the beneficiary's employment. When only a "minor" change has occurred, the employer can simply notify the USCIS when it files to extend the beneficiary's H-1B status. Historically, the USCIS has always considered a change only in the geographic location of the sponsored position as a minor change as long as a new Labor Condition Application ("LCA") was certified for and posted at the new work site, and the employer satisfied the wage and other terms of that LCA going forward.

Recent developments at the USCIS Regional Service Centers suggest that the agency may be revisiting this longstanding policy and requiring amended petitions whenever a job site changes, even though no formal changes have been announced. This new approach has been brewing since 2009, when the USCIS significantly increased the number of unannounced workplace visits from its Fraud and Detection Agency ("FDNS") to the work sites of H-1B employers. The Form I-129 requires H-1B employers to list the exact address of an H-1B employee's position. The FDNS will conduct site visits at the employment location listed on the H-1B petition. If the FDNS investigator determines that the H-1B beneficiary is no longer working at that work site, it will advise the USCIS Service Center that originally approved the petition. Under current practice, this likely means that the Service Center will issue a notice of intent to revoke ("NOIR") because the

H-1B employee was not working at the job location specified in the H-1B petition.

Until recently, employers could rebut the NOIR by showing that a new LCA had been secured and posted in the new location, and that none of the other aspects of the position had changed. In recent months, however, the Service Centers have enforced these NOIRs and suggested that a geographic move in those cases was a material change that required the employer to amend its H-1B petition. While the USCIS policy in this regard appears to be evolving, these recent decisions suggest that employers now should carefully consider whether an amended H-1B petition should be filed when a job location changes or whether simply securing a LCA is acceptable.

III. DOL's Administrative Review Board Applies "Bona Fide Termination" Rule to E-3 Worker

On December 23, 2013, the Administrative Review Board ("ARB"), U.S. Department of Labor ("DOL"), issued its decision in *Matter of S.V. Technologies, LLC*, ARB Case No. 12-042 (Dec. 23, 2013). In this case, the ARB upheld an award of $30,499.51 in back wages to an E-3 nonimmigrant worker who had not received a "bona fide termination." Those who follow our Alerts may recall that the DOL developed and has applied the "bona fide termination" rule to award back pay to H-1B employees where the employer fails to: (1) perform a proper termination under state law, (2) provide written notice of the termination to the USCIS, and (3) pay the worker the reasonable costs of transportation home. H-1B employers that terminate H-1B workers in violation of this rule can be liable for all salary due under the LCA applicable to the particular employee. As the ARB's decision in *Matter of S.V. Technologies, LLC*, indicates, the DOL is now applying the "bona fide termination" rule to the discharge of E-3 nonimmigrants.

IV. Infosys Pays Record $34 Million in Settlement

On October 30, 2013, the U.S. Department of Justice ("DOJ") settled allegations that Infosys Corporation ("Infosys"), an Indian consulting company, engaged in systematic visa fraud and abuse of immigration procedures. DOJ alleged three main categories of violations. First, DOJ claimed that Infosys made misrepresentations in the process of using the B-1 business visitor classification by claiming that workers were coming for meetings and business discussions, when, in reality, they were coming to perform skilled work. In this regard, DOJ alleged that Infosys directed B-1 visa applicants to deceive U.S. Consular Officials by misrepresenting the true purpose of their visits. DOJ also claimed that Infosys prepared contracts with clients to conceal the fact that Infosys was providing B-1 visa holders to perform skilled labor that otherwise would have required a U.S. worker or an H-1B holder to perform. To further conceal its illegal activities, DOJ asserted that Infosys billed clients for the use of off-shore resources, when, in fact, the work was performed by B-1 visa holders in the United States.

Second, DOJ claimed that Infosys failed to obtain an approved LCA for each location where an H-1B employee would work. Infosys allegedly told H-1B employees to represent to the government that they would be working at destinations with approved LCAs, even

though Infosys knew that none had been approved for the actual place of their employment.

Third, DOJ alleged that Infosys failed to maintain Forms I-9 for many of its workers in this country. This included widespread failure to update and re-verify the employment authorization of a significant percentage of its FN population.

The settlement agreement includes civil fines of $34 million and continued auditing of Infosys' B-1 and H-1B visa programs and its Form I-9 compliance efforts. For other employers, this settlement provides several important takeaways:

1. **Monitor B-1 Visitors**: Employers need to pay much closer attention to their use of B-1 nonimmigrant visas and, where applicable, the use of the Visa Waiver Program ("VWP") to be certain that all visitors satisfy the legal requirements for these classifications. Especially when the H-1B quota is reached, the USCIS and Customs and Border Protection ("CBP") will closely scrutinize B-1 and VWP visitors to ensure that they are seeking admission to perform activities permitted by the B-1 visa category.

2. **Monitor Where H-1B Employees Work**: If an employer plans to use an H-1B employee at a work site that differs from the one where he or she originally was authorized to work, it must make sure that it has an approved LCA for each site and may consider filing an amended H-1B petition. Under the H-1B program, the H-1B employee must be paid the higher of the actual or prevailing wage where the job is located. When an employee moves, this wage may change. Thus, the USCIS considers it important to secure a new LCA for the new work site to protect the wages and working conditions of American workers there.

3. **Form I-9 Compliance Is Important**: The initial Infosys investigation resulted from a whistleblower complaint about I-9 violations. While Infosys originally implemented an electronic I-9 system in 2009, DOJ alleged that the company failed to monitor that system and that many Forms I-9 either were not maintained or were not re-verified as required by law. Organizations that elect to process Forms I-9 electronically must be sure to monitor these systems to make sure they continue to maintain the documents and/or information required by law.

At Epstein Becker Green ("EBG"), we have formed a comprehensive interdisciplinary task force designed to assist employers with these complicated 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.

V. New York Federal District Court Awards Undocumented Immigrants FLSA Damages

On December 19, 2013, the U.S. District Court for the Southern District of New York denied the defendant's motion for discovery regarding the plaintiffs' immigration status in *Colon v. Major Perry St., Inc.*, No. 1:12-cv 03788 (S.D.N.Y. 2013). In Colon, several

workers, some of whom are undocumented aliens, sued under the Fair Labor Standards Act ("FLSA") to recover minimum and overtime wages that the employer refused to pay. The defendant argued that under the Second Circuit's decision in *Palma v. NLRB*, 723 F.3d 176 (2nd Cir. 2013), the plaintiffs were barred from collecting back pay under the FLSA if they were here illegally. In *Palma*, the Second Circuit held that the workers, who were undocumented aliens at the time they were fired, were precluded from collecting back pay under the National Labor Relations Act.

The district court explained that the text of the FLSA made clear that its provisions were "unambiguously" intended to apply to undocumented workers by defining the term "employee" as "any individual employed by the employer." The court further noted that the FLSA focuses on back pay as a remedy to ensure that employers don't gain an advantage by violating immigration laws. If this were not the case, then employers would be exempt from wage and hour standards for undocumented employees. Applying the FLSA to undocumented workers, the court found, furthers the purpose of the Immigration and Reform Control Act—to punish employers for employing undocumented workers.

This case serves as another critical reminder to employers that unauthorized aliens are covered under the FLSA'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.

VI. California Passes "Immigrant Friendly" Legislation

On January 1, 2014 several immigrant-friendly laws went into effect in California. These bills provide significant new rights and protections to undocumented Californians and restrict state and local participation in federal deportation efforts. The newly enacted legislation bars employers from reporting or threatening to report a worker's (or his or her family's) suspected immigration status to the government in retaliation for the worker exercising a right under the California labor code. Employers that violate this law are subject to revocation of their business license.

A separate provision of this law prohibits employers from taking actions otherwise deemed to be lawful if the action is taken in retaliation for an employee's exercise of a right protected under the California labor code. In this context, employers are barred from requesting additional proof of an employee's work authorization, using E-Verify to confirm the employee's work authorization, or contacting immigration authorities about an employee.

The new provisions specify that an employer may not retaliate against an employee for making a complaint about unpaid wages. In this regard, employees who have been victims of unfair immigration-related practices may sue their employers for reinstatement and lost wages without first having to file an administrative claim. Employers that violate this provision are not only liable for attorneys' fees and unpaid wages but also subject to civil fines of up to $10,000 per violation, as well as suspension of their business license.

Finally, the new legislation protects employees who are undocumented at the time of hire but later receive work authorization and social security cards. Employers are prohibited from discriminating, retaliating, or taking any adverse action against employees who update their personal information. This protection is particularly important in California, where nearly 2.6 million undocumented Californians may receive work authorization under comprehensive immigration reform. It remains to be seen how this state legislation squares with other traditional elements of employment law. For example, if an undocumented employee provides false information in an employment application, does this mean that the employee cannot be disciplined and/or terminated for violating the employer's honesty policies? Will an employee be able to use this law as a defense to an otherwise valid termination for cause? What record of the "complaint" will be required? Will it be sufficient for the employee simply to claim that he or she orally complained to someone?

While federal law is the primary source of immigration law, it is important for employers to remember that they also must consider state immigration laws that might apply to their operations. In California, EBG is fortunate to have professionals in our San Francisco and Los Angeles offices who can help guide you through this maze. Contact Jang Im in San Francisco or David Jacobs in Los Angeles if you need more assistance with these rules or any other issues relating to the impact of immigration issues on your employment relationships.

VII. OCAHO Provides a Roadmap for Reducing Fines for Form I-9 Violations

The recent decision by the Office of the Chief Administrative Hearing Officer ("OCAHO") in *United States v. The Red Coach Rest., Inc*., 10 OCAHO NO. 1200 (2013), provides a roadmap for employers seeking to reduce fines sought by Immigration and Customs Enforcement ("ICE") for Form I-9 violations. In *Red Coach*, the ICE complaint alleged that Red Coach: (1) failed to prepare Forms I-9 for nine employees within three days of their hire, and/or failed to present the forms to ICE upon request; and (2) failed to ensure proper completion of Forms I-9 for 41 additional employees. The complaint requested penalties in the amount of $30,184.

The administrative law judge ("ALJ") reduced this penalty to $16,300 because the amount sought by ICE was too severe in proportion to Red Coach's ability to pay, did not consider Red Coach's history of no previous Form I-9 violations, and had no deterrent effect because Red Coach's I-9s now are handled by another company. In his decision, the ALJ noted that in determining the appropriate amount of civil penalties for Red Coach's paperwork violations, he gave "due consideration … to the size of the employer, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of the previous violations."

The *Red Coach* decision reminds employers of the potentially severe fines that can arise out of any failure to properly complete the Form I-9 paperwork, and of the need to train staff on the Form I-9 process. The decision also provides avenues for reducing ICE fine determinations through appeals to OCAHO based on the particular facts of the case.

VIII. OSC Settles Workplace Discrimination Complaint

On December 11, 2013, the DOJ, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), and Kim Hoang Coffee and Fast Food ("KHCFF") entered into a voluntary agreement regarding alleged citizenship status discrimination and unfair documentary practices during 2013. The OSC alleged that KHCFF improperly: (1) caused a non-citizen to believe she had been fired while re-verifying her employment authorization; and (2) believed that it could ask non-citizens to produce specific documents to establish work authorization at the time of hire, while not making similar demands of U.S. citizens.

As part of the agreement, KHCFF was required to revise its policies to prohibit: (1) requesting employment eligibility verification documents from any individual prior to making an offer of employment, (2) discriminating on the basis of citizenship status or national origin in the hiring and firing process, and (3) discriminating on the basis of citizenship or national origin during the Form I-9 employment eligibility verification process.

This matter serves as another important reminder of the tightrope that employers must walk in the recruiting and on-boarding process. While they can develop sufficient information regarding the immigration status of the applicant so that that they can make an employment decision, employers cannot use this information in a discriminatory manner or ask questions or request documents in a manner that is not consistent with what the immigration laws permit.

IX. Supreme Court Amends Federal Rule of Criminal Procedure 11 to Include New Immigration Consequences Warning

Effective December 1, 2013, Rule 11 of the Federal Rules of Criminal Procedure requires that, before accepting a plea of guilty, the defendant must be advised in open court of whether a plea of guilty or nolo contendere might subject the defendant to removal from the United States and/or an inability to return to this country in the future.

This change results from the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), finding that the failure to give a defendant this warning prior to accepting any plea would constitute ineffective assistance of counsel. While most of our clients do not face these consequences, this change is an important reminder of the possible immigration consequences from what might appear as only the most routine criminal proceedings. Charges of driving while intoxicated or under the influence, for example, can have significant immigration repercussions. Thus, it is important to consider the possible immigration consequences of *any* arrest or possible criminal proceeding with which any FN employee might be involved.

X. New York Requires Trial Judges to Inform Defendants of Deportation Consequences from Guilty Pleas to Felonies

On November 19, 2013, the New York Court of Appeals held that due process under the

New York State Constitution compels trial courts to apprise FN defendants that they may be deported as a consequence of pleading guilty to a felony. *People v. Peque*, 2013 WL 6062172 (N.Y. Nov. 19, 2013). As the U.S. Supreme Court observed in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the *Peque* Court reasoned that defendants must be given this notice because deportation is so important and can have such a tremendous impact on the defendant. In this regard, the Court of Appeals overruled a portion of its prior decision, *People v. Ford*, 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995), where it held that a court's failure to advise a defendant of potential deportation could never affect the validity of the defendant's plea.

The *Peque* Court, however, was careful to limit the scope of its ruling. The failure of the trial court to advise a defendant of the possible immigration consequences of a plea is not, by itself, an automatic justification for vacating a plea that was otherwise appropriate. To succeed, the defendant must establish a reasonable probability that he would have rejected the plea had the court warned of the possibility of deportation.

XI. BIA Finds That an E-2 Dependent Is Not Required to Apply for Employment Authorization

On November 5, 2013, the Board of Immigration Appeals ("BIA") issued an opinion that found that an E-2 spouse remained eligible for permanent residence even though she had worked without first securing employment authorization. To be eligible to apply for permanent residence, an applicant must demonstrate that, among other things, he or she has not engaged in unauthorized employment. Under the immigration laws, E-2 spouses are authorized to work. The USCIS, however, has found that E-2 spouses can only do so once they first secure an employment authorization document ("EAD"). An Immigration Judge denied this E-2 spouse's application because she worked without an EAD.

The BIA reversed and found that the E-2 spouse did not engage in unauthorized employment that precluded her from green card eligibility. In this regard, BIA relied on Section 214(e)(6) of the Immigration and Nationalization Act, which states that "in the case of an alien spouse admitted under section 101(a)(15)(E) of the Act who is accompanying or following to join a principal alien admitted under the same section, the Attorney General shall authorize the alien spouse to engage in employment and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit." The BIA also relied upon the USCIS regulations, which appeared to be ambiguous on the issue. Since nothing in the regulations prohibited the E-2 spouse from working, the BIA concluded that she was eligible for permanent residence.

This is not an uncommon situation for spouses in E-2 or L-2 classification, which is why we note this decision. It is still strongly recommended that E-2 and L-2 spouses secure an EAD before working. Until this decision, however, the consequences of failing to do so seemed to be a period of unauthorized employment. Now we may see some light at the end of that tunnel for E-2 spouses. It remains to be seen what action, if any, the USCIS and Department of Homeland Security will take in response to this decision.

XII. Important Recent Changes to USCIS M-274 Handbook for Employers

The USCIS released an updated Form I-9 on March 8, 2013, and a revised employer handbook (Form M-274) in March 2013. Recently, the USCIS released a revised employer handbook. It is available at http://www.uscis.gov/sites/default/files/files/form/m-274.pdf. Among the changes are the following:

1. The USCIS added guidance regarding full legal names and other names that an employee has used in the past.

2. The USCIS confirmed common abbreviations for document titles and issuing authorities may be used in section 2 of the I-9.

3. The USCIS, for the first time, stated that employers may accept a laminated social security card as long as the card reasonably appears to be genuine and to relate to the person presenting it. However, the Social Security Administration ("SSA") still advises cardholders not to laminate social security cards.

The revised employer handbook is a valuable resource for those who have questions about the Form I-9 process and provides useful examples on how to complete the Form I-9 in commonly encountered situations. Where this handbook is not helpful, however, we are available to assist you in this increasingly complicated and important compliance area.

XIII. USCIS Announces Enhancement to E-Verify Program to Help Combat Fraud

The USCIS recently announced an "enhancement" to the E-Verify program that it says will help combat fraud by identifying and deterring the fraudulent use of Social Security Numbers ("SSNs") for employment verification. The USCIS now will lock SSNs in E-Verify once they are used in connection with a Form I-9. If an employee attempts to use a locked SSN, E-Verify will send a Tentative Nonconfirmation ("TNC") to the employer. The employee then must contest the finding at a local SSA office. If an SSA officer confirms the employee's identity correctly matches the SSN, the TNC will be converted into "Employment Authorized" status in E-Verify.

It is important for both employers and employees to take notice of this change. Employer enrollment in E-Verify has more than doubled in the last five years, with nearly 500,000 employers now participating in the program. In 2013 alone, employers used E-Verify to authorize nearly 25 million employees. As new states mandate the use of E-Verify and its use becomes more commonplace, employers can expect an increase in TNCs for those employees whose SSNs may have been stolen by others. While this may have a positive result in the long run by advising the new employee of the theft, these TNCs also will place an increased administrative burden on the employer to resolve.

XIV. ICE Will Not Use Information Obtained Under Affordable Care Act in Civil Immigration Enforcement Actions

On October 25, 2013, ICE's Office of the Director, issued a memorandum confirming that

information provided by individuals for purposes of determining eligibility under the Affordable Care Act ("ACA") may not be used to verify their immigration status. Further, the information may not be used as the basis for pursuing a civil immigration enforcement action against such individuals or member of their household. This memorandum is consistent with the laws and regulations outlining the eligibility requirements under the ACA.

XV. DOS Issues February 2014 Visa Bulletin

The DOS has issued its Visa Bulletin for February 2014. 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 February Visa Bulletin showed that the Second Preference ("EB-2") for China continues to lag behind the Third Preference ("EB-3") for that country. The EB-3 Chinese quota has reached June 1, 2012, while the EB-2 quota has only reached January 8, 2009. In the February Visa Bulletin, the EB-2 quota for India has remained at November 15, 2004. The EB-2 cutoff date for the rest of the world remains current. In the February 2014 Visa Bulletin, the cutoff dates for the EB-3 category are as follows: June 1, 2012, for all chargeability, including Mexico. The EB-3 cutoff date for India is September 1, 2003, and, for the Philippines, it is April 15, 2007. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

*****

For more information or questions regarding the above, please contact:

Robert S. Groban, Jr.
New York
212/351-4689
rgroban@ebglaw.com

Pierre Georges Bonnefil
New York
212/351-4687
pgbonnefil@ebglaw.com

Patrick G. Brady
Newark
973/639-8261
pbrady@ebglaw.com

Jang Im
San Francisco
415/398-3500
jim@ebglaw.com

Greta Ravitsky
Houston
713/300-3215
gravitsky@ebglaw.com

About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 250 lawyers practicing in nine offices, in Boston, Chicago, Houston, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. The firm

is uncompromising in its pursuit of legal excellence and client service in its areas of practice: Health Care and Life Sciences, Labor and Employment, Litigation, Corporate Services, and Employee Benefits. Epstein Becker Green was founded to serve the health care industry and has been at the forefront of health care legal developments since 1973. The firm is also proud to be a trusted advisor to clients in the financial services, retail, and hospitality industries, among others, representing entities from startups to Fortune 100 companies. Our commitment to these practices and industries reflects the founders' belief in focused proficiency paired with seasoned experience. Visit www.ebglaw.com