May 2012 Immigration Alert

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I. H-1B Nonimmigrant Applications Approach Cap Limits for Fiscal Year 2013

As of May 25, 2012, U.S. Citizenship and Immigration Services ("USCIS") has received 48,400 petitions that count against the 65,000 H-1B Regular Cap, and 17,500 petitions that count against the 20,000 H-1B Master's Cap. USCIS will continue to accept new petitions until it has filled the H-1B Regular and Master's Caps.

We anticipate that the pace of H-1B submissions will now quicken because, among other reasons, foreign students working in F-1 Optional Practical Training status are receiving degrees, thus allowing their employers to sponsor them for the H-1B classification. Therefore, we strongly advise employers to identify and file immediately any petitions subject to the H-1B Cap – including petitions of L-1B employees who may need to switch to H-1B status to extend their authorized stay due to delays in the green card process. Any foreign national ("FN") candidates who do not make it under the 2013 H-1B Cap may not be able to start work, or continue working, until October 1, 2013 – or later!

II. ICE Expands Worksite Enforcement Efforts

In May 2012, Immigration Customs Enforcement ("ICE"), the agency within the Department of Homeland Security ("DHS") responsible for worksite enforcement, issued 500 additional audit notices requiring companies to produce their hiring records and Forms I-9 for inspection. These so-called "silent raids" have become the hallmark of the Obama administration's worksite enforcement program. The notices are designed to determine whether the companies are complying with the laws relating to the employment of only authorized workers. Since January 2009, the Obama administration has audited over 7,500 employers and imposed more than $100 million in administrative and criminal fines. Under these circumstances, organizations would be well advised to make work site enforcement compliance a higher priority in their overall risk management programs.

III. SEC Investigates Chipotle's Hiring Practices

On May 18, 2012, Chipotle Mexican Grill Inc. ("Chipotle") announced that it has received a subpoena from the U.S. Securities and Exchange Commission ("SEC") seeking information regarding the company's hiring practices and compliance with U.S. immigration laws relating to work authorization. Four days later, Chipotle disclosed that it also is the subject of a federal investigation by the U.S. Attorney's Office for the District of Columbia into whether the company's alleged hiring of undocumented workers constituted possible federal criminal securities law violations. According to Chipotle, it appears that both the SEC and the Department of Justice ("DOJ") are focusing on whether the company made appropriate disclosures regarding its worksite enforcement compliance policies and procedures.

The actions by the SEC and DOJ have ratcheted up the stakes of worksite enforcement compliance for publicly held companies.

IV. NLRB Provides Guidance on Immigration Issues in Compliance Cases

On May 4, 2012, the Associate Counsel for the National Labor Relations Board ("NLRB") issued Memorandum OM 12-55 ("Memorandum"), which contains case handling instructions for regional offices on how to handle immigration issues in unfair

labor practice compliance proceedings. The Memorandum follows a December 2011 ruling by the NLRB that clarified the burdens of parties attempting to explore or litigate the immigration status of employees in NLRB proceedings.

According to the Memorandum, respondents may "not use the compliance phase [of NLRB proceedings] as a means to fish for disabling employee conduct under [the Immigration Reform and Control Act of 1986 ('IRCA')], i.e., no legal authorization for its employees to work in the United States." The Memorandum instructs regional offices that, in the compliance phase, they should demand a full accounting of evidence that a respondent intends to rely upon to assert that employees are ineligible for back pay awards under the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Where a respondent fails to include sufficient facts in its answer supporting a "work authorization" defense, the Regions should file a pre-trial motion for a bill of particulars eliciting the respondent's position and the specific evidence on which it relies to support its claims that the employee(s) are not eligible to work in this country. If the answers are deficient, the Memorandum instructs the Regions to file motions to strike the affirmative defenses and, if no other issues are raised, to seek summary judgment. If subpoenas *duces tecum* are served on employees in a compliance proceeding where a work authorization defense is asserted, the Memorandum instructs the Regions to move to revoke the subpoenas conditionally, subject to a ruling on the motion for a bill of particulars and review of the bill.

The Memorandum also instructs the Regions that future reinstatement offers no longer will be considered valid if conditioned on the re-verification of employment authorization. In the Memorandum, the NLRB reiterates its position that an employee's work status is not relevant to an employer's liability under the National Labor Relations Act. For this reason, the Memorandum instructs Regions to consider whether the charged employer also commits an independent unfair labor practice under Section 8(a)(1) by raising a work authorization defense without sufficient facts to support it.

V. NLRB Settlement Makes E-Verify a Mandatory Subject of Bargaining

In a precedent-setting settlement with the NLRB, Pacific Steel Casting Company ("PSC"), a manufacturing company in Berkeley, California, announced that it had agreed to reinstate employees and pay all lost wages and benefits to employees terminated when PSC registered and started using the DHS's E-Verify Program.

This proceeding began in February 2011, when PSC was subject to a Form I-9 audit conducted by ICE. At that time, PSC voluntarily enrolled into the federal E-Verify program without notifying its unionized employees or Local 164B, their union chapter. Later, when Local 164B discovered this enrollment, PSC claimed that it was required to take such action because the company was a federal contractor. This claim turned out to be incorrect, but PSC continued to use E-Verify. The union then filed a charge with the NLRB claiming that PSC was required to, but did not, bargain over its enrollment into E-Verify because this changed the terms and conditions of employment.

PSC recently settled the union's charges. Under the terms of the settlement, PSC agreed to terminate its participation in the E-Verify program and to reinstate and provide back pay to all employees terminated while contesting a tentative nonconfirmation ("TNC") received from E-Verify, as well as those employees not given the opportunity to contest their TNCs. Under the rules governing the use of E-Verify, employees cannot be terminated if they contest a TNC unless the federal government issues a final confirmation ("FNC") that they lack work authorization. PSC also agreed to post, both physically and via the company's intranet, and to email to all employees a notice stating the employees' rights under the National Labor Relations Act, and to advise them that it would not refuse to bargain with the union over changes to wages, hours, and working conditions, and would notify the union and request bargaining before making any further changes.

This settlement represents a warning to unionized employers that they may need to review their collective bargaining agreements before deciding whether to enroll in E-Verify and, if they do enroll, that they need to follow the E-Verify rules regarding TNCs and FNCs.

VI. Export Control Compliance Presents Discrimination Dilemmas

In the post-9/11 era, the federal government has increased its focus on national security enforcement, with a special emphasis on U.S. export control laws. In February 2011, this focus increased to employers sponsoring an FN under the H, L, and O nonimmigrant classifications, among others, when the government added a new section to the application that required the sponsoring employers to represent whether an export license was required for the FN employee and, if so, whether it had been obtained. Under U.S. law, the disclosure of controlled technology to an FN employee is considered a "deemed export" of the technology to the FN's home country. If an employer needs an export license to send the technology to that country, it also needs an export license to show it to the FN employee.

The impact of this country's concern with export controls can be seen in both DOJ prosecutions and Department of State ("DOS") processing of visa applications. ITT Corp., a leading supplier to the Department of Defense ("DD") of night vision technology, recently paid $100 million in civil fines and criminal penalties to settle allegations that it had illegally sent this technology abroad. In the past few years, the DOS has slowed markedly the processing of visa applications by FNs who have scientific, engineering, or technological backgrounds so that the DD and related security agencies can first confirm whether these FNs present a security threat to the United States.

The growing concern by employers about export control compliance also has spawned new discrimination issues under the International Traffic of Arms Regulations ("ITAR"), which implement the Arms Export Control Act of 1976. 22 U.S.C. §2778. Under the ITAR, employers are permitted only to allow "U.S. persons" access to controlled technology. ITAR defines "U.S. persons" to include protected individuals under Section

1324b(a)(3)(B) of the immigration laws. Under IRCA, the employer cannot define the particular documents a new employee provides for Form I-9 purposes, nor can the employer use documentation submitted to satisfy the Form I-9 requirements for any other purpose. Under ITAR, however, the employer has a legal obligation to verify that the new employee satisfies the definition of a "U.S. person" before allowing that employee access to controlled technology. The issue, therefore, is whether an employer violates IRCA if it requests the specific documentation necessary to satisfy the ITAR requirements.

The Office of Special Counsel ("OSC") is the DOJ division that handles discrimination complaints under IRCA and prosecutes them for FN employees whom it believes have been the victim of unlawful immigration-related discrimination. According to the OSC, employers cannot request the specific documentation required to satisfy the ITAR as part of the Form I-9 process without running afoul of IRCA's anti-discrimination provisions. The OSC indicated, however, that nothing in IRCA prohibits an employer seeking to satisfy the ITAR from "implementing a *separate and distinct* verification procedure under the ITAR requiring the presentation of documents establishing citizenship or immigration status necessary to ensure compliance with the ITAR" [emphasis in original].

VII. Third Circuit Rejects Contract Claim by H-1B Physician

The U.S. Court of Appeals for the Third Circuit recently rejected claims by a physician that he was not an at-will employee because his employer's H-1B sponsorship for three years constituted an express contract of employment. *Edwards v. Geisinger Clinic*, No. 11-1528 (3d Cir. Jan. 23, 2012). In *Edwards,* the plaintiff was a licensed physician from the United Kingdom who specialized in interventional radiology, and who was recruited to work at the Geisinger clinic ("Clinic") in Pennsylvania. During the interview process, Dr. Edwards indicated that he wanted to obtain certification from the American Board of Radiology ("ABR"), a process that required uninterrupted employment in an approved residency program for at least four years. The Clinic then accepted Dr. Edwards into a residency program that would enable him to achieve this objective. This acceptance was memorialized in a formal offer letter that promised Dr. Edwards that he would receive four to six years to secure ABR certification, which was an absolute requirement for all physicians at the Clinic. The offer letter also was subject to a practice agreement that Dr. Edwards admitted he did not review. In the practice agreement, Dr. Edwards acknowledged that his employment at the Clinic was "at will" and that the agreement could be "terminated at any time by either party for any or no reason."

The Clinic sponsored Dr. Edwards for an H-1B nonimmigrant visa that was valid initially for up to three years but could be extended for an additional three-year period. Dr. Edwards was admitted to the United States pursuant to this H-1B visa in 2007. In May 2008, the Clinic terminated Dr. Edwards's employment; he sued for breach of contract, claiming that, among other things, the Clinic's H-1B sponsorship constituted a commitment to employ him for at least three years. The district court granted summary judgment to the Clinic and dismissed Dr. Edwards's complaint on the ground that the practice agreement clearly defined his employment relationship with the Clinic as one

that was at will. The Third Circuit affirmed. In a unanimous decision, a three-judge panel found that Dr. Edwards's reliance on the Clinic's support for ABR certification was "too vague to establish an express contract for a definite term." The panel also rejected Dr. Edwards's argument that the Clinic's H-1B sponsorship constituted an express employment agreement. According to the panel, "… an H-1B visa does not guarantee employment for the visa's maximum duration. Indeed, the Immigration and Nationality Act expressly contemplates that an employer may dismiss a worker with an H-1B visa before the end of the visa's maximum duration."

The Third Circuit's decision in *Edwards* follows a growing trend to reject claims by FNs that sponsorship for their visa classification constituted an express contract of employment for the maximum duration of the visa. In each of these cases, however, the underlying employment contract and immigration documentation directly contradicted such an argument. In all of these situations, therefore, it is important for employers to make sure that their immigration documentation, employment policies, offers of employment, and employment contracts foreclose the type of claim that Dr. Edwards raised in his case.

VIII. DOJ Settles Discrimination Claim Against Health Care Staffing Company

At the same time that the Obama administration is expanding its worksite enforcement actions, the DOJ is vigorously pursuing claims against employers that fail to abide by IRCA's anti-discrimination provisions. During the past year, the DOJ's focus has turned increasingly to the health care industry. In March 2012, the DOJ announced that it had reached an agreement with Onward Healthcare ("Onward"), a health care staffing company located in Wilton, Connecticut, to settle allegations that Onward had posted discriminatory job postings. The DOJ claimed that Onward impermissibly limited applications to American citizens, even though work-authorized immigrants, such as permanent residents, asylees, and refugees, should have been allowed to apply for the positions as well. IRCA generally prohibits employers from discriminating on the basis of citizenship unless required by law, regulation, or government contract. The DOJ alleged that there was no legal basis for the citizenship preference reflected in Onward's job postings.

Onward agreed to pay $100,000 in civil penalties, change its internal policies and procedures to reflect IRCA's protections, and be subject to reporting and compliance monitoring requirements for three years.

IX. DOJ Sues NJ Technology Company for Whistleblower Retaliation

On May 22, 2012, the DOJ announced that it had filed a lawsuit charging Whiz International LLC ("Whiz"), an information technology company located in Jersey City, New Jersey, with violating IRCA's anti-discrimination provisions by terminating an employee in retaliation for expressing opposition to the company's alleged preference for hiring FNs with temporary work visas over American citizens. The complaint alleges that Whiz directed its recruiter to prefer noncitizens and then terminated the complaining

employee when she disagreed with excluding American citizens and permanent residents from the applicant pool. IRCA's anti-discrimination provisions prohibit employers from retaliating against workers who express opposition to practices that arguably are not protected under this statute.

X. DOL Assesses Fines and Back Pay Award Against XCEL Solutions for H-1B Violations

On May 16, 2012, an administrative law judge ("ALJ") within the DOL issued a decision in the *Matter of XCEL Solutions Corporation* that imposed over $300,000 in fines and back pay awards for violations of H-1B program requirements. Case No. 2011-LCA-00016 (May 16, 2012). The investigation that led to this award began in October 2009, when the DOL notified XCEL that it had received complaints from several employees that alleged violations of H-1B program requirements. Specifically, the employees complained that XCEL failed to pay the necessary prevailing wage, refused to post the Labor Condition Application ("LCA") at client worksites, and did not make the secondary displacement inquiries mandated by the provisions of the immigration laws relating to H-1B dependent employers.

Under the immigration laws, employers who sponsor H-1B employees are required to pay them the prevailing wage contained in the LCA approved by the DOL for the position. When these workers are placed on the site of a client, the sponsoring employer also must post the LCA at the client's site to alert workers there to the presence of H-1B employees and allow them to assess whether these workers are being paid the prevailing wage. Where, as in the case of XCEL, the sponsoring employer is considered H-1B dependent because it has too many H-1B employees on its workforce, then that employer also must determine whether the placement of its H-1B workers at the client's site will cause "secondary displacement," namely the termination of U.S. workers.

After an extensive hearing, the ALJ found that XCEL had violated the H-1B program requirements in each of these areas. He assessed back pay in the sum of $253,888.92 to workers who had not received the salary required by the LCA and H-1B wage requirements. The ALJ also assessed $67,500 in civil penalties because he found that XCEL's violations of the H-1B program requirements were willful, and $3,750 in civil penalties due to XCEL's failure to post the LCA at its client sites. The ALJ imposed civil fines of $600 for XCEL's failure to make the required secondary displacement inquiries and for its refusal to cooperate in the investigation. Finally, the ALJ found that XCEL was responsible for both pre- and post-judgment compound interest on the wage assessments until paid.

The *XCEL* decision is another reminder of the importance to employers of satisfying all H-1B program requirements.

XI. District Court Enjoins New H-2B Regulations

We previously reported that the DOL had issued new rules governing the H-2B program, and that it was prepared to implement them on April 27, 2012. On April 16, 2012, several plaintiffs challenged the DOL's new H-2B rules by filing a lawsuit seeking to enjoin them in the U.S. District Court for the Northern District of Florida. See *Bayou Lawn & Landscape Services, et al v. Hilda L. Solis,* 3:12-cv-00183 (MCK-CJK). On April 26, 2012, that court issued an order temporarily enjoining the DOL from implementing or enforcing the new H-2B rules pending a final decision by the court. For this reason, the DOL announced on May 11, 2012, that employers seeking to use the H-2B program would have to continue using the 2008 H-2B rules until further notice.

XII. State Immigration-Related Legislation Slows in 2012

The pace of new state immigration-related legislation slowed considerably during the first quarter of 2012. According to the National Conference of State Legislatures, state lawmakers in 35 states introduced 119 immigration-related bills during this period, compared with 279 pieces of legislation offered during the same period last year. This decline appears to be a function of two principal factors. First, it is an election year and the neither party wants to alienate what may be an important constituency. Second, many states appear to be waiting for the Supreme Court of the United States to issue its decision in *Arizona v. United States*, No. 11-182 (U.S. Sup. Ct.) (Argued April 25, 2012), which is expected to better define the state role in enforcement of the nation's immigration laws.

XIII. DOS Issues June 2012 Visa Bulletin

The DOS issued its Visa Bulletin for June 2012. 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 June visa bulletin showed that the Second Preference ("EB-2") for China and India was unavailable and that there was no indication it would become available again before the new federal fiscal year begins on October 1, 2012. In the June Visa Bulletin, the cutoff dates for the Employment-Based Third Preference category are as follows: June 8, 2006, for all chargeability, including Mexico; May 22, 2006, for Mexico; August 8, 2005, for China; and September 15, 2002, for India. The EB-2 category is current for all chargeability, including Mexico, the Dominican Republic, and the Philippines, but unavailable for China and India. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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For more information, or if you have questions regarding how this might affect you, your employees, or your organization, please contact one of the following members of the Immigration Law Group at Epstein Becker Green:

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