August 2007

IMMIGRATION ALERT:

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The Department of State ("DOS") recently announced the dates for filing applications for the 2009 Diversity Lottery. The Department of Homeland Security ("DHS") recently issued its long-awaited "No-Match" letter regulations. The U.S. Citizenship and Immigration Services ("USCIS") just published a proposed rule that, when implemented, will require approximately 750,000 lawful permanent residents carrying "green cards" without expiration dates to apply for the new Permanent Resident Card (Form I-551), which has a 10-year validity period. Arizona recently adopted immigration-related legislation that will require employers to verify new employees hired on or after January 1, 2008 under the federal Employment Eligibility Verification Program ("EEVP"). The United States Labor Department ("DOL") issued FAQs that clarified the employer's payment obligations in PERM applications, and directed an H-1B employer to pay over $500,000 in back wages to H-1B employees that it underpaid. Finally, the U.S. Customs and Immigration Enforcement ("ICE") continued its efforts at worksite enforcement. In this Special Alert, we shall address these and other recent developments in the

immigration area.

1. Diversity Visa Lottery 2009

The DOS recently announced that the registration period for the 2009 Diversity Lottery ("DV-2009") will run from noon, **October 3, 2007,** through noon, **December 2, 2007**. The applications are filed electronically at the specified DOS website: http://www.dvlottery.state.gov. Information and instructions for the DV-2009 Lottery should be posted on the DOS web site shortly. We do not expect that the procedures for the DV-2009 lottery will differ materially from those for the DV-2008 lottery, but foreign nationals interested in participating should check the DOS web site to make sure they have the correct information.

2. DHS Issues "Safe Harbor" Rules for Employers Receiving "No-Match" letters

As we reported last month, the DHS finally issued its final rule governing the best practices for employers to follow when they receive "No-Match" letters from DHS, USCIS or the Social Security Administration ("SSA"). The new rule outlines "Safe Harbor" procedures that employers must follow to avoid charges that they knowingly retained an unauthorized worker on their payroll after receiving a No-Match letter.

The new rule is scheduled to become effective on September 14, 2007, although several organizations are planning lawsuits to stop it, and other business groups are requesting the DHS to delay implementation of the rule. In the meantime, employers should be performing due diligence to determine how many "No-Match" letters they have received within the past six months, and develop protocols for how they will handle these letters plus any additional ones that arrive. DHS has indicated that it plans to become more aggressive in sending these letters, so employers need to be ready to respond. Under the new regulation, an employer's failure to do so will allow the government to charge the employer with knowingly employing an undocumented alien, and this can have serious civil, criminal and financial consequences.

3. USCIS May Require New "Green Cards"

The USCIS has proposed requiring all permanent residents who have permanent residence cards without an expiration date to apply for and secure new Permanent Resident Cards (Form I-551). The USCIS estimates that this will affect approximately 750,000 foreign nationals. The rationale for this initiative is primarily driven by security concerns. Adoption of the rule would enable the USCIS to update cardholder information, conduct background checks, and electronically store applicant biometric information. The new cards also are more secure and counterfeit resistant. If this proposal is adopted, the USCIS proposes to give affected foreign nationals only 120 days to apply for a replacement. Given the USCIS track-record on processing mass applications like this, the proposal threatens to create a major problem with foreign travel if the other agencies do not recognize existing documents while these applications are pending. Eligible applicants could elect to apply for naturalization instead of applying for the new card.

4. Arizona Adopts Nation's Strictest Workplace Law

On July 2, 2007, Arizona Governor Janet Napolitano signed the "Legal Arizona Workers Act" (the "Act") into law. This legislation imposes significant new obligations on all Arizona employers and is scheduled to take effect on January 1, 2008.

The Arizona legislation basically has two components. First, it imposes a business license penalty on any employer who knowingly hires or retains an unauthorized employee. An employer violating the Act may have its business license suspended or ultimately revoked for a pattern of knowing violations. The Act defines a license so broadly that any business in Arizona potentially could be affected by this legislation. This portion of the Act will be enforced exclusively by the Arizona Attorney General or one of its County Attorneys. Second, it requires all employers in Arizona to enroll in the federal government's EEVP (formerly, the Model Pilot Program).

On a related note, the United States District Court for the Middle District of Pennsylvania recently found that a local ordinance enacted by the City of Hazelton was pre-empted by federal immigration law, violated procedural due process and was barred by the Civil Rights Act of 1866 (42 U.S.C.§§1981 *et seq*.). See *Lozano v. Hazelton*, No. 3:06 CV 1586 (M.D. Pa. July 26, 2007). The *Hazelton* decision represents the first of what we believe will be many cases that address the constitutional question of whether states and municipalities may enact legislation that affects immigration, an area exclusively reserved by the Constitution for the federal government. Stay tuned!

5. DOL Clarifies the PERM Payment Restrictions

The DOL has issued a set of Frequently Asked Questions ("FAQs") that address many of the questions left unanswered by the DOL rule prohibiting employers after July 16, 2007, from substituting a new employee in labor certifications that already had been approved for other employees. In these rules, the DOL also prohibited employers from requiring the foreign national to pay any of the legal fees, costs or other expenses associated with the PERM labor certification process. In the FAQs, the DOL clarified this for situations where the employee already had agreed to pay these amounts prior to the effective date of the regulation. In these situations, the DOL indicated that the employer still could require the employee to pay the agreed upon amounts, even if the payments were received after the effective date of the rule, as long as the obligation predated the rule. In these situations, however, the employer will be required to disclose these payments in the PERM application and this could lead to an audit where the employer would have to explain the arrangement.

6. DOL Fines Technology Company and Directs Payment of $537,189 for H-1B Wages

The DOL fined Technologies 500 Holdings and its president $162,750 and directed them to pay an additional $537,189 in back wages because the company failed to pay 36 of its H-1B workers the required wages from January 2004 through November 2005. H-1B employers are required to pay at least the prevailing wage or the actual wage paid to similarly situated workers, whichever is higher, to all H-1B employees. This company's failure to pay these required amounts undermined the integrity of the H-1B program and its goals of protecting U.S. wage

standards, according to Dominick Denato, Director of the DOL's Wage and Hour division in Southern New Jersey. At the same time, the company president pleaded guilty to one count of immigration fraud and was sentenced to 20 months in federal prison and separately fined $25,000. As part of this criminal proceeding, the federal government instituted an action against the company and its president that led to the forfeiture of cash and cars used by the company.

7. ICE Continues Worksite Enforcement Actions

On August 9, 2007, the ICE issued a Fact Sheet that summarized its most "notable" worksite enforcement actions. It is available at http://www.ice.gov/pi/news/factsheets/worksite_operations.htm Included in these operations was: (a) a federal grand jury indictment against 10 farm workers at Fresh Del Monte Produce in Portland, Oregon, for using fraudulent documents; (b) a federal grand jury indictment of 28 employees at George's Processing Inc. in Southwest Missouri, charging them with, among other things, aggravated identity theft and falsely claiming to be American citizens; (c) the arrests of 77 undocumented workers in four southern states following a five-month investigation into construction projects at critical infrastructure sites; (d) the arrests of 69 employees who were charged with working illegally at Jones Industrial Network ("JIN") and other companies working with JIN in the Baltimore, Maryland area; and (e) the arrests of three managers and the owner of Michael Bianco, Inc. in New Bedford, Massachusetts, for conspiring to induce and facilitate the employment of illegal aliens.

As you can readily see, the ICE has expanded its worksite investigations across the country. This means that employers need to be vigilant in adopting and enforcing stringent Form I-9 policies and practices. This should include the new "Safe Harbor" rule announced this month by the DHS and discussed earlier.

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If you have questions about these issues or any other developments in the immigration area, contact:

New York	New York	Houston	Dallas	Atlanta	San Francisco
Robert S. Groban, Jr.	Pierre Georges Bonnefil	Leigh Ganchan	Elise Healy	William Poole	Jang Im
212-351-4689	212-351-4687	713-750-3141	214-397-4345	404-923-9035	415-398-3500
rgroban@ebglaw.com	pgbonnefil@ebglaw.com	lganchan@ebglaw.com	ehealy@ebglaw.com	wpoole@ebglaw.com	jim@ebglaw.com

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