October 2007

IMMIGRATION ALERT:

Court Again Extends Order That Enjoins Government from Implementing Social Security "No-Match" Rule

On October 10, 2007, the United States District Court for the Northern District of California issued an order granting the motions by the American Federation of Labor and other organizations for a preliminary injunction barring the Department of Homeland Security ("DHS") from implementing its final rule, entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter", that was promulgated on August 15, 2007. The precise form of the injunction remains to be worked out between the parties and the Court.

At this point, it appears that the Court has not enjoined the Social Security Administration ("SSA") from continuing to issue "No-Match" letters, but has prohibited the DHS from attaching its proposed warnings to the SSA letters or otherwise taking any steps to implement its "Safe-Harbor" rule. As a result of the Court's action, employers are not legally required to follow the DHS protocol if they receive a "No-Match" letter. Employers should, however, develop and implement their own protocol for handling "No-Match" letters. The Immigration and Customs Enforcement agency ("ICE") will still look at employer responses to "No-Match" letters, among other things, when determining whether IRCA and work site violations have occurred and in assessing criminal culpability in this area.

After the Court's ruling, DHS Secretary Michael Chertoff made the following statement:

> "Although the Judge rejected many of the plaintiff's legal challenges to the department's no-match regulation, we are disappointed by the district court's decision today that temporarily continued the injunction against the regulation. We are reviewing the decision with the Justice Department and will examine all of our options, including appeal.
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> President Bush made clear in August that we are going to do as much administratively as we can, within the boundaries of existing law, to further secure our borders and enforce our immigration laws. Today's ruling is yet another reminder of why we need Congress to enact comprehensive immigration reform.
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> The American people have been loud and clear about their desire to see our nation's immigration laws enforced. We are taking aggressive steps at our borders and in the interior to do just that and the no-match regulation is an important part of our efforts. **We will continue to aggressively enforce our immigration laws while reviewing all legal options available to us in response to this ruling."** (Emphasis added)

The Court's ruling, therefore, does not mean that employers can ignore "No-Match" letters. Employers must continue to make Form I-9 and work site compliance a top priority. We advise developing and implementing a comprehensive corporate compliance strategy, which will address the continuing problem of "No-Match" letters and, thus, protect the company from the civil and criminal penalties that can accompany violations.

State Department Announces that U.S. Passport Processing Returns to Normal

The State Department ("DOS") recently announced that it now is able to process passport applications within the standard six to eight week period. As a result, all American citizens traveling by air to Canada, Mexico, the Caribbean and Bermuda *must* present a U.S. passport to enter or leave the United States.

As you may recall, the DOS suspended this rule in June 2007 because it could not timely process the tremendous increase in U.S. passport applications resulting from the Western Hemisphere

Travel Initiative ("WHTI") mandated by the Intelligence Reform and Terrorism Prevention Act of 2004. In lieu of a passport, travelers were permitted to present a U.S. government-issued photo identification and a receipt from the DOS showing that they had applied for a passport. This special dispensation ended on September 30, 2007 at midnight. Now U.S. passports are required, so those planning holiday travel should apply for their U.S. passports as soon as possible.

Foreign Nationals Should Apply for Holiday Travel Documents as Soon as Possible

Given the three major religious observances that occur during December, the United States Citizenship and Immigration Services ("USCIS") anticipates higher than usual volume of requests for advance parole and other travel documents. For this reason, the USCIS urges applicants who need travel documents, such as a Reentry Permit, Refugee Travel Document or Advance Parole, to file the Form I-131, Application for Travel Document, as soon as possible but certainly before the end of October 2007.

The USCIS will accept and adjudicate a Form I-131 request to renew advance parole as long as it is filed up to 120 days before the current advance parole expires. Foreign nationals who need advance parole to travel abroad must have their advance parole approvals in hand before leaving the United States. Those foreign nationals in H or L nonimmigrant status who also have applied for permanent residence have an additional option for foreign travel. They may depart and return if they have a valid H or L visa and the *original* I-485 receipts for their permanent residence applications. Traveling abroad without proper documentation can have serious consequences, including the inability to return to the United States and the denial of the pending permanent residence application. It is best if foreign nationals subject to these rules contact counsel before making plans to travel abroad.

Diversity Visa Lottery 2009

The DOS recently announced that the 2009 Diversity Lottery ("DV-2009") registration period will run from noon, **October 3, 2007,** through noon, **December 2, 2007**. The applications are filed electronically. Information, instructions and the application form can be found at the DOS website: http://www.dvlottery.state.gov. The procedures for the DV-2009 lottery do not 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 and follow the proper procedures.

Backlog Elimination Center in Transition/Shutdown Stage

On October 1, 2007, the Department of Labor ("DOL") announced that the backlog in adjudicating traditional Applications for Alien Labor Certification, namely, those filed prior to March 28, 2005, has almost been eliminated. According to the DOL, approximately 99% of these cases have been completed and the rest are pending receipt of employer information. Our experience has been that this assessment may be overly optimistic but it is clear that the work of the Backlog Elimination Centers is near completion.

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New York "State 30" J-1 Visa Waivers

The New York States Department of Health ("NYDOH") recently announced that the New York "State 30" program will sponsor up to thirty (30) physicians annually who hold J-1 visas and are seeking waivers of the two year home residence requirement. In return, these physicians must consent to practice in Health Professional Shortage Areas ("HPSAs") or Medically Underserved Areas/Populations ("MUAs") or attend to the inhabitants of these areas, for a temporary period of up to three years. The NYDOH can approve up to five of these waivers for physicians whose work locations are not situated in a HPSA or MUA, but treat patients residing in an HPSA or MUA.

Applications for waivers under the New York "State 30" program for 2008 must be postmarked by November 30, 2007. For additional information, please see http://www.health.state.ny.us.

State Department issues "Guidance on Processing Visa Applicants with Drunk Driving Hits"

On July 16, 2007, the DOS issued "Guidance On Processing Visa Applicants With Drunk Driving Hits". Under U.S. immigration laws, foreign nationals are inadmissible if they have a serious medical or mental disorder. While alcoholism is not specifically mentioned in the law or implementing regulations, the DOS and USCIS consider it to be a serious problem if it is associated with harmful behavior that indicates the applicant has posed, or is likely to pose, a threat to public safety. In the view of both the DOS and USCIS, arrests and/or convictions for driving while intoxicated ("DWI") or driving under the influence ("DUI") constitute evidence of a medical problem associated with public safety concerns.

The DOS guidance requires consular officers to refer nonimmigrant visa applicants with prior drunk driving issues to panel physicians for medical examination under the following circumstances:

> If an applicant has a single drunk driving arrest or conviction within the last three calendar years, or
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> If the applicant has two or more drunk driving arrests or drunk driving convictions in any time period.

Consular officer must now also refer applicants to panel physicians if there is any other evidence to suggest an alcohol problem. In addition, nonimmigrant visa applicants who disclose an alcohol arrest in the U.S. will also have to undergo National Crime Information Center ("NCIC") processing. This requires the applicant to pay an $85 fee for fingerprinting and wait for the FBI record results (which can take one to two days at posts with electronic fingerprint processing or up to two months at posts that capture fingerprints with ink).

It is imperative that applicants with alcohol related arrests inside or outside of the U.S. consult counsel *before* submitting their visa or other applications. These incidents must be fully disclosed and thus it is important to assess the consequence of the incident to determine the

implications. Moreover, some consulates have and use independent access to records of local DWI/DUI proceedings. If the applicant fails to disclose the incident, then s/he may be barred from entry even if the incident would not have resulted in a denial if it had been properly disclosed.

Visa applicants with a DWI, DUI or any other alcohol-related incident on their record need to secure competent counsel throughout the visa application process.

State Law Update: California vs. Pennsylvania

On October 13, 2007, Governor Schwarzenegger signed into law AB 976. This measure will prohibit cities and counties in California from enacting any local ordinances that require a landlord to inquire, compile, report, or disclose any information about the citizenship or immigration status of a tenant or prospective tenant. The bill also makes it illegal for any landlord under California state law to "Make any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant, or prospective occupant of residential rental property." California is the first in the nation to enact such a law.

This measure came in the wake of ordinances passed by cities in California and around the country that require landlords to verify the citizenship status of their tenants and evict any tenant who is not a legal resident, or face fines and possible revocation of their business license. Such laws present landlords with an impracticable predicament: comply with the city ordinance, while violating state and federal law or uphold state and federal law, facing sanctions from the cities.

Recently, a federal court in Pennsylvania found an ordinance like this, Hazleton's Illegal Immigration Relief Act, unconstitutional. District Judge James Munley found the local ordinance was “pre-empted” by federal law because immigration policies are a federal, not local, responsibility. In addition, Judge Munley found that the Hazelton ordinance violated the tenant’s right to due process because it did not give employers, workers, landlords and tenants an adequate chance to defend themselves. As Judge Munley noted. "[t]he genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public."

The battle over the constitutionality of these ordinances is just beginning. Hazleton Mayor Lou Barletta vowed to appeal. "Hazleton is not going to back down," he said in a written statement. "Neither the city of Hazleton nor I will stop fighting for all legal residents." Other municipalities are looking at the Hazelton experiment to see if they can enact similar ordinances. Perhaps the costs of the litigation and the impact these ordinances have on local businesses when immigrants depart the area will have more impact on the ultimate success of these provisions than the courts. Stay tuned!

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

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