October 29, 2009

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I. DHS/DOL Ramp Up Employer Site Visits

Over the past few months, the Department of Homeland Security (DHS) has intensified its worksite enforcement program and increased the number of its immigration-related site visits to employers who sponsor H-1B and L-1 nonimmigrants. These investigations, conducted by the Fraud Detection and National Security (FDNS) unit of U.S. Citizenship and Immigration Services (USCIS), are funded through the $500 "fraud detection" fee that employers pay when filing a new H-1B or L-1 petition. Recently, the FDNS has expanded its focus beyond those suspected of fraud to include any employer who files an H-1B or L-1 nonimmigrant

petition.

The site visits conducted by the FDNS follow a predictable pattern. Generally, a FDNS Officer will appear, usually unannounced, at the actual place of employment listed on the H or L petition and seek to determine whether the petitioner is employing the foreign national in the position, at the location and for the salary required by the petition. Many of these audits are conducted following approval of the petition to check the accuracy of the representations made by the employer. If, however, the USCIS suspects fraud or another problem with the sponsoring employer, the FDNS audit may be done while the H or L petition is pending. In these cases, the adjudication of the pending petition may be delayed until the audit is completed and the audit results may affect whether the petition is approved.

The U.S. Department of Labor (DOL) also has jumped on the investigative bandwagon by sending questionnaires directly to sponsored H-1B employees. In these questionnaires, the DOL seeks routine information about the H-1B employment, such as worksite location(s), employment start date, position(s) held, hours worked, compensation, fringe benefits and how the compensation and fringe benefits comport with others in the relevant occupational group(s). DOL regulations are very specific about what procedures employers must follow in connection with the H-1B petition process. These regulations preclude employers from "benching" H-1B employees, that is, forcing them to work fewer hours and/or receive less compensation than stipulated in the approved Labor Condition Application (LCA) for the H-1B position. Employers also are generally prohibited from either requiring H-1B employees to pay for the H-1B petition process (filing or legal fees) or deducting these same expenses from the H-1B employees' wages. Finally, the DOL bars employers from charging H-1B employees an early termination fee or "liquidated" damages when they stop employment. The DOL questionnaire requests information in all these areas from the H-1B employee.

These intensified investigative measures reflect a belief by government agencies and some members of Congress that there is widespread fraud in the H-1B and L-1 employment areas. The DHS, FDNS and DOL have designed their investigations to determine if this is correct. Employers found in violation of immigration regulations may find their petitions denied or revoked, may be subject to civil fines or criminal prosecution, may face debarment from federal contracts, may lose their opportunity to file H-1B or L-1 petitions and/or may be designated an "H-1B dependent employer". For this reason, it is important that employers filing H-1B or L-1 petitions satisfy all legal obligations from the outset.

Every employer, at each of its worksites, should develop a protocol for addressing a "surprise" visit from FDNS. Generally, we advise employers to comply with the investigation and assist with the inquiry. Nevertheless, employers should be mindful not to allow investigators to overstep their bounds. For this reason, the managers responsible for responding to the audit should be informed as to what types of questions and document requests can be expected and are reasonable, as well as what types of questions and document requests may exceed the reasonable scope of this process.

II. DHS Issues Final Rule Rescinding 'No-Match/Safe Harbor' Regulation

Harbor' regulation. As we have reported, DHS and the Immigration Custom Enforcement (ICE) believe that receipt of a No-Match letter provides an employer with constructive knowledge that an employee may not be authorized to work. The Safe Harbor regulation defined a procedure for employers responding to a No-Match letter that, if followed, would have insulated them from criminal liability for knowingly hiring an undocumented worker.

The Safe Harbor regulation has been in litigation almost since its initial promulgation in August 2007. DHS first announced its intention to rescind this regulation on August 19, 2009, stating: "[a]fter further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs." This action may be seen as an effort to end years of federal litigation concerning whether the Safe Harbor regulation was constitutional or lawfully promulgated.

Now that this regulation has been published, we fully expect the Social Security Administration (SSA) to begin issuing new No-Match letters in late 2009. We also anticipate that DHS and ICE will continue to consider the receipt of a No-Match letter an indicator of unauthorized employment. Although there will be no 'safe-harbor,' employers should have a plan and procedure in place to address the receipt of, and ensure a response to, every No-Match letter that the employer receives. Establishing a protocol not only will help an employer maintain the integrity of its workforce from an immigration perspective, but also assist in meeting its W-4 reporting requirements with respect to Social Security withholdings.

III. U.S. District Court Holds that Treaty of Friendship, Commerce and Navigation Bars Local Manager's Discrimination Claims

On September 30, 2009, the U.S. District Court for the Southern District of New York held that the Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the United States and Japan barred claims by a local manager that different treatment of Japanese rotational managers constituted citizenship or national origin discrimination. Schanfield v. Sojitz Corporation of America, No. 07-CV-9716 (S.D.N.Y. Sept. 30, 2009)(D.J. McMahon). In this action, the plaintiff alleged race and national origin discrimination, as well as retaliation, under Title VII and various other state and local civil rights laws because he was treated differently from Japanese rotational staff. The court granted summary judgment to the employer on the basic discrimination claims based on the FCN Treaty between the United States and Japan, which allows companies of either country "to engage within the territories of the other …executive personnel…of their choice." The court denied summary judgment on other discrimination, hostile environment and retaliation claims that did not involve disparate treatment with rotational staff.

The Schanfield decision serves as a useful reminder that FCN Treaty defenses may remain available for discrimination claims brought by local employees.

IV. Current H-1B Cap Count

On September 25, 2009, USCIS reported that there were approximately 9,500 H-1B cap-

subject petitions remaining for fiscal year 2010 (FY2010). This count did not include the 6,800 H-1B visa numbers reserved for Singapore and Chilean H-1B1 workers pursuant to free trade agreements. USCIS previously has reported that the additional 20,000 H-1B cases reserved for holders of advanced U.S. degrees already may have been exhausted. Therefore, USCIS will continue to accept all eligible H-1B cases until it receives a sufficient number of H-1B and H-1B1 petitions to reach the statutory limits.

V. CBP & USCIS Issue Holiday Season Travel Reminder

On October 8, 2009, the U.S. Customs and Border Protection (CBP) reminded those planning international trips to have their approved travel documents ready and to anticipate heavy traffic during the upcoming holiday season.

According to the Western Hemisphere Travel Initiative ("WHTI"), implemented on June 1, 2009, any American or Canadian citizen, aged 16 or older, must present a valid, acceptable travel document that establishes both identity and citizenship when entering the United States by land or sea. WHTI-compliant documents include the following:

- Passport.
- U.S. passport card.
- Enhanced driver's license (EDL)—now produced by the states of New York, Michigan, Vermont and Washington; as well as the Provinces of Quebec, Ontario, Manitoba and British Columbia.
- Trusted Traveler Program card (e.g., NEXUS, SENTRI and FAST).
- Form I-551 "Green Card".

CBP also recommends adhering to the following guidelines when crossing the U.S./Canadian border:

- Familiarize yourself with the "Know Before You Go" section of the CBP website (which also can be found as a brochure at border ports) to avoid fines and penalties associated with the importation of prohibited items.
- Prepare for the inspection process by having all border crossing documents ready for inspection, being prepared to declare all items acquired abroad and ending all cellular phone conversations before arriving at the inspection booth.
- Consult the CBP website to monitor border wait times for various ports of entry including Blaine and Sumas, Washington; Sweetgrass, Montana; and Pembina, North Dakota. CBP updates this information hourly and it can be useful for identifying periods of light use/short waits.
- Consider alternate, less heavily traveled entry routes during periods of heavy traffic.
- Build extra time into your trip if you plan to border cross during periods of

exceptionally heavy traffic (i.e., Thanksgiving holiday and adjacent weekends).

- Know the difference between goods for personal versus commercial use.
- Do not attempt to bring fruits, meats, dairy/poultry products or firewood into the United States from Canada without first checking permissibility.
- Understand that CBP officers have the authority to conduct enforcement examinations without a warrant, ranging from a single luggage examination up to, and possibly including, a personal search. Even during the holiday travel season, international border crossers should continue to expect a thorough inspection process when they enter the United States. from Canada.

We remind all foreign nationals holding temporary work visas that the holidays are peak times for nonimmigrant visa applications—which is compounded by the fact that many U.S. Embassies and Consulates also will be short staffed during this period. Those intending to travel should ensure that they have a valid nonimmigrant visa in their passport and, if not, that they make arrangements to obtain one prior to returning to the United States.

VI. USCIS Issues Advance Parole Reminder

On October 19, 2009, USCIS updated its Fact Sheet regarding Advance Parole to remind those who require this travel authorization document to be sure to obtain one prior to leaving the United States. In many cases, this means filing the required I-131 application well before a scheduled trip. Foreign nationals who must travel with Advance Parole include those who have:

- Temporary Protected Status (TPS);
- a pending application to adjust to lawful permanent resident status (unless they are in valid H or L status and have a valid H or L visa, if required);
- a pending application for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA 203);
- a pending asylum application; or
- a pending application for legalization.

In this regard, foreign nationals travelling with Advance Parole must remember that Advance Parole only acts as a travel document, *it does not guarantee admission*. Foreign nationals who may be inadmissible due to criminal, medical or immigration issues may not be allowed to return even with a valid grant of Advance Parole. Those who may fall into this category should seek assistance of counsel before making plans to depart the United States.

VII. President Signs FY2010 Appropriations Bill Extending Immigration Programs

On October 28, 2009, President Obama signed an Appropriations Bill (Bill) that funds

provisions for temporarily extending the E-Verify, Non-Minister Religious Worker, Conrad 30 and EB-5 programs through September 30, 2012. The Bill also grants the E-Verify program $137 million in funding, instead of the $162 million proposed by the House or the $118 million proposed by the Senate, and directs the U.S. Government Accountability Office to conduct two studies of the E-Verify program. Finally, the Bill includes statutory authority for the processing of permanent resident applications for surviving spouses and other relatives of immigration sponsors who die before the USCIS completes the adjudication process.

VIII. 2011 Diversity Visa Lottery Began October 2, 2009, and Will End November 30, 2009

On September 30, 2009, the Department of State (DOS) announced the opening of the registration period for the 2011 Diversity Visa Lottery (DV-2011). Entries for DV-2011 must be submitted electronically between noon, Eastern Daylight Time (EDT) (GMT-4), Friday, October 2, 2009, and noon, Eastern Standard Time (EST) (GMT-5), Monday, November 30, 2009. Because heavy demands could result in website delays, it is strongly recommended that applicants not wait until the last week before registering. No entries will be accepted after noon EST on November 30, 2009. For additional information on DV-2011, please access the following website: www.dvlottery.state.gov.

Foreign nationals considering a DV-2011 application should review the eligibility requirements and instructions on the DOS website carefully. Each eligible applicant can submit only one application to the DV-2011 lottery. However, each eligible family member, including spouse and children, will be considered a separate applicant. Therefore, to maximize potential selection, each eligible family member should submit his or her own application.

On October 13, 2009, the DOS issued a Consular Affairs Update reporting that it had received over 900,000 entries in the first week of DV-2011—a 63% increase over the same period last year. The DOS further added that it expects over 13 million entries before the registration period ends on November 30, 2009.

IX. DOS Issues November 2009 Visa Bulletin:

The DOS recently issued its Visa Bulletin for November 2009. This Bulletin determines who may apply for permanent residence and when. The results were mixed. Employment-Based Third Preference (EB-3) is available, and the cut-off dates are as follows: for all chargeability areas including China, Mexico and the Philippines, the date is June 1, 2002. For India, the date is April 22, 2001. Employment–Based Second Preference (EB-2) is current for all chargeability areas except India, which has a January 22, 2005 cut-off date, and China, which has an April 1, 2005 cut-off date. The monthly Visa Bulletin may be accessed through the following DOS website: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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

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