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The Strategic Plan for U.S. Immigration in the Immigration Reform Vacuum

By Kathleen Campbell Walker
Cox Smith Matthews Incorporated
www.coxsmith.com
kwalker@coxsmith.com

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In the ten years post the September 11 acts of terror against the United States (U.S.) and the more recent economic downturn in the U.S., the issue of immigration reform has been basically an anathema to the public and our legislators. Any interest in reforming antiquated immigration laws has been replaced with numerous border and national security initiatives to the almost total exclusion of reforming our dysfunctional immigration laws to improve the U.S. economy. Thus, to conclude that the U.S. has any sort of true overall strategic plan using immigration policy to its full potential to improve our stagnant economy would be erroneous.

On the one hand, the U.S. wishes to improve its attractiveness to foreign investors as recently evidenced by the announcement of U.S. Secretary of Homeland Security, Janet Napolitano, and U.S. Citizenship and Immigration Services (USCIS) Director, Alejandro Mayorkas, on August 2, 2011. [2] The primary developments announced were as follows:

1. **Sole Shareholders/Employees and the H-1B category** – The H-1B category requires the establishment of an employer/employee relationship for H-1B beneficiaries. A USCIS memorandum had drawn into question further the ability of any H-1B employer "controlled" by the beneficiary as being able to obtain an H-1B petition approval, because of the difficulty in meeting the required employer/employee relationship. The clarification provided by USCIS confirms that there must be a right to control established by the petitioner over the employment of the H-1B beneficiary. USCIS further notes, however, that "if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise, or otherwise control the beneficiary, the petitioner may be able to establish an employer-employee relationship with the beneficiary."
2. **EB-2 Immigrant Entrepreneurs and the National Interest Waiver** – The EB-2 immigrant visa category may be used by foreign nationals with exceptional ability to avoid the normal permanent labor certification process of the Department of Labor (DOL). This option is referred to as Schedule A, Group II precertification. The USCIS clarification provided, however, focuses on the national interest waiver option of the labor certification available in the EB-2 immigrant visa category for those with qualifying exceptional ability. The main benefit of the clarification provided may be to encourage adjudicators to be more accepting of the argument that the creation of jobs for U.S. workers may qualify applicants for a national interest waiver. The jury is certainly out on this particular "benefit."
3. **Expand Premium Processing** – Those applicants attempting to acquire permanent residence as multinational managers or executives under the EB-1-3 immigrant visa category

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[1] Kathleen Campbell Walker is a former national president (2007 – 08) and general counsel (2009 -10) of the American Immigration Lawyers Association (AILA). She is chair of the Immigration Practice Group of Cox Smith Matthews Incorporated and has been practicing immigration law since 1985. She also chairs the 2011-12 AILA National Verification and Documentation Liaison Committee. She is board certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. In 2010, she received the AILA National Service Excellence Award. She has testified multiple times on immigration and border security issues before Congress and the Texas legislature.

[2] Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation (August 2, 2011). http://tinyurl.com/3e56gw9

(multinational managers and executives) will apparently become eligible to request premium processing of their I-140 petitions.

4. **Streamline the EB-5 Immigrant Investor Process** - The EB-5 immigrant visa category for individual investors as well as for those investing in an approved Regional Center has been unpredictable and confusing, and the process is lengthy. USCIS proposed accelerating its processing time for applications via the extension of premium processing and improving the expertise of adjudication teams.
5. **Improve Stakeholder Input with USCIS** - USCIS will be holding more public engagement with communities concerning economic development and the EB-5 immigrant investor category.

On the other hand, the U.S. is having difficulty achieving the appropriate balance between security and oversight of the integrity of our immigration process with continuing to convey the impression of a welcoming nation to tourism, students, business, and entrepreneurship. As an example, U.S. immigration lawyers continue to receive an unusually high number of requests for evidence (RFE) on a variety of issues in the various nonimmigrant categories such as the H-1B (speciality occupation), L-1 (intracompany transferee), TN (Trade NAFTA), 0-1 (extraordinary ability), and E-1/2 (treaty trader/investor categories) from USCIS adjudicators. In addition, employers must be prepared for oversight activities of the Fraud Detection and National Security (FDNS) division of USCIS, which may materialize in the form of blind calls to employees and employers as well as site visits resulting in potential petition revocation. In fiscal year 2010, FDNS conducted 14,433 H-1B compliance review visits. The top recurring compliance issues found in the H-1B context by FDNS in fiscal year 2010 were:

- Petitioner (business) does not physically exist.
- Petitioner misrepresented the details of the beneficiary's employment.
- Beneficiary is not or will not be employed in the location or area certified.
- Beneficiary is not or will not be performing the duties specified on petition.
- Petitioner withdrew the petition.
- Petitioner is not paying the beneficiary at the certified wage.
- Beneficiary is not or will not be employed by the petitioner.

Fortunately, only approximately one percent of the cases reviewed by FDNS resulted in fraud lead referrals.[3] While fraud oversight is critical for the integrity of the immigration process, it will be critical for the U.S. to streamline and enhance its processes so that it can conduct more targeted reviews of petitions. In the later portion of this article, please refer to a brief description of the USCIS electronic filing transformation project, which is being commenced this year to try to address just this point.

Immigration as a U.S. Economic Driver

A recent report released in June of 2011 by the Partnership for a New American Economy led by Mayor Bloomberg of New York and the Chief Executive Officer of Microsoft, Steven Ballmer,

[3] USCIS FDNS Directorate Answers American Immigration Lawyers Association (AILA) Administrative Site Visit & Verification Program (ASVVP) Questions – June 7, 2011 AILA Infonet Doc. No. 11062243.

among other business leaders, highlights the opportunities that the U.S. may lose if future foreign entrepreneurs start their businesses in other countries due to the creation of a hostile investment environment in the U.S. for foreign nationals, including thousands of foreign students at our universities. This report outlines the following key findings:

- *More than 40 percent of the 2010 Fortune 500 companies were founded by immigrants or their children. Even though immigrants have made up only 10.5 percent of the American population on average since 1850, there are 90 immigrant-founded Fortune 500 companies, accounting for 18 percent of the list. When you include the additional 114 companies founded by the children of immigrants, the share of the Fortune 500 list grows to over 40 percent.*
- *The newest Fortune 500 companies are more likely to have an immigrant founder. A little less than 20 percent of the newest Fortune 500 companies — those founded over the 25-year period between 1985 and 2010 — have an immigrant founder.*
- *The revenue generated by Fortune 500 companies founded by immigrants or children of immigrants is greater than the GDP of every country in the world outside the U.S., except China and Japan. The Fortune 500 companies that boast immigrant or children-of-immigrant founders have combined revenues of $4.2 trillion. $1.7 trillion of that amount comes just from the companies founded by immigrants.*
- *Fortune 500 companies founded by immigrants or children of immigrants employ more than 10 million people worldwide. Immigrant-founded Fortune 500 companies alone employ more than 3.6 million people, a figure equivalent to the entire population of Connecticut.*
- *Seven of the 10 most valuable brands in the world come from American companies founded by immigrants or children of immigrants. Many of America's greatest brands— Apple, Google, AT&T, Budweiser, Colgate, eBay, General Electric, IBM, and McDonald's, to name just a few — owe their origin to a founder who was an immigrant or the child of an immigrant.*

Federal Paralysis

It appears though that even with such a positive economic track record, any efforts to improve U.S. global competitiveness with attempts to address our byzantine immigration laws are doomed to wither in a storm of political hyperbole. Even efforts to resurrect bills such as the DREAM [4] act are met with the typical "Amnesty" label, which is the scarlet letter in our immigration world. Some of the recent legislative efforts (from www.aila.org) at the federal level are:

- S. 1258 Introduced by Sen. Menendez (D-NJ) on 6/22/11
  Summary: Provides for comprehensive immigration reform.
- S. 1196 Accountability through Electronic Verification Act - Introduced by Sen. Grassley (R-IA) on 6/14/11 Summary: Expands the use of E-Verify.
- HR 2161 IDEA Act of 2011 - Introduced by Rep. Lofgren (D-CA) on 6/14/11
  Summary: Immigration Driving Entrepreneurship in America Act of 2011. Amends the Immigration and Nationality Act (INA) to promote innovation, investment, and research in the United States.

[4] *See* Bruno, Andorra, "Unauthorized Alien Students: Issues and 'DREAM Act' Legislation," published by the Congressional Research Service (March 22, 2011). S. 729, The Dream Act of 2009 provided that to be eligible for cancellation of removal, a foreign national would have had to demonstrate that he or she had been physically present in the U.S. for a continuous period of not less than five years immediately preceding the date of enactment of the Act; had not yet reached age 16 at the time of initial entry; had been a person of good moral character since the time of application; and had not yet reached age 35 on the date of enactment. The foreign national also would have had to demonstrate that he or she had been admitted to an institution of higher education in the U.S. or had earned a high school diploma or the equivalent in the U.S.

- HR 2164 Legal Workforce Act - Introduced by Rep. Smith (R-TX) on 6/14/11
  Summary: Amends the INA to make mandatory and permanent requirements relating to the use of an electronic employment eligibility verification system.
- HR 1842 Dream Act of 2011 - Introduced by Rep. Berman (D-CA) on 5/11/11
  Summary: Authorizes the Secretary of Homeland Security (DHS) to cancel the removal of and adjust status of a foreign national lawfully admitted for permanent residence on a conditional basis, if the foreign national: (1) entered the U.S. on or before his or her 15th birthday and has been present in the U.S. for at least five years immediately preceding the Act's enactment, (2) is a person of good moral character, (3) is not inadmissible under specified grounds of the INA, (4) has been admitted to an institution of higher education (IHE) in the U.S. or has earned a high school diploma or general education development certificate in the U.S., and (5) was age 32 or younger on the date of the Act's enactment.
- HR 1933 - Introduced by Rep. Smith (R-TX) on 5/23/11
  Summary: Resurrects the H-1C program for admission of nonimmigrant nurses in health professional shortage areas.

States to the Rescue in a Federal Vacuum

Meanwhile, since the federal government has been paralyzed on the immigration front due to reelection goals on the hill, the states have certainly invaded the typical federal realm of U.S. immigration law. In the first quarter of 2011, the National Conference of State Legislatures (www.ncsl.org) reported that state legislators in the 50 states and Puerto Rico introduced 1,538 bills and resolutions relating to immigrants and refugees, which number exceeded the first quarter of 2010, when 1,180 bills were introduced. The "top topic hits" for immigration related legislation were: employment, identification/driver's licenses, and law enforcement. With the enactment of federal health care reform, health care also became a popular focus as the number of health-related bills was more than double those introduced during the same quarter last year. Please refer to Attachment 1 for an NCSL chart of state legislative proposals.

According to the NCSL, during the first quarter of 2010, 34 states enacted 71 laws and adopted 87 resolutions. An additional 37 bills were awaiting governors' signatures.

- **Health:** States are requiring that participants in state health benefit exchanges be U.S. citizens or lawfully present immigrants.
- **Identification/driver's licenses**: States restrict nonresidents' eligibility for driver's, commercial, and trade licenses.
- **Law enforcement**: Virginia established a criminal information exchange program with willing states that share a border with Canada or Mexico in order to share information about drugs, gangs, unlawful presence, and terrorism.
- **Employment**: 279 bills were introduced in 44 state legislatures (Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming), which require public and private employers to use some form of work and employment benefit authorization, mostly E-Verify, and establish penalties for businesses that employ unauthorized immigrants.
- **Resolutions**: Utah authorized studies related to the tax impact of immigration legislation and state employees' sharing immigration-related information within and across state agencies and with employers.

In the first quarter of 2011, state lawmakers in 30 states also introduced 52 immigration-related omnibus bills. Utah's bills include enforcement provisions and a temporary worker visa program. In recent month, Georgia, Indiana, Alabama, and South Carolina enacted legislation. Utah's HB497, Georgia's HB87, and Indiana's HB56 are being challenged by civil rights groups. [5] A civil rights lawsuit was also just filed against the Alabama law HB 56.[6] In addition, the American Civil Liberties Union, the National Immigration Law Center, the ACLU of South Carolina and a coalition of civil rights groups filed a lawsuit challenging South Carolina's anti-immigrant bill (S20) as well.[7]

Employer as Targets

Employers operating nationally face a veritable patchwork quilt of state and federal laws related to immigration. Some states require the use of E-Verify, which is an Internet-based system that allows businesses to determine the eligibility of employees to work in the U.S.[8] Others allow the use of the Social Security Number Verification Service (SSNVS) of the Social Security Administration (SSA) as an option.[9] Recently, the U.S. Supreme Court confirmed that Arizona's mandate of the use of E-Verify by Arizona employers, which is a voluntary program under federal law (except for certain federal contractors via an Executive Order), was constitutional and not preempted by federal law.[10] This decision is seen by many as a green light for such mandates by other states. Currently, Utah (employers with more than 15 employees), Mississippi, Arizona, and South Carolina mandate the use of E-Verify for all employers.[11] Alabama will follow suit in 2012 with Tennessee phasing in all employers with 6 or more employees in 2013.

ICE

In fiscal year 2011 under President Obama, U.S. Immigration and Customs Enforcement (ICE), which enforces immigration worksite compliance laws, audited 2,338 businesses, which was an increase from 503 in 2008. [12] ICE also arrested 196 employers in 2010, compared with 135 in fiscal year 2008. [13] In the same period, the number of employees arrested by ICE decreased from 968 to 197. [14]

In fiscal year (FY) 2010, ICE initiated:

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[5] *See* NCSL chart and report at: http://www.ncsl.org/default.aspx?TabId=22529.
[6] *See* http://www.latimes.com/news/nationworld/nation/la-na-alabama-immigration-20110709,0,4860057.story.
[7] *See* http://www.aclusouthcarolina.org/newsroom/20110627signing_s_20_immig_bill.pdf.
[8] http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.
[9] http://www.ssa.gov/employer/ssnv.htm.
[10] See U.S. Chamber of Commerce v. Whiting, http://www.supremecourt.gov/opinions/10pdf/09-115.pdf.
[11] See http://www.ncsl.org/?tabid=13127.
[12] Hallman, Tristan, "ICE focusing more on firms," *The Dallas Morning News* (July 5, 2011).
[13] *Id.*
[14] *Id.*

- *A record 2,746 worksite enforcement investigations, more than doubling the 1,191 cases initiated in FY 2008.*
- *ICE criminally arrested 196 employers for worksite related violation, surpassing the previous high of 135 in FY 2008.*
- *ICE also issued a record 2,196 notices of inspection to employers, surpassing the prior year's record of 1,444 and more than quadrupling the 503 inspections in 2008.*
- *ICE issued 237 final orders - documents requiring employers to cease violation the law and directing them to pay fines - totaling $6,956,026, compared to the 18 issued for $675,209 in FY 2008.*
- *The total of $6,956,026 last year represents the most final orders issued since the creation of ICE in 2003.*
- *In addition worksite investigations resulted in a record $36,611,320 in judicial fines, forfeitures, and restitutions.*
- *Finally, ICE brought a new level of integrity to the contracting process by debarring a record 97 businesses and 49 individuals preventing unscrupulous companies from engaging in future business with the government.*[15]

ICE has continued to redirect its focus on employers through the use of I-9 Notices of Inspection and criminal investigations against egregious employer violators.[16] Recent enforcement actions include:[17]

HOUSTON - 5 managers and supervisors at Mambo Seafood indicted for harboring illegal aliens **-** Two current managers and three former managers or supervisors of Mambo Seafood were indicted on Wednesday on various charges related to harboring illegal aliens. These indictments were announced by U.S. Attorney Jose Angel Moreno and acting Special Agent in Charge John Connelly with ICE Homeland Security Investigations (HSI) in Houston.

ATLANTA - Employment agency owner sentenced in scheme to recruit undocumented workers in Atlanta - Chun Yan Lin, 44, of Doraville, Ga., was sentenced Thursday in federal court for conspiring to transport and harbor illegal aliens, following a joint investigation by ICE HSI, DHS, and the Federal Bureau of Investigation.

PHOENIX - 3 restaurant chain executives indicted on federal immigration, tax charges - The father and son owners of a regional Mexican restaurant chain, along with the company's accountant, will be arraigned in federal court in Tucson Thursday on tax and immigration violations contained in a 19-count indictment stemming from a lengthy probe by ICE HIS and the IRS. Mark Evenson, 58, of Paradise Valley, Ariz.; his son, Christopher Evenson, 39, of Oro Valley, Ariz., owners of Chuy's Mesquite Broiler restaurants with outlets in Arizona and California; and an accountant for the chain, Diane Strehlow, 47, of Tempe, Ariz., are charged with a variety of criminal violations, including the unlawful hiring and harboring of illegal aliens, conspiracy to defraud the IRS and tax evasion. If convicted of all the charges, Mark Evenson faces up to 86 years in prison and a $5.33 million fine; Christopher Evenson faces up to 81 years in prison and a $5.08 million fine; and, Strehlow faces a maximum prison term of 40 years and a $2 million fine.

[15] Statement of Kumar Kibble, ICE Deputy Director regarding a Hearing on Worksite Enforcement before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, January 26, 2010.
[16] http://www.ice.gov/news/releases/1101/110120washingtondc.htm.
[17] http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=16.

DETROIT - Michigan dairy farmers plead guilty to employing illegal aliens, fined $2.7 million **-** A Michigan dairy farm and its two owners pleaded guilty on Tuesday to charges of employing illegal aliens; following an investigation by ICE HSI. Johannes Martinus Verhaar and Anthonia Marjanne Verhaar own Aquila Farms LLC., a dairy operation based in Bad Axe, Mich. Court records revealed that from about 2000 through 2007, the dairy employed 78 different illegal aliens, which constituted almost 75 percent of its workforce over that time period. Aquila Farms failed to conduct the necessary inquiries to determine the employment eligibility of its work force, as required by federal immigration laws. "Criminal charges and fines are among the government's most effective tools to ensure employers maintain a legal workforce," said Brian M. Moskowitz, special agent in charge of ICE HSI in Detroit. "The charges and significant fines here represent HSI's firm commitment to holding employers accountable."

SSA

Another federal agency, the SSA, effective April 6, 2011, pursuant to a directive from the SSA Commissioner, again started to send employers decentralized correspondence (DECOR) letters for tax year 2010.[18] These letters advise employers of possible incorrect withholding to a social security number (SSN).

SSA had continued to send out an employee version of the DECOR letter to employees at their home address, if the name and/or SSN information listed on the employer's submitted Forms W-2 did not match the information in the SSA's database. Before 2007, if SSA did not have accurate address information for the employee, SSA had sent a different version of the DECOR letter directly to the last employer of record, asking the employer to provide the following information to SSA: employee's name, social security number, address, and whether or not the employee had ever used another name. Although the federal court hearing the challenge to the now-rescinded no-match regulation never prohibited SSA from sending no-match letters to employers, in 2007 SSA stopped sending the employer version of the DECOR letter because of litigation surrounding the rescinded no-match safe harbor regulations.[19] SSA stated that it will not send employers the letters that the agency held for tax years 2007 through 2009.

DOL

Employers face increased compliance challenges in certain nonimmigrant categories such as the H-1B speciality occupation worker category related to the required wages and working conditions. On August 19, 2011, the DOL's Administrative Review Board (ARB) upheld a $1.1 million judgment against the owner of a chain of medical clinics in Tennessee for failing to pay H-1B required wages. In a different case in July, the DOL reached a settlement with the Prince George's County school district to pay $4.2 million in back wages to more than 1,000 teachers for failure to pay H-1B related fees.

There are several fees that must be included with an employer's H-1B petition filed with USCIS:

- Form I-129 filing fee: $325.00
- American Competitiveness and Workforce Improvement Act ("ACWIA") Fee: $750.00 or $1,500.00, depending on employer size

[18] See https://secure.ssa.gov/poms.nsf/lnx/0900901050.
[19] See DHS Rescission of Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 74 *Fed. Reg.* 193 (October 7, 2009).

- Fraud Protection and Prevention Fee: $500.00
- Premium Processing Fee (optional): $1,225.00 (note that there is yet another fee for users of H-1Bs when H-1B, L-1A, and L-1B employees represent 50% of the workforce and the employer has at least 50 employees in the U.S.)

The statute and regulations strictly prohibit an H-1B employee from paying the ACWIA Fee, which is currently $1,500 for employers of at least 26 employees.[20] In addition, if an employee pays an employer liquidated damages for early termination of the employment relationship, the liquidated damages cannot recoup this fee.[21]

The Fraud Protection and Prevention Fee is required for initial H-1B petitions and for a change of employer H-1B petition. DOL has also taken the position that an employee may not pay this fee either although this position has been disputed. As to the premium processing fee, USCIS will accept the payment of the fee by the beneficiary, but DOL has not directly addressed the point. DOL regulations provide that costs associated with the Labor Condition Application (LCA) filed with the DOL as part of the H-1B petition process and the H-1B petition, such as attorney fees, are a business expense of the employer and must not be recouped by the employer. This prohibition though is in the context of meeting the requirement of paying the higher of the actual or prevailing wage to the employee for the area of intended employment. The DOL has indicated in regulatory comment that, "An H-1B employer is prohibited from imposing its business expenses on the H-1B worker – including attorney fees and other expenses associated with the filing of an LCA or H-1B petition—only to the extent that the assessment would reduce the H-1B worker's pay below the required wage, *i.e*., the higher of the prevailing wage and the actual wage." Thus, the debate continues on the correct legal interpretation of this provision.

As noted above, the Wage and Hour Division of DOL prosecuted a school district for requiring its teachers in H-1B status to pay fees associated with the H-1B petition process. In that case, the school district reduced the wages of the teachers in order to recuperate the fees. The school district was required to pay $4,222,146.35 in back wages in that case. The federal investigation in this case was triggered when a teacher reported in 2007 that the school system was illegally charging teachers for their visa applications and other fees. The teachers, recruited mostly from the Philippines, typically used their own money to pay a $500 anti-fraud fee to the DHS, as well as a $1,000 attorney's fee and a $3,500 placement fee, among other expenses, the investigation found in April. Under federal law according to the DOL, the school district should have paid those fees.

OSC

Yet another agency involved in worksite related compliance is the Office of Special Counsel (OSC) of the U.S. Department of Justice (DOJ). The OSC investigates and prosecutes allegations of national origin and citizenship status discrimination in the hiring, firing, and recruitment or referral for a fee of workers, as well as, unfair documentary practices during the employment eligibility verification process and retaliation under the anti-discrimination provisions of the Immigration and Nationality Act (INA).

[20] INA §212(n)(2)(C) and 20 CFR §655.731(c)(10)(ii).
[21] 20 CFR §655.731(c)(10)(ii).

Employers must do what is required but not too much in their I-9 compliance procedures. Thus, on the one hand employers must timely determine the identity and work authorization of the new employee and at the same time the employer must not demand extra documentation of that status or risk charges of discrimination. It is the typical Catch-22 situation for many.

A July 15, 2010 article in the *Wall Street Journal* entitled, "Policing Illegal Hires Puts Some Employers in a Bind," by Miriam Jordan outlined the increasing difficulty for employers caught up in the political fight over illegal immigration. By September of 2010, the DOJ increased the number of attorneys and investigators in the OSC by 25%. On July 1, 2010, the DOJ published press releases regarding a settlement with Macy's regarding the alleged firing of a worker after a permanent resident card expired. (Of course, an I-551 permanent resident card, aka "Green Card" is only documentation of status and the status does not expire with the date on the card.) [22] Recent enforcement announcements include the following cases:[23]

- August 26, 2011 – Kinro Manufacturing Inc. of Goshen, Indiana paid a $25,000 civil penalty and $10,000 in back pay for subjecting newly hired non-U.S. citizens to excessive demands for documents issued by DHS to verify their employment eligibility.
- August 22, 2011 – Farmland Foods, Inc., a major U.S. pork producer agreed to pay $290,400 in civil penalties, the highest civil penalty paid via settlement of violations of the INA's anti-discrimination provisions, for requiring the presentation of certain or excessive work authorization documents.
- May 31, 2011 – The American Academy of Pediatrics agreed to pay $22,000 in civil penalties for impermissibly limiting applications for positions to U.S. citizens and certain visa holders.

These various agency letters and inspections/audits mandate the creation of a pro-active compliance plan to avoid and/or reduce potential severe fines and penalties upon companies as well as potential criminal exposure to management.

USCIS

Transformation

As noted above, USCIS has its own FDNS directorate for oversight of petitions and applications submitted to the agency. Its oversight capabilities will be further enhanced by its plan to implement a wholly electronic environment to encompass the entire immigration lifecycle of an applicant with the agency.[24] This new system will help USCIS identify potential national security, criminality, fraud and other risks by analyzing and sharing information used to verify identity and eligibility for immigration benefits. This transformation will also include sharing of this information with U.S. Customs and Border Protection (CBP) as well as ICE, DOL, the Department of State (DOS), and DOJ. This new online environment will allow individuals to go online to submit benefit requests, respond to requests for evidence, monitor case status, add or terminate legal representation, and manage receipt of communications from the agency.[25]

[22] DOJ has released a video regarding worker rights and employer responsibilities under the anti-discrimination provisions of the INA, which is available at http://www.justice.gov/crt/osc/.
[23] http://www.justice.gov/crt/about/osc/.
[24] *See* Privacy Impact Assessment for USCIS Transformation, DHS/USCIS/PIA-039 (August 29, 2011).
[25] *Id.*

On August 22, 2011, the USCIS Office of Transformation Coordination (OTC) hosted a meeting with AILA representatives, in which it affirmed that in December of 2011, the first phase of the USCIS Transformation project will be launched.[26] The first phase will:

- Introduce initial customer and attorney/accredited representative accounts
- Commence core case management capabilities for submission of the I-539 Application to Extend/Change Nonimmigrant Status.

The second phase of Transformation is planned for mid-2012 with additional phases being launched every six months thereafter. These phases will complete nonimmigrant benefit applications, followed by immigrant benefits applications, humanitarian benefit applications (e.g. asylum and refugee), and followed by naturalization and other citizenship benefit applications. Initially External Data Interface Standards (EDIS) will not be available during the beginning phases of Transformation creating additional hurdles for the careful completion of any benefit application.

USCIS issued its business transformation regulation on August 29, 2011, [27] which will become effective on November 28, 2011. This connect the dot transformation process will only elevate the business risk to employers who fail to maintain consistent policies and procedures regarding immigration law compliance. The transformation process contemplates accounts for legal counsel, businesses, and individuals. Thus, the agency tracking options will be quite robust. See attached USCIS Transformation powerpoint.

Reducing Liability and Management Liability

Certainly agency oversight and database connectivity address enforcement concerning the undocumented population in the U.S. Many states have attempted to create an enforcement atmosphere to encourage the departure of their undocumented population (e.g. Arizona). While the issue of undocumented status has been raised in the litigation context to attempt to bar certain benefits and damages;[28] typically to no avail because the probative value is outweighed by the risk of unfair prejudice,[29] the issue of immigration compliance in the context of corporate and management responsibility is a fertile field for litigation experimentation.

A failure to comply with Arizona's employer sanctions laws can result in the forfeiture of the business charter for the company. An ICE investigation into poor I-9 compliance in the determination of work identity and eligibility can result in millions of dollars of fines and potential asset forfeiture. What sort of actions can be taken as a result of such management negligence by affected shareholders as well as by other members of management?

Corporate Insurers should expect to receive claims by policyholders for a wide range of immigration related enforcement consequences such as: the payment of fines and penalties as

[26] USCIS Office of Transformation Coordination – AILA Liaison Meeting (August 22, 2011) AILA Infonet Doc. No. 11090662.
[27] 76 *Fed. Reg*. 53764 (August 29, 2011).
[28] See Agosto Jr., Benny; Salinas, Lupe; and Arteaga, Eloisa Morales, "But Your Honor, He's An Illegal! Can The Undocumented Worker's Alien Status Be Introduced at Trial?" 74 Tex. B. J 286 (April 2011).
[29] *TXI Transp. Co., et al. v. Hughes*, 2010 Tex. Lexis 212, at *36.

well as costs concerning consent decrees and investigations; and the potential recovery of paid out profits. Policyholders might assert business interruption caused by ICE enforcement actions. Employers are also subject to discrimination suits by the Office of Special Counsel of the Department of Justice, if they fail to hire minorities or wrongfully discharge employees who are authorized workers. [30] Employers also are exposed to whistleblower termination lawsuits, because many ICE investigations begin with an employee insider's tip. Business competitors may also sue for unfair business competitive advantages, due to the use of undocumented workers.

Some insurers are offering new or expanded coverage endorsements that address ICE investigations. In accessing the provision of such coverage, underwriters should review the application of immigration laws carefully including state-related versions, which will impact exposure. In addition, such coverage offers must take into account the type of industry risk to immigration audits by ICE, the location of corporate operations as to immigration enforcement issues, and the compliance protocols used by the company as well as it immigration compliance history.

Criminal Exposure Considerations in Compliance

Knowingly hiring or continuing to employ an undocumented worker can expose management to criminal penalties. The Filip Guidelines of the DOJ provide guidance concerning how companies may decrease exposure to criminal conduct allegations. Examples of corroborative evidence of actions which can lead to criminal investigation include:

- The employer failed to request the worker to present employment eligibility documents.
- The employer did not complete a Form I-9 for the worker until after a Notice of Inspection was served on the employer.
- The employer arranged for the workers to be taken to and from work.
- The employer filed labor certifications for the undocumented employees.

What to be thinking about?

- What exposure does our business have to I-9 compliance and discrimination actions/penalties?
- When was our last I-9 audit?
- Does it make sense to use the SSNVS?
- What is E-Verify and should my company enroll?
- Why are these companies enrolling in IMAGE? Should we?
- What about using electronic I-9s?
- How do we have constructive knowledge exposure concerning an employee's or an employee of a subcontractor's inability to work legally in the U.S.?

Compliance Options

[30] See http://www.justice.gov/crt/about/osc/. National origin discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees. Employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding "foreign." All U.S. citizens, lawful permanent residents, and work authorized individuals are protected from national origin discrimination. The Equal Employment Opportunity Commission has jurisdiction over employers with 15 or more employees.

Electronic I-9s

On July 22, 2010, ICE published a final rule to implement its new electronic I-9 rules effective August 23, 2010. Many large employers have implemented a variety of software programs in conjunction with other payroll programs to attempt to monitor their I-9 compliance obligations. Unfortunately, often employers are not aware of the extent to which any I-9 electronic program must be able to provide an electronic "paper" trail to enforcement authorities to meet regulatory requirements. The new final rule provides for the following substantive changes:

- Employers may use paper, electronic systems, or a combination of both.
- The audit trail required for electronic I-9 compliance requires that the audit be able to document when an I-9 is created, completed, updated, modified, altered, or corrected. This indexing system does not require that a separate electronically stored document system be maintained for I-9s, if comparable results can be achieved without a separate description database.
- Employers are only required to provide or transmit confirmation of an I-9, if the employee requests a copy. This confirmation may be in the form of a printed copy of the electronic record or other transaction record format.
- When employees request such I-9 transaction confirmation, the employer shall provide it in a reasonable period of time.

It is important to remember that an electronic I-9 system may not be subject to any agreement that would limit or restrict access to and use of the system by an agency of the U.S. Just as the use of an electronic I-9 system can improve an agency's enforcement effectiveness, so can the use of the E-Verify or IMAGE programs.

E-Verify and IMAGE

Both E-Verify and IMAGE are cooperative programs offered by the government to employers to improve their compliance with employment verification requirements contained in the I-9 form and related regulations. Only in the past few months has the government represented that an employer will gain any reduced penalty or investigation leniency by voluntarily enrolling in either program. Both programs allow enhanced access by the government to data provided by the employer. The data gained from employers is also used by the government for investigation purposes.

To participate in E-Verify, the employer must register on-line and agree to the terms of the E-Verify Memorandum of Understanding ("MOU"). The MOU provides that the DHS reserves the right to conduct I-9 compliance inspections during the course of E-Verify use and to conduct any other enforcement activity authorized by law. In addition, the employer agrees to allow DHS and the SSA, as well as their agents to make periodic visits to the employer for the purpose of reviewing E-Verify related records [*i.e.*, I-9s, SSA transaction records (no-match letters) and DHS verification records], which were created during the employer's participation in the E-Verify program. Further, the MOU provides that for the purpose of evaluating E-Verify, the employer agrees to allow DHS and SSA to interview it regarding its experience with E-Verify and to interview employees hired during E-Verify use concerning their experience, and to make employment and E-Verify records available to DHS and SSA. These provisions could allow DHS and SSA to circumvent any current I-9 regulatory requirements for subpoenas, search warrants, or even a three-day notice requirement to review records, and substantially expand the types of documentation to be reviewed by the government.

The IMAGE (ICE Mutual Agreement between Government and Employers) program commenced in 2007 with the goal of assisting employers in providing a more secure and stable workforce and to enhance fraudulent document awareness. [31] The basic requirements for IMAGE are as follows: complete self-assessment questionnaire; enroll in E-Verify; enroll in Social Security Number Verification System ("SSNVS"); adhere to IMAGE best employment practices; undergo an I-9 audit conducted by ICE; and review and sign an initial IMAGE partnership agreement with ICE.

The IMAGE program has just increased the attractiveness of its program by offering the following benefits:

- Publicly recognize [Company Name] for participating in the IMAGE program;
- Not subject [Company Name] to a subsequent Form I-9 inspection for a period of two years, from the date of Form I-9 inspection completed as part of the IMAGE certification process, absence the existence of specific intelligence of unlawful employment;
- Mitigate/Waive fines if substantive violations are discovered on fewer than 50% of the Forms I-9. In instances where more than 50% of the Forms I-9 contain substantive violations, ICE will issue fines at the statutory minimum of $110 per violation; and
- Grant the participating employer ample time to resolve discrepancies discovered during the Form I-9 inspection regarding employees' documentation of identity and work eligibility.[32]

I-9 Central

On May 13, 2011, USCIS announced the availability of its new resource for employers regarding the completion of the I-9 form for new hires.[33] I-9 Central is frequently updated and all postings are allegedly cleared by ICE, USCIS, and the OSC. I-9 Central currently provides more detailed information on acceptable documents for I-9 completion, correcting I-9s, how to complete an I-9, which I-9 forms to use, a retention formula, etc. The Citizenship/Document Matrix under the heading, "Who is Issued This Document?," is a new resource as to work authorization documentation for the I-9.[34] One important point to remember is that I-9 Central does not have the force of law. USCIS will look to the M-274 *Handbook for Employers* as to the final word on I-9 compliance guidance. Thus, the utility of I-9 Central is still under review by employers and legal counsel alike. Any reliance by an employer on the contents of I-9 Central should be documented in the employer's compliance file by retaining a copy of the relevant portions of I-9 Central used by the employer along with the date of the content.

Self Check

On August 16, 2011, USCIS expanded the Self Check[35] eligibility confirmation system to include 21 states and the District of Columbia. Self Check is an on-line service offered directly to the public via E-Verify to help employees verify their work eligibility in the U.S. It is voluntary. Self Check is available to workers over the age of 16 to confirm their eligibility to work in the U.S. and to submit corrections to their DHS and SSA records, if needed. Employers cannot require an employee or potential employee to use Self Check to prove work authorization. The main

[31] http://www.ice.gov/image/.
[32] ICE IMAGE MOU posted on AILA Infonet Doc. No. 11063064.
[33] USCIS Launches I-9 Central on USCIS.gov (May 13, 2011). http://tinyurl.com/6goo77z.
[34] USCIS Who is Issued This Document? Citizenship Status/Document Matrix http://tinyurl.com/5wmscx8.
[35] Self Check USCIS webpage www.uscis.gov/selfcheck.

purpose of Self Check is basically as a tool to help improve the accuracy of E-Verify by allowing employees access to determine data accuracy of E-Verify regarding their individual records.

Best Practices Resources

IMAGE

To gain an idea of what the government would like to see from employers, the stated ICE list of best employment practices for employers is as follows:

- Use E-Verify to verify the employment eligibility of all new hires.
- Use the SSNVS for wage reporting purposes. Make a good faith effort to correct and verify the names and Social Security numbers of the current workforce and work with employees to resolve any discrepancies.
- Establish a written hiring and employment eligibility verification policy.
- Establish an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9 how to detect fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS
- Require the Form I-9[36] and E-Verify process to be conducted only by individuals who have received appropriate training and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process.
- Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- Ensure that contractors and/or subcontractors establish procedures to comply with employment eligibility verification requirements. Encourage contractors and/or subcontractors to incorporate IMAGE Best Practices and when practicable incorporate the use of E-Verify in subcontractor agreements.
- Establish a protocol for responding to letters or other information received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, no match letters received from SSA[37] and provide employees with an opportunity to make a good faith effort to resolve the discrepancy when it is not due to employer error.
- Establish a tip line mechanism (inbox, email, etc.) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to credible employee tips.
- Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin.
- Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.

ICE IMAGE Attachment Checklist

Before considering participation in IMAGE, employers must critically analyze their current practices for immigration compliance. For example, refer to the list of documentation below requested for review by ICE to be approved for the IMAGE program:

[36] http://tinyurl.com/5rsp5mm.
[37] http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1127 and http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf.

- Organizational chart and related department descriptions
- List of all locations with employees, including the number of employees at each location; if hiring is conducted at that location; and whether Forms I-9 are retained at that location
- List of all employees with Form I-9 certification authority
- Current employee application packet(s)
- Articles of incorporation
- Hiring policy
- Anti-discrimination policy
- E-Verify summary report
- SSNVS results page
- Company profile
- DOJ/OSC complaints
- SSA Employee Correction Requests (no-match letters) for the past 3 years
- Final Order issued by ICE or the former INS for violation of INA §274A
- List of contract company(s) used and a brief description of services provided by contractor(s)
- Internal Form I-9 audit reports

DOJ OSC Recommendations

The OSC admonishes employers to take the following 10 steps to avoid immigration related employment discrimination:[38]

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.
2. Accept documentation presented by an employee if it establishes identity and employment eligibility; is included in the list of acceptable documents; and reasonably appears to be genuine and to relate to the person.
3. Accept documents that appear to be genuine. You are not expected to be a document expert, and establishing the authenticity of a document is not your responsibility.
4. Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.
5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.
6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.
7. Complete the I-9 Form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.[39]
8. On the I-9 Form, verify that you have seen documents establishing identity and work authorization for all employees hired after November 6, 1986, including U.S. citizens.
9. Remember that many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must reverify employment authorization and record the new evidence of continued work authorization on the I-9 Form. You must accept any valid document your employee chooses to present, whether or not it is the same document

[38] http://www.justice.gov/crt/about/osc/htm/facts.php#steps.
[39] USCIS *Handbook for Employers* http://www.uscis.gov/files/form/m-274.pdf.

provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.

Note: Permanent resident cards and identity documents should not be reverified.

10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process, unless acquired automatically. [40]

Conclusion

The take away from this article is that it is a critical time to implement an aggressive compliance program regarding immigration laws in the U.S. Whether a company is forced into the use of E-Verify though or not, it is expected that we may actually see federal legislation passed making E-Verify (or something like it) a part of all company hiring processes. In addition, as aggressive enforcement in the worksite environment continues, employers will potentially see more frequent use of litigation as a consequence of poor corporate immigration compliance practices. With the electronic transformation goals of USCIS, the processing of applications and petitions via electronic submission will increase the tracking and oversight capacity of the agencies involved in immigration enforcement. Thus, consistency and oversight by employers concerning their immigration related petitions and applications will become even more critical. It is also anticipated that immigration compliance provisions in many contracts will become status quo. Thus, for those operating in the U.S. as part of the global marketplace, the issue of immigration compliance must be consistently on the radar.

[40] DOJ OSC Dos and Don'ts for Employers http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employers.pdf.

The Strategic Plan for U.S. Immigration in the Immigration Reform Vacuum

By Kathleen Campbell Walker
September 2011
Attachments

1. List of State Immigration Legislation published by the National Conference of State Legislatures - www.ncsl.org
2. Worksite Enforcement Links
3. Examples of DÉCOR SSA Letter
4. Sample ICE Notice of Inspection
5. Sample Insurance Coverage Notice
6. USCIS Transformation Powerpoint July 2011