RS &C | Ryan, Swanson & Cleveland LAWYERS
Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

MAJOR RECENT DEVELOPMENTS IN IMMIGRATION

by Rachel Y. Han
© 2007

Immigration has recently been a prominent topic of discussion with unfulfilled promises of comprehensive immigration reform in Congress. Although immigration issues have enjoyed newly added publicity, for employers in the United States, immigration issues are a challenge they have to face every day, whether it is in the form of "No-Match" letters from the Social Security Administration, changing regulations by the Department of Labor, or delays in processing by the U.S. Citizenship and Immigration Services and the Department of State.

A. SSA No-Match Letters

Every year, the Social Security Administration (SSA) sends thousands of "no-match" letters to employers, informing them that certain employees' names and corresponding Social Security numbers provided on Forms W-2 do not match SSA's records. Each year, the SSA finds that about 10 million employee wage reports have names and corresponding Social Security numbers that do not match SSA's records. This is about 4% of the 250 million wage reports the SSA receives each year.

For Tax Year 2006, employers will receive a letter from U.S. Immigration and Customs Enforcement (ICE) accompanying the SSA "no-match" letter, informing employers on how to respond to the employer no-match letter in a manner consistent with obligations under U.S. immigration laws. This is a generic form letter and does not mean that employers are necessarily being examined by ICE.

1. What Employers Should Do

The Department of Homeland Security (DHS) regulations and the ICE letter describe what steps employers should take when they receive these SSA "no-match" letters.

(a) Verify within 30 days that the mismatch was not the result of a record-keeping error on the employer's part.

(b) If it was not a record-keeping error, request that the employee confirm the accuracy of employment records.

(c) If necessary, ask the employee to resolve the issue with SSA.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

(d) If the preceding steps led to a resolution of the problem, follow the instructions on the no-match letter itself to correct information with SSA, and retain a record of the verification with SSA, noting the date and time of your verification.

(e) If the information could not be corrected within 90 days of receipt of the "no-match" letter, complete a new I-9 form within 3 days (93 days from date of receipt of letter) without using the questionable Social Security number, but instead using documentation presented by the employee that conforms with the I-9 document identity requirement and includes a photograph and other biographic data.

Employers who are unable to confirm that the employee is authorized to work risk liability for violating the law by knowingly continuing to employ unauthorized persons.

CAVEAT: There are many reasons for a mismatch between employer and SSA records, including transcription errors and name changes due to marriage that are not reported to SSA. Upon receipt of a "no-match" letter, employers should not assume that the employee has done anything wrong. If an employer takes action against an employee based on nothing more substantial than a mismatch letter, the employer may, in fact, be violating the law.

2. Consequences for not complying with instructions

An employer may decide to ignore the SSA "no-match" letter and not take any of the steps listed above. This may have broader ramifications than just ignoring a letter from the SSA. The SSA shares mismatch information with the Internal Revenue Service (IRS) and under 26 U.S.C. § 6674, the employer may be fined $50 per violation for failing to provide correct information on a wage statement.

Immigration law states that it is unlawful for an employer to employ a person "knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). Both regulations and case law support the view that an employer may be found to have violated this law by having constructive, rather than actual knowledge that an employee is unauthorized to work. The word "knowing" has been defined as including "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 CFR §274a.1(l)(1). The criminal penalties for knowingly hiring or continuing to employ aliens without authorization to work in the United States shall be a fine up to $3,000 per unauthorized alien, imprisonment for up to six months, or both. 8 CFR §274a.10(a). Civil penalties

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

may also be imposed by the Department of Homeland Security or an administrative law judge in the amount of $250 to $2,000 for each unauthorized alien if it is a first offense, $2,000 to $5,000 for each unauthorized alien if it is a second offense, or $3000 to $10,000 for each unauthorized alien if the employer already has two or more offenses. 8 CFR §274a.10(b).

If an employer is determined to have failed to comply with the requirements for verifying employment authorization when hiring an individual, it shall be subject to a civil penalty of an amount between $100 to $1,000 for each violation which occurred before September 29, 1999, and an amount between $110 and $1,100 for each violation after September 29, 1999. 8 CFR § 274a.10(b)(2). The Department of Homeland Security or the administrative law judge determining the penalty will consider the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations of the employer.

The Department of Homeland Security (DHS) published a final rule on August 15, 2007 to amend the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. 72 FR 45611. This new rule was set to become effective on September 14, 2007. However, due to the grant of a Temporary Restraining Order by a federal court judge in California, the effective date of the rule has been delayed until after a Hearing to Show Cause has been held. At the Hearing to Show Cause on October 1, 2007, the Court will determine whether or not a preliminary injunction should be issued to enjoin the Department of Homeland Security from giving effect to this new rule.

According to this rule, "constructive knowledge" of the employment of an unauthorized alien is imputed to an employer when it fails to take reasonable steps to address the receipt of a "no-match" letter from the SSA. Employers who ignore the no-match letters or who fail to follow its instructions in a timely manner may be subject to allegations that an employer had constructive knowledge that it was employing an alien not authorized to work in the United States in violation of section 274A(a)(2) of the Immigration and Nationality Act codified at 8 U.S.C. 1324(a)(2). Thus, if the employer follows the instructions on the SSA "no-match" letter, it allegedly is no longer at risk that the no-match letter would be used in any part of an allegation by the Department of Homeland Security that the employer had constructive knowledge that the employee was not authorized to work.

3. Ryan, Swanson & Cleveland's Recommendation

First, we advise that you follow the instructions on the SSA "no-match" letter (the steps outlined in Section I).

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

If the Social Security Number is incorrect on the Form W-2, or if the employee does not provide a correct Social Security Number within a reasonable time, the employer should complete a new Form I-9 with an identity document showing authorization to work in the U.S. different from the Social Security Card in question. The employer should retain the old Form I-9 as well as the new one as evidence that the employer has complied with the verification requirements both at the time of hire and at the time when the social security number was questioned.

If the employer has policies it generally applies to criminal conduct in the workplace, then it should consistently apply those policies. As the employer, you will not know if the employee has committed a criminal act unless the employee confesses that he/she obtained a Social Security card from anyone other than the SSA and willfully used it to gain employment.

The employee may confess that he/she does not have work authorization and he/she may ask what can be done to keep his/her job. He/she is often the best employee, who never caused any problems, always showed up to work on time, and never sought a raise. You want to help.

Our recommendation is to terminate the person as an employee as soon as possible. After the employee confesses, the employer now has actual knowledge that the employee is not authorized to work. Not acting on this knowledge could result in a civil fine of $250 to $2,000 per individual as well as criminal penalties, although they are rarely imposed.

The employer should call our office for names of local qualified immigration attorneys to whom it may refer the employees for legal assistance. The employee may have legal alternatives unknown to him/her. It may be possible for the employer to assist the employee to secure lawful permanent residency in the United States, but only as a future employee. We can review this alternative with the employer when you have such a situation.

4. For Future Employees

Employers can register for E-Verify, an online service which allows employers to enter names and Social Security Numbers to verify employment eligibility. For more information on E-Verify and to register, please visit www.dhs.gov/E-Verify.

B. New Department of Labor Regulations Regarding Labor Certifications

On July 16, 2007, new regulations from the Department of Labor regarding Labor Certifications went into effect. The new regulations found at 71 FR 27904 significantly impacts the adjudication of Form I-140, Petition for an Immigrant Worker, the

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

employer's petition for a permanent residency application on behalf of an employee. Three consequences of the new regulations are (1) a labor certification will expire 180 days from the date of certification unless it is filed in support of a Petition for an Immigrant Worker (I-140), (2) employers will no longer be able to substitute an employee for a specific labor certification certified for another employee, and (3) where an employer has hired an attorney to complete the labor certification application, the employer is obligated to pay for the costs and fees associated with the labor certification application.

1. Labor Certifications Only Valid for 180 Days

In the process of obtaining permanent residency on behalf of an employee, an employer must first obtain a certification by the Department of Labor (DOL) stating that there are not sufficient workers who are able, willing, qualified, and available to perform the position offered, and the employment of such an alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. Prior to July 16, 2007, these labor certifications were valid indefinitely. However, this new rule states that a labor certification will be valid for 180 days from the date that it is certified. This means that an employer must file a Petition for an Immigrant Worker (Form I-140) before the end of the 180-day period. Labor certification applications certified prior to July 16, 2007 will expire on January 12, 2008, 180 days from the effective date of this new rule.

2. No Substitutions of Beneficiaries on Labor Certifications

Prior to July 16, 2007, employers were permitted to substitute another employee for a labor certification as long as the new employee met the requirements for the position as stated in the labor certification. DOL is no longer allowing such substitutions.

3. Payment of Costs and Fees Related to Labor Certification Applications

The new regulations prohibit the sale, barter, or purchase of labor certifications. Until July 16, 2007, employers were allowed to have agreements with employees seeking permanent residency which allowed the employers to receive payment or reimbursement from their employees for the fees and costs related to labor certification applications under certain conditions. However, as of July 16, 2007, employers, who have engaged the services of a lawyer or law firm to file a labor certification application, are no longer allowed to receive payment from an employee for the costs and fees associated with a labor certification application on behalf of that employee nor are they allowed to deduct costs from the employee's salary or bonus for costs and fees related to the labor certification application. However, an employee may pay the costs and fees

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

related to a labor certification application including attorneys' fees only when the attorney represents the employee, but does not represent the employer. Payment includes monetary payments; wage concessions including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

If an employer is found to have sought or received payment from any source in connection with a labor certification application, the application may be denied, revoked, suspended, or any combination thereof. In addition, the employer may be barred from filing labor certifications for a reasonable period not to exceed three years. In case of such a debarment, the employer would receive a Notice of Debarment within six years after the date of filing a labor certification application, or if a pattern must be established, within six years after the date of the filing of the last labor certification application which constitutes a part of a pattern or practice.

Employers with questions about these new regulations and their impact on their business should contact our office.

C. Permanent Residency Application Debacle at USCIS

On July 2, 2007 USCIS attempted to turn away hundreds of thousands of employment-based permanent residency applications. Fortunately, by mid-July, USCIS decided to accept employment-based permanent residency applications until August 17, 2007.

1. How could this happen?

Each year, the Immigration and Nationality Act allots about 140,000 visas for employment-based immigrants and their dependents. The fiscal year runs from October 1st of every year to September 30th of the next year. Each month, the Department of State issues a Visa Bulletin stating the availability of immigrant visas based on the number of available visas and USCIS' ability to adjudicate applications for permanent residency. In Fiscal Year 2006 (October 1, 2005 – September 30, 2006), the U.S. Citizenship & Immigration Services (USCIS) failed to adjudicate the maximum number of 140,000 applications allotted for permanent residency and therefore did not use up all of the visa numbers available to them for that fiscal year (approximately 10,000 visas were unused).

Since October 2005, there have been backlogs in the processing of immigrant visa applications, some up to over seven years. In June 2007, with the hope of using up all visa numbers available for FY 2007, the Department of State issued the July Visa Bulletin stating that visa numbers were available as of July 2, 2007 for all employment-based preference categories except for the "Other Workers" category, for which visas

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

were not available. The result was a flurry by employees and employers who had been waiting to for visa numbers to become available, some since 2001. In order to prepare applications for permanent residency and gather all the necessary documents, employees, their family members, and attorneys spent countless hours compiling applications to be filed in the month of July according to the Visa Bulletin. On Monday, July 2, 2007, the first day on which USCIS could receive such applications for permanent residency, the Department of State issued a statement declaring that all of the visa numbers had been used up, that there were no longer any visa numbers available for any employment-based preference category, and that as of July 2, 2007, USCIS would not accept any employment-based applications for permanent residency. Information was posted that employment-based permanent residency applications received on or after July 2, 2007 would be returned to the sender.

Right away there were threats of class action lawsuits against the Department of Homeland Security for informing the public of the availability of visa numbers and then yanking them away at the last minute. Because the applicant must be physically present in the United States on the date on which the application for permanent residency is filed with USCIS, some individuals had spent excessive amounts of money and traveled great distances to be physically present in the United States in July. Some employers had gone to great lengths to file hundreds of applications for permanent residency on behalf of their employees. All of this productive motion came to a screeching halt on July 2, 2007. Some employers then decided to continue to file applications in the hope of qualifying as a member of rumored class action lawsuits to be filed. Others stopped working on their permanent residency applications, having decided that the window of opportunity to file applications had closed. Fortunately, the threat of multiple lawsuits coupled with communications with USCIS resulted in a reopening of that window.

On July 17, 2007, the Department of State issued the Visa Bulletin for August 2007. This Visa Bulletin announced that the July 2, 2007 notice was withdrawn and that the original July 2007 Visa Bulletin was effective. An additional notice stated that USCIS would accept permanent residency applications until August 17, 2007. Again, employers, employees, and attorneys scrambled to compile applications to submit. Although USCIS has accepted these applications, due to the volume of applications they received, it is unclear how long it will take them to process these applications. However, it will be years before visa numbers will be available for many of the applicants.

2. <u>What does this mean</u>?

This incident as well as the backlog of permanent residency applications is an indication of the need for comprehensive immigration reform. Although there was a

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

strong effort this year with bills being reviewed in Congress, they were ultimately rejected. However, employers should continue to let their Representatives and Senators know how impacted their businesses are by the limited number of nonimmigrant and immigrant visas available. U.S. employers have a need for skilled workers and employees in specialty occupations, but they are restricted from hiring qualified individuals because of the government's limitations on the number of nonimmigrant and immigrant visas.

The failure of comprehensive immigration reform has divided Congress and caused the President to crack down on labor by increasing raids and building an enormous U.S./Mexican border fence to alleviate the situation. The consequences for employers could be losing a complete workforce in one day, bad publicity after a raid, criminal and civil penalties related to employing aliens not authorized to work, or any combination thereof.

3. What is the solution?

We urge interested employers to lobby Congress to increase the number of visas available so that businesses in the U.S. can grow with a capable workforce. Let your voice be heard and write to your Senators and Representatives in Congress.

D. Delays in Obtaining Passports

As of January 23, 2007, citizens of the United States, Canada, Mexico, and Bermuda were required to present a passport to enter the United States when arriving by air from any part of the Western Hemisphere.

In fiscal year 2006 from October 2005 to September 2006, the Department of State issued 12.1 million passports. To date in fiscal year 2007, the Department of State issued over 16 million passports. Because of the volume of passport applications received, the Department of State recently issued an amendment to the regulation regarding expedited passport processing. 72 FR 45888. Until August 16, 2007, expedited processing required that passports be processed within three business days. The regulations have been amended to state that expedited processing shall mean completing processing within the number of business days published on the Department of State's website: http://www.travel.state.gov. The number of days starts when the application reaches a Passport Agency or if the passport is already with a Passport Agency, then the counting of days starts when the request for expedited processing is approved. As of September 7, 2007, expedited processing is taking about 3 weeks.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=5ef07124-aa94-4bfe-9611-0beafae4630b

Due this delay in passport processing, the Department of State has permitted U.S. citizens traveling by air within the Western Hemisphere to travel with official proof of passport application receipts if they had not yet received actual passports. This accommodation is scheduled to end at midnight on September 30, 2007. As of October 1, 2007, all U.S. citizens traveling by air to Canada, Mexico, the Caribbean, and Bermuda MUST present a passport to enter or depart the United States. There is one exception for U.S. citizens who departed the country under the travel accommodation prior to October 1, 2007 with Department of State official proof of passport application receipts and government-issued identification. These citizens will be readmitted to the United States with these same documents if they are returning after September 30, 2007.

In its last announcement regarding passport production on September 7, 2007, the Department of State states that travelers who have applied for passports should allow six to eight weeks for standard passport processing and 2-3 weeks for expedited processing. Although this is a reduction in processing times from May 2007, when standard processing was taking 10-12 weeks, expedited processing could still take up to three weeks.

For citizens of the United States, Canada, Mexico, and Bermuda traveling through land and sea ports of entry, the Department of Homeland Security and Department of State expect that a passport or other acceptable identification containing biometric information will be required in the summer of 2008.

Thus, if you or any of your employees are planning to travel outside the U.S. and need to obtain U.S. passports, please apply early to allow ample time for processing.