



## Immigration Insights (August 2009)

August 28, 2009

### **Important News -- E-Verify Federal Contractor Rule Effective September 8th**

As a result of a court ruling this week, most Federal contractors can expect to be subject to the federal government's "E-Verify" employee verification program under a federal regulation that will take effect on September 8th – one day after Labor Day.

Last November, the Administration published a regulation requiring businesses contracting with the Federal government ("Federal contractors") to "verify the employment eligibility of: (1) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (2) all persons assigned by the contractor to perform work within the United States on the Federal contract."

In December, the U.S. Chamber of Commerce and other representative organizations filed a federal lawsuit against the government over its Federal contractor E-Verify program. Because of this lawsuit, the Bush Administration agreed to delay the applicability date of the regulation. The incoming Obama Administration agreed to further delay implementing the regulation while the lawsuit was pending, but indicated that it intended to go live with the regulation on September 8 (unless the federal court intervened). On Wednesday, the Administration prevailed in the lawsuit filed by the Chamber of Commerce, with the court rejecting the Chamber's challenges to the regulation.

So what does this mean for employers? Here are answers to some frequently asked questions about this E-Verify rule.

### ***I am a current Federal Contractor. How will the regulation affect me?***

Once effective, this new regulation affects employers entering into future federal contracts with Executive Branch agencies and departments:

- for prime contracts longer than 120 days and valued above \$100,000, and
- for subcontracts for services and construction over \$3,000 if the prime contract contains the E-Verify clause.

Federal contractors will be obligated to participate in E-Verify and electronically verify the employment eligibility of (1) all of the employer's new hires across-the-board (regardless of whether those new hires perform work pursuant to the federal contract), and (2) all employees (meaning both new hires and current employees) directly performing work under the contract.

### ***Will Some contractors have lesser requirements under the E-Verify clause?***

Institutions of higher learning, state or local governments or the government of a federally recognized Indian tribe, or a surety performing under a takeover agreement may choose to verify only those employees assigned to the contract, whether they are existing employees or new hires. Therefore, these organizations

will not be required to use E-Verify for all new hires.

***Are there any contracts that are exempt from this regulation?***

Yes, prime contracts are exempt from the E-Verify rule if:

- the contract is for a period of less than 120 days; or
- the contract is valued at less than \$100,000; or
- the contract is only for commercially available off-the-shelf items (or with minor modifications) and related services; or
- all work performed under the contract is performed outside the United States.

***As a Federal contractor, when must I begin participating in E-Verify after the implementation date?***

The timing of the contractor's obligation to comply with the verification requirements depends on when the contractor enrolls in E-Verify. For contractors not enrolled at the time of the contract award, the contractor has 30 days to enroll and 90 days from enrollment to initiate verification of employees already on staff who will be working on the contract and to begin using the system to verify newly hired employees. For contractors already enrolled in E-Verify for more than 90 days at the time of the contract award, the contractor must initiate verification of new hires within 3 days and will have 90 days to initiate verification of each employee already on staff who is or will be assigned to the contract.

***Must I use E-Verify to confirm the employment eligibility of current employees?***

You must initiate an E-Verify query if current employees will be assigned to the contract, meaning that the employee will be directly performing work under the contract. Under this regulation, an employee is not considered assigned to the contract if the employee normally performs support work and does not perform any substantial duties applicable to the contract. Federal contractors and subcontractors also have the option of verifying their entire workforce, both new hires and existing employees – including those not assigned to a federal contract – but this entire workforce verification is not required.

***What if I cannot identify or predict who will work on the federal contract?***

You may want to consider electing the "entire workforce" option and perform an E-Verify check for all new hires and all current employees for whom an I-9 is required (meaning employees hired after November 6, 1986). If an employer decides to perform an E-Verify check on its entire workforce, the employer will have 180 days to perform E-Verify checks, starting from the time it enrolls in the E-Verify program or notifies E-Verify of its decision to exercise this option to verify the entire workforce. This option eliminates the risk of failing to perform an E-Verify check on an employee who may later be assigned to a federal contract. Also, once an employee's work authorization has been verified in the E-Verify system, the employer need not re-verify that employee if the employee moves from one contract to another.

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**USCIS Revises Date on Form I-9**

U.S. Citizenship and Immigration Services (USCIS) has changed the revision date on its Form I-9. Previously, the revision date (which appears in the form's bottom right hand corner) appeared as "Rev. 02/02/09." Earlier editions of the I-9 form were deemed not acceptable. This month USCIS amended the I-9 form to reflect a new revision date of "Rev. 08/07/09." Employers may use the Form I-9 with the revision

date of either 02/02/09 or 08/07/09. Other than the form revision date, the two forms are essentially identical.

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### **USCIS Investigators Making Site Visits to H-1B Employers**

Recently, employers have reported that U.S. Citizenship and Immigration Services (USCIS) has been making unannounced site visits in connection with H-1B petitions for employees. The USCIS' Fraud Detection and National Security Office is tasked with carrying out these site visits.

USCIS has indicated that the purpose of these visits is to confirm that the employer indeed filed the petition (and it was not filed fraudulently by a third party using company information) and that information provided by an employer in the petition is accurate. Examples of such information include the work address, number of employees, wage of the H-1B beneficiary, the job duties that the employee will perform, and that the employee is qualified for the position. Employers who have received site visits indicate that the investigators have asked to speak with a company representative and may ask to speak with the H-1B employee as well.

Employers should ensure that all of the information provided to USCIS in connection with an H-1B petition is accurate and, if the employer is given advance notice of the visit, the employer should immediately contact counsel. The information obtained through site visits could be used as a basis to deny the petition or revoke previously approved petitions if the government finds the employer to have violated the basis on which the petition was approved. Furthermore, adverse information could also be shared with the enforcement arm of the Department of Homeland Security, Immigration and Customs Enforcement (ICE), and could expose the employer to possible civil and criminal penalties as well.

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### **H-1B Visa Category Remains Open**

As of mid-August, approximately 45,000 H-1B cap-subject petitions and approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed for fiscal year 2010. The regular limit (for non advanced degree cases) is 65,000 H-1B approvals per year. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limits, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn. USCIS continues to update the H-1B cap count about twice a month.

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### **USCIS Accepting New H-2B Petitions for Fiscal Year 2009**

On August 6, 2009, USCIS announced that it would accept H-2B (temporary worker in short supply) petitions for the current fiscal year (which runs until September 30, 2009). Although the government announced in January 2009 that the cap of 66,000 had been reached, the State Department received far fewer visa applications than approvals -- only 40,460 H-2B visas have been issued for this fiscal year. For those employers who wish to sponsor workers for an H-2B visa, employers should act quickly, and USCIS encourages employers to request premium processing for expedited adjudication. USCIS requires that the employer submit the nonimmigrant visa petition along with the required documents, including an approved Alien Employment Certification from the Department of Labor, for an employment start date before October 1, 2009.

### **Global Entry Program Expands into 13 Additional Airports**

The Department of Homeland Security (DHS) has announced a significant expansion to the Global Entry Program. The program, which began in mid-2008, streamlines the screening process at airports for travelers who register and provide biometric identification. Members go to a kiosk at the airport, insert their passport or lawful permanent resident card into a document reader, provide digital fingerprints for comparison with fingerprints on file, answer customs declaration questions on the kiosk's touch-screen, and then present a transaction receipt to DHS officers before leaving the inspection area. DHS reports that this program can cut down airport wait times by 70 percent.

The program began at seven airports -- Atlanta, Chicago (O'Hare), Houston (Intercontinental), Los Angeles, New York (JFK), Miami and Washington (Dulles). This expansion brings the program to the following airports -- Boston, Dallas, Detroit, Fort Lauderdale, Fla., Honolulu, Las Vegas, Newark, N.J., Orlando, Fla., Sanford, Fla., Philadelphia, San Juan, Puerto Rico, San Francisco and Seattle.

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### **September Visa Bulletin -- EB-2 Categories for India and China Advance 15 months**

The U.S. State Department (DOS)'s [September Visa Bulletin](#) reflects an advancement of 15 months in the permanent resident or "green card" Employment Second Preference for India and China. The cutoff date for both EB-2 India and China is now January 8, 2005. The Employment First and Third Preference categories remain unchanged compared to the August 2009 Visa Bulletin -- First Preference is current for all categories and Third Preference is unavailable in all categories. With the beginning of the new fiscal year on October 1, 2009, the Visa Bulletin will reflect advances in many visa categories.