Dinsmore&Shohl LLP
ATTORNEYS

Immigration Insights (September 2009)

September 30, 2009

Reminder -- Federal Contractor E-Verify Regulation Effective September 8, 2009

As we reported in an earlier *Immigration Insights*, most federal contractors are subject to the new E-Verify regulation effective September 8, 2009. Federal agencies that issue new, extended or modified contracts of more than a defined de minimis amount or duration will include a clause requiring the federal contractor to verify all new hires plus at least those employees assigned to directly perform work under the contract. In some cases, an employer will want to invoke a "whole workforce" option which will relieve the employer from tracking who is assigned to federal contracts and which also will buy the employer more time (180 days) to verify existing staff.

Tight time frames apply to the E-Verify obligation, and noncompliant employers can lose federal contracting rights, so if you have not already done so please read our memo and put it on your agenda to quickly determine if your organization is subject to this new rule as either a contractor or subcontractor and if so implement a plan to comply with the rule.

U.S. Citizenship and Immigration Services (USCIS) Intensifies Worksite Audits

Since 2005 USCIS has collected a $500 fraud prevention and detection fee for each new H-1B or L-1 petition filed with USCIS and now has accumulated a substantial war chest of funds. The agency has engaged outside contractors (some of whom are former U.S. Immigration and Customs Enforcement and other governmental agents) who are actively conducting approximately 25,000 site visits to organizations that filed H-1B (specialty occupation) and L-1 (intracompany transferee) petitions.

Operating as an extension of USCIS' Fraud Detection and National Security (FDNS) operation, the agents are making an ever increasing number of unannounced worksite visits to interview Human Resources personnel, H-1B and L-1 workers, and sometimes others to determine if the information and documentation contained in the H-1B or L-1 petition was accurate and truthful and whether the employee is performing the described duties, at the promised wage, and at the location indicated in the petition filed with USCIS. The visit may also include an inspection of the Labor Condition Application public access or compliance files.

Aside from the obvious step to review carefully cases before filing with USCIS to ensure that all information is accurate, honest and defensible in the event of an audit, employers should also ensure that if they wish to change the sponsored employee's job title, duties or work locations, they consult with immigration counsel in advance. Employers should also ensure that their Human Resources staff are versed in what to do if a USCIS officer or contractor comes knocking without notice, including asking for and copying the officer's identity documents, contacting immigration counsel immediately, and determining (in advance) what information and documents – if any at all – the employer is prepared to provide to the government at that time.

Although USCIS may have a basis to conduct a site visit in connection with an H-1B or L-1 petition that is *pending* with USCIS, we do not agree that USCIS has carte blanche authority to enter an employer's business and demand immediate access to personnel, documents or files (except the Labor Condition Application public access file) absent a warrant or subpoena. That is not to say that employers necessarily will want to play hardball, but common business practice is to call in advance and request a meeting, not to show up unannounced and expect immediate access to personnel and files. Courtesy is always appropriate, and arranging a mutually convenient time to conduct the worksite inspection is entirely reasonable.

Some USCIS officers or contractors request internal job descriptions that may differ to some extent from individualized descriptions that employers submit to USCIS to demonstrate how the job meets USCIS' H-1B or L-1 requirements. Employers should consider whether to release these internal job descriptions and, if they do release them, to add language indicating something along the following lines: "This job description depicts the core job duties and general requirements of this position. We often employ workers who perform more specialized versions of this core job so actual job duties and requirements may vary from worker to worker due to such variations."

Additionally, the U.S. Department of Labor ("DOL") sometimes has been sending questionnaires to H-1B employees to determine how the employee came to work for the U.S. employer, when the employee began employment, and particularly whether the employee is paid regularly and at the proper wage. The clear intent of the questionnaire is to find violations of the Labor Condition Application rules such as working offsite in an impermissible fashion, not being paid properly, and so on. Both with the USCIS and DOL investigations, there is a governmental interest in finding violations and levying fines to justify the millions of dollars employers have paid to USCIS to hire staff to investigate the same employers.

October Visa Bulletin Numbers Disappointing

Persons waiting for a decision on a pending permanent residence case based on an approved Employment Based Second (EB2) or Employment Based Third (EB3) Immigrant Petition or waiting to file a permanent residence application once their EB2 or EB3 priority date becomes current were hoping for the EB3 category to show cut-off dates in 2005 and EB2 cut-off dates closer to current. The October Visa Bulletin did make EB3 available again but the cut off dates are very disappointing with the EB3 worldwide date stuck in 2002, the EB3 dates for India and China being worse than that.

New Focus on Employees with DUI Convictions

It is settled law that one (non-aggravated) driving under the influence (DUI) conviction generally is not a crime of moral turpitude that causes a foreign national to be ineligible for a temporary U.S. visa or for U.S. permanent resident status.

In the past, a few U.S. consulates, most notably the U.S. consulate Ciudad Juarez, Mexico, questioned at length visa applicants with a DUI arrest or conviction to elicit information that the DUI was evidence that the visa applicant is an alcoholic (habitual drunkard) and ineligible for a U.S. visa on that basis. In 2007, the U.S. Department of State (DOS) issued guidance to its U.S. consular officials abroad. The guidance directs that visa applicants with a drinking arrest or conviction within the past three years be referred to a "panel physician" (a term used to denote a physician in the location where U.S. consulate operates and who has been approved by the U.S. consulate to perform medial examinations) for an alcoholism assessment. The guidance also dictated that visa applicants with two or more arrests or convictions at any time be referred to a panel physician for the same reason.

Panel physicians are now interrogating applicants with DUI arrests or convictions about their drinking patterns and tendencies, and some applicants claim their visas have been denied or cancelled due to questioning at such medical exams or at consular interviews.

In fiscal 2008, US consulates denied approximately 800 immigrant and nonimmigrant visa requests on this basis, up from less than 100 in 2003. Some applicants have indicated that the panel physician misconstrued their answers about alcohol intake (such as monthly to weekly). There are three things to take away from these developments:

- if a visa applicant has one DUI or other alcohol-related arrest or conviction, consult with an immigration lawyer about the issue before applying for a visa or permanent residence (because the arrest or conviction must be disclosed on one visa application;

- visa applicants should anticipate in advance how they will respond to any questions about alcohol intake, and consider whether it would be better to answer such questions in writing and keep a copy; and

- if the visa applicant has a past alcohol-related arrest, the applicant should be especially vigilant not to drink and drive.