PART XV

IMMIGRATION LAW ISSUES

1. THE EMPLOYMENT ELIGIBILITY VERIFICATION (I-9) PROCESS

Employers are required by the Immigration Reform and Control Act of 1986 to complete an employment eligibility verification form (I-9 Form) for each newly hired employee to ensure he/she is legally authorized to work in the United States. IRCA has two basic goals that must be kept in mind at all times when hiring new employees. First, IRCA prohibits the hiring of individuals who do not have a legal right to work in the United States. Second, IRCA prohibits discrimination against individuals who have a legal right to work in this country, based upon either national origin or citizenship status.

Stiff penalties will be levied against any contractor found to have failed to comply with IRCA's employment verification provisions or anti-discrimination prohibitions. Fines for violations of the I-9 rules range from $230 to $2,292 per violation. In addition, there are criminal penalties, for engaging in a pattern or practice of hiring illegal workers .

GENERAL RULES

Contractors should be mindful of some very basic compliance rules contained in the IRCA statute. The first is that any and every employee hired after November 1986 must complete an I-9 form. This does not mean that an employer must complete an I-9 form for every individual who applies for a job, only those individuals who are actually hired. Once the employee begins work, he/she has three business days from the date work is started to provide the necessary documents to establish his/her legal right to work in the United States. Any employee who cannot establish a legal right to work within three business days must be terminated. Do not count the first day they report to work and fill out the I-9.

Second, an employer cannot refuse to hire an applicant who is not a U.S. citizen (unless the specific job requires such citizenship for legitimate reasons) or a holder of a green card, if that applicant can establish his/her legal right to work in this country. Likewise, employers may not refuse to hire individuals with time-limited work authorization. Employees with time-limited work authorization are entitled to work, albeit for a finite period of time. When faced with an applicant or employee who has time-limited work authorization, an employer will be required to re-verify his/her continued work eligibility on or before the date their employment eligibility expires. There are some categories of EAD (time-limited) that do qualify for an automatic 180 day extension under certain circumstances.

In order to ensure proper re-verification, the employer must establish and maintain a re-verification calendar to keep current on the re-verification obligations.

Third, completed I-9 forms should be maintained in a separate file from individual personnel files.

PRACTICAL POINTERS

There are a few basic tips to assist employers in complying with the I-9 requirements and avoiding potential compliance pitfalls.

Institute Company-Wide I-9 Completion Policies

Employers should institute company-wide, consistently implemented policies regarding I-9 practices and procedures. If an employer follows an established company-wide policy for every employee who is hired and every I-9 that is completed, the chances of a discrimination claim being filed under IRCA, or any discrimination being uncovered during the course of an audit, will be greatly diminished because it will be markedly more difficult for employees to claim that they were treated inconsistently based on their national origin or citizenship status.

Limit the Number of Employees with I-9 Completion Responsibilities

Employers should limit the number of individuals who have I-9 responsibilities. It is easier to train a smaller number of employees and having a smaller number of employees will promote consistency in the employer's I-9 practices.

Complete the I-9 on the New Employee's First Day of Work

In general, the best time to complete Section 1 of the I-9s is the new employee's first day of work. If it is discovered that a current employee was hired after November 1986 but does not have an I-9, the employer should proceed with caution, checking to make sure that an I-9 form does not already exist for this person. If not, then promptly create an I-9 form for this person as soon as possible. Upon completing the I-9, put the current date on the form. Never backdate the form. Further, a margin notice should be inserted …"Created as a result of audit."

Maintain a Re-verification System to Monitor Eligibility

For individuals who have time-limited work authorization, maintain a separate re-verification system, either an automated software program calendar or a simple paper calendar with annotations as to the date of expiration of each employee's work authorization. The annotation should be made in the re-verification system at the time the employee is completing the I-9 form. The re-verification system should be monitored on a regular basis to ensure that every employee has valid work authorization upon expiration when required.

> *Note: Do not re-verify Legal Permanent resident cards, U.S. passport, U.S. passport cards or any List B documents.*

Seek Legal Counsel in the Event of an Inspection

If a government investigator shows up at your facility, do not consent to the inspector proceeding with his/her inspection at that time and contact legal counsel immediately. By law, unless an inspector has a I-9 inspection notice, he/she must give the employer three days of notice before conducting an I-9 compliance audit. This is normally accompanied by a subpoena or production of documents. A warrant would be treated differently and employers must comply, again contact legal counsel.

E-Verify

Most government contractors are now subject to the E-Verify. This rule requires covered government contractors to use the E-Verify system to confirm electronically that both their new hires and their existing employees assigned to government projects undertaken are lawfully authorized to work in the United States. In addition, covered contractors are required to E-Verify all new hires regardless of whether they are assigned to government contracts. Detailed information about the E-Verify program can be found at www.uscis.gov.

2. SECURING NON-IMMIGRANT VISAS

H-1B CATEGORY REQUIREMENTS

Section 101(a)(15)(H) of the Immigration and Nationality Act, as amended, defines an H-1B worker as "an alien coming temporarily to the United States to perform services in a specialty occupation. . . and for whom the DOL secretary has determined and certified to the Attorney General that the prospective employer has an approved labor condition application under section 212(n)(1) of the Act. . ." 8 USC 1101(a)(15)(H).

In order to obtain permission to employ an individual in H-1B status, an employer must first submit a labor condition application to the DOL attesting to certain requirements related to wages and working conditions. Upon certification of the application, the employer must file a petition with USCIS on behalf of the individual establishing that the position it seeks to fill qualifies as a specialty occupation and that the person it wishes to employ in that position possesses the necessary professional qualifications for employment in that occupation.

The H-1B non-immigrant visa category is intended for use by employers in the United States that seek to employ temporarily foreign nationals who will perform services in a "specialty occupation." These occupations are strictly defined by statute and regulation as positions that require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of at least a bachelor's degree in a related academic discipline.

To establish eligibility, an individual must be shown to be a professional in his/her chosen field. A person will be considered to be a professional if that person's field is one for which a specific baccalaureate or higher-level degree is the usual minimum entry-level requirement and the person possesses qualifications that are equivalent to that minimum requirement. In any case, it is critical to establish the relationship between the stated responsibilities of the position offered by an employer and the requirement for a specific academic degree in that occupation, as well as the business-related need for an individual with that particular academic background.

H-2B VISAS FOR TEMPORARY OR SEASONAL NONAGRICULTURAL WORKERS

In order to be eligible to apply for H-2B visas for temporary nonagricultural workers, both the job offered by the employer and the employer's need for the specific alien must be temporary. The applicable regulation states that an "H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers." Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary. The petitioner's need, which must generally be one year or less, can be either a one-time occurrence, a seasonal need, a peak load need or an intermittent need.

The employer must establish that it has not employed workers to perform the services or labor in the past and it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

To obtain approval of an H-2B petition, a process similar to labor certification must be completed. The employer must file an ETA-9142B application with the appropriate state employment service office and carry out basic recruiting, posting and advertising to fill the position(s) at issue. Once certification from DOL has been received (or notification that no certification can be made), a petition (which may include multiple foreign workers) is filed with USCIS on Form 1-129.

The maximum period for which an alien can be admitted to stay in the United States in the H-2B category is three years. After having spent three years in the United States, an alien may not seek extension, change of status, or be re-admitted to the United States under the H or L nonimmigrant classification unless such alien "has departed and remained outside the United States for an uninterrupted period of three months before seeking readmission as an H-2B nonimmigrant."

Two one-year extensions of stay may be granted to H-2B temporary workers. However, each new Form 1-129 extension petition must be accompanied by a new labor certification or notice that certification cannot be made. An H-2B alien who is dismissed from employment for any reason by the employer before the end of the approved nonimmigrant stay must be provided return transportation costs abroad by the petitioner and the petitioner must notify USCIS within two workdays if the H-2B worker is a no show, absconds, is terminated or if they finish the labor or services more than 30 days earlier than the date listed on the H-2B petition.

3. OBTAINING PERMANENT RESIDENT STATUS FOR FOREIGN WORKERS

Employers often wish to offer permanent positions to key foreign employees. Permanent resident status provides foreign citizens with the right to live and work in the United States without time limitations. The two primary ways to become a permanent resident are through a family relationship with a U.S. citizen or an offer of permanent employment by a U.S. employer. It's important to keep in mind that obtaining permanent residence for a foreign worker based on an offer of permanent employment can be a complicated and protracted process—often requiring a significant commitment and investment of time and resources. In most cases, the process requires an Application for Alien Employment Certification (Labor Certification or PERM), including formal recruitment supervised by the government to determine whether there are qualified American workers available for the job, and followed by the filing of a preference petition with USCIS to initiate the final stage of adjustment to permanent resident.

The labor certification process normally includes the filing of a labor certification application with, and subsequent recruitment efforts supervised by, the state employment service to determine the availability of qualified American workers. This preliminary phase concludes with a review by the regional office of the DOL and issuance of a formal "labor certification." Only then may the employer proceed with the filing of a preference petition with USCIS on behalf of the specific employee, after which the employee must file an application for permanent residence with USCIS or for an immigrant visa at a United States Consulate abroad.

The employer will coordinate the state prevailing wage requirements for the position. This will initiate the required test of the local labor market to determine whether a U.S. worker is willing, able, qualified and available to perform the same work that it has offered the foreign national employee, and whether his/her employment in that position will adversely affect the wages and working conditions of similarly employed American workers. The position must be certified by the DOL before it can proceed to the next stage.

Note: This is a very broad discussion of general principles and requirements and must not be construed as definitive legal advice applicable in any specific matter. Facts and circumstances will vary from case to case, and adequate counsel can be provided only upon deliberate consideration of the needs and circumstances of an individual client.