PROSKAUER ROSE LLP

Immigration and Nationality Law Update

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In this month's issue:

BREAKING NEWS: USCIS Again Amends I-9 Form......1

E-Verify and Federal Contractors.........................2

Operating In The Shadows: Policy Memoranda In Immigration Law.................6

Problems With the PERM Company Registration System...............................8

The New Nonimmigrant Visa Application Form: DS-160...............................9

What To Look For In 2009: Upcoming Events In Immigration Law.................9

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Law & the Workplace℠

BREAKING NEWS: USCIS Again Amends I-9 Form

On December 17, 2008, United States Citizenship and Immigration Services (USCIS) published an interim final rule, once again revising the I-9 Form that must be executed each time an individual is hired to verify identity and confirm employment authorization. The Rule goes into effect 45 days after publication, on February 2, 2009. As of that date, only the revised I-9 Form may be used.

List of Acceptable Documents Revised

In order to verify the identity and employment authorization of newly hired employees, the I-9 Form lays out the approved documents that employees may present to the employer in three lists. List A documents verify both identity and employment authorization, List B documents verify identity only, and List C documents verify employment authorization only. The revised Form I-9 changes the list of authorized documents as follows:

- Only unexpired documents may be presented for verification. That means that an expired U.S. Passport is no longer a valid document for verification purposes;
- It eliminates previous versions of the employment authorization document (EAD), Form I-688, I-688A and I-688B;
- Adds a new document to List A : a foreign Passport which contains a machine readable immigrant visa which includes a temporary I-551 printed notation [Form I-551 is the resident Alien card (so-called Green Card)];
- Adds Passports from the Federated States of Micronesia and the Republic of the Marshall Islands with a valid Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

Re-verification After the Effective Date

The new I-9 Form will be required of an employer that is "re-verifying" the employment authorization of an employee whose current authorization will expire after the February 2, 2009 effective date of the rule. The revised list of authorized documents would also be

applicable. For the vast majority of hires for whom re-verification is not required, if I-9 processing took place before the effective date of this interim Rule, there is no need to revisit the process in light of the new document requirements.

Further information will be forthcoming when the form is finalized.

E-Verify and Federal Contractors

A final rule amending the Federal Procurement Regulations to require federal contractors to verify a worker's employment eligibility using the Department of Homeland Security's (DHS) E-Verify system, was published on November 13, 2008, with an effective date of January 15, 2009.

What Contractors are Covered?

The rule requires the insertion of an E-Verify requirement clause into applicable prime federal contracts, with a period of performance longer than 120 days, and a value above the simplified acquisition threshold of $100,000. It applies to subcontractors of a prime contract, for services or construction (or related services) with a value over $3,000, and it also applies to existing indefinite delivery/indefinite quantify contracts that extend at least 6 months after the final rule effective date of January 15, 2009.

Contracts that include only commercially available off the shelf (COTS) items and certain COTS-like items are exempt.

What Employees are Covered?

All new employees of the company must be verified and all existing employees who are classified as "employees assigned to the contract" must be verified. Employees who have already been verified previously by this employer (because it is already participating in the E-Verify voluntary program) should not be re-verified, and employees who have an active federal agency HSBD-12 credential, or who have been granted an active U.S. government clearance, do not need to be verified.

Federal contractors that are institutions of higher education, state or local governments, or the government of a federally recognized American Indian tribe, or are a surety operating under federal agency performance bond, must register with the E-Verify system, but are only obligated to E-Verify those new hires that will actually be assigned to the contract.

Contractors and subcontractors also have the option of verifying their entire current workforces, rather than attempting to select out only "employees assigned to the contract."

Timelines

A contractor must enroll in the E-Verify program within 30 days of receiving a federal contract. Within 90 days thereafter, the federal contractor must begin verifying the

employment authorization of all its new hires, through the E-Verify system, and all employees who are "assigned to the contract." Federal contractors who have already previously been enrolled in the E-Verify system, continue to E-Verify all new employees as hired and within 30 days of the contract, must commence E-Verify for current employees assigned to the contract.

If the federal contractor elects the option to E-Verify all of its current employees, regardless of whether they are assigned to the contract or not, it has 180 days to initiate this verification process, from the time that it notifies the agency that it would like to exercise this option.

What is E-Verify?

In 1996, pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a basic pilot program was initiated requiring the participation of all departments within the Executive Branch of the federal government, and voluntary to all private employers, to supplement the normal I-9 process with an electronic verification of the identity and employment authorization of new hires. All employers are required to verify the identity and employment eligibility of new hires by executing, within three days of hire, the Form I-9. The process requires the new hire to present, from a prescribed list, documents that confirm her identify and employment eligibility. The voluntary E-Verify program (formerly Basic Pilot) is an electronic verification, corroborating the new hire's employment authorization through the databases of the Social Security Administration (SSA) and the DHS. When used by the employer, the E-Verify submission follows the I-9 document review process, and must be concluded within 3 days of hire.

How Does E-Verify Work?

Any employer can register online at http://www.dhs.gov/everify to participate in the E-Verify system, and may choose to participate for all, or part, of the corporate entity at one or more employment locations. The employer must enter into a Memorandum of Understanding (MOU) which requires the employer to ensure that it will not unfairly discriminate against its employees as a result of participating in the E-Verify program. Employers agree to provide access for periodic inspection visits by the DHS and the SSA, and must display notices in plain view at the hiring sites, advising of participation in E-Verify and also advising employees of their rights.

After completing Form I-9 for a new hire, the employer logs into the E-Verify system and enters the hire's name, social security number and other data from the I-9 form. Although not normally an I-9 requirement when executing I-9 forms, E-Verify participants must collect the new hire's social security number, and can only accept identification documents that have photographs.

After electronic submission of the appropriate information, the employer will receive a response either confirming the citizenship or immigration status of the worker, or a Tentative Non-Confirmation either from SSA or DHS. If either of these Non-Confirmation

Notices are received, the employer provides the employee with a Notice to Employee of Tentative Non-Confirmation, which instructs the employee as to her option to contest the Tentative Non-Confirmation. The employee has eight federal government work days to initiate the process of resolving the discrepancy by contacting the agency that issued the Tentative Non-Confirmation Notice. The employer is prohibited from taking any adverse action against an employee while this contest is pending. The employer may, and perhaps must, terminate the employee if she fails to contest the tentative non-confirmation notice, or if a final Non-Confirmation Notice is issued.

If the employer does not terminate the employee under such circumstances, it is subject to monetary fines and a rebuttable presumption may be created that the employer knowingly employed an unauthorized worker in violation of the Immigration and Nationality Act.

What is New in Federal Contractor E-Verify

As noted, E-Verify for federal contractors, unlike the "voluntary program," is mandatory for covered federal contractors, and includes "current employees directly associated with the contract," a provision not applicable to the voluntary program. In fact, under the voluntary program, an employer is not permitted under any circumstances to E-Verify current employees.

Contractors who are already registered in the voluntary E-Verify program are not required to re-register, but will be required to sign a revised Memorandum of Understanding, which provides the additional requirements and procedures specific to federal contractors. The modified provisions relate to processes and procedures to E-Verifying current employees.

Problems with Implementation

There are a number of concerns regarding the mandatory program that go above and beyond the obvious ones, relating principally to the significant expense an employer will incur in implementing this additional procedure in the hiring and contracting process. Additional expenses include those for training, recordkeeping, and monitoring of all staff that are subject to Tentative Non-Confirm Notices.

The voluntary program permits an employer to get involved in E-Verify gradually, by registering only for a particular geographical site or unit or entity of a company, and if it chooses, to then expand to additional entities and sites. E-Verify for federal contractors imposes the obligation on a company that participates at each and every geographical employment location of the company within the United States.

A prime contractor is responsible for assuring that its subcontractors participate in this E-Verify program, but it is unclear how far this obligation will stretch. What would be the consequences to the prime contractor if the subcontractor registers for E-Verify but is later found to be in violation of its terms?

Although the regulation attempts to address the question of how to determine what employees have any nexus to a contract and are therefore in fact "assigned to the contract," it is clearly a problematic issue, complicated further by the fact that assignments can change and evolve over time, and may overlap for an employer that has multiple federal contracts.

In addition, the procedure for using the E-Verify process for current employees raises issues and concerns. The new Memorandum of Understanding for contractors suggests that it is permissible to draw on the data already in the I-9 files for these current employees, if it is sufficient. However, in many, if not most, instances, companies would instead need to either re-do the I-9 form, or at the very least, in accordance with the language in the Memorandum of Understanding, inquire of the employee whether there has been any change in the circumstances of his or her status. The additional steps would be necessary because photograph identifications are not required for I-9 processing at companies not currently in the E-Verify program, and in many instances the documents presented at the original I-9 processing would be out of date. Using data from the existing I-9 files would therefore not be sufficient.

Administering a program with such requirements would be very difficult as the employer must avoid not only discriminatory questioning and intrusion, but even the perception of discrimination, which could trigger legal action on the part of the employees.

Is this Legal?

This regulation came into existence through a very roundabout, or an even tortuous, procedure to avoid the obvious problem that Congress implemented the E-Verify program as a "voluntary" program. On June 6, 2008, the President amended Executive Order 1289 of 1996, which stated that it is in furtherance of the establishment of a stable workforce for federal contractors not to hire undocumented aliens. He amended that Executive Order to mandate the use by federal contractors of an electronic employment verification system. The Secretary of Homeland Security then followed by designating E-Verify as the appropriate electronic employment verification system, and shortly thereafter, the Councils that administer Federal Acquisition Regulation promulgated a proposed rule.

In the Preamble to the final regulation, the Councils went to great lengths to justify this action, arguing that the E-Verify program itself remains "voluntary," as employers can choose to engage or not engage in federal contracts. They disingenuously maintain that, since Section 402 of IIRIRA only enjoins the Secretary of Homeland Security from mandating participation in the program, other government agencies are permitted to do so.

Litigation is likely to result from the promulgation of this rule, and perhaps the new administration will take a look at it, with a mind to amend or reverse. Its fate remains to be seen.

Operating In The Shadows: Policy Memoranda In Immigration Law

Immigration law is a complex area, where legal authority is conveyed by a broad spectrum of sources, including: statute (Immigration and Nationality Act (INA)); the regulations, or rules, written to implement enacted legislation (Code of Federal Regulations (CFR)); administrative decisions that review and interpret relevant laws and rules, issued by the Board of Immigration Appeals (BIA), the Board of Alien Labor Certification (BALCA) and the Administrative Appeals Office (AAO); internal Agency operational manuals, including the Immigration Service's Operations Instructions (OIs), the Technical Assistance Guide (TAG) of the Department of Labor (DOL), and Department of State's (DOS) Foreign Affairs Manual (FAM); Federal case law; and finally, Policy Memoranda from the USCIS, among others.

Under "normal" processing, once legislation is passed by Congress, and signed into law by the President, the government agency or agencies who are responsible for implementing the law are tasked with writing the rules – regulations – that will tell the general public how to obey the law. When it comes to immigration legislation, though, the USCIS has been notoriously slow in issuing regulations. Conventional wisdom says that the red tape involved in gaining the consensus necessary to publish regulations for public consumption has snarled so badly that a gargantuan effort is necessary for USCIS to issue regulations on any major legislation, and the list of outstanding regulations grows longer and longer. Laws passed as long as 20 years ago are in effect without regulatory guidance. Timely regulations seem to be produced only when the agency is extraordinarily motivated, often compelled by outside intervening interests, such as with the Social Security No-Match and E-Verify regulations.

USCIS has instead relied on an informal system of creating Policy Memoranda in lieu of regulations. The application of the immigration laws to real world situations faced by employers, workers, and travelers, not to mention the lawyers that counsel them, requires a ready understanding of not just the statutes and regulations, but the vast body of policy memoranda, some of which are contradictory, and none of which fall within an official system of providing interpretative guidance. Combing through all of the legal policy documentation and laws can be burdensome.

Section 3.4 of the USCIS' Adjudicators' Field Manual provides some insight on the binding policy that should be followed by USCIS Adjudications Offices. Specifically, it indicates that policy material must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material. Examples of policy materials include: statutes and regulations (*e.g.,* INA and CFR); Field and Administrative Manuals; USCIS Handbooks and OIs; published precedent decisions (both interim decisions and those within published volumes, unless superseded by other decisions, regulation, or statutory changes.); and Memoranda and cables from USCIS headquarters. It goes on to state that all "material that is designated as policy material is binding upon *all* employees of USCIS, unless or until it is specifically

superseded by other policy material." What exactly does this mean? It means that the immigration bar practices within a very tenuous environment. Policy Memoranda can be, and are, relied upon as law by immigration practitioners and USCIS employees. However, with the issuance of just one Policy Memo or decision, years of reliance and case law can be "wiped away" by the latest interpretation.

In one glaring example, this year saw an unpublished decision by the Administrative Appeals Office (AAO) undercut the reliance of the immigration bar on a 1994 memorandum by James A. Puleo regarding the interpretation of "specialized knowledge" for purposes of L-1B intracompany transferee visa petitions. As background, the L-1B nonimmigrant visa category is available for a temporary worker entering the U.S. with more than one year of experience for the petitioner or a qualified related entity abroad, who will serve in a "specialized knowledge" capacity in the U.S. The Immigration Act of 1990 (IMMACT) amended the definition of the term "specialized knowledge," replacing a more stringent definition that had been applied to petitions for numerous years. In the three years following IMMACT's implementation, various officials of the legacy Immigration and Naturalization Service (INS) continued to apply the more stringent definition when reviewing L-1B petitions.

Mr. Puleo wrote the 1994 memorandum, directed to the various bodies within the agency responsible for adjudicating petitions or reviewing such adjudications after the fact, in his role as Acting Executive Associate Commissioner of the legacy INS. Mr. Puleo explained that the IMMACT amendment was intended to broaden the definition of "specialized knowledge," and provided guidance about the plain language interpretation of the new definition, which was intended to assist adjudication immigration officers with applying the new definition. The memorandum became widely available, and for nearly 15 years, was used by companies, the immigration bar and the USCIS and the legacy INS as the interpretation of the "specialized knowledge" regulatory definition. This memo was used as the key agency document with respect to L-1B petition adjudications for multinationals with specialized knowledge, and laid the interpretative framework for explaining how intracompany transferees might show that they possess "specialized knowledge" as defined by statute and regulation.

In an unpublished decision rendered on July 22, 2008, the AAO stated that the Puleo memo was not legally binding on the agency, and that memoranda are solely internal guidelines and do not establish judicially enforceable standards (unpublished decision WAC-07-277-53214). The decision further stated that the memo was not intended to advise the public of USCIS' interpretation of "specialized knowledge." Even though USCIS published the memo, and it was widely circulated, the AAO referred back to the statutory definition of "specialized knowledge" and provided its own new interpretation, notwithstanding that the framework had seemingly been settled for almost two decades. Because this is an unpublished decision, it does not set a legal precedent, but it does serve to show how tenuous the reliance of both the USCIS and the immigration bar is on loosely issued memoranda, even those previously relied upon and presumably established policy precedent.

This may simply be an instance of "bad facts make bad law," but it clearly illustrates the fault lines of the practice.

Because USCIS rarely passes regulations, policy memoranda have been the key avenue of presenting Agency interpretations to the public. However, reliance on these policies are daunting as they are easily over-ruled or superseded by newer material. USCIS is able to policy and changes the "rules" as it sees fit, often without consequence.

Problems With the PERM Company Registration System

The PERM Labor Certification Online system allows Labor Certification cases to be filed electronically with the Department of Labor (DOL). To take advantage of on-line filing, companies must first register to use the system. Although the DOL has attempted to make the registration a user-friendly process, glitches may still occur. To confirm registration, the DOL will send an email notification of a company's username, password and PIN for the system, to the designated company representative. The generic email address used by the DOL for its correspondence, though, frequently causes problems.

We recommend that, after registering for the PERM system, an employer representative check her email spam filters regularly for correspondence from DOL. An employer should add to its email contact list and spam filter's authorized-sender list the following DOL email addresses: plc.help@dol.gov plc.helpint@dol.gov and BE-RFI.Atlanta@dol.gov, each of which correspond to a specific DOL email address relating to the PERM process and system. These simple steps should ensure that DOL correspondence regarding PERM applications is received by the company representative.

Other problems may occur following registration. A company representative should make sure that the employer's secure login information is readily available to designated colleagues, and that those colleagues understand basic use of the system. This would alleviate any problems if the primary employer representative is no longer available because of a departure from the company.

In the event that the employer representative does not recall its PERM system username, password, or PIN, all of which are necessary for the employer to access the system, prepare applications, update system information, assign user accounts, and file applications, among other functions, the employer should track down these items in their files or through the link on the PERM website homepage, rather than trying to re-register. Re-registration of the same employer will cause a delay due to the need to verify the validity of the new registration. An employer that continues to have problems with company registration should send an email to the address established to handle registration issues: BE-RFI.Atlanta@dol.gov. This e-mailbox functions as a help desk for companies attempting to register on the PERM system.

Upcoming changes to the PERM system, web address, and application form, are expected to created much confusion and upheaval in the system. We will keep you apprised of developments as they progress.

The New Nonimmigrant Visa Application Form: DS-160

The Government Paperwork Elimination Act (GPEA 1998) requires that, when possible, Federal agencies use electronic forms to conduct agency business. Accordingly, the Department of State (DOS) developed and introduced an electronic application process for nonimmigrant visas to eventually replace the current application process, which depends on a paper form (Form DS-156, and supplementary forms when required, such as the Form DS-157 and Form DS-158). The current Form DS-156 is completed electronically on the DOS website, but must be printed and presented in hard copy at the time of the visa application interview. While the DOS will continue to accept Form DS-156 in some locations, it proposes to eventually eliminate the Form DS-156 entirely and replace it with the Form DS-160, an electronic form designed to be completed, signed and submitted electronically. Use of the Form DS-160 has already been launched in certain U.S. consular posts including the original test sites of Monterrey and Nueva Laredo, as well as in Vancouver, Montreal and Hong Kong.

To use the new Form, the applicant fills out an interactive “smart form” DS-160 application on-line, and after reviewing and verifying the data, submits the application electronically. The data goes into a government database, as a nonimmigrant visa application. The applicant himself must actually click the “submit” button, which serves as an electronic signature. The DOS system does not collect or retain draft data; nor may the data be changed after submission.

The Form DS-160 includes a comprehensive array of questions, and where in use, will replace the current nonimmigrant visa application, Form DS-156, and any necessary supplementary forms. Once the DS-160 form is electronically signed and submitted, the applicant will receive a confirmation notice. The applicant will not be required to print and sign a form to take to the visa interview. All information entered into the Form DS- 160 will be available to the consular officer at the time of the interview, thus simplifying the process.

What To Look For In 2009: Upcoming Events In Immigration Law

Although it is difficult to predict with any specificity exactly where we are heading in immigration law in 2009, several important programs will be implemented or continue in the upcoming calendar year. Any significant legislative changes to the immigration laws may be shelved while the government focuses on the economy, health care, and the finance and auto industries.

Here is a brief look ahead to what to expect. We will keep you apprised of all developments as we proceed throughout what promises to be an active and interesting year:

The Electronic System For Travel Authorization (ESTA)

The Electronic System for Travel Authorization (ESTA) is an application system for all travelers from Visa Waiver Countries – people who travel to the U.S. for business or pleasure without a visa. The application process is online and operated by the U.S. Department of Homeland Security (DHS). ESTA will become mandatory on **January 12, 2009**.

As of that date, all visa waiver travelers must apply for and obtain a travel authorization via the ESTA system prior to getting on a plane to travel to the U.S. for business, pleasure or transit. In addition, the visitors must have a machine readable passport or e-passport. The purpose of ESTA is to let DHS pre-screen all Visa Waiver Travelers before they leave their respective countries. U.S. bound travelers are recommended to apply for the Travel Authorization at least 72 hours prior to departure. An approved Travel Authorization is not a guaranteed entry, but a prerequisite to travel to the United States by air or sea carrier.

E-Verify Authorization

Temporary authorization for the E-Verify program will expire in March 2009, and Congress has a mandate to evaluate the program in depth, and determine if the authorization should be granted indefinitely, and funded appropriately. Congress may also consider whether and in which arenas E-Verify should be made mandatory.

As discussed above, regulations making E-Verify mandatory for certain Federal Contractors become effective on January 15, 2009, and will almost certainly generate litigation.

Social Security No-Match Regulations

Supplementary Social Security No-Match regulations were published October 28, 2008. The original Social Security No-Match regulations were published in August 14, 2007, and are currently the subject of a preliminary injunction issued on October 10, 2007 (Northern District of California in AFL-CIO, et al. v. Chertoff, et al. (N.D. Cal. Case No. 07-CV-4472 CRB)). The injunction must be lifted before the Supplementary Social Security No-Match regulations can take effect.

On December 5, 2008, the DHS requested that an expedited hearing be held in January 2009 to overturn the preliminary injunction, but the court determined instead to follow a schedule that will set the earliest hearing date no sooner than March 2009.

Western Hemisphere Travel Initiative (WHTI): Final Implementation

On June 1, 2009, the final phase of the Western Hemisphere Travel Initiative (WHTI) will go into effect. As of that date, all travelers to the U.S. from Canada, Mexico and the Caribbean, entering at land or sea ports, must present documents showing both identity and

citizenship. (Such documents have been required for travelers entering by air since January 23, 2007.)

Acceptable documents vary based on the traveler's citizenship, but among others, they include: a valid passport, a U.S. passport card, a U.S. Enhanced Driver's License (currently issued in Washington), a trusted traveler (NEXUS, FAST or SENTRI) program card, and a U.S. Lawful Permanent Resident Card.

Please see this website for a list of all acceptable documents, by citizenship: http://www.cbp.gov/linkhandler/cgov/travel/vacation/ready_set_go/sea_travel/faqs/doc_reqs_poster.ctt/doc_reqs_poster.pdf.

Immigration and Nationality

The Immigration and Nationality Law Update is published by Proskauer Rose's Immigration Law Practice Group. This newsletter identifies and discusses recent developments relating to the field of U.S. Immigration and Nationality Law, which would be of interest to the corporate employer.

Proskauer Rose LLP counsels corporate clients and their employees in all areas of immigration, nationality and consular law. This includes obtaining work authorizations and visas to enable companies to hire aliens or transfer personnel between nations; compliance with and defense of antidiscrimination and unlawful immigration practices; and advice and appearances in special circumstance matters such as asylum claims and removal proceedings. Much of the work involves obtaining appropriate nonimmigrant or immigrant visas to enable corporations to transfer executives, managers, persons with specialized knowledge, or other key personnel temporarily or permanently to the United States.

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