PROSKAUER ROSE LLP

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Law & The Workplace™

An Analysis of the Proposed Regulation To Make E-Verify Mandatory for Federal Contractors

Introduction

Over the last year, states across the country have implemented laws that make the use of E-Verify mandatory for employers. E-Verify, an Internet-based system managed by USCIS and the Social Security Administration, allows participating employers to electronically verify the employment eligibility of newly hired employees. In an effort to make E-Verify mandatory for even more employers, the federal government is now planning to require federal contractors to participate in E-Verify as well. On June 6, President Bush issued an Executive Order requiring federal contractors to utilize the E-Verify system in order to verify that their employees are eligible to work in the United States. On June 12, a Proposed Rule implementing the Executive Order was published in the Federal Register for comment. Comments on the rule were accepted through August 11, and it is expected that a final rule will be published once the comments are considered. It is not clear when that final rule will be issued; however, it is certain that if the rule is implemented as proposed, it will have a wide impact affecting close to 170,000 contractors and subcontractors and 3.8 million employees.

The Rule's Key Provisions

The Proposed Rule applies to federal contractors and subcontractors who have contracts with the federal government that are worth more than $3000 and relate to work to be performed in the United States. The Rule governs solicitations and contracts awarded after the effective date of the final rule. However, the Rule also will apply to *existing* contracts if the remaining period of performance of an existing indefinite-delivery/indefinite-quantity contract extends at least six months after the effective date of the final rule and the amount of work or orders expected is substantial. The Rule does not apply to contracts that are for commercially available off-the-shelf (COTS) items. In summary, the Rule –

- Requires a contractor or subcontractor to enroll in the E-Verify program *within 30 days* of the contract award;
- Requires contractors/subcontractors to verify the employment eligibility of *new employees* that are hired after the enrollment in E-Verify;
- Requires contractors/subcontractors to continue to use E-Verify for the life of the contract; and
- Requires contractors/subcontractors to use E-Verify to confirm the work authorization of all *existing employees* who are directly engaged in the performance of work under the federal contracts.

The Rule also allows the "head of the contracting activity" to waive the E-Verify requirement in "exceptional circumstances," but the details of this procedure remain unclear.

Concerns with the New Rule

Proskauer Rose joined with the U.S. Chamber of Commerce in preparing a comment on the proposed regulation, raising a number of concerns. Numerous other entities in the business community felt a need and obligation to speak out as well. One of the most serious problems is that the Rule runs counter to the federal statutory language that makes E-Verify a strictly *voluntary* program. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress authorized the creation of an employment eligibility verification system, the Basic Pilot program (now renamed E-Verify), specifically as a voluntary program. IIRIRA forbids any mandatory requirement unless specifically provided by statute. E-Verify has remained a voluntary program with limited scope to allow Congress time to monitor E-Verify's effectiveness, and to ensure that employers would not abuse the program and leave employees disenfranchised. Thus, many critics view the proposed rule as a backdoor mandate that violates congressional intent to create a strictly voluntary program for employers.

The Rule also violates current E-Verify program rules that specifically prohibit employers from using E-Verify for *existing* employees. Under the Proposed Rule, federal contractors are required to verify the work eligibility of two distinct sets of employees: a) New Hires: All individuals hired by the federal contractor during the life of the contract term, regardless of whether they work on the contract. b) Existing employees: All employees assigned by the contractor to perform work within the U.S. on the federal contract. The inclusion of existing employees is regarded as an unfair expansion of E-Verify's scope that could potentially lead to discrimination claims by current employees.

In addition to these issues, which highlight the Rule's weak legal foundation, the new Rule leaves many unanswered questions. For example, while the Rule requires contractors to use E-Verify to check the work authorization of all "assigned employees" who are directly performing work under a contract, the Rule does not adequately define who is and is not

considered an "assigned employee." Another example is the important "exceptional circumstance" waiver. The rule makes a passing reference to the waiver without fully describing what types of situations would warrant waiving the mandatory E-Verify requirement.

Opponents of the Rule also argue that it will lead to decreased competition in federal contracting and create substantial economic burdens to small federal contracting entities. Most agree that it is also inevitable that if the Rule is implemented, the Social Security Administration will become saddled with unmanageable extra work loads. As expressed in the U.S. Chamber of Commerce's published comment to the Proposed Rule, "Mandating the E-Verify program for close to 200,000 federal contractors and their millions of employees is an imprudent and dangerous decision leaving employers ill-equipped to manage the new costs, administrative burdens, and potential loss in workforce."

We will keep you posted on developments. If you have questions on how the new Rule could impact your workforce, please contact our Immigration Group.

New U.S. Passport Card Is Added to "List A" Documents on Form I-9

USCIS has recently informed the public that the newly issued U.S. Passport Card may be accepted by employers in the Employment Eligibility Verification (Form I-9) process. The new passport card, now in full production, is a more portable alternative to the traditional passport book, and can be used to expedite document processing at U.S. land and sea ports-of-entry for US citizens traveling to Canada, Mexico, the Caribbean and Bermuda.

USCIS announced on August 8, 2008 that, as the new card is a valid passport document that can attest to both the U.S. citizenship and identity of the bearer, it can be used as a "List A" document in the I-9 employment verification process. It also can be accepted by employers participating in the E-Verify program.

For additional information on complying with the requirements of the I-9 or the E-Verify program, please feel free to contact our offices.

Fragomen Fights Back

Since the U.S. Department of Labor announced through a Press Release in June 2008 that it would be auditing all PERM applications filed by the Fragomen firm, the immigration community has been waiting for the firm's measured response to DOL's disturbing and unfair challenge to the firm's right to zealously represent its clients. The response came in the form of a federal lawsuit against the Department of Labor in the U.S. District Court for the District of Columbia. In the forty-one page complaint, Fragomen seeks to "invalidate, rescind and permanently enjoin" the Department of Labor from actions that it alleges "are in excess of DOL's statutory authority, violate the employer's constitutional right to

counsel, force attorneys to breach ethical duties to clients, violate plaintiffs' constitutional right to pursue a vocation, and depart from decades of settled practice in the Immigration bar." As the issues raised by the DOL and corresponding lawsuit affect many legal and ethical aspects of labor certification practice, employers and immigration attorneys will carefully monitor the way the court handles this matter.

In addition, the decision by DOL to audit all of the Fragomen PERM applications may very quickly increase the already existing delays in adjudication of PERM applications at the Department of Labor. According to the Fragomen complaint, DOL already had initiated audits of 2,500+ of its labor certification applications since the announcement of its decision in June 2008. This number is widely believed to be the limit of DOL's auditing capability for an entire fiscal year. As the existing delays in audited cases were already significant before DOL's recent course of action, the Fragomen audits may very well have a crippling effect on the entire system. Absent significant new funds from Congress, the DOL backlog is likely to grow.

Needless to say, all of this news is incredibly frustrating to employers who looked forward to using the DOL's new "streamlined" PERM process.

The DOL Administrative Review Board – Not Friendly to Employers of H-1B VISA Holders: An Analysis of Recent Decisions

Employers often overlook potential liability and costs that can accrue when hiring and employing H-1B visa holders. However, recent decisions of the Administrative Review Board of the U.S. Department of Labor remind employers of the strict way in which the DOL interprets the obligations of an employer under the H-1B program. We already have noted in the November 2006 edition of our Client Update a finding that a bona fide termination of employment did not take place where an employer did not formally notify United States Citizenship and Immigration Services of the termination and fulfill its regulatory obligation of offering to pay the costs of the employee's return trip home. As a result, back pay was awarded for the period following the "termination."

More recently, the Administrative Review Board had clarified its position regarding the scope of the employer's liability for the costs of immigration-related legal services. In the past, the Department of Labor has consistently assessed expenses, including legal fees associated with the process of obtaining H-1B status, as an expense of the employer. However, it has now even gone as far as to determine that legal services associated with obtaining a waiver of the personal requirement of an employee to return to his home country for a period of two years (following a stay in the United States under J-1 visa classification), should be assessed to the employer, since the waiver facilitated the employee's ability to obtain an H-1B visa. [*U.S. Department of Labor vs. Mohan Kutty d/b/a Center for Internal Medicine and Pediatrics*, (ARB CASE No. 03-022, ALJ CASE Nos. 01-LCA-010 to 025).] This was the case even though this so-called "two-year foreign

residence requirement" was a personal obligation of the applicant, which accrued as a result of his decision to enter the United States and participate in a J-1 exchange visitor program. This decision was in no way directly associated with the H-1B petition process. This begs the question of how far DOL would take this rationale. In the case of an applicant who has a criminal conviction and must apply for a waiver of inadmissibility to the United States in order to seek H-1B classification, would DOL assert that the costs of obtaining such waiver also are the responsibility of the employer?

Another disturbing determination is *Chelladurai v. Infinite Solutions, Inc.* (ARB Case No. 03-072, ALJ Case No. 03-LCA-004). In this case, the Administrative Review Board found that the employer was responsible to pay back wages for the period of time after an H-1B petition had been filed on behalf of the employee, but before the H-1B petition actually had been approved, where the employer did not choose to employ the applicant until the petition was approved!

By way of background, pursuant to the American Competitiveness in the 21st Century Act of 2000 (AC21) an employer may choose to commence the employment of an H-1B petition applicant once the petition for H-1B classification has been filed, even though it has not yet been approved, if the employee is already in H-1B classification with a prior employer and has been maintaining status. (Under this AC21 "portability" provision, if the new employer commences the employment as soon as the H-1B petition is filed, that employer assumes the risk that the H-1B petition ultimately will be denied and the employment would have to be terminated immediately.) However, there is no obligation under U.S. immigration law that the new employer commence this employment. In fact, the applicant can, if s/he chooses, continue employment with the prior H-1B employer until such time as the new petition actually is approved. This so-called "portability" provision was intended to facilitate employment transfers, not create an obligation to transfer immediately.

Pursuant to the regulations at 20 C.F.R. § 655.731(c)(6), an H-1B nonimmigrant must be paid the required wages beginning with date the nonimmigrant "enters into employment" with the new employer. The nonimmigrant is considered to have entered into such employment when he or she first "makes him/her self available for work, or otherwise comes under the control of the employer, such as by waiting for an assignment, reporting for orientation or training, going to an interview or meeting with a customer, or studying for a licensing examination, and includes all activities thereafter."

In this case, the Administrative Review Board determined that the applicant could "make himself available for employment" even before the petition was approved and trigger all of these regulatory obligations, even though the employee had not begun working. Thus, back pay was assessed beginning on the date the employee made himself available for employment, pursuant to AC21 portability, despite the fact that the petition had not yet been approved.

This decision could have a practical implication for employers. It would therefore seem that, in situations where the employee is *permitted* to commence employment under AC21 portability, an employer that does not want to engage an applicant and assume responsibility for that applicant until such time as the H-1B petition is actually approved might need to make this clear by contract and within the framework of the H-1B petition filed with United States Citizenship and Immigration Services.

USCIS Issues Memo Clarifying Post-6th Year H-1B Extension Requirements

The maximum duration of a stay in H status is generally six (6) years, which begins from the time the H-1B nonimmigrant enters the U.S. or from the validity start date of a change of status from another nonimmigrant visa category (e.g. "F status").

The American Competitiveness in the 21st Century Act of 2000 (AC21) provides two instances where the authorized stay in H status may be extended beyond this six-year limit. Specifically, the U.S. Citizenship and Immigration Service (USCIS) is authorized by law to grant post-6th year extensions in one-year or three-year increments, under certain conditions.

AC21§ 106(a) permits H-1B extensions in one-year increments until a final decision is made on the H-1B nonimmigrant's lawful permanent residence application where 365 days or more have passed since the filing of a labor certification application or of the employment-based (EB) immigrant petition.

AC21§ 104(c), on the other hand, permits the USCIS to grant three-year extensions where the H-1B nonimmigrant is the beneficiary of an approved I-140 petition, but is unable to apply for adjustment of status due to per-country limits (quota backlog).

The USCIS issued a memorandum on May 30, 2008 that clarifies the rules on post-6th year H-1B extensions under AC21.

Unexpired Labor Certification Requirement

The memorandum from USCIS Acting Associate Director Donald Neufeld ("Neufeld Memo," for brevity) provides that an H-1B nonimmigrant seeking a one-year extension under AC21 § 106(a) must be the beneficiary of an *unexpired* labor certification at the time of filing the H-1B petition.

In most employment-based residence cases, employers are required to test the U.S. labor market to determine: (a) whether there are able, qualified and available U.S. workers for a job, and (b) whether the employment of the foreign national will adversely affect the wage and employment conditions of similarly employed US workers. A labor certification application (also referred to as the ETA 9089) is filed electronically after the employer conducts recruitment for the job opportunity in accordance with strict DOL requirements.

To protect the integrity of the labor certification process, the DOL issued an antifraud regulation that took effect on July 16, 2007 (hereafter, the "PERM Anti-Fraud Rule"). Under this rule, the employer has 180 calendar days after issuance of the labor certification to file an I-140 petition on behalf of the beneficiary. Before the PERM Anti-Fraud Rule, there was no such expiration date on labor certifications.

With this development, it was not clear how post-6th year H-1B extensions under AC21 § 106(a) would be affected by the DOL's new rule imposing a 180-day validity period on labor certifications.

The Neufeld Memo addresses this issue by providing that the USCIS will not grant the one-year H-1B extension under AC21 §106(a) where the labor certification has expired for failure to file an I-140 petition during the 180-day validity period. It further explains that the USCIS views an expired labor certification "no differently than one that has been denied, or revoked."

Combined Pre- and Post-6th Year H-1B Extensions

The Neufeld Memo also provides that an H-1B extension request for the remaining period of the 6-year maximum may now be combined with a request for the one-year extension under AC21 §106(a). This categorically obviates the need to file two separate I-129 petitions: one, for the balance of the 6-year H-1B limit, and another for the 7th year extension.

USCIS adjudicators now are required to first determine the amount of H-1B extension time available to reach the 6-year maximum, and then determine if the labor certification or I-140 petition was filed 365 days by the end of the 6th year. In such a case, the one-year extension under AC21 § 106(a) may be granted in addition to the balance of the 6-year maximum limit of stay. However, no extension may be granted for more than three (3) years.

On 3-Year Extensions under AC21 §104(c)

In cases where an H-1B nonimmigrant approaching the 6-year limit would not qualify for the one-year extension in AC21 §106(a) because the labor certification application or EB petition of the H-1B nonimmigrant had been pending for *less* than 365 days from filing, an extension may still be obtained under AC21 § 104(c).

To qualify for the three-year extension under AC21 § 104(c), the H-1B nonimmigrant must meet two requirements: first, s/he must be the beneficiary of an approved I-140 petition; and second, s/he is not eligible for adjustment of status because her/his priority date is not current *at the time of filing the H-1B extension*.

In order to determine eligibility for this three-year H-1B extension, the Neufeld Memo requires the submission of the I-140 Approval Notice with the H-1B petition. The I-140 Approval Notice does not only prove that the H-1B nonimmigrant meets the first requirement. It also indicates the priority date of the petition so that USCIS adjudicators

could take administrative notice of the nonavailability of visa numbers or visa categories at the time the H-1B extension is filed.

To expand the applicability of the three-year extension under AC21 §104(c) to more H-1B nonimmigrants, the USCIS restored on June 16, 2008 its premium processing service for certain I-140 petitions, as a key element to qualify under §104(c) is to have an approved I-140 petition.

For an additional premium processing fee of $1,000.00, the USCIS will expedite the processing of such I-140 petitions by either issuing an approval, a denial or a request for further evidence within 15 days from receipt of the petition.

This I-140 premium processing service is limited only to cases where the one-year extension under AC §106(a) is not available to a beneficiary whose 6-year H-1B stay will end in 60 days.

The Neufeld Memo also tacitly recognizes the severe quota backlogs in certain EB visa categories by reiterating that it may grant such 3-year extensions "*until such time*" as the H-1B nonimmigrant's adjustment of status application had been decided.

These clarifications in the Neufeld Memo regarding H-1B extensions under AC21 § 104(c) are particularly applicable in recent months to many China-and India-born I-140 beneficiaries under the EB second preference, also referred to as the "EB-2" category (pertaining to persons with advanced degrees or of exceptional ability), and to all EB third preference (EB-3) beneficiaries (pertaining to professionals, skilled and other workers) regardless of country of birth.

The August Visa Bulletin of the State Department reported that visa numbers for the EB-2 category for China and India are available only for those with priority dates earlier than August 1, 2006. There are, however, no available visa numbers for the entire EB-3 category worldwide as this category is already oversubscribed.

The availability of visa numbers or visa categories periodically changes and may be monitored through the monthly Visa Bulletin of the State Department, found at www.travel.state.gov.

September 2008 Visa Bulletin

The Visa Bulletin for the month of September 2008 shows continued progress and good news in the EB2 category. Notably, the second preference category (EB2) for Indian-born and Chinese applicants continues to have availability, with immigrant visas available for applicants with a priority date of **August 1, 2006** or earlier. For applicants born in any other country, immigrant visa availability is current for the EB2 category. The first employment-based preference category (EB1) remains current for all nationalities. The Visa Bulletin shows no progression in the backlogs for the third employment-based

preference category (EB3). Visas remain unavailable for all nationalities in the EB3 category, unchanged from last month.

New "STEM" Rule Survives Initial Court Challenges

As many employers and foreign nationals have experienced firsthand over the last few years, the annual H-1B quota can make obtaining a new H-1B visa quite challenging. This year, on April 8, 2008, USCIS published a rule in the *Federal Register* to ease some of the burden of the "H-1B cap" on some of the foreign students who participate in an Optional Practical Training (OPT) program following graduation from a U.S. college or university. In particular, the rule extended the eligible OPT period from 12 to 29 months for qualified F-1 nonimmigrant students with a degree in science, technology, engineering or mathematics (STEM degrees) and who are employed by a business enrolled in the E-Verify program. The extension of OPT provides an employer with up to three chances to file an H-1B petition while the student remains in valid work-authorized status.

While this new relief was regarded generally as good news for employers and foreign students, some opponents argued that the extension was a "backdoor visa increase" that would hurt U.S. workers. In May, a lawsuit was filed by the Programmers Guild, the Immigration Reform Law Institute and other groups in order to block the rule's implementation. However, in early August, a U.S. district court judge in New Jersey denied the preliminary injunction, finding that the plaintiffs had no legal standing to bring a claim. The judge wrote, "Instead of alleging concrete injury, plaintiffs assert a generalized grievance with a particular government policy." To date, good news still for many employers and STEM degree students.

USCIS Updates Changes to Vaccination Requirements for Permanent Residence Applicants

After announcing on July 24, 2008 that applicants seeking to adjust status to permanent resident are required to have additional vaccinations, USCIS has issued an update that the Center for Disease Control has informed them that the Zoster vaccine, which is on the new list of required vaccines, is unavailable at the present time due to shipping delays by the manufacturer. Accordingly, until further notice from USCIS, permanent resident applicants are not required to have the Zoster vaccination and may submit the Form I-693 completed by their civil surgeon with the notation "vaccine not available."

Research Family Immigration History through the USCIS Genealogy Program

You can now turn to USCIS for help in researching your family's immigration history through the USCIS's new Genealogy Program. For a fee USCIS will search its archives for historical immigration records, such as naturalization files, alien registration forms and visa files from certain periods. Individuals may submit genealogy records requests by using the new forms, G-1041 - *Genealogy Index Search Request*, and G-1041A - *Genealogy Records Request*. These forms are available on the USCIS Genealogy Program page at: http://www.uscis.gov/genealogy.

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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