

# Immigration & Nationality Law Update

## October 2007

In August 2007, the U.S. Department of Homeland Security (“DHS”) issued a final rule providing “safe harbor” protection for employers when they receive a letter from the Social Security Administration (“SSA”) stating that the information submitted for an employee does not match SSA records (a “no-match” letter). The rule indicated that if an employer follows the “safe harbor” procedures, DHS will not use the “no-match” letter as evidence that the employer has “constructive knowledge” that it has hired undocumented workers. The rule was scheduled to go into effect on September 14, 2007 and SSA planned to send letters to approximately 140,000 employers beginning September 4, 2007. On August 29, 2007, immigrant and labor rights activist groups filed a lawsuit arguing that only Congress, not DHS, has the legal authority to implement this rule. On August 31, 2007, the U.S. District Court in Northern California granted the plaintiffs’ request for a temporary restraining order (“TRO”). On October 1, 2007, the court held oral argument concerning the plaintiffs’ motion for a preliminary injunction and extended the TRO for 10 more days.

In granting the TRO, the court temporarily prohibited DHS from implementing the “no-match” rule until the court has an opportunity to hear oral arguments, consider, prepare and issue a ruling on the motion for preliminary injunction. SSA is prohibited from sending the “no-match” letters that refer to DHS’ rule until the court issues a ruling, expected on October 11, 2007.

On October 10, 2007, United States District Court Judge Charles R. Breyer, sitting in the United States District Court for the Northern District of California, granted the motion for a preliminary injunction. Thus, the government will not be permitted to implement the rule until the court finally decides the case and determines whether or not the rule is, in fact, legal. In his ruling, Judge Breyer stated that the government failed to analyze the rule’s impact on businesses and that the threat of criminal prosecution represented a major change in DHS policy. Further, because the plaintiffs raised significant questions regarding the merits of the rule, a preliminary injunction is appropriate.

Although SSA could technically send “no-match” letters to employers (without referring to the new DHS rule) the government has indicated that it will not send the letters to the 140,000 employers nationwide until the court rules that it is permissible. SSA will continue its long-standing practice of sending these letters to individual workers at their homes, and to employers as part of their normal yearly process, without any reference to the new DHS rule.

### **2009 DV Lottery Registration Begins**

Applications for the 2009 Diversity Visa (“DV”) Lottery will be accepted between noon on Wednesday, October 3, 2007 and noon Eastern Standard Time (EST) (GMT-5) on Sunday, December 2, 2007. Applicants are strongly encouraged not to wait until the last week of the registration period to enter, as heavy demand may result in website delays. Entries will not be accepted after noon EST on December 2, 2007. Instructions as to participation in the lottery are found on the website of the Department of State, [www.travel.state.gov](http://www.travel.state.gov).

Under the program, up to 55,000 Diversity Visas (DV) are made available each fiscal year to persons from countries with low rates of immigration to the U.S. The annual DV program makes permanent residence visas available to persons meeting the strict eligibility requirements. A computer-generated random lottery drawing chooses selectees for diversity visas. The visas are distributed among six geographic regions with a greater number of visas going to regions with lower rates of immigration, and with no visas going to nationals of countries sending more than 50,000 immigrants to the United States over the period of the past five years. Within each region, no one country may receive more than seven percent of the available Diversity Visas in any one year.

For DV-2009, natives of the following countries are not eligible to apply:

BRAZIL, CANADA, CHINA (mainland-born), COLOMBIA, DOMINICAN REPUBLIC, ECUADOR, EL SALVADOR, GUATEMALA, HAITI, INDIA, JAMAICA, MEXICO, PAKISTAN, PERU, PHILIPPINES, POLAND, RUSSIA, SOUTH KOREA, UNITED KINGDOM (except Northern Ireland) and its dependent territories, and VIETNAM. Persons born in Hong Kong SAR, Macau SAR and Taiwan are eligible.

### **DV Lottery Qualification Requirements**

A. Country Qualification:

Must be a native of a country whose natives qualify: In most cases this means the country in which you were born. However, there are two other ways you may be able to qualify. First, if you were born in a country whose natives are ineligible but your spouse was born in a country whose natives are eligible, you can claim your spouse's country of birth, provided both you and your spouse are on the selected entry, are issued visas and enter the United States simultaneously. Second, if you were born in a country whose natives are ineligible, but neither of your parents was born there or resided there at the time of your birth, you may claim nativity in one of your parents' countries of birth if it is a country whose natives qualify for the DV-2009 program.

#### B. Education/Work Experience

DV applicants must have EITHER a high school education or its equivalent, defined as successful completion of a 12-year course of elementary and secondary education OR two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform.

Please contact the Proskauer Rose Immigration Team for questions concerning your ability to apply for the DV lottery program.

#### **DOL Announces (Perhaps Prematurely) That the Work of the Backlog Elimination Center Has Been Essentially Completed**

On October 1, 2007, the U.S. Department of Labor ("DOL") announced that the work of the Backlog Elimination Center, set up to complete the processing of old labor certifications filed before implementation of the PERM program, has essentially been completed. It claimed that the backlog has been eliminated with nearly 99% of cases completed. The DOL announced that the Backlog Elimination Center has started a transition into a shutdown phase that will continue through December.

In fact, there still remains a very considerable inventory of unresolved cases, incomplete cases, and cases erroneously denied or classified as completed. It is not certain that the Department will complete its work as it anticipates, by December.

#### **E-Verify/Basic Pilot**

The E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the employment authorization of their newly hired employees. The U.S. Citizenship and Immigration Services (“USCIS”) administers the program. E-Verify is free and voluntary and is the best means available for determining employment eligibility for new hires and the validity of their Social Security numbers. On September 17, 2007, USCIS formally launched a photo screening tool enhancement to E-Verify that allows participating employers to check the photos on Employment Authorization Documents (EAD) or Permanent Resident Cards (green card) against images stored in USCIS databases.

There is much controversy as to whether it is beneficial for employers to participate in the E-Verify program, given the belief that there is a high error rate in the databases that the DHS and the SSA Rely upon. Some states have passed legislation making E-Verify/Basic Pilot mandatory which, as a practical matter, might require employers to participate in the program, at least in these certain specific states, even if such laws might be constitutionally questionable pursuant to the “preemption” doctrine. See our discussion of this issue in our September 2007 Update.

More than 23,000 employers are currently using the E-Verify program to verify new hires are authorized to work in the U.S. Employers can register online at [www.dhs.gov](http://www.dhs.gov).

## **USCIS Announces New Test for Naturalization**

Beginning October 2008, USCIS will administer a new naturalization test to citizenship applicants. USCIS announced the 100 questions and answers that comprise the civics component of the new test on September 27, 2007. USCIS selected the new items on the test after a panel of history and government scholars and English as a Second Language (“ESL”) teachers conducted a thorough review. A second review was performed by an expert technical advisory group affiliated with Teachers of English to Speakers of Other Languages (“TESOL”) to ensure that individuals with low-beginning to high-beginning levels of English comprehension were capable of understanding the question and answer items. It is believed that the revised test will help strengthen assimilation efforts by emphasizing fundamental concepts of American democracy, basic US history and the rights and responsibilities of citizenship. The 100 new questions and answers, the reading and writing vocabulary lists a side-by-side comparison of the current and new tests and other information about the new test are available online at:

<http://www.uscis.gov>.