

## NEWS UPDATE

June 27, 2011

### **Employers Beware: Social Security “No-Match” Letters Resume**

The Social Security Administration (SSA) has resumed issuing “no-match letters” to employers advising them that certain Social Security Numbers (SSN) provided by employees do not match the names of the individuals that SSA has on file for such numbers. While a “no-match” may be caused by the use of fraudulent documents by an individual unauthorized to work, it can also be the result of a simple typographical error or a change to an individual’s status such as a name change.

In the current environment of U.S. Immigration & Citizenship Enforcement (ICE) aggressive workplace enforcement, Employers should seek the advice of counsel to develop an effective strategy to address such letters in a lawful yet non-discriminatory manner. The new SSA no-match letters advise employers that its receipt, in and of itself, should not be the basis of adverse action against the employee. While an employer should not take adverse action against the employee merely on the basis of the letter, an employer should not take a laissez-faire approach to receiving such a notice.

### **States Flex Their Muscles on Immigration**

State legislatures continue to be the staging ground for real action on immigration, and the U.S. Supreme Court recently has served as the final arbiter of who has authority in these matters: the states or the feds. The Supreme Court recently upheld a controversial Arizona law requiring businesses to participate in the federal E-Verify program or risk losing their business license. E-Verify is an Internet-based program run by the federal government that compares information from an employee’s I-9 form to data from U.S. government records. Opponents argued that the Arizona law usurped the federal government’s authority on immigration. The Supreme Court disagreed, upholding the measure in a 5-3 ruling. Arizona’s even more controversial “papers please” law (SB1070), which grabbed headlines last April and has been blocked at several stages in the federal appeals process, is widely expected to reach the high court sometime next year. The Court’s decision in the Arizona E-Verify program has emboldened supporters of SB1070, and it is likely to spawn copycat legislation at the state level.

Indeed, conservative state legislators around the country have jumped into the fray with similar efforts. Utah recently passed a bill requiring businesses to participate in E-Verify and establishes immigration enforcement measures including an “Arizona-like” provision which would require officers to verify the immigration status of individuals who are stopped under a number of circumstances, but tempered it with a measure that would create a guest worker program and a migrant worker partnership with Mexico. Georgia also passed a bill almost identical to Arizona’s SB1070, requiring police to demand proof of legal status of anyone they suspect of being in the country illegally, empowering police to check the immigration status of criminal suspects, requiring businesses to use E-Verify, and imposing harsh sentences on those who use false documents to obtain employment. Both Utah and Georgia’s laws face challenges in federal courts by several civil liberty groups. Meanwhile, Texas was mulling over several stringent immigration proposals at the end of its legislative session, including one championed by Governor Rick Perry addressing “sanctuary cities.” All failed to muster enough support in last minute negotiations.

Still, some states are moving in the other direction and enacting more liberal policies toward immigrants. Illinois lead the way in May with a statewide cancellation of participation in the DHS Secure Communities program. Under that

program, the fingerprints of everyone booked by police are cross-checked for immigration violations in a database maintained by DHS. New York and Massachusetts followed suit in late May with similar statewide cancellations. All three states have large immigrant populations and are led by Democratic governors.

In the absence of federal immigration reform, the states are becoming the new battle ground on immigration enforcement and regulation. What is particularly troubling about these initiatives and the recent Supreme Court decision is the danger of a muddled jumble of state immigration laws, each of which claims to track the federal law, but in reality has its own requirements, making it difficult as well as expensive for multi-state employers to comply with the law. This developing patchwork also could lead to a myriad of immigration enforcement policies.

### **Prospects for Immigration Reform Remain Dim**

Despite several recent high-profile speeches by President Obama on immigration, congressional action to fix our nation's immigration system appears unlikely for the foreseeable future. The President recently spoke about immigration in El Paso where he cited an effective and efficient immigration system as being the bedrock of economic competitiveness in the 21<sup>st</sup> Century. This speech came on the heels of a commencement speech to the graduates of Miami Dade College in Florida where Obama stressed the need to pass the DREAM Act and other measures that allow hard-working, high-achieving immigrants to stay in this country.

Congress, however, remains stalemated on the issue. Split down party lines – with conservatives pushing an enforcement-first approach and liberals urging broader, comprehensive reform – lawmakers are struggling to find any common ground at all. Several stand-alone pieces of legislation have been introduced that address issues on the periphery. While many are restrictive, enforcement-minded (greater visa security, limitation of due process protections by increasing the government's already broad authority to detain noncitizens), other “benefits” bills also were reintroduced, including the DREAM Act and the Military Families Act, legislation that would grant permanent resident status to the immigrant relatives of active-duty military personnel. Despite these attempts to keep some issues alive, it is very unclear whether these bills will inspire sufficient support to work their way through Congress. Many key supporters of immigration reform in Congress have expressed their reluctance to take up piecemeal immigration legislation, at least not at this point in the legislative session.

### **ICE Expands STEM Programs Eligible for OPT**

ICE recently expanded by 50 the list of science, technology, engineering, and math (STEM) degree programs that qualify eligible graduates in F-1 status for a 17-month extension of Optional Practical Training (OPT). By expanding the list of STEM degrees (including such fields as neuroscience, medical informatics, pharmaceuticals and drug design, and computer science), the Administration is seeking to address shortages of talented scientists and technology experts in certain high tech sectors.

Under the OPT program, foreign students who graduate from U.S. colleges and universities are able to remain in the U.S. and receive training through work experience for up to 12 months. Students who graduate with one of the STEM degrees can obtain an additional 17 months of OPT work authorization if his/her employer participates in E-Verify.

### **Changes on the Horizon for the EB-5 Immigrant Investor Program**

The Immigrant Investor Program, commonly referred to as the EB-5 Program, makes green cards available to eligible immigrant investors and their family members who invest \$1 million in commercial enterprises that create at least 10 U.S. jobs (or \$500,000 in targeted employment areas). At long last, the EB-5 Program may be undergoing significant changes in the upcoming months that will make the program more attractive to prospective investors. First created in 1990, the program has been plagued by changing interpretations, uncertainty, and slow processing times, leading many to call for its complete review. In May, U.S. Citizenship and Immigration Services (USCIS) responded, and promulgated proposed rules offering three fundamental changes to the way it processes certain regional center filings, but stopped short of a total overhaul.

The first change is a fast-track for applications of enterprises that are fully developed and ready to be implemented, with an option for premium processing to further accelerate the review. Premium processing guarantees processing within 15 calendar days. Second, USCIS proposes the creation of specialized intake teams comprised of economists and subject-area experts to review proposals, communicate directly with applicants, and streamline the resolution of issues without the need for formal requests for additional evidence (RFEs). Third, USCIS proposes an “expert decision board” comprised of economists and adjudicators and supported by legal counsel, to make decisions on new EB-5 regional center applications.

### **Citizenship, I-9, and J Visa Resources Online**

USCIS and the Department of State are making it easier to find information about immigration online. USCIS has created the Citizenship Resource Center (<http://www.uscis.gov/citizenship>) that has information about the process of gaining US citizenship designed for individuals, teachers, and organizations. It also launched “I-9 Central” ([www.uscis.gov/I-9central](http://www.uscis.gov/I-9central)), a website that provides employers and employees with resources, tips, and guidance on completing the I-9 form as well as a discussion of common mistakes and guidance on avoiding such errors.

The launch of I-9 Central follows the introduction of the controversial E-Verify Self Check, a service launched in March by USCIS that allows workers and job-seekers in the United States to check their own employment eligibility status online. In a related development, USCIS recently rolled out new E-Verify website content in Spanish. Perhaps the most important feature now in Spanish is instructions for employees on how to resolve a tentative non-confirmation (TNC). Occurring in about three percent of all E-Verify inquiries, a TNC is issued when E-Verify is unable to match employee information with information in federal databases. In such cases, employees commonly need to visit a Social Security Administration office to resolve the discrepancy. With the new content in Spanish, employers will be better prepared to advise their employees on how to handle and resolve TNCs.

And, finally, the Department of State launched a redesigned website for the J-1 Exchange Visitor Program (<http://j1visa.state.gov>) aimed at improving the application experience by providing a one-stop shop for everything a J-1 applicant needs to know written in plain, easy to understand English.

If you have any questions, email us at [contactRS@rudnickspector.com](mailto:contactRS@rudnickspector.com).

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