

Immigration Law Alert

Recent Developments in Business Immigration Law

Federal Contractors Required to Use E-Verify System to Confirm Workers' Eligibility

On January 15, 2009, new rules become effective requiring federal contractors to use E-Verify, an electronic employment eligibility verification system designated and operated by the U.S. Department of Homeland Security (DHS). E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) allows employers to electronically confirm the biographical data of newly hired employees pursuant to a Memorandum of Understanding (MOU) entered into between the employer, DHS and the Social Security Administration (SSA). The new rules implement President Bush's Executive Order dated June 9, 2008. Approximately 90,000 employers across the United States are currently registered to use E-Verify.

The new rule will require future government contracts to contain a clause requiring companies to register for E-Verify within 30 days of the contract award and to verify the status of new and existing hires through E-Verify within 90 days of enrollment in E-Verify. The rule will apply to all future contract employees as well as all existing employees and federal subcontractors' employees once they begin working on new federal government contracts. Exempt from this requirement are employees hired before November 6, 1986, employees working on contracts performed outside the United States, prime contracts valued at less than the simplified acquisition threshold of \$100,000, subcontracts lasting for a duration of less than 120 days covering commercially available products (COTS items) and construction subcontracts valued at less than \$3,000.

If the E-Verify system is unable to confirm the employee's status, the worker will receive a "tentative nonconfirmation" notice and have eight days to resolve the discrepancy with DHS or SSA. In the event that the discrepancy cannot be resolved, the employee may be terminated. The Federal Acquisition Regulations provide federal officials with the authority to terminate a federal contract or to recommend suspension or debarment proceedings for companies that knowingly hire undocumented workers. The new rules also require DHS and SSA to refer the contractor to a suspension or debarment official if the MOU is terminated.

In the event your organization is required to register for E-Verify, please contact your Vedder Price attorney to assist in registering for E-Verify and executing the MOU with DHS and SSA.

Social Security “No-Match” Regulations Update

On October 28, 2008, the U.S. Department of Homeland Security (DHS) issued revised “no-match” regulations that set forth procedures for employers to follow in response to a Social Security no-match letter. These regulations define a “safe harbor” for employers when dealing with Social Security no-match letters. These regulations were reissued in response to a preliminary injunction issued by the Federal District Court for the Northern District of California. Although the effective date of these regulations is October 28, the federal court injunction still stands. Therefore, the court order still prohibits DHS from implementing the regulations, so they are *not* in effect. We will keep you apprised of developments in this area.

Improved Benefits for Treaty NAFTA Employees

Effective October 16, 2008, employees in Treaty NAFTA (TN) status will be eligible to enter the country or extend their stay in the United States for up to three years. Until now, admission and extensions could be issued for a period of only one year. TN status is available to Canadian and Mexican nationals who

are employed in the United States in specific professional occupations. This benefit should reduce the cost of employing Canadian and Mexican nationals, as employers will no longer need to extend their employees’ authorized periods of stay on an annual basis.

Holiday Travel Alert

Many foreign national employees plan to apply for visas when traveling home for the upcoming holidays. As a reminder, foreign nationals with expired visas will need to have new visa stamps issued into their passports to reenter the United States. A prescheduled, in-person interview is required for visa issuance. Depending on the Post, interview backlogs may be six weeks or longer. We recommend that employers contact their immigration counsel to schedule interview appointments now to ensure that the employees are able to obtain their visas during the holiday period and return to the United States in a timely manner.

Visa Waiver Program— Travelers Must Register with the Electronic System for the Travel Authorization (ESTA) Program

The U.S. Department of Homeland Security (DHS) plans to implement a new Electronic System for Travel Authorization (ESTA) on January 12, 2009. ESTA is a new on-line system that is part of the Visa Waiver Program (VWP). Currently, travelers from the 27 VWP countries can travel to the United States visa-free for up to 90 days without any registration or notice requirements. Under ESTA, all citizens of VWP countries who plan to travel to the United States for business or tourism using the VWP must receive an electronic travel authorization prior to boarding a U.S.-bound airplane or cruise ship. (The requirement will not affect U.S. citizens traveling overseas.) ESTA applications may be submitted at any time prior to travel, although it is recommended that the VWP traveler apply for ESTA travel authorization at least 72 hours before departing for the United States. VWP travelers can apply for ESTA authorization now at <https://esta.cbp.dhs.gov>. Once approved, ESTA travel authorizations will be valid for multiple entries for up to two years or until the

applicant's passport expires, whichever first occurs.

Seven Countries Added to Visa Waiver Program

Effective November 17, 2008, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia and South Korea are eligible for the U.S. Visa Waiver Program. Citizens of these countries will be able to travel to the United States for business or tourism without a visa for up to 90 days. Please note that citizens of these countries must also register with ESTA before traveling, as discussed above, even if the travel occurs prior to January 12, 2009.

State and Local Law Alert: E-Verify Required

A number of states and municipalities have recently passed legislation regulating undocumented workers and imposing immigration-related obligations on employers. Consequently, employers now need to ensure compliance with state and local immigration laws in addition to federal immigration laws. The following states *now* require certain employers to use E-Verify, often in connection with state contracts and subcontracts: Arizona, Colorado, Georgia, Idaho, Minnesota, Mississippi, Missouri, North Carolina,

Oklahoma, Rhode Island, South Carolina and Utah. Arizona now requires all employers, public and private, doing business in the state to use E-Verify. Mississippi employers with over 250 employees must also register to use E-Verify. The E-Verify requirement for smaller Mississippi employers will be phased in over the next several years. South Carolina employers with more than 500 employees must begin using E-Verify on January 1, 2009; smaller employers will be phased in.

Illinois Allows E-Verify Despite New Law

In late 2007, the State of Illinois passed a new law (Section 12(a) of the Illinois Right to Privacy in the Workplace Act) *prohibiting* employers from enrolling in the E-Verify program, citing the unreliability of the database. However, DHS filed an action against the State of Illinois in federal court asking that the law be found unconstitutional. Although the new law was scheduled to take effect on January 1, 2008, the State of Illinois has agreed to withhold enforcement until the lawsuit with DHS is resolved.

If your Illinois business already has enrolled in E-Verify, you may continue to use E-Verify to check the data

of your newly hired employees. If your business has not yet signed up for E-Verify, you may enroll in the program. The State of Illinois will not penalize employers for participating in the program while the lawsuit is pending.

Limited Relief for Students Requires Use of E-Verify

U.S. Citizenship and Immigration Services (USCIS) has announced that certain F-1 students may apply for a 17-month extension of their optional practical training (OPT) in order to mitigate the lack of H-1B Specialty Occupation visas. To qualify for additional work authorization, the student must have a degree in a science, technology, engineering or mathematics (STEM) field and must have a job or job offer from an employer that is enrolled and in good standing in the E-Verify employment eligibility verification program where the student will be employed. The employer must provide its E-Verify identification number for inclusion on the Form I-765 application for employment authorization. Please note that the employer should not use the E-Verify system to confirm the STEM graduate's employment eligibility unless the graduate

is a new hire, since E-Verify cannot lawfully be used to verify the employment eligibility of existing employees.

“Green Card” Lottery Registration

The U.S. Department of State administers an annual Diversity Visa Lottery (DV Lottery) for lawful permanent resident status in the U.S. This year, citizens of all countries **except** Brazil, Canada, China (mainland), Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Peru, Poland, South Korea, United Kingdom (except Northern Ireland) and Vietnam are eligible to apply. Please note that this year Russian nationals are eligible to apply, in contrast to recent years.

Applications must be made online at www.dvlottery.state.gov by noon EST on December 1, 2008. **There is no fee to apply for the DV Lottery.** The government has issued a Fraud Notice noting that some companies posing as the U.S. Government have sought money in order to “complete” lottery entry forms. There is no charge to download and complete the Electronic Diversity Visa Entry Form. The Department of

State notifies successful DV Lottery applicants by letter, not by e-mail, and paying a fee will not increase the possibility of being selected.

Travel Updates for U.S. Citizens and Residents

Effective June 1, 2009, the Western Hemisphere Travel Initiative (WHTI) will require travelers to present a passport or other approved secure document denoting citizenship and identity for *all air, land and sea travel* into the United States, Canada, Mexico, the Caribbean and Bermuda. This requirement **will** affect U.S. citizens. Currently, secure documentation is required only for persons traveling by air to these countries.

A new, less expensive alternative to the passport is the new U.S. “passport card,” available through the U.S. Department of State. This new card was designed to meet the needs of border community residents, and over 350,000 cards have been issued since production began in July 2008. The passport card facilitates entry at U.S. land and sea ports of entry when arriving from Canada, Mexico, the Caribbean and Bermuda. *The card may not be used for travel by air.* Otherwise, it carries the same rights and privileges as a U.S. passport. Information may be

found at www.travel.state.gov. Additionally, DHS is working with the States of Michigan, Washington, Vermont, Arizona and New York to issue enhanced driver’s licenses that denote both identity and citizenship to comply with WHTI requirements.

Several other “trusted traveler” programs have been implemented by the State Department. The NEXUS and SENTRI trusted traveler programs provide expedited travel for preapproved, low-risk travelers through dedicated lanes at land and some air ports of entry. Newly issued trusted traveler cards have enhanced security features and up-to-date technology that help speed enrolled travelers across the border.

On June 10, 2008, the Global Entry pilot program was launched for approved U.S. citizens and lawful permanent residents who conduct international air travel to reenter the United States using automated, self-service kiosks. The program is currently operational at the Atlanta, JFK, Houston, LAX, Miami, Chicago and Dulles airports. Information is available at www.travel.state.gov.

USCIS Announces U.S. Passport Card Is a “List A” Document for I-9 Purposes

Effective August 2008, USCIS has announced that the new U.S. passport card may be used in the Employment Eligibility Verification form (I-9) process. The new passport card is considered a “List A” document that may be presented by newly hired employees during the employment eligibility verification process to show authorized work status. List A documents are those used by employees to prove both identity and work authorization when completing the Form I-9.

USCIS Announces New Version of Form I-9, Employment Eligibility Verification

USCIS has withdrawn the June 16, 2008 version of the Form I-9, Employment Eligibility Verification, and has reinstated the use of the June 5, 2007 version. The June 5, 2007 version has been updated with a new expiration date of June 30, 2009. Other than the revision date, there are no differences between the two versions. The form is available at www.uscis.gov/i-9.

Employers are required to use Form I-9 to verify the identity and work eligibility of all new employees (including U.S. citizens) at the time they are

hired. The form is not submitted to the government. Instead, employers must retain completed I-9 forms for all current employees. I-9 records must be retained for terminated employees for three years after the employee’s date of hire or one year after the date that employment is terminated, whichever is later.

Immigration & Customs Enforcement (ICE) Outlines Elements of Acceptable Immigration Compliance Policy

In October 2008, a Houston waste collection company was fined \$3 million by Immigration & Customs Enforcement (ICE) in connection with an ICE investigation involving undocumented workers. However, the U.S. government agreed not to criminally prosecute the company provided that the company adhere to an immigration compliance policy. ICE noted with approval the steps being taken by the company to ensure compliance, which included internal audits, consultation with immigration counsel, providing formal training, and appointing a compliance officer. These steps closely follow the recommendations set forth in the U.S. Sentencing Guidelines and the “McNulty Memorandum”

issued by the U.S. Attorney’s Office for avoiding indictment and mitigating sentencing. Vedder Price routinely prepares Immigration Compliance Policies for its clients that follow these recommendations. Please contact your Vedder Price attorney to update or implement your company’s Immigration Compliance Policy.

Tips for Employers Using E-Verify

For employers who use or plan to use E-Verify, we recommend the following actions to ensure compliance with the government program and avoid disruptions in their operations:

1. **Strategize.** It can be difficult logistically for employers with multiple sites in multiple states to roll out the E-Verify program. Most importantly, will every site enroll in E-Verify? Which sites will be required by law to register? Who will make the determination as to which sites will be included? Employers should consider infrastructure issues, including computer compatibility with the E-Verify interface.
2. **Timing Issues.** How long will it take to train

your HR representatives? Employers planning to launch E-Verify by January 1, 2009 to comply with a state-imposed E-Verify law should be training HR representatives now.

3. **Training.** The employer's Immigration Compliance Policy should require that E-Verify training occur at least annually—more often if there is frequent turnover in HR personnel. Access to the E-Verify system should not be enabled until training has taken place. Employers should train backup staff to handle time-sensitive notices and procedural steps required by the E-Verify Memorandum of Understanding (MOU) to accommodate vacations, illness, etc.

4. **Audit.** Employers should self-audit at least once per year to ensure that the organization's E-Verify users are in compliance with the E-Verify rules set forth in the MOU with the government as well as the E-Verify User Manual. Audits should examine whether E-Verify posters are clearly posted at hiring areas in English and Spanish. Are HR representatives timely notifying new hires about

Tentative Non-Confirmations and enforcing deadlines required by the MOU?

5. **Manage Expectations.**

Many newly hired employees, especially U.S. citizens, have not previously had to comply with E-Verify requirements. New employees and their prospective managers often have difficulty understanding why the new employee must go to the Social Security Administration to clear up his or her records. Managers and executives must be educated as to the obligations and penalties imposed by the MOU that the employer has entered into with Homeland Security and the Social Security Administration.

Global Immigration/Visa Issues for Employers

United Kingdom Announces New Points-Based Immigration System

This year the UK government unveiled the most substantive changes to UK immigration law in over 40 years. The new points-based system (PBS) will replace all current UK work permit and other employment categories. The UK Border Agency announced that Tiers 2 and 5 of the PBS will take effect on November 27, 2008. Tier 1, representing

highly skilled migrant workers, became effective on June 30, 2008. Tier 2 applies to skilled migrants with job offers who are coming to the UK to fill a gap in the UK labor market, and Tier 5 applies to those traveling temporarily to the UK primarily for noneconomic reasons. Under Tier 2, all companies that seek to sponsor foreign nationals for employment must first register with the UK Border Agency and obtain a Sponsorship License. Applications for work permits under the prior system posted after Tiers 2 and 5 of the points-based system are introduced November 27, 2008 will not be accepted (unless the individual is a Bulgarian or Romanian national). Individuals with work permits under the current work permit scheme may apply for the related passport endorsement after Tiers 2 and 5 are launched.

The new system will result in employer audits and visits by the UK Border Agency to ensure that employers are complying with the law. Taking a page from the United States, new civil penalties for noncompliance include fines of up to £10,000 per illegal worker, and new criminal penalties carry a sentence of imprisonment of up to two years and unlimited fines for employing illegal workers.

China Resumes Issuing Multiple-Entry Visas, Relaxes Processing Requirements

The Chinese government has resumed issuing multiple-entry L (Tourist) and F (Business) visas, which are usually valid for up to 180 days. Earlier this year, the government was approving only single-entry and dual-entry visas.

Generally, Invitation Letters issued by the Chinese government (Official Invitation Letters) are no longer required for single-entry and dual-entry F visa applications but are still required for multiple-entry F visa applications. For applications filed in the United States, Official Invitation Letters are no longer required. However, company-issued Invitation Letters are required for all multiple-entry F visa applications, and for single-entry and dual-entry F visa applications filed with the Chinese Consulate in New York. Confirmed return tickets and hotel reservations in China are no longer required for L and F visa applications, unless the applicant is a national of a restricted country.

Russia Permits In-Country Extension Applications

Foreign nationals working in Russia may now extend their multiple-entry work visas on the basis of a renewed labor

agreement with their employer, even if the employer has not renewed the foreign national's Work Permit before its expiration date.

While such foreign nationals may not work between the expiration and renewal of the Work Permit, they may remain in Russia while the Work Permit extension is adjudicated.

Non-U.S. Employees Traveling to Europe on Business

Although U.S. citizens do not require a visa to travel to Europe on business, many foreign national employees will require a visa to do so, including citizens of India and China. Many are eligible for a Schengen visa, which has made traveling between the 15 member Schengen countries much easier. A Schengen visa holder can travel to any (or all) member countries using one single visa, thus avoiding the time and expense of obtaining individual visas for each country. The purpose of the visit must be leisure, tourism or business—employment is not permitted on a Schengen visa. A Schengen visa allows the holder to travel freely within the Schengen countries for a maximum stay of up to 90 days in a 6-month period. Schengen countries include: Austria, Germany, Belgium,

Denmark, Finland, France, Greece, Iceland, Italy, Luxemburg, Norway, Portugal, Spain, Sweden and The Netherlands. Please note that applications for Schengen visas must be applied for prior to departure from the U.S. Applications may take up to three weeks to be approved, so please contact your Vedder Price attorney as soon as the business trip is planned.

If you have any questions or wish to discuss these topics further, please contact your Vedder Price attorney or Gabrielle M. Buckley at 312-609-7626 (gbuckley@vedderprice.com) or P. Michelle Jacobson at 312-609-7761 (mjacobson@vedderprice.com).

VEDDERPRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47th FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

875 15th STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

www.vedderprice.com

About Vedder Price

Vedder Price P.C. is a national, business-oriented law firm with over 260 attorneys in Chicago, New York and Washington, D.C.

The Vedder Price Business Immigration Group

U.S. companies—whether large or small—increasingly hire employees from around the globe. The search for talent within industries such as financial services, biomedical, high-tech, pharmaceutical, automotive, engineering and other key sectors of the U.S. economy is relentless in its intensity. In response to the needs of companies to manage their internationally mobile workforce, Vedder Price's Business Immigration Practice Group is designed specifically to serve the immigration law and compliance needs of companies throughout the country. In addition, the firm provides counsel and assistance with respect to all types of employment-related immigrant and nonimmigrant visa categories.

Specific services include:

- Determining and applying for the most appropriate visa categories for individuals who intend to stay temporarily in the United States for employment or other business-related reasons.
- Preparation and processing of permanent resident visas for executives and other professional employees.

- Due diligence regarding immigration law issues in corporate mergers, acquisitions, divestitures and other forms of corporate reorganization.
- Counseling employers regarding compliance with immigration laws in order to avoid civil and criminal penalties.
- Assisting in processing visa applications and resolving other State Department matters in U.S. embassies and consulates around the world.
- Assisting employers with their non-U.S. immigration needs through our network of attorneys licensed in other countries.

Business Immigration Group Chair:
Gabrielle M. Buckley 312-609-7626
gbuckley@vedderprice.com

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