IMMIGRATION LAW

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I. U.S. IMMIGRATION LAWS

- The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, was created in 1952. Before the INA, a variety of statutes governed immigration law but were not organized in one location. The McCarran-Walter bill of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law.
- The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324, seeks to control illegal immigration by eliminating employment opportunity as an incentive for unauthorized persons to come to the United States, by prohibiting the hiring or continued employment of aliens who employers know are unauthorized to work in the United States. To comply with the law, all U.S. employers must verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986 by completing Employment Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States may face civil and criminal penalties.
- The Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. § 1325, sought to limit the practice of marrying to obtain citizenship by providing a penalty of five years imprisonment and a $250,000 fine for any "individual who knowingly

enters into a marriage for the purpose of evading any provision of the immigration laws."

- The Immigration Act of 1990 thoroughly revamped the INA by equalizing the allocation of visas across foreign nations, eliminating archaic rules, and encouraging worldwide immigration.
- The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 made further revisions to U.S. immigration laws, including the enactment of 3 and 10 year bars to admissibility for aliens "unlawfully present" in the US (those entering the US without any inspection or who overstay a nonimmigrant visa). Those aliens who are unlawfully present in the US for 180 days but less than a year are barred from being admitted in any legal status in the US for a 3-year period. Those who are unlawfully present in the US for more than a year are barred from being admitted in any legal status for 10 years. The most controversial provision of the bill which would have barred the school age children of illegal aliens from public schools was deleted.

II. U.S. IMMIGRATION AGENCIES

- On March 1, 2003, the Department of Homeland Security (DHS) opened, replacing the INS. The DHS is responsible for providing immigration-related services and benefits such as naturalization and work authorization as well as investigative and enforcement responsibilities for enforcement of federal immigration laws, customs laws and air security laws. The DHS's immigration regulations are codified in 8 C.F.R. §§ 100.1 *et seq.*

- Within DHS, there are three different agencies - U.S. Customs and Border Enforcement (CBE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) – which now handle the duties formerly performed by the U.S. Immigration and Naturalization Service (INS).
- Currently, the CBE handles the INS's border patrol duties, the USCIS handles the INS's naturalization, asylum, and permanent residence functions, and the ICE handles the INS's deportation, intelligence, and investigatory functions.
- The U.S. Department of Justice (DOJ), Civil Rights Division, Office of Special Counsel for Unfair Immigration-Related Practices (UIREP) enforces the anti-discrimination provisions of INA § 274B, 8 U.S.C. § 1324b.
- The U.S. Department of State (DOS), Bureau of Consular Affairs, through its "overseas" Consular Officers, is responsible for issuing immigrant and non-immigrant visas to foreign visitors (i.e., aliens) in accordance with the INA and applicable regulations. The Bureau of Consular Affairs supports over 11,000 people located in more than 300 places around the world, including 21 domestic passport facilities and two regional visa processing centers.
- The U.S. Department of Labor (DOL) also has various roles in the visa process including overseeing the PERM labor certification process for the permanent employment of aliens in the United States, and the certification process for the employment of Temporary Agricultural Workers (H-2A), Temporary Non-Agricultural Workers (H-2B), Professional and Specialty Occupation Workers

(H-1B, H-1B1 and E-3), Registered Nurses (H-1C) and Crewmembers (D-1) non-immigrant classifications.

III. IMMIGRANT AND NON-IMMIGRANT VISAS

Under the INA, there are two types of visas: immigrant visas and nonimmigrant visas.

A. Immigrant Visas

Immigrant visas (or "green cards") permit their holders to stay in the United States permanently and eventually to apply for U.S. citizenship. Aliens with immigrant visas can also work in the United States.

Section 201 of the INA sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits (i.e., 25,620). The dependent area limit is set at 2%, or 7,320.

1. Family-Sponsored Preferences

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

- **A. Spouses and Children**: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;
- **B. Unmarried Sons and Daughters (21 years of age or older)**: 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

2. Employment-Based Preferences

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences. This preference includes (i) Persons of extraordinary ability in the sciences, arts, education, business, or athletics; (ii) Outstanding professors and researchers with at least three years experience in teaching or research, who are recognized internationally; and (iii) Certain executives and managers who have been employed at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

B. Non-Immigrant Visas

Non-immigrant visas are issued to tourists, students and temporary business visitors. U.S. immigration law divides non-immigrant visas into 18 different types, but for most types, does not impose a cap on the number that may be granted in a year with the H-1B classification for Professional and Special Occupation Workers being the most notable exception with an annual cap of 65,000.

The non-immigrant classifications include the following temporary visas:

- B-1/B-2 Temporary Business Visitors/Tourists
- E-1/E-2 Treaty Traders and Investors
- F-1 Academic Students
- H-1B Specialty Occupations/DOD Workers
- H-1C Registered Nurses
- H-2A Temporary Agricultural Workers
- H-2B Temporary/Seasonal Workers (Skilled/Unskilled Labor)
- H-3 Trainees
- J-1 Exchange Visitors
- K-1 Fiancés/Fiancées
- L-1 Intra-Company Transfers
- M-1 Vocational Students
- O-1 Individuals of Extraordinary Ability in Sciences, Arts, Education, Business, or Athletics
- P-1 Artists, Athletes and Entertainers
- Q-1 International Cultural Exchange Visitors
- R-1 Religious Workers
- TN Trade NAFTA Visas for Canadian & Mexican Citizens

C. **The Visa Waiver Program**

The Visa Waiver Program (VWP) enables nationals of 35 participating countries to travel to the United States for tourism or business (B-1/B-2 visitor visa purposes only) for stays of 90 days or less without obtaining a visa. The program was established in 1986 with the objective of eliminating unnecessary barriers to travel, stimulating the

tourism industry, and permitting the DOS to focus consular resources in other areas. VWP eligible travelers may apply for a visa, if they prefer to do so.

Nationals of VWP countries must meet eligibility requirements to travel without a visa on VWP, and therefore, some travelers from VWP countries are not eligible to use the program. VWP travelers are required to have a valid authorization through the Electronic System for Travel Authorization (ESTA) prior to travel, are screened at the port of entry into the United States, and are enrolled in the DHS's "US-VISIT" program.

IV. FORM I-9; E-VERIFICATION; SSN NO-MATCH LETTERS

A. Overview of Employment Authorization Verification

In order to comply with IRCA, 8 U.S.C. § 1324, 8 C.F.R. §§ 274a.1 *et seq.*, all U.S. employers must verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986 by completing Employment Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States may face civil and criminal penalties. All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States.

Beginning May 7, 2013, all employers must use the new I-9 form published by the U.S. Citizenship and Immigration Services (USCIS) to verify the identification and employment authorization of each newly hired employee. While the purpose of the new Form remains the same, the new I-9 Form has significant changes designed to minimize errors in form completion.

The changes to the I-9 form include improvements on the form's instructions and the addition of data fields, including a data field for an employee's foreign passport information. The form's overall layout also has been revised, and is now two pages instead of one. The following is a summary of the significant revisions made to Form I-9:

1. **Section 1, now entitled "Employee Information and Attestation":**

- Requires the employee to complete and sign this section before the first day of employment, but not before the employee accepts the job offer
- Contains several new data fields, including the optional fields for phone number and email address, but allows the employee to enter "N/A" if he/she chooses not to provide this information
- Includes data fields for an employee's foreign passport information (if applicable)
- Replaces the "maiden name" data field on prior versions of the form with "Other Names Used".

Employees may have assistance in completing the form, but employers are ultimately responsible for the accurate completion of Section 1.

2. **Section 2, now entitled "Employer or Authorized Representative Review and Verification":**

- Includes an expanded parenthetical explanation of the employer's responsibilities in completing and signing Section 2 of the I-9 form within three (3) business days of the employee's first day of employment
- Provides additional fields to record up to three List A documents, if applicable
- Includes specific designations of the four data fields in Lists B and C
- Requires that the employer completing the form or the employer's authorized representative identify his/her title in the certification block of this section
- Provides a separate line for the employer to record the first day of employment

3. **Section 3, which is now entitled "Reverification and Rehires":**

- Adds a data field for printing the name of the employer, in addition to the employer signing the form
- Explains that the employer must provide a record of List A or C documentation if a previous grant of employment authorization has expired.

A copy of the new Form I-9 can be downloaded from the USCIS's website at **www.uscis.gov**.

B. Acceptable I-9 Verification Documents

When employees are given a Form I-9, they should be asked to provide **either** one document from List A (identity and employment eligibility) **or** one document from each of Lists B (identity) and C (employment eligibility). Again, it is important to emphasize that an employer should not ask an employee to provide any particular document (e.g., green card) for completing Section 2 of Form I-9. As stated above, an employer must accept any document specified on Form I-9, provided that it appears genuine and relates to the employee.

The following shows the documents that are currently acceptable, as well as the List A documents which have been deleted:

List A (Documents that establish both identity and employment eligibility)

- United States Passport or Passport Card
- Permanent Resident Card ("green card") or Alien Registration Receipt Card (I-551)
- Employment Authorization Document (I-766)
- Foreign Passport with temporary I-551 stamp or temporary I-551 printed notation on machine-readable immigrant visa
- For aliens authorized to work only for a specific employer:

i) Foreign Passport with Form I-94 authorizing employment with this employer; or

ii) Passport from the FSM or the RMI with Form I-94/FormI-94A indicating admission under the Compact of Free Association between the USA and the FSM or RMI

List B (Documents that establish identity only)

- Driver's license with photo or identifying information (name, DOB, height, weight, etc.) issued by a state or outlying USA possession
- Identification card issued by federa, state or local government agencies with photo or identifying information (name, DOB, height, weight, etc.) issued by federal, state or local agencies or entities
- School identification card with a photograph
- United States military card or draft record
- Voter's Registration Card
- Military dependent's identification card
- United States Coast Guard Merchant Mariner Card
- Native American tribal document
- Canadian driver's license or ID card with a photograph
- School record or report card; daycare or nursery school record; or clinic doctor or hospital record *(for individuals under age 18 who are unable to produce any of the above-listed identity document)*

List C (Documents that establish employment eligibility only)

- Social Security account number card without USA employment restrictions
- Native American tribal document

- Certification of Birth Abroad issued by the Department of State, Form FS-545
- Certification of Report of Birth issued by the Department of State, Form DS-1350
- Original or certified copy of birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal
- Native American tribal document
- United States Citizen Identification Card, Form I-197
- Identification card for use of a resident citizen in the United States, Form I-179
- Employment authorization documents issued by DHS

C. Reverification of I-9 Documents and Employees

Employers or their authorized representatives should complete Section 3 of the new I-9 Form when reverifying that an employee is authorized to work. When rehiring an employee within three (3) years of the date on which the Form I-9 was initially completed, employers have the option to complete a new Form I-9 or to complete Section 3. When completing Section 3 in either a reverification or rehire situation, if the employee's name has changed, the employer should record the name change in Block A. For employees who provide an employment authorization expiration date in Section 1 of the I-9 Form, employers must reverify their employment authorization on or before the expiration date provided.

It should be noted that the obligation to reverify List A and List C documents does **not** extend to Form I-551 Alien Registration Receipt Cards or Permanent Resident Cards. USCIS and the Department of Justice Office of Special Counsel (which enforces the anti-discrimination provisions of the IRCA) take the position that while these cards

may expire, the beneficiary's status as a Lawful Permanent Resident continues so long as he or she remains a resident of the United States and, therefore, does not need to be reverified. Form I-551 must have been valid at the time it was originally submitted as evidence of employment authorization.

D. Inspections and Penalties

Both ICE and the DOJ inspect employers to ensure compliance with the I-9 requirements. Do not file Form I-9 with ICE or the DOJ. Form I-9 must be kept by the employer either for three years after the date of hire or for one year after employment is terminated, whichever is later. The form must be available for inspection by authorized U.S. Government officials from ICE and the DOJ.

Both the ICE and DOJ have drastically increased their enforcement efforts during the Obama administration. For example, in fiscal year 2012, several companies in Connecticut and the northeast were levied heavy fines for violations. Nationally, administrative fines increased by approximately $2 million since 2011.

1. ICE Inspections

Formed in 2003 as part of the federal government's response to the 9/11 attacks, ICE's is the largest investigative agency in the DHS . ICE has developed what it considers to be a comprehensive worksite enforcement strategy that promotes national security, protects critical infrastructure and ensures fair labor standards. The Worksite Enforcement Unit's stated mission encompasses enforcement activities intended to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation's critical infrastructure.

In July 2009, ICE announced that it had issued Notices of Inspection to 652 businesses nationwide, thereby initiating a new effort to audit and inspect employers' hiring records to determine whether they are complying with IRCA employment verification obligations. Accordingly, it appears that the current Administration will now focus more ICE resources on investigating employers that fail to comply with their IRCA employment verification obligations.

2. Record-Keeping Penalties

Penalties for record keeping violations range from $110 to $1,100 per each paperwork occurrence per employee regardless of the number of prior offenses for which the employer has been cited. Each mistake on the I-9 Form is considered to be a separate violation. Penalties for committing or participating in document fraud range from $375 to $3,200 for the first offense; and from $3,200 to $6,500 for each subsequent offense.

3. Unauthorized Worker Penalties

Penalties for knowingly employing an unauthorized alien range from $375 to $3,200 per each unauthorized worker for the first offense; from $3,200 to $6,500 for the second offense; and from $4,300 to $16,000 for each subsequent offense. Criminal penalties of up to $3,000 in fines per each unauthorized worker and imprisonment of up to six months for the entire violation are possible where a "pattern or practice" of knowingly employing unauthorized workers is demonstrated.

4. UIREP Penalties

The anti-discrimination provisions of INA § 274B, 8 U.S.C. § 1324b, prohibit citizenship or immigration status discrimination with respect to hiring, firing, and

recruitment or referral for a fee, by employers with four or more employees. Employers may not treat individuals differently because they are, or are not, U.S. citizens. U.S. citizens and nationals, recent permanent residents, asylees and refugees are protected from citizenship status discrimination.

Employers found to have engaged in UIREPs may be subject to penalties ranging from $375 to $3,200 per each individual discriminated against for the first offense; from $3,200 to $6,500 for the second offense; and from $4,300 to $16,000 for each subsequent offense. In addition, back pay for a period of up to two years from date of filing of the complaint may be issued, together with attorneys' fees if the losing parties' claims or defenses are "without a reasonable foundation in law and fact."

An employer which demands more documents than the law requires or rejects documents that "on their face appear to be genuine" may be subject to civil penalties ranging from $110 to $1,100 per individual discriminated against.

E. E-Verify System

1. Overview

More than 400,000 employers, large and small, across the United States use E-Verify to check the employment eligibility of their employees. E-Verify is an Internet-based system that allows an employer, using information reported on an employee's Form I-9, to determine the eligibility of that employee to work in the United States. There is no charge to employers to use E-Verify. The E-Verify system is operated by the DHS in partnership with the Social Security Administration (SSA). An employer can register for

E-Verify at www.vis-hs.com/EmployerRegistration, which provides instructions for completing the registration process.

While participation in E-Verify is voluntary for most businesses, some companies may be required by state law or federal regulation to use E-Verify. For example, most employers in Arizona and Mississippi are required to use E-Verify. E-Verify is also mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation E-Verify clause.

2. Federal Contractors

Employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause are required to use E-Verify to determine the employment eligibility of:

- Employees performing direct, substantial work under those federal contracts
- New hires organization wide-regardless of whether they are working on a federal contract

A federal contractor or subcontractor who has a contract with the FAR E-Verify clause also has the option to verify the company's entire workforce.

Federal contracts awarded and solicitations issued after September 8, 2009 now include a clause committing government contractors to use E-Verify. The same clause is also required in subcontracts over $3,000 for services or construction. Contracts exempt from this rule include those that are for less than $100,000 and those that are for commercially available off-the-shelf items. Companies awarded a contract with the federal government are required to enroll in E-Verify within 30 days of the contract

award date. They also need to begin using the E-Verify system to confirm that all of their new hires and their employees directly working on federal contracts are authorized to legally work in the United States.

3. E-Verify Process

Before a company can use E-Verify to verify the employment eligibility of its employees, the company and employee must first complete Form I-9. All of the Form I-9 rules that companies followed before signing up for E-Verify still apply with two exceptions. Employees must provide their Social Security numbers on Form I-9. (Providing a Social Security number on Form I-9 is voluntary unless the employer participates in E-Verify.) Any List B document that employees present must contain a photo. (Some List B documents without photos are acceptable unless the employer participates in E-Verify.)

Once Form I-9 is completed, the company enters the information from Form I-9 into E-Verify. Depending on the documents an employee provides, the employer may have to compare a photo displayed on a computer screen to the photo on the employee's document. The photos should match, which ensures the document photo is genuine and has not been altered.

Once the information has been entered and submitted, E-Verify will compare it against millions of government records. If the information entered matches, E-Verify will return an "Employment Authorized" result. This confirms the employee is authorized to work in the United States. After printing the results page and attaching it to the

employee's Form I-9 (or recording the employee's E-Verify case verification number on the form itself), the employer simply closes the case to complete the E-Verify process.

If there's a mismatch, E-Verify will return a "Tentative Non-confirmation (TNC)" result. If this happens, the employer needs to print and review a notice with the employee that explains the cause of the mismatch and what it means for the employee.

If the employee decides to contest the mismatch, the employer will refer the case in E-Verify to the appropriate agency (either the U.S. Department of Homeland Security or Social Security Administration) and print a letter that it must give to the employee. The letter contains important instructions and contact information that the employee will need to resolve the mismatch. The employee then has eight federal government work days from the date the case was referred in E-Verify to resolve the problem.

E-Verify will alert the employer of an update in the employee's case. If the employee successfully resolves the mismatch, E-Verify will return a result of employment authorized. If the employee doesn't resolve the mismatch, E-Verify will return a final non-confirmation result. Only after an employee receives a final non-confirmation may an employer terminate an employee based on E-Verify.

In certain cases, the DHS or the SSA might need more time to verify an employee's employment eligibility. When this happens, E-Verify will return a case in continuance result. While an employee's case is in continuance, the employer must allow the

employee to continue to work until E-Verify gives a final result of "Employment Authorized" or a "Final Non-confirmation."

F. "**No-Match" Letters**

Every year the SSA informs thousands of employers via a letter entitled "Employer Correction Request," commonly known as "No-Match" letters, that the Social Security numbers employers provided on W-2 Forms for certain employees do not match SSA's records. An employer should take reasonable steps to resolve the mismatch, and apply these reasonable steps uniformly to all employees referenced in the enclosed SSA letter.

A SSA "No-Match Letter" is a written notice issued by the SSA to an employer, usually in response to an employee wage report, advising that the name or Social Security Number (SSN) reported by the employer for one or more employees does not "match" a name or SSN combination reflected in SSA's records. The letter cautions employers against taking any adverse employment action against a referenced employee based solely on receipt of the letter, and explicitly states that the letter makes no statement about the referenced employee's immigration status. Rather, the letter simply reports an apparent error in either the employer's records or SSA's records, and seeks the employer's and, if necessary, the employee's assistance in conforming those records.

To confirm that a reporting or input error is not the cause of a no-match, an employer, with the assistance of the referenced employee, should confirm that the name and SSN reported accurately reflects the referenced employee's name and SSN. If no

error is discovered, the employer should then advise the referenced employee to contact the local SSA office to address the reported no-match.

An employer should not use the no-match letter or other no match notice by itself as the reason for taking any adverse employment action against the referenced employee. In addition, employers should not use the receipt of a no-match letter or other no-match notice (or the fact that an employee raises any objection to the employer's no-match response procedures) as a basis to either retaliate against the employee or otherwise subject the employee to heightened scrutiny. Doing so may violate the anti-discrimination provision of the INA, or other state or federal equal employment opportunity or labor laws. The anti-discrimination provision of the INA prohibits discrimination on the basis of national origin, citizenship status or immigration status, document abuse during the employment eligibility verification process and retaliation.

The mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute "constructive knowledge" on the part of an employer that the referenced employee is not work authorized. Only the DHS is legally authorized to conclusively determine an individual's authorization to work. It is recommended that an employer give a referenced employee a "reasonable period of time" to address and correct information contained in a no-match letter or other no-match notice.

There are no Federal statutes or regulations in effect that define a "reasonable period of time" in connection with the resolution of a no-match notice. As a practical matter, a "reasonable period of time" depends on the totality of the circumstances. Of note, in the E-Verify context SSA has the ability to put a tentative non-confirmation into

continuance for up to 120 days. This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database.

While not required to do so, an employer may schedule (and document) periodic meetings or other communications with the employee during the resolution period to keep abreast of the employee's efforts to resolve the no-match, and to determine whether the employee needs more time to resolve the no-match than initially contemplated.

Employers can minimize the receipt of SSA No-match Letters by using the Social Security Number Verification Service (SSNVS). SSA offers this free online service that allows registered users (employers and authorized third-party submitters) to verify the names and SSNs of employees against SSA records. Telephone Number Employer Verification (TNEV) is very similar to SSNVS, but it is an automated telephone service that allows registered users to verify names and SSNs over the telephone without speaking to an agent. Verifying SSNs through SSNVS and TNEV allows SSA to properly credit the correct earnings to the correct individual's earnings record. These services can only be used for wage reporting purposes. An employer's use of SSNVS or TNEV for any other reason (*e.g.*, to verify work authorization) is improper and may violate the anti-discrimination provision of the INA.

V. RECENT DEVELOPMENTS IN IMMIGRATION LAW

A. DISCUSSION OF PENDING LEGISLATION

B. POTENTIAL IMPACT ON U.S. IMMIGRATION LAWS