

# **Business Immigration – A Practical Update on Today’s Hot-Button Issues for Employers and Employees**

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## **I. INTRODUCTION**

The Immigration Reform and Control Act (“IRCA”) went into effect on November 6, 1986. For more than thirty years now, employers have been required to verify – through the preparation of form I-9 – that each new hire has authorization to work in the United States. Employers who fail to comply with the I-9 requirements are subject to substantial civil fines and even potential criminal liability. But potential liability for violations of IRCA goes far beyond fines for failing to complete the I-9 form completely or on time. The Immigrant and Employee Rights (IER) section of the U.S. Justice Department (formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices) in addition to seeking back pay and reinstatement has levied fines into the hundreds of thousands of dollars on employers who discriminate against foreign workers or who – often inadvertently – take actions during the I-9 process which violate IRCA.

E-Verify is an online verification system which combines the databases of the Social Security Administration and the Department of Homeland Security, to further “vet” the bona fides of the documentation provided by a new hire. Certain federal contractors are required to use the on-line E-Verify system to further ensure that their employees are work authorized. A growing number of States are also requiring employers to use the federal E-Verify system. Some companies require their subcontractors to participate in E-Verify as a condition of doing business. The use of E-Verify can give rise to independent investigations by the IER for alleged “document abuse”, subjecting employers to liability for large civil fines.

Restrictive quotas for years have impacted the ability of U.S. employers to employ foreign nationals on the H-1B professional work visa. The “Buy American and Hire American” Executive Order (“BAHA”) issued in April 2017 set goals to reduce illegal immigration, detect and prevent fraud in the immigration process, and protect jobs for U.S. workers. BAHA has resulted in a higher level of scrutiny of temporary work visa petitions, which seems to have created a “chilling effect” on U.S. employers seeking H-1B professional work visas. As a part of the efforts to protect jobs for U.S. workers, DHS has announced its intention to terminate the work authorization program for H-4 spouses. The DACA program is ending, as is TPS for several countries. Those seeking issuance of visas at U.S. Consulates around the world are experiencing longer wait times due to cases being placed in “administrative processing.”

## **II. UNDOCUMENTED WORKERS**

Under the U.S. immigration laws, an individual who is not a U.S. citizen or national, or a U.S. permanent resident (green card holder) cannot visit or reside in the U.S. without permission. Similarly, such individual cannot work in the U.S. without permission. As a general rule, all individuals who are not U.S. citizens/nationals or U.S. permanent residents are required to have work visas or work cards in order to work in the United States.

A significant root cause of illegal immigration into the U.S. is the unavailability of work visas for individuals who do not work in professional-level jobs requiring a college degree. With the exception of individuals transferred here from abroad by their foreign employer, certain trainees or seasonal workers, and athletes and entertainers and other persons of distinction (“extraordinary ability” aliens), work visas are not granted to those lacking a college degree or equivalent and who work in jobs which do not require a college degree.

As a result, persons from other countries wanting to work in the U.S. on a year-round basis in such fields as food service, housekeeping, construction, landscaping, manufacturing and the like generally cannot obtain work visas under the current law.

The Pew Hispanic Center has estimated that there are at least 10 million undocumented men and women (“illegal immigrants”) currently in the U.S., who in turn are parents to 1.6 million undocumented children and over 3 million children who are U.S. citizens by virtue of their birth in this country. The Department of Homeland Security estimates that over 65% of these undocumented persons have lived in the United States for 10 years or more.

Although many undocumented persons crossed the border “without inspection,” others entered with valid visas (such as visitor visas or student visas) and simply “over stayed.”

The Trump Administration has stated its intention to be vigorous in putting undocumented persons into removal (deportation) proceedings.

### **III. CURRENT WORKPLACE ENFORCEMENT EFFORTS – ICE AUDITS**

Immigration and Customs Enforcement (ICE), the enforcement arm of the U.S. Department of Homeland Security, since late 2009 has issued I-9 audit notices to thousands of businesses. Fiscal years 2015 and 2016 each saw a record number of audits, with ICE collecting millions of dollars in fines from employers. Although the number of audits declined in 2017, the Trump Administration has indicated that it intends to step up worksite enforcement efforts.

An ICE audit begins with a “Notice of Inspection” (NOI). In an I-9 audit, the employer is typically requested to submit its I-9s, payroll records, payroll tax filings (“941s”), information on related companies, and prior Social Security no-match letters, so that ICE can determine whether the employer is in compliance with federal employment eligibility verification laws. Typically, *an employer is given only three business days* in which to turn over its documents to ICE.

A finding of noncompliance can lead to fines and, in the case of “pattern or practice” violations, criminal penalties or debarment from federal contracts. Accordingly, companies should consider completing an internal audit of their I-9s, to *be prepared* in the event of an ICE audit.

At the conclusion of each audit, employers are given a list of workers with “suspect” documents or other “discrepancies.” Unless the workers choose to challenge the

finding (and provide additional documentation of their identity and immigration status to ICE to verify), their employment must be terminated within 10 days.

Thus a company can emerge from an ICE audit without fines (if its I-9s are in good order), but still “lose” a portion of its workforce if those individuals were determined to be “undocumented” (not authorized to work in the U.S.).

#### **IV. DOCUMENT FRAUD/IDENTITY THEFT**

The two documents most frequently presented by new hires to complete the I-9 process are a *driver’s license* (identity document) and *Social Security card* (work authorization document). Bogus Social Security cards are easily obtained in the United States. Millions of undocumented workers provide such documents at the time of hire, while others engage in identity theft or “sharing.”

Under the federal REAL ID law (put in place after “9/11”), States were required to tighten up the procedures for issuing drivers’ licenses, requiring applicants (both for new licenses and renewals) to document that they have a lawful immigration status in the U.S. So while it used to be easy for undocumented persons (illegal aliens) to obtain real drivers’ licenses, this is no longer the case.

USCIS has made it clear that employers are *not* held to a standard of determining the authenticity of documents such as Social Security cards or green cards, unless these appear *fraudulent on their face*. Employers who reject valid documents can be fined for “document abuse” violations under IRCA.

#### **V. MONITORING OF E-VERIFY USAGE BY THE IER**

Employers who require new hires to present specific documents (for example asking permanent residents to show their green cards) are subject to fines (and to backpay awards if the job offer was withdrawn). The IER actively monitors employers’ E-Verify usage, and may conduct an investigation if an employer has a larger percentage of “List A” documents used in its E-Verify cases than would typically be anticipated on average. Asking for specific documents in the I-9 process can lead to fines for “document abuse” under IRCA. Fines range from \$179 to \$1790 per violation. Civil penalties exceeding \$100,000 are not uncommon.

#### **VI. EMPLOYEES PRESENTING “NEW” IDENTITIES**

Although it has long been recommended that employers be very cautious in accepting a “new” identity from a current employee whose name has appeared on a Social Security Administration “no match” letter, after the implementation of the “Deferred Action” Program (DACA), the federal government encouraged employers to accept such documentation from DACA recipients. Employers may have in place an “honesty policy” which specifies that any falsification in the hiring process is grounds for immediate termination. Although employers can certainly enforce that policy, this must be done in a

uniform manner, to avoid potential liability. Asking U.S. permanent residents to show documentation for authorization when their green cards are expiring is also a “document abuse” violation.

If the employee has provided a new name, *or* a new date of birth, *or* a new Social Security number, a new I-9 form should be prepared and kept with the I-9 form completed at the time of hire. An E-Verify case would also be submitted if the employer participates in E-Verify.

## **VII. EXPANDING GROUNDS OF EMPLOYER LIABILITY -- CONSTRUCTIVE KNOWLEDGE AND IMMIGRATION STATUS DISCRIMINATION**

The Department of Homeland Security has made it clear that it is focusing on employer good faith and “constructive knowledge” in evaluating potential violations of IRCA’s prohibition of “continuing to employ” unauthorized workers. In a “Worksite Enforcement Advisory” issued in February 2008, which is still the most recent such Advisory available, DHS provided guidance to employers on current ICE worksite enforcement. The Advisory specifically acknowledged the significant problem with bogus Social Security cards and gave employers “things to look for” as part of I-9 compliance.

The “Advisory” also makes it clear that employers should follow up on “no-match” letters. (“Check with your employee to verify the information given to you is correct. Verify any corrections with SSA. Encourage the employee to resolve the issue with SSA and *ensure any corrections are valid by checking again with SSA.*”)

Examples of information resulting in constructive knowledge to the employer include a third-party payroll system reporting that an employee name and Social Security number do not match, or an individual providing documentation from the IRS regarding unpaid taxes on wages earned at a company, when that individual has never worked at that company.

An appropriate response would be to inform the employee that an issue has arisen with his immigration status/work authorization and give the employee a reasonable amount of time to provide additional documentation. Again, the employer should not require the employee to provide a particular document; the choice of which document to present is solely the employee’s (as it is with I-9s).

The IER has also provided guidance with respect to several types of “third party” information which could give rise to a duty to inquire further on the part of employers. Although the guidance clearly states that receipt of a “no match” letter in and of itself would not necessarily give an employer “constructive knowledge,” employers were urged to do appropriate follow up if they receive information raising questions about an employee’s status from such sources as a *background check, an identity theft-related inquiry, or a health care provider which provides services to employees pursuant to an employer-sponsored health plan.*

## VIII. RECENT DEVELOPMENTS UNDER THE TRUMP ADMINISTRATION

Through Executive Orders and other initiatives there have been significant changes in recent months not only in immigration enforcement but also the adjudicative process itself. As noted above, the Administration has also taken steps to cut back on work authorization provided on certain humanitarian-based programs such as DACA and TPS.

Under the “Buy American, Hire American” Executive Order 13788, which was issued on April 18, 2017, the Department of Homeland Security was directed to implement policies to prevent displacement of U.S. workers by foreign nationals. BAHA’s stated purpose in this regard is to create higher wages and employment rates for U.S. workers. The interests of U.S. workers are to be protected by strictly enforcing the laws governing the entry of foreign workers. DHS was directed to put in place standards to ensure that H-1B visas were approved only for the “most-skilled” and “highest-paid” workers, although those parameters are nowhere in the statute or regulations.

An example of the significant change in adjudicatory approaches by USCIS is reflected in policy guidance issued on March 31, 2017 on the eligibility of Computer Programmer positions for H-1B visas. In the body of the guidance, USCIS advised that “entry-level” Computer Programmer positions would generally not qualify for the H-1B because the USDOL’s Occupational Outlook Handbook (OOH) states that an individual with only an Associate’s Degree could enter that particular occupation. Even more noteworthy, *in a footnote*, that guidance directed USCIS officers adjudicating H-1B petitions to consider whether a position for which an employer is paying a Level I (entry-level) wage would qualify for the H-1B, stating that payment of such a wage “will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions within the same occupation.”

Prior to the issuance of this guidance, payment of a Level I wage top a worker had not been problematic for H-1B employers. Many foreign workers sponsored for their initial H-1B visas are in fact recent graduates working in entry-level positions. Practitioners reported a huge surge in the percentage of H-1B petitions for which Requests for Evidence (“RFEs”) were issued during 2017, on this as well as other issues.

USCIS in recent years has also been challenging whether positions for which an individual can qualify through a number of alternative Bachelor’s Degree programs (i.e., different majors) qualify for the H-1B. Relying on a regulatory definition that “specialty occupations” (occupations qualifying for the H-1B professional work visa) are those which require knowledge typically obtained through coursework leading to a Bachelor’s Degree or higher “in a specific specialty,” USCIS has denied H-1Bs for occupations such as Financial Analyst. As a basis for such rejection, USICS points to the OOH’s statement that one can prepare for entry into that occupation with degrees in Accounting, Finance, Economics, Mathematics, or Statistics.

On November 20, 2017, USICS issued a policy memorandum restricting the TN work visa classification under NAFTA for “Economists.” In the past, a number of occupations related to economics, such as those filled by financial analysts and marketing

research analysts were recognized as qualifying for the TN visa under the Economist occupation category. Today only those jobs focused on a narrow range of economic analysis will qualify.

The Administrative Site Visit and Verification Program (ASVVP) has been directed to increase its number of annual site visits (workplace visits) to ensure compliance of both employers and employees holding H and L visas. On February 22, 2018, USCIS issued yet another policy memorandum, this time imposing more onerous evidentiary requirements for H-1B petitions for “third-party worksites.”

The Foreign Affairs Manual (FAM) has been revised to specifically allow consular officers (those who issue visas at U.S. Consulates and Embassies abroad) to consider the “Buy American, Hire American” goals in the visa issuance process. In other words, these consular officers can consider whether those seeking visas might be displacing U.S. workers. Including applying for E work visas at U.S. Consulates and Embassies are routinely being asked to explain why a U.S. worker could not do their jobs.

Beginning in February of 2015, certain H-4 spouses of H-1B visa holders were permitted to apply for work authorization. The general rule has long been that H-4 spouses of H-1B workers had permission to live in the United States but not to work. The H-4 EAD rule was designed to address the situation in which workers and their families under the current per-country green card quotas must “wait in line” for many years (with some having to wait more than a decade) to get their green cards. The government has reported that more than 100,000 EADs have been issued as of late June of 2017. The stated reason for bringing the H-4 EAD program to an end is to comply with BAHA, to better protect jobs for U.S. workers.

The Immigrant & Employee Rights Division of the U.S. Justice Department has been instructed to focus more efforts to ensure that H-1B and L-1 visa holders do not displace U.S. workers, and that U.S. workers have not been “ignored or unfairly disadvantaged” in the hiring process.

A number of countries previously designated for the Temporary Protected Status (TPS) program are ending. TPS is a humanitarian program designed to permit nationals of certain countries facing natural disasters, civil wars, or other serious conditions, to remain in the United States with permission to work. When the Trump Administration began its work in January of 2017, there were ten countries which had TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. Since January of 2017, that Administration has announce the coming termination on the TPS program for El Salvador, Haiti, Nicaragua, and Sudan, and has indicated that it is considering terminating TPS for Honduras as well. Many TPS recipients have not only been living but have been working in the United States for many years. By way of example, the government estimates that most of the more than one quarter of one million individuals from El Salvador with the TPS have been in the U.S. for at least 20 years.

USCIS has announced that it is no longer giving any “deference” to prior visa adjudications. In other words, the fact that a particular employee has been previously approved for a certain work visa type with the same employer in the past, for the same job, is to carry no weight at all in the adjudicative process for an extension petition.

On September 5, 2017, the Trump Administration announced an end to the Deferred Action for Childhood Arrivals (DACA) program put in place by the Obama Administration in 2012. A group of affected immigrants as well as the States of New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia as well as the District of Columbia, brought suit challenging the rescission of the DACA program. The legal theories included allegations that the termination of the program targeted Hispanics, in violation of the Constitution’s equal protection clause, as well as substantive Administrative Procedure Act claims, alleging that the termination of DACA was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” In that suit, a federal district court judge for the Eastern District of New York entered a preliminary injunction against the repeal of the DACA program. At issue is protection from deportation and continuing work authorization for more than 800,000 young immigrants who came to the U.S. as children. The September 2017 announcement by the Trump Administration rescinded the program with an effective date of March 5, 2018, but a number of federal court injunctions in this and other cases have kept the program temporarily alive.

In recent decades, USCIS has waved the requirement of a personal interview in most employment-based green card applicants. Such interviews are now required in all employment-based green card application cases, which is leading to an increase in overall green card processing times.

Homeland Security Investigations (HSI), which is part of ICE, has announced that it may quadruple the number of worksite enforcement (IRCA compliance) actions it carries out in 2018. ICE has announced its implementation of a “comprehensive worksite enforcement strategy.” Under that strategy, it has been announced that “HSI prioritizes violators who abuse and exploit their workers, aid in the smuggling or trafficking of their alien workforce into the U.S., create false identity documents or facilitate document fraud or create an entire business model using an unauthorized workforce.” We are seeing the disappearance of several types of work authorizations, including DACA and TPS.

Plans have also been announced to consider bringing to a close the two-year STEM extension of OPT EAD work cards which was put in place in March of 2016 under the Obama administration.

In recent years, practitioners have also seen a significant growth in USCIS adjudication backlogs/processing times. USCIS reported that as of the end of Fiscal Year 2017, it had 5.6 million applications and petitions pending. Processing time delays can result in hardships ranging from job loss to an inability to travel internationally for family emergencies. Of particular note here are long-pending applications for employment authorization documents (EADs). On January 17, 2017, in conjunction with an

announcement of “automatic extensions” for a number of categories of EADs, USCIS eliminated a long-standing regulatory requirement that it adjudicate I-765 EAD applications within 90 days. Those categories *not* eligible for the automatic extensions including DACA, H-4 spouses, and E and L spouses.