Special registration update: Blanket 30-day and annual re-registration suspended, other requirements continue

On December 2, 2003, the Department of Homeland Security (DHS) issued a notice in the Federal Register suspending future blanket application of 30-day and annual re-registration requirements. The notice is posted on our website under Important News. Note that although the 30-day and annual registration requirements are suspended, the port of exit special registration requirement—as well as the requirement to report changes of address, employment or educational institution—continues unchanged; also port of entry special registration is now expanded to include a discretionary case-by-case periodic re-registration requirement. Further, this modification of future special registration requirements does not excuse any prior failures to comply with special registration requirements. For additional information regarding special registration, please visit the Special Registration page on our website.

More secure travel documents

On November 24, 2003, Eduardo Aguirre, Director of U.S. Citizenship and Immigration Services (USCIS), announced that USCIS would be re-designing the travel documents issued to permanent residents, refugees and asylees to re-enter the United States following travel abroad. The new travel document is light green in color and resembles a U.S. passport in size and shape. Refugee travel documents and re-entry permits currently in circulation will remain valid until the expiration dates printed on those documents.

The principal aim of re-designing the document is to make it more secure and efficient to manufacture. The new features will include a digitized integrated photo and a number of hidden features that require sophisticated forensic equipment to view. According to USCIS, the re-design of the document will allow a tenfold increase in daily production for these documents.

Holiday travel and visa application delays

As reported in our last issue of Spotlight, we expect there will be delays in obtaining visas at U.S. embassies abroad. If a foreign national employee is traveling for the holidays, we strongly advise him/her to make a visa appointment ahead of time and review the Travel Advisory posted on our website before leaving the U.S.
SC/CHiPS survey — new prevailing wage source for employers

As most H-1B employers know, it can sometimes be challenging to find prevailing wage data that complies with DOL requirements. DOL requires that employers pay prospective foreign nationals the greater of the company’s actual wage and the prevailing wage for the occupation in the area of intended employment. The SC/CHiPS Survey is a new resource that provides wage data for key industries and positions. The survey offers five benchmark surveys, including the “Professional & Managerial Survey”, the “Executive & Senior Management Survey”, the “Sales Plus Survey of Customer-Focused Positions”, the “Research & Development Survey”, and the “New College Graduate Survey”.

The SC/CHiPS Survey meets the Department of Labor guidelines in that the report categorizes the survey data by industry and geographic location (including data for the Silicon Valley). The wage data provide information for various levels of each occupational classification, including the recommended degree and experience level for each position. The survey also runs Custom Peer Group Reports at the request of the client, allowing the client to create custom reports using location specific requests.

The custom reports and the number of participating employers in the report will reflect the amount of data reported in that particular area. As long as the number of participating employers is at least 20 for a metropolitan statistical area, and the job surveyed accurately reflects the job opportunity with your company in terms of description and requirements, then your company can rely on the SC/CHiPS survey as an “Independent Authoritative Source” for LCA purposes.

If you would like to order the survey, please contact Clark Consulting directly at www.clarkconsulting.com or 508-460-9600 for a breakdown of membership fees and the costs.

DOL issues memo to regional offices on “auto remands”

Substance of the memo

The U.S. Department of Labor (DOL) issued a memorandum on November 20, 2003 to its regional offices providing procedural guidance on the processing of alien employment certifications (AECs) filed under Reduction in Recruitment (RIR). The memorandum was drafted to address the mounting backlog of cases at the State Workforce Agencies (SWA) and the inconsistent adjudication of cases by the regional offices.

Over the past six months, some regional offices—in particular Region VI, the region which has jurisdiction over workplaces in California—have automatically remanded pending RIR applications for high-tech occupations to the SWAs for supervised recruitment, without giving employers the opportunity to address any alleged deficiencies in their pattern of recruitment. Previously, DOL had issued “60 day letters” providing employers the opportunity to retest the labor market or to request remand to the SWAs. As a result of these automatic remands, many of the SWAs received a large number of RIR applications and their backlogs increased dramatically.

1. The “policy guidance” issued standard operating procedures for the following issues

"Initial Review Provision". According to the memo, “All RIR applications must be reviewed based upon existing criteria for completeness of the application, demonstration of a pattern of recruitment and compliance with applicable regulations such as absence of restrictive requirements, layoffs by the requesting employer that have not been adequately addressed, etc”. This validates DOL’s current process for issuing Notice of Findings (NOF)—or intents to deny—on RIR applications.

If an application has satisfied the “completeness/compliance requirements”, the regional office shall adhere to the following guidelines:

- If, according to the minimum requirements listed on the Form ETA 750 Part A, either a Bachelor’s degree and 3 or more years of experience, or a Master’s degree and 6 months of experience are re-
quired for the position, these applications should be approved, and there is no need for the market to be re-tested.

- If the minimum requirements fall short of those listed above, the regional office should approve the alien employment certification if “the level of recruitment and the detail provided in the recruitment report satisfy the Certifying Officer such that further recruitment is unnecessary”.

2. Retest provision

For the remaining cases, the regional DOL offices are instructed to advise employers of the following options:

Withdraw the application. Withdraw the request for RIR and have the case remanded back to the SWA and placed in the SWA queue based on the application’s priority date. Alternatively, if the employer wishes, the case can be put in the queue based on the (later) remand date.

One-day retest of the U.S. labor market. The employer may elect to place a “one-day” ad in the newspaper to retest the U.S. labor market. The employer will be required to provide a detailed report of the recruitment results, which must include “the disposition of all applicants for the position”. Although not required, employers are “encouraged” to provide copies of the resumes to the DOL. When doing the retest, the employer will be allowed to “look back” to recent prior recruitment, and use advertisements placed in the last 6 months to satisfy the retest requirement. Previously, DOL permitted employers to utilize only those advertisements placed within the last 60 days. The new “look back” provision expands this period to six months.

An important new development with respect to the retest is that the DOL memorandum includes an “Application Modification Provision”. This allows employers to change the requirements in the applications as long as the changes do not “change the occupational classification of the job opportunity at the original time of filing”. This is very important for employers: when many of these alien employment certifications were filed in the high tech boom, the SWAs encouraged employers to reduce the requirements so that the cases would be adjudicated quickly and favorably. However, it is clear that many of the requirements may not have been realistic and, before doing the “retest”, employers now have the opportunity to change the requirements and/or job description as long as the changes do not alter the position and do not exceed the DOL guidelines governing minimum and maximum requirements. If DOL determines that the position requirements have been modified in such a way that they are not in compliance with the regulations, DOL will issue a NOF and not provide the employer the opportunity to retest the U.S. labor market.

3. The timetable set by SWA in California

In response to the DOL memorandum, the SWA in California (Employment Development Department) has indicated that DOL in San Francisco is recalling all cases that had been remanded to EDD on the grounds of worker availability. The only applications not being sent back to DOL are those that only require a BS and 0 years of experience. EDD is in the process of sending the files back to DOL and has provided the following schedule:

- Cases remanded to EDD on or before June 2003 will be returned to DOL by December 15, 2003.
- Cases remanded to EDD between July 1 to July 10, 2003 will all be returned to DOL by January 1, 2004.
- Cases remanded to EDD after July 10, 2003 have not been logged in yet. Therefore, EDD cannot even advise us if they have the case or not. These cases will be logged in and out at the same time and EDD anticipates that it will return these cases back to DOL no later than April 1, 2004.

4. What action is required at this time?

According to EDD, we cannot request that a file be remanded back to DOL. Moreover, it is not necessary because EDD is returning many of these files to DOL pursuant to DOL’s request. EDD has indicated that it will not send a transmittal notice when these cases are transferred back to DOL. Therefore, we will not be aware of the transfers until we receive further communication from DOL pursuant to the instructions contained in this policy guidance memo. Based on the thousands of cases which are affected, it will take EDD some time to transfer these files and it will take DOL even more time to review them for appropriate action. Further, it is foreseeable that the DOL processing times on RIR cases will continue to retrogress at least during the period of time when RIR applications are being returned in large numbers.

Jackson & Hertogs will monitor the situation closely and advise our clients promptly in the event of any DOL action on their cases.
Independent contractors and illegal immigration

On October 23, 2003, government immigration officials arrested 250 alleged illegal immigrants at 61 Wal-Mart stores in 21 states. Almost all of the workers were employed by independent contractors to provide overnight cleaning services. Ten were Wal-Mart employees recently hired away from the contractors. As a result, Wal-Mart, Inc., which is one of the world’s largest companies, is currently under investigation by a federal grand jury for its role in hiring illegal immigrants on contractor cleaning crews. The company could face criminal charges and possible fines of up to $10,000 per illegal worker.

The situation with Wal-Mart, Inc., the largest U.S. private sector employer, has focused attention on issues relating to employer use of independent contractors. In this article we will discuss independent contractors and I-9 compliance, and employer obligations with respect to the employees hired by the contractors.

I-9 compliance and independent contractors

All U.S. employers are legally responsible for the completion and retention of a Form I-9 for all U.S. citizen and non-citizen employees who are hired after November 6, 1986. As a result of this requirement, employers must verify the identity and work authorization of every employee by viewing documents which establish the employee’s identity and his/her right to work in the U.S.

However, there are several exceptions to the I-9 requirement for employers, one being the use of independent contractors. The general rule is that employers are not required to verify the employment eligibility of independent contractors and their employees. The independent contractor is responsible for completing the I-9 for each of its employees. This is one of the main reasons why the use of outside contractors has proved so popular as part of an increase in outsourcing by U.S. companies. Large companies like Wal-Mart are attracted to this option because the arrangement insulates companies from checking work eligibility and the myriad other responsibilities of having workers on their own payrolls.

Employers are not totally carefree in these situations, however, because immigration regulations specifically prohibit an employer from contracting for the labor of a foreign national if the employer knows that the foreign national is not authorized to work in the U.S. Therefore, employers cannot circumvent the I-9 requirements by knowingly hiring illegal workers as independent contractors.

Knowingly using undocumented workers

Under immigration regulations at 8 C.F.R. § 274a.5, an employer is liable for penalties if it “knowingly” used a contract, subcontract, or exchange to obtain the services of an unauthorized alien. This rule stems from the concern that employers might decide to “farm out” essential business functions in order to avoid responsibility for verifying employment status. The rule allows for penalization in clear cases of subterfuge, where there are obvious indications that the employer intended to make use of unauthorized workers through a subcontract.

The biggest problem for employers in these situations, however, is distinguishing what constitutes as “knowing”. Knowledge has been defined as arising when the employer shows reckless and wanton disregard for the consequences of letting another person, like a contractor, into its work force. If the employer knows that the contractor has previously supplied it with unauthorized aliens, the employer may be considered liable under this definition of knowledge.

So is there anything an employer can do to prevent accusations of “knowing” employment of unauthorized workers? Although employers are barred from seeking indemnity bonds from individual employees to cover fines if the employees turn out to be unauthorized, employers are allowed to incorporate indemnity clauses into agreements with independent contractors. The regulations specifically recognize the validity of contract terms that require indemnification by the contractor if the employer is penalized for hiring an unauthorized worker under the contract.

Therefore, an employer can contract to impose on the independent contractor the duty to assure that all of its employees are authorized to work in the U.S., and the employer can require the independent contractor to indemnify the employer for any fines and legal fees incurred because employees supplied by the contractor were not authorized to work in the U.S. Employers should also consider including a provision in the contract that requires the contractor to complete an I-9 for all of its employees and otherwise comply with the
employer sanction provisions.

The recent immigration-related problems faced by Wal-Mart underscore the importance to employers of ensuring that they are not hiring unauthorized workers. Even if the workers are employees of independent contractors and the employer is not obligated to comply with the paperwork requirements, the employer must take all reasonable steps to ensure that an independent contractor is following appropriate employment practices with regards to its employees.

There may be other steps, other than indemnification and hold-harmless agreements, which an employer can take to avoid potential liability in independent contractor situations. If you would like to discuss this issue further, please contact your attorney at Jackson & Hertogs.

J&H Holiday Schedule

In our ongoing effort to provide you with the best service, we would like to give you advance notice to changes in our office hours during the upcoming holiday season.

J&H will be closed on the following dates:
December 25-26; and

Our office will also close at 1:00 p.m. on both December 24 and 31.

If you have any questions, please contact our office. We wish you a safe and happy holiday season!

J&H News

J&H First Wednesday Seminars

Due to the winter holidays, there will be no seminar on the first Wednesday in January. We will resume our monthly First Wednesday Seminars in February.

We will send out the invitation as soon as the topic and date are set. You may also check our website at www.jackson-hertogs.com/jh/seminars.htm.

Immigration Trivia

An employer may do the following to prevent being found to have “constructive knowledge” of the employment of unauthorized workers by its contractors:

a. Include a provision in the employer’s contract with the independent contractor that requires the contractor to complete an I-9 for all of its employees
b. Require the independent contractor to indemnify the employer for any fines and/or legal fees incurred as a result of a government investigation or related suit
c. Both a and b
d. Neither a nor b

Answer: c. An employer can contract to impose on the independent contractor the duty to assure that all of its employees are authorized to work in the U.S. and the employer can require the independent contractor to indemnify the employer for any losses and legal fees incurred because employees supplied by the contractor were not authorized to work in the U.S.

From all of us at Jackson & Hertogs:

We wish you a safe and happy holiday season and a prosperous new year!

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For up-to-date information, visit us on the web: www.jackson-hertogs.com