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Immigration eNews

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Forms I-9 and Electronic Signature and Storage Rules

On June 15, 2006, the Department of Homeland Security (DHS) issued an interim rule that establishes standards for electronic signatures and the electronic retention of Forms I-9. Under this interim rule, employers and recruiters, including referrers for a fee, who are required to complete and retain Forms I-9 may complete, sign and retain these forms electronically, as long as certain performance standards for the electronic filing system are met. The DHS is upgrading the downloadable PDF version of Form I-9 to enable employers and employees to electronically sign and save the completed Forms I-9 . The PDF version of Form I-9 complies with the electronic form requirements of this rule.

In addition, employers may also electronically scan and store their existing Forms I-9, as long as the electronic filing system standards are met. There is no single U.S. Government-wide electronic record-keeping standard for recordkeeping by private individuals and entities. To the extent applicable to the electronic storage of Forms I-9 , the DHS attempts to use the standards already established by other U.S. agencies. In addition, in recognition of the rapid development of the electronic storage mechanisms and methods, the DHS adopts "product neutral" standards and will guide the application of new products to meet minimum performance standards, rather than establishing specific requirements. [back]

H-1B Cap Met for Most but Not for Some...U.S. Advanced Degree...Higher Education...Chilean...Singaporean...Australian?

Although the U.S. Citizenship and Immigration Services (USCIS) announced on June 1, 2006,

that it has received a sufficient number of H-1B petitions to meet the congressionally mandated cap for fiscal year 2007 (FY 2007), options remain for some temporary professional workers.

If an individual holds at least a U.S. master's degree, he or she may be exempt from the cap until the government receives 20,000 U.S. advanced degree cases. Under the H-1B Visa Reform Act of 2004, the first 20,000 H-1B petitions filed on behalf of foreign nationals with U.S.-earned masters' or higher degrees will be exempt from any fiscal year cap on available H-1B visas. As of June 9, 2006, the USCIS has received approximately 7,324 cases for FY 2007. Accordingly, there still may be time to file for someone who holds a U.S. master's degree and to request an H-1B H-1B start date within FY 2007.

It is also important to remember that petitions for new H-1B employment are exempt from the annual cap if the foreign national will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or governmental research organization. Therefore, petitions for these exempt H-1B categories may be filed for work dates starting in FY 2006 or 2007.

While the H-1B cap numbers for individuals who do not possess U.S. advanced degrees has been reached, there are still H-1B1 numbers left for nationals of Chile and Singapore. (An H-1B1 is really the same as an H-1B but it is available only to nationals of Chile or Singapore.) Through May 2006, 301 H-1B1s were counted against the FY 2006 H-1B1 cap. The combined statutory limit is 6,800 per year. Based on the H-1B1 usage to date, the USCIS has projected that only 700 H-1B1 visa numbers will be used in FY 2006.

Australian nationals also have an H-1B-like category available to them. The E-3 category is available to those Australian citizens who will work in the U.S. in a specialty occupation (like the H-1B and H-1B1 category). Up to 10,500 E-3 visas are available to Australian professionals each fiscal year. In order to obtain an E-3 visa, the Australian national must apply directly at a U.S. Consulate/Embassy abroad after his/her employer has obtained an approved Labor Condition Application from the U.S. Department of Labor. Like the H-1B1s, it is unlikely that the cap will be reached for E-3 visas. [back]

DHS Proposes Regulation Setting Forth Guidance for U.S. Businesses when Receiving "No-Match" Letters from the Social Security Administration

The Department of Homeland Security (DHS) has proposed new rules that would change an employer's obligations for confirming a worker's employment authorization. Under the proposed rule, employers would be deemed to have "constructive knowledge" that an employee does not have employment authorization if: (1) the employer receives written notice from the Social Security Administration (SSA) that the combination of name and Social Security Number (SSN) submitted for an employee does not match SSA records ("no-match" letter) or (2) the employer receives written notice from the DHS that the immigration status or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the employment authorization document was assigned to anyone. A DHS finding that an employer possessed constructive knowledge that a worker is not authorized to work could result in fines or other penalties.

The proposed regulation also provides a safe harbor for employers who take reasonable steps within 14 days after receiving a no-match letter from the SSA:

- The employer should check its records to determine whether the discrepancy resulted from a typographical, transcribing or similar clerical error. If there is such an error, the

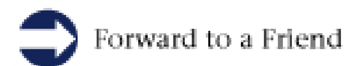
employer should correct its records, inform and verify with the relevant agencies that the discrepancy has been resolved and make a record of the manner, date and time of the verification.

- If the steps above do not resolve the discrepancy, the employer should request that the employee confirm the documentation provided to the employer and, if necessary, work with the DHS or the SSA to resolve any discrepancy.

If, within 60 days of the receipt of the no-match letter, the discrepancy is not resolved, and if the employee's identity and work authorization cannot be verified by the employer and employee, then the employer must choose between taking action to terminate the employee or face the risk that the DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien.

By following the safe harbor provisions in a timely fashion, an employer may avoid a DHS finding that, based on the totality of circumstances present in the particular case, the employer had constructive knowledge that the employee was not authorized to work in the United States.

Please note that the proposed regulations are now undergoing a period of public comment and could be changed in that process before being implemented. [back]



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