Breakout Sessions – Series 1

THE CONVERSATION CONTINUES

CHANGES IN EMPLOYMENT IMMIGRATION

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Employers encounter many compliance challenges with regard to employment eligibility verification. With U.S. Immigration and Customs Enforcement (ICE) investigations on the rise, addressing compliance issues in a timely and strategic manner can make all the difference. ICE’s Homeland Security Investigations (HSI) division uses a comprehensive worksite enforcement strategy that considers various factors including the level of cooperation and culpability to determine the final outcome for a company and its employees.

ICE is the federal agency charged with the enforcement of the employment verification provisions enacted by the Immigration Reform and Control Act (IRCA) of 1986. Its current strategy, according to Derek N. Benner, Acting Executive Associate Director for ICE’s Homeland Security Investigations (HSI) Division, is to focus on criminal prosecutions of employers that knowingly break the law and to use I-9 audits and resulting civil fines assessed against employers as tools to encourage compliance with the law.

HSI uses a three-prong approach to worksite enforcement:

1. Compliance - I-9 inspections, civil fines and referrals for debarment;
2. Enforcement - criminal arrest of employers, administrative arrest of unauthorized workers; and
3. Outreach – instill a culture of compliance and accountability, administration of ICE Mutual Agreement between Government and Employers (“IMAGE”).

The agency’s ultimate goal, if it can secure funding and support from the Trump administration, is to open as many as 10,000–15,000 audits a year and to instill in employers a “reasonable expectation” that they will be audited. “Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records. All industries, regardless of size, location and type are expected to comply with the law,” Benner said.

As the table below shows, ICE appears to be making good on its promise to increase enforcement efforts.

<table>
<thead>
<tr>
<th>Fiscal Year (FY)</th>
<th>Worksite Investigations</th>
<th>I-9 Audits</th>
<th>Criminal Arrests</th>
<th>Administrative Arrests</th>
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<tbody>
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<td>FY 2017</td>
<td>1,691</td>
<td>1,360</td>
<td>139</td>
<td>172</td>
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<tr>
<td>FY 2018</td>
<td>6,848</td>
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<td>779</td>
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A. I-9s and E-verify

E-verify is an important component of the U.S. immigration enforcement system. The E-Verify system compares the identity and work authorization information provided on Form I-9 with the information in the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. A flag raised by either database triggers a “tentative non-confirmation,” requiring the employee and employer to follow specific procedures to follow up with one agency or the other to identify and resolve the discrepancy. If the employee and employer cannot resolve the issue, the employer must terminate the new employee through a “final non-confirmation.”
U.S. Citizenship and Immigration Services (USCIS) is now equipped to detect unusual data or transaction patterns that may suggest E-Verify misuse. While USCIS, the agency that manages the E-Verify program, does not presently have enforcement authority to impose civil fines on employers for E-Verify misuse, the USCIS E-Verify Monitoring and Compliance Branch will alert companies of potential misuse and may even appear at the worksite to conduct “educational” site visits. USCIS has said that it is developing policy and guidelines to sanction employers for E-Verify non-compliance.

E-Verify is not yet mandated nationwide although several states have mandated its use under certain circumstances and many Federal contractors currently use it.

B. Ensuring I-9 Compliance Through Increased Audits

The employer sanctions laws were developed based on the belief that employers would voluntarily comply similar to the strong compliance regime associated with taxes and the Internal Revenue Service. For that reason, the system was developed with only a basic investigation mechanism, which is still in use today. First, ICE initiates an inspection through the service of a Notice of Inspection (NOI) upon an employer. The NOI explains that the employer must produce the Forms I-9 and, although under the statute employers are provided with three business days to produce the Forms I-9, ICE will often provide slightly more than this for document assembly and transmittal. It is also very common for the NOI to request additional documentation such as payroll records, a list of current employees, Articles of Incorporation, and business licenses.

Once the employer has turned over the documents, ICE agents or auditors review each form for compliance. When technical or procedural violations are found, pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Penalties for substantive violations, which includes failing to produce a Form I-9, range from $224 to $2,236 per violation. Under the fines matrix, the more violations a company has, the costlier each fine is. Fine amounts increase on a yearly basis according to the statutory formula in the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, effective date November 2, 2015. Currently, ICE utilizes the fine amounts derived from the increase last published in the Federal Register on April 2, 2018.

Employers determined to have knowingly hired or continued to employ unauthorized workers under INA § 274A(a)(1)(a) or (a)(2) (8 U.S.C. § 1324a(a)(1)(a) or (a)(2)) may be fined, and in certain situations criminally prosecuted. Monetary penalties for knowingly hiring and continuing to employ an unauthorized worker range from $559 to $22,363 per worker. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations. ICE can increase or decrease the civil fine.

C. Making Contact

ICE may initiate contact with an employer in a number of ways. The following notice types are the most common:

- Notice of Suspect Documents – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that an
employee is unauthorized to work. This Notice advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.

- Notice of Discrepancies – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish employment eligibility.

- Notice of Technical or Procedural Failures – identifies technical violations identified and provides ten business days to correct and return the forms. After ten business days, uncorrected technical and procedural failures are treated as substantive violations.

D. The Results of the Investigation

The following are the most common notices that ICE uses to notify the audited employer of the inspection results:

- Notice of Inspection Results – or "compliance letter," notifies the business that they are in compliance.

- Warning Notice – issued in circumstances where substantive verification violations were present, but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer. This Notice will often come with a tentatively scheduled inspection approximately 6 months in the future.

- Notice of Intent to Fine (NIF) – issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

When ICE serves a NIF, charging documents are provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a Final Order. If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ), and sends all parties a copy of a Notice of Hearing and government's complaint.

E. THE COST OF NON-COMPLIANCE

Many employers that are penalized for I-9 violations are fined for administrative/technical paperwork violations, in other words, errors on the I-9 forms. In fact, even if it is confirmed that a company has not hired illegal immigrants, a company may still be fined for poor record keeping and clerical errors. Audits are not necessarily about immigration; they are also about demonstrating to employers the importance of keeping good employment records. The fines assessed against employers continue to rise. But settlement amounts alone do not give a complete picture of the true financial loss to businesses in this situation. Businesses raided by ICE are usually labor-intensive and consistently report difficulty in quickly hiring replacement workers. The delays in a return to full production can cause higher costs and lost business. Some enforcement actions have even had the unintended effect of eliminating U.S. workers' jobs when the company could not rebound and ultimately closed.
F. ENFORCEMENT AT THE CRIMINAL LEVEL ON THE RISE

Until recently employers charged with violating prohibitions on unauthorized employment were accustomed to dealing with civil penalties and the administrative fines process but the possibility of criminal proceedings and asset forfeiture associated with violations has increased. In its shift from civil penalties to full-blown criminal prosecution, ICE most frequently uses the “harboring” provision under section 8 U.S.C. § 1324(a), which includes conspiracy and aiding and abetting. Prior to the enactment of the Immigration Reform and Control Act in 1986, there existed a statutory provision that exempted employment and its normal incidents from the definition of harboring. Now, although technically mere employment could be subject to the harboring provision, in most cases there are additional aggravating factors. ICE will look for evidence of the mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering and other such criminal conduct.

G. THE IMAGE PROGRAM

ICE announced the Mutual Agreement between Government and Employers (IMAGE) program in July 2006. The government’s stated goal for IMAGE is to assist employers to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training. ICE enrolls ‘exceptional’ employers that already have a fully compliant, audited and successful I-9 program, but seek a government “seal of approval.” IMAGE participants must follow 12 Best Hiring Practices, including use E-Verify; use the Social Security Number Verification Service (SSNVS) and make a good faith effort to correct and verify; establish a written hiring and employment eligibility verification policy; establish an internal compliance and training program; require the Form I-9 and E-Verify process to be conducted only by individuals who have received appropriate training, arrange for annual Form I-9 audits; report suspected criminal misconduct to ICE, Establish a program to assess contractors’ and/or subcontractors’ compliance; establish “no match” letter response protocol; establish a tip line; maintain anti-discrimination policies; keep identity and employment authorization document copies.

Employers find some of these best practices challenging to apply in practice. For example, there are varied opinions as to when an employer is legally obligated to notify the government of credible criminal misconduct in the employment eligibility verification process. Such decisions center around careful legal analysis of what obligation an employer has to report misconduct and when knowledge coupled with the failure to report could be viewed as a conspiracy. ICE provides IMAGE informational forums across the U.S. and publishes information about employers as they join the program.

H. WORKSITE INSPECTIONS BY USCIS

ICE is not the only agency authorized to conduct worksite inspections. USCIS may also conduct random, unannounced onsite employer inspections to verify the parameters attested to in an H-1B or L-1 petition (for example: job location, role, salary, etc.). Unlike an I-9 audit, cooperation with a USCIS worksite inspection is voluntary. USCIS does not have the authority to impose civil fines. That said, cooperation with onsite inspections is encouraged.

In the event of a USCIS worksite investigation:

1. Employers should designate an individual within the company to meet the inspector. The designated company representative should have access to immigration counsel and visibility on foreign national employment details and compliance documents (LCAs, job descriptions, payroll, etc.).
2. Employers should train receptionists and/or security personnel to alert the designated individual of auditor’s arrival.

3. The designated representative should escort the inspector during the visit.

4. The designated representative should consider engaging counsel to address any additional inquiries.

I. WHAT TO DO IN THE EVENT OF AN AUDIT

Given the agency’s goal to increase the number of companies it audits, regardless of size, location, or type, employers are encouraged to conduct internal reviews of their I-9 files and compliance processes, train hiring personnel on proper I-9 verification, correct any compliance deficiencies to the extent possible, and make sure employers know their rights in the event of a worksite visit.

Employers may also want to take proactive steps to develop policies and procedures to follow in the event of a worksite inspection so that they are better prepared to effectively assert their rights and protect their interests. Here are some considerations employers can keep in mind in the event of an ICE visit:

- Employers may ask ICE agents to identify themselves and obtain their names and business cards.

- If ICE has a search warrant, employers may ask to review the warrant. If there is no search warrant, ICE cannot enter the premises without the permission of an authorized representative.

- Upon ICE’s arrival, a company should consider notifying the appropriate corporate officer(s) and provide them with a copy of the search warrant. Time is of the essence because ICE is not required to wait for counsel to arrive before beginning its search.

- Employers should remember that if ICE demands to review I-9 forms, the agent must produce a notice of inspection (NOI) or an administrative subpoena and that ICE must give an employer at least 72 hours to turn over I-9 documents.

- If ICE serves a NOI or subpoena, an employer may want to notify the appropriate corporate officer(s) and provide them with a copy of that document. Again, time is of the essence because ICE tends to be strict with enforcing the 72-hour deadline.

- Employers may want to appoint a designated staff member to be the primary point of contact for the government agents conducting the investigation. Ideally, the designated staff member would be someone who is familiar with the employer’s immigration records and procedures so he or she can answer basic government questions. Employees can direct all inquiries and requests from ICE agents to the designated point of contact.

- An employer may deny ICE access to nonpublic areas of the employer’s property if ICE does not have a search warrant. In fact, employers in California are prohibited by state law from permitting ICE agents to access nonpublic areas without a warrant
and from sharing personnel records (including I-9 forms) with agents without a warrant, subpoena, or NOI.

- Employees are not required to give any statements to ICE officers. But if an employee is to be interviewed as a representative of the employer, the employer has the right to have counsel present during any such questioning.

- Employers may want to take detailed notes of all activities being performed by the visiting government officials. If ICE agents remove documents or items from the premises when executing a search warrant, employers may want to take notes of what was removed and request an inventory list from the ICE agent.

- ICE agents may not insist that an employer representative remain in a specific location or office unless ICE has detained or arrested that person based on probable cause or an arrest warrant. Thus, the employer representative may legally shadow the ICE agents as they execute the search warrant, so long as the representative does not actively interfere in the agent’s execution of the warrant.

ENFORCEMENT THROUGH INCREASED SCRUTINY OF VISA ELIGIBILITY

Compliance and enforcement efforts come in all forms. For instance, President Trump’s emphasis on the extreme vetting of visa beneficiaries and the elimination of visa fraud, has shifted USCIS toward immigration enforcement, something traditionally reserved for ICE. For instance, when reviewing extensions or amendments, USCIS no longer allows deference to prior adjudications, essentially treating every case as an initial filing and increasing the likelihood of a request for evidence (RFE) or denial.

Additional examples of immigration enforcement through increased agency scrutiny follow.

A. Enhanced Scrutiny of H-1B Visa Petitions

U.S. Citizenship and Immigration Services (USCIS) published a breakdown of the most common reasons it issued requests for evidence (RFEs) for H-1B petitions in fiscal year (FY) 2018. The list lends some context to USCIS reports showing that RFE and denial rates continue to climb under the Trump administration, especially for H-1Bs.

Specialty Occupation

The most common reason for an employer to receive an RFE in response to an H-1B petition was for failure to “establish that the position qualifies as a specialty occupation.”

In order to qualify for an H-1B visa, the petition must demonstrate to USCIS that the position sought is a specialty occupation by providing evidence that the job is one that requires not only the understanding and application of a highly specialized body of knowledge but also that it normally requires at least a bachelor’s degree, or its equivalent, in a particular specialty.

USCIS has narrowed its interpretation of what qualifies as a specialty occupation, often challenging positions with job duties that do not appear complex enough to require a bachelor’s degree or the equivalent. In other instances, USCIS will challenge how a specific degree relates to the role offered to the foreign national employee.
To overcome these challenges, USCIS recommends employers provide a detailed list of duties, roles, responsibilities, and educational and experience requirements necessary to perform the job. The job description should provide a link between the work performed and the educational requirements for the position.

USCIS will also consider industry-specific practices as proven by expert opinion statements provided by industry experts, as well as attestations from competitors concerning their hiring practice. The goal is to create a strong link, through objective evidence, between the job duties and the need for the degree.

**Employer-Employee Relationship**

USCIS also issued RFEs to petitioning employers that failed to “establish that they had a valid employer-employee relationship with the [H-1B] beneficiary.”

An employer must be able to demonstrate that it will maintain the right to control the H-1B beneficiary’s work for the duration of the requested period of employment. This is particularly important when the H-1B beneficiary will be placed at a third-party worksite. An employer may submit copies of the employment contract and/or offer letter detailing the terms and conditions of the employment as proof that it will maintain a valid employer-employee relationship with the H-1B beneficiary.

**Availability of Work (Off-Site)**

USCIS also issued RFEs to petitioning employers that failed to establish that the H-1B beneficiary, working at a third-party worksite, would be engaged in specific, non-speculative work assignments in a specialty occupation for the requested period of employment.

USCIS requires employers to prove that the H-1B beneficiary will be engaged in actual and ongoing work in a specialty occupation for the requested period of employment. The work cannot be anticipated or based on prospective contracts. To prove a steady workflow exists, an employer may provide copies of signed contracts, detailed work assignments, and work orders signed by end-user clients, among other things.

**Beneficiary Qualifications**

USCIS issued RFEs to petitioning employers that failed to “establish that the [H-1B] beneficiary was qualified to perform services in a specialty occupation.”

An employer must prove that the H-1B beneficiary has the required credentials to work in the specialty occupation. Generally, an employer must show that the H-1B beneficiary holds at least a bachelor’s degree in the specialty field or, in the alternative, the H-1B beneficiary has sufficient training, experience, or licensure to engage in the specialty occupation. If the H-1B beneficiary does not have a bachelor’s degree in the specialty field, an employer may consider getting a combined education and experience evaluation for a related field of study to corroborate the beneficiary’s qualifications to fill the position. USCIS also suggests that employers include a statement explaining how the unrelated degree relates to the job offered to the H-1B beneficiary.
Maintenance of Status

USCIS issued RFEs to petitioners that failed to establish that the H-1B beneficiary had “properly maintained [his or her] current status.”

This usually indicates that USCIS has identified an issue or deficiency in the H-1B beneficiary’s previous status. To resolve this issue, the beneficiary may provide copies of previous Forms I-94, Form I-797 approval notices, paystubs, employment verification letters, and travel itineraries, among other things.

Availability of Work (In-House)

USCIS issued RFEs to petitioning employers that failed to establish that they had specific, non-speculative work assignments in a specialty occupation for H-1B beneficiaries to be placed in-house for the entire period of requested employment.

The analysis for this reason is the same as that for off-site work, but it applies to H-1B beneficiaries who will work in-house.

LCA Corresponds to the Petition

USCIS also issued RFEs to petitioning employers that failed to “establish that they obtained a properly certified Labor Condition Application (LCA)” from the U.S. Department of Labor that corresponds to the position in question.

The LCA must properly correspond with the position offered to the H-1B beneficiary, specifically in regard to the job title and wage level selected by the employer. USCIS suggests that employers provide a detailed description of the skills, education and experience required to perform the job.

Itinerary

USCIS issued RFEs to petitioning employers that failed to submit a detailed “itinerary with a petition that requires services to be performed in more than one location. The itinerary must include the dates and locations of the services to be provided.”

An employer is required to submit an itinerary with its H-1B petitions documenting the dates and locations of the services to be provided, including all third-party worksites. While not required, a more detailed itinerary may also serve as evidence that the employer has non-speculative employment.

B. L-1 RENEWALS FOR CANADIAN CITIZENS

There have been an increasing number of reports that U.S. Customs and Border Protection (CBP) is refusing to process subsequent, or renewal, L-1 petitions presented by Canadian nationals at ports of entry (POEs) along the Canadian border. Applicants, both those seeking renewals stemming from L-1 blanket and individual petitions, are being told that they must present an approved Form I-129 petition from U.S. Citizenship and Immigration Services (USCIS) in order to be readmitted to the United States.
Despite long-established practice to the contrary, and without notice of the policy shift, CBP now appears to be taking the view that a request for a subsequent L-1 petition amounts to a request for an “extension,” which according to immigration regulations fall under the exclusive jurisdiction of USCIS. Because this viewpoint appears to distort the benefit that is actually being sought by the Canadian L-1 applicants, there does not seem to be a legal basis for CBP refusing to process the petitions at the POE.

Initial reports limited the refusals to POEs near Calgary and its surrounding land ports of entry, but in recent weeks, the list has grown to include more than numerous POEs and preclearance locations, including:

| Calgary International Airport | Edmonton International Airport | Montreal Trudeau International Airport | Ottawa MacDonald-Cartier International Airport | Pembina, ND | Point Roberts, WA | Seattle, WA | Sumas, WA | Toronto – Lester B. Pearson International Airport | Warroad, MN | Vancouver International Airport | Winnipeg International Airport |

Petitioning employers and Canadian L-1 applicants are encouraged to take precautions before travelling to a land port of entry or pre-clearance airport to request an L-1 renewal.

C. L-1 ELIGIBILITY – USCIS CLARIFICATION OF ONE-YEAR FOREIGN EMPLOYMENT

U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum clarifying how immigration officers determine if an L-1 visa candidate has satisfied the one year of foreign employment requirement.

The L-1 visa allows a U.S. employer to transfer an executive, manager or an employee with specialized knowledge from one of its qualifying foreign offices to one of its existing offices in the U.S., or to establish a new office in the U.S. Under current law, the L-1 employee must be able to demonstrate that “within 3 years preceding the time of his application for admission into the United States, [the foreign national] has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof.”

The policy memorandum focused on two main points:

1. The U.S. employer and the employee must meet all requirements, including the one year of foreign employment, at the time the petitioner files the initial L-1 petition. This means that the employee must have already hit the one year anniversary when the petition is filed. Brief trips to the U.S. do not interrupt the accrual of the one year, but must be recouped (if the employee travels to the U.S. for 30 days, they must add 30 days to their time working abroad).

2. The lookback period may be adjusted for individuals who were previously admitted to the U.S. to work for the U.S. employer in another status (such as H-1B, E-2, etc.). For example, if an employee spends December 1, 2017 through December 1, 2018 working for the U.S. employer in the United States in valid H-1B status, the lookback period is shifted such that the proper window is November 30, 2014 through November 30, 2017.
No such adjustments will be made for those who entered the U.S. in a dependent or student status (such as L-2, H-4, F-1, etc.) or to work for an unrelated employer.

Under the prior policy, employees satisfied the one year foreign employment requirement as long as they had accrued a full year by the time they were admitted into the United States. It is unclear whether this will be a problem for those seeking an L-1 extension since they did not meet all requirements at the time the petition was filed, as required under the new policy. It is also not clear whether the new policy applies to L-1 blankets.