Know the Procedural Ins and Outs to Avoid Immigration Pitfalls

by ROBERT F. LOUGHRAN and DUSTIN J. O'QUINN

The enforcement of immigration laws will continue to focus on terrorism and homeland security. There also will be enhanced governmental focus on site visits, audits, requests for additional evidence, and the interlinking of databases and information-sharing. Legal practitioners should advise employer-clients of these increased deterrence policies.

In its September 2008 H-1B Fraud and Compliance Assessment study, the U.S. Department of Homeland Security (DHS) asserts that more than 20 percent of H-1B specialty occupation worker petitions are fraudulent or contain technical violations of immigration law or policy. Consequently, we have seen an increase in government measures to counter the perceived fraud in applications for immigration benefits.

In accordance with the April 2009 guidance from Secretary Janet Napolitano found on DHS' Web site, investigators from U.S. Citizenship and Immigration Services (CIS) began appearing at employee work sites and employers' principal places of business last year to compare assertions made in immigration filings to the work status and working conditions of foreign national employees.

Additionally, over the past year, the U.S. Department of Labor (DOL) began issuing more labor certification application audits and denials, according to the April 2009-June 2009 "DOL Quarterly Performance Report."

In a labor certification application, the first step in the permanent residency application process, the employer attests that there are not sufficient U.S. workers who are able, willing, qualified and available to work. The employer also attests that the employment of a foreign national will not adversely impact the wages and working conditions of similarly employed U.S. workers. These attestations are proven via an employer's test of the job market, which includes placing advertisements for the position in print, electronic and other media. The DOL must review and approve the job market test in consideration of the application. Recently, the DOL has approved fewer tests of the job market and the number of government challenges (audits) have spiked dramatically, according to the Office of Foreign Labor Certification's "Selected Statistics on the Permanent Labor Certification Program" on the DOL's Web site.

Further, CIS officers who review applications for immigration benefits have always enjoyed broad discretion, as immigration regulations allow the government significant room in its decision to issue a request for additional evidence (RFE) or to immediately deny a petition. The harm to employers in this broad discretion lies in the CIS' frequent practice of issuing lengthy, cut-and-paste RFEs containing multipage boilerplate checklists, which increases the costs to the employer and extends the time before the employee can begin work. In some cases these burdensome RFEs could force the employee to depart the country to avoid accruing days or even months of "unlawful presence" in the United States.

The greatest impact of the new data-mining procedures is the speed at which employers will be exposed to liability for compliance errors.

E-Verify/Data Mining

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) legally enabled the E-Verify program, an Internet-based system operated by CIS in partnership with the Social Security Administration. It provides an electronic link to federal databases to compare and contrast existing data points on employees to determine discrepancies that may indicate employment ineligibility for newly hired employees.

Entities contracting with the federal government (and their subcontractors) are required to enroll in E-Verify. Further, some states have required that some or all of their employers enroll in E-Verify. Texas does not require any private employers to enroll, although many bills have been proposed and a gubernatorial candidate has made it a platform issue. One notable flaw in the system is that it cannot detect

identity theft where the information is consistent; it only identifies inconsistencies. Federal law is likely to require most, if not all, employers to enroll in E-Verify within the next two to three years. E-Verify has been a component of every immigration bill proposed over the past 12 months.

In the May 22, 2009, Federal Register, DHS announced that it was establishing a Compliance Tracing and Monitoring System (CTMS), a system of records that provides the government the opportunity to data mine the required information provided by employers enrolled in E-Verify.

DHS' verification division created the monitoring and compliance branch to detect and refer employers' proposed faulty or failed compliance practices to U.S. Immigration and Customs Enforcement (ICE). If and when CTMS analysts become aware of any perceived noncompliant behavior, they are to notify ICE special agents, who are empowered to conduct administrative and criminal investigations.

The greatest impact of these new data-mining procedures is the speed at which employers will be exposed to liability for compliance errors. Through E-Verify, ICE special agents have immediate access to employer records. They may already have begun an investigation before the employer is able to identify the mistake in its routine compliance review.

This is a reversal of the government's former laissez faire Employment Eligibility Verification environment, which resulted in paper I-9s being locked in cabinets with little chance of review by ICE investigators. The systems are now in place for every U.S. hire to be reviewed electronically by government computers, and suspicious activity kicked out to investigators.

E-Verify arose from the same legislative intent as the Immigrant in the National Interest Act of 1995 (INIA). The House Judiciary Committee's 1995 report states, "While most employers try to comply with the law, it is impossible for honest employers

to distinguish genuine documents from high-quality (but inexpensive) counterfeit ones." The INIA explicitly prohibits the employment verification system in place from becoming over-reaching or too powerful, and outlaws the program's use for any purpose other than to verify work eligibility, to receive certain government benefits or to enforce only criminal statutes related to document fraud.

However, this most recent alteration of the system's use for broad data mining amounts to a unilateral contractual modification of the memorandum of understanding that more than 120,000 employers previously have signed with DHS, as is required when enrolling in E-Verify. The program now is being used in direct opposition to the Judiciary Committee's original intent and exposes those employers enrolled in the program to criminal sanctions and civil penalties.

Legal practitioners should advise employer-clients that they should:

- never sign any immigration document without specific knowledge of the facts therein;
- never alter or tailor information outside the bounds of truth to support an immigration application;
- never rely on the guidance of counsel whose duties are to the employee over the employer;
- always treat the signature on any immigration document as importantly as if it was a tax return; and
- always retain experienced immigration counsel to assist in applications and to remedy compliance failure before ICE is contacted for an investigation. TNL

Robert F. Loughran is a partner in FosterQuan and managing partner of the firm's Austin office. He is board certified in immigration and nationality law and has nearly 20 years of experience representing and advising multinational companies on U.S. and global immigration law. Dustin J. O'Quinn is an associate with the firm's San Antonio and Austin offices.