IMMIGRATION COMPLIANCE ISSUES FOR EMPLOYERS

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I. U.S. IMMIGRATION LAWS

- The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, was created in 1952. Before the INA, a variety of statutes governed immigration law but were not organized in one location. The McCarran-Walter bill of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law.
- The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324, seeks to control illegal immigration by eliminating employment opportunity as an incentive for unauthorized persons to come to the United States, by prohibiting the hiring or continued employment of aliens who employers know are unauthorized to work in the United States. To comply with the law, all U.S. employers must verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986 by completing Employment Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States may face civil and criminal penalties.
- The Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. § 1325, sought to limit the practice of marrying to obtain citizenship by providing a penalty of five years imprisonment and a $250,000 fine for any "individual who knowingly

enters into a marriage for the purpose of evading any provision of the immigration laws."

- The Immigration Act of 1990 thoroughly revamped the INA by equalizing the allocation of visas across foreign nations, eliminating archaic rules, and encouraging worldwide immigration.
- The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 made further revisions to U.S. immigration laws, including the enactment of 3 and 10 year bars to admissibility for aliens "unlawfully present" in the US (those entering the US without any inspection or who overstay a nonimmigrant visa). Those aliens who are unlawfully present in the US for 180 days but less than a year are barred from being admitted in any legal status in the US for a 3-year period. Those who are unlawfully present in the US for more than a year are barred from being admitted in any legal status for 10 years. The most controversial provision of the bill which would have barred the school age children of illegal aliens from public schools was deleted.

II. U.S. IMMIGRATION AGENCIES

- On March 1, 2003, the Department of Homeland Security (DHS) opened, replacing the INS. The DHS is responsible for providing immigration-related services and benefits such as naturalization and work authorization as well as investigative and enforcement responsibilities for enforcement of federal immigration laws, customs laws and air security laws. The DHS's immigration regulations are codified in 8 C.F.R. §§ 100.1 *et seq.*

- Within DHS, there are three different agencies - U.S. Customs and Border Enforcement (CBE), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) – which now handle the duties formerly performed by the U.S. Immigration and Naturalization Service (INS).
- Currently, the CBE handles the INS's border patrol duties, the USCIS handles the INS's naturalization, asylum, and permanent residence functions, and the ICE handles the INS's deportation, intelligence, and investigatory functions.
- The U.S. Department of Justice (DOJ), Civil Rights Division, Office of Special Counsel for Unfair Immigration-Related Practices (UIREP) enforces the anti-discrimination provisions of INA § 274B, 8 U.S.C. § 1324b.
- The U.S. Department of State (DOS), Bureau of Consular Affairs, through its "overseas" Consular Officers, is responsible for issuing immigrant and non-immigrant visas to foreign visitors (i.e., aliens) in accordance with the INA and applicable regulations. The Bureau of Consular Affairs supports over 11,000 people located in more than 300 places around the world, including 21 domestic passport facilities and two regional visa processing centers.
- The U.S. Department of Labor (DOL) also has various roles in the visa process including overseeing the PERM labor certification process for the permanent employment of aliens in the United States, and the certification process for the employment of Temporary Agricultural Workers (H-2A), Temporary Non-Agricultural Workers (H-2B), Professional and Specialty Occupation Workers

(H-1B, H-1B1 and E-3), Registered Nurses (H-1C) and Crewmembers (D-1) non-immigrant classifications.

III. IMMIGRANT AND NON-IMMIGRANT VISAS

Under the INA, there are two types of visas: immigrant visas and nonimmigrant visas.

A. Immigrant Visas

Immigrant visas (or "green cards") permit their holders to stay in the United States permanently and eventually to apply for U.S. citizenship. Aliens with immigrant visas can also work in the United States.

Section 201 of the INA sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits (i.e., 25,620). The dependent area limit is set at 2%, or 7,320.

1. Family-Sponsored Preferences

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

- **A. Spouses and Children**: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;
- **B. Unmarried Sons and Daughters (21 years of age or older)**: 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

2. Employment-Based Preferences

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences. This preference includes (i) Persons of extraordinary ability in the sciences, arts, education, business, or athletics; (ii) Outstanding professors and researchers with at least three years experience in teaching or research, who are recognized internationally; and (iii) Certain executives and managers who have been employed at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

B. Non-Immigrant Visas

Non-immigrant visas are issued to tourists, students and temporary business visitors. U.S. immigration law divides non-immigrant visas into 18 different types, but for most types, does not impose a cap on the number that may be granted in a year with the H-1B classification for Professional and Special Occupation Workers being the most notable exception with an annual cap of 65,000.

The non-immigrant classifications include the following temporary visas:

- B-1/B-2 Temporary Business Visitors/Tourists
- E-1/E-2 Treaty Traders and Investors
- F-1 Academic Students
- H-1B Specialty Occupations/DOD Workers
- H-1C Registered Nurses
- H-2A Temporary Agricultural Workers
- H-2B Temporary/Seasonal Workers (Skilled/Unskilled Labor)
- H-3 Trainees
- J-1 Exchange Visitors
- K-1 Fiancés/Fiancées
- L-1 Intra-Company Transfers
- M-1 Vocational Students
- O-1 Individuals of Extraordinary Ability in Sciences, Arts, Education, Business, or Athletics
- P-1 Artists, Athletes and Entertainers
- Q-1 International Cultural Exchange Visitors
- R-1 Religious Workers
- TN Trade NAFTA Visas for Canadian & Mexican Citizens

C. **The Visa Waiver Program**

The Visa Waiver Program (VWP) enables nationals of 35 participating countries to travel to the United States for tourism or business (B-1/B-2 visitor visa purposes only) for stays of 90 days or less without obtaining a visa. The program was established in 1986 with the objective of eliminating unnecessary barriers to travel, stimulating the

tourism industry, and permitting the DOS to focus consular resources in other areas. VWP eligible travelers may apply for a visa, if they prefer to do so.

Nationals of VWP countries must meet eligibility requirements to travel without a visa on VWP, and therefore, some travelers from VWP countries are not eligible to use the program. VWP travelers are required to have a valid authorization through the Electronic System for Travel Authorization (ESTA) prior to travel, are screened at the port of entry into the United States, and are enrolled in the DHS's "US-VISIT" program.

IV. FORM I-9; E-VERIFICATION; SSN NO-MATCH LETTERS

A. Overview of Employment Authorization Verification

In order to comply with IRCA, 8 U.S.C. § 1324, 8 C.F.R. §§ 274a.1 *et seq.*, all U.S. employers must verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986 by completing Employment Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States may face civil and criminal penalties. A copy of the current version of Form I-9 is attached hereto as Exhibit A and is also available for download on the USCIS's website at www.uscis.gov.

All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual and record the document information on the Form I-

9. The list of acceptable documents can be found on the last page of the form.

The USCIS's Handbook For Employers (Instructions for Completing Form I-9)(M-274) provides a valuable reference source for employers concerning the completion of Form I-9, a copy of which can be downloaded from the USCIS's website at www.uscis.gov.

B. Inspections and Penalties

Both ICE and the DOL inspect employers to ensure compliance with the I-9 requirements. Do not file Form I-9 with ICE or the DOL. Form I-9 must be kept by the employer either for three years after the date of hire or for one year after employment is terminated, whichever is later. The form must be available for inspection by authorized U.S. Government officials from ICE and the DOL.

1. ICE Inspections

Formed in 2003 as part of the federal government's response to the 9/11 attacks, ICE's is the largest investigative agency in the DHS . ICE has developed what it considers to be a comprehensive worksite enforcement strategy that promotes national security, protects critical infrastructure and ensures fair labor standards. The Worksite Enforcement Unit's stated mission encompasses enforcement activities intended to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation's critical infrastructure.

In July 2009, ICE announced that it had issued Notices of Inspection to 652 businesses nationwide, thereby initiating a new effort to audit and inspect employers' hiring records to determine whether they are complying with IRCA employment verification obligations. Accordingly, it appears that the current Administration will now

focus more ICE resources on investigating employers that fail to comply with their IRCA employment verification obligations.

2. Record-Keeping Penalties

Penalties for record keeping violations range from $110 to $1,100 per each paperwork occurrence per employee regardless of the number of prior offenses for which the employer has been cited. Each mistake on the I-9 Form is considered to be a separate violation.

3. Unauthorized Worker Penalties

Penalties for knowingly employing an unauthorized alien range from $375 to $3,200 per each unauthorized worker for the first offense; from $3,200 to $6,500 for the second offense; and from $4,300 to $16,000 for each subsequent offense. Criminal penalties of up to $3,000 in fines per each unauthorized worker and imprisonment of up to six months for the entire violation are possible where a "pattern or practice" of knowingly employing unauthorized workers is demonstrated.

4. UIREP Penalties

The anti-discrimination provisions of INA § 274B, 8 U.S.C. § 1324b, prohibit citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with four or more employees. Employers may not treat individuals differently because they are, or are not, U.S. citizens. U.S. citizens and nationals, recent permanent residents, asylees and refugees are protected from citizenship status discrimination.

Section 1324b also prohibits national origin discrimination with respect to hiring,

firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees. All individuals eligible to work in the United States – including citizens, nationals, immigrants, and temporary work visa holders -- are protected from national origin discrimination. (The Equal Employment Opportunity Commission has national origin jurisdiction over employers with 15 or more employees.)

In addition, section 1324b prohibits unfair documentary practices related to verifying the employment eligibility of employees. Employers may not, on the basis of citizenship status or national origin, request more or different documents than are required to verify an individual's employment eligibility and identity, reject reasonably genuine-looking documents, or specify certain documents over others. All work authorized individuals are protected from document abuse.

Finally, the anti-discrimination provision prohibits employer retaliation against individuals who file charges with OSC, cooperate with investigations under section 1324b, contest action that may violate the statute, or otherwise assert their rights under the statute.

Employers found to have engaged in UIREPs may be subject to penalties ranging from $275 to $2,200 per each individual discriminated against for the first offense; from $2,200 to $5,500 for the second offense; and from $4,300 to $16,000 for each subsequent offense. In addition, back pay for a period of up to two years from date of filing of the complaint may be issued, together with attorneys' fees if the losing parties' claims or defenses are "without a reasonable foundation in law and fact."

An employer which demands more documents than the law requires or rejects

documents that "on their face appear to be genuine" may be subject to civil penalties ranging from $110 to $1,100 per individual discriminated against.

C. Recent Form I-9 Revisions

The current version of the recently revised Form I-9 is marked with a revision date of "Rev. 08/07/09." The revision date can be found on the lower right hand corner of the form. (See Exhibit A).

The "02/02/09" edition of Form I-9 is also still being accepted. The revised Form I-9 reflects the USCIS's efforts to streamline the Employment Eligibility Verification (Form I-9) process by issuing the following new rules:

- Narrows the list of acceptable identity documents and further specifies that expired documents are ***not*** considered acceptable forms of identification.

- Adds foreign passports to List A which contain specially-marked machine-readable visas and documentation for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI).

D. Completing the I-9 Form

Section 1 of Form I-9, on which the employee states whether he or she is a U.S. citizen, permanent resident or alien authorized to work, must be completed and signed on the first day the employee reports for work. Section 2 of the form, on which the employer records which documents were presented by the employee to evidence his or her status, must be completed within three days of the employee commencing work.

The following are some points to keep in mind when completing Form I-9:

- An applicant should not be asked to complete Form I-9 prior to the offer of employment. Form I-9 provides information on

citizenship, national origin and visa status which could serve as a basis for a claim of discrimination if the applicant is not hired.

- Section 1 of Form I-9 must be completed and signed by the employee on the date the employee commences work. Any translator or person preparing Section 1 for the employee must also sign the form.

- Review Section 1 to make sure that it was properly completed. Make certain that the employee has indicated whether he or she is a U.S. citizen, a lawful permanent resident, or an alien authorized to work in the U.S., and provided his or her "A" number and employment authorization expiration date, as appropriate.

- Review the information provided in Section 1 against the documents that are produced for Section 2 for consistency. The employee should be given an opportunity to correct Section 1 if there is a discrepancy.

- Do not ask for any document to substantiate the information in Section 1.

- Section 2 of the form must be completed within 3 business days of the commencement of employment. An employee who is unable to provide a document but can provide a filing receipt showing that the document has been applied for, must be given 90 days to produce the actual document, provided that the employee already has current employment authorization.

- Make certain that the document title, identity of the issuing authority, document number, and expiration date (if any) are entered in Section 2.

- Make certain that the person reviewing the documents presented by the employee signs and completes the lower part of Section 2.

- A Form I-9 must be completed for every employee and for each independent contractor. The burden of I-9 compliance can be shifted by contract to an entity providing individual contractors.

- Do not ask for any particular document for completing Section 2 of Form I-9.

- The employer should accept any document specified on Form I-9, provided that it appears genuine and relates to the employee.

- Do not ask for another document to confirm the expiry date of work authorization.

- Do not consider the expiration date of work authorization in making the hiring decision.

- Review the documents that are provided to make sure that they are on list of approved documents for Section 2. Also review the documents to assure that they are genuine, relate to the employee, and are consistent with other information about the employee.

- The employer is not required to be a document expert. The I-9 Handbook does not contain every variation of every document that can be submitted. If a document is one of the approved documents, and does not appear to have been tampered with or to be forged, the employer should accept it.

- The employer is not required to make copies of the documents which are produced for Section 2. While there are certain advantages to not making copies of these documents, on balance it seems preferable to make copies and keep them paper clipped to the I-9.

- Establish a reminder system file for reverifying I-9s showing that employment authorization will expire at a certain date. The employee should be reminded of the need to renew his or her employment authorization at least 120 days prior to expiration of the current employment authorization.

- Follow the same I-9 procedures for all employees.

- Remember that the employer must retain the I-9 **for the longer of** three years from the date of hire or one year after termination of the employment relationship. The employer must have an I-9 on file for all current employees other than employees hired prior to November 6, 1986.

E. Acceptable I-9 Verification Documents

When employees are given a Form I-9, they should be asked to provide **either** one document from List A (identity and employment eligibility) **or** one document from each of Lists B (identity) and C (employment eligibility). Again, it is important to

emphasize that an employer should not ask an employee to provide any particular document (e.g., green card) for completing Section 2 of Form I-9. As stated above, an employer must accept any document specified on Form I-9, provided that it appears genuine and relates to the employee. Attached as Exhibit B are relevant pages from the USCIS's Handbook For Employers (Instructions for Completing Form I-9) which contain photographs of acceptable I-9 verification documents.

The following shows the documents that are currently acceptable, as well as the List A documents which have been deleted:

List A (Documents that establish both identity and employment eligibility)

- United States Passport or Passport Card
- Permanent Resident Card ("green card") or Alien Registration Receipt Card (I-551)
- Employment Authorization Document (I-766)
- Foreign Passport with temporary I-551 stamp
- For aliens authorized to work only for a specific employer:
- Foreign Passport with Form I-94 authorizing employment with this employer
- Passport from the FSM or the RMI with Form I-94/FormI-94A indicating admission under the Compact of Free Association between the USA and the FSM or RMI

Prior List A documents which have been eliminated:

- Permanent Resident Card (Form I-151) is not acceptable evidence for employees hired on, or after, March 21, 1996
- Certificate of United States Citizenship, Form N-560 or N-561
- Certificate of Naturalization, Form N-550 or N-570

- Re-entry Permit, Form I-327
- Refugee Travel Document, Form I-571
- Temporary Resident Card (I-688)
- Employment Authorization Document (I-688B or I-688A)

List B (Documents that establish identity only)

- Driver's license with photo or identifying information (name, DOB, height, weight, etc.) issued by a state or outlying USA possession
- Identification card with photo or identifying information (name, DOB, height, weight, etc.) issued by federal, state or local agencies or entities
- ID card issued by a state or outlying possession
- School identification card with a photograph
- United States military card or draft record
- Voter's Registration Card
- Military dependent's identification card
- United States Coast Guard Merchant Mariner Card
- Native American tribal document
- Canadian driver's license or ID card with a photograph
- School record or report card; daycare or nursery school record; or clinic doctor or hospital record *(for individuals under age 18 who are unable to produce any of the above-listed identity document)*

List C (Documents that establish employment eligibility only)

- Social Security account number card without USA employment restrictions
- Native American tribal document

- Certification of Birth Abroad issued by the Department of State, Form FS-545
- Certification of Report of Birth issued by the Department of State, Form DS-1350
- Original or certified copy of birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal
- Native American tribal document
- United States Citizen Identification Card, INS Form I-197
- Identification card for use of a resident citizen in the United States, INS Form I-179
- Employment authorization documents issued by INS *other than those listed under List A*

F. Reverification of I-9 Documents and Employees

Employers are required to reverify the employment authorization of an employee whose List A or List C employment authorization document expires. The employer should either use Section 3 of the original Form I-9 or prepare a new Form I-9, including Section 1. The employer should establish a reminder system for the employee to file an application to renew his/her work authorization well in advance (120 to 180 days) of the expiration date of the current document because of the time taken by the USCIS to issue new documents.

It should be noted that the obligation to reverify List A and List C documents does **not** extend to Form I-551 Alien Registration Receipt Cards or Permanent Resident Cards. USCIS and the Department of Justice Office of Special Counsel (which enforces the anti-discrimination provisions of the IRCA) take the position that while these cards may expire, the beneficiary's status as a Lawful Permanent Resident continues so long as

he or she remains a resident of the United States and, therefore, does not need to be reverified. Form I-551 must have been valid at the time it was originally submitted as evidence of employment authorization.

The following List A documents which must be reverified:

- Foreign passport with I-551 stamp or Form I-94 or Form I-94A which contain an employment authorization expiration date.
- Employment Authorization Card (Form I-766).

The other List A documents, United States Passports or Passport Cards, Alien Registration Receipt Cards/Permanent Resident Cards (Form I-551), or a List B document should **not** be reverified.

The following List C documents must be reverified: Employment authorization documents issued by DHS which are time limited and not listed on List A. The other List C documents should **not** be reverified.

G. E-Verify System

E-Verify is an Internet-based system that allows an employer, using information reported on an employee's Form I-9, to determine the eligibility of that employee to work in the United States. For most employers, the use of E-Verify is voluntary and limited to determining the employment eligibility of new hires only. There is no charge to employers to use E-Verify. The E-Verify system is operated by the DHS in partnership with the Social Security Administration (SSA).

As of September 8, 2009, employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause are required to use E-Verify to determine the employment eligibility of:

- Employees performing direct, substantial work under those federal contracts
- New hires organization wide-regardless of whether they are working on a federal contract

A federal contractor or subcontractor who has a contract with the FAR E-Verify clause also has the option to verify the company's entire workforce.

The new rule implements Executive Order 12989, as amended on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. The amended Executive Order is intended to reinforce the policy, first announced in 1996, that the federal government does business with companies that have a legal workforce. This new rule requires federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States.

Federal contracts awarded and solicitations issued after September 8, 2009 will include a clause committing government contractors to use E-Verify. The same clause will also be required in subcontracts over $3,000 for services or construction. Contracts exempt from this rule include those that are for less than $100,000 and those that are for commercially available off-the-shelf items. Companies awarded a contract with the federal government will be required to enroll in E-Verify within 30 days of the contract award date. They will also need to begin using the E-Verify system to confirm that all of

their new hires and their employees directly working on federal contracts are authorized to legally work in the United States.

The final rule reflects some changes from the proposed rule that are designed to lighten the burden on small businesses who decide to accept federal contracts, and to provide contractors with flexible means of complying with the basic requirement that all persons working on federal contracts be electronically verified.

An employer can register for E-Verify at www.vis-hs.com/EmployerRegistration, which provides instructions for completing the registration process.

H. "No-Match" Letters

Every year the SSA informs thousands of employers via a letter entitled "Employer Correction Request," commonly known as "No-Match" letters, that the Social Security numbers employers provided on W-2 Forms for certain employees do not match SSA's records. An employer should take reasonable steps to resolve the mismatch, and apply these reasonable steps uniformly to all employees referenced in the enclosed SSA letter.

When SSA processes wage reports, it notifies every worker whose name and SSN could not be matched to SSA's records. The "No-Match" letter is sent to the address on the worker's Form W-2. If there is no address or an address is not found in the Postal Service database of valid addresses, this letter is sent to the employer.

Approximately two weeks after the release of the worker letters, SSA sends employer "No-Match" letters. The employer notice advises of the no-matches and asks

for corrected information. SSA began sending "No-Match" letters to workers in 1979 and to employers in 1994.

In August 2007, the DHS and SSA promulgated a Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a 'No-Match' Letter." Under the former "safe harbor" rule, a "reasonable" employer who receives a "No-Match" letter from the SSA was not deemed to have "constructive knowledge" that an employee is an unauthorized worker if the employer took the following steps:

1. Within 30 days of receipt of the "No-Match" letter, the employer would have had to:

    a. Check the employer's records to determine if the discrepancy is because of a typographical, transcribing or similar clerical error in the employer's records or in its communication to the SSA or DHS. If there is an error, the employer should correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records (either over the phone or by using the Internet); and

    b. If the employer's records are accurate, the employer was advised to "promptly" ask the employee to confirm that the information the employer has in its records is correct. DHS defines "promptly" as immediately upon receipt of the "No-Match" letter or within 5 business days of the employer completing the internal review.

    c. If the employee provides corrected information, the employer was advised to correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records.

    d. If the employer's own records are correct, the employer should ask the employee to resolve the discrepancy with the relevant agency within 90 days of the receipt of the "No-Match" letter to the employer**.**

2. If the discrepancy was not resolved within 90 days of receipt of the "No-Match" letter, the employer had the option to reverify the employee's employment

eligibility and identity by completing a new Form I-9. The employer and employee would have had 3 additional days to complete this form (or which must have been completed within a total of 93 days of receipt of the "No-Match" letter). An employee was to have been prohibited from using a document containing the SSN or "alien number" that is the subject of the "No-Match" letter to establish employment eligibility, or identity, or both.

In the August 2007 final rule, the regulations suggested that in all instances the employer should make a record of the manner, date, and time of the verification and store such record with the employee's Form I-9. The 2007 rule also encouraged employers to document telephone conversations as evidence that the discrepancy is corrected. The supplemental proposed rule and the 2008 final rule, however, stated that employers were not required to make or keep new records as a result of the "safe harbor" rule.

The "safe harbor" rule has never been implemented in light of a preliminary injunction issued by the United States District Court for the Northern District of California. *AFL–CIO* v. *Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

As a result of that litigation, DHS also issued a supplemental proposed and final rule providing to address specific issues raised by the court. *See, e.g.*, 73 Fed. Reg. at 15944 (Mar. 26, 2008) (supplemental proposed rule), 73 Fed. Reg. at 63843 (Oct. 28, 2008) (supplemental final rule). Neither the supplemental nor 2008 final rules, however, changed any regulatory text.

The DHS subsequently amended its regulations by rescinding the amendments

promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor from receipt of "No-Match" letters. See Final Rule: "Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission," 74 Fed. Reg. at 51447-52 (Oct. 7, 2009).

V. RECENT DEVELOPMENTS IN IMMIGRATION LAW

A. Temporary Protected Status For Haitian Nationals

The USCIS has announced that eligible Haitian nationals in the United States may file for Temporary Protected Status (TPS). DHS Secretary, Janet Napolitano, has determined that an 18-month designation of TPS for Haiti is warranted due to the devastating earthquake and aftershocks which occurred on January 12, 2010. As a result of the earthquake, Haitians who live in the United States are unable to return safely to their country. DHS has announced that it will continue to work with other branches of the U.S. Government to closely monitor developments in Haiti to determine the need for additional action.

The USCIS will process applications for TPS filed by nationals of Haiti (and other individuals without nationality who last habitually resided in Haiti). DHS estimates that approximately 100,000 to 200,000 individuals will be eligible for TPS.

To qualify, a person must:

- Be a national of Haiti, or a person without nationality who last habitually resided in Haiti.
- Have continuously resided in the United States since January 12, 2010.

- Have been continuously physically present in the United States since the date of the Federal Register Notice publication, which will be January 21, 2010.

- Meet certain immigrant admissibility requirements, and other TPS eligibility requirements (See INA § 244(c), 8 U.S.C. § 1254a and 8 C.F.R. §§ 244.2 - 244.4)

- Satisfactorily complete all TPS application procedures as described in the Federal Register notice announcing Haitian TPS, the TPS application instructions (Form I-821), and regulations at 8 C.F.R. §§ 244.6 - 244.9.

TPS applicants may file for employment authorization on Form I-765. The USCIS will review the TPS application to make a preliminary assessment of the applicant's eligibility for TPS. If eligible, the applicant's employment authorization application (Form I-765) will be approved and an EAD will be mailed to him/her. A TPS applicant may present a valid EAD to an employer as proof of employment authorization and identity. They may also present any other legally acceptable document or combination of documents listed on the Form I-9 as proof of identity and employment eligibility.

B. DHS 2011 Budget Requests for Immigration Law Matters

E-Verify: A total of $103.4M is requested for the E-Verify Program. In FY 2011, USCIS will develop and implement an E-Verify portal that will provide a single-user interface for the program's products and services. In addition, USCIS will enhance E-Verify's monitoring and compliance activities through analytical capabilities that will support more robust fraud detection and improved analytic processes and will continue developing system enhancements in response to customer feedback, surveys, mission requirements and capacity needs.

Secure Communities: Total funding of $146.9M is requested to continue FY 2010 progress toward nationwide implementation of the Secure Communities program—which involves the identification, apprehension and removal of all Level 1 criminal aliens in state and local jails through criminal alien biometric identification capabilities.

Immigrant Integration: A total of $18M is being requested to fund USCIS Office of Citizenship initiatives, including expansion of the competitive Citizenship Grant Program to support national and community-based organizations preparing immigrants for citizenship, promote and raise awareness of citizenship rights and responsibilities, and enhance English language education and other tools for legal permanent residents.

C. Pending 2010 Immigration Reform Legislation

On December 15, 2009, Congressman Luis V. Gutierrez (D-IL) introduced legislation (HR 4321) to reform U.S. immigration laws entitled "The Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009" (CIR ASAP). The following is a summary of the bill's contents:

Border Security: The bill would create a Southern Border Security Task Force that is composed of federal, state, and local law enforcement officers with oversight and accountability provided by DHS.

Enforcement: The bill would repeal the Section 287(g) program, a provision of immigration law relating to cooperation between state and local enforcement agencies and ICE, and clarifies that the authority to enforce U.S. immigration law lies solely with the federal government.

Judicial Review: The bill would restore provisions providing for judicial review of immigration proceedings that were repealed from the law by 1996 legislation.

Legalization: The bill would create a program providing conditional nonimmigrant status for undocumented immigrants (and their spouses and children) in the U.S., which is valid for 6 years. An undocumented immigrant must establish his/her presence on or before December 15, 2009, ass a criminal background check, learn English and U.S. civics and pay a $500 fine (plus necessary application fees) in order to obtain a 6-year visa. After the 6-year term has expired, the undocumented alien is also eligible to adjust his/her status from conditional nonimmigrant to lawful permanent resident status (i.e., "green card") and ultimately U.S. citizenship.

Visa Reforms: The bill would reduce the existing backlog by permitting "recapture" of unused employment-based visas and family sponsored visas from fiscal years 1992-2008 and allows future unused visa numbers to roll over to the next fiscal year. The bill would increase the number of employment-based green cards from 140,000 to 290,000 per year. To promote family unity, the bill would reclassify the spouse and children of U.S. permanent residents and treats them the same as the spouses and children of citizens, exempting them from the annual immigration cap.

D. Proposed 2009 DREAM Act

The Development, Relief, and Education for Alien Minors (DREAM) Act of 2009, a bill introduced by Senator Richard Durbin (D-IL) and Congressman Howard Berman (D-CA) on March 26, 2009, would provide qualified undocumented students with a conditional path to U.S. citizenship. After meeting certain provisions and

completing two years of college within a six-year period, students will become eligible for permanent citizenship. In addition, the Act amends IRCA, permitting states to determine state residency in order to offer immigrant students in-state tuition rates.