

# Immigration and Employment Law in 21st Century America – Parallel Universes Coming Together

***By Angelo A. Paparelli and Lily S. Hense'***

American attorneys practicing employment law and their counterparts in the field of immigration inhabit the same country and cover overlapping legal terrain. Their shared turf is the employment relationship. Yet for many practitioners, the other's domain is *terra incognita*. While employment attorneys and immigration lawyers operate in parallel universes, their encounters with one another often reflect a timidity born of a fear – a fear of the unknown – as if coming too close to the other's practice area might risk being sucked into the vortex of a black hole.

On closer analysis, however, the two groups share a number of common attributes:

- Whether representing management or labor, they tend to encounter the same people in the Human Resources and Legal Departments.
- Their professional lives are set against the ever-present backdrop of litigation, dealing with common issues involving avoidance of conflict of interest, the scope of legal representation, and government regulation (some would say, overregulation) of the employment relationship.
- Their specialty areas of law are both code-based and, to an increasing degree, administrative, with bureaucratic guidance made available through policy memoranda issued sporadically by a variety of government agencies, and sometimes by press release.
- Ultimately, they both provide legal advice that helps shape the legal relationship between and among business entities and their employees.

If the near-term past is any guide – with news of employer investigations and immigration raids regularly emblazoned on the front pages and home pages of the nation's newspapers and blogs – the future suggests that employment attorneys and immigration lawyers ought to be better acquainted. Indeed, they should become allies. Increasingly, these specialty areas intersect in many significant ways, particularly as the HR imperatives of “global mobility management” create collaborative opportunities for both practice areas, and the U.S. and state governments introduce and enforce greater worker protections and stricter limits on employer conduct in the immigration space.

This article will try to bridge the great divide by presenting employment attorneys with information concerning basic principles of work-related immigration law and the immigration consequences of a

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variety of employment decisions. The article will alert employment attorneys to potential actions by management or employees that may trigger adverse immigration consequences and suggest ways to limit or minimize liability or negative, unintended results affecting the work force and the employment relationship.

### ***A Word of Caution: The Maze of Immigration Laws Governing Employment Authorization for Foreign Nationals Is Perplexing and Perilous***

The laws governing the employment of foreign-national workers by U.S. employers are intricate, overlapping and complex. Tax, labor, pension, and civil rights laws dealing with these employees are just a few of the disciplines that corporations and their employment lawyers must consider. This patchwork of intersecting laws becomes even more complex and confusing when federal regulation of foreign workers and their American employers is included in the mix.

Immigration law has been characterized as confusing and inscrutable by several knowledgeable authorities. A USCIS spokeswoman has called it “a mystery and a mastery of obfuscation.”<sup>2</sup> Courts have likened its complexity to King Minos’s labyrinth in ancient Crete, describing it as “a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government” and the regulated community alike.<sup>3</sup>

Congress in its wisdom has conferred substantial authority on several federal agencies to administer and enforce various provisions of U.S. immigration law that affect employers and foreign workers.

Within the Department of Homeland Security (DHS), three primary agencies exercise overlapping jurisdiction in immigration matters:

- U.S. Citizenship and Immigration Services (USCIS) – which grants or denies requests for immigration benefits such as work permits, work-visa status and employment-based permanent residence;
- U.S. Customs & Border Protection (CBP) – which confirms immigration status or refuses requests to be admitted to the U.S. at ports of entry; and
- U.S. Customs & Immigration Enforcement (ICE) – whose officers serve as the interior enforcers of the immigration laws.

Under the Department of State (DOS), two relevant units regulate in the immigration field:

- The Visa Office, within the Bureau of Consular Affairs in Washington, D.C. – which drafts immigration regulations and issues legal rulings through its Advisory Opinion division, and

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<sup>2</sup> U.S. Citizenship and Immigration Services spokeswoman, Karen Kraushaar, quoted in the *Washington Post*, April 24, 2001 Metro Section, in an article entitled “[Maryland] Family Ensnared in Immigration Maze – After Changes in Law, Couple Faces Deportation.”

<sup>3</sup> *Drax v. Reno*, 338 F.3d 98, 99-100 (2d Cir. 2003).

- U.S. consular officers at American embassies and consular posts abroad – who interview visa applicants, make binding determinations of fact questions, and issue or refuse temporary (nonimmigrant) and permanent (immigrant) visas, while operating under authority conferred by DHS in a Memorandum of Understanding with the DOS.

At the Department of Labor (DOL), two relevant units reign over immigration matters:

- The Employment and Training Administration (ETA) – which develops regulations, certifies employer attestations on wages, benefits and working conditions in Labor Condition Applications, and oversees labor market tests to determine U.S. worker availability in PERM labor certification applications; and
  - The Employment Standards Administration (ESA) – which operates through the Wage and Hour Division (WHD) to develop regulations and audit employer compliance with immigration-related worker protections and paperwork requirements.

Lastly, the Department of Justice (DOJ) plays an important role:

- The Executive Office of Immigration Review (EOIR) is comprised of Immigration Judges (IJs) who preside over removal (deportation) hearings, adjudicate applications for relief from removal and confer immigration benefits such as asylum and adjustment of status to lawful permanent resident and the Board of Immigration Appeals (BIA) whose panels hear appeals of IJ decisions;
  - The Office of the Chief Administrative Hearing Officer (OCAHO) whose Administrative Law Judges hear civil cases involving claims under the I-9 and antidiscrimination provisions of the INA; and
    - The Office of Special Counsel for Unfair, Immigration-Related Employment Practices (OSC) who enforce the laws prohibiting discrimination on the basis of citizenship (and as to smaller employers) and national origin and prosecute employers before OCAHO's Administrative Law Judges.

### ***Employment-based Immigration Sponsorship***

Congress has created a befuddling array of some 40 or so categories of immigrant and nonimmigrant visa classifications utilizing an alphabet-soup listing replete with letters, hyphens and numbers.<sup>4</sup> An analysis of all visa categories is beyond the scope of this article. In most situations involving the hiring of a foreign national, however, the nonimmigrant work-visa categories are comparatively few and can be grouped in logical ways. Selected visas allow employment of scholars, students and trainees, professional workers, corporate transferees from foreign affiliates, investors and traders, as well as workers with specialized knowledge, essential skills or outstanding talents.

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<sup>4</sup> For a general discussion on employment-based immigration law in the United States, see Angelo A. Paparelli and J. Ira Burkemper, "Immigration and Nationality," Chapter 23, in The International Practitioner's Deskbook Series: International Lawyer's Deskbook, 2<sup>nd</sup> Edition (Lucinda A. Low, Patrick M. Norton, and Daniel M. Drory, Eds.), American Bar Association, Section of International Law & Practice, accessible at: <<http://www.abanet.org/intlaw/hubs/publications/books.html>>.

In most instances, the terms of employment are circumscribed. Foreign nationals may not freely float or flit from employer to employer. Unless new permission is granted or rules of compliance are satisfied, a foreign worker is normally allowed to be employed only by the “petitioner,” the employer that sponsored the worker’s authorization for employment in the United States. Thus, the terms and conditions of sponsorship outlined in the nonimmigrant visa petition and supporting documents in most instances control the work permission. These submissions to the government identify a named employer offering a specific job to a foreign citizen, who will perform a prescribed set of job duties in a particular geographical area, for a prescribed compensation package on a full-time or part-time basis.

To complicate matters, however, the USCIS has also made available to numerous categories of aliens an Employment Authorization Document (commonly referred to as an “EAD” or work permit) which in most instances allows so-called “open-market” employment with any employer.<sup>5</sup> Thus, employment attorneys should keep their antennae attuned to changed circumstances and advise employers to consult immigration counsel whenever a change in employment is considered for a foreign national. A promotion, demotion, job transfer or entity-restructuring can all too often eliminate the basis for a foreign national’s employment authorization.<sup>6</sup> If this situation occurs, unless proactive or remedial measures are taken promptly, the foreign national may be required to resign or be terminated from employment and leave the United States.

The failure to understand the terms of sponsorship and the immigration implications of a proposed change in the employment of a foreign national can result in considerable liability for an employer. For example, if a sponsoring employer promotes a foreign engineer to a new position, such as project manager, the previously approved sponsorship may be nullified. If the employee will no longer be performing the same core duties, an amended petition to USCIS must be filed with the USCIS and, in most cases, approved by the agency prior to implementing the change in the employee’s duties.

Even if the core duties have not materially changed, the employer may need to consider other terms of sponsorship. For example, recall that a corporation hiring an H 1B employee must pay that employee the greater of the prevailing wage or the actual wage in the specialty occupation. If the corporation does not research the actual or prevailing wage prior to changing the job assignment, a wage violation may occur, which could subject the corporation to an enforcement action by the DOL’s WHD, the agency responsible for policing underpayments to H-1B workers.

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<sup>5</sup> Eligible foreign nationals may apply for an EAD using USCIS Form I-765. Examples of classifications of aliens who may seek open market employment by applying for an EAD include aliens admitted to the United States in refugee status, aliens granted asylum or withholding of removal, and aliens who have filed an application for adjustment of status to lawful permanent resident. See 8 C.F.R. §§ 274a.12(a)(3), (5) & (10); 8 C.F.R. § 274a.12(c)(9).

<sup>6</sup> For information on the immigration consequences of mergers, acquisitions, and corporate changes, see Angelo A. Paparelli, “Assuage Therapy: Enticing M & A Lawyers to Help with Immigration Successorship,” Immigration & Nationality Law Handbook, Vol. II (American Immigration Lawyers Association [AILA], 2008); Alan Tafapolsky, Angelo A. Paparelli, A. James Vazquez-Azpiri and Susan K. Wehrer, “Thriving on Change: How to Solve Immigration Problems in Merger & Acquisition Deals,” New Rules for the New Millennium (AILA 2001); Angelo A. Paparelli & Susan K. Wehrer, “Update on Mergers and Acquisitions: Congress Toys with the H-1B,” Immigration & Nationality Law Handbook, Vol. II (AILA 2000-01); Stanley Mailman & Stephen Yale-Loehr, “More on the Impact of Corporate Reorganizations on H-1B Workers,” 6 Bender’s Immigr. Bulletin 381 (April 15, 2001).

## *The Most Popular Work-Visa Categories*

Three of the most common visa categories used by businesses to hire foreign nationals with restricted terms of sponsorship include the H-1B (specialty occupation), L-1 (intracompany transferee), and E-1 and E-2 (treaty trader and investor) classifications.<sup>7</sup>

The H-1B category is available to “fortunate” for-profit businesses seeking to hire foreign nationals to provide services in a “specialty occupation.” Good fortune is conferred only on the lucky employers whose H-1B visa petitions come in before the meager 65,000-person annual quota is exhausted,<sup>8</sup> or whose petitions USCIS selects at random (if the quota fills within the first two days of its opening). A specialty occupation is an occupation requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree – or its equivalent – in the specialty.<sup>9</sup> H-1B workers include professionals in such fields as computer science, engineering, accounting, architecture and an expanding array of traditional and evolving highly-skilled occupations. The terms of sponsorship for H-1B employees include requirements to perform specific job duties for the petitioning employer and the payment by the employer of the higher of the “prevailing wage” in the local area or “actual wage” at the employer’s work-site.<sup>10</sup> With few exceptions, the H-1B employee must generally work solely within a defined and previously approved geographical area.

The L-1 visa category is available to foreign employees working abroad for a qualifying parent, subsidiary, or affiliate of the U.S. entity. L-1 visas may be issued to employees of a foreign entity who have been employed abroad for the qualifying entity in an executive, managerial, or “specialized-knowledge” position for at least one year out of the three years immediately preceding entry into the United States.<sup>11</sup> The terms of sponsorship for L-1 employees include requirements to perform specific job duties at a particular U.S. parent, subsidiary, or affiliate of the foreign entity abroad. In some cases, an employer can qualify employees to come to the United States under a “blanket L-1,” a special status granted to certain midsize

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<sup>7</sup> Other useful categories authorizing employment include the TN professional-worker classification for Mexican and Canadian citizens under the North American Free Trade Agreement, the O-1 visa for “Extraordinary Ability Aliens” in Business, Science and Arts, the P-1, P-2 and P-3 categories for Professional Athletes, support personal and certain artists, and a sub-category of F-1 and J-1 academic students, scholars and “Exchange Visitors” who are issued an EAD.

<sup>8</sup> Foreign nationals with a Master’s or higher degree conferred by a U.S. educational institution are accorded an additional H-1B quota of 20,000. Special allotments are granted to H-1B workers who are citizens of Singapore and Chile, and Australians are given benefits under the E-3 category, which resembles the H-1B and has its own annual quota of 10,500 per fiscal year.

<sup>9</sup> INA § 214(i)(1), 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214.2(h)(4)(ii).

<sup>10</sup> The actual wage is defined in the regulations as the wage rate paid by the petitioning employer to all other company employees with “similar experience and qualifications for the specific employment in question.” 8 C.F.R. § 655.731(a)(1). The prevailing wage is defined as the prevailing wage paid employees in an occupational classification “in the area of intended employment.” The employer must base the determination of the prevailing wage “on the best information as of the time of filing the application.”

<sup>8</sup> C.F.R. § 655.731(a)(2).

<sup>11</sup> See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l).

and large multinational corporations with more than one U.S. office, which permits mobility for its L-1 employees.<sup>12</sup>

The E-1 Treaty Trader and E-2 Treaty Investor visa classifications are authorized under Immigration and Nationality Act (INA) § 101(a)(15)(E)<sup>13</sup> and various Friendship, Commerce and Navigation treaties and Bilateral Investment treaties between the United States and selected countries. These treaties authorize foreign entities from treaty countries to employ selected personnel at their U.S.-based subsidiaries and affiliates. These visas may be granted to foreign nationals of a treaty country who are or will become owners or qualifying employees of a U.S.-based treaty enterprise. The E-1 treaty entity must satisfy various criteria demonstrating that it engages in trade principally conducted between the United States entity and the treaty country, whereas the E-2 treaty entity must demonstrate that an individual or entity has invested (or is actively in the process of investing) a substantial amount of capital in the U.S. based company.<sup>14</sup> The terms of sponsorship for an E-1 and E-2 alien include requirements that the employee work for the sponsoring entity in an executive or supervisory position or a position in which the employee renders services “essential to the operation of the employing treaty enterprise.”<sup>15</sup>

### ***I-9 Verification, Record-Keeping and Anti-Discrimination Compliance***

In order to avoid liability for failing to comply with the duty of Form I-9 verification, the employee and employer must correctly complete the Form I-9 on a timely basis. The employee must complete Section 1 of the I-9 on or before the first day of hire and attest to his or her basis for employment in the United States as a citizen, lawful permanent resident or foreign national with temporary work permission. Within the first three days of hire, the employer must inspect original documents of identity and work permission proffered by the worker, confirm that they relate to the new hire, and complete Section 2 by verifying that the foreign national is authorized to work in the United States.

While performing this task, the employer may not engage in prohibited discrimination (“document abuse”) by requesting too many documents or requesting particular documents. These seemingly contradictory and confusing legal mandates originated with the Immigration Reform and Control Act of 1986 (IRCA) and have been amended since original enactment.<sup>16</sup> These laws require employers to verify that all employees, regardless of their nationality, hired on or after November 6, 1986, are authorized to accept

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<sup>12</sup> For information on the blanket L-1, see Alan Tafapolsky & A. James Vazquez-Azpiri, “Global Warming: The L Blanket Program and the Transitional Corporation,” 99-04 Immigr. Briefings (Apr. 1999). See also Alan Tafapolsky, A. James Vazquez-Azpiri, Charles Foster Stephen Yale-Loehr, “Cover Me: The Blanket L Program,” Immigration & Nationality Law Handbook, 2001-2002 edition V.2. (AILA June 2001).

<sup>13</sup> 8 U.S.C. § 1101(a)(15)(E).

<sup>14</sup> 8 C.F.R. § 214.2(e)(1) & (2); 22 C.F.R. § 41.51(a) & (b).

<sup>15</sup> 8 C.F.R. § 214.2(e)(17) & (18); 22 C.F.R. § 41.51(c). For a discussion of the interplay between and among employment law, immigration law and tax law in the E visa context, see Angelo A. Paparelli and Suzanne J. Holland, “The Quasar Case: Hidden Problems of Employment, Immigration, and Tax Law,” published in *The International Lawyer*, Winter 1992.

<sup>16</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 411- 413; Pub. L. No. 104-208.

employment in the United States, and that – in the case of a foreign national with a temporary work permit – work authorization continues throughout the foreign national's employment.<sup>17</sup> The Form I-9, effective June 5, 2007, is the only version now authorized for use.<sup>18</sup>

Several I-9 concerns can be addressed and resolved through the development of a corporate compliance policy on employment eligibility verification. A number of issues need to be addressed in an I-9 compliance review.<sup>19</sup> The company, with counsel's guidance, should ask a number of questions, including:

- Are qualified management representatives assigned to monitor and supervise I-9 verification procedures?
- What are the safeguards for assuring that I-9s are completed by the new employee on the first day of hire and by the company within three days after the worker begins employment?
- What measures are in place to confirm that document abuse and other forms of prohibited discrimination do not occur?
- Has the employer adopted a policy (and applied it consistently) either to copy all documents of identity and employment eligibility provided by new hires (and retain such copies for the required retention period) or to decline to copy such documents?
- Has the employer developed an adequate file management system (separate from personnel records) for proper maintenance of the verification documents, and the docketing of deadlines for reverifying the continued employment eligibility of workers with time-limited permission to work?
- Has the employer developed an employee training system to assure that assigned employees understand the compliance policy so that a consistent, correct application of I-9 verification procedures occurs?
- Has the employer considered whether to maintain solely paper files or to utilize and comply with regulations authorizing electronic signature and storage of I-9 records?<sup>20</sup>

Forethought in this area of law may well save the employer substantial costs by placing the company in a better position to defend itself against an I-9 investigation by the USCIS, the DOL or the Office of Federal Contracts Compliance Programs.<sup>21</sup> Moreover, under a presidential Executive Order, federal contractors

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<sup>17</sup> For information on I-9 verification procedures, see the new *Handbook for Employers: Instructions on Completing the Form I-9*, last revised on November 1, 2007, accessible at: <<http://www.uscis.gov/files/nativedocuments/m-274.pdf>>. See also, Ted J. Chiappari and Angelo A. Paparelli, "The Lowly Form I-9 Gets a Makeover," *New York Law Journal*, December 27, 2007, accessible at: <[http://entertheusa.com/publications/articlesanalysis\\_CommentaryPLB.pdf](http://entertheusa.com/publications/articlesanalysis_CommentaryPLB.pdf)>.

<sup>18</sup> The latest Form I-9 can be found at <<http://www.uscis.gov/files/form/i-9.pdf>>

<sup>19</sup> To review a checklist for the prevention, response and defense against USCIS employer sanction investigations, see Ann L. Lamdin, Michael D. Patrick, Richard A. Gump Jr. and Angelo A. Paparelli, "When Uncle Sam Knocks: Representing Employers Who Face or Fear Government Investigations," *Immigration & Nationality Handbook*, (AILA 1997).

<sup>20</sup> See 71 Fed. Reg. 34510, 34513 (June 15, 2006).

<sup>21</sup> An employer's failure to position itself to defend against a potential I-9 investigation can prove costly, because if the government finds fault, the sanctions can add up. Failure to complete or maintain the Form I-9 properly and required documents subjects an employer to a fine from \$110 to \$1,100 for each violation. INA § 274a(e)(5), 8 U.S.C. § 1324a(e)(5).

face additional potential liability for knowingly hiring unauthorized foreign nationals. This order subjects federal contractors to a one-year government contract bar if the contractor has been found to have employed alien workers with knowledge that the employees lack the right to work in the United States.<sup>22</sup>

Employment lawyers should also be aware of the interplay of the I-9 verification obligation and the employer's duty to comply with tax and payroll withholding obligations. For the past several years, the Social Security Administration (SSA) has taken to mailing employers so-called "no-match" letters. These letters inform employers that the agency is unable to post earnings reported on a W-2 tax form on behalf of an employee because of a discrepancy in the employer-reported Social Security Number (SSN) and the worker's name and number in SSA's records. As this policy has evolved, the SSA has dramatically increased its issuance of such letters.

In 2007, DHS was poised to implement a new rule, allowing a 90-day "safe harbor" period for employers to respond to payroll and SSA discrepancies,<sup>23</sup> but DHS was stymied by a Federal Court in San Francisco that enjoined its implementation.<sup>24</sup> The rule requires employers to take specific actions upon receipt of a no-match letter including: (1) verifying within 30 days that the lack of a match was not the result of a record-keeping error on the employer's part; (2) requesting that the employee confirm the accuracy of employment records; (3) asking the employee to resolve the issue with SSA; (4) if these steps lead to resolution of the problem, follow instructions on the no-match letter itself to correct information with SSA, and retain a record of the verification with SSA; and (5) where the information could not be corrected, complete a new I-9 form without using the questionable SSN and instead using documentation presented by the employee that conforms with the I-9 document identity requirements and includes a photograph and other biographic data.<sup>25</sup>

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If the government determines that the employer hired or continued to employ a worker after November 6, 1986 while knowing that the worker was unauthorized to work, the possible penalty range is:

\$275 to \$2,200 for the first offense (for each worker);

\$2,200 to \$5,500 for the second offense (for each worker); and

\$3,300 to \$11,000 for the third offense (for each worker).

INA § 274a(e)(4)(A), 8 U.S.C. § 1324a(e)(4)(A). If USCIS determines that the employer committed a pattern or practice of violating Form I-9 laws, criminal sanctions of six months in jail and a \$3,000 fine may be imposed. INA § 274a(f)(1), 8 U.S.C. § 1324a(f)(1).

<sup>22</sup> Executive Order 12989 (February 13, 1996); 61 FR 6091 (February 15, 1996). Amended by Executive Order 13286 (February 28, 2003).

<sup>23</sup> This new rule is entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." For the full text of the rule, see 72 Fed. Reg. 45611.

<sup>24</sup> See Order Granting Motion for Preliminary Injunction in *American Federation of Labor, et al. v. Michael Chertoff, et al.* (N.D., CA, No. C 07-04472-CRB, Oct. 10, 2007).

<sup>25</sup> See DHS, Immigration and Customs Enforcement ("ICE") website, <<http://www.ice.gov/partners/employers/safeharbor/index.htm>>.



If these steps were faithfully followed, then the rule would have provided that the employer could generally be assured that DHS would not hold the employer to constructive knowledge of an employee's unauthorized status. Employers who fail to satisfy the safe-harbor requirements, however, would have faced civil or criminal penalties if the government later established that the employer knew or should have known its employees lacked work authorization.

The final rule was set to go into effect on September 14, 2007; however, the AFL-CIO, several labor unions, and business groups filed a motion for a preliminary injunction in the U.S. Court of Appeals for the 9th Circuit, which was granted on October 10, 2007. A major basis for the issuance of the preliminary injunction was that the rule would result in the wrongful termination of a large number of employees that were actually authorized to work, because of the inability to resolve discrepancies within the 90 day "safe harbor" timeframe<sup>26</sup>. With the preliminary injunction in place, however, the DHS and the SSA are enjoined and restrained from implementing the final rule until a final decision is made at a hearing on the merits.

Even with the preliminary injunction in effect, employers should remain wary, since the government is moving towards an enforcement mechanism that, in essence, outsources its immigration enforcement duties.<sup>27</sup> The government is baring its teeth in an effort to crack down on illegal immigration by creating programs that, for now, at least at the federal level,<sup>28</sup> allow voluntary participation such as E-Verify,<sup>29</sup> an online employment verification program, and the Ice Mutual Agreement between Government and Employers (IMAGE), a program which would require employers to submit to an I-9 audit, and verify the SSNs of their existing labor force by using the Social Security Number Verification System (SSNVS). Meanwhile, U.S. employers who hire foreign nationals may find themselves in a difficult position, faced with possible lawsuits from employees who have been wrongfully terminated as a result of its obligation to comply with immigration enforcement laws.

In sum, employment lawyers must be careful about the way they advise a business client on what to do after receiving a no-match letter. Receipt of the letter may lead an employer to ask the worker to explain the discrepancy. The employee's response may cause the employer to learn about the unauthorized employment of the worker or merely about some other innocent change in circumstances.<sup>30</sup> Employers

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<sup>26</sup> See Order Granting Motion for Preliminary Injunction in *American Federation of Labor, et al. v. Michael Chertoff, et al.* (N.D., CA, No. C 07-04472-CRB, Oct. 10, 2007).

<sup>27</sup> See Angelo A. Paparelli and Ted J. Chiappari, "Homeland's Outsourcing of Enforcement Gains Impetus," *New York Law Journal*, October 22, 2007.

<sup>28</sup> *Arizona Contractors Ass'n., Inc., et al. v. Candelaria, et al.*, No. 2:07-cv-07-02496-NVW (AZ. Dist. Ct., Feb. 7, 2008)(upholding an Arizona statute requiring employers – as a condition of remaining licensed and chartered under state law, to participate in E-Verify).

<sup>29</sup> E-Verify was formerly known as Basic Pilot.

<sup>30</sup> An employee's use of a false Social Security Card is only one of many reasons why an employer's records and the SSA's records do not match. For example, a person may neglect to inform the employer or the SSA of a name change following marriage.

should be cautioned against moving forward too quickly in investigating employees who are the subject of a no-match letter, without first receiving immigration advice on the proper course to pursue. As discussed above, an employer may face sanctions for knowingly employing workers who have no work authorization, but the employer also must follow anti-discrimination rules that limit the information that may be requested of an employee. The employer, as noted, can also be liable if it violates other immigration or employment laws prohibiting unlawful discrimination.

### ***Maintaining Lawful Immigration Status***

The events of September 11, 2001 have changed, perhaps forever, the way of business and of life in America. The terror attack has heightened security at airports, altered the way we travel, created adverse effects on the economy, especially in the tourism industry, caused the loss of jobs, and threatened the federal surplus by requiring taxpayers to absorb the cost of fighting a multi-front war on terrorism. Foreign nationals are particularly affected by the U.S. government's reactions to the events of September 11. Indeed, foreign nationals can expect to face additional scrutiny of their status in the United States as part of the government's effort to enforce immigration laws and protect national security. Some of these issues are of particular concern to employment lawyers.

### ***Employee Travel Abroad: Beware the Unwary Traveler***

One way an employer can lose the services of a foreign employee is for the worker to become stranded abroad because of his or her failure to demonstrate eligibility for admission to the United States in a lawful immigration status. CBP has limited the discretion of inspecting officers at ports of entry to admit aliens into the United States when the applicant for admission fails to produce all of the required documentation.<sup>31</sup> Further, in July 2007, CBP issued detailed procedures for conducting inspections including requiring field office managers to assess compliance with these procedures. Despite such efforts to tighten controls at the border, a recent General Accounting Office ("GAO") report found weaknesses in inspection processes that will likely lead to even stricter inspection and admission rules.<sup>32</sup>

While it may seem obvious that foreign workers must carry all necessary documentation to demonstrate eligibility to enter the United States, the documentary requirements themselves can be complex, bewildering, and, sometimes, nonsensical. For example, an H-1B employee who has filed an application for adjustment of status to that of a permanent resident ("adjustment application"), but has not yet

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<sup>31</sup> See Michael A. Pearson, Memorandum to Regional Directors, et al. (HQ INS 10/10.10), "Deferred Inspection, Parole and Waivers of Documentary Requirements," (November 28, 2001). This memorandum provides that during "the nation's heightened security alert and until further notice" inspectors at Ports of Entry and Port Directors no longer have authority to grant deferred inspection, a waiver of passport, visa, or other document, or to exercise parole authority." The memorandum limits the discretion to grant deferred inspection, a waiver of passport, visa, or other document, or to exercise parole authority to District Directors, Deputy District Directors, Assistant District Directors for Inspections, and Assistant District Directors for Examinations, but only if certain restrictive criteria are met.

<sup>32</sup> See *Border Security, Despite Progress, Weaknesses in Our Inspections Exist at Our Nation's Ports of Entry*, testimony before the Committee on Homeland Security, House of Representatives: (Jan. 3, 2008), (statement of Richard M. Stana, Director Homeland Security and Justice Issues for GAO), posted on AILA Infonet, Doc. No 08010464.

received a travel document (known as an “Advance Parole” document), generally may nevertheless travel abroad without abandoning the adjustment application using his or her H-1B visa, so long as the nonimmigrant is properly abiding by the terms of the H-1B visa and carries his/her original receipt for filing the adjustment application. This travel benefit is also available for L-1 employees.

Another way employers often lose the services of employees results from requests for Security Advisory Opinions (SAOs) by consular officers upon visa application at a consular post. After 9/11, consular posts have become much more stringent in visa issuance standards in an effort to counter terrorism. Consular interviews are now more rigorous than before 9/11 and utilize a larger database of terrorism-related information.<sup>33</sup> Applicants of concern are referred to Washington, D.C. for in-depth review by means of an SAO. Consular Officers also send suspect names to the FBI in connection with a name check program called “Visa Condor.” Visa Condor is part of the broader SAO system that requires a consular officer to refer selected visa cases identified by law enforcement and intelligence information (originally, visa applicants from 26 predominantly Moslem countries), for greater review by intelligence and law enforcement agencies.<sup>34</sup>

In addition to procedures related to terrorist watch-lists, consular officers screen visa applicants for employment or study that would give the foreign national access to controlled technologies, or those that could be used to upgrade military capabilities under a screening process termed “Visa Mantis.” Consular officers also invariably refer foreign nationals from countries of concern (China, India, Iran, Iraq, North Korea, Pakistan, Sudan, and Syria) to the FBI and other key federal agencies for review.<sup>35</sup> While the objective of the U.S. Government is to effectively counter terrorism, these security clearance procedures often adversely affect innocent foreign nationals and their employers by keeping them out of the country for an unknown amount of time, and in many cases up to a year or more, while these procedures are performed.

In order to avoid the loss of productive employees due to technical violations discovered by CBP officials at ports of entry or abroad because of the implementation of post-9/11 security clearance procedures, foreign employees should be warned about the risks of international travel, the need for all required documentation for re-entry after a trip abroad, and, when appropriate, advised to delay unnecessary

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<sup>33</sup> See *Fact Sheet: Key Bush Administration Actions Consistent With 9/11 Commission Recommendations*, on Department of State website, <<http://fpc.state.gov/documents/organization/34916.pdf>>.

<sup>34</sup> *The Post 9/11 Visa Reforms and New Technology: Achieving the Necessary Security Improvements in a Global Environment*, testimony before the Senate Foreign Relations Committee, Subcommittee on International Operations and Terrorism, (October 23, 2003), (statement of Janice L. Jacobs, Deputy Assistant Secretary for Consular Affairs), posted at <<http://www.state.gov/r/pa/ei/otherstmy/25932.htm>>.

<sup>35</sup> See *Export Controls: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Needs Improvement*, report to Chairman, Subcommittee on National Security, Veterans Affairs and International Relations, Committee on Government Reform, House of Representatives (Sept. 2002), (statement of GAO), posted at <<http://www.gao.gov/new.items/d02972.pdf>>. See also *Immigration: Terrorist Grounds for Exclusion of Aliens*, Congressional Research Service Report for Congress, (March 30, 2005), posted at <<http://fpc.state.gov/documents/organization/46481.pdf>>.

travel.<sup>36</sup> In-house counsel and H.R. departments would be well advised to consult an immigration practitioner for guidance on these issues.

### ***Examining Maintenance of Status Prior to Offering Employment***

Often, when an employer wishes to hire an employee, the employer wants the hiring done immediately. With an expedited procedure known as the USCIS Premium Processing Service, employers can now hire foreign national workers much more quickly than before this system was put in place.<sup>37</sup> Moreover, under a new law, the American Competitiveness in the 21st Century Act (AC21), two categories of foreign employees (workers with H-1B visa status and certain adjustment of status applicants who hold open market EADs), may now invoke a right of “portability” and likewise change employers more quickly than before.<sup>38</sup>

While these provisions offer greater worker mobility, employment lawyers should nonetheless counsel their clients (employers or alien workers) to watch out for status problems that may cause a delay in, or prohibit, the hiring of the foreign national. For example, an H-1B or L-1 employee who has recently been terminated by a prior employer may not be eligible for a change of status or change of employer petition approval even though the worker’s period of authorized stay on the entry document issued upon arrival to the country has not expired. USCIS has stated that it is considering whether to allow a certain grace period that would permit a recently terminated H-1B employee to seek new employment with a United States company without first leaving the United States, but USCIS has clearly stated that, currently, no grace period exists.<sup>39</sup> In other words, if an H-1B employee is terminated, and does not immediately leave the United States, the USCIS may consider the employee out of status the next day.

While USCIS can exercise the discretion in extraordinary circumstances<sup>40</sup> to grant a change of employer or change of status petition on behalf of such an individual, it need not do so.<sup>41</sup> Since September 11,

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<sup>36</sup> For a discussion of post-September 11 changes in immigration laws, *see* Angelo A. Paparelli and John C. Valdez, “September 11 Ushered in a New Era in Immigration Law and Practice,” *Bender’s Immigr. Bulletin* (April 1, 2002 and April 15, 2002).

<sup>37</sup> Premium Processing allows employers to pay a \$1000 fee to USCIS in return for the promise of an adjudication of certain petitions within 15 calendar days (or, if additional information is requested from the employer, within fifteen calendar days after the request is answered by the employer minus the number of days the request for additional evidence is pending). For information on the premium processing program, *see* USCIS website, <<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=79ef78264614d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>>.

<sup>38</sup> For a discussion on AC21 and “portability” issues, *see* Angelo A. Paparelli and Janet J. Lee, “‘A Moveable Feast’: New and Old Portability Under AC21 § 105,” *Bender’s Immigr. Bulletin* (Feb. 1, 2001).

<sup>39</sup> *See* Yoshiko I. Robertson, “Avoiding the Abyss: H-1B Strategies When Facing Reductions in Force,” *Immigration and Nationality Law Handbook*, vol. 2 (AILA 2001); Naomi Schorr & Stephen Yale-Loehr, “Corporate Cuts: Reductions in Pay and Hours for Nonimmigrants,” *Bender’s Immigr. Bulletin* (Apr. 15, 2002).

<sup>40</sup> Extraordinary circumstances are defined as circumstances “beyond the control of the applicant or petitioner, and the Service (USCIS) finds the delay commensurate with the circumstances.” 8 C.F.R.

§ 214.1(c)(4)(i).

2001, there have been signs that USCIS will limit its discretion to permit a grace period.<sup>42</sup> In view of the possible issues involved with recently terminated foreign nationals seeking new jobs, employers should investigate the probability of a petition approval before expending money on costs associated with the filing of the petition.

### ***Professional Employer Organizations***

Many companies outsource their human resource function to what are sometimes called professional employer organizations (PEOs). This outsourcing can result in a situation where a foreign national, for whom the company submitted a petition with the USCIS, may actually be paid and nominally employed or co-employed by another entity.<sup>43</sup> This situation has generated confusion among attorneys and employers as to which of the entities is or should be treated as the sponsoring “petitioner” for purposes of immigration petition filings.

The USCIS has informally addressed the issue of PEOs in the H-1B context in correspondence, stating that “an entity can file an H-1B petition on behalf of an alien even though the alien’s salary is paid from another source, provided that an employer-employee relationship exists. The existence of the employer-employee relationship can be demonstrated by evidence establishing that the entity has control over the H-1B nonimmigrant even though the alien’s salary is paid from another source.”<sup>44</sup> In earlier informal correspondence addressing employee leasing companies, the USCIS indicated that if both companies exercise a degree of control over the alien, “one of the firms involved in the leasing agreement would either have to designate itself as the petitioner for immigration purposes, provided it meets the regulatory definition of a United States employer, or both firms could petition for the alien.”<sup>45</sup>

Thus, when an employer has outsourced more than the payroll function, it runs the risk of being deemed a co-employer for immigration purposes. Under certain circumstances, to avoid the need for both entities

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<sup>41</sup> Michael Pearson, Memorandum to Service Center Directors et al (HQ 70/6.2.8), “Initial Guidance for Processing H-1B Petitions,” (June 19, 2001).

<sup>42</sup> One official from the USCIS Nebraska Service Center commented that an H-1B employee terminated from his H-1B employment thirty days ago would be out of status too long for the USCIS to exercise favorable discretion to grant a change of employer petition. AILA, USCIS Nebraska Service Center Liaison Minutes, posted on AILA InfoNet, Doc. No. 01101833.

<sup>43</sup> For a further discussion of outsourcing, see Angelo A. Paparelli, “Yes, We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment,” 13 Immigration Law Report No. 16 (Aug. 15, 1994).

<sup>44</sup> Letter from Efred Hernandez III to Kari Ann Woodward (Dec. 20, 2000), posted on AILA Infonet, Doc. No. 01062632 (June 27, 2001). Immigration counsel should note that adjudicators are not bound by such correspondence. *Matter of Izumii*, Int. Dec. (BIA) 3360, 1998 WL 483977 (BIA) (Jul. 13, 1998) (“[The] OGC [Office of General Counsel of the former Immigration and Naturalization Service] is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations.”) Rather, the OGC and the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), an entity within the U.S. Department of Justice, Civil Rights Division helps protect individuals from employment discrimination based on immigration status and unfair documentary practices when verifying the employment eligibility of employees. Those discriminated against may file charges with OSC and be awarded back pay and reinstatement, among other remedies.

<sup>45</sup> Letter from Yvonne M. LaFleur, Chief, Business & Trade Services, Adjudications, to H. Ronald Klasko (Feb. 5, 1996), reproduced at 73 Interpreter Releases 342 (Mar. 18, 1996).

to file a petition on behalf of each nonimmigrant worker, it may be possible for the company and the PEO to execute a written agreement designating which party will serve as the employer for all immigration purposes. It may be safer, however, for H-1B and other nonimmigrant workers to be taken off of the payroll of the PEO and instead be paid and supervised solely by the petitioner.

### ***Immigration Law Expertise in Employment Litigation***

Immigration legal issues are increasingly prevalent in employment suits, even if the litigator realizes their importance only belatedly. For example, a wrongful termination suit may be bottomed on the employer's alleged flouting of public policy and retaliation. The terminated worker may claim that the firing arose because he/she objected to the employer's violation of federal immigration law, namely, by failing to pay H-1B "required wages" or the "prevailing wage" in a labor certification case. Although the general rule is that an expert witness may not opine on the law (given that opposing counsel and the judge are lawyers, and legal questions are the province of the court), immigration law, particularly, the arcane immigration legal system and process, can be a proper subject of expert testimony.<sup>46</sup>

### ***Selected Best Practices***

Because of overlapping areas of laws, there are good reasons for employment lawyers and immigration practitioners to develop good working relationships. Employment attorneys often draft or litigate employment policies and procedures. These guidance documents should help employers to comply with immigration laws dealing with the hiring and retention of foreign nationals.

One good practice the employment attorney can follow while working with immigration counsel is to encourage the employer to establish a policy and procedure for tracking the status of foreign nationals.<sup>47</sup> This can be done with a tickler system that will inform the employer of the proper time to begin the process to extend the work status of employees in order to avoid a lapse in employment authorization.

Another good practice is to recommend that the employer inform nonimmigrant employees of their obligation to notify USCIS within 10 days of a change in address on Form AR-11,<sup>48</sup> as required under the immigration laws.<sup>49</sup>

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<sup>46</sup> See *Lozano et al. v. City of Hazelton*, 2007 U.S. Dist. LEXIS 13295 (M. D. PA, February 27, 2007) pp. 14-15 ("While any legal conclusions from Mr. Yale-Loehr [plaintiff's immigration expert] about whether Hazelton's ordinances violate the Constitution would be inappropriate, we agree with the plaintiffs that testimony about the nature and extent of federal immigration law--a large and complex body of doctrine--would help us to reach our own decision about the constitutionality of the ordinances.) The court in *Lozano* struck down a municipal ordinance requiring, inter alia, that employers comply with supplemental employment-verification requirements that were preempted by federal immigration law. See also *Lozano v. City of Hazelton*, No. 3:06-cv-1586 (U.S. Dist. Ct., M.D. PA July 26, 2007), posted on AILA Infonet, Doc. No 07072666.

<sup>47</sup> For information on subjects involving the maintenance of status, see Angelo A. Paparelli and Susan K. Wehrer, "Troubled Times for U.S. and Foreign Clients: Immigration Tips All Lawyers Can Use," *Orange County Lawyer* (March 2002); see also, Angelo A. Paparelli, "Importance of Maintaining Status after September 11," *American Immigration Law Foundation*, (2002).

<sup>48</sup> Form AR-11 is available on the USCIS website, <<http://www.uscis.gov/files/form/ar-11.pdf>>.

In addition, as noted above, because the terms of sponsorship of a nonimmigrant visa are important for the maintenance of nonimmigrant status (and employment authorization), a system should be in place that requires an examination of the immigration consequences of a change in the working conditions or benefits of an employee before the change takes place.

Thus, the drafting of sound policies and procedures to address the specific issues involved in the hiring and continued employment of foreign nationals can be critical for employers that rely on the employment of foreign workers.

## ***Conclusion***

As employment attorneys and immigration lawyers continue to occupy parallel universes, and as the global elements of employment practice take on greater significance, the two specialty areas of immigration and employment law will inevitably draw closer to each other. Will they collide or will they dock safely? Let us hope that colleagues in these intersecting disciplines travel safely together into the 21st Century future where no lawyers have yet to venture.

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<sup>49</sup> INA § 265(a), 8 U.S.C. § 1305(a). Evidence of the USCIS' newfound interest in enforcing this law is its reference to this reporting requirement in recently issued proposed rules on changes to the B visa category. "[T]he Service is restating these existing requirements [reporting requirements] here for the benefit of readers, so that aliens who apply for nonimmigrant status will be advised of them." 67 Fed. Reg. 71 (April 12, 2002).