

ALERT

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LABOR AND EMPLOYMENT

News Concerning
Recent Labor and Employment Issues



IMMIGRATION ALERT

New VIBE Program

In a misguided effort to “simplify” the sponsorship process for the employer, U.S. Citizenship and Immigration Services (USCIS) has complicated the process further by instituting its new Validation Instrument for Business Enterprises (VIBE) program. VIBE is web-based tool used to confirm company details provided by the petitioner in employment-based immigrant and nonimmigrant visa petitions. Previously, USCIS reviewed documentation provided with the initial filing by petitioning companies to establish eligibility for the requested classification. The VIBE program now allows USCIS to consult commercially available business data supplied by the independent information provider Dun and Bradstreet (D&B) to verify evidence submitted by the petitioner. Relevant company data may include: business activities, ownership, financial standing, current address, number of employees, and relationships with other domestic and international entities. Where the information does not match, USCIS now issues Requests for Evidence (RFE) or Notices of Intent to Deny (NOID). This gives the petitioner an opportunity to correct or clarify any discrepancies between D&B and the petition, or to provide any missing information. USCIS hopes that VIBE will streamline the petitioning process. Once a petitioner’s information is verified, it no longer needs to submit extensive corporate documentation with subsequent filings. This will reduce the number of RFEs issued to petitioners who have successfully undergone the VIBE screening process. In addition, USCIS claims that VIBE should improve the consistency of the adjudication process, as the same company information will be accessible to all four USCIS Service Centers.

The criticisms of this program are many. Among the most troubling is the apparent change in adjudication procedure without a formal change in the regulations, as well as USCIS’ reliance on information from D&B, a publicly-traded company, as the determinant for government action. As usual, USCIS is dismissive of this criticism and places the burden on the employer to comply while the program is in its initial roll-out.

In light of the new program, we recommend that before filing petitions with USCIS, employers update and verify their information with D&B in order to avoid discrepancies and minimize processing delays.

Latest News on Immigration Legislation

On April 7th, Marcy Stras moderated a panel at the 2011 Spring Meeting of the ABA Section of International Law entitled “Immigration Reform and the Corporate Employer: A Cross-Border Nightmare and the Third Rail of U.S. Politics.” The Speakers represented various interested parties—policymakers, government agencies, unions, and the business community—and included David Shahoulian, Democratic Chief Counsel to the House Judiciary Committee’s Subcommittee on Immigration Policy and Enforcement; James McCament, Chief of the Office of Legislative Affairs at USCIS; Ana Avendaño, Assistant to the President and Director of Immigration and Community Action at AFL-CIO; Randel Johnson, Senior Vice President of Labor, Immigration, and Employee Benefits at the U.S. Chamber of Commerce; and Rima Shouli, Senior Corporate Legal Counsel of Magna International, Inc.

Despite the range of perspectives reflected in the discussion, the speakers uniformly acknowledged the inadequacy of current U.S. immigration policy, and offered their predictions as to what employers are likely to see in the coming years. They anticipated an expansion of USCIS E-Verify to include all public and private employers operating in the U.S. E-Verify is an internet-based system that discourages unauthorized employment by comparing Employment Verification Forms against U.S. Department of Homeland Security and U.S. Social Security Administration data, which currently affects only federal contractors, subcontractors, and companies in the fourteen states that require program enrollment. The speakers also noted that the Obama administration has prioritized enforcement over amnesty, investing in U.S. border security and doubling worksite enforcement investigations.

Finally, the panelists observed that states are reacting to the shortcomings of federal policy by enacting state-based laws that create enforcement mechanisms or immigration benefits above and beyond what has been codified on a federal level. On April 11th, the Ninth Circuit Court of Appeals upheld a lower court ruling that prevented the enactment of certain provisions of a 2010 Arizona law that required law enforcement officers to inquire as to the immigration status of individuals detained for other matters, stating that such measures exceeded state authority. Last month,

lawmakers in Utah passed a bill that deviates from federal policy by introducing a guest worker program that issues work permits to undocumented individuals who do not have federal employment authorization. As these examples show, numerous states have implemented their own interpretations of immigration reform. Response at the federal level, however, remains uncertain.

2012 H-1B Cap Count

Each fiscal year, USCIS grants 85,000 H-1B cap-subject visas: 65,000 under the H-1B regular cap for specialty occupation workers that offer theoretical or technical expertise, and 20,000 additional visas for workers who have earned an advanced degree in the United States. Employers began filing H-1B cap petitions on April 1st, and will continue until the quota is exhausted. As of April 22nd, USCIS received 8,000 eligible petitions under the regular cap, and 5,900 eligible petitions under the master's exemption. While it is difficult to predict how long the quota will remain open, in FY2009 the quota was filled in December 2009, and in FY2010 it filled in January 2011. This trend is reflective of the limited opportunities in today's labor market.