Immigration Law Today

MAR|APR.08 VOL. 27|NO. 2

Cautious Steps to Avoid ICE Raids

- The No-Match Dilemma
- Form I-9 Compliance
- Monitoring FNBVs

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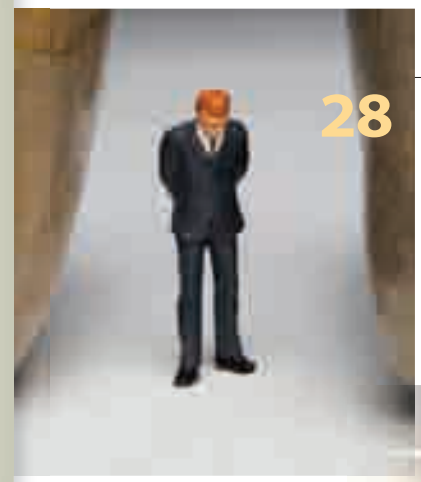

NOTABLE QUOTES

[W]hat is the economic magnet that is bringing people into the country to work illegally? The answer is jobs. And therefore, worksite enforcement and interior enforcement are critical elements of a strategy to deal with this issue of illegal migration.

—DHS Secretary Michael Chertoff, Briefing on Immigration Enforcement and Border Security Efforts, February 22, 2008.

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Employers Between a Rock and a Hard Place

WE HAVE SADDLED UP YET AGAIN FOR ANOTHER ROUGH RIDE through the luck of the H-1B lottery draw on April 1, 2008. Only in immigration law would one see this sense of bureaucratic humor to hinge such an important visa category to April Fool's Day. It's appropriate, since I feel like a fool regarding the inability to get Congress to fix these critical economic-driver visa categories. We expected some procedural U.S. Citizenship and Immigration Services improvement in the chaos caused by thousands seeking to fill labor needs, but again, many have spent countless hours on petitions that did not have the luck of the draw.

Glimmer of H Hope

On a procedural-fix front, the letter from numerous U.S. senators requesting that Optional Practical Training be extended to 29 months to help the F to H-1B cap-gap is apparently being stymied at the White House level. It seems that some want this potential change to be limited to science, technology, engineering, and medical occupations.

There also are newly proposed H-2A regulations—as promised by the administration—along with another letter signed by numerous senators in support of the H-2B returning worker exemption. It seems someone is trying to come up with some executive authority penumbral argument for this exemption continuation. Let's hope for success!

Business Coalitions Unite

On the employment front, business coalitions are discovering that just focusing on their particular industry segment (*i.e.,* high technology) is not necessarily the recipe for success in attempts at business immigration improvements. The U.S. Chamber of Commerce—among other organizations, such as the Arizona Employers for Immigration Reform—has certainly shown leadership in the business area with efforts concerning the no-match proposed regulations. But employers' voices are still often silenced by fears regarding the presence of unauthorized workers, especially in an environment in which states and municipalities all seem to want to be on the U.S. Immigration and Customs Enforcement employer-verification band wagon.

We have to use our resources and talents to educate others on immigration law provisions and immigrants' contributions to our economy.

While the revised version of the no-match proposed regulations sits at the Office of Management and Budget, all eyes are on the state and local fronts. For example, the U.S. district court in Arizona has not found that the Arizona statute regarding employers is preempted by federal law. We also await developments regarding U.S. Department of Homeland Security's challenge of the Illinois statute regarding E-Verify use. In the meantime, employers must learn to check on local ordinances regarding employment verification to ensure legal compliance. We must keep challenging these efforts location-by-location while continuing to pressure for reforms.

Stop Systemic Discrimination

Ironically, with the upcoming implementation of REAL ID and other state legislative efforts, those lucky H-1B lottery winners may be able to work in the United States and pay taxes. Unfortunately, these workers cannot obtain a driver's license in states like Michigan, since legal status is defined by some states as reserved only for lawful permanent residents and U.S. citizens.

At such times, we cannot be part of the silent majority. We have to use our resources and talents to educate others on immigration law provisions and immigrants' contributions to the economy. The AILA National Advocacy and Communications departments have done a yeoman's work in launching the new State and Local Advocacy Resource Guide to centralize information that is categorized in topical issues (*see www.aila.org/stateguide*). We also have policy briefs courtesy of the American Immigration Law Foundation's Immigration Policy Center (*see www.ailf.org*), public service announcements, and other tools to help members overcome these local initiatives (*see www.aila.org*).

We encourage you to create your own listserve to disseminate information and clear the cobwebs from immigration rhetoric spin. Jewels such as diamonds are forged in intense pressure. Based on that process, immigration lawyers are becoming far more precious in our current climate. Thank you for doing your part in effecting change, starting with your participation in AILA's inaugural National Day of Action on April 3, 2008. I look forward to hearing about your efforts in Washington, D.C., and across the nation.

KATHLEEN CAMPBELL WALKER *is a partner in and chairperson of Kemp Smith, LLP's immigration department in El Paso.*

PRACTICE TIPS FOR THE BUSY IMMIGRATION LAWYER

Coping with PERM Audits

LONG-TIME IMMIGRATION LAW ATTORNEY Steve Clark's *Immigration Law Today's* column, Ask the Expert, offers practice tips to the busy immigration lawyer and answers to commonly asked questions. This issue's Q&A focuses on coping with PERM audits.

Members report increased PERM audits. What is the cause?

The U.S. Department of Labor (DOL) has played its cards close to the vest. When the PERM rule was published, DOL indicated that it would not reveal its plans for audits because to do so would undermine their effectiveness, and it would need to remain flexible to respond to changing trends and patterns (*see 69 Fed. Reg.* 77, 326, 77, 359 (Dec. 27, 2004)). Clearly, DOL had been focusing on process issues in an effort to iron out the bugs in a complex system rather than substantive issues in the first three years of PERM operation. It is natural, now that some of those issues have been put to rest, that DOL would take a closer look at substantive issues. Perhaps this delayed attention to substantive issues was accentuated by having senior managers retiring from the DOL headquarters as PERM began.

The abrupt shift of focus to audits and substantive issues in the past several months may well have been accelerated by the fact that the backlog elimination centers (BECs) are now closing and their personnel are available and familiar with the substantive issues. When DOL started to wind down the BECs, it transferred the federal employees at the BECs to the PERM program. Possibly, there will be jobs created at the PERM processing centers for the temporary BEC contract employees as well. The fact that these temporary workers have reviewed the employers' documentation in connection with traditional labor certification (TLC) and reduction in recruitment (RIR) applications gives them a possible edge, since PERM analysts have had relatively few audits that would have exposed them to the documentation underlying the attestations embedded in the Form ETA 9089.

Will the trend of increased audits continue?

DOL has not announced its intentions. Some members report that all their cases are being subjected to audits; others report that all their cases where the Specific Vocational Preparation (SVP) (guidelines for maximum education and experience requirements) has been exceeded are being audited. It is entirely possible that some attorneys have received extra scrutiny, or that DOL is currently focusing on the SVP issue. But the beauty of the electronic system is that it enables DOL to detect processing patterns, adapt its criteria to these patterns, and respond to workload factors. Obviously, if all cases involving an SVP issue are audited—given the downgrading of SVP codes for numerous occupations—we will soon have the extensive backlogs that forced DOL to adopt the PERM program. No doubt, as backlogs increase, audit criteria will ease. DOL may want to look at a larger universe of cases precisely so that it can set criteria and provide a foundation for further guidance. Hope springs eternal!

How can one avoid audits?

Audits may be directed at trigger points in the application, such as excessive requirements or foreign language requirements. But numerous audits are conducted on a random basis. When the PERM rule was published, DOL indicated that it would not go on fishing expeditions but →

About Steve Clark

AILA Past President Steve Clark (1999–2000), of Flynn & Clark, P.C., has practiced business immigration in Cambridge, MA, for more than 30 years. As a long-time AILA member, Clark authored a monthly practice advisory on employment-based issues, which appeared in the *AILA Monthly Mailing* (a predecessor of *Immigration Law Today*) from 1989 to 1996. In addition, he has served as senior editor of AILA's annual conference handbook, the *Immigration and Nationality Law Handbook*, and editor-in-chief of AILA's monograph, *Representing Professionals Before the Department of Labor*. He also is a contributor to AILA's *David Stanton Manual on Labor Certification* (Third Ed. (2005)). Clark currently updates the chapter on labor certifications in the Matthew Bender treatise, *Immigration Law and Procedure*. He is a graduate of Yale College and Harvard University Law School, and he is listed in *Who's Who Legal, Best Lawyers in America*, and *Super Lawyers*.

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would be relying primarily on targeted audits. Unfortunately, the heavy reliance on random audits (that ask for most all documentation) and the insistence on furnishing all such information (even if there is an attachment focusing on a specific issue) is at odds with this representation. So simply complying with SVP requirements will not eliminate audit requests.

What should one provide in response to an audit request?

The standard random audit letter requests a variety of documentation:

- Copy of the submitted ETA Form 9089, with original signatures in Section L, M, and N (Alien, Preparer, and Employer).
- Proof of business necessity as outlined by 20 CFR §656.17(h) if the answer to question H-12 is "no", (*i.e.*, the job requirements are not normal); the answers to H-13, H-15, or H-17 are "yes", (*i.e.*, the job requires a foreign language, a combination of occupations, or living on the employer's premises); or the job duties and/or requirements are beyond those defined for the job by the SOC/O*NET code and occupation title provided by the state workforce agency (SWA). Business necessity documentation is not requested if the response is that the requirements are normal for the occupation.

PRACTICE POINTER: DOL policy, as announced in the frequently asked questions (FAQs) section in PERM, is to deny cases where the employer states the requirements are normal even if business necessity documentation is offered (*see* PERM FAQ Set, Round 1 (March 3, 2005); all FAQs are located at *www.foreignlaborcert.doleta.gov/*). Further, the rule does not require business necessity documentation if the job duties are unusual, unless they involve a combination of occupations or the SVP is exceeded (*see* 20 CFR §§656.17(h)(1), (3)).

- Documentation required for live-in household domestic service workers as outlined by §656.19(b) if H-18 indicates such an occupation and requirement are involved.
- Notice of filing as outlined in §656.10(d). This would include in-house postings, whether print or electronic.
- Recruitment documentation:

For basic process cases:

- Recruitment report signed by the employer describing steps taken and results achieved, number of hires, and, if applicable, number of U.S. workers rejected, summarized by lawful job-related reasons for such rejections. Résumés and applications are not requested, but the audit letter advises that they may be requested later.
- Copy of the prevailing wage determination (PWD) from the SWA, including the prevailing wage request if it is not included as part of the determination.
- Recruitment documentation outlined in §656.17(e), (*i.e.*, two Sunday advertisements and documentation of three additional steps if the job is professional).

For college and university teachers using special recruitment:

- Statement of hiring authority detailing recruitment procedures undertaken, setting forth total number of applicants and specific, lawful job-related reasons why the alien is more qualified than each U.S. applicant.
- Final report of selection committee.
- Copy of advertisement and other recruitment sources, if any.
- Written statement as to alien's qualifications.

Most, if not all, of this documentation would have been submitted with the ETA-750 form, at least in a TLC case. What makes the PERM audit different is that DOL is not required to tip its hand and tell you what its concerns are and how to overcome them, as it had to under the rules in effect prior to PERM. (*See* 20 CFR §656.25) DOL's *Technical Assistance Guide* No. 656 (TAG) at 81–82 states that the certifying officer must state "every reason for the employer's failure to meet the regulation requirements, specifics of the availability finding, and particulars of the adverse effect, thereby giving the employer the opportunity to rebut the findings." For the notice of findings to provide a basis for denying a certification, it must show specific facts that are relied upon in making the determination. Conclusory statements alone do not provide enough information for the applicant to prepare a rebuttal." (*See Matter of Cotton L.A.*, 00-INA-313 (BALCA Sept. 25, 2001) [raising issue for first time in final decision rather than in NOF "deprives the Employer of due process"].) For that reason, it may be wise to err on the side of providing items not explicitly requested.

Where the audit letter requests documentation of a specific issue, is it necessary to submit the documentation requested in the general or random audit letter?

The targeted audit letters normally do require the employer to provide the documentation specifically requested as well as the documentation in the standard request. Frequently, the standard documentation will be needed to evaluate the documentation specifically requested. As with all documentation submitted, do not hand it over uncritically: check for defects that could trigger a denial. This is your last chance to avoid a mishap.

What should be done if the audit letter refers to an attachment, but only the standard two-page letter is enclosed in the envelope?

A number of audit letters have incorrectly referred to attachments. If you receive a letter referring to an attachment, but find none enclosed, e-mail DOL at the info mailbox to inquire whether DOL issued an attachment but forgot to enclose it. Members report a number of instances where DOL responded that no attachment was issued and the letter incorrectly referred to one. Depending on which processing center issued the audit request, the address will be either *plc.atlanta@dol.gov* or *plc.chicago@dol.gov*. Give the subject line a catchy heading such as "Audit attachment missing," and include the employer name and case number so that your response can be triaged appropriately.

What steps should be taken if the employer's representative is no longer employed by the employer?

This can present a problem because the au-

dit letter requests a copy of the "submitted" Form ETA 9089. The prudent practitioner will have the employer and employee sign the draft ETA 9089 prior to filing, but the file number on that copy will bear the letter prefix "T", whereas the copy as submitted will bear the prefix "A" or "C", depending on whether the case was submitted to the Atlanta or Chicago National Processing Center. It also is possible to have the new employer's representative sign the submitted copy and provide a letter from the company explaining the transition. In the absence of guidance on this issue from DOL, we have provided both. Attorneys, too, are not always chained to their desks and may no longer be employed by the law firm at the time of the audit. Again, in the absence of DOL guidance, it is possible to provide the draft copy and the submitted copy signed by the newly appearing attorney, along with a letter of explanation.

Should one submit proof that the employee gained experience with the petitioner in a position that is not substantially comparable?

If the employee began working for the employer under the same employer tax identification number and is qualifying based on this on-the-job experience, then the employer must prepare documentation to show that either it is no longer feasible to train for the position or that the offered position involves performance of the same job duties less than 50 percent of the time. Note that the audit letter does not request the documentation that it is no longer feasible to train or the time allocations to document that the 50 percent-test is met. However, some practitioners do volunteer the percentage allocation of job duties for the proposed position and the qualifying position with the employer. Some members report denials for requiring experience gained with the petitioner without affording an opportunity to provide such information. Hopefully, DOL will confirm that such a denial would be inappropriate, but some members have attempted to head off such a denial by voluntarily disclosing the percentage time breakdown for each duty in the ETA 9089 form at items H11 and in Section K. Until this is clarified, the conservative practitioner should include the job descriptions with time breakdown in the audit response if it is not already in the ETA 9089 form.

Should one submit résumés of rejected applicants?

The rule and audit letter do not require the employer to furnish résumés of U.S. applicants. The rule specifically authorizes DOL to request résumés *after* the initial audit documentation has been reviewed (*see* 20 CFR §656.17(g)). We are unaware of any requests for résumés in outstanding audits, but it is entirely possible that DOL will later begin to request résumés to provide a baseline for the recruitment reports it has been reviewing. Given the language in the rule, it should not be necessary to furnish résumés with the audit in the absence of an express request for them. →

Should the recruitment report detail reasons for rejection?

The audit letter does not request detailed reasons for rejecting applicants; only the summary report of number rejected for each reason is required for basic processing cases. The kind of close questioning of each rejection in applications prior to PERM will not resurface unless DOL begins to request copies of résumés. Even then, it will be difficult for DOL to focus on rejection of a particular applicant since the employer is not required to link the reasons to a particular résumé. Moreover, failure to interview or telephonically screen applicants whose résumés fail to mention special requirements cannot be addressed since the reports are not required to disclose the number of applicants contacted or interviewed. However, recruitment reports with manifestly inappropriate grounds for rejection—such as failure to meet a requirement not mentioned in the application, overqualified applicants, or applicants rejected for subjective or speculative reasons—will be expected to result in denials.

What are the requirements for in-house postings, electronic or print?

DOL has provided guidance in FAQs that appear at odds with the statutory and regulatory mandate to post in the employer's customary manner, because the FAQs incorporate requirements from the DOL regulations required for the physical posting, which is clearly not intended to be the customary employer posting. First, the physical posting advises the applicant pool that the job is the subject of a labor certification (*see* 20 CFR §656.10(d)(3)(i)). In fact, DOL's FAQs require the employer to indicate that any person may submit documentary evidence bearing on the application to the certifying officer and to furnish the address of the certifying officer (*see* PERM FAQ Set, Round 10 (May 9, 2007); 20 CFR §656.10(d)(3)(ii, iii)). Clearly, the FAQ requirement that the in-house posting disclose the dollar amount or range of the wage is anything but customary. Finally, DOL opines that the in-house media should publish the posting for 10 consecutive business days or the period customarily used, whichever is longer (*see* PERM FAQ Set, Round 2 (April 6, 2005)).

These FAQs are DOL's interpretation of the rules, but they do not have the legal effect of a regulation, and where the Board of Alien Labor Certification Appeals (BALCA) finds them at odds with the rules, it will not hesitate to determine that an FAQ can be ignored. (*See e.g.*, *Matter of HealthAmerica*, 2006-PER-1 (BALCA Jul. 18, 2006) (en banc) at 14 stating, "[W]e find that FAQ No. 5 imposes substantive rules not found in the PERM regulations, nor supported by PERM's regulatory history, nor consistent with notions of fundamental fairness and procedural due process.")

If the newspaper ad tear sheet is not available, will a photocopy suffice?

DOL has not provided guidance for documenting Sunday newspaper advertisements under PERM, but regional certifying officers had usually accepted photocopies, provided the copy shows the full page so that DOL can determine if it was in the appropriate section of the paper. Also they accepted proof of publication provided by the newspaper, but not bills, invoices, requisitions, or copies of the ad text standing alone. (DOL, Alien Labor Certification Program Q&As, Part I, Case Processing, Q. 24 (1995) provides that photocopies are acceptable, so long as they are copies of the entire page and the date of publication does not appear to have been altered. The employer also may submit a "proof of publication" from the newspaper indicating the dates of publication.)

If the employer places the ad on its website but did not copy the ad before it was taken down, will an affidavit be acceptable?

DOL has issued an FAQ stating that the employer may submit an affidavit as to alternative documentation not specified in the rule at 20 CFR §656.17. If an actual printout is unavailable, then the employer may submit an affidavit under pains and penalties of perjury of the company official responsible for posting the position attesting to the fact it was posted. Whether it will be accepted in a given instance will depend on the nature of the submission, including the presence of other primary documentation (*see* PERM FAQ Set, Round 10 (May 9, 2007)). The FAQ does not indicate what it means by other primary documentation, but presumably, a requisition for the posting—actual e-mails requesting or referring to it—will be helpful. Presumably, failure to keep the records of posting on other job search websites or campus recruitment could be documented using alternative documentation of a similar nature. It is interesting to note the latitude given with an online posting as opposed to a newspaper ad. Presumably, this is because normally, newspapers keep archive copies of old ads whereas online services do not.

Is it necessary to document that the job duties are those normally encountered in the occupation?

Notwithstanding the language of the audit letter requiring proof of business necessity if the duties or requirements are beyond those defined by the SOC/O*NET, the rule actually does not expressly require business necessity for the duties unless there is a combination of occupations or the SVP is exceeded. (20 CFR §656.17(h)(1) states that the requirements must not exceed the SVP. There is no mention of duties, but where the SVP is exceeded with respect to job requirements, it does state that both the "duties and requirements" must bear a reasonable relationship to the occupation in the context of the employer's business and be essential to perform the job.) The rule does state that, where excessive experience or education is required, business necessity must be established by showing, among other things, that "the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer's business" (*see* 20 CFR §656.17(h)(1)). BALCA decisions under the prior rule had held that the employer must justify the requirements, not the need for someone to do the job duties (*see Matter of Chang*, 88-INA-536 (BALCA 1989) [certifying officer reversed where the challenged job required tutor of Mandarin Chinese and Taiwanese]).

How should a combination of occupations be documented?

If the audit request suggests that the position combines occupations, it behooves the employer to show that it has employed others performing the same combination of duties, and/or that workers customarily perform the combination of occupations in the area of intended employment, and/or that the combination is based on business necessity. Position descriptions, relevant payroll records, and/or letters from other employers stating their workers normally perform the →

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combination of occupations in the area of intended employment, and/or a business necessity letter will be helpful. The business necessity letter may be required to show such a level of impracticability as to make the employment of two workers infeasible (*see Matter of Robert L. Lippert Theatres*, 88-INA-433 (BALCA 1990) (en banc)). However, where the job definition contemplates disparate duties, such documentation is not required (*see Matter of Gulliver Preparatory School*, 87-INA-549 (BALCA 1988) [documentation not required when DOT definition includes disparate duties. Teacher expected to coach as well as teach substantive course]. Under PERM, one would look to the O*NET definition instead of the DOT).

How does one determine if the job involves a combination of occupations?

A good rule of thumb under PERM would be to see if the duties are embraced by the SOC/O*NET definitions. If they are, then there is no combination of occupations and no further documentation should be needed. If the specific duties are not mentioned, then look more closely at the O*NET tasks and see if there is a basis there for including the duties in the occupation. If not, do a word search for the duties not mentioned and see if they relate to another occupational classification. If they do, then there is a probable combination of occupations and should assemble the required documentation or consider deleting the duty.

When is it necessary to document special requirements?

The PERM rule simply states that the requirements must be those "normally required for the occupation" (*see* 20 CFR §656.17(h)(1)). DOL has opined that if the requirement is not found in the O*NET job 1/2 pasummary for the occupational code used by the SWA in its PWD, then it must be documented as arising from business necessity. If the requirements are not found in the O*NET, and the employer has indicated in item H12 that the requirements are normal, then the case will be denied whether or not business necessity documentation is available (*see* PERM FAQ Set, Round 1 (March 3, 2005)).

Often, it will not be clear whether the requirement was specified in the O*NET because the O*NET requirements are quite general. Does this mean that if the language is not literally found that documentation is required and the position will be deemed not "normal?" Prior to PERM, guidance indicated that the employer should not use the precise language of the DOT, and cases that quoted the DOT verbatim would be viewed with suspicion. Quite clearly, the system will break down under its own weight if the requirement must be literally stated in the O*NET. DOL should be pressing the issue only where the requirement goes beyond O*NET and the ambit of what was generally discussed. If the requirement is a specific instance of a skill mentioned in O*NET, then further documentation should not be necessary. However, DOL has not provided any guidance on this issue.

How can O*NET be used to document special requirements?

O*NET provides a summary report for each occupation and a summary and details tab under that. The details tab is useful in that it sometimes provides more specific skills, and it also shows the percentage of jobs requiring such skills. The guidance only sanctions the use of the summary, but both the details and summary tab are part of the job summary for the occupation, so arguably both can be used.

The summary tab lists various tools and knowledge used in the job. The tools are quite concrete. For instance, it lists AutoCad for an architect. The knowledge required is fairly general, though, and not of a level of detail found in a normal job requirement. For instance, under knowledge required for an architect, it specifies "[k]nowledge of materials, methods, and the tools involved in the construction or repair of houses, buildings, or other structures such as highways and roads." Under "knowledge", it lists some fairly general knowledge needed, such as knowledge of algebra, calculus, statistics, and their applications. It lists time management skills in the skills section. While this will be more general than the type of requirements employers specify that are pegged to their specific work environment, O*NET will sometimes expressly mention a required skill. More frequently, it will provide a context with which one can argue a requirement is reasonable in combination with other evidence, such as a detailed →


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explanation from the employer or third party documentation.

Can an in-house test be required?

BALCA decisions held under the rule prior to PERM that employers may require a performance test even if it is not stated as a requirement. However, the employer was required to document its reasons for rejecting U.S. applicants based on their performance test (*see Matter of Franco Wood Crafting, Inc.*, 98-INA-131 (BALCA Dec. 22, 1998)). Some cases further required the employer to provide a copy of the test used, correct answers, and copies of the answers given by both the foreign national prior to hire and the U.S. applicant. Needless to say, if the foreign national had been hired several years earlier, those records are not necessarily maintained.

What documentation should be provided of a foreign language requirement?

If the position is for an interpreter, translator, or foreign language teacher, then it is intrinsic to the occupation and this should be sufficient to demonstrate business necessity under the rule (*see* 20 CFR §656.17(2)(i)). Alternatively, the employer can document that a foreign language is needed to communicate with a large majority of the employer's customers, contractors, or employees who cannot communicate effectively in English. The employer may do this by furnishing the number and proportion of its customers, clients, contractors, or employees[1] who cannot communicate in English. If they speak English, but not well enough to transact needed business, then it is acceptable to document that they cannot communicate in English.

However, if customers or clients can communicate in English, but prefer to conduct business in their native tongue, the case will be more difficult and it will be necessary to show the percentage of such customers, and the circumstances why it is reasonable to believe they would take their business elsewhere if the employer did not have a native speaker for this position.[2] In all cases, provide a detailed explanation of why the duties of the position require frequent contact and communication with customers, employees, or contractors who cannot communicate in English and why it is reasonable to believe the foreign-language-speaking customers, contractors, or employees cannot communicate in English.

Further, explain why it will not be feasible to use a part-time interpreter or translator. If the need arises from plans to market in a foreign country, provide a detailed marketing plan. If the need arises from future expansion of the business, provide concrete documentation of any steps taken toward implementation of such a plan such as contracts, plans, or letters from vendors or other third parties involved in the implementation. Attach as many of the following as possible: samples of letters, memos, faxes, product or promotional literature using the language, telephone bills with international phone calls to the relevant country highlighted, and/or proof of travel to such countries.

If, upon your own review, you decide that the documentation is deficient, can you withdraw and refile?

Once the audit letter is issued, the application cannot be withdrawn. The employer must respond or face the consequences (*see* PERM FAQ Set Round 4 (June 1, 2005)). Presumably, DOL will want to examine whether the failure to provide documentation was a deliberate manipulation warranting an order of supervised recruitment as authorized by the rule.[3] The prudent practitioner will thus obtain all documentation required for the audit before filing. That being said, as understanding of the rules is constantly evolving, there may be situations where the documentation did not seem necessary at the time of filing, but was deemed necessary as a result of interpretations or case experience subsequent to filing. This can turn the audit from a simple transmittal of existing documentation into a stressful experience assembling additional documentation in a tight timeframe. No doubt labor certifications will continue to deserve the moniker, the "root canal" of immigration practice. ILT

Notes

1 *Matter of Lucky Horse Fashion, Inc.*, 1997-INA-182 (BALCA Aug. 22, 2000) (en banc) held that the need to communicate with the employer's employees does not, standing alone, provide business necessity. However, the PERM rule specifically provides for the need to communicate with employees. 20 CFR §656.17(h)(2)(ii). This was not an oversight. The supplemental information to the rule expressly noted that AILA comments were well taken, mentioning the need to communicate with coworkers and subordinates as well as the fact that "there are working environments where safety considerations would support a foreign language requirement." *69 Fed. Reg.* 77326, 77352 (Dec. 27, 2004).

2 The rule does not preclude necessity of a foreign language based on convenience of the customer as opposed to actual necessity, and uses the accommodating language, "need to communicate with … customers … who can not communicate effectively in English." 20 CFR §656.17(h)(2)(ii). Although the rule does specify inability to communicate "effectively" in English, it can be argued that it is not effective if the person will take their business elsewhere and that the question isn't language capacity, but business impact of the language. *See also Matter of Prestige Cars Corporation*, 88-INA-351 (BALCA July 17, 1989); *Matter of Isak Sakai*, 90-INA-330 (BALCA Oct. 31, 1991); *Matter of Dimitri's, Inc.*, 89-INA-169 (BALCA Mar. 4, 1990).

3 A substantial failure to provide documentation will result not only in denial under 20 CFR §656.24, but an order of supervised recruitment for up to two years. 20 CFR §656.20(b), 21.

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The Halliburton Portlet: Monitoring Foreign National Business Visitors

AS ONE OF THE WORLD'S LARGEST PROVIDERS of products and services to the energy industry, Halliburton has offices in over 70 countries with more than 45,000 employees. Each year, thousands of foreign nationals visit Halliburton's U.S. offices as employees, trainees, contractors, clients, and potential clients. Halliburton, therefore, wanted to create a systematic program that keeps track of these visitors' entrances to and exits from the United States in a user-friendly and automated context. The process would be mandatory, but it was understood that without the employees' acceptance and willingness to use it consistently, the program would fail. Halliburton also wanted the ability to run reports from any of the data contained in the visitor records. Thus, driven by the desire to enhance compliance with immigration laws and to address corporate and national security concerns, the vast conglomerate tackled its Foreign National Business Visitors (FNBV) project from several fronts.

Policy and Practice

While developing the FNBV portlet, Halliburton first issued a Foreign National Visitors Policy and Practice. There are several advantages in having written policies and practices for complex or repetitive immigration processes. Written policies signal the company's awareness of immigration law and the intent to follow it. Halliburton's written practices educate and assist employees with specific questions and draw their attention to compliance issues within a process.

Halliburton's FNBV policy is a short, one-page, generic document that applies to employees who visit a country as a business visitor where they are noncitizens or nonpermanent residents. Primary objectives of the policy are to remind employees that each country has its own immigration laws, that a basic understanding of and compliance with those laws is expected, and that in most cases, a foreign national cannot perform productive work as a business visitor.

In contrast, the U.S. FNBV practice is six pages long. It describes different categories of business visitors, including the B-1, Visa Waiver Program (VWP), B-1 in lieu of H-1B and H-3, and visitors under the North American Free Trade Agreement (U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (entered into force Jan. 1, 1994)). It discusses permissible business visitor activities and provides examples of prohibited activities. Letters of invitation, federal income tax, and deemed export licensing implications also are covered (*see* Department of the Treasury, Internal Revenue Service, "Tax Information for Visitors to the United States," Publication 513, Rev., Cat. No. 15017P (Jan. 2008); 15 CFR §734.2). Last, but not least, the practice explains the new FNBV process. The practice served as first notice to employees of an upcoming change in the way Halliburton would handle U.S. business visitors.

For business visitors out-bound from the U.S., Halliburton relies on its travel department and a visa services provider to assist employees in obtaining proper documentation and correct visas. Halliburton's long-term goal is to have written business visitor practices for each country in which it does business. Each practice will be initially introduced to employees through training sessions and newsletters. The practices will be accessible to employees through Halliburton's website. If desired, Halliburton's employees abroad can use its own version of the U.S. FNBV portlet as it can be customized to reflect the requirements of other countries' business visitor immigration laws.

Creating the Portlet

Halliburton is fortunate to have brilliant, accommodating, and very patient information technology (IT) specialists who can transform a list of "must-haves" and "I wants" into a full-fledged web-based portlet.

Group Effort

Halliburton's IT department used Oracle as the database for the portlet, which is written in C# language and runs on NET framework 1.1. The senior applications analyst and senior manager of IT projects were an integral part of the development team, who were in constant communication for more than a year before the portlet was unveiled. They were joined by outside immigration counsel, Shawn Orme and Jeremy Fudge, of Berry Appleman and Leiden, who reviewed the business visitors practice and policy, provided multiple versions of letters of invitation, reviewed the portlet's progress, and made recommendations for changes. "Halliburton's FNBV portlet is a great way for the company to manage the increasing number of individuals coming for visits to its U.S. offices," said Orme. "As Halliburton continues to grow internationally, it is important for the company to ensure its compliance and to create a sense of accountability among its employees."

After getting word of the new program, the company's international human resources tax specialist recognized that the data it intended to collect would assist with end-of-the-year reporting

requirements. Fields were added in the FNBV record to accommodate this necessity as well as other needs in Halliburton training centers. As a result, periodic summary reports from the portlet were provided to several departments within Halliburton.

Final Product

In its finished state, the FNBV portlet permits a record to be made of every foreign national business visitor to Halliburton in the United States who was expressly invited by a U.S. employee. Access to the portlet is necessarily limited to U.S. employees because only a U.S. responsible manager can invite a visitor. The U.S. manager is responsible for completing the FNBV record, issuing the letter of invitation, and ensuring that the business visitor participates in only the legally permissible activities listed on the FNBV record. Requiring an identifiable person in the United States responsible for inviting and monitoring the business visit is essential to attaining immigration law compliance, particularly for a global company hosting thousands of foreign national visitors annually. In addition, the steps built into the process remind employees that inviting a business visitor to the United States is not a simple, off-the-cuff process, but one that requires thought, pre-planning and an understanding of permissible business activities.

Employee Feedback

Feedback from employees indicates that the portlet is easy to navigate, but help is always available via the law department's functional mailbox, where employees can post their questions. The functional mailbox questions are answered by telephone or e-mail. A written step-by-step "User's Training Guide" is available on the portlet's homepage from a help icon, and Halliburton's help desk supports the portlet. Other informational icons on the portlet's homepage lead to answers to frequently asked questions (FAQs) that were used in presentations during roll-out and the "Foreign National Visitors Policy and Practice."

FNBV Portlet FAQs

By far, the most asked question was, "How do we know if the visitor needs to be entered into the portlet?" It sounds simple but it was actually complicated to answer. Consider the foreign national stopping by unannounced to speak with a Halliburton employee while visiting the United States, or vendors who accompany a client from Canada to a Halliburton meeting in Houston. How about Halliburton employees who travel to the United States to attend the Houston Offshore Technology Conference? The dilemma is resolved by clearly defining a business visitor who requires an FNBV record as "a business visitor coming to the U.S. to visit a Halliburton office at the invitation of a Halliburton employee." This definition *excludes*:

- Employees coming to the Offshore Technology Conference, *unless* they plan ahead to visit a Halliburton office while attending the conference;
- Any individual already in the United States who independently arrived without any assistance from Halliburton (*i.e.*, a letter of invitation) who just wants to stop by and say hello while in town; and
- Vendors who accompany Halliburton clients to the United States from Canada, since the vendors pay their own transportation costs.

Letters of Invitation

When the FNBV program was introduced to employees, it was emphasized that business visitors to the United States were required to carry a letter of invitation. During training, employees who frequently traveled to the United States from visa waiver countries and Canada protested that they were never asked for such letters and felt they were unnecessary. However, Halliburton emphasized that having a letter of invitation on hand—and being able to produce it upon request—paved the way to admission into the United States (*see Inspector's Field Manual* 15.2(2)(b)). Hopefully, the ability of the portlet to create correctly worded letters of invitation with just the push of a button would encourage employees to rely on the program and use it with ease.

A variety of letters of invitation are stored in the portlet. There are form letters for Canadians, for those from visa waiver countries, for those needing a B visa, and for those with a B visa. The letters are addressed to either the U.S. consulate or to U.S. Customs and Border Protection (CBP). Information stored in the FNBV record's data fields—such as the visitor's employer abroad, the U.S. location to be visited, and the specific purpose and dates of the visit—is transferred to the appropriate letter to fill in the blanks on these form letters. The applicable responsible manager's name, phone number, and e-mail address appear on the letter as the contact person, and the manager's name is typed below the signature line.

To allow for some flexibility in making minor changes to the letters of invitation, the U.S employee is instructed and relied upon to leave the substantive wording of the letter of invitation unchanged in order to meet legal requirements. Since the →

letters are each two pages long, are formal in nature, and contain legal citations, a good deal of legalese seems to dissuade employees from doing much editing to the letters. Thus, feedback from employees who formerly had to write individual letters of invitation from scratch is favorable because the letters can now be produced in a matter of minutes. Also, the letters from the portlet facilitate Halliburton visitors' entry into the United States, and the quality and content of its letters of invitation are consistent and meet the U.S. Department of State and CBP expectations.

When Something Goes Wrong

Infrequently, a business visa is denied, or a letter of invitation is found insufficient by a U.S. consulate. In such events, the visa applicant usually contacts the immigration coordinator in International HR, requesting manager, or local HR representative who in turn contacts the Halliburton immigration attorney. In the straightforward case of an insufficient letter of invitation, the attorney will revise the letter of invitation and e-mail it to the applicant for re-submission. More problematic are the visa denials. Halliburton has found that a denial often occurs under INA §214(b) for failure to establish entitlement to nonimmigrant status. Usually, these business visa applicants are fairly new Halliburton employees who are recent college graduates, single, with small or non-existent bank accounts. The Halliburton attorney may contact the consulate to discuss the ties and seek a re-evaluation, but often the employee must postpone the visit.

Maintaining Visitor Privacy

Because the FNBV portlet is a Halliburton web-based program, and contains personal information about its visitors, there was a great need to limit access to the individual FNBV records. Only U.S. requestors and managers can view and edit the FNBV records that they have entered into the portlet. The home address and phone number of the visitor are initially typed into the FNBV record, but are thereafter blocked from viewing except by Halliburton tax personnel. A written "consent" is e-mailed to the visitor for signature when they are asked to complete the Visitor's Information section of the FNBV record. The visitor consents to voluntarily providing the personal data relative to the U.S. visit, understands that access to the information is limited to the requestor, manager, and law and tax departments. The visitor further consents and understands that the personal data will be stored in the FNBV portlet in the United States, and might be subject to data protection and privacy laws that provide a level of protection that is not equivalent to the laws in the visitor's home jurisdiction. Besides IT, only four people in Halliburton's law department have access to the entire FNBV portlet and are the only ones who can create reports from it.

Rolling Out the Portlet

In the fall of 2005, the FNBV portlet was ready for roll-out. Although the program would be mandatory, Halliburton wanted its employees to accept it voluntarily, and see it as a tool to help them in their work rather than a program that would create more work for them. Thus, throughout training, Halliburton stressed: (1) the importance of maximizing corporate and national security since 9/11; (2) enhancing compliance with immigration law; (3) facilitating admission of the visitors into the United States with proper letters of invitation; and (4) providing reports to federal law enforcement agencies, if requested. These four benefits were emphasized in all written materials used during the portlet roll-out.

The FNBV program was introduced to all Halliburton employees world-wide in an e-mail memo by Halliburton's vice president of human resources in October 2005. Initially, there were many questions, and as expected, some resistance to the new program. Employees thought the process meant additional work; managers wondered if they had to sit down at a computer themselves and create a record; others said it would be difficult to get the required information for the record from the visitor; and more than one manager worried that if they were "responsible" for the visitor's activities in the United States, would that mean the manager had to oversee the visitor after work hours? These concerns were quite enlightening; what seemed clear and simple to those who created the program was quite murky to the users—and they were right. As the questions came in, scenarios Halliburton had not contemplated also came in. As answers to the FAQs were drafted, Halliburton tried to imagine every possible situation that could arise, and added more details to the answers to assist the users in understanding when and how to make a record.

The FNBV Program Today

Due to the sheer number of Halliburton employees in the United States, the number of new hires, and the many employees who are

transferred to different jobs, it is unlikely that every employee is aware of the FNBV process at any given time. However, since the portlet's unveiling in October 2005, indications are that the majority of employees who invite business visitors know about and use the program. Each year, the number of records entered into the portlet increases from the prior year. This could be the result of an increase in the number of visitors, increased use of the portlet, or both. For the three months in 2005, 465 visitors were entered into the portlet. In 2006, that number increased to 2,895; and in 2007, 3,164 visitor records were created. Users advise that they particularly appreciate the simplicity of the program; a record can be completed in its entirety and a letter of invitation created in less than 10 minutes.

After the first eight months, e-mails to the functional mailbox and phone calls for assistance tapered off dramatically, but continued to be received throughout the first year on a regular basis. On average, Halliburton currently receives around five e-mails per month via the functional mailbox from employees seeking assistance with the portlet. Training is ongoing, and immigration law on business visitors and the FNBV process are almost always covered in the various immigration presentations to employees during the year.

Knowing the who, why, what, when, and where about the company's FNBVs gives Halliburton much better control of immigration compliance issues and addresses its security objectives. Halliburton is now in a position to better direct its focus on enhancing specific, legal compliance issues because of the salient information provided by the portlet. It is not a perfect system, but it is a good system that enables the company to have more confidence in its ability to comply with the law and improve corporate and national security. Through use of the system, Halliburton employees have heightened awareness of business visitor immigration law requirements. Overall, the benefits Halliburton has reaped from the FNBV portlet are well worth the time and effort it took to develop it. ILT

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Enjoying Exemptions and Avoiding the Pitfalls of J-1 Exchange Visitor Tax Rules

THE J-1 EXCHANGE VISITOR PROGRAM has long been used by institutions of higher education, teaching hospitals, and research institutes to bring to the United States students, teachers, professors, research scholars, specialists, foreign physicians, and other short-term international visitors. With the expansion of the global business community, U.S. corporations increasingly employ J-1 exchange visitors as interns and trainees, and J-1 exchange visitors in the student category under academic training. However, many corporate employers are unfamiliar with the special tax rules that apply to individuals in J-1 status and the pitfalls that they present.

U.S. Tax Rules for Foreign Nationals

The Internal Revenue Code (IRC) provides two separate tax structures—one for U.S. citizens and resident aliens and another for nonresident aliens. (For purposes of this article, resident alien and nonresident alien are tax terms and not immigration terms.) Foreign nationals who are resident aliens are taxed in the same manner as U.S. citizens except for the year that they first become a resident alien. Resident aliens whose first day as a resident is not January 1 are dual-status taxpayers and taxed under special rules. Full-year resident aliens file a Form 1040, 1040A, or 1040EZ tax return. Resident aliens may claim exemptions for their dependents who: (1) meet the definition of dependent; (2) are either a U.S. citizen or national, resident alien, or a citizen of Canada or Mexico; and (3) have a U.S. taxpayer identification number.

Nonresident aliens are subject to U.S. income tax only on U.S.-source income and on income that is effectively connected to a U.S. trade or business. Effectively connected income (ECI) includes compensation for services (employment and self-employment) performed in the United States and taxable scholarships paid to foreign nationals in J status. ECI is taxed after deductions (which are very limited) using single or married-filing-separately graduated tax rates. Other U.S.-source gross income—such as dividends, interest, royalties, and rents—is subject to a 30 percent tax rate. In certain situations, an income tax treaty may apply to reduce or eliminate U.S. tax. Nonresident aliens file a Form 1040NR or 1040NR-EZ tax return. Only certain nonresidents may claim dependents. They include U.S. nationals, residents of Canada or Mexico, students and business apprentices from India, and residents of South Korea if the dependents have been with the taxpayer in the United States during the year. All other nonresident aliens may claim only one personal exemption even if they have a dependent who was born in the United States and is, therefore, a U.S. citizen.

Part-year resident aliens file Form 1040 with a statement for their nonresidency period income and deductions on Form 1040NR that are carried to their Form 1040 return. Dual-status taxpayers cannot use the standard deduction, and, if married, must use married-filing-separately rates. Nonresident aliens married to a U.S. citizen or resident alien may elect to file jointly with their spouse (*see* IRC §§6013(g) and (h). They must report worldwide income from January 1 in their U.S. tax return. Two married nonresident aliens may not make such an election, and, therefore, must file using married-filing-separately rates. Nonresident aliens who are "exempt individuals" (described below) must submit Form 8843, Statement for Exempt Individuals and Individuals with a Medical Condition, with their nonresident or dual-status tax return, or separately, if they have no tax return filing obligation.

The withholding and reporting tax rules—both for employment tax purposes and for withholding of tax at source—attempt to mirror the income tax rules. Therefore, in order to determine the appropriate withholding and reporting tax rules that apply to payments to a foreign national, a U.S. payer must first determine whether the foreign national employees and payees are resident aliens or nonresident aliens for U.S. tax purposes.

Determining U.S. Tax Status

A foreign national's U.S. tax residency status is determined by his or her immigration status and countable days of U.S. presence over a three–calendar-year period (*see* IRC §7701(b)). In addition, any time spent in the United States in F, J, M, or Q status from January 1, 1985, forward also must be taken into consideration. Foreign nationals who are U.S. lawful permanent residents (LPRs) are resident aliens for U.S. income tax purposes. Nonimmigrants are resident aliens if they are physically present in the United States at least 31 countable days in the calendar year in question, and their U.S. presence over a three–calendar-year period satisfies the 183-day residency formula (called the "substantial presence test"), unless an exception applies. The formula adds all of the countable U.S. days in the current year, plus one-third of the countable U.S. days in the prior year, plus one-sixth of the countable U.S. days in the second preceding year. For purposes of this formula, a U.S. day is any part of a day that an individual is

physically present in the United States for any reason unless an exception applies. Therefore, a nonimmigrant whose U.S. presence averages 122 countable days or more per year will satisfy the 183-day residency formula and become a resident alien for U.S. income tax purposes. A nonimmigrant whose U.S. presence fails to meet the 183-day residency formula is a nonresident alien.

Nonimmigrants whose U.S. presence satisfies the 183-day residency formula, but who are physically present in the United States for fewer than 183 days in the current year, may be able to claim nonresident alien status under the closer connection exception. In order to meet the closer connection exception, they must submit a completed Form 8840, Closer Connection Statement for Aliens, with facts and circumstances supporting (1) a tax home in a foreign country or countries for the full calendar year; and (2) a closer connection to a foreign country or countries than to the United States. Foreign nationals who have taken steps to become LPRs cannot use the closer connection test to avoid U.S. tax residency status.

Exceptions for J-1 Exchange Visitors

The J-1 Exchange Visitor Program provides for various categories of exchange visitors and defines the rules that apply to each category. For tax policy reasons, foreign nationals in J exchange visitor status do not count their days of U.S. presence for purposes of the 183-day residency formula for a specified number of calendar years, thus remaining nonresident aliens for U.S. income tax purposes longer than other nonimmigrants. These foreign nationals are referred to as "exempt individuals" for the periods that they are exempt from counting days for purposes of the 183-day residency formula. (They also may be exempt from tax but under other rules and procedures discussed below.)

A J exchange visitor's category determines which special exceptions apply for counting days. One rule applies to students and another rule applies to teachers and trainees. Students are J exchange visitors-present in the United States in the student category. Teachers and trainees are J exchange visitors in all other J categories. (The category can be found on Form DS-2019, Certificate of Eligibility for Exchange Visitor Status.) For purposes of this article, "teachers and trainees" are referred to as J nonstudents. The tax rules apply to spouses and other dependents in the United States in a J-2 derivative status as well.

Five–Calendar-Year Rule for Students

A special five–calendar-year rule applies to maintain nonresidency status for J-1 students, who are exempt from counting U.S. days for purposes of the 183-day residency formula for five calendar years. J-1 students in the United States for more than five calendar years must generally begin counting U.S. days for purposes of the 183-day residency formula. Just one U.S. day in the calendar year satisfies the one–calendar-year requirement. J-1 students who have been exempt from counting U.S. days for five calendar years (beginning in 1985, the first calendar year for which the 183-day residency formula was effective) must count their U.S. days for purposes of determining their U.S. tax residency status. In the typical situation, a J-1 student must begin counting days in his or her sixth calendar year in the United States as a student. However, the individual also must count calendar years as an exempt individual in any F, M, J, or Q immigration status in the prior years. IRC allows students to continue to be exempt from counting days for purposes of the 183-day residency formula if they can prove to the Internal Revenue Service (IRS) their intent not to reside permanently in the United States. This extension is claimed with Form 8843.

Two-Out-of-Seven–Calendar-Year-Rule for J-1 Nonstudents

A special two-out-of-seven–calendar-year rule exempts J-1 nonstudents—such as trainees and short-term visitors—from counting days for purposes of the →

183-day residency formula. Under this exception, a J-1 nonstudent who has not been in the United States as an exempt individual at any time in the prior six calendar years is a nonresident alien for tax purposes. In the typical situation, a J-1 nonstudent is a nonresident alien for two calendar years in the United States. J-1 nonstudents in the United States for two years or longer become resident aliens in their third calendar year when their U.S. days add up to 183 days. J-1 nonstudents who have been in the United States as exempt individuals before (for example, as F-1 or J-1 students) will become resident aliens sooner if those years are in their prior six calendar years.

Four-Out-of-Seven–Calendar-Year Rule for Certain J-1 Nonstudents

A special four-out-of-seven–calendar-year rule applies to determine the residency status of J nonstudents paid exclusively by a foreign employer. A foreign employer is defined by the IRC as a nonresident alien individual, a foreign partnership or foreign corporation, or a branch or place of business maintained in a foreign country by a domestic corporation, domestic partnership, or U.S. citizen or resident alien (*see* IRC §872(b)(3)). A foreign government or foreign government agency is not included in this definition.

J-1 nonstudents who receive *all* of their remuneration from a foreign employer are exempt from counting U.S. days for purposes of the 183-day residency formula for four-out-of-seven calendar years. If a J-1 nonstudent receives *any* remuneration from U.S. sources, then the two-out-of-seven–calendar-year rule applies instead.

Withholding and Reporting on Payments to Nonresident Aliens

U.S.-source income payments made to nonresident aliens are subject to 30 percent withholding unless an exception applies (*see* IRC §1441). There is an exception for wages paid to nonresident employees but special wage-withholding rules described below apply. The 30-percent tax applies to compensation payments made to independent contractors, even though such income is taxed at graduated rates on the recipient's U.S. tax return. The withholding tax is to ensure that taxes are paid by these U.S. income recipients who would be unlikely to voluntarily submit a U.S. tax return and pay their tax.

There also is an exception for noncompensatory scholarship and fellowship grants paid to or on behalf of nonresident alien recipients studying or engaged in training or research in the United States who are in F, J, M, or Q immigration status. Taxable grants to these recipients are subject to a lower 14 percent tax rate. A number of other possible tax exceptions for J-1 exchange visitors are discussed below.

U.S.-source income payments made to or on behalf of nonresident alien recipients must be reported to recipients and the IRS on a Form 1042-S information return. (Wages that are not exempt from tax under a tax treaty, however, are reported on Form W-2.) Employers and payers submitting Forms 1042-S must submit a Form 1042 tax return as well, even if no taxes were withheld.

Nonresident Employees

The federal income tax withholding rules for compensation paid to nonresident employees include special provisions because of the limitations on deductions and exemptions imposed on nonresident aliens discussed above. According to the IRS Notice 2005-76, special Form W-4 rules that apply to nonresident employees:

- Can only use single status;
- Cannot claim "exempt" on Form W-4;
- Can only claim one personal exemption unless an exception applies; and
- Must indicate "NRA" on line 6.

In addition, payroll processes must apply a "phantom gross-up" to a nonresident employee's salary before using the wage-withholding table to eliminate the standard deduction built into the wage table.

These special rules are described in IRS Publication 15, *Employer's Tax Guide*. Foreign national employees submitting an invalid Form W-4 are subject to withholding at the default rate using single status and zero exemptions.

Nonresident aliens making an election to be taxed as a resident alien with their U.S. citizen or resident alien spouse may make this election for wage withholding purposes as well. The election does not apply to Federal Insurance Contribution Act (FICA), however.

U.S.-source income payments made to nonresident aliens are subject to 30 percent withholding unless an exception applies.

Reimbursed Expenses

Compensation for services is subject to wage (for employees) or 30 percent (for nonresident alien independent contractors) withholding unless an exception applies. One important exception for J-1 trainees and other temporary exchange visitors is the exception for temporarily away-from-home business expenses. To qualify for this exception, a foreign national's temporary visit must be anticipated to last a year or less (*see* IRC §162(a)(2)). If the planned visit is for longer than a year, the exception does not apply. If the planned visit is for a year or less but is extended to beyond a year, the exception does not apply from the time that the employer knew that the visit would extend beyond a year (*see* Rev. Rul. 93-86, 1993-2 C.B. 71). If the recipients do not qualify for the temporarily away-from-home exception because of the length of their stay in the United States or because the reimbursed expenses fail to satisfy the accountable-plan rules, the reimbursed expenses are subject to wage withholding and Form W-2 income reporting.

Under these rules, an employee's deductible travel, food, and lodging for a qualifying visit are excludable from income if the reimbursed expenses are made under an accountable plan (*see* IRC §274). Per diem amounts paid in lieu of reimbursed expenses are excludable to the extent that they do not exceed U.S. government guidelines (*see* Rev. Proc. 2006-41, 2006-43 IRB 777). Reimbursements for the employee's family such as airfare—which are personal and not business expenses—are not excludable from income reporting, or exempt from taxes under this exception. These rules also can apply to expenses and per diems paid

to or for J-1 exchange visitors who are taxed as independent contractors with one exception: the per diem amounts for independent contractors are limited to the per diem for meals and incidentals. Lodging expense reimbursements must be based on receipts or paid directly to the hotel.

J-1 exchange visitors who are the recipients of noncompensatory scholarships or fellowship grants also may use these rules to reduce the 14 percent tax on their taxable grants (described in IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*, 21 under "Alternate Withholding Procedure").

Special Tax Exemptions for J-1 Exchange Visitors

Any one of several special IRC provisions or treaty provisions may apply to exempt compensation paid to a J exchange visitor from U.S. taxes.

Payments by a Foreign Employer

A special U.S. tax rule applies to exempt from U.S. tax, remuneration that is paid to J-1 nonresident aliens by a foreign employer. Foreign employer, for purposes of this rule, has the same definition as for the four-out-of-seven–year rule discussed above. Once the J exchange visitor becomes a resident alien for income tax purposes, this exemption no longer applies, and the compensation paid from abroad is subject to U.S. tax unless another exception applies. If such a resident alien remains paid by the foreign employer, the foreign employer is subject to U.S. payroll tax obligations (*see* Rev. Rul. 92-106, 1992-2 C.B. 258).

Social Security/ Medicare Tax Exemption

Compensation for employment services performed in the United States is subject to Social Security and Medicare taxes unless an exception applies. According to IRC §3121(b)(19), compensation paid to J-1 exchange visitors, regardless of the source of the payment, is exempt from Social Security and Medicare taxes if three conditions are met:

1. The J-1 exchange visitor is a nonresident alien;

2. The services performed are in connection with the purpose for which the Exchange Visitor entered the country; and

3. The employment is authorized under immigration rules.

A comparable exemption applies to federal unemployment taxes. The IRS does not allow this special tax exemption for a J-2 dependent because the J-2's purpose for entering the United States is to accompany the primary visa holder.

This exemption is lost if the individual in J-1 status becomes a resident under the residency tax rules described above. In the calendar year that the individual must begin →

counting days for purposes of the 183-day residency formula, the IRS requires the employer to begin withholding Social Security and Medicare taxes from the individual's compensation from the first countable U.S. day in the calendar year—typically, calendar year 3 for nonstudents and calendar year 6 for students. Employers can refund Social Security and Medicare taxes to foreign nationals who fail to become resident aliens in the calendar year through an adjustment of their Form 941, Employment Tax Return.

Social Security (Totalization) Agreements

The United States has entered into social security agreements, called "totalization" agreements, with more than 20 countries. The purpose of the agreements is two-fold:

1. To eliminate duplicate coverage and taxes on the same covered employment; and

2. To provide a formula for providing benefits to individuals who may not otherwise vest in either system.

To qualify for exemption from U.S. Social Security/Medicare taxes, the temporary employment assignment in the United States must be anticipated to last five years or less, and the employee and the foreign employer must continue to make payments into the foreign social security system on the remuneration being paid for the assignment, regardless of where it is paid. To evidence the foreign coverage, the foreign national should obtain a certificate of coverage from the social security office of the country where social security coverage is being maintained.

Income Tax Treaty Exemptions

The United States has income tax treaties in effect with more than 60 countries. These treaties operate to exempt from U.S. income tax compensation for services performed in the United States by a resident of the treaty country who meets the specific treaty criteria. (Income tax treaties generally do not apply to Social Security and Medicare taxes.) A foreign national's immigration status and purpose for entering the United States determine which treaty benefits may be available. For example, the treaty with France includes the following articles exempting compensation income of a resident of France from U.S. income tax:

- Article 14 (Independent Personal Services) allows an exemption from U.S. tax on self-employment income if the individual does not have a fixed base (*i.e.*, an office) in the United States.
- Article 15 (Dependent Personal Services) allows an exemption for employee compensation paid and borne by an employer that is not a resident of the United States, provided that the employee's U.S. days do not exceed 183 days in a 12-month period beginning or ending in the calendar year.
- Article 20 (Teachers and Researchers) allows a two-year exemption from tax on compensation for services earned by an individual engaged in teaching or research at an education or research institution. The research must be for the public benefit. The benefit can be claimed only once.
- Article 21 (Students and Trainees) allows an exemption from tax on an annual amount of up to $5,000 for students, certain trainees, and individuals engaged in research who also are the recipients of a grant. Grants also are exempt from tax under this article, along with an exemption from tax of up to $8,000 for an employee of a resident of France who is in the United States to study at an educational institution or to acquire training.

Article 16 (Directors' Fees) and Article 17 (Artistes and Sportsmen) can eliminate the benefits for individuals who would otherwise be covered by Articles 14 and 15. The benefits under Articles 14 and 15 also are lost if the foreign national either (1) fails to maintain tax residency in France; or (2) becomes a resident alien for U.S. tax purposes. The benefits of the other articles are not lost in either case as long as the foreign national claiming the benefits does not become a U.S. citizen or LPR. (For an overview of benefits of other treaties, see *IRS Publication* 901, U.S. Tax Treaties, Table II.)

Although tax treaties by their terms apply to federal income taxes, a treaty exemption may be available from state income taxes as well. This typically occurs when a state defines income with reference to a federal definition of income.

Foreign nationals claiming tax treaty exemptions on compensation, scholarship, or fellowship grants must submit their claim on their U.S. tax return. They also may claim an exemption from withholding tax by submitting a completed Form 8233 (for compensation) or W-8BEN (for noncompensation), to their employer or payer prior to payment. For the claim to be valid, both forms must include a U.S. taxpayer identification number (a Social Security number (SSN) or individual taxpayer identification number (ITIN)). Alternatively, a copy of Form 8233 must be submitted to the IRS ITIN Unit with Form W-7, ITIN application following instructions. There is no exception to the requirement for an SSN or ITIN on a W8-BEN claiming treaty benefits for scholarship or grant income.

Exemptions at a Cost

The IRC provides a number of tax-saving opportunities for J-1 exchange visitors, particularly for those who remain employed and paid by a foreign employer. Special tax exemptions also may be available for J-1 visitors paid by U.S. employers or payers. However, these exemptions present a number of pitfalls for U.S. employers and payers. They must determine the J-1 exchange visitor's U.S. tax residency status in order to allow the tax exemptions that only apply to nonresident aliens. Employers also must identify the tax residency status of their foreign national employees in order to apply the special wage-withholding and Form W-4 rules for nonresident employees. Lastly, income tax treaties and totalization agreements may provide special exemptions from U.S. tax. However, both employers and employees must follow special procedures in order to allow an exemption from withholding. Allowing exemptions from withholding and/or Social Security and Medicare taxes without following the proscribed rules and procedures exposes employers and payers to assessment by the IRS for underwithheld taxes, penalties, and interest. ILT

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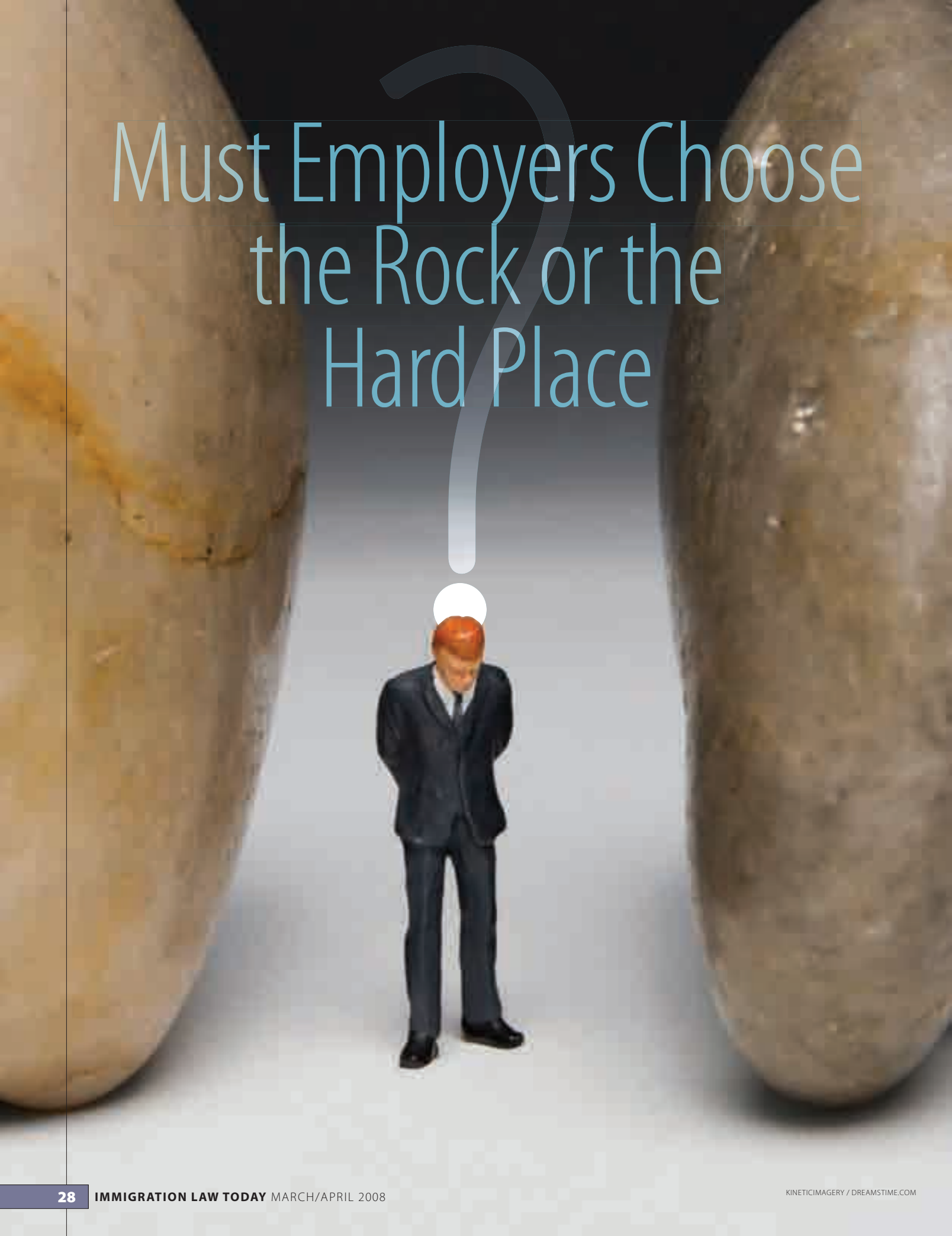

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Businesses Caught Between an SSA No-Match Letter and National-Origin Discrimination

by Eli Kantor

For years, the Social Security Administration (SSA) has been sending so-called "no-match" letters to employers when the name and Social Security number (SSN) of an employee did not match. In the past, those letters did not require the employer to terminate the employee in question. Rather, they only asked the employer to clarify the situation with the employee and to correct the error. The U.S. Department of Homeland Security (DHS) recently has dramatically increased worksite enforcement through the use of these no-match letters as its latest tool in ferreting out unauthorized aliens in the workplace, and in so doing, has placed employers between a rock and hard place.

Employer Responsibilities

Pursuant to the Immigration Reform and Control Act of 1986 (IRCA) (Pub. L. No. 99-603, 100 Stat. 3359), employers are required to ask all new employees for documents verifying their identity and U.S. work authorization. In order to work, many undocumented workers (as much as an estimated 75 percent) obtain false identification and work authorization documents. Undocumented workers have purchased false driver's licenses and Social Security cards for a minimal price to present to the employer during the Form I-9 completion and verification process. The employer is not permitted to look beyond the documents shown to him or her by the employee, so long as the documents appear to be genuine on their face and relate to the person presenting them. Otherwise, the employer could be fined for national-origin discrimination under Title VII of the Civil Rights Act of l964.

PRACTICE POINTER: An employer *still* can be held liable even without asking for further proof of authenticity, so long as he or she has "constructive knowledge" of an employee's fake documentation. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition (*see* 8 CFR §274a.1(*l*)(1)).

On August 15, 2007, DHS issued a new regulation in which it changed the definition of an employer's "constructive knowledge" in employing an unauthorized alien to include receipt of a no-match letter. However, DHS included a so-called "safe-harbor" provision under the new regulation that would allow an employer to escape liability if the employer were to follow certain steps toward curing the no-match problem. This →

safe-harbor provision has set off a firestorm among business organizations, unions, and immigration advocates because of the conflicts it causes for employers and the potential criminal liability associated with not following its procedures. Under the provision, if an employer receives an SSA no-match letter, it is required to confront the employee and give him or her 90 days to resolve the problem. If, at the end of the 93rd day, the employee is unable to resolve the problem and cannot complete a new Form I-9 with valid work authorization and identity documents, the employer must terminate the employee or face charges of "knowingly" employing an unauthorized alien.

DHS prepared an insert to the SSA no-match letter to provide additional guidance on an employer's responsibility once a no-match letter was received. The following is an excerpt from the U.S Immigration and Customs Enforcement's (ICE) website regarding how the government's safe-harbor procedure works (*see www.ice.gov*):

> The employer should take reasonable steps to resolve the no-match, and apply these steps uniformly to all employees listed in the SSA letter. It is possible that a no-match was the result of a clerical error on the part of the employee, the employer, or the government. DHS/ICE considers the following to be reasonable steps:
>
> **1.** If the employer promptly (no later than 30 days) checks its records to ensure that the mismatch was not the result of an error on the part of the employer;
>
> **2.** If this does not resolve the problem, the employer should ask the employee to confirm the accuracy of the employer's record;
>
> **3.** If necessary, the employer should ask the employee to resolve the issue with SSA. The employer should inform the employee in order to give him or her as much time as possible to resolve the matter and inform the employee that he or she has 90 days from the date the employer received the no-match letter to resolve the matter with SSA (explaining that resolution of the mismatch could take time);
>
> **4.** If the employer is able to successfully resolve the mismatch, the employer should ensure that the instructions in the SSA letter have been followed. The employer also should verify that the error has been corrected by using the SSN Verification Service (SSNVS) administered by SSA, and retain a record of the date and time of verification. SSNVS can be contacted by e-mail at *www.socialsecurity.gov/employer/ssnv.htm* or by telephone at 1-800-772-6270; and
>
> **5.** If none of the foregoing measures resolves the matter within 90 days of receipt of the no-match letter, the employer should complete, within three days, a new Form I-9 as if the employee in question were newly hired, except that no document may be used to verify the employee's authorization for work that uses the questionable SSN. Additionally, the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

If the employer cannot confirm that the employee is authorized to work (by following the above procedures), the employer risks liability for violating the law by knowingly continuing to employ unauthorized workers.

On August 29, 2007, several plaintiffs—including the American Federation of Labor-Congress of Industrial Unions and the U.S. Chamber of Commerce—filed separate lawsuits to prevent the implementation of the new regulations on the basis that they were

Constructive Knowledge

SOURCE: 8 CFR §§274a.1(l)(1)–274a.1(l)(1)(iii)(C)

1. The term knowing includes having actual or constructive knowledge. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.
2. Examples of situations where the employer may, depending on the totality of relevant circumstances, have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:
   a. Fails to complete or improperly completes the Employment Eligibility Verification, Form I-9;
   b. Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf; and
   c. Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as:
      i. An employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee;
      ii. Written notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to match Social Security Administration records; or
      iii. Written notice to the employer from the Department of Homeland Security that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person, or that there is no agency record that the document has been assigned to any person.

We do things as well as we can, but in a situation with the overall unemployment numbers way down, there is no way to replace these workers, and it scares us to death.

—J. Allen Carnes, farmer and president of Texas Vegetable Association
(D. Solis, ***The Dallas Morning News,*** Jan. 27, 2008)

arbitrary and capricious, exceeded DHS's authority under IRCA, and violated the Regulatory Flexibility Act. The plaintiffs also argued that the regulations could result in terminations of not only undocumented workers, but legal residents and citizens as well, due to the notorious inaccuracy of the SSA database.

On August 31, 2007, just before SSA was going to send out no-match letters with the DHS safe-harbor insert to thousands of employers, a U.S. district court judge issued a temporary restraining order to prevent DHS and SSA from sending out those letters. On October 10, 2007, a preliminary injunction was issued.

Appeasing the Courts

DHS has announced that it will be issuing a proposed regulation that will attempt to meet the district court's concerns and has filed an appeal to the U.S. Ninth Circuit Court of Appeals. The new regulation already has been sent to the Office of Management and Budget and may be published in the *Federal Register* shortly. In the meantime, an employer that terminates an employee based on receipt of a no-match letter may be subject to liability for national-origin discrimination. If the employer does not terminate the employee, it faces liability from ICE for "knowingly" employing an unauthorized alien, and therefore could face up to $11,000 in fines per worker and up to six months in jail.

The above-scenario is a lose-lose situation for employers caught between employer sanctions and national-origin discrimination laws on one side and the possibility of having to replace large portions of their workforce on another. It underscores the fundamental flaw of the "enforcement-only" approach, which cracks down on undocumented workers and employers but fails to provide a legal mechanism for employers to legalize their current workforce. →

The Long and Winding Road

There currently are an estimated 12 million undocumented people in the United States (working mainly in industries such as agriculture, construction, cleaning, and maintenance) who will be drastically affected by the proposed rules. The agricultural sector, which depends heavily on migrant labor, may be hit the hardest and left with crops rotting in the fields. There will be major disruptions, starting with the economy of states that are heavily dependent on migrant laborers, and slowly spreading across the nation. This will create a domino effect, as more lay-offs and lack of workers will plague restaurants, hotels, factories, and other businesses in neighborhoods across America. It will get worse before it gets better if nothing is done about the severe worksite enforcement and imminent no-match letter regulation. ILT

ELI KANTOR *practices immigration law in Beverly Hills, CA*

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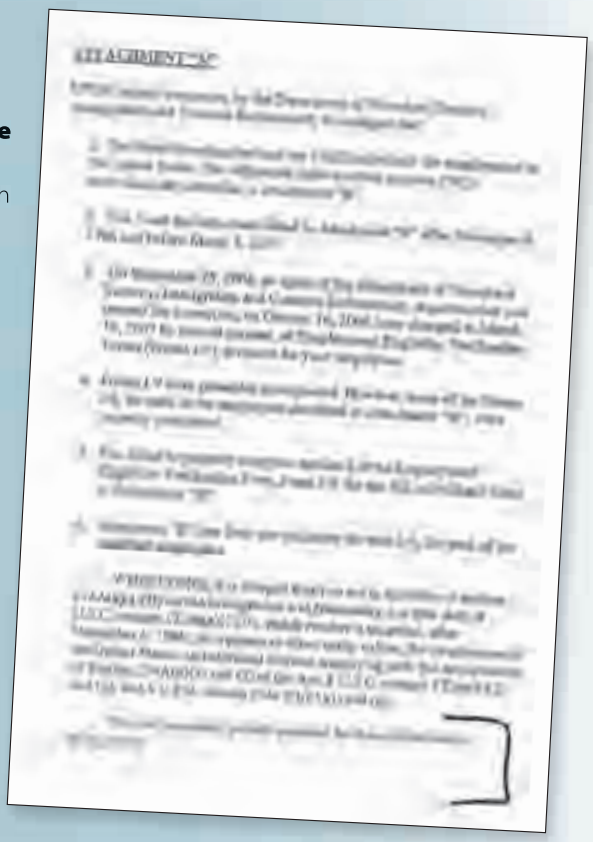

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The phrase "worksite enforcement" has become synonymous with surreal images of armed U.S. Immigration and Customs Enforcement (ICE) officers raiding companies large and small across the United States, rounding up alleged illegal workers, and tearing apart distraught families in one callous sweep. Worksite enforcement currently is a salient issue at the top of the U.S. Department of Homeland Security's (DHS) illegal immigration reform agenda. It is starting to affect many businesses and has entered the consciousness of mainstream American society. Thus, it is normal for U.S. employers to live in fear that ICE officials would be knocking on their doors next. However, they can alleviate their worries and take preventative measures by being meticulous with their Form I-9 records.

Better Safe

Last year, this author's firm received a frantic phone call from a client whose business is located in the Miami area. The company had been notified by phone of an impending ICE inspection. The employer was concerned about the state of the employees' Form I-9 documentation, and desperately needed guidance on how to best prepare for the upcoming ICE audit. The firm's counsel arrived at the company's physical location to review its hiring practices and internal compliance policy, along with all Form I-9 records. The team of counsel divided the I-9 forms into three stacks: (1) one containing currently employed personnel listed on the company payroll; (2) another listing independent contractors whose names do not appear on payroll records; and (3) a stack consisting of terminated employees. Even the I-9 forms of terminated employees were thoroughly checked, since the regulation states that an I-9 document must be kept on file for either three years after the time of hire or one year after employment termination, if the duration of employment exceeds three years (*see* 8 CFR §274a.2(b)(1)(iii)).

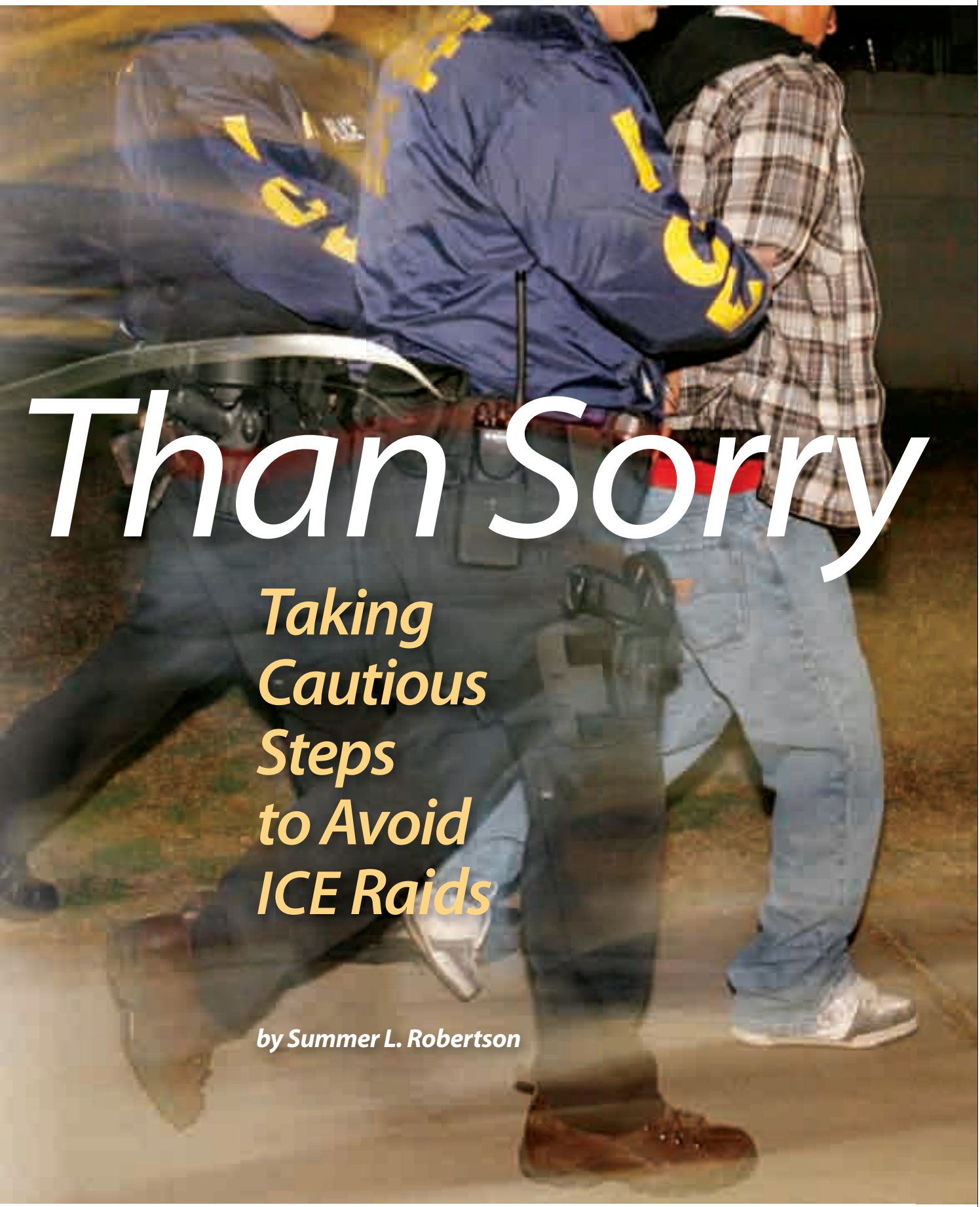
Section 1: More than Biographic

Counsel inspected Section 1 of the I-9 forms, which each employee has to complete on the very first day of active employment (*see* 8 CFR §274a.2(b)(1)(i)(A)). No employee should be allowed to commence employment before all information in Section 1 has been filled out, including designation of status, alien registration number, and U.S. Citizenship and Immigration Services (USCIS) work authorization expiration date. Since the focus of the I-9 process is on the employer's Section 2 responsibility rather than on the employee's accountability in completing Section 1, the first section's importance often is downplayed as simply biographic—carelessly characterizing omission and errors as insignificant (*see http://judiciary.senate.gov/testimony.cfm?id=1949&wit_id=5428*).

However, it is the employer's responsibility to ensure that Section 1 has been completed in its entirety, as failure to do so would result in employer liability (*see* 8 CFR §274a.2(b)(1)(ii)(A)). All the boxes have to be properly completed and attested with the employee's signature at the bottom of the section. This particular company revealed minor but consistent errors of this section. For example, some employees had failed to enter their date of hire, which meant human resources (HR) had to pull employee records so that the employees in question could verify their documents' missing information and initial and date the amendment. However, a bigger dilemma can occur if Section 1 contains missing information by a terminated employee, since no amendment could be effectuated.

Section 2: Employer's Verification

Section 2 of Form I-9 has to be completed by the employer within the first three days of hiring the new employee. It requires the employer to attest to having reviewed a combination of acceptable documents that verify an individual's identity and work authorization (*see* 8 CFR §274a.2(b)(1)(ii)(B)). In this client's case, some boxes had been left blank, and HR was called in to amend the mistake and initial and date the amendment. Counsel was careful to ensure that ICE would be alerted to any amendment to the I-9 by the designation of an initial and current date. →



Than Sorry

Taking Cautious Steps to Avoid ICE Raids

by Summer L. Robertson

AP PHOTO /MARK AVERY

If ICE agents want to talk to employees, view payroll documents, or otherwise inspect the facilities beyond what is on the I-9 forms, they need to acquire a subpoena or a warrant.

As extra precaution, the lawyers recommended that all changes be made in a different color ink. This approach demonstrates an employer's good intention to comply by updating its records prior to an ICE visit.

While inspecting Section 2 of the I-9 forms, the team of counsel noticed a glaring inconsistency. Some of the forms had copies of the requested employee documents affixed to the I-9s, while others did not. The team advised the employer to decide upfront whether to attach copies of the employee documents to the I-9 forms, since keeping document copies of certain employees and not of others could be problematic for the employer for several reasons. Upon inspection, ICE might wrongfully deduce that only certain employees with specific characteristics—such as country of origin, nationality, etc.—had copies pinned to their forms, and thus, may suspect discrimination. To prevent such an accusation, the team advised the client to be consistent in either keeping document copies for every employee or for none.

Section 3: Reverification Updates

Section 3 of Form I-9 is reserved for reverification of work authorization. If an employee submitted work authorization papers bearing an expiration date, and the employee remains employed past the specified expiration date, Section 3 must be completed to verify that the employee continues to hold legal work authorization in the United States. This section also is attested to by the employer, and its completeness is the first thing that ICE checks.

At the time of reverification, an employee is required to produce a document attesting to continued work authorization, but the chosen and eligible document may not contain a USCIS-specified expiration date, such as if the employee chooses to produce a Social Security card. The employer, in turn, should not request additional documents that evidence an expiration date since the employee produced a document listed under a list of documents bearing work authorization eligibility; otherwise, the employer might be accused of discrimination. In order to obtain a new expiration date, the employer may ask the employee to complete a new Form I-9 to shield the company from a potential ICE accusation of continuing to hire an unauthorized alien.

Once all the I-9 forms had been reviewed, counsel asked for a printout of the company's current payroll to make sure that the number of completed I-9 forms corresponded to the number of employees listed on the payroll. As it turned out, three people on payroll had no corresponding I-9 forms; however, that week, two people had been newly hired and one person was terminated. Since updated payroll printouts operate on a bimonthly basis, the changes had not yet appeared on the current roster. Further, the team asked to see a sample of payroll papers from the past three years to account for terminated employees still requiring Form I-9 documents on record to make sure their names appeared on the physical I-9 forms.

In general, failure to verify employment eligibility as well as failure to keep, maintain, and update I-9 forms is considered a paperwork violation. This violation carries a monetary fine, and ICE determines the amount of the fine according to the type of paperwork violation. ICE also takes into consideration the potential presence of up to five stipulated mitigating factors, which the lawyer can argue on the client's behalf. The mitigating factors in paperwork violations are: (1) size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether the employee was in fact an unauthorized alien; and (5) the history of previous violations of the employer (*see* INA §274A(e)(5)).

Just the Facts

Generally, ICE is authorized to review only company Form I-9 records. Therefore, counsel advised the client to direct ICE inspectors to a room that would hold nothing but the I-9 forms.

PRACTICE POINTER: If ICE agents want to talk to employees, view payroll documents, or otherwise inspect the facilities beyond what is on the I-9 forms, they need to acquire a subpoena or a warrant. The warrant must specify which person(s) and/or record(s) ICE wishes to examine more closely, especially when it comes to employee records that may contain sensitive information such as medical reports, reports of disciplinary action, performance evaluations, and other such confidential information.

Interestingly, over the three-day audit period, counsel was not able to confirm with ICE officials the validity of the phone call regarding an ICE inspection. ICE never came to audit the company, so the company could very well have fallen victim to a prank call. Legitimacy of the notice aside, the company was given the chance to get its I-9 records in order.

E-Verify Pros and Cons

In view of a potential, future ICE visit, management questioned counsel whether it would be beneficial to the company if it signed up under the E-Verify program (formerly Basic Pilot). Implemented in 1997, this verification system promises to virtually eliminate Social Security Administration (SSA) no-match letters while helping secure the jobs of authorized U.S. workers and providing support

Updated List of Acceptable Documents

LIST A Documents that Establish Both Identity and Employment Eligibility	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Eligibility
1. U.S. Passport (unexpired or expired)		**1.** Driver's license or ID card issued by a state or outlying possession on the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		**1.** U.S. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		**2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		**2.** Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-13150)
3. An unexpired foreign passport with a temporary I-551 stamp		**3.** School ID card with photograph		**3.** Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766l, I-688, I-688A, I-688B)		**4.** Voter's registration card		**4.** Native American tribal document
		5. U.S. Military card or draft record		**5.** U.S. Citizen ID Card (Form I-197)
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer		**6.** Military dependent's ID card		**6.** ID Card for use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		
		8. Native American tribal document		**7.** Unexpired employment authorization document issued by DHS (other than those listed under List A)
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care nursery school record		

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

for U.S. employers vested in maintaining a legal workforce. Furthermore, DHS recently introduced ICE Mutual Agreement between Government and Employers (IMAGE), with the goal of assisting employers in targeted sectors to develop a more secure and stable workforce, and to enhance fraudulent document awareness through education and training (*see www.smartbusinesspractices.com/legal_image.php*). All IMAGE participants gain membership to DHS's E-Verify program, administered by U.S. Citizenship and Immigration Services (USCIS). Through this employee authorization verification program, employers can verify that newly hired employees are eligible to work in the United States. This Internet-based system is available in all 50 states and is currently free to employers. It provides an automated link to the SSA database and DHS immigration records.

While this firm advises its clients against participation in an ostensibly flawed program such as IMAGE, its position in regard to E-Verify has been more of an evaluation on a case-by-case basis. The program remains in an expansion phase, with the government's intention to institute it nationally and mandate participation on the part of all U.S. employers. As of April 2007, in testimony by USCIS before the House Judiciary Subcommittee, the number of employers registered with E-Verify was at 16,000 (*see www.shrm.org/government/federal/lht_published/CMS_021902.pdf*).

The program's automated system verifies employment authorization with the help of SSA and DHS databases. USCIS asserted that at the time of its testimony, around 92 percent of queries came back with an instantaneous employment authorization response. That still represents 8 percent faced with what is called "tentative nonconfirmations" that allow for a 10-day period in which →

the employee has to contact the proper agency to rectify a professed error. A new hire's training or employment commencement date cannot be held up while final confirmation is pending. Critics of the program have cited to the protracted E-Verify processing times of up to two weeks and longer for noncitizen employment verification.

Costs to the company and efficacy of the system are a legitimate concern in this matter. Another issue not yet resolved with the current version of E-Verify is its deficiency detecting valid yet stolen Social Security numbers. Although DHS has gradually included extended features, the system remains subpar in the identification of fraudulent documentation. As of last summer, databases have added pictures to help in the verification process. Pundits have been debating whether this feature represents a beneficial tool to U.S. employers or, if in fact, it muddles the verification process further. Aside from a blatantly obvious mismatch, changes in someone's physical appearance—such as a new haircut, weight discrepancies, cosmetic procedures, or even colored contact lenses—can complicate a sound assessment. The question then arises as to when an employer should second-guess whether the picture matches the prospective hire. Without proper training and government guidelines, this question is impossible to answer so as to not cross the proverbial discrimination line while trying to avoid "constructive knowledge."

On the positive end, E-Verify, represents a certain immunity against a "constructive knowledge" accusation. A case in point is the ICE raid conducted at six meatpacking facilities of Swift & Company in December 2006. The raid ended with the arrest of 1,282 illegal immigrants and 200 criminal charges after a 10-month investigation. The fact that Swift had voluntarily signed up for participation in E-Verify had been viewed as a good faith effort to hire a legal workforce. Economic sectors predominantly hiring a foreign-worker base could ward off potential hefty fines and worse prison sentences by registering for E-Verify.

Playing It Safe

With the uncertainties as to the future of E-Verify, and with continual changes making the E-Verify system complex and confusing to navigate, this author's client decided to wait for a more definitive ruling on the ultimate administration and implementation of E-verify before signing up for it. But the company already has taken the one necessary step in dodging future ICE dilemmas: a meticulous and accurate list of Form I-9 documents.

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Getting Technical

Why Strict Form I-9 Compliance

IN RECENT TIMES, the issue of Form I-9 compliance has reemerged as an important priority for business owners and human resource professionals. With the U.S. Department of Homeland Security (DHS) stepping up worksite enforcement efforts at an alarming rate, and the specter of Social Security Administration (SSA) "no-match letters" becoming an unwelcome distraction, employers across the country are undertaking preemptive measures in an attempt to offset the threat of heavy penalties (*see* R. Tsai, "The Immigration Crackdown on Employers," *Business Law Today,* Vol. 16, No. 6, July/Aug 2007). One of the ways businesses can take a proactive approach to ensure the employment eligibility of their workforce is by performing regular, internal Form I-9 compliance audits. Such a strategy will enable the implementation of uniform policies and procedures during the hiring process, as well as allow employers to better identify any necessary training for human resources professionals. Perhaps more importantly, however, conducting internal audits can significantly limit the extent of any sanctions imposed by an administrative law judge (ALJ) in the event of an external audit by a federal agency.

AP PHOTO / STEPHAN SAVOIA

Is a Necessary Evil

BY STUART GILGANNON

Revisiting IRCA

The requirement that all new employees complete a Form I-9 within three business days of their start date is far from a recent phenomenon, having been first introduced by Congress as part of the Immigration Reform and Control Act of 1996 (IRCA) (Pub. L. No. 99-603, 100 Stat. 3359). Certainly, the broad policy goals underlying IRCA's enactment are very much in line with those that fuel DHS's recent worksite enforcement efforts, as well as the Bush administration's authorization of DHS letters explaining a new "safe harbor" rule for employers, accompanying the issuance of Social Security "no-match letters" (*see* R. Mazzoli and A. Simpson, "Enacting Immigration Reform: Again," *Washington Post*, Sept. 15, 2006). However, DHS's enforcement of the Immigration and Nationality Act's (INA) Form I-9 compliance provisions differs significantly from other immigration enforcement methods due to the stronger likelihood of legal U.S. citizens becoming caught in the crossfire of immigration enforcement efforts.

INA §274A contains a well-known provision that makes it unlawful to knowingly hire an unauthorized alien for employment in the United States (*see* INA §274A(a)(1)(A)). However, an important yet often overlooked provision is INA §274A(e)(5), which provides for civil fines ranging from $110 to $1,100 for employers who commit "paperwork violations" in connection with their completion or non-completion of Form I-9. Such violations can include a failure to sign the employer attestation section of the form, failure to complete the form in a timely manner, or failure to list documents considered sufficient to indicate both identity and employment authorization. Violations committed before September 29, 1999, are subject to fines of $100 to $1,000. (*See* 8 CFR §274a.10(b)(2).) Several factors are considered by an ALJ when imposing financial penalties under INA §274A(e)(5). These factors include: (1) the size of the employer's business; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether the individual was in fact an unauthorized alien; and (5) the history of previous violations.

No U.S. Citizen Protection

The fact that an employee for whom Form I-9 was not adequately completed is a U.S. citizen will not shield an employer from sanctions under this section, and will simply be considered as a mitigating factor when determining the amount of the civil financial penalty to be imposed. Similarly, an ALJ will only consider the size of the employer's business as it pertains to having sufficient resources to withstand the level of financial penalties sought by DHS, and whether a business's lack of administrative resources may be a mitigating factor in the commission of paperwork violations. The range of fines →

provided by §274A(e)(5) is *per employee* for whom paperwork violations occur, and are mandatory as a matter of law; no discretion is afforded to an ALJ to deviate from the statutory range.

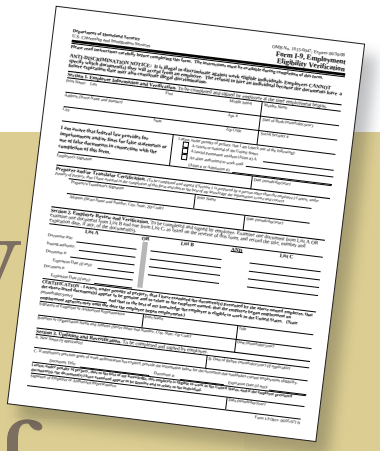
Many ALJs will choose to apply a mathematical formula when calculating the amount of civil penalties to be imposed for paperwork violations (*see U.S. v. Spring & Soon Fashion, Inc.*, 8 OCAHO 1003, at 24 (1998)). This is done by taking the difference between the maximum and minimum permitted amounts—currently $990—and dividing this number by five, ensuring that a total of $198 in fines is imposed for each of the above-listed factors found to be present. This can result in significant financial penalties for employers who fail to ensure the timely completion of I-9 forms for all new hires, regardless of their employment authorization status or the size of the business involved.

Form 1-9 Enforcement and Defenses

Two affirmative defenses may be available to employers charged with paperwork violations under INA §274A(e)(5). Following an amendment contained within the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724), INA §274A(b)(6) allows an employer to escape liability for certain "technical or procedural" violations if it can be shown that a good faith attempt was made to comply with INA §274A(b) requirements. A similar defense also has been recognized by the Office of the Chief Administrative Hearing Officer under the doctrine of substantial compliance. (*See e.g.*, *U.S. v. Anthony Borrelli and Sons, Inc.*, 4 OCAHO 1027, at 397–398 (1999); *U.S. v. Northern Michigan Fruit Company*, 4 OCAHO 667, at 692–698 (1994).)

Such defenses notwithstanding, DHS and legacy Immigration and Naturalization Service have demonstrated a clear commitment to the enforcement of §274A(e)(5) provisions, having sought substantial penalties for employers found to have committed technical paperwork violations. By far, the most high-profile of these prosecutions occurred in 1994, when Disneyland was fined $394,840 for 1,156 alleged paperwork violations, which was later reduced to $260,000 following a settlement (*see* "INS Slaps Disneyland with $395,000 Fine for Paperwork Violations," 70 *Interpreter Releases* 680 (May 24, 1993)).

However, several less-publicized cases serve as a grim reminder of the pitfalls §274A(e)(5) can present. In 1990, an ALJ imposed a $1,000 fine despite acknowledging that the respondent's business had no more than three employees during the relevant time period, and that none of the employees concerned was alleged to be unauthorized aliens (*see U.S. v. Dr. Merrill Cahn, DPM*, 1 OCAHO 127 (1990)). In 1993, an employer determined by the ALJ to fall within the "small to medium sized business" category was, nevertheless, fined $10,500 for a total of 42 Form I-9 paperwork violations (*see U.S. v. Business Teleconsultants, Ltd.*, 3 OCAHO 565 (1993)). The employer's pleas that it was "unaware that the [I-9] forms needed to be completed meticulously" fell on deaf ears. Similarly, a case decided in 1998 saw a small store owner fined $1,160 for five paperwork violations, despite a request for leniency due to the business's precarious financial state (*see U.S. v. Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO 1013 (1998)).



Know Your Workforce

The Key to Immigration Compliance

U.S. Immigration and Customs Enforcement (ICE) issued the following worksite enforcement advisory for employers to spot questionable employee documents:

1. Notable changes in the claimed citizenship or immigration status of employees
   - ICE investigated schemes by local document vendors who traffic in legitimate identification documents belonging to U.S. citizens, typically from one particular state, possession, or territory.
   - If new hires are suddenly presenting identical documentation (birth certificates, or driver's licenses, for example), from one particular state, possession, or territory (or locality), this may warrant further inquiry.
2. Middle management isn't immune from prosecution
   - Indifference to the law by supervisors and employees is never a good business practice and may result in criminal charges against employer, the company, and its employees.
3. Respond to SSA "Employer Correction Requests" or no-match letters
   - Check with employee to verify recorded information.
   - Verify any corrections made with SSA.
4. Verify any other discrepancies identified by Social Security Number Verification System (SSNVS)
   - Employers should immediately check their records for errors and discuss/address the issue with the employee and SSA if the error cannot be identified.
   - See *www.socialsecurity.gov* for instructions on proper use of the SSNVS system.

Source: *www.ice.gov/pi/news/topstories/*

In many instances, forms presented by complacent employers for U.S. citizen employees can cause more headaches for auditors than those for foreign-national employees, who tend to be more familiar with official government forms and valid, employment-eligibility documentation.

Such cases demonstrate the need for *all* employers to strictly comply with the verification requirements imposed by Form I-9—even smaller businesses with a workforce consisting exclusively of U.S. citizens. These examples also provide a wake-up call to those who believe that smaller companies who rarely recruit noncitizen employees are unlikely to be the direct target of a U.S. Immigration and Customs Enforcement (ICE) investigation.

No-Match Letter Consequences

One of the major objections raised by opponents of the "no-match letter" regulation is the significant hardship that this enforcement effort would impose on the many eligible employees—including U.S. citizens—who would receive such letters as a result of errors on the part of SSA. Indeed, the likelihood of such hardships was cited in an order for a motion for a preliminary injunction filed by various labor organizations (*see* AILA InfoNet Doc. No. 07101034). The key difference, however, is that the final rule issued by ICE provided a safe-harbor period of 90 days from the receipt of a no-match letter for employees to resolve any purported discrepancies with the SSA (*see* AILA InfoNet Doc. No. 07081562).

PRACTICE POINTER: Theoretically, at least, an employer cannot be held liable as a matter of law under the controversial "no-match" regulation, so long as each employee's employment eligibility is clarified in a timely manner.

A further consideration for small business owners is the possibility that failing to ensure Form I-9 paperwork compliance may result in the termination of subcontracts with larger organizations wary of DHS worksite raids. Indeed, the author recently assisted in the performance of a Form I-9 audit of numerous subcontractors →

Perhaps even more alarming than the violations themselves was the reaction of many employers when informed of their noncompliance, with one business owner referring to the auditors as "the ones treating my guys like terrorists."

involved in a construction project for a major national retailer. A condition of being awarded these contracts was passing an audit of I-9 documentation for each employee seeking access to the worksite. While the vast majority of employees audited purported to be U.S. citizens, numerous paperwork violations were found.

Among the most common of these violations was the inspection of only a driver's license by the employer, despite clear instructions on the form itself that such documentation is insufficient to demonstrate an individual's authorization for employment in the United States. Perhaps even more alarming than the violations themselves was the reaction of many employers when informed of their noncompliance, with one business owner referring to the auditors as "the ones treating my guys like terrorists."

Unintended Results

Consequently, one of the biggest challenges facing immigration attorneys today comes from a source not likely anticipated by Congress at the time of IRCA's passage. Many smaller businesses whose workforce consists largely of U.S. citizens appear unable—or unwilling—to appreciate the importance of strict compliance with Form I-9 requirements. In many instances, forms presented by complacent employers for U.S. citizen employees can cause more headaches for auditors than those for foreign-national employees, who tend to be more familiar with official government forms and valid, employment-eligibility documentation. By taking care of the relatively simple steps for completion of I-9 form at the time of hire, employers can ensure that they are not unwittingly caught in the crossfire of DHS's aggressive enforcement of Form I-9 provisions. ILT

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Primary Sources

- Immigration & Nationality Act
- 8 USC sections not in the INA
- Public Laws (104th Congress to date)
- CFR (Titles 6, 8, 20, 22, 28, and 42 immigration-related)
- Federal Register Final Rules & Notices (1996 to date)
- 9 Foreign Affairs Manual (7 FAM coming soon!)
- BIA Decisions (Vol. 1–Vol. 24)
- Court Decisions (Supreme Court and select immigration-related federal circuit courts)
- Internet Resources (links to O*NET and other federal agency sites)
- INS Operations Instructions
- U.N. Documents
- NAICS Codes and Titles
- Agency-Issued Cables, Letters, and Memos (CBP, DOJ, DOL, DOS, EOIR, ICE, USCIS, SSA, etc.)

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- INL Handbooks (1997 to date)
- The Visa Processing Guide & Consular Posts Handbook
- Professionals: A Matter of Degree
- Litigating Immigration Cases in Federal Court
- Immigration Practice & Procedure Under NAFTA & Other FTAs
- Immigration Consequences of Criminal Activity
- The David Stanton Manual on Labor Certification
- Global Immigration Guide: A Country-by-Country Survey
- Global Immigration Guide: Crossing Borders for Business
- Ethics in a Brave New World
- California Chapters Conference Handbooks (1998 to date)
- New York Chapter Immigration Law Symposium Handbooks (2001 to date)
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Proposed Rule Scrutinizes Religious Workers' Tax Returns

U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) has proposed a rule that places greater scrutiny on religious workers' federal income tax returns. The rule, which was introduced on April 25, 2007, will amend regulations regarding the Special Immigrant and Nonimmigrant Religious Worker Visa classifications. As a result, questions surrounding a tax status of a religious worker—such as what taxes he or she is subject to or what tax documents a religious organization should issue to a religious worker—are becoming increasingly important for immigration purposes.

Employment Paper Trail

The proposed rule requires, among other things, detailed evidence relating to the alien's prior employment in religious visa status (*see* 72 *Fed. Reg.* 79 (Apr. 25, 2007). Specifically, it states:

> [I]nitial evidence must include evidence of the alien's prior religious employment. If the alien was employed in the United States during the two years immediately preceding the filing of the application, the petitioner must submit the alien's W-2 wage statements, the employer's wage transmittal statements, and the transcripts of the alien's processed income tax returns for the preceding two years reflecting such work. If more than six months of such employment is not yet reflected in the documents such as W-2s, wage transmittal statements, or income tax returns (to be completed or filed at the time of filing the petition), then pay stubs relating to payment for such employment shall also be presented for work not yet reflected in such documents. If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of compensation and religious work.

Even though the proposed rule has yet to take effect, USCIS, in some ways, already applies it in practice. For example, from summer 2007 onward, USCIS issued requests for evidence in a number of cases filed by the authors' firm for the following information:

1. Payroll summary: copies of the petitioner's Internal Revenue Service (IRS) Forms W-3 (Transmittal of Wage and Tax Statements) evidencing wages paid to employees;

2. Quarterly wage reports: copies of the petitioner's quarterly wage reports for all employees that were accepted by Massachusetts. The forms must include the total wages and the number of employees per month; and

3. Tax documentation: IRS-certified copies of the beneficiary's IRS Forms W-2 (Wage and Tax Statement) and income tax filings or transcripts.

Minister Dual Status Dilemma

It is clear that a church's tax exemption under Internal Revenue Code §501(c)(3) does not cover salaries that a religious organization pays its ministers or any other religious workers. However, it is not clear whether a religious organization should withhold federal income taxes from the payments to their employees or what tax forms should be issued.

The confusion arises from the dual status of a minister—as opposed to other religious workers—for Social Security, Medicare, and income tax purposes (see "Social Security and Other Information for Members of Clergy and Religious Workers," *Dept. of Treasury IRS Publication* 517, Cat. No. 15021X, p. 2). According to 8 CFR §204.5(m)(2), a minister is a "person duly authorized by a religious denomination to conduct religious worship and perform other duties usually performed by the clergy of that religion."

Social Security and Medicare Tax

Social Security and Medicare taxes are collected under two systems: Self-Employment Contribution Act (SECA) and Federal Insurance Contributions Act (FICA). Under SECA, a self-employed person pays all the taxes, while under FICA, the employee pays half of the tax and the employer pays the other half. The services that a minister performs in the exercise of his or her ministry are covered by SECA (*see IRS Publication* 15, p 3; *www.clergytaxpros.com/FS_FAQ.htm##2*). In other words, for Social Security and Medicare purposes, a minister is considered a self-employed person even if he or she is an employee of a religious organization.

Note that under very limited conditions, a minister may apply for an exemption from Social Security tax (*see* p 4). IRS grants an exemption if the minister meets a number of IRS-prescribed conditions, like being opposed to public insurance because of his or her individual religious beliefs or the principles of his or her religious denomination.

Income Tax Withholding

For income tax purposes, a minister is treated differently. If a minister is employed by a congregation for a salary, he or she generally is a common law employee, and income from the exercise of his or her ministry is considered wages for income tax purposes (*see* p. 3). In contrast, amounts received directly from members of the congregation—like fees

for performing marriages, baptisms, etc.—are considered self-employed income.

Usually, employees must have their income tax withheld from their pay. The minister's situation is different. Even though ministers are considered employees, duly ordained, licensed, or commissioned ministers are not subject to federal income tax withholding (*see* p. 10). Of course, this does not mean that they do not pay income taxes. At its minister's option, a religious organization may deduct federal and state taxes from his or her monthly salary. If a minister chooses not to make monthly deductions, he or she must pay estimated taxes every quarter.

Tax Forms

As an employee, a salaried minister must receive a Form W-2 annually from the employing organization, while he or she must file quarterly payroll tax reports with the state and annual wage reports (Form W-3) with IRS. Furthermore, each year, a minister must file his or her own income tax return Form 1040 (unless his or her income was below the IRS threshold.)

Other Religious Workers

Generally, other religious workers are considered employees for Social Security, Medicare, and income tax purposes. Employees of religious organizations are covered under the above-mentioned FICA, and, therefore, the employee (a religious worker) and the employer (religious organization) each pay half of the Social Security and Medicare taxes (*see* p. 2). Exceptions to this general rule include situations where:

- organizations are opposed, for religious reasons, to pay Social Security and Medicare taxes, and choose to exclude their employees from FICA coverage;
- A person is a member of a religious order or a recognized religious sect; and
- A person is a Christian Science practitioner or reader.

Different rules apply depending on whether a member of a religious order has taken the vow of poverty. Those who have not taken the vow of poverty are covered under SECA unless they requested and received an exemption from IRS. Members who have taken vows of poverty are exempt from paying Social Security and Medicare taxes unless their order elected Social Security coverage for its members, in which case they are covered under FICA (*see* p. 3). Members of recognized religious sects must have an approved exemption from IRS; otherwise, they are covered under FICA (*see* p. 2).

Furthermore, members of a religious order also may be exempt from income taxes if they have received earnings for services performed as an agent of a religious order in the exercise of the duties required by that order, and renounce their earnings by giving it to the order (*see* p. 9).

Filing Correct Forms

In light of the pending rule amending USCIS regulations regarding the Special Immigrant and Nonimmigrant Religious Worker Visa classifications and present USCIS practice, it is very important for religious organizations petitioning for their workers to obey tax laws and issue the correct tax forms. Specifically, religious organizations must be mindful of the different forms for ministers and other religious workers. Otherwise, they risk the consequence of USCIS denying their petitions. ILT

RODNEY M. BARKER *is a member of AILA's Religious Worker Committee, editor-in-chief of Immigration Options for Religious Workers, and a principal of Barker, Epstein & Loscocco in Boston where* AUKSE USAITE, *a graduate of the Suffolk University Law School LLM program, works as a legal assistant.*

Los Angeles CLINIC Tends to Detainees and Unaccompanied Minors

"IGNACIO" WALKED INTO AILA MEMBER LINCOLN STONE'S OFFICE in downtown Los Angeles with his mother, "Ana." Looking at him now, it's hard to believe this happy, intelligent, and polite 8-year-old barely escaped a local gang in Guatemala that had threatened to kidnap him last year if his family did not pay a ransom of $5,000. He was being targeted because gang members knew his parents lived in the United States and assumed they had money. On top of that, Ignacio suffered from abuse from his caretakers and witnessed a gang execution with his own eyes. Rather than pay the ransom, Ignacio's parents decided to spend what little money they had to bring the boy to the United States where they could secure his safety.

Los Angeles CLINIC's legal team L–R: Julianne Donnelly (supervising attorney), Charlie Cassidy (detention attorney), Martin Gauto (detention attorney), Linda Arzaga (staff support)

Ignacio traveled with his uncle by car for 10 days from Guatemala through Mexico to San Ysidro, CA. He was pulled by immigration officials from the primary vehicle inspection lane because his entry documents appeared suspect. The Office of Refugee Resettlement (ORR) placed Ignacio in a social services facility in El Paso. There, social workers connected Ana with the Catholic Legal Immigration Network, Inc. (CLINIC) in Los Angeles. The attorneys at CLINIC's Los Angeles field office referred Ignacio to Stone & Grzegorek LLP for pro bono representation in his immigration hearings. Through the efforts of CLINIC, Ignacio was able to reunite with his parents after years of separation and abuse.

CLINIC Programs for Detained Adults and Minors

Ignacio is one of the many detainees who have benefitted from CLINIC—a national nonprofit organization dedicated to providing free and direct legal services for immigrants regardless of their race, religion, national origin, or other identifying characteristic. CLINIC's Los Angeles field office opened in September 1998. Here, CLINIC serves the most vulnerable low-income immigrants in an urban community burdened by the harsh penalties and restrictions of current immigration laws.

Since 1998, Los Angeles CLINIC has focused on serving those who are in the custody of U.S. Immigration and Customs Enforcement (ICE), a mission that few nonprofit organizations have sought to undertake. Los Angeles CLINIC saw the injustice of subjecting individuals to a deprivation of freedom (immigration detention) without providing legal counsel. The organization recognized a void in pro bono services for detained individuals, undertook to fill it, and has since made great strides in serving detainees in the Los Angeles area.

Los Angeles CLINIC has two main projects dedicated to serve those detained for immigration purposes, both of which are coordinated with the Executive Office for Immigration Review Pro Bono Program (EOIR). The Legal Orientation Program caters to adult ICE detainees, while the Unaccompanied Minors Program protects unaccompanied minors. Los Angeles CLINIC's detention attorneys, Supervising Attorney Julianne Donnelly, Charlie Cassidy, and Martin Gauto, run both programs.

Legal Orientation Program

Through its Legal Orientation Program, Los Angeles CLINIC provides free and comprehensive explanations about immigration court procedures to large groups of adult detainees at the ICE Mira Loma Detention Facility in Lancaster, CA. The orientations normally comprise three distinct services: (1) "know your rights" presentations offered by CLINIC attorneys who conduct an interactive group orientation open to general questions; (2) an individual orientation where unrepresented individuals can briefly discuss their →

PRO BONO PROFILE:

Meet Mark Shmueli

MARK SHMUELI'S REPERTOIRE includes a long history of human rights work dating back to his representation of rural immigrant communities in Colorado and Texas. He was an AILA pro bono liaison even before the "official" position existed! Mark currently leads the AILA Washington, D.C. Chapter's pro bono efforts, and has helped developed the D.C. Court Referral Project, which places unrepresented cases from both the Arlington and Baltimore courts with AILA pro bono attorneys.

The Baltimore court's participation has skyrocketed under Mark's watch. He believes that community outreach, coalition-building, and training attorneys in areas of the law with which they are unfamiliar are the cornerstones of any successful direct representation program. In addition, those building blocks are critical to the establishment of a corps of advocates dedicated to immigrant rights issues in the local front and across the nation.

Mark also assisted in launching the recently established Maryland Immigrant Rights Coalition (MIRC), which seeks to coordinate immigration pro bono efforts in Maryland in order to maximize the participation of experienced immigration lawyers in pro bono representation, and to facilitate the training and support of nonimmigration attorneys. Not surprisingly, members of this newly minted coalition have asked Mark to serve as one of their primary leaders.

One of the first events Mark planned on MIRC's behalf was a court training that taught members of the Maryland Bar the basics of asylum law before granting attendees an opportunity to participate in a mock trial with a Baltimore immigration judge. In exchange for attending this free event, attendees committed to taking one pro bono case through the D.C. Court Referral Project.

We look forward to seeing more fruit of Mark's organizing labor efforts in the years to come!

Courtesy of Susan Timmons, AILA Pro Bono Associate.

[H]ow can we expect justice to be served when we require people to navigate such a complicated and harsh immigration system without access to clear information or legal assistance in a language they can understand?

—Charlie Cassidy, Los Angeles CLINIC attorney

cases with experienced CLINIC attorneys; and (3) the self-help and referral workshops in which individuals are given legal materials and basic training through group workshops to complete applications for relief and prepare for merits hearings and, in some cases, be placed with pro bono counsel.

When asked about his commitment to the program, Cassidy exclaims, "[H]ow can we expect justice to be served when we require people to navigate such a complicated and harsh immigration system without access to clear information or legal assistance in a language they can understand?"

Los Angeles CLINIC's Lancaster Legal Orientation Program is only a beginning. According to Gauto, statistics from the Migration Policy Institute indicate that represented detainees received relief in 24 percent of their cases compared to 15 percent for unrepresented detainees. Los Angeles CLINIC's legal pro bono assistance of adult detainees at the Mira Loma Detention Facility increases the probability that their cases will be resolved in a just manner.

Unaccompanied Minors Program

Children who flee to the United States without parents or guardians are exceptionally vulnerable, and present special concerns because of their vulnerability. Some of them are escaping political persecution, while others are simply fleeing war, famine, abusive families, or other dangerous conditions in their home countries that may give rise to asylum or other claims to relief. When they arrive, these children face a stressful and confusing ordeal with no real support system.

Detention—often in isolated areas—diminishes a child's ability to find legal assistance. Since 1998, Los Angeles CLINIC has provided free legal services to detained children regarding immigration procedures and advice on what to expect in removal proceedings. CLINIC attorneys individually screen all unaccompanied minors in ICE detention in the Los Angeles area. They assist children in locating family members, securing release, and receiving pro bono representation. For children who remain detained and cannot be released to family members, CLINIC matches them with volunteer attorneys, or provides direct representation for a small number of children. On a weekly basis, Gauto represents children on the juvenile docket of Los Angeles EOIR master calendar hearings.

Through its experience with unaccompanied minors, Los Angeles CLINIC has been in the forefront of advocacy for federal government agencies to improve the facilities for detained children. In addition to its main projects for adults and minors in ICE detention, Los Angeles CLINIC conducts monthly community forums in collaboration with the Los Angeles Mexican American Bar Association and KCAL CBS Channel 9. Presentations include current topics such as raids awareness, protection against "notario" fraud, snapshots of what to expect in immigration detention and removal proceedings, and open Q&A sessions followed by individual legal counseling. Los Angeles CLINIC also educates prisoners at the California Institute for Women in Chino, conducting seminars on immigration detention and removal proceedings.

Make a Difference

Los Angeles CLINIC provides attorneys with legal training in representing detained adults and minors on a pro bono basis. CLINIC is part of the Model Hearing Pilot Program operated in coordination with EOIR. The Model Hearing Program in Lancaster provides substantive legal training through mock immigration trials with participating immigration judges, ICE assistant chief counsel and prospective pro bono counsel.

Los Angeles CLINIC is overwhelmed with the need for pro bono counsel, and seeks assistance in key areas: (1) taking pro bono cases of detained adults and minors; (2) volunteering to do intakes at the children's center to prepare summary profiles of cases for distribution to potential pro bono counsel; (3) providing mentorship to attorneys and law students lacking experience in detention and removal defense; and (4) providing legal advice at its community outreach forums.

You have an opportunity to assist detained adults and children who have no access to sources of evidence or witnesses; do not understand U.S. legal processes; and may have educational, cultural, or psychological disabilities that make it difficult for them to articulate their experiences or discuss their situations with government officials. To participate in CLINIC's Unaccompanied Minors Program, contact Martin Gauto at (213) 251-3535. For information on training and mentoring opportunities, or to represent adult detainees, contact Kim Luu at (213) 640-2863. ILT

MADHU N. SHARMA *is a member of Stone & Grzegorek LLP in Los Angeles, specializing in asylum, removal defense, and federal appeals, and serves as a mentor for CLINIC's pro bono attorneys.*
CANDICE GARRETT *is a law student at Loyola University School of Law in Los Angeles.*

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Norton Tooby has practiced criminal law for over 35 years. He specializes in finding immigration-safe plea bargains and in post-conviction relief for non-citizens and is author of *Aggravated Felonies* (2006), *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005), *Post-Conviction Relief for Immigrants* (2004), *California Post-Conviction Relief* (2002) and *California Expungement Manual* (2002).

J.J. Rollin has co-authored this work, as well as *Aggravated Felonies* (2006), *Crimes of Moral Turpitude* (2005) and *Safe Havens* (2005).

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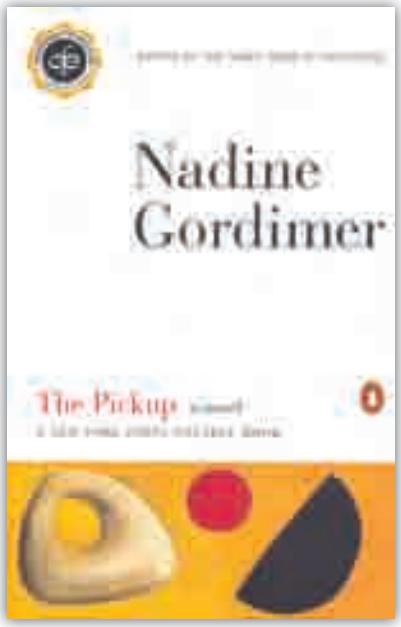
The Pickup: Amid High Hopes and Painful Reality

ART IMITATES AND PORTRAYS the real-life challenges of star-crossed lovers in Nadine Gordimer's novel, *The Pickup* (Penguin Group, $14, paperback). *The Pickup* traces the story of Julie and Ibrahim—two very different young people struggling to find their identities as they move between two countries. The first half of the book traces the couple's chance meeting in South Africa, while the second half focuses on the unraveling of their strained marriage in a remote desert village. The book is well worth reading, and the plot is painfully plausible.



A Chance Encounter

Ibrahim is a Middle Eastern laborer working on an expired temporary visa as a mechanic in South Africa. He already has worked in and been kicked out of two European countries. When Julie Summers—a young, wealthy, white South African woman—has car trouble in the street near his shop, he ends up fixing the car. She is intrigued (her life, otherwise, bores her), and their encounter is the "pickup"—the start of a torrid love affair that introduces them to each other's world. For Julie, Ibrahim's past life is a vague abstraction, one that she can grasp only through snippets of news reports and school history courses somewhere in her memory.

In the first part of the book, Ibrahim and Julie hang out with her young, liberal, disaffected crowd at the El Ay Café. She brings him along with her wherever she goes, but they seem to exist in parallel universes—physically together but understanding next to nothing about each other. He is baffled by her dissatisfaction with everything her birthright entitles her to, while she seems to give little thought to how different his life is from hers.

Eventually, Ibrahim is served with a notice for overstaying his temporary visa. This is a rare work of fiction that really captures the life of an undocumented worker, and the details resonate with the stories of clients these authors have seen over the years. The setting happens to be in South Africa, but it could just as easily be in New England.

In Between Countries

Julie is accustomed to having rights and options, and finds a lawyer through family connections. Her regular attorney suggests finding one "stupid enough to take on such cases and clever enough to see what he can do with" hers. The lawyer, who is not a particularly appealing character, cautions the couple to be realistic. In the end, he is only able to extend the notice to leave by a few days.

One of the most interesting parts of the book for immigration lawyers is seeing how, literally, clients can hang onto and act on a lawyer's every word. While some clients certainly question their lawyers' advice, there also are situations where lawyers have made suggestions that clients follow despite being inconvenienced, such as driving a long distance to a government office or anxiously waiting for a call at an appointed time when a quick

Prospective Immigrants, Please Note
Either you will go through this door, or you will not go through. If you go through there is always the risk of remembering your name.

—A. Rich, "The Fact of a Doorframe,"
Collected Poems Old and New 1950–1984,
W.W. Norton, & Co. Inc., New York, 1994, 51

Book in Brief

Quite a few people have recommended Kiran Desai's *The Inheritance of Loss* (Penguin Group, $24, hardcover) as another contemporary novel with themes similar to *The Pickup*. Desai's book is more complex and darker than Gordimer's—giving a very pessimistic view of the post-colonial developing world. It is the story of five characters whose lives are intertwined, and their brutal struggles for identity in a world that is pulling them in different directions.

Sai is a young woman, orphaned and sent to live with her grandfather in the Indian town of Kalimpong, in the shadow of the Himalayas. Her grandfather, Jemubhai, is a British-educated, retired judge, still in shock more than 30 years after his humiliating experience as a dark-skinned student in Great Britain. Their cook (unnamed until the final page of the book) has only one purpose in life—his son, Biju, whom he has sent off to New York City to work as a delivery boy or a waiter or a dishwasher. Biju, invisible and homesick, is desperate for a green card and to return home.

But Biju has no chance of obtaining a green card. His friend applies for the immigration lottery each year, but Biju cannot because "on and on the list went, but no, no Indians.

There were just too many jostling to get out, to pull everyone else down, to climb on one another's backs and run."

Perhaps the most arresting scene in the novel takes place in the U.S. embassy where Biju is applying for a tourist visa. The terms and setting are familiar to those of us practicing immigration, but Biju's fear and confusion color the scene and bring the brutal experience to life.

> Some would be chosen, others refused, and there was no question of fair or not. What would make the decision? It was a whim; it was not liking your face, forty-five degrees centigrade outside and impatience with all Indians, therefore; or perhaps merely the fact that you were in line after a yes, so you were likely to be the no. He trembled to think of what might make these people unsympathetic.

Both *The Inheritance of Loss* and *The Pickup* have been used in book groups around the country and are very much worth reading. Suggestions for book reviews are most welcome at *dhb@curranberger.com*.

call made sooner would end their cycle of speculation. Like these clients, Julie and Ibrahim wait almost painfully, day after day, for the attorney to call back with any piece of advice after their initial consultation.

However, there was no escaping the expired visa, and Ibrahim leaves as scheduled. Julie decides to go with him. They get married to appease his strict Muslim family then fly off to a small, unnamed country in the desert where his family ekes out a living.

A failure in the eyes of his family and himself, Ibrahim desperately applies for new visas to any developed country that might take him. Meanwhile, Julie settles down into the lifestyle of his family and town. She befriends the women and girls of the household, learns to cook, teaches English, and enjoys the peace and spiritual power of the desert. The tension between the couple is palpable. She naturally possesses—yet has rejected—what he is so ardently seeking. Her acceptance and eventual embrace of the life in the tiny desert town further widens the chasm between them.

Julie finds serenity in the place where Ibrahim sees only failure and misery; ultimately, their fundamental differences and the overwhelming circumstances between them overcome their relationship. Ibrahim and Julie are both searching for a country to which they can belong, but ironically, the land that Ibrahim rejects is precisely the place where Julie feels most at home and wants to stay. Julie is rich, white, and privileged; Ibrahim is poor, dark-skinned, and disadvantaged despite his education. Gordimer creates a binary opposition between the two— their backgrounds and their ideals—engaging the reader's interest in the way both characters are drawn together as opposites.

Immigration Reality Check

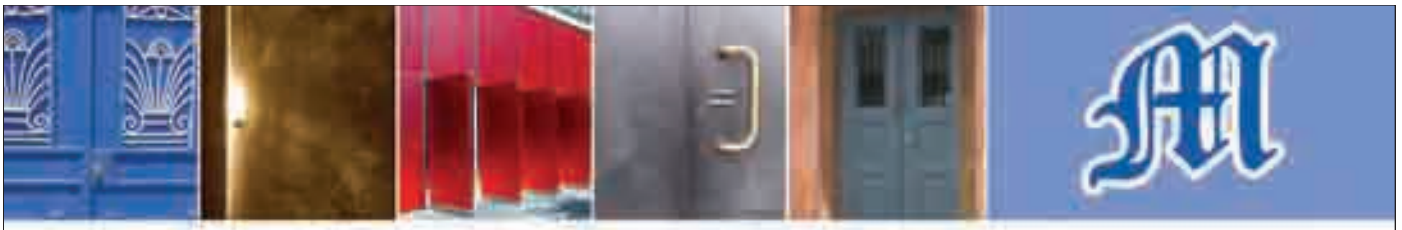
Gordimer's novel is both beautiful and gripping. *The Pickup* depicts undocumented immigrants driven by desperation to return to their native land. Gordimer was awarded the 1991 Nobel Prize for Literature, and belongs in the vast arena of post-colonial writers who portray the lasting effects of colonialism throughout the world. Her writing centers on the political, and yet transcends through the complexity of her narratives.

Gordimer has tackled many topics involving class and belonging. Her style in →

The Pickup, as in her earlier work, can best be called "elliptical." She paints a picture of a scene, always describing, rather than taking the reader through a chronological narrative. The result is a bit jarring at first. It takes several chapters before the main characters' names are introduced, and the small desert country that is itself a main protagonist in the book is never identified.

The Pickup is a familiar story of the fruitless attempts many people make to find a place for themselves in the developed world. The grim reality is that an expensive education does not guarantee admission to the United States; nor does business experience, a trust fund, or a mother married to a U.S. citizen (as in Julie's case). The H-1B professional working visa is one option, but the filing fees alone are currently $2,320, and quotas prioritize foreign students who have graduated from U.S. universities. Finding a U.S. employer to sponsor someone in Julie's position sight unseen would be extremely hard, especially with these hurdles to overcome.

A trust fund like Julie's might help, but only if the person starts a business. However, the United States does not have a treaty with South Africa that allows a temporary E-2 investor visa—and the very tough EB-5 green card category requires investing $500,000 to $1 million to achieve conditional residence. Furthermore, →



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while Julie's mother is characterized as married to a U.S. citizen and living in the United States, this does not help the couple's situation. Presently, the family-sponsored third preference category (married adult sons and daughters of U.S. citizens) is backlogged more than seven years.

Grim Prospect

Ten years ago, about one-third of the potential clients who approached our offices from "off the street" had no immediate immigration options. We would go over the situation, and put their names on lists of people to call if the law changed in one way or another. Now, the situation is even more challenging. Foreign students—especially those who possess only a bachelor's degree—are finding that they cannot get an employer to sponsor them for the H-1B lottery, given the expense and uncertainty despite their U.S. education. Thus, in today's precarious nature of U.S. immigration law, *The Pickup* is not only engaging, it also is painfully realistic.

[I]n today's precarious nature of U.S. immigration law, *The Pickup* is not only engaging, it also is painfully realistic.

Authors' Note: The novel's social and political concerns are presently vital, and it is not surprising to hear that Cornell University chose it as a required book for all incoming first-year students. Professor Phyllis Katz explained that based on her teaching experience, many students are misinformed about these issues—many have not met (or think they have not met) an undocumented worker, and have not thought about the challenges these workers face. Most U.S. college students would be surprised to learn how many undocumented students there are in higher education in the United States.

DAN H. BERGER *is chair of the AILA Board of Publications and a named partner at Curran & Berger in Northampton, MA, where* REBECCA SCHAPIRO *works as an immigration paralegal.* PHYLLIS KATZ *is a senior lecturer at the Women's and Gender Studies department at Dartmouth College in Hanover, NH.*

Reporting Our Colleagues for Discipline to Save Our Clients from Deportation: An 'Ineffective' System

IN THE PRACTICE OF IMMIGRATION LAW, attorneys try to help clients stay in the United States. In so doing, we are sometimes like good soldiers who do not question orders, even when these orders are highly distasteful. A case in point concerns the procedures when representing a client who has been a victim of "ineffective assistance of counsel." In preparing a motion to reopen for a noncitizen who has been the victim of such representation, attorneys are instructed—among other things—to report the "ineffective" lawyer to the "appropriate disciplinary authorities," or explain the failure to do so (*see Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988); 8 CFR §208.4 (a)(5)(iii) (2002)).

Lozada Precedent

The first published opinion to set forth the "complaint" requirement was *Matter of Lozada*. In *Lozada*, a noncitizen filed a notice of appeal after an immigration judge (IJ) found him deportable. The notice of appeal indicated that the noncitizen would file a separate written brief in support of his appeal. However, his attorney failed to file the brief, and after more than one year had elapsed, the Board of Immigration Appeals (BIA) summarily dismissed the appeal. The noncitizen filed a motion to reopen, alleging that his attorney provided ineffective assistance. The BIA denied the motion and held that in order to establish sufficient "egregious circumstances," noncitizens must, among other requirements, file a complaint with the "appropriate disciplinary authorities," or explain why a complaint has not been filed. The *Lozada* requirements were subsequently codified at 8 CFR §208.4 (a)(5)(iii) for cases dealing with ineffective assistance of counsel in the asylum context.

To deal with the situation in which there has been ineffective assistance of counsel, the BIA established a procedure that must be followed when a noncitizen and/or his or her representative file a motion to reopen. First, *Lozada* requires that the motion be supported by an affidavit attesting to the relevant facts. This affidavit should include a statement about the agreement that was entered into with the former counsel regarding that representation. Second, before allegations of ineffective assistance of counsel are presented to the BIA, the former counsel should be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure to or refusal to respond, should be submitted with the motion. And finally, "If it is asserted that prior counsel's handling of the case involved the violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." (*See Lozada* at 639–40.)

Since this requirement was enacted, many attorneys have struggled with it. After all, how can we properly represent our clients without antagonizing and possibly damaging the livelihood of a colleague who we may see in court next week or at a continuing education seminar next month?

Circuit Courts on *Lozada*

Since *Lozada*, multiple circuit court cases have addressed the *Lozada* requirements. Every circuit that has addressed the issue has generally endorsed the procedural requirements set forth in *Lozada* (*see Matter of Azad*, 23 I&N Dec. 553 (BIA 2003) *citing Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 132 (3d Cir. 2001); *Lara v. Trominski*, 216 F.3d 487, 489 (5th Cir. 2000); *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000)). However, *Lozada* has been limited by the Ninth Circuit, which does not require strict compliance with the procedures where ineffective assistance is clear from the administrative record (*see Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000)). *Lozada* also has received criticism from the Third Circuit, which expressed concern that *Lozada* will be interpreted to "effectively require all petitioners claiming ineffective assistance to file a bar complaint." (*see Xu Yong Lu v. Ashcroft*).

[T]he requirement of reporting one's colleague to disciplinary authorities is not only repugnant, but also "ineffective."

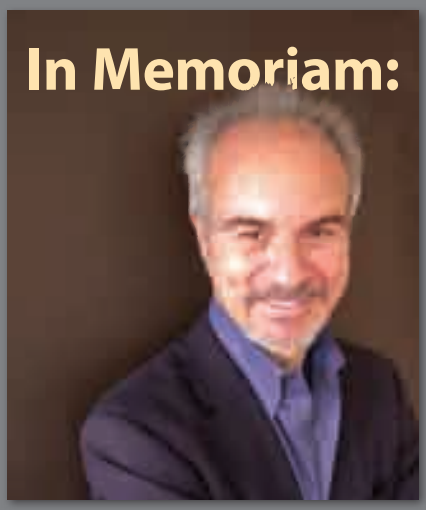
Although the language of *Lozada* allows a noncitizen to explain why a bar complaint was not filed, case law suggests that not filing a complaint is risky at best, and may ultimately prove fatal. Some of →

the infrequent examples of successful motions without bar complaints include cases where the noncitizen believed that the attorney already had been suspended for his actions, (*see Esposito v. INS*, 987 F.2d 108), and where the noncitizen was an adolescent who did not speak English, and thus could not be expected to file a bar complaint (*see Figueroa v. INS*, 886 F.2d 76, 79 (4th Cir. 1989)).

Progeny of *Lozada* Requirements

The *Lozada* procedural requirements are aimed at providing a basis to evaluate ineffective assistance claims, deter baseless allegations, and notify attorneys of the standards for representing noncitizens in immigration proceedings. In addition, the "complaint" requirement increases the BIA's confidence in the validity of a particular claim, reduces the likelihood that an evidentiary hearing will be needed, and serves its long-term interests in monitoring the representation of noncitizens by the immigration bar. The validity of a particular claim is enhanced by the "complaint" requirement because it supposedly decreases the likelihood of collusion between the original "ineffective" attorney and the noncitizen. The requirement also is intended to deter meritless motions (*see In Re Rivera*, 21 I&N Dec. 599, 604 (BIA 1996)).

On the surface, this is a strong rationale. But do the *Lozada* requirements really deter collusion? Suppose an immigration attorney makes a mistake by failing to file a timely appeal. He or she realizes that one way to overcome the problem is for the client to file a motion to reopen based on ineffective assistance of counsel pursuant to *Lozada*. It can be argued that the "complaint" requirement of *Lozada* will actually *encourage* the attorney to find a friendly colleague to take over the matter instead of letting the case fall into the hands of an attorney with no incentive to downplay the errors committed. Through "collusion"—which *Lozada* explicitly sought to deter—the bar complaint, if filed, could be couched in friendly terms or indeed avoided altogether. As noted above, one way to overcome the complaint requirement is to provide a satisfactory explanation of why one was not made. Therefore, when put to the test, the collusion argument fails.



In Memoriam: Michael Maggio

Friend, Colleague, Advocate, and "Matter of Ethics" Pioneer

THE FIELD OF immigration law lost one of its supernovas in the passing of Michael Maggio on February 10, 2008, after courageously battling non-Hodgkin's lymphoma for 10 months. Michael was the chairman and co-founder of Maggio & Kattar in Washington, D.C. He authored many publications, received countless accolades for his tireless advocacy and representation of immigrants' rights, and was a nationally recognized authority on numerous complex areas of immigration law.

Michael was a trailblazer, always thinking of innovative ways to enhance the practice of immigration law. To ensure that attorneys represent their clients ethically and to the best of their abilities, Michael began the "Matter of Ethics" column in *Immigration Law Today* to remind his colleagues of this awesome responsibility. Thus, we dedicate this issue's "Matter of Ethics" to Michael's memory and lasting legacy. Thank you, Michael, for gracing us with your passion, intelligence, infectious energy, and deep commitment to your profession.

The progeny of *Lozada* also assert that the "complaint" requirement "highlights the standards which should be expected of attorneys who represent noncitizens in immigration proceedings" (*see Matter of Rivera*, 21 I&N Dec. 637 (BIA 1998)). But the decisions neglect to explain how. It is difficult to see how the procedural requirements in *Lozada* enhance immigration attorneys' understanding of their obligations. To begin with, there already is a system in play to deal with ineffective assistance of counsel. Attorneys who commit malpractice are subject to civil lawsuits for professional negligence or malpractice. There already are many incentives for attorneys to avoid committing malpractice. Further, if the circumstances of the "ineffective assistance" are so egregious as to warrant a bar complaint, the aggrieved party is always at liberty to file one.

Finally, the complaint requirement does not substantially reduce the likelihood that an evidentiary hearing will be needed to ascertain the merits of the claim. For example, in criminal law, there is a mechanism in place for conducting full evidentiary hearings, pursuant to 28 USC §2254, in which both the client and the former attorney provide evidence pertaining to the latter's actions that the client alleges constituted ineffective assistance. A mere bar complaint, however, lacks the adversarial nature of these full evidentiary hearings. Anyone can lodge a bar complaint without any independent verification of the facts contained therein. Further, there is no suggestion in *Lozada* or its progeny that the BIA is concerned with the resolution of the bar complaint (*i.e.*, whether the state bar finds the allegations credible). Therefore, the required bar complaint adds no independent verification of allegations and in no way alleviates the potential need for an evidentiary hearing.

It should be noted that the BIA is authorized to "impose disciplinary sanctions against any practitioner if it finds it to be in the public interest to do so" (*see* 8 CFR §292.3(a)(1)). The Executive Office for Immigration Review (EOIR) may initiate a

preliminary inquiry upon receipt of a complaint or on its own initiative (*see* 8 CFR §3.104(b)). The regulations set out a procedure for investigating, charging, and adjudicating disciplinary charges (*see* 8 CFR §§3.101–3.109). In any case, where an individual establishes that his or her counsel was ineffective, EOIR may initiate disciplinary proceedings. Given EOIR's expanded authority to regulate the practice of immigration law and its adoption of a mechanism to investigate and discipline lawyers, it no longer is necessary to rely on state bar procedures to police the immigration bar.

State Bar on Immigration Matters

According to an official for the California State Bar, Rule of Professional Conduct (RPC) §3-110A is controlling when determining whether negligence leads to disciplinary action. According to this rule, "a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The official added that "if the facts indicate mere negligence by an attorney but not an intentional reckless repeated failure to perform legal services with competence, then we would not have grounds for investigation."

The RPC in most states suggest that this approach is typical. Mere negligence by an attorney—as opposed to willful misconduct—does not subject him or her to discipline. Therefore, the "complaint" requirement has not only encouraged the filing of state bar complaints that would otherwise have not been filed, it also has caused complaints to be submitted that are routinely dismissed. Thus, the drafters of the "complaint" requirement set forth in *Lozada* and 8 CFR §208.4(a)(5)(iii) have overstepped their authority and gone into an area well beyond their domain.

Alternative Approach to Ineffective Assistance of Counsel

Below are two scenarios in which ineffective assistance of counsel comes into play in immigration law. They are followed first by a look at the applicable *Lozada* requirements, then by a proposed alternative to those requirements.

Scenario 1: Clerical Error

Attorney is negligent and does not dispute this.

Suppose a case is set in immigration court for May 15, 2008, at 1:00 pm. The immigration court sends the attorney of record a new hearing notice indicating that the case has been reset and moved to May 15, 2008, at 8:30 am. The attorney (and/or attorney's staff) fails to properly convey this information to the respondent. As a result, the noncitizen is "deported in absentia." →

Under *Lozada*

Under current rules, the only way for the damage to be undone is for the client to file a motion to reopen based on ineffective assistance of counsel pursuant to *Lozada*, including evidence that a complaint was filed to the state bar about the "ineffective" attorney, or an explanation of why a complaint was not filed.

Alternative to *Lozada*

In civil law, a procedure exists that allows judgments taken as a result of a party's "mistake" to be corrected. According to California Code of Civil Procedure §473(b), the court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

For situations involving administrative errors, a similar procedure should be implemented in immigration law. An attorney should be allowed to present a motion to reopen and provide a detailed explanation of the mistake that led to a deportation order. If the explanation appears concocted, the adjudicator could deny it. The fact that the only system in play to correct a clerical error or honest mistake in immigration law requires a complaint to the disciplinary authorities (that will most likely be disregarded) provides compelling evidence of the urgent need to modify the approach set forth in *Lozada*.

Scenario 2: Questionable Motion to Reopen
Prior attorney vehemently disputes allegations.

The BIA affirms the IJ's decision to deport or remove a noncitizen. Years later, the noncitizen receives a "bag and baggage letter" asking him or her to report for deportation. A motion to reopen is brought alleging that the prior attorney failed to inform the noncitizen that he or she could file a motion to reconsider with the BIA within 30 days or file a petition for judicial review in circuit court.

In truth, the noncitizen was informed of all his or her appeal options by the prior attorney. Nevertheless, the current attorney has informed the noncitizen that if he or she wishes to remain in America with his or her family, the only option is to blame the prior attorney and file a motion to reopen based on ineffective assistance of counsel.

Under *Lozada*

Under *Lozada*, a declaration is required from the noncitizen setting forth the contractual agreement. It also is necessary to inform the prior attorney of the allegations against him or her and the opportunity to respond. It should be noted that pursuant to *Lozada*, it is the attorney bringing the motion who is responsible for informing the prior attorney of these allegations. It also is the current attorney's responsible to provide the prior attorney's (understandably indignant) response to the IJ or BIA.

Alternative to *Lozada*

The above-situation illustrates another deficiency in *Lozada*. In this scenario, the attorney bringing the motion is clearly the last person who should be responsible for including the prior attorney's response with the motion. Like the "complaint" requirement, the requirement of informing the "ineffective" attorney of the allegations against him or her and including his or her response in the motion is a requirement likely to be defied.

Time for Change

There is a reason why one law student becomes a prosecutor while the other a defense attorney. Many factors go into this choice. What has been labeled "deportation defense" often involves helping families stay together in America. Indeed, the practice of "deportation defense" could be characterized as helping people in trouble. This is distinguishable from getting people into trouble. Some of the practitioners best suited for "deportation defense" are the most ill-suited for reporting their colleagues to the state bar—an action more associated with a prosecutorial temperament. Yet *Lozada* has the effect of forcing defenders to be prosecutors.

As seen from the foregoing, the requirement of reporting one's colleague to disciplinary authorities is not only repugnant, but also "ineffective." It does not deter collusion; it encourages it. It does not deter frivolous motions to reopen; rather, it encourages frivolous bar complaints that are routinely disregarded when they deal with mere negligence as opposed to willful misconduct.

The proposals offered as alternatives are by no means intended as final solutions to the problem of dealing with ineffective assistance of counsel in immigration matters. Rather, they are intended as a call for a new approach that recognizes the current problems and addresses them in an effective and reasonable manner. ILT

CURTIS PIERCE *is a certified immigration specialist in Los Angeles, and has successfully argued many cases before the Ninth Circuit Court of Appeals.* MATTHEW HALL *is a recent graduate of Loyola Law School and practices immigration law in Los Angeles.*
The authors would like to thank Beth Werlin, AILF Litigation Clearinghouse Attorney, for her invaluable assistance and insights.

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STATUS CHECKS ✔

Honors and Appointments

☑ AILA Practice and Professionalism Director **Reid Trautz** was elected as a **fellow** in the **College of Law Practice Management**, having more than 10 years of outstanding contributions to the law practice management profession.

☑ **Alice Yardum-Hunter** was honored as a **"Super Lawyer"** by ***Los Angeles Magazine*** and the research firm, **Law and Politics**, for the fifth consecutive year.

☑ **David H. Nachman** was recently appointed by the Teaneck Township Council to serve as a representative of the **Teaneck Economic Development Corporation** in New Jersey.

Announcements

☑ **Philip C. Curtis** is one of the licensed attorneys providing free advice at the newly launched **VisaAmigo.com**, an immigration law information website.

☑ The Dallas-based firm of **Chavez, Gallagher & Valko, LLP** opened an additional office in Fort Worth, TX, in March 2008.

☑ **Nick Chavez**, creator of "Chavez World" cartoons in *Immigration Law Today*, received his board certification from the **Texas Board of Legal Specialization** to practice immigration law.

☑ **Elizabeth Ricci** completed a **Certificate in Homeland Security**—an intensive study on homeland security and protection systems.

☑ **Evans J. Legros** celebrated his third anniversary as a solo practitioner in October 2007.

☑ **Denise C. Hammond** and **Joan S. Claxton**, formerly of Tobin, O'Connor & Ewing, are pleased to announce the formation of **Hammond Claxton, P.C.** in Washington, D.C.

☑ **Yahima Suarez** formed **Suarez & Echeverri, P.A.**, located in North Miami Beach, FL.

On the Move

☑ **Russell W. Roberts** joined **Harris Beach PLLC** in Rochester, NY, as of counsel, concentrating in all aspects of business and family immigration.

☑ **Martin Valko** has joined **Chavez, Gallagher & Valko, LLP** in Dallas as partner.

☑ **Amita Vasudeva** joined the immigration group of **Duane Morris LLP** in San Francisco.

☑ **Joseph Kallabat & Associates, P.C.** in West Bloomfield, MI, welcomed new associates, **Mariana Kulikowska**, **Justin Facciolla**, and **Lydia Deddeh**.

☑ **Frank & York, LLC** in Newark, NJ, is pleased to announce the addition of the firm's newest associate, **Maggie Dunsmuir,** who previously clerked at the New York Immigration Court, Catholic Charities, Legal Services, and Legal Aid.

☑ **Amy Erlbacher-Anderson** was elected a **partner** at **Baird Holm LLP** in Omaha.

☑ **Kyle B. Mandeville** was named **partner** at **Bennett Boehning & Clary LLP** in Lafayette, IN.

☑ **Leon Rosen**, AILA Past President (1972–73), celebrated **53 years of AILA membership**, and continues in active practice in his Las Vegas office at 501 South Seventh Street, Las Vegas.

☑ **Marin K. Ritter** is pleased to announce the opening of the **Law Offices of Marin K. Ritter LLC** in Beachwood, OH.

Civic Duties

☑ **Bashist Sharma** is now an **equestrian volunteer ranger** at the **Bush Intercontinental Airport** in Houston.

☑ **Frank Tse** and **Helen Y. H. Hui** host Taishanese, a weekly hotline radio show airing on Thursdays at 8:00 pm PST.

☑ **Ollie R. Jefferson** served as an **international observer** at a **hearing in Haiti**, for Father Gerard Jean-Juste, a Haitian human rights activist and political prisoner.

In Memoriam

☑ Family, friends, and colleagues mourn the untimely loss of **Kimberly Fanning** on January 23, 2008.

☑ **Michael Maggio** passed away on February 10, 2008, after courageously battling non-Hodgkinís lymphoma for 10 months. Michael was a beloved friend and colleague who made a lasting impact and legacy in immigration law.

☑ AILA Past President **John Barry** (1966) passed away on March 2, 2008. Friends and colleagues described John as a "remarkable guy and a very tenacious lawyer."

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