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November 2009 Immigration Update

Topics: Unannounced site visits for H-1B employers; FY2010 DHS Security Appropriations Bill; "public charges"; Columbia Farms deferred prosecution; E-Verifying entire workforces (for federal contractors only); and an update to the H-1B cap count.

USCIS FDNS commences audit of H-1B program including unannounced site visits to H-1B employers and their clients. The Office of Fraud Detection and National Security (FDNS) is performing an audit of the H-1B program which includes collecting information during site visits to verify petitions that were both pending and already approved. FDNS uses the information gained during the site visits to develop databases to identify factors and trends that could indicate fraud. The employer may request immigration counsel be present during the site visit but FDNS usually does not reschedule visits to allow the attorney time to be present. FDNS will allow counsel to be present by phone, if requested. In general, the FDNS site inspector will ask to speak to the person who signed the I-129 petition (for an H-1B), ask to view the facilities, and ask to speak with the H-1B beneficiary.

Some items which are checked by site inspectors during the visits are whether the facility visually appears to be that of the organization, whether an organizational representative authority is present during the site visit, whether the site visit suggests the presence of a legitimate organization, whether the organization has knowledge of the beneficiary and the petition filed on behalf of the beneficiary, and whether the beneficiary is working for the organization and is available to speak with the site inspector. They also review the details of the beneficiary such as whether they were performing the duties outlined in their H-1B petition and whether their current salary was what was listed in the H-1B petition. Typically, site visits last for approximately one hour.

White House announcement on final rule to end HIV travel ban. On Oct. 30, 2009, President Obama announced the elimination of the HIV entry ban at the signing of the Ryan White HIV/AIDS Treatment Extension Act of 2009. On Nov. 2, his administration issued a final rule to repeal the ban effective on Jan. 4, 2010. This rule removes the HIV infection from the definition of 'communicable disease of public health significance' and removes references to "HIV" from the scope of examinations for aliens. Click here for the final rule.

Columbia Farms to enter into deferred prosecution agreement regarding the companies' alleged hiring of undocumented workers. The Greenville, S.C., poultry processing plant, Columbia Farms, Inc., and its affiliate companies with House of Raeford Farms, entered into a deferred prosecution and global settlement agreement with the federal government to resolve pending criminal charges, as well as any civil and administrative violations, regarding the companies' alleged hiring of undocumented workers.

The federal investigation into Columbia Farms' hiring practices began in December 2007, when U.S. Immigration and Customs Enforcement

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(ICE) agents began reviewing the company's employment eligibility forms and supporting employment documentation for suspected violations of hiring undocumented workers and their continued employment. That review, and an October 2008 search of the Greenville plant, resulted in the criminal prosecution of 21 supervisory employees who were hired with false documents as well as the administrative deportation of more than 300 employees who were likewise determined to be in the country illegally. Under the terms of the agreement, the criminal case against Columbia Farms will be continued for 24 months, allowing the company and its affiliates to continue with ongoing efforts to institute internal hiring procedures and controls at each of its eight poultry processing facilities in South Carolina, North Carolina and Louisiana.

The companies will adopt and maintain a compliance program during the 24-month period to ensure that their hiring practices comport with federal law. The companies' efforts will be subject to review by the court, the U.S. Attorney's Office and ICE. The remedial actions called for by the agreement include:

- use of the Department of Homeland Security's "E-Verify" employment eligibility verification program for all hiring;
- use of Spanish language services for the completion of the I-9's Employee Eligibility Verification Form, by Spanish-speaking job applicants;
- use of the Social Security Number Verification Service to ensure that job applicants and current employees hold a validly-assigned social security number;
- providing regular training to employees on hiring practices to ensure compliance with federal law; and
- use of an external auditor to conduct annual reviews of the companies' I-9 employment forms.

In addition, the company will pay $1.5 million to the government to settle all criminal, civil or administrative claims that are pending, or could be brought as a result of the investigation. Provided the company and its affiliates successfully comply with the terms of the agreement, the criminal charges against Columbia Farms will be dismissed. Click here for more information.

USCIS issues public charge fact sheet. USCIS issued a fact sheet for non-citizens about public charge determinations. An individual who is likely at any time to become a "public charge" is inadmissible to the U.S. and ineligible to become a legal permanent resident. Some non-citizens and their families are eligible for public benefits without being found to be a public charge. Click here for more information about being a "public charge" and those benefits which are not subject to public charge consideration.

President signs the FY2010 DHS Security Appropriations Bill. On Oct. 28, 2009, President Obama signed into law the FY10 Department of Homeland Security Appropriations bill (P.L.111-83).

The law extends the non-minister religious worker (section 568), the "Conrad 30" (section 568), the EB-5 visa (section 548), and the E-Verify (section 547) programs through Sept. 30, 2012. The law also includes statutory authority for USCIS to complete processing of permanent residence applications for surviving spouses and other relatives of immigration sponsors who die during the adjudication process (section 568). The bill was previously approved by the House of Representatives on Oct. 15, 2009 by a 307 – 114 roll call vote, and by the Senate on Oct. 20, 2009 by a 79 – 19 vote.

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USCIS reminds applicants for travel documents to apply early. USCIS reminds individuals that they must obtain Advance Parole – permission to reenter the United States after traveling abroad – from USCIS before traveling abroad if they have:

- been granted Temporary Protected Status (TPS);
- a pending application for adjustment of status to lawful permanent resident (LPR);
- a pending application for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA 203);
- a pending asylum application; or
- a pending application for legalization.

By law, certain individuals must apply for a travel document and have Advance Parole approved before leaving the United States. Attempts to reenter the United States without prior authorization may have severe consequences since individuals requiring Advance Parole may be unable to return to the United States and their pending applications may be denied or administratively closed. Applicants planning to travel abroad should plan ahead as Advance Parole processing times take about 90 days, depending on the USCIS office location. Click here for more information.

USCIS updates FY 2010 H-1B and H-2B count. As of Oct. 25, 2009, approximately 52,800 H-1B cap-subject petitions and approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. Any H1-B petitions filed on behalf of an alien with an advanced degree will now count toward the general H1-B cap of 65,000. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limits, taking into account the fact that some of these petitions may be denied, revoked or withdrawn.

Should contractors E-Verify their entire workforce? (applies to federal contractors only) It is now 60 days past the start of FAR Federal Contractor E-Verify. Some contractors may now begin to see the first contracts with a clause requiring E-Verify. Williams Mullen has received a number of queries about whether it makes sense to voluntarily apply E-Verify to all current workers rather than limit it to new hires and those assigned to the federal contract. (E-Verify provides for a 180-day roll-out.) This is not an easy choice. The cost/benefit analysis can involve: whether a large number of existing I-9s will need to be reviewed with the employees and new I-9s completed before E-Verify can be rolled-out for the entire workforce; whether electronic I-9 Forms are being used; how easy it will be to identify employees assigned to federal contract work; and the "report card" or score card results for existing I-9s. In short, although the government made it sound "easy" when it first announced the "all employee" option, it may be more work than it's worth for some companies. One size does not fit all!

Our Immigration Team has been working actively with a number of clients on these issues. Each situation presents different challenges and issues. We would be interested in finding out what approach to FAR E-Verify you are adopting and why. We would also be pleased to share with you our preliminary analysis of the pros and cons of rolling out E-Verify for ALL employees.

For more information on these and other immigration developments, please contact Kathryn Carmichael at kcarmichael@williamsmullen.com, or Eliot Norman at enorman@williamsmullen.com.

Please visit www.williamsmullen.com/immigration for more information about the Williams Mullen Immigration Team.

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