PUBLICATION

Immigration Update: Helpful Guidance in a Tricky I-9 Situation; "Known Employer" Program in Development

Authors: Melanie Colvert Walker
February 17, 2015

This month: Helpful guidance in a tricky I-9 situation, and a "Known Employer" program in development.

I-9 Guidance and Handling Former Documents that are Not Genuine

On February 18, 2015, the United States Citizenship and Immigration Services (USCIS) will begin accepting applications for work authorization from a larger pool of individuals who are now eligible to apply under the expanded Deferred Action for Childhood Arrivals (DACA) program, as announced by the President on November 20, 2014. With what may become a significant influx of newly authorized workers, employers may be wondering what to do if an existing employee presents new work authorization documents and explains that documentation previously submitted to the employer was not genuine. A recent Technical Assistance Letter (TAL) from the Department of Justice's Office of Special Counsel (OSC) provides guidance to employers for handling these circumstances.

In the facts presented in the TAL of January 8, 2015, the employee (who had initially provided work authorization documents that appeared genuine) presented a new social security number and work authorization documents, informing the employer that the "previous documents were not real." In response to the employer's concerns regarding exposure to discrimination claims if it decided to terminate or keep this employee, the OSC referred the employer to the *M-274 USCIS Handbook for Employers, Guidance for Completing Form I-9* and stated that an employee who is terminated under these circumstances may allege citizenship status and national origin discrimination and unfair documentary practice under 8 U.S.C. §1324b. The OSC further advised that ultimately whether the OSC concluded that such a termination actually violated the anti-discrimination provision depends on the particular facts and "an employer with a consistently-followed policy of terminating individuals for providing false information during the hiring process may have a legitimate, non-discriminatory reason for the termination."

If an employer complies with the required verification process when completing the Form I-9 under 8 U.S.C. § 1324a, which includes (1) accepting an employee's documents that reasonably appear genuine and relate to the person presenting them and (2) recording the information about the documents in Section 2 of the Form I-9, then the appropriate process for handling an employee who returns with new documents and claiming former submissions were "not genuine" is provided on p. 24 of the M-274:

You may encounter situations other than a legal change of name where an employee informs you or you have reason to believe that his or her identity is different from that previously used to complete the Form I-9. For example, an employee may have been working under a false identity, has subsequently obtained a work authorized immigration status in his or her true identity, and wishes to regularize his or her employment records. In that circumstance you should complete a new Form I-9. Write the original hire date in Section 2, and attach the new Form I-9 to the previously completed Form I-9 and include a written explanation.

In cases where an employee has worked for you using a false identity but is currently work authorized, the I-9 rules do not require termination of employment.

In light of this TAL guidance and reminder of language in the M-274, employers are urged to review their current policies, including any relevant "honesty policy" language, consulting with legal counsel if unclear how to proceed. Employers should also consider whether a self-audit is advisable when faced with a claim that prior documents were "not genuine" if there may be other circumstances (No-Match letters, Employee Hotline complaints) that could give rise to a finding of constructive notice that an employer's workforce has much larger authorization issues.

The Technical Assistance Letter is available here.

The Complete M-274 Guide is available here.

The "Known Employer" Still Unknown

In January, the Department of Homeland Security (DHS) announced plans for a pilot "Known Employer" program to improve efficiency and facilitate cross-border business travel in processing certain types of employment-based immigration benefit requests filed by U.S. employers. This initiative, expected to be launched by the end of 2015, furthers the binational commitment under the North American Free Trade Agreement and the goals of the United States-Canada joint declaration, announced in February 2011 by President Obama and Prime Minister Harper, known as *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness.* While employers with frequent cross-border business travelers should be encouraged by the pilot program's promise of more efficient processing and reduced paperwork and delays, they should also resist the temptation to rely on such a program to cut corners when a more demanding employment-based visa immigration filing may be necessary (e.g., H-1B filing with USCIS). What happens when an applicant becomes unworthy of “trusted” status, or how companies' performance will be tracked and reported to other government agencies, is still unknown. Further updates will be provided as the program develops and information becomes available.

Limited information on the "Known Employer" program can be found here.