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Immigration Update: A Tech Giant's Hefty Immigration fine; Improved Website for USCIS; A Developing Challenge for the Department of Labor

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November 14, 2013

Snapshots of both big picture and meaningful small-scale developments in the world of immigration.

This month: a technology giant's hefty immigration fine and its implications, an improved interactive website for USCIS, and a developing challenge to the Department of Labor's interpretation of the requirement for employers to "notify and consider" candidates.

Broader Lessons from Infosys $34 Million Settlement of Government Immigration Claims

An IT giant's huge immigration fine brings some lessons to all companies in the U.S. using foreign workers directly or indirectly.

In late October, India-based Infosys agreed to pay $34 million to the U.S. Departments of Justice, State, and Homeland Security to settle civil and criminal law claims that it had made misrepresentations in the process of misusing the B-1 business visitor classification (claiming that workers were coming for "meetings and business discussions" when in reality they would perform coding and programming) and H-1B classification (failing to obtain LCA approvals for each location where an employee would work and misrepresenting that they were traveling only to approved locations) and failed to properly use Form I-9 to verify the employment authorization of such workers.

Other companies should learn vicariously from the settlement:

- The enforcement arms of the U.S. immigration agencies, including CBP port inspection officers, don't particularly like the "B-1 in lieu of H" concept that allows some travelers who remain paid from abroad to use the "business visitor" B-1 classification (with a visa or on a visa waiver from certain countries) to engage in certain professional work or training in facilitation of international commerce, and they particularly don't like a failure to be up front about a visitor's particular purposes. Travelers seeking to do more than true meetings on B-1 should present to port inspectors clear letters that detail what they will be doing, despite the risk of being placed in secondary inspection and even being refused admission. If real work is involved, maybe other visa classifications should be used.
- The enforcement arms of the U.S. immigration agencies don't like the use of H-1B by staffing companies to send workers around to different customer sites, particularly if separate LCAs have not been filed for each location (which should also involve postings even at customer worksites), and even if LCAs have been filed but new I-129 petitions have not been filed to cover new locations. Employers who use H-1B workers, either as employees or by contract with staffing vendors, should make sure that H-1B filings and postings are made for each location of work.
- Consular officers and especially port inspectors aware of this highly publicized settlement have become increasingly aware that even some major companies may be misrepresenting facts to them, and they may tend to ask more and harder questions and take negative action when they feel or find they have been lied to. Individuals could become sent back on the next flight from the port of arrival, possibly with a finding of misrepresentation that gives rise to permanent inadmissibility to the U.S.

Companies associated with incidents might be placed on secret watch lists for special scrutiny of their associated travelers.
- Companies should impose internal controls on the types of visas used for different purposes and on the types of representations that can be made to immigration authorities. This may include corporate compliance programs with hotlines for employees to report violations even anonymously.
- Companies should be prepared to cooperate fully with federal investigations. Cooperation (in addition to some ambiguities in the law) clearly made the difference for Infosys between the civil fines paid and the potential debarment and criminal enforcement it had faced.

United States Citizenship & Immigrations Services (USCIS) Launches its Redesigned Website, USCIS.gov

On October 30, 2013, USCIS launched its redesigned website in both English and Spanish. In addition to its new look, the website incorporates more intuitive navigation menus and has improved functionality. Some of the more noteworthy improvements include:

- A comprehensive tools section that allows customers to complete commonly used electronic transactions.
- A rotating banner that highlights important news alerts and timely press releases.
- A prominent summary of national and local events.
- A streamlined online tool that allows customers to more efficiently file a change of address.

These developments are part of the Department of Homeland Security's web strategy to incorporate a common content management system and to consolidate the Department's public websites. The agency anticipates further enhancements will be available in the coming months.

The new and improved site is now available at: http://www.uscis.gov/

Department of Labor's Layoff Regulation for PERM Applicants Challenged

The American Immigration Council (in collaboration with the American Immigration Lawyers Association) and the U.S. Chamber of Commerce both filed amicus briefs on November 7, 2013, in an *en banc* case currently pending before the Board of Alien Certification Appeals (BALCA), *In re* Microsoft Corporation, 2013-PER-01478, 2013-PER-02904, 2013-PER02962. BALCA is the agency charged with reviewing appeals from permanent labor certification (PERM) denials.

The appeal, filed in August of this year, hinges on the Department of Labor's (DOL) recent interpretation of 20 C.F.R. § 656.17(k), which requires an employer to document that it has "notified and considered all potentially qualified laid off (employer applicant) U.S. workers of the job opportunity" being offered to the foreign worker in the PERM application, and to document the results of such notification and consideration. The Department of Labor has not articulated the preferred or required method of notifying former employees of the job opportunity, and employers have historically decided for themselves the most effective method to make the required notifications and how to document the results of such notifications. After a period of approving such employers' methods of notification, these same methods are now being more strictly scrutinized by the DOL, often resulting in the denial of PERM applications, as in the *Microsoft* case.

The appeal and amicus briefs challenge the perceived change in DOL's policy as arbitrary and capricious, and argues that altering these requirements without proper notification of employers constitutes a denial of due process. More information on this critical aspect of filing PERM labor certifications will follow once BALCA issues its decision in the case. At a minimum, the BALCA decision will likely clarify how employers should

implement this requirement going forward. We anticipate a question-and-answer feature on the DOL website addressing this aspect of the PERM process.