



# The Immigration Insider

KRA IMMIGRATION LAW

## Employment Guidelines: Are you in compliance?



### Final Rule Regarding Employers Who Receive a "No-Match" Letter From Social Security Administration

The U.S. Immigration and Customs Enforcement has amended its regulations on the unlawful hiring or continued employment of unauthorized aliens. The first notification of the legal obligations of an employer is in the form of a "no-match" letter from the Social Security Administration (SSA), or in a letter regarding employment verification forms from the Department of Homeland Security (DHS).

Employers annually send the SSA millions of W-2 Forms in which the combination of employee name and social security number (SSN) does not match SSA records. In some cases, SSA mails an "Employer Correction Request" (employer "no-match" letter) informing the employer of the mismatch. There can be many causes for a no-match, including clerical errors and name changes. Another case may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or a SSN assigned to someone else.

DHS sends a similar letter, a "Notice of Suspect Documents," after it has inspected an employer's Employment Eligibility Verification Forms (Forms I-9) during an investigation audit and after unsuccessfully attempting to confirm, in agency records, that an employee's immigration status document or employment authorization document presented or referenced in the Form I-9 was legally assigned to that person.

These letters not only describe an employer's current obligations under immigration laws, but also the options available to avoid liability. However, both regulation and case law support the view that an employer can be in violation of the law by having constructive rather than actual knowledge that an employee is unauthorized to work. If the employer fails to take reasonable steps after receiving written notice from either SSA or DHS; and if the employee is in fact not authorized to work in the

United States, the employer may be found to have had constructive knowledge of the unauthorized worker.

The regulations also describe specific steps an employer may take after receiving a no-match letter. By taking these steps in a timely fashion, an employer avoids the risk the no-match letter would be used as any part of an allegation that an employer had constructive knowledge an employee was not authorized to work in the United States.

The regulation provides that a discrepancy will be considered resolved only if the employer verifies with SSA or DHS, as the case may be, that the employee's name matches in SSA's records the number assigned to the name, or, with respect to DHS letters, verifies the authorization with DHS that DHS records indicate the immigration status document or employment authorization document was assigned to the employee.

If the discrepancy referred to in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using the reasonable verification procedure, then the employer must choose between taking action to terminate the employee, or facing the risk that DHS may find the employer violated the law. Employers should apply these procedures uniformly to all of their employees having unresolved no-match indicators. If they do not do so, they may violate applicable anti-discrimination laws.

An employer with actual knowledge that one of its employees is an unauthorized alien cannot avoid liability by following the procedures described in the amended regulation. The burden of proving actual knowledge would, however, be on the government.

By Meghan Kennedy Riordan

#### Did you know that...?

The U.S. Government does not provide an unlimited number of "green cards"? In fact, only 406,731 "green card" numbers were available for the 2007 fiscal year for employment- and family-based immigrants.

In 2006, a total of 5,836,718 nonimmigrant visas were issued at U.S. Embassies and Consulates around the world?


Employers may verify a SSN with SSA by telephoning toll-free 1-800-772-6270, weekdays from 7:00 a.m. to 7:00 p.m., EST. Employers should make a record of the manner, date, and time of any such verification.

#### Inside this issue:

Final Rule Regarding Employers Who Receive a "No-Match" Letter From Social Security Administration	1
New Department of Labor Regulations for PERM	2
Employment Eligibility Verification of Employees	3



## New Department of Labor Regulations for PERM



The new Department of Labor Regulations for the PERM process came into effect on July 16, 2007. Most employers who wish to permanently employ an alien must first file with the United States Department of Labor (DOL), and obtain approval of ETA Form 9089, entitled Application for Permanent Employment Certification, (PERM Application). Once approved by the DOL, the PERM Application is filed with Form I-140, Immigrant Petition for Alien Worker, with the U.S. Citizenship and Immigration Services (CIS). CIS must approve the I-140 Petition, and an immigrant visa must be available, in order for an alien to be eligible to obtain Permanent Resident Status ("Green Card") in the United States.

In order to limit the acquisition and use of permanent labor certifications, as well as enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States, the DOL has amended its regulations.

*"The new rule prohibits the sale, barter, and purchase of applications and approved labor certifications."*


### **Substitution of Alien Beneficiaries**

The new DOL rule prohibits the substitution of alien beneficiaries on labor certifications after July 16, 2007. This prohibition applies to all pending permanent labor certification applications and to all approved permanent labor certifications with the exception of substitution requests currently pending with or already approved by CIS.

### **Modification**

The new DOL rule prohibits any modifications to permanent labor certification applications once they are filed with the DOL.

### **Validity Period of PERM Applications**



All permanent labor certifications approved on or after July 16, 2007 will expire 180 calendar days after certification unless filed prior to expiration in support of an I-140 Petition with CIS. Likewise, all certifications approved prior to July 16, 2007 will expire 180 days after July 16, 2007 (which is January 12, 2008) unless filed in support of an I-140 Petition with CIS prior to the expiration date.

### **Sale, Barter, Purchase and Certain Payments**

The new rule prohibits the sale, barter, and purchase of applications and approved labor certifications, as well as certain payments to employers in compensation or reimbursement for the employer's costs incurred to obtain labor certification. This ban applies to all such transactions on or after July 16, 2007.

In regard to the employer's obligation for the payment of costs, the DOL regulations require that the employer pay all costs related to the preparation, filing and obtaining of labor certification. Specifically, such costs include attorney fees, advertisement costs, and any other expenses. Moreover, the employer is prohibited from transferring or charging back any costs incurred to the alien whether it be in the form of kickbacks, wage withholdings, financial incentives, and lump sum reimbursements, as well as non-monetary transactions, such as free labor.

### **Debarment and Program Integrity**

The new rule allows the DOL to debar an employer, attorney, and/or agent from the permanent labor certification program for up to three (3) years, when it determines such employer, attorney, and/or agent has facilitated or participated in one or more of the following actions:

- Sale, barter or purchase of a PERM application;
- Prohibited payment for an activity related to obtaining permanent labor certification;
- Willful provision or assistance in the provision of false or inaccurate information for an application for labor certification;
- Pattern or practice of failure to comply with the terms of the PERM application;
- Pattern or practice of failure to comply with the PERM application audit process or the supervised recruitment process; or
- Fraud or willful misrepresentation involving a Permanent Labor Certification, as determined by a court, the Department of Homeland Security, or the Department of State.

By Deniz M. Baser

For the full text of any of our articles, please visit our website.

## Employment Eligibility Verification of Employees

The Immigration and Nationality Act (“INA”), as amended in 1986 by the Immigration Reform and Control Act (IRCA) made it unlawful as of that date for any employer to hire, recruit, or refer for a fee any foreign national knowing that s/he is not authorized by law for employment in the United States. In addition, in the aftermath of the September 11<sup>th</sup> attacks, the Department of Homeland Security continues to implement new policies for U.S. employers through the U.S. Citizenship and Immigration Services (CIS) in order to ensure that there are no breaches of security through unauthorized employment. Employers are subject to civil or criminal penalties if they do not comply with requirements.

### I-9 Form

In order to verify identity and employment eligibility, U.S. employers are required to complete and maintain Form I-9 Employment Eligibility Verification for all current, new, and past employees, including U.S. Citizens and non-citizens, with a hire date after November 6, 1986. Persons hired before November 7, 1986 who have been continuously employed by the employer since that date are exempted, even if the employer knows that they lack employment authorization. However, this section of the Act only protects the employer from liability and does not grant authorization to work for those foreign nationals nor the right to remain in the United States.

Unlike other government forms, I-9 forms are not filed with a government agency, but kept at the company headquarters or employee worksite. I-9 records must be retained for 3 years after the date of hire or 1 year after the date the employee's employment is terminated, whichever is later. As of October 30, 2004, employers are allowed to electronically complete and store I-9 forms, and the use of either handwritten or electronic signatures is permitted.

A new employee must complete Section 1 of Form I-9 no later than the close of business on his/her first day. The employer is responsible to ensure the completion of the entire form, as well as review and record the original documentation presented by the employee on the form no later than the employee's third day of employment.

### Documentation

Proper documentation establishes both the employee's identity and authorization to work in the United States. Employers **CANNOT** specify which document(s) they will accept from an employee nor refuse to accept a document, unless the documents presented are not originals or appear fraudulent. Form I-9 includes a list of acceptable documents for the employee to review and select from. Employ-

ers are not expected to be experts in authenticity of documents, but instead are held to a reasonableness standard (i.e. the presented document reasonably appeared to be genuine or belong to the person presenting it). Employers may keep copies of employee-presented documentation attached to I-9 Forms. Employers must update and re-verify the employment eligibility of their employees on or before the expiration date of documentation previously recorded on the I-9 Form. Expiration dates on identity documents such as passports, green cards (Form I-551), and driver's licenses do not trigger the need for re-verification.

If a new employer resulted from a merger, acquisition or re-organization, the new employer is responsible for compliance with I-9 regulations and adequacy of those records from the predecessor employer. Employees transferred from one U.S. subdivision to another within the same company do not need to undergo employment verification.

### Government Audits

There are two reasons for an official request for inspection: 1) inspection of documents to ensure employer compliance with regulations, and 2) inspection of either documents or individuals on the premises. Both require at least a three day written notice and in the latter case require either a warrant or a subpoena for documents. Employers found to have knowingly committed a violation will be required to cease the unlawful activity and may be fined. IRCA also contains criminal penalties for employers who are found to engage in a “pattern or practice of knowingly hiring or continuing to employ unauthorized aliens” (U.S. Department of Justice Immigration & Naturalization Service's 1987 *Immigration Officer's Field Manual for Employer Sanctions*.) There is no criminal penalty or liability for employers who believed in good faith that the documents were genuine and it was later discovered that they were not.

Finally, it is important to note it is illegal to discriminate against any work-eligible individuals in hiring, discharging, or recruiting or referring for a fee because of an individual's national origin or citizenship status. The refusal to hire an individual because of a future expiration date on documents presented for employment eligibility verification may also constitute illegal discrimination. In addition, employers may not set different verification standards for different (levels of) employees nor keep copies of employee-presented documentation of a limited group of employees. All employees must be treated equally with regard to completion of the I-9 form.

By Anne H. Dysinger



**KRA Immigration Law**  
12763 Stark Road, Suite 201  
Livonia, Michigan 48150  
P: 734.762.7260  
F: 734.762.7606  
Questions@cis-immigration.com

## *Employment Guidelines: Are you in compliance?*

### **Contact Us**

*KRA Immigration Law - the law offices of Kennedy Riordan & Associates P.C. - is solely dedicated to the practice of Immigration and Nationality Law. We represent businesses and individuals in all areas of immigration law including: temporary and permanent residence based on employment, business investment, international trade, family based permanent residence, international consular processing, naturalization, Form I-9 audits, employer sanctions, political asylum, exclusion and deportation proceedings, administrative appeals and litigation.*

### *About the Authors...*

#### **Meghan Kennedy Riordan, Managing Partner**

Ms. Riordan graduated with honors from Canisius College in Buffalo, New York in 1987 with a Bachelor's degree in History and minored in International Relations. She received her Juris Doctor in 1990 from the University of Detroit School of Law in Detroit, Michigan. She has been engaged in the practice of immigration law since 1990 and is extremely knowledgeable in all areas of immigration.

#### **Deniz M. Baser, Senior Associate**

Ms. Baser graduated from Albion College in Albion, Michigan in 1987 with a Bachelor's degree in Political Science and French with a concentration in Pre-Law. She continued her studies toward a Master's Degree in Political Science and International Relations at Bogazici (Bosphorus) University in Istanbul, Turkey in 1991. Ms. Baser received her Juris Doctor in 1994 from the University of Detroit Mercy School of Law in Detroit, Michigan. She has extensive knowledge of the Permanent Residency processes for corporate and family-based cases.

#### **Anne H. Dysinger, Paralegal Operations Manager**

Ms. Dysinger obtained a Master of Arts in Liberal Studies, and a Bachelor's Degree with honors in English from Madonna University in Livonia, Michigan. She is a native of Belgium and also obtained a college degree in Communication Management from Belgium. Ms. Dysinger has been an immigration paralegal in the U.S. since 1996, and has vast experience in non-immigrant and immigrant visa processing for both corporate and family-based cases.

The Immigration Insider is published solely for educational purposes. Please note that this publication only provides you with basic information on immigration law, and does not replace attorney advice. Every immigration case is different. We strongly urge you to consult a licensed Immigration Attorney with your individual case, because it is easier to plan your immigration strategy ahead than it is to go back to try and fix mistakes. If you wish for us to be your immigration attorney, please refer to the bottom of the front page for our contact information.

