

REDUCED ACCESS

NEW REGULATIONS AIMED AT TEMPORARY WORKER VISAS

This has been a difficult year for businesses that rely on foreign workers. Both Congress and the new administration imposed restrictions on several widely used visa categories. The Department of Homeland Security made employers the target of a new immigration enforcement strategy likely to result in dramatically increased criminal prosecutions. As the downturn drags on, the public is increasingly skeptical that employers need immigrant workers, and additional threats loom on the horizon: legislation pending in the Senate could reduce employers' access to highly-skilled workers, and lawmakers in the House are working on a bill that could do the same for seasonal workers.

H2A AGRICULTURAL WORKERS – DOL TIGHTENS REGULATIONS

The H2A program allows U.S. employers to bring foreign nationals to the United States to fill temporary agricultural jobs for which U.S. workers are not available. Prospective employers of H2A workers must first obtain certification from the Department of Labor that there are insufficient U.S. workers to fill open slots and that the employment of H2A visa-holders will not adversely affect the wages and working conditions of similarly employed U.S. workers.

New regulations. In January 2009, in the last days of the Bush administration, DOL finalized new regulations to streamline the H2A visa process. In March, the incoming Obama administration tried to suspend the new rules, but was prevented from doing so by a federal court. In response, the department has now issued its own proposed regulations that undo many of the Bush-era innovations and make it more difficult for employers to use H2A visas. When final, the new H2A regulations will:

- Eliminate the streamlined application process introduced by the Bush-era regulations, which would have allowed employers to attest to their need for workers rather than submit to a lengthy DOL review. The new rule will revert to a requirement of DOL certification, while retaining the more severe penalties introduced in January 2009.
- Restore use of the USDA Farm Labor Survey, as opposed to the BLS Occupational Employment Statistics wage survey, to determine the "adverse effect wage rate" for H2A workers. This will lead to higher costs for many employers.
- Expand potential liability for associations, agents and lawyers, who could face penalties or debarment if they are found to have "participated in, had knowledge of, or *had reason to know*" of an employer's violation.

H2B SEASONAL WORKERS – LEGISLATION ON THE HORIZON

The H2B visa program is designed for U.S. employers in nonagricultural industries who experience "peak load," seasonal or intermittent labor needs and allows them to bring foreign nationals to the U.S. to fill slots for which there are no U.S. workers available. Among the sectors that rely heavily on H2B workers: construction, health care, landscaping, lumber production, manufacturing, food service and food processing, resorts and hospitality.

Legislation being drafted. Democrats in the House are drafting legislation that would impose new burdens on seasonal employers and reduce access to H2B visas. Early drafts of the bill include provisions that would:

- Prohibit construction companies from hiring H2B workers unless appropriate unions certify there are no U.S. workers to fill the jobs.
- Require employers to pay employees' transportation costs from the place of recruitment to the place of employment.
- Impose additional filing fees for each DHS application and each DOL labor certification.
- Create a private right of action in federal court, making it possible for aggrieved American workers and H2B visa-holders to sue U.S. employers.
- Require stricter regulation of foreign labor contractors.

WORKSITE ENFORCEMENT – MORE CRIMINAL PROSECUTIONS

The criminal prosecution of employers is a priority of ICE's worksite enforcement program and interior enforcement strategy . . . ICE is committed to targeting employers, owners, corporate managers, supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations.

– Internal ICE Memorandum, April 2009

I-9 audits. In past years, most employers thought to be knowingly employing illegal workers were charged with civil violations. The Bush administration introduced wider use of criminal charges. And in April 2009, Immigration and Customs Enforcement announced a new worksite enforcement strategy expected to significantly increase criminal prosecutions, particularly of employers. ICE chief John Morton stated that the agency is "set to increase the number of companies it will audit and systematically impose fines on violators."

In July 2009, ICE launched a nationwide I-9 audit and issued "Notices of Inspection" to 652 companies – more notices in one day than were issued in the entire 2008 fiscal year. Employers across a wide range of industries were required to turn I-9 records over to ICE for investigation and review, and the agency is expected to use the results of the audits to press criminal charges.

Expanded E-Verify. In September 2009, DHS implemented the E-Verify Federal Contractor Rule, which requires all federal contractors and subcontractors to use the E-Verify system to verify their employees' eligibility to work in the United States. In a departure from previous E-Verify regulations, the new rule requires federal contractors to verify existing employees and increases the likelihood that employers will be liable for the actions of subcontractors.

The 2010 DHS Appropriations bill re-authorized E-Verify as a voluntary program through December 2012. But individual states continue to mandate it for some or all employers. In 2009, Arkansas, Idaho, Georgia, Missouri, Nebraska, Mississippi, South Carolina and Utah became the latest states – the total is now twelve – to require state agencies or state contractors to enroll in the program.

Social Security No-Match. After a defeat in federal court, DHS has withdrawn its Social Security No-Match regulation. Under the rule, an employer who received a notice that workers' social security numbers did not match those on record at the Social Security

Administration would have been required to terminate any employee who could not resolve the discrepancy – or face charges that the company had “knowingly” employed someone not authorized to work in the U.S. The withdrawal of the rule leaves employers without guidance on what to do upon receipt of no-match notices. And ICE continues to pursue criminal charges against employers who failed to act on notices in the past. This creates a confusing and uncertain environment for business owners.

H1B AND L1 PROFESSIONALS – NEW LEGISLATION, MORE OVERSIGHT

The H1B program allows U.S. companies and universities to employ high-skilled, professional foreign-born workers on temporary visas lasting up to six years. To qualify for an H1B visa, an applicant must have at least a bachelor’s degree or equivalent experience as well as a job offer that requires “theoretical or technical expertise” in a specialized field. The H1B category covers a range of occupations, including architects, engineers, scientists, computer programmers, accountants and college professors. The L1 program allows firms to transfer employees formerly working for them abroad to subsidiaries, parent companies and affiliates in the United States.

Durbin-Grassley bill. In April, Sens. Richard Durbin (D-IL) and Charles Grassley (R-IA) introduced the *H1B and L1 Visa Reform Act*. The pending legislation would:

- Require additional labor-market tests and impose new wage requirements for all H1B visa-holders.
- Require companies to pay L1B workers a government-specified “prevailing wage.”
- Limit the ability of companies to place their H and L visa employees at clients’ worksites without obtaining authorization from DOL and DHS.
- Double the financial and debarment penalties imposed by current law.
- Eliminate the “good faith” defense for technical violations, opening employers to the possibility of being debarred for unintentional, technical errors.

Employ American Workers Act. In February, Congress enacted the *Employ American Workers Act*, which imposes additional obligations on companies that receive TARP funds and employ H1B workers. Before hiring H1B workers, these employers must attest that they have recruited U.S. workers and that no similarly employed U.S. worker was terminated around the time the H1B worker was hired.

USCIS employer audits. DHS has launched a major initiative to detect fraud in the H and L visa programs. The Fraud Detection and National Security Branch of USCIS will visit up to 20,000 H and L employers in the coming year, and DHS will use the information gathered during these audits to pursue criminal investigations.

Lynden Melmed, former chief counsel at U.S. Citizenship and Immigration Services, is a partner at the immigration law firm, Berry, Appleman & Leiden, and chairman of the ImmigrationWorks USA Legal Advisory Committee.

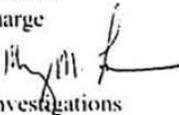
APPENDIX

*Office of Investigations*U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

APR 30 2009

U.S. Immigration
and Customs
Enforcement

MEMORANDUM FOR: Assistant Director
Deputy Assistant Directors
Special Agents in Charge

FROM: Marcy M. Forman 
Director, Office of Investigations

SUBJECT: Worksite Enforcement Strategy

Worksite Enforcement Strategy**I. The Purpose and Priorities of Worksite Enforcement**

The prospect for employment in the United States continues to be one of the leading causes of illegal immigration, creating a market for criminal smuggling organizations who exploit people willing to pay high fees and take great risks to enter the United States without detection. Immigration and Customs Enforcement (ICE) has a vital responsibility to engage in effective worksite enforcement to reduce the pull of illegal employment, ease pressure at the border, and protect employment opportunities for the nation's lawful workforce.

DHS has extensive but finite resources which it must effectively allocate. Arresting and removing illegal workers must be part of a strategy to deter unlawful employment, but alone is insufficient as a comprehensive worksite enforcement strategy. Of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were of employers. Enforcement efforts focused on employers better target the root causes of illegal immigration. An effective strategy must do all of the following: 1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to take advantage of well-crafted compliance tools. To accomplish these goals, ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal workforce.

Although criminal prosecution of employers will efficiently advance the stated goal of worksite enforcement, ICE will not rely solely on that approach. ICE will continue to fulfill its responsibility to arrest and process for removal illegal workers encountered during worksite enforcement operations. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.

ICE will strategically approach worksite enforcement efforts to maximize their impact. To that end, ICE offices should refer to this Worksite Enforcement Strategy when beginning any worksite enforcement investigation. ICE offices also must refer to the reporting requirements and humanitarian guidelines applicable to worksite enforcement operations.

II. Criminal Prosecution of Employers

- The criminal prosecution of employers¹ is a priority of ICE's worksite enforcement (WSE) program and interior enforcement strategy.
- ICE is committed to targeting employers, owners, corporate managers, supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations.
- ICE offices should utilize the full range of reasonably available investigative methods and techniques, including but not limited to: use of confidential sources and cooperating witnesses, introduction of undercover agents, consensual and non-consensual intercepts and Form I-9 audits.
- ICE offices should consider the wide variety of criminal offenses that may be present in a worksite case. ICE offices should look for evidence of the mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, and other such criminal conduct.
- Absent exigent circumstances, ICE offices should obtain indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office (USAO) to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite. In the absence of a timely commitment from a USAO, ICE offices should obtain guidance from ICE Headquarters prior to proceeding with a worksite enforcement operation.

III. Administrative and Civil Tools

ICE offices should use administrative tools to advance criminal cases and, in the absence of criminal charges, to support the imposition of civil fines or other available penalties.

A. *Form I-9 Audits*

The most important administrative tool is the Notice of Inspection (NOI) and the resulting administrative Form I-9 audit.

- The Form I-9 audit process will be utilized in both criminal and administrative investigations to identify illegal workers, including criminal aliens employed at a business.
- Although auditors will assume primary responsibility for conducting Form I-9 audits, ICE special agents and auditors must coordinate closely because this process will often serve as an important step in the criminal investigation and prosecution of employers.

¹ In this context, "employer" refers to someone involved in the hiring or management of employees. This includes owners, CEOs, supervisors, managers and other occupational titles.

SUBJECT: Worksite Enforcement Strategy

Page 3

- ICE offices may issue documents to employers, including Discrepancy and Suspect Document letters, for the purpose of fostering prompt corrections in hiring and documentation practices and also laying the groundwork to establish probable cause to support subsequent criminal charges if corrections are not made.

B. Civil Fines

Civil fines, although not as key as criminal prosecution, are an important part of an effective worksite enforcement strategy. These fines provide a penalty when the evidence is not sufficient to support a criminal prosecution or as otherwise appropriate. In the mid-1990's, employers received notices of intent to fine (NIFs) totaling \$26 million.

- ICE offices should work with attorneys in OPLA when issuing a NIF, to facilitate the collection of civil fines for each worker employed in violation of the law.

C. Debarment Proceedings

Debarment precludes companies that have knowingly hired illegal workers from securing work on federal contracts. Debarment, therefore, carries highly significant consequences. As ICE increasingly pursues debarment, the practice may have a significant deterrent effect.

- ICE offices should initiate the debarment process, if appropriate, following the successful prosecution of an employer or the occurrence of another trigger to debarment.

D. Outreach

Through the ICE Mutual Agreement between Government and Employers (IMAGE) program and other means, ICE will continue to seek out employers who want to comply with our nation's immigration laws and provide them with the training and tools they need to minimize the risk of unwittingly hiring illegal workers.

IV. Critical Infrastructure and National Security Sites

- ICE has a responsibility to help assure a legal workforce at America's critical infrastructure workplaces and other security-sensitive locations. Based on careful investigative work, ICE will initiate audits, searches, and targeted employee interviews to remove unlawful workers from such worksites.
- Whenever possible, critical infrastructure protection enforcement operations also will target the employer, including contractors, for criminal or administrative penalties.

V. Executing a Worksite Enforcement Operation

Historically, ICE's worksite enforcement operations receive significant attention from Congress, non-governmental organizations, the press, and the public. In addition, particularly because the arrest of a number of illegal workers at the same site can have rippling

SUBJECT: Worksite Enforcement Strategy

Page 4

consequences on others in the community, ICE offices must refer to and comply with the following:

A. Reporting Requirements

All worksite investigations will adhere to pre-existing reporting requirements, including providing 14-day notice to ICE Headquarters in advance of developing or executing enforcement activity. Advance reporting should include a comprehensive operational plan with a section dedicated to the prosecution plan as well as the worksite operation checklist. Requests for exceptions due to exigent circumstances will require immediate telephonic notification to the Assistant Director, Operations.

B. Humanitarian Guidelines

The existing humanitarian guidelines, found on the Office of Investigation's intranet, remain in effect, except they will apply to all worksite enforcements involving 25 or more illegal workers rather than 150.

VI. Conclusion

ICE is committed to robust worksite enforcement. The above guidance re-prioritizes and refines the existing ICE worksite enforcement strategy and methodology, in order to emphasize the criminal prosecution of employers who violate the law. This strategy is subject to further refinements and improvements as deemed necessary. Additional guidance will be issued in the Special Agent Handbook, currently under revision. While ICE is re-focusing efforts to develop criminal cases against employers who hire and use illegal workers, the administrative arrest of the illegal workforce under ICE's existing immigration authorities continues to be an integral aspect of the overall ICE worksite enforcement strategy. To ensure maximum deterrence, ICE also will pursue all other available tools to encourage employers to utilize and rely on this nation's lawful workforce.