Alice M. Yardum-Hunter, A Law Corporation
Certified Specialist in Immigration and Nationality Law
California Board of Legal Specialization

16055 Ventura Blvd., Suite 902
Encino, California 91436 USA

Phone: 818 609-1953 Fax: 818 609-1964
Email: alice@yardum-hunter.com Website: www.yardum-hunter.com

PIHRA LEGAL UPDATE, JANUARY 2010
Immigration Issues: Paradigm Shift from Business as Usual

By
Alice M. Yardum-Hunter

INTRODUCTION

Candidate Barack Obama won his election based in great part on former immigrant U.S. citizen voters and President Obama promises Comprehensive Immigration Reform (CIR) for millions of undocumented aliens. However, thus far, his administration has not just been distracted by other more pressing issues, but has stepped up enforcement beyond that of the Bush administration. In 2008, more than 400,000 aliens were detained in the U.S. Removals (deportations) from the U.S. of aliens not permitted to be here has increased every year since 2011. In the first three fiscal quarters of 2009 alone, removals have increased by 17% from 2008. In 2001, the year of 9/11, only some 30,000 aliens were removed from the U.S. By comparison, today removals from the U.S. have increased many fold. The government might try avoid Comprehensive Immigration Reform with the enforcement only approach we see today, however, it would take many decades to achieve this imperfectly, while causing the ripping apart of U.S. citizen family from those who are not permitted to be in the U.S. as well as adverse affecting U.S. employers as well with criminal prosecution for the employment of unauthorized workers.

While it is appealing to consider that the U.S. should enforce its laws and should have always done but hasn't until recently, the problem is that U.S. immigration laws have evolved such that sometimes they allow the same undocumented alien who is removable from the U.S. to also qualify for permanent residence at the very same time. What happens for some people under the law today is that their legal status application in the U.S. may or may not be approved based on whether the government chooses to enforce their removal. This decision rests on nothing more than timing or luck. The law is supposed to be based on reason, maintaining civil society, policy considerations and justice. Basing it instead on luck and timing is antithetical to principles of civilized society.

For nearly 25 years, employers have faced the two sides of immigration: mostly applications for legal status, temporary (various alphabet soup statuses: H-1, L-1, E-1 and 2, O-1, etc.) and permanent (through labor certifications and/or I-140 petitions) but coupled to a lesser extent with I-9 compliance and enforcement. This duality is a reflection of people who are removable and eligible for benefits, at the same time, as above explained.

Today however, the rates of removal are increasing so much, and the ability to apply for legal status decreasing so much that focus has shifted to enforcement more and more. At this rate, the need for comprehensive immigration reform diminishes and advocates of "CIR" are concerned that it might again not happen. They have been advocating for CIR since the Clinton administration. The Obama administration has stated that instead of focusing enforcement on aliens themselves, they are focusing more on workplace enforcement on employers and has not moved on CIR. The DHS for 2010 is more than $55 million dollars; an increase of approximately 5% over 2009's $52.5 million dollar budget and most of this money is going toward investigations. In addition to this amount, Department of Labor has hired more than 400 investigators, including attorneys since last summer.

At the same time, there is lesser ability for aliens lawfully in the U.S. to qualify for legal status due to unrealistic quota numbers that have not increased with the need for more workers in the U.S. for the past 20 years while at the same time the economy has grown significantly, even with the deep recession taken into account.

In the U.S. today, unless you have masters or higher degree, or you are exceptional or extraordinary and not from China or India, it takes many years as an employee to immigrate to the U.S. through an employer. Currently, cases filed in 2001 or 2002 are ready for processing for people from most countries for skilled workers, professionals and unskilled professionals alike. This is an incredible seven or eight year wait. But if you're unfortunate enough to be even a master degreed or exceptional alien from China or India, your wait time is currently nearly five years and within the last year has been as long as 10 years! Unless the legal immigration system is altered, it could take many years for your legal workers to complete their immigration processing.

None of the last three U.S. presidents would be admissible to the U.S. were they so unfortunate to not be U.S. citizens. Presidents Obama, Bush and Clinton all have admitted to having taken controlled substances before becoming president of the U.S. Under U.S. immigration laws, such conduct makes a person inadmissible. The laws are harsh and can be unforgiving.

The above realities are the back drop of immigration law today. The remainder of this article shifts the perspective to a more specific picture of immigration laws as they apply to employers now.

THE BELOVED I-9, PLUS

This year marked the use of a new I-9 Employment Eligibility Verification form updating the June 5, 2007 version. The purpose of the amended I-9 is to improve integrity of employment verification with a view toward preventing those not entitled to employment authorization from getting it. This is done by eliminating documents no longer issued and which have all expired, thus simplifying the types of acceptable documents. Also according to CIS this makes it easier for employers to single out false documents. Initially to be effective on February 2, 2009, the revision date on the new form, DHS waited an addition 60 days until April 3, 2009 for the form to be effective for further public comment and consideration by CIS of the proposal. The effective date saw no changes to the initial revision/effective date. This rule also adds new documentation to the list of acceptable documents that evidence both identity and employment authorization (List A). It also prohibits employers from accepting expired documents to verify employment authorization. It also makes several technical corrections and updates.

Eliminated documents from List A are Forms I-688, I-688A, and I-688B (Temporary Resident Card and older versions of the Employment Authorization Card/Document). Added to List A is the new U.S. Passport Card, foreign passports containing certain machine-readable immigrant visas, temporary I-551 printed notation on machine-readable immigrant visas, and foreign passports with a temporary I-551 stamp, as well as valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), along with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

Other change to the form includes the section on Employee Information and Verification. An employee can now attest to being either a citizen or noncitizen national of the United States. Noncitizen nationals are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad. This change might raise issues for aliens making false claims to U.S. citizenship, an immigration civil offense which makes a person inadmissible as well as removable from the U.S. and for which there is no relief.

Employers must complete the revised version of the Form I-9 for new employees after the April effective date. Employers should not complete Forms I-9 for

existing employees. However, they must use the Form I-9 when re-verifying employment authorization of their employees after the effective date.

On November 19, 2009, U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton announced Notices of Inspection for 1,000 employers across the U.S. focusing on public safety and national security "critical infrastructure-alerting business owners". I-9 audits and other investigatory means will certainly result in civil and likely some federal criminal prosecutions. In addition to the use of I-9 audits, ICE over the last several years has also used wire taps and undercover informants posing as new hires to investigate employers much like the means used to investigate organized criminal rings and prosecute under Racketeer Influenced and Corrupt Organizations Act (RICO). This is the same law used to prosecute drug lords who traffic controlled substances. In addition to harboring undocumented aliens, employers are being prosecuted for offenses such as money laundering and conspiracy, amongst many others. Human workers are comparatively treated as contraband drugs. The investigations of targeted companies have even culminated in SWAT type operations, the threatened use of weapons, the seizure of documents and computers, cessation of business operations during raids, and the arrest and prosecution of employers. Criminal prosecution of employers is on the rise and has very serious financial and custody implications for executives and managers, including human resources managers. While focus of the Obama administration is on employers, undocumented alien workers lose their jobs even if not removed from the U.S. It is dubious to believe removals will decrease even though employer enforcement is increasing.

E-VERIFY AND SOCIAL SECURITY NO MATCH UPDATE

Begun in 1997 under President Clinton as the Basic Pilot Program of E-Verify, this electronic system uses Social Security and several Department of Homeland Security databases to determine whether a worker is eligible for employment in the U.S. E-Verify started as a voluntary program used by over 100,000 companies to verify employment eligibility. September 8, 2009 marked the end of voluntary use of the system and since mandates it for federal contractors with contracts over $100,000. President Obama authorized the new mandate to address concerns that undocumented immigrants might benefit from his fiscal stimulus package. It is estimated that 168,000 workers are affected by the required use by employers of E-Verify. Employers of F-1 foreign Student Practical Trainees in the Sciences, Technology, Engineering and Mathematics are also required to use E-Verify as a condition for a 17 month extension of their 12 month period of practical training.

Other employers may use E-Verify if they so choose. There are some strong arguments for not using the system. Employers and others have criticized E-

Verify. For employers, the government database inaccuracy results in rejection of lawful workers frustrating the system and creating employer liability as the safe harbor of the Social Security No Match proposed rule doesn't exist in E-Verify. However, there is a rebuttable presumption that exists for all employers who utilize E-Verify that the employees hired are properly documented. U.S. born citizens and aliens alike may fall victim to the database inaccuracies denying those individuals with the ability to work and earn a living, sometimes because of government error. Immigrant advocacy groups and others have these concerns as well as concerns about invasion of privacy, the illegal use of E-Verify to screen job applicants, encouraging employment of workers off the books, employer failure to notify workers about tentative non-confirmation notice which prevents challenge and results in final non-confirmation, and discrimination potential by employers who refuse to hire foreign looking or sounding workers.

If Comprehensive Immigration Reform moves forward, President Obama will want to include E-Verify for all employers. On July 8, 2009, Secretary Napolitano announced the Department's intention to rescind the Social Security No-Match Rule, which has never been implemented and has been blocked by court order, in favor of the more modern and effective E-Verify system.

H-1 CIS SITE VISITS, DOL AUDITS AND WORKPLACE ENFORCEMENT

As of this year, CIS has targeted 25,000 H-1 employers for Site Visits. Additionally for several years, Department of Labor (DOL) has been conducting Wage and Hour audits, which overlaps with immigration investigations. This is also separate from the 1,000 employers targeted by ICE, above mentioned.

A company has a right to an attorney before any seizure of documentation or the taking of any sworn statements by management, staff or others. In advance of such government action, which can be very difficult to comply with in real time, there are steps an employer can take to minimize exposure which sometimes can bankrupt a business or run into millions of dollars in fines payable to the government. In these economic times, the U.S. government is hungry to satisfy its debt and will undoubtedly exploit U.S. employers with less than fully authorized workforces.

DOL AUDITS – For several years now, DOL has investigated employers concerning Wage and Hour violations in conjunction with immigration law violations. This is particularly of concern as CIS also has started investigating H-1 employers, thus DOL investigations in this area are likely to increase as well. In preparation of the 25,000 employers being visited by CIS, with counsel, you can gather information, not just Public Access files required under DOL H-1

regulations, or the I-129 petitions and Labor Condition Applications (LCA), but other information generally about the company and requirements of H-1 status to confirm that the petition filed accurately reflects the facts as they are.

Documentation concerning the type of company, number of worksites, whether there are any H-1 dependent employees, the formality of salary structure (and payroll records) and job descriptions, whether there have been wage and/or hour cuts, and whether employees travel (how long and with what frequency) are but a few of the sorts of information documented in many ways which should be examined. If there are material discrepancies, an amended LCA and I-129 petition should be filed. If such is not possible, certain employees may need to be terminated, but do this only with the advice of counsel. Such termination could also be an invitation to a wrongful termination lawsuit.

In the event of a DOL audit, more than the above will be requested. In addition to more documentation than can prove these points, testimony of employees would likely be taken.

Such investigations can be instigated by disgruntled employees, including disgruntled H-1 employees. Such a disgruntled employee is someone who has been laid off, an employee paid as a contractor, someone incorrectly categorized as exempt, an H-1 worker who has not been paid the prevailing wage, etc. H-1 workers cannot be benched for lack of work or be paid less than prevailing, so not only might such a person show an employer per se is in violation of DOL regulations, but such a person is an invitation for more invasive investigation. A government agency, including DOL can initiate the complaint process.

CIS H-1 SITE VISITS - The Office of Fraud Detection and National Security (FDNS) of CIS is assessing the H-1B Program. As part of the program, unannounced site visits are occurring at places of employment or residence of the H-1B employee. USCIS has been making these site visits without a warrant based on instructions to the I-129 form regarding Compliance Review and Monitoring Methods, which includes site visits and requests in writing by fax, internet, or telephone. The instructions discuss the ability to address adverse or derogatory information resulting from compliance review, verification, or site visit, after initiation of adverse action or formal decision on a case resulting in revocation or termination of an H-1 petition. Information is also available through Freedom of Information Act (FOIA) Request.

The FDNS Officer during an employer site visit will verify the information in the I-129 petition and discuss the matter with the employer's representative who signed the I-129 or another representative if that person is not available. Like DOL audits, in addition to verifying the information stated in filed forms, the officer

may request tax returns, quarterly wage reports, the H-1's W-2 and pay stubs, and other evidence of the business. The officer might also request confirmation of the signature on the forms, request a tour of the premises, and take photographs. The H-1B beneficiary will also be interviewed concerning the job title, duties, responsibilities, dates of employment, location of work, requirements for his or her position, academic background, previous employment history, address, and dependents. The officer will then seek to verify the H-1 alien's information by speaking with a supervisor or colleague.

While many CIS site visits are innocuous and won't result in actions, some will. DOL audits are different as they are initiated based on complaint. All this is toward a view of building possible criminal prosecution of a company, its executives and managers, including HR managers. Documentation audit in advance of commencement of such possible proceedings can prevent havoc and minimize civil and criminal exposure. Counsel is typically brought in after the fact, after damage is done, but planning and risk assessment and remediation can substitute instead. Corrections made after the fact can mitigate damages and likelihood and extent of federal prosecution.

Alice Yardum-Hunter, Certified Specialist, former Commissioner, Board of Legal Specialization, California State Bar, has practiced business immigration for 30 years. She has been honored annually among *Super Lawyers* published by *Los Angeles Magazine* and *Law and Politics* since inception. Alice is 2nd Vice President, L.A. County Bar Association, Immigration Section. She serves on the Distance Learning Committee of the American Immigration Lawyers Association and for them she has edited two books: *California Chapters Conference Handbook* and *Practice Before the Department of Labor.* In 2007, she was nominated for the top 25 lawyers award among 9,000 in the San Fernando Valley.