Employers & HR Directors

A New Age of Immigration Legal Services

Chances are, U.S. employers will be hiring (more) foreign workers in the future. According to Peter F. Drucker, the fabled teacher, consultant and writer for several generations of managers, further U.S. reliance upon foreign professionals is inevitable:

> "**...The dominant factor for business in the next two decades-absent war, pestilence, or collision with a comet-is not going to be economics or technology. It will be demographics.** The key factor for business will not be the *over*population of the world, which we have been warned of these last 40 years. It will be the increasing *under*population of the developed countries-Japan and the nations of Europe and North America.... There will be no single dominant world-economic power, because no developed country has the population base to support such a role. **There can be no long-term competitive advantage for any country, industry, or company, because neither money nor technology can for any length of time offset the growing imbalances in labor resources.** "

--Peter F. Drucker's September-October 1997 Harvard Business Review article "The Future That Has Already Happened:" Click here for full text of excerpt.

As Mr. Drucker points out, the supply of "knowledge workers" or highly-skilled professional personnel in the developed countries and in the emerging countries is rapidly becoming the key asset which U.S. businesses need to attain increased productivity and success in a world economy. Not surprisingly, both foreign and U.S. employers are increasingly recruiting and hiring "knowledge workers" from the international workforce.

Historically, the recruitment and hire of international professionals had been primarily the province of large multinational corporations. In the past, the corporation would typically refer its immigration matters to its long-standing U.S. law firm or labor firm. In many instances, the corporation's firm would in turn outsource the immigration matter to a recommended immigration attorney. This paradigm is certainly still widely practiced and is often the first step toward matching an employer with its initial immigration counsel. However, the landscape is drastically changing.

Today, domestic and foreign employers of all sizes in virtually every industry are now hiring knowledge workers from the international workforce. Moreover, employers with large numbers of foreign professionals increasingly handle their immigration matters with the effective aid of in-house Human Resources professionals.

The reality is that many employers are now staffed with highly competent Human Resources professionals who are fully capable of handling a plethora of nonimmigrant visa and I-9 documentation compliance matters. Ironically, this movement toward in-house immigration services has increased corporate reliance on and demand for the intermittent tutelage from highly professional and experienced business immigration attorneys.

One of our primary services is to mentor Human Resources professionals on devising cohesive nonimmigrant visa, labor certification, consular visa processing and I-9 compliance strategies. In many instances, a corporate client will retain our services to perform a "knowledge transfer" to its Human Resources professionals with the ultimate goal of establishing an in-house immigration staff. Occasionally we will handle or retool complex cases and other matters upon the employer's request. For example, an employer client seeking to hire 200 laborers for various temporary positions might typically refer the supervision of the project to our firm while the Human Resources staff prepares most of the government forms. While this model may not be feasible or even prudent for many clients, it is a great value for those who fit the profile.

For many employers, this model of tailored and intermittent representation is often the best value and the most efficient "win-win" outsourcing paradigm. Simply put, most Human Resources professionals capable of preparing INS and DOL forms would rather budget for and purchase the more useful and specific hourly (and not repetitive flat fee) advice of an experienced immigration teacher, critic and problem-solver.

When Is An Alien Authorized For Employment?

This is usually one of the initial questions asked by Human Resources professionals exploring the possibilities of recruiting and hiring noncitizen professionals and laborers. It is an intelligent question that is in essence the heart of corporate immigration practice.

In general, the INS deems a noncitizen worker "self-authorized" for U.S. employment if he or she is: 1) a Lawful Permanent Resident or 2) has a valid, unexpired but temporary employment authorization document (EAD). With rare exceptions, all other noncitizens require a specific temporary ("nonimmigrant") status issued by the INS as the result of an approved petition filed by the U.S. employer.

Lawful Permanent Residents (LPRs) can prove their status to the recruiting employer by presenting either a laminated I-551 Alien Registration Receipt (or "Resident Alien") Card, which is commonly referred to as an "immigrant visa" or "green card", or a passport which contains an unexpired I-551 Permanent Resident "stamp". The INS issues I-551 cards and temporary stamps to aliens who have granted LPR status. LPR status is valid indefinitely but the documentary proof (I-551 card) must replaced in 10 years. Potential hiring candidates who expired I-551 cards can obtain replacement cards through a simple INS application procedure. LPRs are authorized, without limitation, for employment with any employer.

A temporary employment authorization document (EAD or I-766 card) is a laminated card with the inscripted words "Employment Authorization". The INS issues EADs for certain qualifying noncitizens. For the most part, an alien with an EAD is either: 1) a recent foreign graduate of a U.S. university or college and has applied for and obtained an "optional practical training status" which is typically valid for one year or less; or 2) an alien in the final stage of becoming an LPR and has an EAD which can be extended for one year increments until the final stage is adjudicated by the INS; or 3) an asylee or refugee.

If the alien in question is not an LPR and does not have an EAD, the employer must obtain an appropriate nonimmigrant status from the INS before the alien can be authorized for employment. This is true even if the alien is currently in the U.S. under the desired nonimmigrant status. For example, an alien with an approved H-1B status with employer A cannot be lawfully employed with employer B unless and until employer B files for and obtains an H-1B in employer B's name.

It is worth noting that is permissible for an alien to be simultaneously employed by more than one U.S. employer (referred to as "concurrent nonimmigrant status") as long as each employer has obtained the same nonimmigrant status on behalf of the alien. For example, a Canadian engineer may work for two different U.S. companies as long as each company

has acquired same nonimmigrant classification for the alien. Thus, the engineer cannot simultaneously work in TN and H-1B status.

There are a multitude of scenarios in which a noncitizen worker may or may not be authorized for U.S. employment. Human Resources professionals just becoming acquainted with immigration matters should consult a competent immigration attorney. Sometimes the best option (or lack thereof) is not readily apparent even to Human Resources professionals well-versed in corporate immigration. Potential land mines such as defects in the noncitizen's prior immigration history or the noncitizen's lack of specific skills, experience or education are often not detected at the time the job is offered. In other instances, an otherwise advisable, "textbook" course of action may not viable due to lengthy government processing times or recent shifts in policy. A capable, experienced immigration attorney can provide Human Resources professionals specific solutions as they relate to specific sets of facts.

Hiring Aliens With Preexisting Visa Status

A "status" is an authorized period of stay in the U.S. as granted by the Immigration & Naturalization Service (INS). It is not to be confused with a "visa" which is a document for entering the U.S. as issued by the U.S. State Department.

The terms "change of status" or "extension of status" apply only to nonimmigrant (temporary) status categories (i.e. H-1B, L-1, TN). Permanent status, properly referred to as "Lawful Permanent Resident" status, has an indefinite duration contingent upon the alien's conduct. Lawful Permanent Resident status can neither be "extended" or "changed", although a qualifying alien may elect to apply for naturalization to become a U.S. citizen.

An alien or the alien's current /potential employer is said to be seeking a "change of status" when a petition is filed with the INS to reclassify the alien's temporary status. An employer petitioning the INS to change an alien's F-1 student status to an H-1B professional status so the alien can be authorized for employment would be an example of a "change of status". An alien in an unexpired B-2 tourist status filing a self-petition to be reclassified as an L-2 dependent spouse of an L-1A multinational manager or executive would be another example of a "change of status."

An "extension of status" is being sought whenever the alien or the alien's current employer is seeking to extend the authorized period of stay in the same status classification. An employer petitioning the INS to extend an alien employee's soon-to be expiring H-1B status for another period of authorized stay is seeking an "extension of status."

Although there are many exceptions (see below), a qualifying alien currently in the U.S. in a valid and unexpired nonimmigrant status may generally obtain a change of status or an extension of status.

In corporate immigration practice, an alien's eligibility for a change of status or extension of status is often a potential deal breaker. Aliens who are eligible for a change of status or extension of status receive the new classification of status or the extension of status inside the U.S. Thus, an alien employee may be authorized to begin/continue employment without a break in time. Aliens who are not eligible for a change of status or extension of status suffer the inconvenience of traveling to the U.S. Consulate in their home countries, thus resulting in either a break in the alien's employment or a delay in placing the alien on the employer's payroll as a new hire.

Aliens who are eligible for a change of status or extension of status receive INS issued nonimmigrant status inside the U.S. in the form of a new I-94 arrival/departure card. The new I-94 card document's the alien's new status classification and/or new authorized period of stay. Thus, when the INS grants the alien a change of status or extension of status, he or she does not have to make the trip to a U.S. Consulate or Embassy to apply for the status. In fact, he or she already has the status which authorizes his or her stay (and in many instances, employment) in the U.S.

However, at some point the alien may wish to travel to a U.S. Consulate or Embassy and obtain the State Department's visa stamp in his or her passport. An alien (other than a Canadian) who obtains a change of status or extension of status cannot freely travel outside the U.S. (except to Canada, Mexico and Bahamas) and reenter solely upon presentation of his or her I-94 arrival departure card. The alien will need to obtain a visa stamp at the U.S. Consulate or Embassy in their home country or at a "stateside" U.S. Consulate in Mexico or Canada.

Pursuant to the Immigration & Nationality Act, some aliens are not eligible for a change of status, even if the alien's current status is valid and unexpired. J-1 nonimmigrants such as foreign medical graduates and certain exchange visitors subject to the "two-year foreign residence" requirement cannot change from J-1 status to any other nonimmigrant status without first obtaining a waiver of the and D-1 ship crewman and C-1 airline crewman

In such an instance, the alien does not have to travel to a consular post abroad to be able to temporarily reside (and work, depending on the classification) in the U.S. However, during

the validity of the new status, should the alien decide to seek future reentries into the U.S. from countries other than Canada or Mexico, he or she must first obtain a new visa from U. S. consulate abroad.

Hiring Foreign Students

One of the most common corporate immigration matters is the hiring of a foreign-born graduate of a U.S. university or college or foreign-born graduate of a foreign university or college. Foreign students are often eligible to work for a U.S. employer through a school-sponsored practical training or curricular training visa. See Employing Foreign Students for a more detailed discussion on practical training and curricular training visas.

In most instances, the U.S. employer hires the foreign student while he or she is still in F-1 optional practical training (post-graduate visa) status. Since the practical training visa is only valid for one year, eventually the U.S. employer will need to file a petition to change the student's F-1 status to H-1B status or some other employment-authorizing status. Given the annual limitations of the H-1B cap, the timing of the filing of the petition is a major consideration. If the employer waits too long to file for the change of status, the foreign student may not be able to work continuously. In other words, there may be a gap in employment if the student's practical training expires before the INS can issue the H-1B status.

Hiring Canadian Professionals

Although Canadian citizens are "visa-waived", meaning they do not require visas for entry into the U.S., they are not authorized for U.S. employment without some type of employment authorization. U.S. employers must first obtain an employment-authorizing nonimmigrant status before the Canadian professional can be placed on the payroll. If the U.S. employer does not have international operations, the most likely nonimmigrant visa options for prospective Canadian professional employees are the TN and H-1B status classifications. Most of the time, the Canadian professional may qualify for both the TN and H-1B classification. TN classification can be obtained expediently at a Class A port of entry or pre-flight inspection station; however, TN status is only valid for one year and should not be pursued if the Canadian has been sponsored for an immigrant visa (green card) by his or her previous employer. Another advantage of the TN classification is that unlike the H-1B status, the employer does not have to obtain an approved Labor Condition Application (LCA) from the U.S. Department of Labor. On the other hand, the H-1B status may be more appropriate if the employer desires to sponsor the Canadian professional for an immigrant visa (green card) and the annual H-1B cap has not been reached for the given fiscal year.

Hiring Out-of-Status Aliens

Aliens physically present in the U.S. are not eligible for a "change of status" or "extension of status" unless they have an unexpired temporary nonimmigrant status. Out-of-status aliens may be petitioned for the desired nonimmigrant classification; however, upon INS approval of the nonimmigrant petition, the alien must apply for the temporary visa at the U.S. Embassy or Consulate in his or her home country and reenter the U.S. before the INS can issue the employment-authorizing I-94 arrival/departure card. In short, out-of-status aliens have to leave and reenter before they can begin employment with the U.S. employer.

Aliens who have been "unlawfully present" in the U.S. for 180 days or more (since 4/1/97) may be inadmissible (barred from entry or issuance of classification) and thus ineligible for employment with a U.S. employer. Unless the alien qualifies for a waiver of inadmissibility, he or she cannot obtain the necessary employment-authorizing status. Any alien who has been unlawfully present for more than 180 days should contact a qualified immigration attorney before departing the U.S. The bars to admissibility are triggered by departing the U.S. and seeking reentry.

When Can The Alien Go On The Payroll?

This may be the most frequently asked question by human resources professionals and individual aliens. The answers to such questions often depend upon a number of factors. In each instance, the employer and alien alike should contact a qualified immigration attorney to get a fact-specific opinion.

Usually the employer and alien alike are anxious to commence the employer-employee relationship. However, the employer and alien must follow the employment authorization and I-9 compliance rules set forth in the Immigration Reform & Control Act of 1986. Since the employer is liable for employing an alien without INS authorization, the employer should wait until the INS approves the requested nonimmigrant status and issues the I-94 card before placing the alien on the payroll.

In some instances, the INS will approve a nonimmigrant visa petition retroactive to the date requested on the petition. In other instances, such as an extension of status case where the employer is seeking to extend the status of its alien employee, the timely filing of the extension petition will permit the continuing employment of the alien for 240 days (or longer, if the petition is approved). The I-797 receipt notice can be added to the employer's I-9 file to document the requested extension.

Employment Authorization and I-9 Compliance

Determining whether a newly hired employee is authorized for employment by verifying the identity and employment authorization documents can present employers and their counsel with formidable challenges. Mastering the details of the Immigration Reform & Control Act of 1986 (IRCA's) verification requirements, establishing appropriate compliance methods and procedures, and training the employer personnel responsible for IRCA compliance are time-consuming and expensive. Document fraud is now a multi-million dollar industry and has some aliens going to extraordinary, often unlawful, lengths in the attempt to gain employment in the U.S. The failure to comply with IRCA's requirements can cause an employer to lose a large percentage of their work force overnight following an INS raid, pay hefty fines, and the possibility of additional civil and/or criminal penalties. Moreover, serious disruption and inconvenience may result from even a routine inspection of the I-9 Forms.

In the initial "hiring" stage, the employer must attest under penalty of perjury on INS Form I-9 that the employee produced documents establishing both employment verification and the alien's identity. The INA specifically requires an employer to note the identification number and expiration date (if any) of any document provided by employee. The employee must attest that he is U.S. citizen, a LPR, or authorized to work in the United States on Form I-9 by completing this portion of the I-9 at the time of hire. However, it is the employer, not the employee, who is liable for any defects in the I-9 form. The employer has three business days within the time of the hire in which to examine the employee's documents and provide the proper verification on the I-9. Some of the more common problems made by employers in this "inspection" include: failing to recognize that an employee has failed to check one of the three boxes regarding immigration status or has checked too many boxes, e.g., checked both the citizen and permanent resident boxes; the employer has photocopied the employee's provided documentation but has failed to verify them; the employer has failed to record the expiration date of time-limited work authorization documents; or the employer has failed to insert the date the employee starts work.

The completion and proper maintenance of an I-9 file is a continuing responsibility for

employers. Should an employer receive a notice of inspection or be faced with an audit, having the I-9 file properly maintained will relieve a great deal of stress, anxiety, and complication.

Employer Sanctions, Audits and Investigations

The Immigration & Nationality Act (INA) makes it illegal for an employer to hire, recruit or refer for a fee someone not authorized to work in the United States. An employer will be found to have violated the Act where it employs an alien knowing that the alien is not authorized to be employed under INA and where it continues to employ an alien knowing the alien has become unauthorized. All employees must be authorized to work either automatically as a U.S. Citizen or Lawful Permanent Resident, or by the INS. The terms "hire," "employer," and "employee" have all been broadly defined and may incorporate a wide variety of individuals and entities. Generally, any exchange that involves services or labor for pay in almost any form will create an employee/employer relationship under the INA. Further, if an employer knows aliens are unauthorized to work, then the employer cannot hire or continue using them in any capacity.

The INS regulations adopt the view of "knowing" as including "not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." Therefore, knowledge may be inferred from a myriad of situations. For example, if an employer fails or improperly completes the I-9 or has information available to it that indicates employee not authorized to work (e.g., rejected labor certification application), then that employer could be found to have violated the "knowing" requirement of the Act and open to sanctions.

If an employer should learn that an employee is unauthorized, there is no set time limit for firing that employee. To determine whether an employer, after obtaining notice that the employee is not authorized to work, fired the employee within a reasonable time courts will often look to a variety of factors, including: the number of days that the employee continued to work after notice; the certainty of information that the employee is illegal; or the steps taken by the employer to confirm the noncitizen employee's illegality. Any of these violations open the employer up to sanctions under the Act.

Investigation of Employer Sanctions Cases

The INS will not generally conduct an investigation unless the Service has a lead and articulable facts concerning any employer sanctions or violations. "Articulable facts" is a very malleable term and may include the race or alienage of an employee when coupled with other aspects, such as the employer's past history of hiring undocumented aliens or an INS agent's observation of persons entering or leaving the employer's place of business. Any articulable facts forming the basis of reasonable suspicion are "measured against an objective reasonable man standard, not by the subjective impressions of a particular officer" and may be based on an anonymous tip. Under recent policy guidelines, the INS has accelerated its enforcement strategies and begun to focus on lead driven investigations instead of random audits and will no longer maintain an education visit or contact as a prerequisite for instituting a fine proceeding.

Random Audits

The INS conducts random I-9 compliance audits through the use of statistical methods that are supposed to insure random selection of employers under its General Inspection Program. They also provide a subset of randomly selected employers within industries known to use undocumented employees under the Special Emphasis Inspections Program. The purpose of the random audits is to "ensure neutrality" and to "send the message that no employer is immune from sanctions." Although at first only a few local offices in each of the four INS regions were used, the program was eventually expanded to all INS local offices with enforcement responsibilities. The random samples of employers are computer generated at the INS Central Office in Washington, D.C. to eliminate the possibility of any local bias in the selection of employers.

Inspections

An employer must retain all I-9s for all employees for the latter of 3 years after the date of hiring or one (1) year after the date of termination. At any time, the INS and DOL may inspect or audit an employer's I-9 file. An inspection will usually be initiated by a notice of inspection delivered personally or by certified return receipt mail, whereas an audit may come without notice. The INS and/or DOL must provide at least 3 days notice to the employer prior to any inspection of the forms. The INS or DOL is not required to obtain a subpoena or warrant to conduct an inspection. Further, the employer must make all I-9 Forms available for inspection within a reasonable time period. The employer's failure to complete I-9s retroactively before reinspection can result in liability and if an employee's employment authorization expires or the INS informs the employer that an authorization is not sufficient, the employer must re-verify the I-9 or the person will be unable to work. The employer can re-verify directly on the existing I-9 by noting the submitted document's ID number and expiration dates. Lastly, any false attestations on an I-9 form are separate

criminal offenses and open the employer to further penalties beyond sanctions.

Penalties

The civil penalties for each offense, except paperwork violations, may range from $250 to $2,000 for each alien for a first offense to $3,000 to $10,000 for each alien for anything above a second offense. Paperwork violations (e.g., the failure to fill out and maintain I-9s) can range from $100 to $1,000 for each I-9 found to be insufficient. For first time violations, the INS starts at the statutory minimum and will adjust upward based upon any "aggravating factors." For second or subsequent violations the INS will start at the statutory maximum and may mitigate fines in certain circumstances where the size of employer, good faith of employer, the seriousness of violation, or the history of violations warrant that the fines be tempered.

Criminal Penalties may also be "handed down" where there are "pattern and practice" violations found. The INS defines pattern and practice to be "regular, repeated, and intentional activities." Criminal violations are to be reserved "for serious and repeat offenders who have clearly demonstrated an intention to evade the law." Criminal penalties usually begin at $3,000 and/or 6 months in jail for a first offense. Further, the Attorney General may seek an injunction in the U.S. district court keeping the employer from carrying on with the violative behavior.

The ALJ may enter a Final Order based on the evidence before the court and shall do so within sixty days of receipt of the hearing transcript. If the ALJ determines that a person has violated the unlawful hiring provisions, then his/her Order "shall include a requirement that the respondent cease and desist from such violations and to pay a civil penalty ...." The ALJ may also enter two types of orders based on settlements. If a party settles the case and asks the court simply to dismiss the case, the ALJ may do so. Alternatively, the government may request a consent order and the ALJ must then enter an order which contains the consent findings and agreement by the parties.

Defenses

There are many defenses that may be used by an employer in the course of an INS inspection or hearing on sanctions. However, the most common is known as "good faith" compliance. However, good faith is not a defense to paperwork violations or to a charge continuing to employ unauthorized aliens.

An employer can also challenge, on constitutional grounds, the INS audit procedure to inspect the employer. The employer may argue that the General Inspection Program or the INS Special Employers Inspection Program for selecting employers for audits is not random, and therefore it violates the fourth amendment. The employer may also challenge

on fifth amendment equal protection grounds the selective enforcement of employer sanctions, particularly where race or national origin discrimination is raised.

Independent Contractor & Joint Employer Liability

In general, an employer who knowingly hires and/ or employs unauthorized alien workers is subject to sanctions and civil fines. In the instance where the employer directly hires or continues to employ an alien worker who is unauthorized to work, the employer's liability or exposure to INS sanctions and fines is more easily ascertainable. In situations where the employer is not directly hiring or employing the alien workers, but rather is utilizing an "independent contractor" for the temporary services of the independent contractor's alien workers, the employer using such services may in some instances have exposure to INS sanctions or civil fines for hiring or employing unauthorized aliens.

It is important for the employer to understand the ramifications of and the solutions to using independent contractors who may have unauthorized (undocumented) aliens assigned to work on the employer's premises. Any purchaser of an independent contractor's services should take a "caveat emptor" or "let the buyer be aware" approach to choosing which contractor to use. Because of the potential for liability, it behooves potential purchasers to continue to proceed cautiously in pursuing the services of any independent contractor by requesting to inspect the I-9 files of the contractor prior to the inception of the business relationship. If the purchasing employer waits to inspect the contractor's I-9 files after the services are engaged, the purchasing employer may be imputed with actual knowledge and thus be subject to liability.

Prior to the enactment of the Immigration Reform and Control Act of 1986 (IRCA), all that employers of unauthorized aliens risked was losing them as employees if they were apprehended and removed by the INS. IRCA made it illegal for employers to hire unauthorized aliens and required all employers to check the documentation of every new employee. The employer sanctions provisions of IRCA fall within three categories: (1) a prohibition on the knowing hiring of unauthorized aliens; (2) a prohibition on the continued employment of known authorized aliens; and (3) a prohibition on the hiring of any individual without verifying identity and authorization to work. IRCA defines an "unauthorized alien" as an alien who is neither a lawful permanent resident (someone with an immigrant visa or "green card") nor authorized to work in the U.S. by the INS.

Graduated civil fines and cease and desist orders can be imposed upon employers knowingly hiring or continuing to employ unauthorized aliens. Nongraduated civil penalties can be imposed upon employers who violate the verification requirements. An employer who engages in "a pattern or practice" of knowingly hiring or continuing to employ unauthorized aliens may be subject to criminal penalties and injunctions. The standard penalties for knowingly hiring or continuing to employ an unauthorized alien include the following:

- First Offense: $250-$2,000 per unauthorized alien
- Second Offense: $2,000-$5000 per unauthorized alien
- Third Offense: $3,000-$10,000 per unauthorized alien

Under IRCA, every U.S. employer must keep Form I-9 records for its new alien employees. The only aliens clearly definable as employees who are not subject to the I-9 requirement are: (1) employees working outside the U.S.; (2) "Casual" employees who provide domestic service in a private home; (3) alien crewmen; (4) "Grandfathered" employees (pre-1986); (5) Independent contractors and their employees (see below); (6) workers not receiving wages or other remuneration in the U.S.; and (7) Persons legitimately on a foreign payroll performing B-1 services.

The INS has used various ways to decide whom to investigate for I-9 compliance, such as: (1) Written complaints; (2) Random audits; (3) Industries with traditionally high use of unauthorized aliens (including hospitality/hotels); and (4) Labor-certification applicants and other referrals from Department of Labor agents. INS fines of employers for failing to complete and retain I-9 Forms may range from $100 to $1,000 per employee.

Although such fines may be issued whether any employee turns out to be an authorized alien or not, the size of the fine per record keeping violation is to be determined according to various factors, including (1) the size of the business, (2) the employer's good faith, (3) the seriousness of the violation, (4) whether the alien involved was an unauthorized alien and, (5) the history of previous violations. An employer who has made a "good faith effort to comply" with I-9 requirements cannot be penalized for "technical or procedural" violations unless the employer has failed to cure violations within 10 days of having them explained by INS, or unless a "pattern and practice" of violations is involved.

INS "raids" on places of employment frequently result in charges of document fraud under a related statute. Someone found to have committed document fraud can be fined $250 to $2,000 for each document used, accepted, or created and for each instance of use, acceptance, or creation. Individual officers and employees responsible for hiring and I-9 functions for an employer should consider potential personal liability and although remote, criminal liability.

Having discussed the IRCA sanctions for hiring unauthorized aliens and the failure to keep I-9 records, the salient issue is: Can a company still be liable for or exposed to sanctions and fines even if the alien employees are documented in the I-9 files and the only unauthorized aliens on the premises are employed by an independent contractor? Stated in another way, can the employees of the independent contractor be classified as employees of the job-site company?

The INS regulations define "employee" as "an individual who provides services or labor for an employer for wages or other remuneration within the U.S." There are only two state exceptions to the "employee" definition: (1) independent contractors and (2) casual domestic employment. However, the regulatory definition of "employer" contains an additional exception for other "contract labor" that does not necessarily fall within the independent contractor exception.

The INS has stated that its "independent contractor" definition was derived from the Internal Revenue Service. The particular facts of each case, not the designations assigned by employers or individuals performing services, determine whether "an independent contactor" relationship exists. The primary focus is on control. The INS considers as an independent contractor one who works according to his or her "own means and methods" and is "subject to control only as to results". The INS considers other factors, including who owns the tools or materials, who determines the sequence and hours of work, and whether or not the worker offers services to the general public and to specific clients simultaneously.

At first glance, it appears under this definition that temporary employees supplied by an agency or independent contractor could be considered "employees" of the company receiving the services if the daily control over the work and working conditions lay with that company. However, upon a closer reading, the regulations contain an additional exception for "contract labor or services" other than independent contractors. The INS regulations state that "in the case of an independent contractor *or contract labor or services, the term 'employer' shall mean the independent contractor or contactor and not the person or entity using the contact labor.* In other words, contract labor or services performed by individuals who do not meet the independent contractor definition may nevertheless fall outside the scope of the employee definition for IRCA purposes. Thus, it appears that temporary service agencies that hire, assign, and pay temporary employees would be the employers of such employees, rather than the company contracting for the individuals' labor or services.

Because independent contractors are not employees, neither they nor their own employees must be checked through I-9 Forms by persons who obtain their services by contract (whether written or oral). Nevertheless, even in the absence of an employer-employee relationship, someone obtaining labor through contract (written or oral) with knowledge that any worker involved is an unauthorized alien

may be fined for "knowingly hiring" an unauthorized alien.

While a person or entity obtaining unlawful independent contract labor may not be assessed liability for "continuing to employ or hire" an unauthorized alien (liability which would exist in the direct employment relationship), the "fictitious hire" created in the contract situation is deemed to occur each time the contract is renegotiated or extended. This rule is to avoid a loophole that has existed in other countries' employer sanctions laws. IRCA specifically states that an entity using a contract or other negotiated agreement entered into, renegotiated or extended after November 6, 1986 to obtain the services of an alien known not to be authorized to work in the U.S. (unauthorized alien) becomes the employer of such alien for purposes of IRCA's employer sanctions provisions.

Therefore, in situations where an entity has actual knowledge of alien's unauthorized status, the existence of an independent contractor or contractor relationship will not save that entity from sanctions for knowingly hiring an unauthorized alien.

Neither IRCA nor the INS regulations define "knowingly" or "actual knowledge." The parameters of these terms are worked out through case-by-case adjudication by administrative law judges and the federal courts. It seems apparent from the statutory scheme and the legislative history that "knowingly" means something beyond mere negligence. It also seems clear that the failure to comply with the verification provisions of IRCA, although separately punishable, does not in and of itself establish that an employer knowingly hired an unauthorized alien. An employer would be deemed of having "actual knowledge" if an alien worker under its employ has an expired employment authorizing document, visa or status. An employer who discovers, through the continuing nature of the form I-9 verification process that its alien employee's work authorization has expired and has not been renewed, is obligated to terminate that employee or otherwise expose itself to penalties for IRCA violations.

In the situation where a company has a contractual relationship with an agency or independent contractor employing unauthorized aliens, the company using the agency's employees does not have a duty to keep I-9 forms for the agency or the agency's employees. Nevertheless, if the company or entity engaging the services of the agency or independent contractor discovers that the alien workers of the agency or independent contractor are in fact unauthorized, the company or entity must terminate the contractual relationship. Unless the entity or company actually conducts an audit of the contractor's I-9 files or one of the contractor's employees somehow inadvertently presents documentation to the company or entity what would constitute the entity or company's "actual knowledge" that its contractor's employees are unauthorized aliens is difficult to determine. Although rumors of INS investigations and other second hand unsubstantiated accounts regarding certain contractors or the contractor's individual alien employees do not impute the company or entity with "actual knowledge", the company's continued usage of the

contractor's services is a risky venture which could entangle even the most compliant of companies into a web of INS investigation.

The bottom line is that if a company were to investigate the I-9 files of its independent contractors, it may discover that the contractor is employing unauthorized aliens. Thus engaging in this seemingly prudent investigation, ironically the company could acquire the actual knowledge that could render it liable under IRCA and other INS regulations.

On the other hand, perhaps a consensual private inspection of the contractor's files would clear the conscience if all of the I-9 files were in order. Of course, the contractor may not keep I-9 files for all of the alien workers as required by law. Some files may be "conveniently" hidden by the contractor. This is one of the many shortcomings of investigating a contractor. If the company were to claim that it previously had conducted a private audit, the INS may impute the company with actual knowledge of the unauthorized status of the contractor's alien employees.

By the same token, continued usage of the contractor's services despite doubts as to the status of its alien employees also creates potential problems despite possible "good faith" defenses of lack of actual knowledge. The most prudent course of action would be to terminate the contractual relationship and seek other options for these services. Moreover, the employer can petition the U.S. Department of Labor and Immigration & Naturalization Service for its own foreign workers, thereby insuring the foreign labor is authorized for employment.

Labor Condition Applications

The INA requires that employers of H-1B a nonimmigrant to file a Labor Condition Application (LCA) with the U.S. Department of Labor concerning the conditions of the foreign national's employment. The employer is required to maintain documentation of its compliance with the LCA assurances and this documentation must be available for inspection by any interested person, in the Public Inspection File (PIF).

The "prevailing wage" is an average of the wages paid to similarly employed workers in the area of intended employment. There were three substantial changes regarding prevailing wages in recent INS regulations. First, the source of the prevailing wage must be set forth

on the labor condition application. Second, all SESA determinations are limited to 90 days. That is, any request for a prevailing wage determination will only remain valid for a 90 day period at which time the determination becomes invalid and the prevailing wage is no longer "good." Lastly, employers may choose to rely on an independent authoritative source should the employer feel that the SESA determination is either inaccurate or inapplicable to their particular region. However, an employer should note that using an independent source causes the employer to lose the "safe harbor" afforded to those who use a valid SESA determination in their LCAs.

These regulations also made changes to the "actual wage" paid to the noncitizen employee. First, the employer's PIF must contain a memo fully explaining the system the employer uses to set the wages of any employee who would be working in the same position as the noncitizen employee. The PIF should also set forth the system the employer uses for updating or increasing the wage scale and document how the particular wage was arrived at for the noncitizen employee. The "actual wage" is the wage paid by an employer to similarly employed workers with comparable qualifications. These recent regulations are quite strict and comprehensive and many employers feel these regulations are out-of-touch with "real" business practices. However, compliance is a "real" issue that employers must face and can lead to complicated and often uncomfortable, if not impossible, situations.

Peter F. Drucker Excerpt

The following excerpts are from Mr. Drucker's September-October 1997 Harvard Business Review article "The Future That Has Already Happened:"

"**...The dominant factor for business in the next two decades-absent war, pestilence, or collision with a comet-is not going to be economics or technology. It will be demographics.** The key factor for business will not be the *over*population of the world, which we have been warned of these last 40 years. It will be the increasing *under*population of the developed countries-Japan and the nations of Europe and North America.

The developed world is in the process of committing collective suicide. Its citizens are not having enough babies to reproduce themselves, and the cause is quite clear: its younger people are no longer able to bear the increasing burden of supporting a growing population of older nonworking people... in the United States, the birthrate of the native-born population is far below the overall production

rate...The U.S. population also would decline, but for the massive immigration from south of the U.S. border and from Asia....Of course, birthrates may go up again, although so far there is not the slightest sign of a new baby boom in any developed country. But even if birthrates jumped up overnight to the three-plus figures of the U.S. baby boom that began 50 years ago, it would take 25 years before those new babies would become fully educated and productive adults. For the next 25 years, in other words, the underpopulation of the developed countries is an accomplished fact and has the following implications for their economies and societies:....There will be no single dominant world-economic power, because no developed country has the population base to support such a role. **There can be no long-term competitive advantage for any country, industry, or company, because neither money nor technology can for any length of time offset the growing imbalances in labor resources.** The training methodologies developed during the two world wars-mostly in the United States-now make it possible to raise the productivity of a preindustrial and unskilled manual-labor force to world-class levels in virtually no time, as Korea demonstrated 30 years ago and Thailand is demonstrating now. Technology--brand-new technology--is available, as a rule, cheaply on the open market...The productivity of knowledge and knowledge workers will not be the only competitive factor in the world economy. It is, however, likely to become the decisive factor, at least for most industries in the developed countries...Knowledge makes resources mobile. Knowledge workers, unlike manufacturing workers, own the means of production: they carry their knowledge in their heads and therefore can take it with them. At the same time, the knowledge needs of organizations are likely to change continually. As a result, in the developed countries more and more of the critical workforce--and the most highly paid part of it--will increasingly consist of people who cannot be 'managed' in the traditional sense of the word. In many cases, they will not be employees of the organizations for which they work, but rather contractors, experts, consultants, part-timers, joint-venture partners, and so on. An increasing number of these people will identify themselves by their own knowledge rather than by the organizations that pay them.

The only comparative advantage of the developed countries is the supply of knowledge workers. It is not a qualitative advantage: the educated people in the emerging countries are every whit as knowledgeable as their counterparts in the developed world. But quantitatively, the developed countries have an enormous lead.."