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No More "Mr. Nice Guy" in Immigration Enforcement

By Robert S. Whitehill

A friend, on his 50th birthday, announced that "If I'm going to accomplish my goals, then no more Mr. Nice-Guy." He indeed changed the way he did business – and truly no longer was Mr. Nice-Guy – but in the end, he failed dismally to reach his goals.

Last week, I received a call from a weeping client whose loved one had been taken into custody by the United States Immigration and Customs Enforcement (USICE). The husband and wife went to USICE to check on the status of their family-based immigration petition. They were told to wait so that the information official could check on the status of the case. In a few minutes, two USICE officers approached them and took the husband into custody. It was awful.

In another case reported in the *New York Times* (Nov. 17, 2007), an illegal immigrant was taken to jail to "await deportation. Her nine-month old daughter, Brittany Bejarano, who was born in the United States and is a citizen, was put in the care of social workers." The article goes on to cite studies that have found that "at least 13,000 American children have seen one or both parents deported in the past two years after round-ups in factories and neighborhoods. The figures are expected to grow. Over all, about 3.1 million American children have at least one parent who is an illegal immigrant, according to a widely accepted estimate by the Pew Hispanic Center in Washington."

Immigration enforcement has become serious business for employers, employees, and their families. Like my unfortunate and unfulfilled friend, for immigration it is time for "no more Mr. Nice-Guy." Time will tell if the emphasis on enforcement will succeed or fail. In the meantime, squeaky clean compliance should be among employers' top priorities.

Increasingly, USICE is emphasizing large scale enforcement actions, which often come as worksite raids. Government officers descend on a business armed with subpoenas for documents and ready to take workers into custody. In a case arising out of a raid in Bedford, Massachusetts, the U.S. Court of Appeals for the First Circuit declined to examine the due process claims of the detained workers. While the court characterized USICE action as "callous," it was not so shocking as to violate the constitutionally protected due process of the detained workers. (*Aguilar v. U.S. Immigration & Customs Enforcement, 1st Cir., No. 07-1819, 11/27/07*).

An employer's best protection against a raid is to have no illegal workers and to have all of the I-9 employment eligibility forms in order. (See Cynthia Yializis' article in this issue.)

Six-Point Raid Checklist

Even if all the I-9 documentation appears to be spotless, what if the raids come anyway?

To prepare for the eventuality of a raid, use the following six-point checklist:

- assign and train one or more people to serve as a point person for interfacing with USICE officers
- employment files should be in one place and in good order
- call legal counsel immediately upon USICE arrival
- secure an inventory of the documents sought by the subpoena and taken by the authorities
- allow only the designated point person to speak with the officers on the company's behalf
- document the names of workers who are taken (to the extent possible) and notify the families

There are civil, criminal, and immigration ramifications to a raid. Fox Rothschild partners Robert Goldman and Alka Bahal recently helped a raided business protect the company and its owners from civil fines and criminal indictments arising from alleged violations.

Fortunately, while raids are infrequent, they always are extremely disruptive, and the need to comply cannot be perceived with a "devil may care" attitude. It has been the law since 1986 that all employers must comply with the immigration law with respect to each new hire. This requires employers to fill out and maintain I-9s for each new hire and

to refrain from hiring or continuing to employ any person known, actually or constructively, to be working with out authorization.

The I-9's New Face

The I-9 has a new, simplified appearance. Take a look at the I-9's new face and become familiar with it. The new form is found at www.uscis.gov/files/form/i-9.pdf, and the employer handbook is found at www.uscis.gov/files/nativedocuments/m-274.pdf. All employers will need to use, complete, reverify, and store this form for all employees.

The new I-9 identifies a new, smaller list of acceptable documents, and it emphasizes the need to refrain from discrimination. List A documents establishing identity and employment authorization have been pared down to: U.S. passport, permanent resident card, unexpired foreign passport with temporary (I-551) permanent residency stamp, unexpired employment authorization document (which has a photograph), and an unexpired foreign passport along with an unexpired I-94. USCIS does give a transition period of 30 days from the publication of the new I-9. Since most people didn't read the November 26, 2007 *Federal Register*, employers should begin to make the transition now.

Three details of the new I-9 include:

- the Spanish version is only to assist employees and may only be used in Puerto Rico
- re-verification must be done on the new form
- the employee is not obligated to provide his/her Social Security number unless the employer participates in E-Verify

Social Security Mismatch Letters

A preliminary injunction has been issued restraining the implementation of the program that would require employers receiving notice from Social Security to act to have the employee verify his or her number. The program provided a safe harbor for employees timely following its steps. The government has vowed to try again with another program. Injunction or no injunction, employers receiving such a letter must treat it seriously. Employers should establish an immigration compliance plan to guide their reaction to no match and other immigration compliance matters. Without discrimination, and after the employer has determined whether the error was the employee's or not, companies should confront (but not discharge) the individual, and seek to have the mismatch corrected. If employers cannot correct the mismatch in a reasonable period of time (no longer than 90 days), the employer should consult with counsel since the employee will need to be discharged if not employment eligible.

Pittsburgh lawyer Robert S. Whitehill chairs the Immigration Practice Group of Fox Rothschild, a law firm with offices in seven states. If you have any questions about the information contained in Legally Speaking, *or any legal matter, please contact him at 412.394.5595 or rwhitehill@foxrothschild.com.*

The U Visa – A Second Chance for Victims of Violent Crimes

By Cynthia Yializis

In 2000, Congress passed the Victims of Trafficking and Violence Prevention Act (VTVPA), which created the nonimmigrant U visa program for non-citizen victims of violent crimes. The stated purpose was to protect non-citizens who were willing to come forward and assist law enforcement authorities in the investigation and/or prosecution of criminal offenders. Too often, victims remain silent because they are vulnerable to the threat of deportation. The reality for many is that the ability to remain in the United States outweighs the need to seek justice when the perceived "reward" is a one-way ticket. The U visa seeks to alleviate this fear by providing victims with a second chance.

On October 17, 2007, USCIS published a long-awaited interim rule that establishes both formal requirements and an application procedure (form I-918 Petition for U Nonimmigrant Status) for non-citizens who qualify. The U visa is not limited to non-citizens with legal status – any non-citizen can apply as long as he or she is not deemed inadmissible. (The Secretary of Homeland Security has discretion to waive a ground of inadmissibility if the waiver would be in the public or national interest.)

The following criteria must be met:

- he or she must have suffered substantial mental or physical abuse as a result of the criminal activity
- he or she must have information regarding the criminal activity
- he or she must be willing to assist government officials in the investigation of the crime

- the crime must have occurred in the U.S. or have violated the laws of the U.S.

It is imperative that a petitioner provide substantial evidence that demonstrates the satisfaction of these criteria. This evidence can include trial transcripts, court documents, news articles, police reports, orders of protection, and affidavits of witnesses and medical personnel.

The most critical document required of all applicants is a certification from a law enforcement agency that the applicant has, is, or is willing to assist with the investigation and/or prosecution of the qualifying criminal activity. USCIS has designated form I-918 Supplement B as the official certification form. This form must be completed and signed by a "certified authority." Such an authority is defined as "the head of the certifying agency, or any person[s] in a supervisory role who has been specifically designated by the head of the certifying agency to issue U [visa]…certifications on behalf of that agency, or a Federal, State or local judge." The certification must be submitted concurrently with the initial petition. This requirement is a necessary safeguard to prevent the filing of frivolous petitions.

There are several benefits to the U visa. Applicants are permitted to petition for their spouse, child, parent, and/or unmarried sibling under 18 years of age. (The Petitioner must be under 21 years of age for parents and/or unmarried siblings under the age of 18 to qualify.) They are also eligible for employment authorization. The duration of U nonimmigrant status cannot exceed four years. If a U visa holder maintains three years of continuous physical presence in the U.S., he or she will be permitted to apply for permanent residence.

USCIS has provided a cap of 10,000 U visas per year. This number does not include individuals who are eligible for U visa derivative status. If the number of petitions exceeds this cap in any given year, a waiting list will be established. Those petitioners placed on the list will be granted deferred action and will not accrue unlawful presence in the U.S.

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