Immigration Obligations for Employers and Professional Employer Organizations

by Alka Bahal

All U.S. employers, including professional employer organizations (PEOs), have responsibilities under U.S. immigration laws. The Immigration Reform and Control Act (IRCA) prohibits unfair immigration-related employment practices and makes all U.S. employers responsible for verifying the "employment eligibility'" and "identity" of all employees hired to work in the United States after Nov. 6, 1986. Since the obligation to verify is triggered by "hiring," this responsibility typically falls to the PEO.

The specific unfair immigration-related employment practices prohibited under IRCA require an employer with four or more employees not discriminate because of national origin[1] or citizenship[2] when hiring, discharging, or recruiting or referring for a fee. For example, IRCA prohibits employers from hiring only U.S. citizens or lawful permanent residents unless required to do so by law, regulation or government contract. It also prohibits employers from always hiring temporary visa holders or undocumented workers over U.S. citizens who may be qualified for the position.[3]

Professional Employer Organizations and Co-employment

Employers often elect to contract with a PEO to handle many of its personnel functions to avoid the administrative headaches and costs associated with managing its workforce. In a typical PEO relationship, the PEO will establish and maintain employee files, process payroll, file payroll taxes, develop employee handbooks, manage benefits, oversee workers' compensation and provide human resource support including immigration-related compliance.

The relationship between an employer and a PEO is established with a contract that sets out which employment functions will be retained by the employer (client-employer) and which will be contracted out to the PEO. Through this contract, the PEO assumes certain employer rights, responsibilities, and risks. This assumption confers upon the PEO the right of direction and control over the client-employer's employees; the authority to pay their wages and employment taxes out of its own accounts; the ability to report, collect and deposit employment taxes with state and federal authorities; and, ultimately, the right to hire, reassign, and fire the client-employer's employees assigned to the client-employer's locations. Unique to the PEO contractual arrangement is the client-employer's simultaneous retention of those rights normally attributed to an employer, as well as all of the responsibilities assigned to the PEO. Although certain indemnifications are available in the immigration arena, the client-employer ultimately remains responsible for everything. If employees are subjected to unlawful discrimination or harassment, the client-employer is ultimately responsible, even if the PEO had otherwise agreed to be administratively responsible for these employees. Thus, the PEO and the client-employer maintain a 'co-employment' relationship, whereby both companies share employment obligations to the same group of employees and one co-employer can be held liable for the violations committed by the other co-employer.

The concept of co-employment as between an employer and a PEO is recognized in relation to certain immigration functions. The United States Citizenship and Immigration Services (USCIS), formerly known as the Immigration and Naturalization Service or INS, has recognized the concept of co-employment in the I-9 arena,[4] although it has either specifically disallowed a co-employment relationship or not spoken to it in the visa sponsorship arena. As a result, certain rights and responsibilities may successfully be assigned to the PEO, while others may not, raising a number of interesting issues in the immigration arena.

One of the most prominent benefits PEOs offer to client-employers is the avoidance of dealing with IRCA require-

ments. Additionally, while IRCA strictly prohibits employers from indemnifying themselves from IRCA violations in contracts with individuals, these clauses can be included in agreements between companies. Indemnity clauses in the client services agreement serve to reinforce to the PEO's effort to insulate the client from any failures in employment verification. Therefore, irrespective of any co-employment analysis, the liability for IRCA violations is not only likely, but encouraged, to remain with the PEO.

IRCA: Penalties

Since the penalties for IRCA violations are assessed per violation, the total sum of potential penalties can become significant for PEOs with a sizeable aggregate workforce. Violations include failure to complete an I-9 properly; knowingly hiring, continuing to employ or contracting to obtain the services of an unauthorized alien; or providing or knowingly accepting false Social Security cards. For example, the civil penalties for improperly completed, retained, or missing I-9s range from $110 to $1,100 for a first offense, and from $375 to $14,050 for knowingly hiring/continuing to employ/contracting to obtain the services of an unauthorized alien or providing/knowingly accepting false documents. The law also allows recovery for back pay and attorney fees (only if defense is frivolous), and may authorize orders to comply or reinstate the employee.

On the other hand, demanding excessive documentation can also result in fines ranging from $375 to $16,000. IRCA's anti-discrimination provisions prohibit employers of four or more employees from discriminating against certain protected individuals (including permanent residents, temporary residents, special agricultural workers, refugees, and asylees) with respect to hiring, discharging, recruiting, or referring for a fee. These civil penalties can be cumulatively applied (*i.e.*, separate fines may be assessed for the violation of improperly completing an I-9 form as well as for the violation of participating in document fraud).

The Form I-9: Verifying Identity and Employment Eligibility

Employers, or PEOs on behalf of their clients, are required to verify the identity and eligibility for employment of all persons they hire after Nov. 6, 1986, to ensure they are not knowingly hiring or continuing to employ a person who is not authorized to work in the U.S. To verify if an individual is eligible for employment, the employer must complete a copy of Form I-9, Employment Eligibility Verification, for each employee.

Form I-9 must be completed within three business days of an employee's first date of employment. The employee is required to complete Section 1 of the form no later than close of business on the first day he or she reports for work, and the employer must complete the remainder of the form, including reviewing the employee's original documents, no later than three business days from employee's first date of employment. Employers are permitted to terminate any employee who fails to produce the required document(s), or a receipt for a replacement document(s) (in the case of lost, stolen or destroyed documents), within the prescribed period. If an employee has presented a receipt for a replacement document(s), he or she must produce the actual document(s) within 90 days of the date employment begins.

The challenge for a PEO completing Forms I-9 for client-employers often arises because the employees are not required to physically appear at the PEO's office. In many cases it may be impracticable for PEOs to require employees to physically come to the PEO's office to complete paperwork due to the distance between the PEO's office and the employee (and the client site where the employee is assigned.) Further, the distance between the PEO and its client-employer, even if not great, may create impracticalities for the PEO's tracking of the three-day period for the completion of the form. As such, the PEO may designate an agent to carry out their I-9 responsibilities.[5] The PEO should choose agents cautiously, however, since the PEO will be held responsible for the agent's actions. It is not advisable for the PEO to request the client-employer to perform these tasks on their behalf, since to do so removes the very benefit conferred to the client-employer by the PEO relationship.

During the completion of Form I-9, employers verify the identity and employment eligibility of the new employee by reviewing his or her original documents. I-9 responsibilities should *never* be completed by means of documents faxed by a new employee, because employers must review *original* documents. Likewise, Form I-9 should not be mailed to a new employee to complete Section 2 him or herself.

Only those documents contained in the current list of acceptable documents included with Form I-9 may be accepted. The documents are arranged in three lists: List A includes documents that establish both identity and employment eligibility; List B includes documents that establish identity only; List C includes documents that establish employment eligibility only. The documents must be valid when presented, and employers may accept one document from List A or one document from List B and one document from List C.

Employers are not required to photocopy the documents presented, but are permitted to so long as *only* those documents presented by employees to fulfill their I-9 requirements (no other documents) are copied and the copies are

attached to Form I-9. The copying and retention of documents presented does not relieve the employer from the obligation to complete the form.

Employers must perform a "reasonable inspection" of the genuineness of each document. While employers are not required to be document experts, they are required to examine the document(s) and certify "they appear to be genuine and to relate to the individual named."

Employers may not demand to see certain documents; employees must be allowed to present any of the documents that have been deemed acceptable. Further, employers may not require additional documentations beyond the minimum identity and employment documents as described in Form I-9 and its instructions. At the core of this condition is the prohibition against "national origin discrimination" under federal employment discrimination and immigration laws, meaning employers cannot selectively hire, or refuse to hire, nationals from certain countries for any reason.

The prohibition against the 'knowing' employment of an unauthorized alien extends to the client-employer, despite the use of a PEO. Therefore, if a client-employer learns an employee at their worksite employed through the PEO is unauthorized for employment, the client-employer would be subject to the same liability as the PEO for the violation. The client-employer's knowledge of the violation, either actual or constructive, may subject it to liability for "[use of] a contract, subcontract, or exchange" to avoid I-9 requirements. The regulations specifically refer to several situations where constructive knowledge will be inferred: 1) where the I-9 is not completed or is improperly completed; 2) where the employer has information indicating the alien is not authorized to work; and 3) where the employer acts "with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf."[6]

Retention and Storage Requirements

Employers must maintain their own I-9 records for possible inspection by the federal government. This means employers must be prepared to produce I-9 records for all current employees (except those hired before Nov. 6, 1986), as well as for terminated employees who fall within the retention period, which is three years from the date of hire or one year from the date of termination, whichever is later.[7] When the retention requirement has been fulfilled, I-9 forms may be discarded.

Absent the existence of a PEO, employers would normally maintain their I-9 records at the work location or a centralized corporate location. The regulations permit the storage of I-9 records at the "worksite to which they relate" or at a "company headquarters (or other) location," as long as the storage choice makes it possible for the documents to be transmitted to the worksite within three days of an official request for production of the documents for inspection.[8] In the PEO context, it is not advisable for I-9 records to be maintained at a worksite under the control of a client-employer, as this serves to undermine the benefit conferred to the client-employer by the relationship. PEOs remain responsible for the retention and production of the I-9 documents and, therefore, must maintain them where accessible to the PEO.

Immigration Status and Employment

Where a PEO is responsible for verifying the client-employer's employee's identity and work authorization, it is not only imperative that the PEO fully understand the Form I-9 obligations as outlined above, but also the types of visas that authorize foreign nationals to work in the U.S. and their related sponsorship obligations. Below is a brief discussion of specific visa types and the respective roles the PEO and the client-employer must take in relation to them.

In the context of visa sponsorship, it is important to distinguish between the classic PEO arrangement and an employee leasing arrangement. Where an employee leasing agreement exists between the parties, it is permissible for the PEO to use the H-1B visa to sponsor their own employees, whom they then place at the client's site.[9] The question is whether the PEO qualifies as an employer, and may be the sponsoring entity in a visa application on behalf of a client-employer's employee. In an employee leasing arrangement, it is arguable that the PEO exerts sufficient control over the employee(s) to qualify as the employer and, hence, become the petitioner in their visa sponsorship. However, in the classic PEO arrangement, where the PEO is contracted solely to administer certain business functions, including issuing payroll checks and other benefits to the client-employer's employees, and only has a minimal employment relationship with these individuals, the PEO would not qualify as an employer for visa sponsorship purposes.

Immigration Status and Employment: The H-1B Visa

The Immigration Service has specifically addressed PEO arrangements with respect to H-1B visas. The H-1B visa is a nonimmigrant visa available for professional positions where the prospective beneficiary possesses a U.S. bachelor's degree or its equivalent in a field related to the occupation.[10] The immigration regulations now specifically permit the filing of a petition under the H provisions by "[a] United States employer" seeking to classify an alien as a "temporary employee."[11] A United States employer is defined by INS/USCIS as a

person or entity having an IRS identification number that has "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee…"[12] Therefore, in situations where by the contract terms the PEO merely pays the employee's salary, the Immigration Service considers the client-employer to be the organization that controls the work of the employee, not the PEO. Thus, in the typical arrangement between a client-employer and a PEO, the client-employer, rather than the PEO, must act as the employee's H-1B petitioner, regardless of the other immigration-related responsibilities contractually conferred to the PEO.[13]

Immigration Status and Employment: The L-1 Visa

A similar analysis regarding whether the PEO can function as the sponsor of a client-employer's employee occurs in the L-1 visa arena. The L visa may be used to employ an intra company transferee or a foreign national, who, within three years prior to the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm, corporation, or other legal entity or parent, branch affiliate, or subsidiary, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate or a subsidiary, in a capacity that is managerial (L-1A), executive (L-1A) or involves specialized knowledge (L-1B), and the spouse and minor children of the alien if accompanying him or her.

Because the L-1 visa requires this pre-existing relationship between the sponsoring employer and the L-1 visa holder (*i.e.*, employment at an appropriately related corporate entity abroad) the client-employer must act as the employee's L-1 petitioner, regardless of the other immigration-related responsibilities that may have been contractually conferred to the PEO.

Immigration Status and Employment: The E-1 Treaty Trader and E-2 Investor Visas

The E category was established to give effect to treaties between the United States and foreign countries that provide for reciprocal benefits to nationals of each country who invest in the other country, or who conduct trade between the two countries. The U.S. entity must be at least 50 percent owned and controlled by nationals of the treaty country. There is no limit to the duration of stay in E-1 or E-2 status. Individuals who are citizens of a treaty country who engage in substantial trade (or are an 'essential' employee of a qualifying trading company) between the United States and their country are classified as E-1 treaty traders and persons who are citizens of a treaty country who make a substantial investment (or are an 'essential' employee of a qualifying investor company) in the United States are classified as E-2 treaty investors.

Because the E-1 and E-2 visa requires shared nationality and specific requirements (investment or trade) the client-employer must act as the employee's L-1 petitioner, regardless of the other immigration-related responsibilities that may have been contractually conferred to the PEO.

Immigration Status and Employment: TN-NAFTA Professionals

The North American Free Trade Agreement (NAFTA) provides for the temporary entry of Mexican and Canadian business persons to "engage in activities at a professional level" under the TN category. "Activities at a professional level" is defined as requiring "at least a baccalaureate degree or appropriate credentials demonstrating status as a professional."[14] In order to qualify for TN status as designated by this category, the applicant must: 1) have a job/job offer in the United States, 2) work one of the occupations or professions listed, and 3) meet the listed educational, licensing or experience requirements as indicated in the regulations for the specific occupation or profession.

Similar to the analysis for the H-1B visa, the required job offer must be by "[a] United States employer," defined by INS/USCIS as a person or entity having an IRS identification number that has "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee…"[15] Therefore, in the typical arrangement between a client-employer and a PEO, the client-employer, rather than the PEO, must act as the employee's TN sponsor, regardless of the other immigration-related responsibilities that have been contractually conferred to the PEO.

Immigration Status and Employment: O-1 Extraordinary Ability Visas

O-1 visas are available to individuals of extraordinary ability in the science, art, education, business, or athletics areas, and to those with extraordinary achievement in the motion picture or television industry who are coming to the U.S. to work in an area of extraordinary ability/achievement, as demonstrated by sustained national or international acclaim.

The individual must meet a high standard and document that he or she is extraordinary in his or her field of endeavor (*i.e.*, superior to others in terms of knowledge, ability, expertise and accomplishments), have his or her ability corroborated by opinions from well-regarded sources in the field, and demonstrate that he or she is coming to the United States to continue to work in

his or her field of extraordinary ability (although the position itself need not require a person of extraordinary caliber).

Although self-employment is not permissible in the O-1 visa context, the O-1 visa does not always require an employer-employee relationship in the traditional sense. There must be, however, a U.S. 'sponsor' who takes on the responsibility to file the petition and provide USCIS with a contact needed to keep track of the individual while he or she is in the United States. If the employee will work only for one employer, that employer (the client-employer) must serve as the petitioner for the O-1 visa. Alternatively, established agents[16] may file petitions in lieu of employers for "an alien who is traditionally self-employed," or who plans to arrange short-term employment with numerous employers (such as in the case of a musician or artist). Where an agent serves as the petitioner for an O-1 visa, it must also include a detailed itinerary, as well as samples of contracts between the venue and the beneficiary and representation by the venues that they authorize the petitioner to act as the agent to obtain O-1 classification for the musician.[17]

Immigration Status and Employment: P Entertainers and Athletes

P visas are available to internationally recognized athletes and certain entertainers who have achieved national or international recognition as outstanding in the discipline who cannot meet the standards to qualify under the O-1 category. The P category is broken down into the following sub-categories: P-I visa for athletes who compete individually or as part of a team at an internationally recognized level, and entertainers who perform with, or are an integral and essential part of the performance of, an entertainment group that has received international recognition as outstanding for a sustained and substantial period of time. P-2 visas are for artists and entertainers, individuals or groups, who seek to be admitted through a reciprocal exchange program between a foreign-based and U.S.-based organization that are engaged in the temporary exchange of artists and entertainers, and are essential support persons based on their support to an entertainer or entertainment group. P-3 visas are for artists and entertainers, including groups, who will perform under a program that is culturally unique.

Similar to the analysis for the H-1B visa, the required petition for a P visa must be filed by a United States employer.[18] Therefore, in the typical arrangement between a client-employer and a PEO, the client-employer, rather than the PEO, must act as the employee's TN sponsor, regardless of the other immigration-related responsibilities that have been contractually conferred to the PEO.

Conclusion

Immigration law imposes considerable requirements on all employers. The existence of a PEO triggers additional considerations that may not be readily apparent. As discussed above, a PEO may successfully contract to assume certain responsibilities related to immigration compliance. These immigration-related functions are primarily limited to the employment eligibility verification (I-9) process, and do not embrace sponsorship of visa applications for the client-employer's foreign national employees. However, while the PEO itself may never have to navigate the complexities of visa sponsorship on behalf of its client-employers, by understanding the underlying immigration requirements for employment and sponsorship it can provide invaluable guidance to its client-employers with regard to identifying those employees who would not be eligible for employment with the client-employer without sponsorship. Only the PEO, as the entity responsible for the I-9 process, has access to information about the employee's employment authorization and possible need for sponsorship. Instead of losing potentially valuable employees, the PEO can direct the client-employer's attention to the employee's need for sponsorship and, with a basic understanding of certain visa types, will be able to limit its guidance to those foreign nationals who may actually qualify for an employment-based visa. ⚖

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ENDNOTES

1. against U.S. citizens, U.S. nationals, and authorized aliens.
2. status against U.S. citizens, U.S. nationals, and permanent residents, refugees, and ayslees who have work authorization.
3. Pre-Employment Inquiries and Citizenship, eeoc.gov/laws/practices/ inquirie _citizenship.cfm.
4. United States Citizenship and Immigration Services, on the professional employer organization (PEO) available at uscis.gov/e-verify/feder al-contractors/e-verify-federal-contractors-questions-and-answers/faq /what-professional-employer-organization-peo.
5. Agents may include attorneys, accountants, personnel officers, foremen, notaries public, etc.
6. 8 C.F.R. § 274a.1(l)(1)-(2).
7. 8 C.F.R. § 274a.2.
8. 8 C.F.R. § 274a.2.
9. INS Discusses H-1B Employment "Leasing" Scenario, 73 No. 11 Interpreter Releases 333 (March 18, 1996); Letter from H. Ronald Klasko to Yvonne M. LaFleur, Chief, Nonimmigrant Branch, INS (Jan. 5, 1996) (reproduced in Interpreter Release appendix) (describing the employee leasing scenario); (Letter from Yvonne M. LaFleur, Chief, Nonimmi-

grant Branch, to H. Ronald Klasko (Feb. 5, 1996) (reproduced in Interpreter Release appendix).

10. *See* Understanding H-1B Requirements, at uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements.
11. 8 C.F.R. § 214.2(h)(2)(i).
12. 8 C.F.R. § 214.2(h)(4)(ii), cited in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) (holding that nurses would not be working in a specialty occupation where their ultimate hospital jobs did not require the degree, as the petitioner, a medical-services contract agency, although paying the nurses, was only a token employer). The service, however, has not been wholly consistent in this position. For example, in a response to lawyer, Harry T. Joe, Efren Hernandez, INS Acting Branch Chief, Business and Trade Services, File No. HQ70/6.2.12 (Feb. 14, 2000), discussed and reproduced in 77 Interpreter Releases 272, 294 (March 6, 2000), the INS advised that an employee hired through a temporary employment agency that continued to pay his salary, did not qualify as being employed by an operating company abroad and therefore was ineligible for L-1 transfer to its affiliate in the United States, even though that company selected the employee and exclusively controlled his functions. Essentially begging the question, the letter argued that the company abroad "must employ individuals directly" and that the regulation "is derived directly from the Immigration and Nationality Act." INS Says Individual Working For Overseas Affiliate Remained an Employee of Temp Agency and, Hence, Is Ineligible for L-1 Status, 77 Interpreter Releases 272, 294 (March 6, 2000); Letter from Harry J. Joe to Michael Cronin, Associate Commissioner for Programs, INS (Dec. 15, 1999) (reproduced in Interpreter Release Appendix); Letter from Efren Hernandez, Acting Branch Chief, Business and Trade Services, INS (Feb. 14, 2000) (reproduced in Interpreter Release Appendix).
13. INS Clarifies Obligations of Employee Leasing Companies Versus Employers in H1-B Context, 78 No. 27 Interpreter Releases 1172 (July 16, 2001); Letter from Kari Ann Woodward, Esq. to Chief, Nonimmigrant Branch, INS (Nov. 29, 2000) (reproduced in Interpreter Release Appendix); Letter from Efren Hernandez III, Director, Business and Trade Services, INS to Kari Ann Woodward, Esq. (Dec. 20, 2000) (reproduced in Interpreter Release Appendix).
14. The regulations specify various categories of professions that are covered by Appendix 1603.D.1 to Annex 1603. 8 C.F.R. § 214.6(c). The list is quite extensive (containing 63 professions)1.
15. *See* 8 C.F.R. § 214.2(h)(4)(ii), *cited in Defensor v. Meissner, supra* note ix.
16. 8 C.F.R. § 214.2(o).
17. Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2.18 and .19, Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications (Nov. 20, 2005), *reprinted at* 14 *Bender's Immigr. Bull.* 1574, 1591 (App. D.) (Dec. 15, 2009) and AILA InfoNet at Doc. No. 09100861 (posted Nov. 30, 2009). To satisfy the requirement that the petitioner/employer prove it is authorized to act as an agent/petitioner for the other venues, include a letter from a sampling of the venues stating something along these lines: "We authorize the petitioner to act as our agent for the limited purpose of securing O or P visa status for the beneficiary."
18. *See* 8 C.F.R. § 214.2(h)(4)(ii), *cited in Defensor v. Meissner, supra* note ix.