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Immigration Newsflash

I-9 Compliance and Independent Contractors

Recent events have focused attention on the issue of I-9 compliance and independent contractors. Specifically, employers are evaluating options for ensuring that independent contractors comply with the employer sanction provisions of the Immigration and Nationality Act. These provisions require that employers hire only individuals who may legally work in the U.S., and that employers complete and retain Form I-9 to evidence their employment eligibility.

Questions often arise as to whether an employer is responsible for verifying the employment eligibility of independent contractors and their employees. While this is often a complex issue that requires careful consideration of the specific factual situation, there are a few general rules that employers may follow:

- Employers are not required to verify the employment eligibility of independent contractors and their employees. The independent contractor is responsible for completing the I-9 for each if its employees.

- The regulations specifically prohibit an employer from contracting for the labor of a foreign national if the employer knows that the foreign national is not authorized to work in the United States. Thus, employers may not circumvent the I-9 requirements by hiring illegal workers as independent contractors.

The immigration regulations define "independent contractor" to include "individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." The determination as to whether an individual or entity is an independent contractor is to be made on a case-by-case basis.

Employers are generally advised not to investigate the employment eligibility of their contractors' employees. Instead, employers should consider including a provision in the contract requiring that the contractor complete an I-9 for all of its employees and otherwise comply with the employer sanction provisions of Section 274A of the Immigration and Nationality Act. Indemnification and hold harmless agreements may also be considered.

U.S. VISIT – First Biometric Entry/Exit Systems to be Implemented on December 31, 2003

U.S. VISIT (United States Visitor and Immigrant Status Indicator Technology) is a new technology-based entry and exit system that is designed to use scanning equipment to collect biometric identifiers, such as fingerprints and digital photographs, to gather information from a foreign national upon entering the U.S. about his or her identity and travel activities. The Department of Homeland Security ("DHS") announced on October 28, 2003, that it is aggressively working to meet the Congressionally mandated year-end deadline to have U.S. VISIT in place at airports and seaports by December 31, 2003. In its statement, DHS officials stated that it will implement the U.S. VISIT entry procedures at 115 airports and 14 major seaports by early 2004. Exit procedures will be operational at approximately ten major airports and at one seaport. The DHS also stated that it expects to have the U.S. VISIT program implemented at 50 land ports of entry by December 31, 2004, and that the system will be

employed at all ports of entry by December 31, 2005.

Second J-1 Training Programs No Longer Permitted

Employers are advised that a foreign national who previously completed a J-1 exchange visitor training program is no longer eligible to participate in a "second" J-1 training program. On October 1, 2003, the Department of State's Bureau of Educational and Cultural Affairs issued a notice to all designated J-1 sponsors prohibiting the issuance of a Form DS-2019 to foreign nationals to participate in a "second" J-1 training program. This notice does not, however, prohibit the issuance of extensions for J-1 programs authorized by the sponsor if the initial training program was for a period of less than 18 months (or 24 months in the case of flight trainee programs).

Transit Visas Required to Fly through the U.K.

As of October 15, 2003, nationals of certain countries are required to obtain a Direct Airside Transit Visa ("DATV") to travel through the U.K., even when on route to a third country. Nationals from the following countries are affected: Afghanistan, Albania, Algeria, Angola, Bangladesh, Belarus, Burma, Burundi, Cameroon, Peoples Republic of China, Colombia, Ecuador, Eritrea, Ethiopia, Gambia, Ghana, India, Iran, Iraq, Ivory Coast, Lebanon, Liberia, Macedonia, Moldova, Nepal, Nigeria, Pakistan, Palestinian Authority, Rwanda, Senegal, Sierra Leone, Somalia, Sri Lanka, Sudan, Turkey, Trnc, Uganda, Vietnam, Yugoslavia, Zaire (formerly Republic of Congo), and Zimbabwe. (Note that a brief grace period may apply in certain circumstances to nationals of certain countries.)

Reminder: Diversity Lottery Deadline

Entries for the DV-2005 Diversity Visa Lottery must be submitted electronically between Saturday, November 1, 2003 and Tuesday, December 30, 2003. Applicants may access the Electronic Diversity Visa Entry Form at http://www.dvlottery.state.gov/. Paper entries will not be accepted.

Reminder: Annual Registration Deadline

Non-immigrants from designated countries who complied with the NSEERs reporting requirements for special registration between November 15, 2002 and April 25, 2003 may be subject to the annual re-registration requirements. If required to re-register, the individual must do so within 10 days of the registration anniversary.

The information in this Newsflash is not intended to be legal advice. However, if you require legal assistance or would like additional information about immigration matters, please contact your local Paul Hastings representative or **Daryl Buffenstein** *at 404-815-2232 or via email at darylbuffenstein@paulhastings.com.*