

I-9 Forms, Deferred Action for Childhood Arrivals, EB-5 Visas, and Reform Q&A

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I-9 Audits

A fine for a couple of I-9 violations pales in comparison to the \$34 million settlement paid by Infosys in 2012 for repeated I-9 violations and omissions discovered by Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security. The hidden costs of noncompliance are not just fines or settlement amounts, but also corporate governance repercussions. Publicly traded companies must answer to their shareholders and as a result, I-9 noncompliance has become the hot topic. Sometimes hard questions such as these must be asked if errors or omissions are discovered.

- What role did officers play in allowing non-compliance to occur?
- Is the HR manager doing his or her job?
- Is an employer compliant in its I-9 processes to not only avoid ICE or Labor investigations (resulting in fines or settlements), but also to avoid shareholder wrath, and, in the case of publicly traded companies, a devaluation in stock prices?

A more recent fine of over \$330,000 for paperwork violations was levied and reduced slightly against a Georgia construction company with over 250 employees. What prompted this ICE investigation? Apparently, ICE obtained a secretly taped conversation of a foreman discussing the company hiring illegal workers. ICE found that employees were improperly completing Section 1 of the I-9 and the employer was failing to properly complete Section 2 by using a rubber stamp instead of a signature, often “pre-signing” the I-9s before they were completed by the employee.

Large or small, public or private, a company must conduct internal I-9 audits annually to ensure forms are complete and documentation for employment authorization has not expired.

DACA Developments

The North Carolina Department of Transportation issues driver's licenses to young people who have received work permits under the federal Deferred Action for Childhood Arrivals (DACA), enacted June 15, 2012. A DACA beneficiary is eligible for a driver's license along with a social security number and employment authorization document (EAD), all of which can be used in completing an I-9 Form. Their driver's license contains the phrase "Legal Presence" and expires when the holder's deferred action status ends.

*Reminder, an employer may not ask about an employee's immigration status.

The employee gets to choose which document to present to the employer: the EAD is found on List A accompanying the I-9 and would be issued upon application to a DACA beneficiary. Since the EAD alone is sufficient to establish both identity and employment eligibility, most DACA beneficiaries would choose that document. (A driver's license can be chosen from List B and an unrestricted social security card from List C.)

EB-5 "Retrogression"

The EB-5 Immigrant Investor visa has been receiving a great deal of attention in the media as a fairly ready source of needed capital for large-scale projects supplied by foreigners seeking green cards. In fact, for the first time, the 10,000 visas allocated annually to EB-5 investors are predicted to be insufficient to meet the demand. There is a per-country annual limit of 7% - example: China has 700 visas allocated annually. These visas are allocated for each family member vs. one for the investor with dependent family members being included, exhausting the number of visas available much faster. Eligible accompanying family members are the spouse and children under 21. If other countries do not fully use their 7% quota, the unused visas can be moved to a country that is over-subscribed. Since China accounts for over 80% of all EB-5 investors, it is virtually certain that, due to the demand, there will not be enough visas available for Chinese investors and their eligible family members this coming year. This does not mean they will not be approved: the investor and his family will just have to wait for the next fiscal year for a new quota of visas to become available.

Questions & Answers on Immigration Reform

Q. President Obama has made it clear that he will act on immigration reform for the 11-plus million undocumented individuals living in the US ?But what does this mean?

A. These undocumented individuals include those who entered legally and over-stayed and those who entered illegally. Many have US born children who are US citizens. Those that brought children into the US now have some relief for their children under DACA, allowing these young people to live and work in the US in temporary legal status. The holdup on the President's reform promise has been attributed to the mid-term elections and pressure not to do anything until after the elections.

Q. How much reform can the President eventually enact through executive action while not exceeding the executive power vested in his office by the Constitution?

A. Lawyers from several agencies are currently researching what actions the President can constitutionally take. As he made clear in his June 20, 2014 speech addressing immigration reform, "...even with aggressive steps on my part, administrative action alone will not adequately address the problem.... Today, I'm beginning a new effort to fix as much of our immigration system as I can...on my own...without Congress." It seems that immigration reform will be, at best, minor without

Congressional action.

Q. What is the recent precedent for Presidential immigration reform?

A. In 1986, President Reagan passed the Immigration Reform and Control Act which granted amnesty and citizenship to the three million undocumented immigrants who entered the US prior to 1986. President Clinton signed the Operation Gatekeeper Bill in 1994 that focused on enhanced border security and doubled the length of the wall between the United States and Mexico. President George W. Bush ran his election campaign on the promise of passing immigration reform and was meeting with then President Fox of Mexico to collaborate on a bill with a goal to benefitting both countries. That effort was quickly sidelined after September 11, 2001 when national security took priority.

It seems clear that President Obama will not be able to offer amnesty, but compromise would most likely be an iteration of DACA for those that entered the US as adults or are otherwise ineligible for DACA relief: registration, payment of back taxes and a fine, followed by some sort of temporary, i.e., not permanent, immigration status allowing legal employment.

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