



William J. Kovatch, Jr.

Attorney at Law, PLLC

Immigration Law Newsletter

September 15, 2008

The Human Toll of ICE's Enforcement Mentality

In August of 2008, a 34 year old computer engineer and father of 2 U.S. citizen children died in ICE custody after allegedly being denied even rudimentary medical care, despite continued reports of severe pain in his lower back.

The New York Times reported that Hiu Lui Ng, a native of Hong Kong, was taken into custody a year ago, when he arrived to attend an interview for his application for permanent residency.

Mr. Ng entered the United States on a tourist visa at age 16, but requested asylum once his permission to stay ended. While his asylum petition was pending, he was granted permission to work. Although his petition was eventually denied, the U.S. Government did not immediately attempt to remove him. The Government waited until he applied for permanent residency years later. ICE detained him when he arrived for his interview, and placed him in removal proceedings.
(Cont'd on Page 3)

Some Efforts to Comply with Immigration Laws Can Open a Company to Liability for Employment Discrimination

The United States uses employers to help enforce certain immigration laws. Employers, for example, are responsible to verify the identity and employment authorization of all new hires. An employer who knowingly hires a person who is not authorized to work in the United States can face stiff penalties.

Sometimes, however, in their zeal to comply with U.S. immigration laws, employers adopt policies that could run afoul of antidiscrimination laws. For example, I recently attended a conference where the goal was to educate churches on compliance with tax and other federal laws. The presenter warned the attendees that the Department of Homeland Security was more aggressive than the IRS, and stated that at a minimum the church should have a copy of a person's driver's license, green card and visa. His theme was that all paperwork should be completed
(Cont'd on Page 4)

Employment Visa Labor Certification Applications Face High Chance of Audit

The U.S. Department of Labor reports that as of May of 2008, 44% of the total applications filed under the new permanent labor certification program (PERM) have been selected for audit.

In most instances, a certification from the Department of Labor that there are no able, willing, qualified and available workers to fill the job offered is the first step in applying for an employment-based visa. The PERM system came into force in 2005 and permitted employers to submit a single form while keeping the supporting documentation in its own records. The employer only presents the supporting documentation if its application is selected by the Department of Labor for an audit.

Audits, however, lengthen the time it takes to have the labor certification approved. Normally, the process is expected to take 2-4 months. With respect to cases selected for auditing, the Department of
(Cont'd on Page 2)

Litigation Update



Ninth Circuit Holds SSA No-Match Alone Not Sufficient Reason to Find Constructive Knowledge

In the case of ARAMARK Facility Services v. Service Employees International Union, Local 1877, Court No. 06-56662, the U.S. Court of Appeals for the Ninth Circuit held that an employer's receipt of a no-match letter from the Social Security Administration (SSA) alone is not a sufficient reason to find constructive knowledge that the employer hired an unauthorized worker.

ARAMark received letters from SSA stating that the Social Security numbers of 48 employees did not match the names in SSA's records. ARAMark gave each employee 3 days to begin correcting the problem with SSA. When 33 of the employees did not begin to do so, ARAMark terminated their employment. The Union filed a grievance on their behalf.

U.S. law provides that if an employer knowingly hires an unauthorized worker, the employer faces possible civil and criminal penalties. The term "knowingly" also includes constructive knowledge, which happens when the circumstances would have led a reasonable person to know that the worker was unauthorized.

ARAMark argued that the receipt of the no-match letters from SSA, along with the failure of the employees to address the problem in the given time, would amount to constructive knowledge and put ARAMark at risk for sanctions from the U.S. Government. Therefore, according to ARAMark, it was justified in terminating the employees.

The court rejected this argument, noting that SSA itself states that the letters are not meant to be "positive evidence" of an employee's immigration status. Moreover, there are numerous other reasons that an employer may receive a no-match letter, including errors in SSA's database. The court also found that ARAMark gave the employees too little time to address the problem with SSA. ■

Audits

(Continued from Page 1, Column 3)

Labor reports that as of July of 2008, it was just working on applications filed in March of 2007. Thus, an audit can delay the receipt of a labor certification for a year or more.

An audit can be triggered for a number of reasons. The employer, for example, could adopt requirements for the position that are greater than the requirements normally applicable to the job type. This could cause the Department of Labor to suspect that the employer is trying to disqualify a number of qualified U.S. workers in favor of the foreign worker. The Department of Labor could also be suspicious of experience gained by the foreign worker with the same employer. Other audit triggers could be the desire of the Department of Labor to take a closer look at the employer's recruitment efforts, or observed discrepancies between the job requirements in the PERM application, and the job requirements posted on an employer's website. Finally, the application could be selected for audit by random.

The Department of Labor reports that it is currently shifting more resources to investigating potential fraud. One way it is accomplishing this is by hiring computer experts to analyze electronic filings. Certain types of cases may be selected for audit to allow those computer experts to create a profile that will be used to identify potential fraud. In other cases, an application could be selected for audit because of discrepancies with an employer's earlier labor certification applications.

The Department of Labor's shift in focus should alert employers that delays in obtaining labor certifications will become more common. ■

ICE's Enforcement Mentality

(Continued from Page 1, Column 1)

After being taken into custody, Mr. Ng was shuffled through 3 different jails and detention facilities. In April of 2008, according to the New York Times, Mr. Ng began to complain of severe back pain. He was treated only with analgesics. When Mr. Ng reported that his pain was not responding, ICE detention officers allegedly assumed that he was faking it. Instead of providing medical treatment, according to affidavits filed in federal court, ICE officers allegedly pressured him to withdraw appeals filed in his immigration case and accept removal.

Concerned for his health, Mr. Ng's family filed a habeas corpus petition to have him released for medical treatment. A hearing on the petition was scheduled for July 31st. On July 30th, according to the New York Times, ICE officials dragged Mr. Ng in shackles from a detention facility in Rhode Island, causing bruises to his arms and legs in the process, and drove him to a detention facility in Hartford, Connecticut.

During the July 31st hearing, the judge insisted that Mr. Ng get the medical care he required. As a result, he was taken to a hospital on August 1st for an MRI. There, doctors determined that he had a fractured spine and terminal cancer. Mr. Ng died in ICE custody 5 days later.

Sadly, this is not an isolated incident. In May, the Washington Post ran a series of articles, in conjunction with a television report from 60 Minutes, detailing the appalling conditions that people in removal proceeding endure while in detention. According to these reports, the U.S. Government has failed to provide enough resources for even rudimentary medical care for detainees. As a result, people with pre-existing conditions are not provided the care they need. Moreover, dangerous medical conditions are going undiagnosed. When a detainee complains of pain, or even collapses in a detention cell, ICE officials have allegedly assumed that the detainee has been faking the condition, and ignored the problem for extended periods of time.

Several people, including detainees in their twenties and thirties, have died while in ICE custody due to a lack of medical attention. The Washington Post and 60 Minutes reports prompted Congress to investigate the situation. Mr. Ng's death occurred despite the attention Congress was giving the issue.

In an August 15, 2008 news release, the American Immigration Lawyers Association decried the reported circumstances surrounding Mr. Ng's death, blaming "policies and a culture that have led to the abandonment of responsible law enforcement in favor of a pretext of enforcement of a system that has completely broken down."

This sad case only highlights the serious human consequences resulting from the U.S. Government's enforcement-only attitude toward immigration issues. The U.S. Government has placed more and more people in removal proceedings without giving consideration to the resources needed to process the cases and treat those in detention in a humane manner. The result is that ICE attorneys are overworked, cases are being delayed, and the federal detention system is being overburdened. Due to the lack of space, people are shuffled between federal detention facilities and local jails where they are placed in the general population with real criminals. Medical personnel assigned to care for detainees are woefully understaffed, and burn-out far too quickly. ■

Employment Discrimination

(Continued from Page 1, Column 2)

before any work was done.

The problem with this approach is that it opens the employer to legal liability for employment discrimination. On page 1 of the I-9 form, in the very first text box, the Government warns:

It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee.

Page 4 of the I-9 lists the type of documents that are acceptable. Many of us are used to showing a driver's license and a Social Security card when we start a new job. The driver's license is a list B document that shows identity and a Social Security card is a list C document that shows authorization to work. But, those are not the only acceptable documents.

If a person shows a green card, for example (also known as the I-551), that person cannot be required to show any other form of documentation. A green card falls under list A, and demonstrates both identity and authorization to work. Similarly, if a U.S. citizen shows a U.S. passport, whether expired or unexpired, that is sufficient to show both identity and authorization to work. The employer cannot require further identification.

In adopting policies to ensure an employee's ability to work in the United States, the employer should be mindful of the potential employment discrimination liability. Reading Form I-9 thoroughly, and taking the time to understand it is a good first step in balancing the duty to comply with the duty to avoid discriminatory practices. ■



William J. Kovatch, Jr., Attorney at Law, PLLC, is located in Old Town Alexandria, on the north side of King Street between Washington and Columbus Streets.