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# Hospitality Immigration Compliance: Making Sure You Aren't Stuck Between a Rock and a Hard Place

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**Hospitality Immigration Compliance:**
**Making Sure You Aren't Stuck Between a Rock and a Hard Place**

~Neena Dutta ~

Every Director of Recruitment at a hotel, restaurant or other hospitality service, when seeking a new candidate for an open position has two challenges: How can I properly protect the company by asking appropriate, non-discriminatory questions to establish whether or not this individual is work authorized? And, how to I confirm that this individual is actually able to work legally? Some of these issues are raised at the interview stage, and some may not come to light until the person is actually completing the Form I-9. I-9s are not just for immigrant employees. An employer is required to keep excellent records of Form I-9s for every employee, regardless of their origin. As a result, it is imperative that employers ensure that they comply with I-9s, immigration policies, and they might just consider enrolling in E-Verify.

Before even interviewing a new candidate, it is important to identify some immigration terms. Firstly, the INS is no longer a term used but U.S.C.I.S. or United States Citizenship and Immigration Services, under the umbrella of the Department of Homeland Security. USCIS regulates all immigration within the U.S. A non-immigrant visa permits its holder to apply for entry to the U.S. for a temporary period of time and for a specific purpose. Appropriate purposes are so that an individual may be authorized to work, go to school, attend a conference or explore business opportunities, to visit the country as a tourist and to visit family and friends. What distinguishes a non-immigrant visa from an immigrant visa is that the non-immigrant visa only allows a person to enter temporarily, whereas an immigrant visa holder can enter and stay permanently for the duration of their immigrant visa, or until the individual is eligible to apply for naturalization. At the border, the non-immigrant visa holder can be admitted to the U.S. in the particular immigration status indicated on the visa. The duration of an individual's stay in the U.S. depends on which immigration status they are admitted. A person admitted in one status can sometimes change their status in order to stay for a different purpose.

There are a myriad of visas, but only a few that apply to the hospitality industry:

**H1-B Specialty Occupation**
The H-1B program allows an employer to temporarily employ a foreign worker in the U.S. on a nonimmigrant basis in a specialty occupation or as a fashion model of distinguished merit and ability. A specialty occupation requires the theoretical and practical application of a body of specialized knowledge and a bachelor's degree or the equivalent in the specific specialty (e.g., sciences, medicine and health care, education, biotechnology, and business specialties, etc…). Current laws limit the number of foreign workers who may be issued a visa or otherwise be provided H-1B status to 65,000, with up to 20,000 additional H-1B visas available to graduates of U.S. master's degree (or higher) programs. In hospitality, certain management positions qualify, such as Front

Office Managers or Executive Housekeepers. However, a concierge or desk agent would not qualify.

**L-1 Intra-company Transfers**
The L-1 visa allows multinational companies to transfer high-level and essential employees from oversees to the United States. In order to qualify, the non-immigrant must have worked at the affiliate or subsidiary of that same employer in the U.S. in a managerial, executive, or specialized knowledge capacity within the last three years for a minimum of one year. Spouses of L-1 visa holders are eligible for work authorization.

**E-1 Treaty Traders**
The E-1 visa allows a non-immigrant to enter the United States solely to carry on substantial trade between the country he or she is from and the United States. The home country of the non-immigrant must have a treaty with the United States.

**E-2 Treaty Investor**
The E-2 treaty investor visa allows a non-immigrant to come to the United States to develop and direct the operations of an enterprise in which he or she has invested. An employee of a treaty trader investor may also be qualified as an E visa holder if the nonimmigrant will be performing duties that require special qualifications essential to the business. In addition the nonimmigrant must have the same nationality as the alien employer and the home country of the non-immigrant must have a treaty with the United States.

**H-3 Management Trainee**
The H-3 is not a work visa, but a training visa. These visas are ideal for international companies which want to train potential executives or managers in the U.S. entity in preparation for working at the foreign hotel or entity. The trainee may still receive a stipend.

**J-1 Trainee**
The J-1 is similar to H-3 trainees, except it is not the employer who submits the application, but an umbrella J-1 agency. The J-1 is also restricted, as far as, they must be trained and should not do productive work.

**TN Professionals**
Under the NAFTA treaty, citizens of Mexico and Canada can apply for a TN visa. To qualify the applicant must be employed in one of the listed professions in NAFTA. The professions are very similar to that of the H-1B specialty occupations.

All new hires by an employer must under go I-9 verification. It is unlawful to hire, recruit, or refer for a fee a person who is not authorized to work in the U.S. I-9 documents show two things: the employee's identity (therefore there must be a document with the individual's picture) and eligibility for worth authorization. I-9 documents can range from driver's licenses, I-797 Approval Notices and passports to the Department of Corrections identification cards. Each piece of identification offered by the employee

must be reviewed in the original form, but it is optional for the employer to make copies and retain records of such items. It is highly recommended to keep copies. During an internal audit, an employer could find expired documents, documents which look suspicious or are incomplete. Although it is the duty of an employer to be thorough, re-verification (requesting an employee submit further documentation) is necessary in some circumstances, but actually prohibited in others. A legal permanent resident (commonly known as a green card holder) may have a permanent residency card which expires after ten years. However, the status of a legal permanent resident is a protected class and re-verification of such employees typically is unnecessary and could be considered harassment. Of course, a legal permanent resident who has a conditional green card may be re-verified. Therefore, supervised audits by an attorney are recommended.

I.C.E. raids and D.O.L. audits are similar to I.R.S. audits: there is no particular reason why they occur and they come when you least expect it. The best way for an employer to protect itself, is to keep excellent records and perform internal audits. A trend in raids and audits is if the industry as a whole seems to hire undocumented workers, raids and audits will randomly occur in the rest of the industry. For example, the meatpacking plants in the Midwest were found to have undocumented workers. In 2008, raids on such plants increased since other plants were found to have employed undocumented workers. Although there is no specific trigger, industry trends tend to be good indicators that an audit or raid may be expected.

Immigration and Customs Enforcement, or I.C.E. has historically targeted factories and plants. However, the hospitality industry is certainly not immune to I.C.E. raids or audits. Hotels and restaurants will have to be extra vigilant in record keeping and hiring practices as I.C.E. and the Department of Labor (DOL) increase their raids and audits. Thus, it is imperative that employers undertake investigations to ensure that proper documentation is kept for every employee, while at the same time remembering that employees must be given time to cure any defects in their I-9 documentation prior to termination of their employment. While it may seem like a precarious situation for employers, training and internal I-9 audits can help companies stay compliant with the law and fair to the employee, avoiding fines and litigation.

When conducting an internal policy audit, it is imperative that employers ensure three things: (1) that all existing policies are lawful; (2) that any additional necessary policies are implemented; and (3) that all policies are properly publicized, enforced, and monitored. Case law demonstrates that the mere existence of a policy that is not enforced is not a valid defense in litigation. In contrast, the courts encourage a proactive approach to minimizing litigation threats by recognizing the affirmative defense of adopting and enforcing effective policies, and legislative bodies across the country have likewise endorsed a proactive approach by supporting mandatory training legislation. In addition, during a mandatory audit, the Department of Labor also takes into account an employer's "Good Faith" and will make concessions to an employer who has made an effort to comply with the law and implement lawful policies. Employers should therefore work with their in-house counsel, human resources, and outside counsel when necessary to review policies, implement necessary changes, and consistently advise and train

employees. Investing in preventative measures such as auditing and training can avoid litigation and fines in the long run.

Another way for employers to demonstrate good faith and make an effort to comply is the E-Verify system. E-Verify is essentially an electronic Form I-9. In order to participate, an employer must sign a memorandum of understanding ("MOU") with DHS and SSA. Under this agreement, the employer attests that they will verify all new hires within the enrolled hiring site. However, E-Verify cannot be used to go back and verify employees hired and I-9's previously. As with I-9s, the employer must submit the employee's information into the system within three business days of the employee's hire date.

The biggest challenge with E-Verify is when there is a tentative nonconfirmation. During the nonconfirmation period, the employer may not terminate the unconfirmed employee simply based upon nonconfirmation. There are two choices in response to nonconfirmation: contest or abandon. If the employees suggests abandoning, the employment relationship is terminated since the employee is unable to show his or her work authorization and may not continue to work. Contesting ranges from checking the spelling, checking a double-barrel name, checking married or changed names with social security. Occasionally there can be issues with I-94 numbers depending on whether the person arrived in the U.S. via land or air. Some employees have names identical to other people in the U.S., and this can cause huge issues.

The employee should be given eight days to resolve the matter. This could be a matter of calling E-Verify directly to confirm biographical information. Or simply going to Social Security Administration in person to check any discrepancies with the spelling of the person's name. Most times, the employee can resolve this issue and the nonconfirmation appears to be the result of some kind of spelling error, name issue or duplicate name issue.

E-Verify will not help to avoid liability or problems if an employer has violated I-9 compliance regulations, or immigration laws, however, if the employer does participate in E-Verify, it will certainly mitigate damages by showing good faith and an active effort to comply as best the employer can. During an audit by ICE, DOL or USCIS, an employer's best defense is to show that they have made efforts to comply and to verify each and every employee as work authorized in a proper manner. A show of good faith will not help avoid liability, but it will certainly help.