Oden & Dillard, PLLC

1601 18th Street, NW • Suite One • Washington, DC 20009

TEL: 202-299-9500
FAX: 202-299-9696
WWW.ODENDILLARD.COM

Nicole C. Dillard, Partner

Oden & Dillard, PLLC, located in Washington, D.C., is a general practice law firm providing outstanding legal representation to individuals and businesses facing a wide range of legal challenges. With a focus on immigration law, business law, and sports and entertainment law, we help our clients address some of their most important legal matters.

Nicole C. Dillard focuses her practice primarily on business immigration and corporate visa matters related to businesses seeking to employ both skilled and unskilled workers who are either in the United States or are currently abroad. Specifically, she assists businesses and organizations seeking to sponsor employees for both non-immigrant and immigrant visa status and advise them of their responsibilities in the immigration process. She regularly advises human resources professionals in industries such as public, private and charter school systems, universities, the hospitality industry and the high-tech research organization through various stages of international recruitment while they navigate through the immigration process.

Ms. Dillard has an expertise in obtaining permanent resident status through National Interest Waivers, Outstanding Researcher and Extraordinary Ability based petitions for scientists, researchers and high-tech professionals. Ms. Dillard also has an expertise in obtaining Permanent Resident Status through filing Applications for Alien Labor Certification for employers on behalf of their employees (PERM). Ms. Dillard has represented clients in a variety of non-immigrant visa matters (e.g. E-3, L-1, H-1B, B-1/2, O, P, TN, J-1 and J-1 waivers, H-2B, and H-3), family based immigrant visa (family based petitions including Fiancée(e), spouse and children) matters and citizenship/naturalization applications. Ms. Dillard also assists Employers in ensuring that they are compliant with I-9 regulations as well as provides Employment law assistance to employers of foreign nationals to advise them with the Employment and Labor laws that govern foreign national employees.

Prior to becoming an attorney, Ms. Dillard was an English as a Second Language teacher for Fairfax County Public Schools in Northern Virginia. She has therefore segued her experience as an educator which assists her as she serves many school districts as they recruit foreign national educators and other professional employees to staff their schools. Consequently, Ms. Dillard has presented on important immigration topics before human resources professionals of various organizations such as the American Association for School Personnel Administrators, the Virginia Association for School Personnel Administrators and individual public, private and charter school districts. Additionally, she has presented before the American Payroll Association and served as in-house immigration counsel as employers recruited applicants during a minority job fair.

In addition to advising companies and organizations, Ms. Dillard regularly assists clients who are seeking to sponsor their family members. Specifically Ms. Dillard assists clients as they seek to obtain immigrant and nonimmigrant visas for their fiancées, spouses, parents and/or children. She prepares Applications to Adjust Status packages and Application for Naturalization documents and prepares clients for their interviews before the adjudication officers. She also assists those individuals who are preparing for interviews before the various U.S. Embassy's abroad. Each of Ms. Dillard's clients receive her personalized care and attention as they navigate through the complex maze of immigration law.

Ms. Dillard is a graduate of Catholic University, Columbus School of Law. She also earned her Masters of Education in Bilingual Education from Boston University and a Bachelor of Arts from the University of Virginia. For matters other than immigration, Ms. Dillard is licensed to practice law in the Commonwealth of Virginia and the District of Columbia. She is admitted to the Fourth Circuit Court of Appeals, Court of Appeals for the District of Columbia and the Supreme Court of the Commonwealth of Virginia.

By Kiyo Oden, Esq., Oden & Dillard, PLLC
1601 18th Street, NW, Suite One, Washington, DC 20009
(202) 299-9500 •www.odendillard.com

Immigration Issues Facing Hospitality Operators

Can We Still Hire Foreign Employees in a Pro Enforcement Environment?

The purpose of this client alert is to provide updates on current immigration issues facing the hospitality industry. Whether facing issues such as hiring foreign nationals, I-9 compliance or the threat of immigration raid, immigration issues are an integral part of the hospitality operator's management responsibilities. This newsletter will cover certain of the current immigration topics of significance in today's hospitality industry. These topics include:

- I-9 Compliance
- U.S. Immigration and Customs Enforcement (ICE) activities;
- Overview of Commonly Used Employment-Based Visas in the Hospitality Industry.

A. I-9 Compliance

Under the Immigration Reform and Control Act of 1986 ("IRCA"), U.S. employers have three basic requirements with respect to their personnel practices:

1. IRCA prohibits employers from knowingly hiring any alien who is not authorized to work in the United States.

2. The Act requires all employers to complete and retain a form, provided by the Immigration and Naturalization Service (INS), certifying that they have checked certain documents which verify.

3. IRCA prohibits discrimination on the basis of sex, race, religion and national origin. Every U.S. Employer must treat U.S. citizens, permanent residents, and all aliens similarly. The lack of authorization to work may not be inferred from an employee's appearance or accent.

In connection with IRCA, it is of paramount significance that employers ensure that they are using the recently updated I-9 Form dated February 2, 2009. Employers must also know that compliance with I-9 requirements applies to all employees, regardless of their citizenship and whether or not the employee is personally known to the employer. It is also critical for employers to know that the documentation provisions of IRCA apply to all employees hired after November 6, 1986, and who continue to be employed after

May 31, 1987. Therefore, employers need not only ensure that they comply with properly documenting all new hires, but also complete I-9 documentation for existing employees as well.

It is also important to note that employers have the responsibility of carefully examining the documentation provided by the employee and ensuring that it appear to relate to the individual who presents them. In addition, the employer should take the following actions in completing the I-9 review and verification process:

- Section 1 must be completed by the employee.
- Section 2 must be completed by the employer.
- Documents examined must be the original.
- The document identification number and expiration date (if any) must be noted in the appropriate space on Form I-9.
- Employer should maintain an internal tickler system which record the expiration dates of temporary employment authorization documents.
- Refer to list of documents which an employer may rely upon.
- Only certain documentation are recognized as establishing both identify and employment eligibility (List A) while others are recognized only for identity (List B) or work authorization (List C).
- The Employer should NOT request more than the minimum necessary documentation nor may the company specify which documents will be accepted.
- The Employer may retain photocopies of the documents presented by the individual with Form I-9.

IRCA also places certain requirements on employers to retain I-9 forms and have them available for inspection for a minimum of three (3) after the date of hire and one (1) year after the employment terminates, whichever is later.

IRCA provides an array of penalties for employment violations. An employer who has committed "paperwork violations" for mistakes in completing I-9 forms or failure to maintain I-9 records is subject to penalties of $110 to $1,100 for each violation. An employer who knowingly hires or continues to employ foreign nationals not authorized to work in the United States is subject to first offense civil fines of $250 to $2,200 for each unauthorized worker, and fines of up to $11,000 for subsequent offenses. In addition, if it is established that the employer had a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers, criminal penalties, including fines and prison terms, are possible. Employers who commit document fraud – e.g., fraudulently completing an I-9 form or knowingly accepting a forged or counterfeit document for verification purposes – are subject to first offense fines of up to $2,200 for each occurrence and up to $5,500 for subsequent offenses. In addition, employers who knowingly hire or continue to employ unauthorized workers may be barred from participating in contracting relationships with the federal government. Note that IRCA penalties may also be assessed against an employer who used unauthorized workers

through a relationship with an independent contractor and who knew or had reason to know that the workers were ineligible for employment in the United States.

B. Updates in Workplace Enforcement

Over the past several years, U.S. immigration workplace enforcement policy has been focused on workplace raids, detaining and deporting undocumented workers. More recently, however, immigration policy has shifted from a focus on the illegal workers to those who employ them. Now, the federal government is not only using the Immigration and Nationality Act to prosecute employers who hire undocumented workers, they are also looking to statutes like the Racketeer Influenced and Corrupt Organizations Act ("RICO") to charge employers with additional criminal and civil offenses and incur even greater penalties under such statute, including prison sentences under the federal sentencing guidelines. Given the current employer-focused climate, it is paramount that hospitality operators understand where their liability lies, what the penalties are when lapses occur, and how to mitigate such liability. ICE is now bringing criminal charges against employers and seizing "illegally derived assets" in addition to the traditional fines for I-9 violations. Under the aforementioned RICO statute which has historically been used to prosecute organized crime, employers are subject to charges that carry prison sentences of up to 20 years. As these sentences are subject to the mandatory sentencing guidelines of the U.S. Sentencing Commission, it is imperative that employers are cognizant as to what constitutes illegal conduct under the immigration laws and implement and execute compliance programs to prevent and mitigate the impact of any potential illegal acts.

Generally speaking, a corporation is criminally liable for the actions of employees, executives and officers who commit illegal acts within the scope of their duties which were intended to benefit the corporation. The Department of Justice uses the following factors in determining whether to indict a corporation:

1. How widespread the activity was

2. The complicity or condonation of the wrong-doing by corporate management;

3. How high up and extensive the complicity of management was;

4. Timely and voluntary disclosure of wrongdoing and cooperation in investigation;

5. The existence of a preexisting compliance program;

6. Remedial action – including an effective compliance program, replacing responsible management, and termination of wrongdoers.

One of the most serious criminal statutes being used to prosecute employers is for "harboring" persons unlawfully in the country. This statute makes it a crime for any person or corporation to a) Knowingly or in reckless disregard of the fact that the alien has come to or remains unlawfully in the U.S.; and b) Conceal, harbor, or shield that person from detection, or facilitate the alien remaining in the United States illegally or conspire to do so. In addition to the criminal penalties for these actions, civil actions are also being brought under the aforementioned statutes. In such cases, suit has been filed by a competitor or employee alleging that the violating company has engaged in a pattern of either harboring hiring or continuing the employment of illegal aliens which has resulted in either lost business in the case of competitors or depressing salaries.

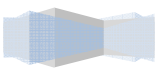
What triggers worksite enforcement actions?

Typically, it is a disgruntled former/current employee or a competitor who contacts ICE and relays information. Once an investigation is commenced by ICE, several methods are used to build a case against an employer, including: (i) Investigations by ICE; (ii) Confidential informants; (iii) Cooperating witnesses; (iv) Consensual electronic surveillance; (v) Data from governmental agencies (SSA, DOL wage and hour division); (vi) Visits to worksite or homes of company representatives; and (vii) An arrested employee who gives information regarding lax compliance policies or intentional conduct by employer.

C. Overview of Commonly Used Employment-Based Visas in the Hospitality Industry.

Notwithstanding some of the issues outlined above with respect to I-9 compliance and immigration enforcement, hiring foreign nationals has become essential to the personnel policy of many hospitality operators. Below is a discussion of some of the non-immigrant visas most commonly used in the hospitality industry:

1. **H-1B – Specialty Occupation Visa** – This visa is issued for a total of six years in three year increments. It requires that the beneficiary (employee) hold a bachelor's degree or higher in the field in which they are being hired to work or its equivalent if the degree was earned in a foreign country. Only 65,000 H-1B visas are issued per year, between October 1 and September 30, and employers must file for the next fiscal year beginning on April 1 of every year, six months prior to the start date for which a visa will be issued. This visa is typically used in the hospitality industry for management level foreign national workers.



2. **L-1 Visa – Intra-Company Transferees** – This visa is typically issued for a person who worked for a company abroad in an executive, managerial, or "specialized knowledge" (detailed understanding of the company's products/services and the international markets for those products/services, or, advanced knowledge of company processes and procedures that can be obtained only through experience with that employer). The transferee must have worked in such capacity for at least one (1) year within the past three (3) years and is coming to the U.S. to work for a related (parent, subsidiary, affiliate, or branch) company in one of those three types of positions. Large hospitality operators often apply for a "Blanket L-1", which gives them the flexibility to transfer employees from offices/sites abroad to the U.S. quickly and on short notice without having to file a petition with USCIS. In order to do so, companies must have a U.S. office for at least one year, have three or more branches, subsidiaries, or affiliates and either U.S. annual sales of $25 million, a U.S. workforce of 1,000 or at least 10 L-1 petition approvals in the past year.

3. **J-1 Visa – Exchange Visitor Visa** – This visa is issued to individuals who take part in a wide range of exchange visitor programs sponsored by schools, businesses, and a variety of organizations and institutions. Several exchange programs for young people including summer employment programs, internship programs for university students and au-pair programs. Individuals meet the criteria for a J-1 exchange visitor if they are coming to the US. as a au pair, camp counselor, student, college/university, student/secondary, government visitor, international visitor, alien physician, professor, research scholar, short-term scholar, specialist, summer work/travel, teacher, trainee or a cultural enrichment program that is specifically designed for such individuals by the U.S. Department of State.

Certain other visas and immigration status (e.g., greencard status) may be applicable based upon the beneficiary's qualifications, the type of employer and position as well as the employer's needs. Hospitality operators should contact experienced immigration attorneys to discuss the particular visa or immigration status appropriate for their situation.

Understanding some of the immigration issues set forth above will enable hospitality operators to carefully navigation the waters of employing foreign national workers and maximize their overall hiring and ability to service their customers.

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