

ICE Steps Up Its Aggressive Employer Audit Campaign: The Use of Forfeiture Laws to Seize the Assets of Businesses Employing Illegal Aliens

By James G. Aldrich

Background

In a departure from the Bush-administration emphasis on worksite raids, United States Immigration and Customs Enforcement (“ICE”) announced on July 1, 2009, that it had issued Notices of Inspection (“NOI’s”) to 652 businesses nationwide requesting their employment eligibility verification documentation.¹ The action stemmed from the directions issued by Secretary Janet Napolitano, of the United States Department of Homeland Security (“DHS”), to immigration enforcement authorities to “apply more scrutiny to the selection and investigation of targets as well as the timing of raids.”²

Under its new strategy, ICE stated it would focus its resources on the auditing and investigation of employers suspected of cultivating illegal workplaces by knowingly employing illegal workers instead of reliance on workplace raids.³ These notices are intended to alert business owners that ICE would be inspecting their hiring records to determine whether they are complying with employment eligibility verification laws and regulations. ICE stated it believes these inspections are one of the most powerful tools the federal government has to enforce employment and immigration laws, and it has indicated its increased focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce.⁴ Immigration officials stated the notices are the “first step in ICE’s long-term strategy to address and deter illegal employment.”⁵

ICE has confirmed the 652 businesses receiving NOI’s were *not* selected randomly, but rather as a result of leads and information obtained through other investigative means.⁶ The names of the companies were not released. In Fiscal Year 2008, ICE issued 503 similar notices throughout the year.⁷

On November 19, 2009, ICE announced the issuance of an additional 1,000 NOIs to employers across the United States “associated with critical infrastructure.” ICE stated that the 1,000 entities that received NOIs were selected based on “investigative leads and intelligence” and because of the business’ “connection to public safety and national security.”⁸ Although this might sound like an effort aimed at preventing terrorism, at least some of the notices were directed to agricultural and other companies employing low-skill labor.

Under federal law and regulations, employers are required to complete and retain a Form I-9 for each individual they hire for employment in the United States. Form I-9 requires employers to review and record the individual’s identity and employment eligibility document(s), and to determine whether the document(s) reasonably appear to be genuine as well as related to the individual.⁹

An additional method for employers to verify employment eligibility is through the use of the E-Verify program. This is an online system that accesses Homeland Security and Social Security databases and can provide almost instant confirmation of a worker’s ability to work in the United States. However, the USCIS has announced it intends to begin data-mining the information it obtains through E-Verify to identify patterns of misuse and fraudulent documentation.¹⁰

Forfeiture and Other Risks for Business Owners and Managers

Not only has the U.S. government changed its approach to investigating employment eligibility compliance by U.S. employers, it has stepped up the penalties it seeks when it finds violations. Federal authorities have begun taking the unusual step of seeking the

forfeiture of an actual business (and/or its assets) that is suspected of employing illegal aliens.¹¹ The French Gourmet, a San Diego-area bakery, its president, and a manager were charged in April 15, 2010, with conspiring to engage in a pattern or practice of hiring and continuing to employ unauthorized workers (a misdemeanor) and 14 felony counts, including making false statements and shielding undocumented alien employees from detection. In addition to imprisonment and fines, the government is also seeking forfeiture to the United States assets used in or derived from the alleged illegal activities including the restaurant itself and the property on which it sits.¹²

According to the indictment, the owner and managers certified on the firm's Employment Verification Forms (I-9) that the documents they examined appeared to be genuine, and to the best of their knowledge, the employees listed on the I-9 were eligible to work in the United States. They then placed the workers on the company's payroll and paid them by check until they received "No Match" letters from the Social Security Administration (SSA) advising that the Social Security numbers being used by the employees did not match the names of the rightful owners of those numbers. The indictment also alleges that after receiving the "No Match" letters, the company conspired to pay the undocumented employees in cash until the workers produced a new set of employment documents with different Social Security numbers.¹³

In May 2008, ICE agents executed a search warrant at The French Gourmet and arrested 18 undocumented workers. The men face up to five years in prison and a fine of \$250,000 on each count.¹⁴

Other Recent Enforcement Actions

ICE has reported that in Fiscal Year 2009, worksite investigations resulted in a total of 410 criminal arrests, including 114 management personnel.¹⁵ In addition, it has announced these recent enforcement actions:

Missouri Roofing Company

On February 3, 2010, the owner of a Bolivar, Missouri, roofing company was sentenced in federal court to forfeit more than \$180,000 and pay a \$36,000 fine for knowingly hiring illegal aliens following a worksite enforcement investigation conducted by ICE. Russell D. Taylor pleaded guilty September 14, 2009, to knowingly hiring, contracting, and

sub-contracting to hire illegal aliens from August 2006 through April 2008.

The court ordered Taylor to forfeit to the government \$185,363, which represented the amount of proceeds obtained as a result of the offense and to pay a fine of \$36,000, representing a \$3,000 fine for each of the 12 illegal aliens who worked under company supervision. A company supervisor also pleaded guilty in a separate but related case to harboring illegal aliens. Taylor was also sentenced to serve five years of probation, to implement an employment-compliance plan, and to pay the \$185,363 forfeiture amount in monthly installments during the first 30 months of probation.¹⁶

Hanover, Maryland Restaurant

On February 16, 2010, the owner of a Hanover, Maryland Chinese restaurant was arrested and charged with transporting, employing, and harboring illegal aliens. The criminal complaint alleges that, between January 2009 and February 4, 2010, Yen Wan Cheng knowingly hired aliens who were not authorized to work in the United States, transported the aliens to their jobs, and harbored them in residences she provided. According to the criminal complaint, five aliens were specifically identified during the investigation as working at the restaurant and residing in a home Cheng owns in Columbia, Maryland. She faces a maximum sentence of three years in prison for employing illegal aliens and five years in prison each for transporting illegal aliens, harboring aliens, and harboring aliens for financial gain.¹⁷

Reno, Nevada Electronics Firm

On March 4, 2010, the owner of a Reno electronics manufacturing company was indicted by a federal grand jury on six counts of encouraging illegal aliens to reside in the United States and aiding and abetting them. According to the indictment, between March 2005 and May 2009, Hamid Ali Zaidi, owner of Vital Systems Corporation, allegedly encouraged six illegal aliens to work at his company and therefore to reside in the United States, knowing that such residence was in violation of federal law. If convicted, Zaidi faces up to five years in prison and a \$250,000 fine on each count.¹⁸

Illinois Staffing Companies

On April 26, 2010, in federal court in the Northern District of Illinois, the president and office manager of two Bensenville, Illi-

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nois staffing companies were charged with illegally employing illegal aliens to staff their customers' needs. Clinton Roy Perkins, and Christopher J. Reindl, president and office manager, respectively, of Anna II Inc., and Can Do It Inc., were charged with one count of unlawfully hiring illegal aliens between October 2006 and October 2007. In addition to employing illegal workers, the defendants are alleged to have paid wages in cash and failed to deduct payroll taxes or other withholdings. Federal authorities also seek forfeiture from Perkins of \$488,095, seized from various company bank accounts, as well as the Bensenville office.

Both defendants allegedly failed to require the aliens that Perkins hired to provide documents establishing their immigration status or lawful right to work in the United States. In addition, they are alleged to have directed low-level supervisory employees to transport illegal workers back and forth between locations. Both also allegedly provided fake six-digit numbers to a client, claiming they were the last six digits of the aliens' Social Security numbers, knowing the workers were present in the United States illegally and lacked valid Social Security numbers.

They also, allegedly, repeatedly withdrew funds in the amount of \$9,800 from bank accounts to pay their employees' wages in cash, believing that withdrawing amounts less than \$10,000 would avoid triggering the banks' currency transaction reporting requirements. If convicted, they each face a maximum penalty of five years in prison and a \$250,000 fine.¹⁹

Illinois Construction Companies

Wedekemper's Inc. and Wedekemper's Construction Inc., two Illinois construction companies, pleaded guilty to charges related to employing illegal aliens on April 23, 2010. Wedekemper's Inc. was fined \$500 and forfeited \$5,500, while Wedekemper's Construction Inc. was fined \$2,500 and forfeited \$12,500. The companies were also ordered to pay a \$50 special assessment fee for every count charged against them and participate in the E-Verify employment eligibility verification system for five years. The investigation began in June 2009, through a tip to ICE that a previously deported alien was employed by Wedekemper's Constructions Inc. The investigation found that several other illegal aliens were also employed by the company. Seven employees of Wedekemper's Construction,

Inc. were arrested during the investigation, and six were later charged with various criminal offenses related to document fraud and re-entry after deportation.²⁰

Maryland Painting Company

Robert T. Bontempo, owner of Annapolis Painting Services (APS) pleaded guilty on April 23, 2009, to employing illegal aliens and money laundering. He admitted to knowingly hiring and employing these people, failing to properly document them, and paying them with cash.²¹ He was sentenced to six months confinement in a halfway house as part of three years probation. As part of his plea agreement, he forfeited five bank accounts, ten vehicles, and seven properties purchased with the profits from his painting business. These assets were estimated to be worth over \$1,000,000.²²

Other Penalties

Employers who fail to document the employment eligibility of their employees (or who do it improperly) can also be liable for civil charges and penalties.

Hiring or Continuing to Employ

Unauthorized Aliens

If DHS determines that the employer has knowingly hired unauthorized aliens (or continued to employ aliens knowing that they are or have become unauthorized to work in the United States), it can issue a cease and desist order prohibiting such activity and requiring payment of the following civil fines:

1. First Offense: Not less than \$375 and not more than \$3,200 for each unauthorized alien for offenses after March 27, 2008 (\$275.00/\$2,200.00 before that date);
2. Second offense: Not less than \$3,200 and not more than \$6,500 for each unauthorized alien for offenses after March 27, 2008 (\$2,200.00/\$5,500.00 before that date); or
3. Subsequent Offenses: Not less than \$4,300 and not more than \$16,000 for each unauthorized alien for offenses after March 27, 2008 (\$3,300.00/\$11,000.00 before that date).²³

Failing to Comply with Form I-9

Requirements

An employer that fails to properly complete, retain, and/or make available for inspection Forms I-9 as required by law, can face civil money penalties of not less than \$110 and

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not more than \$1,100 for each violation.²⁴ In determining the amount of the penalty, DHS will consider:

1. The size of the business of the employer being charged;
2. The good faith of the employer;
3. The seriousness of the violation;
4. The history of previous violations of the employer; and
5. Whether or not the individual was an unauthorized alien.²⁵

Civil Document Fraud

Employers found by DHS or an administrative law judge to have knowingly accepted a fraudulent document to verify a worker's employment eligibility may be ordered to cease and desist from such behavior and to pay a civil money penalty as follows:

1. First offense: Not less than \$375 and not more than \$3,200 for each fraudulent document that is the subject of the violation.
2. Subsequent offenses: Not less than \$3,200 and not more than \$6,500 for each fraudulent document that is the subject of the violation.²⁶

Criminal Penalties

Persons or entities convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens (or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) after November 6, 1986, may face fines of up to \$3,000 per employee and/or six months imprisonment.²⁷

Harboring

In addition to using forfeiture statutes, Federal authorities have also begun bringing charges of harboring against U.S. employers. INA 274(a)(1)(A)(i)-(v); 8 USC 1324(a)(1)(A)(i)-(v) defines the offense:

- 1) (A) Any person who-
 - (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future

official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law, shall be punished as provided in subparagraph (B); or

(v) (I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts.

Harboring can bring a maximum of five years in prison for each alien harbored.²⁸ If the employer harbors the alien for financial gain, the maximum penalty increases to ten years.²⁹ The maximum fine for harboring is \$250,000 or double the gain to the employer, whichever is greater.³⁰

Money Laundering

Although commonly associated with drug dealing, employers of illegal aliens can also be criminally charged with money laundering. 8 USC 1961(1)(F) includes "any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens" under its definition of racketeering. 8 USC 1956(c)(7)(A) includes, by reference to 8 USC 1961(1)(F), harboring illegal aliens as an offense for which an employer can be charged with money laundering.

The penalties for money laundering are up to ten years in prison and fines of up to \$500,000 or twice the amount laundered, whichever is greater.³¹

Conclusion

Now more than ever, it is critical that employers audit their own Form I-9s in advance of receiving an NOI. When assessing charges and penalties, federal authorities will look at the employer's good-faith compliance with Form I-9 regulations that impose on employers an on-going duty to determine compliance with U.S. law. Given that enforcement efforts now include targeting business owners and managers and the threat of prison and significant financial sanctions, many employers have begun taking steps to determine whether their employment eligibility documentation complies with federal requirements. While this includes reviewing and correcting existing I-9s and establishing a sound compliance policy, it is absolutely essential that each employer understands its responsibilities and how to fulfill them.

NOTES

1. U.S. Immigration and Customs Enforcement (July 1, 2009), "652 Businesses Nationwide Being Served with Audit Notices Today" (<http://www.ice.gov/pr/nr/0907/090701washington.htm>).
2. Hsu, Spencer S. (March 29, 2009) "DHS Signals Policy Changes Ahead for Immigration Raids" Washington Post (<http://www.washingtonpost.com/wpdyn/content/article/2009/03/29/AR2009032901109.htm>).
3. U.S. Immigration and Customs Enforcement (July 1, 2009), "652 Businesses Nationwide Being Served with Audit Notices Today" (<http://www.ice.gov/pr/nr/0907/090701washington.htm>).
4. Id.
5. Id.
6. Id.
7. Id.
8. U.S. Immigration and Customs Enforcement (November 19, 2009), "ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for Their Hiring Practices" (<http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>).
9. USCIS, M-274, Handbook for Employers (Rev. 04/03/09)N, p.6.
10. 74 Fed. Reg., No. 98, pp 23957-23958 and 24022-24027 (May 22, 2009).
11. Indictment, *United States v The French Gourmet, Inc.* (1), Michael Malecot (2), and Richard Kauffmann (3), United States District Court, Southern District of California, Case No. 10-CR-1417 (April 15, 2010).
12. Id.
13. Id.
14. U.S. Immigration and Customs Enforcement (April 21, 2010), "San Diego Area Bakery, Its Owner and Manager, Indicated on Federal Charges for Hiring Undocumented Workers" (<http://www.ice.gov/pi/nr/1004/100421sandeigo.htm>).
15. Id.
16. U.S. Immigration and Customs Enforcement (February 3, 2010), "Missouri Roofing Company Owner Sentenced for Hiring Illegal Aliens" (<http://www.ice.gov/pi/nr/1002/100203springfield.htm>).

17. U.S. Immigration and Customs Enforcement (February 17, 2010), "Howard County Restaurant Owner Arrested Following Worksite Investigation" (<http://www.ice.gov/pi/nr/1002/100217baltimore.htm>).

18. U.S. Immigration and Customs Enforcement (March 4, 2010) "Owner of Reno Electronics Firm Faces Federal Charges for Employing Illegal Aliens" (<http://www.ice.gov/pi/nr/1003/100304reno.htm>).

19. U.S. Immigration and Customs Enforcement (April 24, 2010), "Managers of 2 Suburban Staffing Companies Charged with Hiring Illegal Aliens" (<http://www.ice.gov/pi/nr/1004/100426chicago.htm>).

20. U.S. Immigration and Customs Enforcement (April 23, 2010), "2 Illinois Companies Plead Guilty, Sentenced for Employing Illegal Aliens" (<http://www.ice.gov/pr/nr/1004/100423stlouis.htm>).

21. U.S. Immigration and Customs Enforcement (April 23, 2009), "Maryland Employer Pleads Guilty to Hiring Illegal Aliens, Money Laundering" (<http://www.ice.gov/pr/nr/0904/090423baltimore.htm>).

22. U.S. Immigration and Customs Enforcement (September 4, 2009), "Owner of Annapolis Painting Services Sentenced for Money Laundering and Hiring Illegal Aliens" (<http://www.ice.gov/nr/pr/0909/090904baltimore.htm>).

23. 8 CFR 272a.10(b)(1)(ii)(A)-(C).

24. 8 CFR 274a.10(b)(2).

25. 8 CFR 274a.10(b)(2)(i)-(v).

26. 8 CFR 270.3(b)(1)(A) and (C).

27. INA 274A(f)(1), 8 USC 1324(f)(1), 8 CFR 274a.10(a).

28. INA 274(a)(1)(3)(ii), 8 USC 1324(5)(1)(B)(ii).

29. INA 274(a)(1)(B)(i), 8 USC 1324(a)(1)(B)(i).

30. 18 USC 3571(b)(3).

31. 18 USC 1756(a)(1)(B).



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