

Bond Manufacturing Week
Webinar Series
October 2-6, 2017

Navigating Immigration Issues Within
the Manufacturing Industry
Presented by Caroline M. Westover

 **BOND SCHOENECK & KING** ATTORNEYS
Commitment · Service · Value · Cost Effect

Bond Manufacturing Week
Webinar Series
October 2-6, 2017

October 2: Cybersecurity: What We Should Be Doing
October 3: Protecting Your Manufacturing Business from IP Theft
October 4: Wage and Hour Traps for the Manufacturing Industry
October 5: Avoiding OSHA Liabilities
October 6: Navigating Immigration Issues Within the
Manufacturing Industry

 **BOND SCHOENECK & KING** ATTORNEYS
Commitment · Service · Value · Cost Effect

Session Agenda

- Employment Verification Issues
- Commonly Used Work Visas in Manufacturing
- Immigration Updates from the Trump Administration



 **BOND SCHOENECK & KING** ATTORNEYS

Employment Verification Issues



4



The Immigration Reform and Control Act of 1986 ("IRCA")

IRCA Requirements

- Requires employers to verify the identity and employment eligibility of all employees hired after November 6, 1986 (I-9 verification process)
- Prohibits against "knowingly" hiring or employing workers who are not authorized to work in the U.S.
- Prohibits against continuing to employ workers not authorized to work in the U.S.
- Anti-Discrimination Provisions

5



Who Is (and Is Not) Subject to I-9 Employment Verification?



Current Employees

- Current employees should not be subject to I-9 verification procedures, except in four instances:
 - (1) there is no I-9 Form for a current employee on file;
 - (2) an audit of the employer's I-9 records reveal deficiencies in those records, requiring the verification procedures;
 - (3) the employer has been involved in merger/ acquisition and it wants to assure that the merged/acquired entity has adequate I-9 records; or
 - (4) some current employees indicated on their I-9 Forms that they have time-limited employment authorization, so re-verification is required

7



New Hires

- All persons newly-hired by the employer, even for one day, must undergo I-9 verification
- Persons who are included in this group include any person put on the employer's payroll to whom a W-2 statement is issued

8



Independent Contractors

- Independent contractors are **NOT** subject to I-9 verification
 - An employer, however, may not make use of an "independent contractor" knowingly to obtain the services of unauthorized alien workers. If the employer has knowledge that the contractor uses such workers, the employer will also be liable for an IRCA violation

9



Internal Transfers

- Employees transferred within the same company (e.g., to a different subsidiary, affiliate, or division) need not undergo the I-9 verification procedure
- It is a good practice to have the I-9 record for that employee “follow” the employee to the new division, in case of a government audit



Rehires

- If an employer rehires an employee within three years of the date that a previous I-9 Form was completed, the employer may complete a new I-9 Form for the employee or complete Section 3 of the previously completed I-9 Form
 - If an employee has worked for the company for five years and then leaves the company, only to seek reemployment six months later, the special rule regarding rehires does not apply



Rehires

- If the employee is still authorized to work, enter the date of the rehire in the space provided in Section 3 and sign and date the employer attestation
- If the employee is no longer authorized to work, the employee must be re-verified
- If the current version of the I-9 Form is different from the previously completed I-9 Form, the employer must complete Section 3 on the current version



Form I-9 Updates



13 

The New Form I-9 (rev. 11/14/2016)

- **11/14/2016:** Updated Form I-9 was published
- **01/22/2017:** Mandatory effective date for use of the updated Form I-9
 - Prior versions no longer valid as of 1/22/2017
- **07/17/2017:** Updated Form I-9 was published – again!
- **09/18/2017:** Mandatory effective date for use of the updated Form I-9
 - Prior versions no longer valid as of 9/18/2017

14 

A Summary of the “Round #1” Changes to the Form I-9 (v. 11/14/2016 N)

- It’s a “smart form” designed to reduce errors & enhance accuracy of completion.
 - Embedded prompts in the online version w/ instructions on how to complete subsections
 - Drop-down lists for some questions
 - Auto-population of “N/A” for certain blank fields
 - Auto-population of employee’s name / citizenship status into Section 2
 - Prompts for missing and/or incomplete information
 - A “start over” option to clear the Form I-9 and start over
 - A “print” option to print the Form I-9 once data has been entered
 - Generation of a “QR” (quick response) code

15 

A Summary of the "Round #1" Changes to the Form I-9 (v. 11/14/2016 N)

- Section 1
 - "Other LAST Names Used" Field
 - Foreign national workers need only to supply one response from three possible options:
 - Alien Registration Number; or
 - I-94 Admission Number; or
 - Foreign Passport Number.
 - Employees must affirmatively answer whether he/she has used a preparer / translator for completion of Section 1 of the Form I-9
- Section 2
 - Addition of employee's "citizenship/immigration status" at the beginning of Section 2
 - A dedicated box for comments / additional information for use by the employer representative

16



A Summary of the "Round #2" Changes to the Form I-9 (v. 07/17/2017 N)

Revisions to the Form I-9 instructions:

- The anti-discrimination and privacy act notices on the instructions are revised to change the name of the Office of Special Counsel for Immigration-related Unfair Employment Practices to its new name, "Immigrant and Employee Rights Section"
- The phrase "the end of" is removed from the phrase "the first day of employment"

17



A Summary of the "Round #2" Changes to the Form I-9 (v. 07/17/2017 N)

Revisions to "List of Acceptable Documents":

- *New Addition!* Form FS-240, Consular Report of Birth Abroad, has been added as a new "List C" document
- All certifications for reports of birth issued by the Department of State (Form FS-545, Form DS-1350 and Form FS-240) are now combined into one selection within List C
- The Addition of FS-240 to List C has resulted in the "renumbering" of all List C documents (with the exception of the Social Security card)

18



I-9 Compliance Reminders



22



I-9 Compliance Issues

Timely Completion of I-9 Forms

- The employee must complete Section 1 of Form I-9 no later than the 1st day that the employee begins work
- The I-9 verification procedure must be completed within 3 business days of when the employee starts work; If the employee cannot present acceptable documents by the 3rd business day, the employee generally should not be allowed to work
- An employer may require that employees complete their I-9 forms after accepting offers of employment, but before the 1st day of scheduled work
- For short term employees, who the employer expects to work less than 3 days, the entire I-9 must be completed at the time employment begins

23



I-9 Compliance Issues

Timely Completion of I-9 Forms

- The employee must be allowed to choose which document(s) he/she wants to present from the List of Acceptable Documents
- Employer representative must physically examine each original document to determine if it reasonably appears to be genuine and relates to the person presenting it
 - The person who examines the documents must be the same person who signs Section 2
- The employer must conclude that the documents reasonably appear genuine and establish the employee's identity and work authorization

24



Accepting Receipts for Verification

- There are three instances in which receipts are acceptable for I-9 verification purposes:

- (1) The receipt indicates that an application for a replacement of a List A, B, or C document has been submitted because the document was lost, stolen, or damaged. The actual document must be presented within 90 days following the date of hire;
- (2) The receipt is a Form I-94 containing a temporary I-551 stamp and photograph. The stamp serves as a receipt for Form I-551 which must be submitted before the expiration date listed on the temporary I-551 stamp or within one year from the date of issuance of the Form I-94 when the I-551 stamp does not list an expiration date; or
- (3) The receipt is a refugee admission stamp on a Form I-94. Form I-94 serves as a receipt for either an Employment Authorization Document (EAD) or a Social Security Card (SSC) one of which must be submitted within 90 days from the date of hire or, if presented for re-verification, within 90 days of expiration of prior work authorization

25



Copying Documents Presented for I-9 Form Completion

- The law permits the employer to make copies of the documents presented by the employee. The employer, however, is not required to make copies of the documents
- With copies of the documents attached to the I-9 Form, the employer has a chance to demonstrate that even if it made mistakes in completion of the I-9 Form, it had a reasonable basis for concluding that the employee was eligible for employment
- Maintaining copies of the documents may also help the employer avoid fines for paperwork violations. For example, failure to provide document title, ID number, or expiration date of a document is considered a technical mistake if a copy of the document is retained with I-9. An employer cannot be fined for this mistake unless it is given an opportunity to cure the violation

26



Reverification

- US Citizens
 - U.S. citizens never need re-verification
 - Never re-verify an expired U.S. passport or passport card
- Permanent Residents
 - Permanent residents who have presented Permanent Resident Cards (Form I-551) do not need to be re-verified because permanent residents remain employment authorized even if their permanent resident cards expire
 - Form I-551 may contain no expiration date, a 10-year expiration date, or a 2-year expiration date. Permanent Resident Cards with either an expiration date or no expiration date are List A documents that **should not** be re-verified

27



Penalty Changes for I-9 Violations



28



Penalties for IRCA / I-9 Violations

- In 2015, Congress passed the Bipartisan Budget Act of 2015 which mandated federal agencies to “**adjust**” civil penalty amounts for inflation.
- “**Adjustments**” were significant.
 - For example: Penalties for paperwork violations increased by 96%.
- The new penalty schedule took effect on August 1, 2016 and applies to violations occurring after November 2, 2015.



29



Penalties for IRCA / I-9 Violations

- Penalties for Knowingly Hiring Individual Not Authorized To Work in the United States
 - First Offense: **\$539 to \$4,313 per unauthorized worker**
 - Previously: \$375 to \$3200 per unauthorized worker
 - Second Offense: **\$4,313 to \$10,781 per unauthorized worker**
 - Previously: \$3,200 to \$6,500 per unauthorized worker
 - Subsequent Offense: **\$6,469 to \$21,563 per unauthorized worker**
 - Previously: \$4,300 to \$16,000 per unauthorized worker
- Recordkeeping Violations: **\$216 to \$2,156 per record**
 - Previously: \$110 to \$1,100 per record
- Document Abuse: **\$178 to \$1,782 per individual**
- Good Faith Defense

30



Penalties for IRCA / I-9 Violations

- Criminal Penalties
 - 10 years and/or \$250,000 fine for harboring, smuggling, concealing or transporting illegal aliens “for financial gain”



31



Commonly Used Work Visas in the Manufacturing Sector



32



The Immigration Alphabet for Work Visas...

- E-1 – Treaty Traders
- E-2 -- Treaty Investors
- E-3 – Australian specialty occupation workers
- H-1B – Specialty Occupation
- H-2 – Temporary skilled and unskilled workers
- H-3 – Alien trainees
- J-1 – Exchange visitors
- L-1 – Intra-Company Transfers
- M-1 – Vocational students
- O-1 – Aliens with extraordinary ability in the sciences, education, business, athletics, their support staff and family
- P-1 – Athletes, entertainment groups, artistic exchange, culturally unique artists and their support personnel
- Q-1 – International cultural exchange program participants
- R-1 – Religious workers
- TN – Canadian and Mexican Professionals

33



The H-1B Visa: A Frequently Used Non-Immigrant Visa Option



34



H-1B: Professional & Specialty Occupations

- Applies to professional and other "specialty occupation" workers
- Duration of stay: Total of six years (granted in 3 year increments)
- Additional extensions available when processing for permanent residency
- Requirements
 - Position requiring theoretical and practical application of a body of highly specialized knowledge
 - Attainment of a Bachelor's degree for entry into the occupation
 - Alien must have the minimum qualifications for the job (education or experience)
 - Alien must intend to depart the U.S., but application for permanent residency is allowed (*i.e.*, dual intent)
 - Payment of the prevailing wage

35



H-1B: Professional & Specialty Occupations

- Requirements (con't)
 - Provide benefits and other terms of employment consistent with those provided to similarly-situated employees.
- Notice to workforce or any union representative of the H-1B employment.
- Public access to records relating to the H-1B employment.
- No employer initiated lay-off or unpaid leave of absence for the H-1B worker.
- Employer must pay for return trip to worker's home country if the visa holder's employment is terminated prior to the expiration of the approved duration of stay.
- H-1B Portability
 - Employee who is already in the U.S. on an H-1B visa is authorized to work for the employer upon filing of a new H-1B Petition with the Immigration Service

36



H-1B: Professional & Specialty Occupations

- The H-1B Cap
 - Congress has established an annual maximum of 65,000 H-1B visas at the Bachelor's degree level and an additional 20,000 H-1B visas for the Master's degree level (and higher)
 - Years ago, H-1B visas exhausted quickly. During more recent years, the H-1B cap has been exhausted *within several days*
 - **APRIL 1, 2018** will be the initial (opening) filing date for the next fiscal year (employment beginning October 1, 2018)

37



Other Work Visas

- Principal Non-Immigrant Work Visas
 - B-1 Business (Visitor) Visa
 - F-1 (Student) Training & Employment
 - TN – Canadian / Mexican professionals
 - L-1 – Intra-company transfers



38



B Visitor Visa

- B-1 Business Visitor
 - Purpose: For temporary business visitors who are conducting business in the United States
 - Duration: Up to one year with extensions of stay in six month increments
 - Basic requirements:
 - Intention to depart at expiration of stay
 - Maintenance of a foreign residence
 - Adequate financial arrangements – to cover the cost of travel in the U.S. and cost to depart
 - Engage solely in legitimate business activities (i.e. soliciting sales, negotiating contracts)
 - Visa Waiver Program

39



Employing F-1 Students

- F-1
 - Curricular Practical Training (CPT)
 - CPT is a training program integral to an established curriculum whereby the student alternates between the approved training and classroom instruction
 - CPT takes place during the student enrollment
 - CPT requires actual job offer
 - CPT does not require approval by the USCIS; can be authorized by the designated school official

40



Employing F-1 Students

- F-1
 - Optional Practical Training (OPT)
 - OPT may take place during, or after completion of, the individual's studies
 - OPT does not require a job offer, but the student must apply to USCIS before completion of his/her academic program
 - OPT is typically issued for no more than 12 months.
 - In limited circumstances, it may be extended (e.g., STEM extension)
 - Potential transition to H-1B visa

41



TN Visas

- Temporary employment of Canadian and Mexican professionals
 - Canadian workers can process at the border or port of entry without prior petition to the USCIS
 - Mexican workers must file a petition with the USCIS
- Duration of Stay
 - Up to 3 years in a single request
 - Extensions are permitted
 - No specified outer limit on the number of extensions
- Temporary work requirement
- Non-Immigrant intent is required



42



TN Visas

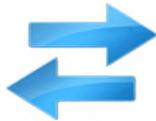
- Requirements:
 - Position listed on Schedule 2 of NAFTA, including:
 - accountant
 - architect
 - computer systems analyst
 - engineer
 - forester
 - graphic designer
 - attorney
 - management consultant
 - various scientific and medical professionals
 - post-secondary teachers
 - The individual must have the minimum qualifications or credentials for the profession as specified on NAFTA Schedule 2

43



L-1: Intra-Company Transfers

- L-1A – executives and managers
- L-1B – specialized knowledge employees
- Duration: Initial period of stay is 3 years
 - L-1A – May extend for a maximum of 7 years
 - L-1B – May extend for a maximum of 5 years
- Individual must have at least 1 year of service (within the past 3 years) with an existing foreign affiliate entity



44



L-1: Intra-Company Transfers

- Requirements
 - Prior employment with foreign company for a continuous one year period in the preceding three years
 - The foreign company is the same employer, a parent, subsidiary or affiliate of the U.S. company
 - The foreign company must continue in business during the transferee's entire period of U.S. stay
 - The individual must have been employed by the foreign company as an executive or manager, or in a position involving specialized knowledge
 - The individual must fill an executive, managerial or specialized knowledge position with the U.S. employer

45



Immigration Updates from the Trump Administration



The Travel Ban(s) of 2017



Travel Ban #1: Executive Order 13769



- **Title:** "Protecting the Nation from Foreign Terrorist Entry into the United States"
 - Signed by President Trump on Friday, January 27, 2017
 - Took effect immediately
 - **Refugees:** Suspends the entire U.S. refugee program for 120 days and the Syrian refugee program indefinitely
 - **Travel Ban:** Suspends the entry of immigrants and non-immigrants from certain designated countries of concern for an initial period of 90 days
- 48
- BOND SCHOENECK & KING

Travel Ban #1: Executive Order 13769

- Designated Countries of Concern

- Iran
- Iraq
- Libya
- Somalia
- Sudan
- Syria
- Yemen



49



Travel Ban #1: Executive Order 13769



Stopped by Court Order

50



Travel Ban #2: Executive Order 13780

- EO 13780 revoked and replaced EO 13769
- Signed on March 6, 2017; intended to take effect on March 16, 2017
- 90-day pause on the ability of nationals from 6 countries (Iran, Libya, Somalia, Sudan, Syria and Yemen) to enter into the US
 - Would apply only to those foreign nationals from the 6 enumerated countries if:
 - Foreign national is not yet physically present in the US on March 16, 2017
 - Foreign national did not have valid visa at 5:00 pm EST on January 27, 2017
 - Foreign national did not have a valid visa on March 16, 2017
- EO 13780 would not apply to green card holders, those with validly issued visas and dual citizens
- EO 13780 removed indefinite ban on Syrian refugees; capped general admission of refugees to no more than 50,000 for FY2017; suspended refugee admissions for 120 days
- Also included a variety of measures design to review certain agreements, policies, data collection, etc.

51



Travel Ban #2: Executive Order 13780



Stopped by Court Order

52



US Supreme Court Weighs In On Travel Ban By Executive Order...

- June 26, 2017 – US Supreme Court permit a portion of the travel ban to be implemented
- SC decision allowed Trump Administration to exclude foreign nationals from each of the six countries of concern, provided they have no “credible claim of a *bona fide* relationship with a person or entity in the United States”
 - 90-day ban beginning on June 29, 2017



53



The Latest... Travel Ban by Presidential Proclamation



54



A Word About E-Verify...



55



E-Verify

- What is it? An internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility.
 - E-Verify is an *additional verification step*, not a replacement for I-9 verification
- E-Verify is mandatory for federal contractors
- A number of states have also adopted laws that require use of an E-Verify system

56



What's on the Horizon for E-Verify?



57



In the Cross-Hairs: The H-1B Visa

- Attacking the H-1B visa program through “Buy American, Hire American” Executive Order
 - Crack down on fraud and abuse
 - Direct DOL, DOJ, DOS and DHS to suggest reforms to H-1B program
 - Goal(s):
 - Switch current system away from low-skilled workers to high-skilled workers by removing lottery system in favor of points system
 - higher wages
 - higher visa fees



58

In the Cross Hairs: The TN Visa

- May 18th: the Trump Administration provided notice to Congress regarding his intent to “renegotiate” NAFTA – a free trade agreement between the US, Canada and Mexico
- 1993: NAFTA created new immigration visas (TN visa) to all 3 countries that would provide greater mobility for certain professionals
 - Professions that qualify for the TN visa are listed in Appendix 1603.D.1 of NAFTA
 - More than 60 professions covered / included
 - Most (but not all) of the listed professions require at least a Bachelor’s degree
- If NAFTA is renegotiated it is unknown (at this time) what will happen to the TN visa



59

The Announcement to End DACA... (Deferred Action for Childhood Arrivals)



- On September 5th, formal plan to end DACA was announced
- DACA:
 - allows illegal immigrants who entered the U.S. as minors to receive a renewable two-year period of deferred action
 - DACA recipients are eligible to receive an employment authorization document (“EAD”), which allows them to work legally in the U.S.
- DACA is scheduled to end on March 5, 2018; as of September 5th, no new DACA applications accepted for processing
- Individuals whose DACA/work permit expires prior to March 5, 2018 may apply for a two-year renewal, but applications must be received on or before October 5th



60

“Extreme Vetting”: Interviews for Employment-Based Green Cards

- In-person interviews will now be required for employment-based nonimmigrant visa holders (e.g., H-1B, O-1, etc.) applying to adjust their status to permanent residents (“green card” holders)
- In-person interview requirement is expected to take effect on October 1, 2017
- This new “step” will lengthen green card processing times



61



Building a Wall



62



Questions



63



Navigating Immigration Issues
Within the Manufacturing Industry



Caroline M. Westover
One Lincoln Center
Syracuse NY 13202-1355
315.218.8636
cwestover@bsk.com

THANK YOU FOR ATTENDING
OUR MANUFACTURING WEEK WEBINAR SERIES
