

INDICTMENT OF VISION
SYSTEMS GROUP:
SOME UNANSWERED QUESTIONS

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Recently a New Jersey corporation (Vision Systems Group) was indicted on criminal charges of conspiracy and mail fraud - along with a Notice of Forfeiture seeking forfeiture of \$7.4 million from proceeds derived from the offenses. The Immigration and Customs Enforcement also arrested 11 individuals. In America, everyone - individuals and corporations - is innocent until proven guilty. They will have their day in court where the complete evidence will be presented. In the meantime, without passing judgment on whether the company is guilty of the charges in the indictment, let's look at some of the possible circumstances.

THE ALLEGATIONS IN THE COMPANY INDICTMENT:

Conspiracy: The government used information from immigration filings and tax filings to combine for a charge of conspiracy. A conviction for conspiracy under the United States Code requires "two or more persons to conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." The punishment can include a fine and/or imprisonment up to five years.¹

The government alleges that the company filed LCA's (Labor Condition Applications) and applications for permanent employment certification containing prevailing wages for a location other than where the employees would actually be employed and then tried to conceal it by filing tax wage reports to support the location listed on the immigration filings, rather than the actual work locations.

Mail Fraud: The government also used the immigration filings to support a charge for mail fraud. A conviction of mail fraud requires devises a scheme or "intending to devise any scheme or artifice to defraud" and placing "in any

¹ 19 U.S.C. § 371

post office or authorized depository for mail matter” anything to carry out the fraud. It is punishable by a fine and/or up to 20 years in prison.

The government alleges that the company filed applications for permanent residence on behalf of eight employees, which listed incorrect addresses (“non-existent addresses”) for the company location, and the employee’s residence.

SOME UNANSWERED QUESTIONS:

The Labor Condition Application: The government alleges that the company filed LCA's (Labor Condition Applications) in H-1b petitions with prevailing wages for a location other than where the employees were actually employed.

What is an LCA? A Labor Condition Application (LCA) is a form containing an attestation to the Department of Labor that the employer will provide specific working conditions and wages to a foreign national employee in the “area of intended employment.” It is filed with H-1b petitions for temporary employment. An “area of intended employment” covers the geographic area within “normal commuting distance” of the place of employment.

Why did the LCA locations not match the locations where the employees worked? Were the LCA’s correct at the time of the filing the H-1b and subsequently became invalid due to a change in business needs and relocation of employees? Did the company comply with ongoing legal requirements for H-1b petitions and file new LCA’s and amended H-1b petitions to reflect a change in work location?

There are three possibilities on the allegation that the LCA’s did not match the locations where the employees actually worked. First, the LCA’s and H-1b petitions could have been wrong at the inception, which is clearly a problem. Perhaps there was a sinister purpose for the LCA’s containing prevailing wages for a location different from where the employees worked: to obtain a lower prevailing wage.

Second, the LCA’s could have been correct initially but the company may have failed to meet ongoing legal requirements for LCA’s and H-1b petitions.² Maybe the LCA’s were correct at the time the H-1b petition was filed and the employees were placed at the Iowa location and subsequently changed locations as business needs changed. Even so, the company could still be in violation of Department of Labor Regulations and USCIS Regulations

² See 8 C.F.R. 214.(h)(2)(i)(E) which says a new petition must be filed if there is a material change in the terms of the original petition; See Letter from Isaiah Russell, Jr. Acting Branch Chief, Business and Trade Services, INS Benefits Division to attorney Donald Frieberg (Mar. 19, 1997), stating that if the Department of Labor requires a new LCA then the USCIS will require an amended H-1b petition even if the change would not originally have required an amended petition to be filed with the USCIS.

unless the company filed new LCA's (and amended H-1b petitions) to correspond with the new work locations.³

Third, the company could have been in compliance by filing the new LCA's and amended petitions but has not yet produced the evidence of compliance. This latter scenario is probably not the case. Why? Because before issuing the indictment, the government pooled the resources of several agencies including the U.S. Citizenship and Immigration Services' Fraud Detection and National Security Division (FDNS) and the Department of Labor so presumably they would have noticed if there were new LCA's and amended H-1b petitions filed.

Permanent Residence Applications: The government presented evidence to the grand jury that the company's applications for permanent residence on behalf eight employees listed the employer's address and employee's residential address in Iowa and contained Notice of Job Opportunity (commonly referred to as "internal posting") and job advertisements for Iowa whereas the employee's worked at other locations.

Why were the applications for permanent residence filed in Iowa, which the government alleges, was not the actual worksite of the employees? Was the address listed on the application the corporate headquarters for the company? Were the employees "roving employees"? These questions remain unanswered.

In the indictment, the government cited permanent residence applications that were filed in 2004. It said the addresses for the employer and employee listed on the applications were "non-existent." It remains to be seen whether the addresses are simply "non-existent now" or whether they were "non-existent at the time the application was filed." Clearly, the latter scenario poses some serious problems but let's look at both possibilities:

Assume the addresses were "non-existent at the time the applications were filed." This is a serious violation. If this is the case, it appears the company may have gained three possible advantages: (1) lower prevailing wages in a city where the average wage was most likely less than in other cities where the employees actually worked; (2) more favorable recruitment results since the recruitment was done in an area more likely to be populated and less likely to yield qualified U.S. workers, thereby passing the "labor market test" required in Department of Labor applications for permanent residence; and (3) faster processing time on the permanent residence applications.

How did the company potentially gain a faster processing time? The answer to that question requires a "look back" at how applications for permanent residence were done in the year 2004 (the date of the applications

³ For further analysis on the issue of H-1b employees moving to a new location, refer to the Hammond Law Group article, *More than Just a Suitcase! Legal Requirements when Moving an Employee to a New Location*, www.hammondlawfirm.com/monthly/Feature_Article/More_Than_Suitcase.pdf

cited by the government in the indictment against Vision Systems Group). In March 2005, the Department of Labor implemented a new process for permanent residence applications. However, prior to that time, applications were processed in the state of intended employment and then reviewed by regional Departments of Labor. The processing times were impacted by the volume of cases in the state and the number of government workers available to process the applications. This created great disparity in processing times. For example, Iowa was notably among the fastest processing states, sometimes as much as 2 or 3 years faster than heavily populated states such as New York and California, which had larger number of foreign nationals filing for permanent residence. That process changed in March 2005 when the Department of Labor implemented its online filing system whereby all cases are filed electronically and processed by one Department of Labor office. ⁴

Assume the addresses are “non-existent now” but were correct at the time the applications were filed. Let’s look only at the issue of the company address (the location of employment listed on the application). Having employees at a different location than what was originally stated on the application for permanent residence is not *per se* bad. USCIS and the Department of Labor have long realized that the employer may not know the exact location where the employee will work for the duration of the permanent residence process. Both agencies have addressed the concepts of “roving employees” and “unanticipated locations.” In the case of Schedule A occupations (nurses and physical therapists), the USCIS issued a memorandum providing guidelines on where the employer should post the notice (Internal Posting) when the employer does not know the exact location where the employee will work.⁵ Of course, most schedule A applications are filed for nurses located outside the U.S. (whose occupation does not qualify for an H-1b temporary that allows for entry and employment while the permanent residence application is in process) and “unanticipated locations” are more likely in those cases where it may be several years between the time the application is filed and the foreign national enters the U.S. to begin employment. In contrast, in the IT industry and most likely for Vision Systems Group employees mentioned in this case, the workers can enter on H-1B's so there's not a case of "unanticipated locations" but possibly a situation of a "roving employee".

What is a roving employee? A roving employee is one who works at different job sites. Under the “roving employee” theory, the Department of Labor has advised that the posting and prevailing wage ought to be based at the company’s corporate headquarters.

⁴ From March 2005 until spring 2008, applications were handled by two offices of the Department of Labor – Chicago and Atlanta – but all filed electronically. Thus, since March 2005 there is a level playing field for all employers and employees as it pertains to the location of employment.

⁵ See Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006, AILA Doc. No. 06021661

So how would the government know if an employee was a “roving employee” for purposes of the permanent residence application? Neither the previous labor certification form nor the current form provides enough space to list multiple locations of the employee. However, they ask for the work location. The previous labor certification form (ETA 750 which is the subject of the indictment against the corporation) contains a question for the “address where the alien will work.” In the case of a roving employee, a prudent attorney would use verbiage such as “same as location in box #6 (the company address) as well as various client sites.” The current labor certification form (9089) provides a box to provide “job opportunity information (where work will be performed)” but does not provide space for multiple work locations to be listed.⁶

CONCLUSION:

While the full evidence of Vision Systems Group has not yet been presented, there are a few lessons to glean from this latest enforcement action:

First, the government is getting better at pooling resources of various agencies to enforce the law. In this case, the Department of Labor and the USCIS Fraud Detection and National Security Division (funded in part by the \$500 fraud fee payable in each new employment petition for H-1b and L-1 petitions) provided information along with the Social Security Administration, Department of State and the U.S. Postal Service.

Second, the government is pursuing criminal charges including asset forfeiture more vigorously than in many years passed.⁷ These charges have long been available to the government. In fact, the immigration forms specifically outline some possible criminal charges. For example, the Department of Labor form for an application for permanent residence (Form 9089) states:

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. § 1546 and §1621.

In essence, the form is outlining the possible federal charges of: (1) misrepresentation or fraud by “whoever, in any matter within the jurisdiction

⁶ For more than the past year the Department of Labor has been in the process of revising the labor certification form to provide space for multiple locations. The latest update from the Department of Labor indicates that the new form will go into effect in late spring 2009.

⁷ See 20 C.F.R. § 655.805 for a list of other possible violations in the H-1b context; the Department of Labor may assess penalties such as a fine, back-pay of wages that should have been paid to the foreign nationals, and debarment from the H-1b program.

of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully... makes any materially false, fictitious, or fraudulent statement or representation," punishable by not more than 5 years; (2) fraud and misuse of visas, permits, and other documents by someone who "knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations", punishable by not more than 25 years;⁸ and (3) perjury through any "declaration, certificate, verification, or statement....willfully subscribes as true any material matter which he does not believe to be true", punishable by a fine and/or imprisonment not more than five years.⁹

The penalties are applicable not only to the one who signs the form but also to the one who directs it to be performed on their behalf. The United States Code says, "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."¹⁰

The previous labor certification form (ETA 750) was not as specific in its warning of federal charges although it did warn of perjury as follows: Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury the foregoing is true and correct.

Third, immigration compliance is an ongoing matter. It doesn't end when an H-1b petition is approved or when an application for permanent residence is filed. Clearly, there is a requirement to file things properly from the beginning. But there's also a requirement to update petitions and file amended petitions when the law requires so. Sometimes the ongoing legal requirements are clear-cut. At other times, they require detailed analysis of various regulations and government memorandum.¹¹ Nevertheless, at ALL times, companies should be diligent in seeking legal advice and following the legal requirements to ensure compliance with all immigration laws.

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⁸ 18 U.S.C. § 1546.

⁹ 18 U.S.C. § 1621.

¹⁰ 18 U.S.C. § 2

¹¹ For a discussion on H-1b amendments when changes occur post-filing, refer to the Hammond Law Group article, *To Amend an H-1b or Not?* www.hammondlawfirm.com/monthly/Feature_Article/bim_featured_article_may_2007.pdf