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2007 – The Year That Wasn't (For Immigration Reform)

By A. Robert Degen

The 110th Congress

It seems that 2007 was yet another year of unproductive discussion about the broken state of the nation's immigration laws.

In his January State of the Union Address, President Bush urged Congress to enact comprehensive immigration reform. In March, through a bipartisan effort, the STRIVE Act was introduced in the House, and the Comprehensive Immigration Reform Act of 2007 was introduced in the Senate. Both pieces of legislation would have provided enhanced border security, interior enforcement, a temporary guest worker program, enlargement of the H-1B Program, a path to permanent resident status for certain agricultural workers, relief to unauthorized alien students, overhaul of the immigrant visa program, and a path to earned citizenship for certain undocumented aliens. Though much debated, any hopes for comprehensive immigration reform died on June 28, 2007, when the Senate failed to invoke Cloture and the bill was pulled from the Senate floor. The House bill languished in committee until the 110th Congress adjourned, when it died also.

Throughout the rest of the year, a number of stand alone immigration bills were introduced, including the "DREAM Act," "AgJOBS," the "Save our Small and Seasonal Business Act," and the "SKIL Act."

The DREAM Act would have provided undocumented high school students attending college or serving in the armed forces an opportunity to obtain legal status. Unfortunately, it died in the Senate, leaving innocent, undocumented students – many of whom entered the United States as infants – with virtually no chance of gaining legal status.

A number of bills, generally called "AgJOBS," also were introduced in the House and Senate. Though not identical, each would have provided for an overhaul and simplification of the H-2A agricultural worker program. Congress adjourned without taking action on any of the legislation.

The H-1B program also received some attention, first as part of comprehensive immigration reform and then in free standing bills in the House and Senate under the name the "SKIL Act." The Act would have increased the H-1B cap and allowed for annual increases based on demand. It also would have exempted certain holders of U.S. master's degrees from the H-1B and immigrant visa caps, increased the number of immigrant visas, and eased restrictions on extension of nonimmigrant status for those with pending adjustment applications. After a brief appearance on the floor, the bills were referred to committee in the House and Senate, where they remain unaddressed.

In 2005, Congress passed and the president signed the "Save our Small and Seasonal Business Act," which exempted returning H-2B workers from the annual cap through the end of FY 2007. While independent efforts in the Senate and House were introduced to extend the exemption past October 1, 2007, neither made it into law before Congress adjourned, leaving no relief for H-2B employers facing a severe shortage of seasonal workers across a broad range of industries.

USCIS, ICE, AND DOL

While Congress has not passed significant immigration legislation, there have been some important changes from USCIS, ICE, and DOL.

In May, U.S. Citizenship and Immigration Services (USCIS) published a final rule that became effective July 30, 2007, which substantially increased the filing fees for most immigration applications and petitions. Under the new fee schedule, a family of four with children over 14 can expect to pay filing fees of $4,040 to apply for permanent residence in the U.S. The fee for applying for U.S. Citizenship went from $400 to $675; other filing fees increased similarly. As an unintended consequence, USCIS was swamped with applications in May and June from people who were eligible to file before the fee increase took effect, resulting in severe backlogs and delays that will likely continue for the next two years according to USCIS Director Emilio Gonzalez.

On another front, Immigration and Customs Enforcement (ICE) announced a final rule that was intended to clarify the confusion over the employer's receipt of Social Security mismatch letters by providing a procedure and safe harbor for dealing with employees identified by the Social Security Administration as having a non-matching Social Security numbers. The Regulations would require the employer to go through a number of steps with the employee to resolve the mismatch. If not resolved within 90 days, the employer would be required to either terminate the employee or risk being found to have constructive knowledge of employing an undocumented worker.

While the process sounds reasonable in theory, employer groups thought otherwise based on the notoriously inaccurate information contained in the Social Security Administration database and the impermissible expansion of the concept of constructive knowledge. Employer groups sued to block implementation of the regulation, resulting in the District Court for the Northern District of California granting a temporary restraining order on August 31, 2007, and ultimately a preliminary injunction on October 10, 2007, enjoining implementation of the regulation.

Proceedings before the District Court have been stayed pending rulemaking proceedings by DHS. In the meantime, the government has appealed to the Ninth Circuit. Stay tuned.

Beginning in 1986 with the Immigration Reform and Control Act, employers were required to verify the employment authorization of all employees by completing a Form I-9. In 1997, the legacy INS published an interim final rule amending the acceptable documentation for proof of employment authorization. The rule was never implemented and was finally updated in November 2007, when USCIS published an updated version of Form I-9 that reduced the number of acceptable supporting documents. The primary change was the removal of five documents from list A, proof of employment authorization and identity. As of December 26, 2007, only new versions of the I-9 may be used.

Finally, in the wake of Congress' failure to implement comprehensive immigration reform and the efforts by states to enact their own immigration legislation, ICE has dramatically increased enforcement actions at work places throughout the United States. The actions have resulted in increased incidents of criminal prosecution rather than administrative processing and sanctions.

While ICE and USCIS were active, The Department of Labor (DOL) was not sitting on its hands. In May, the DOL published a final rule that made significant changes to the labor certification program. Historically, some states' initial processing of labor certification applications could take many years, resulting in a situation where the original beneficiary either no longer wanted the position or was unavailable for the sponsored employment. With an approved labor certification, the employer was able to substitute a similarly qualified individual as beneficiary of the approved application. In a final rule published on May 17, 2007, DOL prohibited substitution of the beneficiary of an approved application for permanent labor certification. The final rule, for the first time, also made labor certifications valid only for a period of six months following certification. In a significant departure from existing practice, the final rule also prohibited the employer from allowing the employee to pay his or her own attorney's fees or costs in connection with filing an application for permanent labor certification.

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Traveling in the Western Hemisphere

By Cynthia Yializis

The commencement of an 18-month transition period to educate and prepare travelers for the new documentary requirements of the Western Hemisphere Travel Initiative (WHTI) began on January 31, 2008. All U.S.-citizen travelers wishing to enter the U.S., Canada, Mexico, Bermuda, and the Caribbean via land or sea will be required to present secure documentation at the border, replacing the oral declaration of citizenship.

The U.S. Customs and Border Patrol (CBP) has published a list of acceptable documents that may be presented during this transition period. When the final rule is implemented in June 2009, CBP will publish a final list of acceptable documents. The changes will not be significant, but travelers should check the list once the final rule is announced.

The following documents have been approved for land and sea travel during the transition period:

- Canadian or U.S. Passport
- U.S. Passport Card
- Trusted Traveler Card
- Enhanced Driver's License

- Enhanced Tribal Card
- U.S. Military Identification with Military Travel Orders
- U.S. Merchant Mariner Document
- Native American Tribal Photo Identification Card
- Form I-872 American Indian Card
- Indian and Northern Affairs Canada (INAC) Card

Included in this list are two new documents: the U.S. passport card and the enhanced driver's license. As of February 1, 2008, U.S. citizens may apply for a U.S. passport card. The U.S. passport card is a low-cost, wallet-sized, anonymous, limited–use land and sea travel document that will permit entry *only* in the U.S., Canada, Mexico, Bermuda, and the Caribbean. The enhanced driver's license is a state initiative whereby driver's licenses will be modified to designate citizenship. Washington, Vermont, New York, and Arizona are currently working with the Department of Homeland Security (DHS) to develop this document.

If travelers are unable to obtain one of the approved documents listed above, they will have the option of presenting ***both*** an approved identification *and* an approved citizenship document. Acceptable identification documents include:

- Driver's license or government issued ID card
- U.S. or Canadian military ID card

Acceptable citizenship documents include:

- A certified or original U.S. or Canadian Birth Certificate
- U.S. Consular report of birth abroad
- U.S. Certificate of Naturalization
- U.S. Certificate of Citizenship
- U.S. Citizen Identification Card
- Canadian Citizenship Card
- Canadian certificate of citizenship without photo

Travelers who are 18 years of age or younger will be required to prove citizenship at the border.

If a traveler does not possess the proper documentation as outlined above, CBP officers will attempt to verify the citizenship and identity of the traveler. This verification process allows CBP to educate travelers about the new documentation requirements without penalty, and will presumably not be available once the final rule is implemented.

This transition for land and sea travel follows the final implementation of phase I of the WHTI, whereby all U.S. citizens are now required to present a valid U.S. passport when traveling by air.

Cynthia Yializis is an associate with the Pittsburgh office of Fox Rothschild. If you have questions about her article, please contact her at 412.394.5349 or cyializis@foxrothschild.com.

States Implement Immigration Laws in Response to Lack of Federal Legislation

By Alka Bahal

Arizona – Work in Progress

On February 7, 2008, a federal district court in Arizona upheld the state's new employer sanctions law for hiring unauthorized aliens entitled, "The Legal Arizona Workers Act" (H.B. 2779) – a remarkable outcome for a law generally viewed as the most stringent state law of its type in the nation. Upon signing the law, Arizona Governor Janet Napolitano stated that the aggressive new law implementing severe actions against employers who knowingly or intentionally hire undocumented workers was necessary because Congress had "failed miserably" to address immigration reform.

The Legal Arizona Workers Act was originally passed on July 2, 2007, and was scheduled to go into effect on January 1, 2008. However, it was delayed in response to two lawsuits filed to block its implementation. The new law had already survived earlier court challenges filed by a coalition of immigrant rights and business groups. An earlier suit for a temporary restraining order was denied by both the federal court in Arizona and the U.S. Court of Appeals in December. On February 7, the federal district court issued its final ruling in the second suit, determining that the law was not preempted by federal law, specifically the Immigration Reform and Control Act of 1986 (IRCA), because it does not encroach on the federal government's authority to regulate immigration law based on the fact that it relates to state control over the issuance of business licenses, which is specifically exempted from IRCA. In response to the most recent ruling, business and immigrant rights groups filed an appeal, seeking to consolidate it with an appeal from an earlier lawsuit.

At present, enforcement of the Law is postponed until

at least March, when the next hearing in response to the appeals is scheduled, in concurrence with the state's 15 county prosecutors. While all parties await a ruling, Governor Napolitano urged lawmakers to address what she termed as "flaws" in the new law, including assurances that the law cannot be used to discriminate.

The Legal Arizona Workers Act imposes strict sanctions on employers who hire unauthorized aliens:

- a first-time violation will result in suspension of a company's state license to conduct business for up to 10 days and carry a three-year probationary period
- for a company that actively takes steps to avoid the hiring ban, the first offense will result in a minimum 10-day suspension and carry a five-year probationary period
- for second violations occurring during a probationary period, business licenses will be permanently revoked

Additionally, the Act requires employers in Arizona to participate in the federal E-Verify system (known as the Basic Pilot Program) operated by the Department of Homeland Security.

Missouri – Success?

On January 31, 2008, a federal judge in Missouri upheld a city ordinance that denies business licenses to employers who hire unauthorized aliens, rejecting arguments against the ordinance made by the American Civil Liberties Union and the Mexican American Legal Defense and Education Fund. The Missouri federal court held that the ordinance was not preempted by federal law because it is primarily a business license regulation, "an area historically occupied by the states."

The Missouri ordinance (No. 1722) bars any employer that knowingly hires an illegal alien from obtaining or renewing a business permit, city contract, or grant, and includes a safe harbor provision for employers who use the federal E-Verify system. The upholding of this ordinance comes after the final ruling on Hazelton, Pennsylvania's ordinance, which related to the employment of unauthorized aliens that declared that ordinance preempted by federal law.

Alka Bahal is a partner and co-chair of Fox Rothschild's Corporate Immigration Practice Group. In the course of her career focused on corporate immigration law, Ms. Bahal has acquired extensive experience in corporate immigration and employer compliance issues, including IRCA, I-9s, Social Security mismatch issues, and U.S. visas. Ms. Bahal is based in the firm's Roseland, NJ, office representing clients throughout the United States. She can be contacted at immigration@foxrothschild.com or 973.994.7800.

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