Legally Speaking
Fox Rothschild LLP
ATTORNEYS AT LAW
Current Issues in Immigration Law
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Will Obama Administration Pacify Roiling Immigration Seas?

By Robert S. Whitehill

America is navigating through roiling, frothy, possibly even deadly seas of uncertainty caused by the economic meltdown of our nation and indeed the world. Month after month brings growing unemployment, company shutdowns, re-evaluation of spending, and the government's unprecedented role in an effort to buoy the ship of state as it takes on extraordinary deluges of proverbial water.

Continuing the nautical metaphor, our ship has a new political captain, whose stated course evokes hope. For aliens, either on the ship or seeking to board, there is fear that they will either not be permitted entry or be thrown overboard into the churning depths.

The Pennsylvania State University recently opened its new law school and Center for Immigrant Rights with a symposium featuring "A-list" advocates and academics. The symposium provided significant insights regarding the state of immigration law and policy.

Late in the afternoon of the all-day program, one lawyer in attendance asked the panel, "With all the terrible things that you say are happening to aliens in this country, the criminalization of work, the culture of enforcement, deaths and detention, do I have an ethical obligation to advise my clients not to come to the U.S.?" This stumped the panel and stupefied the audience until Kareem Shora, National Executive Director, American Arab Anti-Discrimination Committee, said that after President Obama's inauguration, there is hope for change.

The experts expressed faith that the Obama administration will push for the legislative initiative that has become known as Comprehensive Immigration Reform (CIR). According to panelist Jeanne Butterfield, Executive Director of the American Immigration Lawyers Association, CIR rests on four legs – border security, employment authorization, enhanced availability of employment-based visas and legalization. She is hopeful that a comprehensive package will be enacted before the end of 2009 and is doubtful that there will be piecemeal legislation anytime soon.

Professor Steven Legomsky of Washington University School of Law, and author of the principal law school case book on immigration law, analyzed the political line in the sand that has been drawn in the debate. Immigration restrictionists tend to view the undocumented population collectively, while advocates see undocumented immigrants as individuals. There is no evidence, according to Legomsky, that undocumented individuals are more prone to commit crimes than the general population. There is no consensus among economists as to the total economic or labor market impact of our undocumented population. What Legomsky pointed out quite clearly is that immigration policy affects individuals. He ended by saying, "Never forget that by demonizing our immigrant populations, we are talking about our friends and our neighbors" and, by extension, employees and colleagues.

Coming down from 30,000-foot view and hoping for legislative change at a federal level, New York University Law School professors Nancy Morawetz and Muzaffar Chishti spoke about enforcement. Morawetz pointed out that the Department of Homeland Security's (DHS) enforcement strategy - known as "Operation End Game" - is to maximize the number of people removed from our nation's soil. What has been lost in the numbers game, she said, is prosecutorial discretion and, therefore, proportionality and the human reality. Her hope and prediction is that the Obama administration will change the culture of numbers-only immigration enforcement into a new operational paradigm: smart enforcement that is aimed at ridding our country of threatening, high-profile law breakers, rather than on

anyone in technical violation of our complex immigration laws.

With another set of hopeful observations for immigrants, Chishti said that the number of state laws addressing or attempting to address immigration matters and immigrants, legal and illegal, is on the wane. He predicted that state and local law enforcement, similarly, will resume their focus on crime detection and law enforcement, not on the enforcement of U.S. immigration laws.

Recent events provide an unclear picture of whether that hope was well placed. On February 24, 2009, agents from the U.S. Immigration and Customs Enforcement (USICE) continued the Bush Administration strategy of work-place raids and descended on the Yamato Engines Specialists plant in Bellingham, Washington. Twenty-eight people were arrested.

In the aftermath of the raid, *The New York Times* quoted a high-level DHS official saying that its Secretary, Janet Napolitano, "was not happy about it because it's inconsistent with her position, and the president's position, on these matters." The day after the raid, Secretary Napolitano appeared before the House Homeland Security Committee and stated as it relates to these raids:

> In my view, we have to do workplace enforcement and it needs to be focused on employers who intentionally and knowingly exploit the illegal labor market. That impacts American workers, has an impact on wage levels and often has an impact on workers themselves. Our ICE efforts should be focused on those kinds of things. We should have thought through prosecutions that are going to result in deportations that result from any workplace action. That is the direction we seek to move.

Addressing the American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Congress also focused on immigrant workers. Balancing the consequences of our economic meltdown with a need for H-1B labor, the act added limitations in hiring H-1B workers by Stimulus Bill beneficiaries. The Stimulus Bill went into effect February 17, 2009, and will sunset February 16, 2011. During that period of time, restrictions are imposed upon H-1B petitions filed by any company that receives funding under Title I of the Emergency Economic Stabilization Act of 2008 (the TARP Bill) or receives funding under Section 13 of the Federal Reserve Act.

Covering only banks and other companies receiving TARP money or credit directly from the Federal Reserve system, the provision imposes restrictions comparable to those currently in place on H-1B-dependent employers. Simply stated, these restrictions require the employer, before filing the H-1B petition, to take good-faith steps to recruit U.S. workers for the position. In doing so, employers need to assert that they have not laid off nor will lay off any U.S. worker in the job category that the H-1B worker is filling for 90 days before and 90 days after the filing of the H-1B petition.

If there are any questions regarding whether an employer has received funds triggering the new application protocols, the list of recipients is disclosed publicly by the U.S. Treasury on its website: http:www.treas.gov/initiatives/eesa/transactions.shtml.

It is clear that the administration is trying to steer its immigration course through stormy seas. A review is under way of many of the Bush Administration's immigration regulations and policy pronouncements. One controversial policy whose implementation has been delayed and delayed is discussed in more detail by Fox Rothschild immigration lawyer Cynthia Yializis in her article "The Future of E-Verify" in this newsletter.

Whether there are policy and regulation changes or not, for employers who are contemplating layoffs, there are significant consequences for their legal immigrant workers.

To learn more about the Immigration consequences of layoffs, please see the article entitled, "How Layoffs and Downsizing Affect Foreign-Born Employees Working on Visas."

By the time of our next newsletter, we will see how much of the hope expressed by the experts is warranted.

Pittsburgh lawyer Robert S. Whitehill chairs the Immigration Practice at Fox Rothschild. If you have any questions about the information contained in Legally Speaking*, or any legal matter, please contact him at 412.394.5595 or rwhitehill@foxrothschild.com.*

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How Layoffs and Downsizing Affect Foreign-Born Employees Working on Visas

By Robert S. Whitehill

For Non-Immigrants Only:

The principal non-immigrant, or temporary, visas that permit employment by foreign nationals are called H-1B, L, O and TN. These visas are based upon a petition by an employer and are employer specific. When the employment terminates, so does the worker's status in that non-immigrant visa category. While United States Citizenship and Immigration Services (USCIS) can and often does cut some slack to a foreign worker who is discharged, technically, the end of that person's employment with the petitioning company is the end of the validity of his or her visa with that company. Therefore, human resource managers often give consideration to the date of discharge in laying off foreign workers.

The law allows USCIS to grant a change of non-immigrant status to an individual who is out of status through no fault of his or her own and has not worked without authorization. In many cases, if an employer discharges a worker whose employment authorization is pursuant to one of the above-referenced visa categories, if that alien has not worked illegally and finds a new position within a short (30 to 60 days) period, USCIS may permit the person to move to the new employer without requiring him or her to depart the U.S. to secure a new visa. If the person is not granted an in-country change of status, he or she may depart the U.S. and receive new permission to re-enter on a new visa to work for a new employer. One of the many lookouts is that if an employee has overstayed the expiration date of his or her prior employer's visa petition by more than 180 days, when that worker departs to get a new visa, he or she triggers the three-year/10-year bars to returning.

When an employer discharges an alien worker in the H-1B and O-1 categories, there are additional actions that must be taken. Employers of H-1B workers need to be particularly careful to comply with the requirements for a "*bona fide* termination." When a foreign worker on H-1B visa is discharged, the employer must withdraw the approval of the visa with USCIS, withdraw the approved Labor Condition Application (LCA) with the Department of Labor and tender the alien worker return transportation home. Without performing these three acts, the employer runs the risk that a discharged employee could bring an action for back wages long after discharge.

The employer of a TN worker is not obligated to inform anyone of the discharge of a TN employee. Similarly, the L employer has no specific obligation. The employer of an O-1 alien of extraordinary ability is obligated to tender return transportation home to a discharged worker.

Even though there are no other specific requirements to withdraw the visas of terminated employees, many employers feel more comfortable severing their immigration relationship with former employees.

For Immigrants Only:

If the employer has started the process of securing permanent residency for the employee, and then the employee loses his or her job or there are company layoffs, the effect on the process may be dramatic.

If there has been a layoff by the company within six months of the filing of a PERM labor certification in the same or related occupation, the employer must notify and consider all potentially qualified laid-off U.S. workers and document the results to the Department of Labor. Although the employer need only notify and consider laid-off individuals and not necessarily select them for the position, a U.S. worker will be deemed qualified. This defeats the labor certification if by

education, training, experience or combination thereof, the U.S. worker is able to perform the duties in the normal accepted manner or can acquire the skills during a reasonable period of on-the-job training. Needless to say, layoffs have a chilling effect on the filing and adjudication of labor certifications.

Understanding AC-21 - With the passage of the American Competitiveness in the Twenty-First Century Act (AC-21), a new verb came in to use – "to port" – meaning a worker's switch to a new employer while retaining the benefit of an application for labor certification and immigrant visa petition (I-140) filed by a prior employer.

If the employer's I-140 has been approved or was approvable when filed, and the adjustment of status application (I-485) has been pending more than 180 days, the alien may "port" to a new employer if the I-140 petition has been or should have been approved when filed. On the other hand, if the I-140 petition is withdrawn before 180 days or the U.S. Citizenship and Immigration Services (USCIS) denies or revokes the approval at any time, the portability provision of AC-21 does not apply.

There is no requirement that during the 180 days, or at any time thereafter until permanent residence is authorized, that the worker must be employed by the petitioner. While it is advisable for the employer to withdraw a pending I-140 petition, the employer is not obligated to do so. If the employer seeks to withdraw an approved I-140 petition, and the employee is otherwise eligible for portability, the withdrawal will have no effect upon the alien's ability to port. If the I-140 has been approved, the employee may use that visa's priority date with his or her next employer.

Numerous other permutations and results occur when an employee is terminated during the permanent residency process. Each situation needs to be analyzed with regard to the effect upon employee and requirements of employer. As a general statement, when an employer finds it necessary to lay off a foreign worker, the employer's obligation is to inform the appropriate government agencies; when and how is subject to some discussion. The effect of the layoff on the worker involves a complicated legal analysis and generally, it leads to a frantic effort by the individual to find a way to remain in the U.S. lawfully.

Pittsburgh lawyer Robert S. Whitehill chairs the Immigration Practice at Fox Rothschild. If you have any questions about the information contained in Legally Speaking*, or any legal matter, please contact him at 412.394.5595 or rwhitehill@foxrothschild.com.*

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The Future of E-Verify

By Cynthia Yializis

The future of E-Verify hangs in a precarious balance.

Prior to leaving office, President George W. Bush signed Executive Order 12989, which would have mandated the use of E-Verify, the Department of Homeland Security's (DHS) internet-based employment verification system, for all federal contractors. The order was set to go into effect on February 20, 2009, but upon taking office, the Obama administration postponed implementation until May 21, 2009, for further review. While this delay has inspired hope in some, our current climate demands caution and accountability from a new chief executive who has yet to speak out strongly on immigration issues.

Economic crisis and massive job loss do not generally bode well for foreign workers. This may explain why, in light of delaying Executive Order 12989, E-Verify managed to slip into President Obama's initial economic stimulus package. The package initially provided that E-Verify would be mandated for businesses receiving federal funds or tax breaks from the federal government. This may make sense to many when the perceived goal is to create jobs for American workers; E-Verify exists solely to protect individuals who have legal authorization to work, and in the government's view, now is not the time to let jobs fall to undocumented workers while Americans are suffering.

The Cost of E-Verify? Billions. Those who believe E-Verify is a one-size-fits-all solution to the problem of illegal immigration are ignoring its reality, including its inherent economic costs. The United States Chamber of Commerce concluded that a federal rule expanding E-Verify would result in net societal costs of $10 billion a year, with small businesses being disproportionately affected. One such cost is the obstacle E-Verify creates for law-abiding citizens' ability to work. The U.S. Citizenship and Immigration Services (USCIS) recently reported that 96 percent of new hires are automatically verified through this system, leaving an error rate of approximately four percent. At this rate, approximately one in 25 new hires receives a "tentative non-confirmation" and is forced to navigate a burdensome, bureaucratic maze to seek permission to work from the Social Security Administration (SSA). It's not a stretch of the imagination to see how some new hires risk losing their newfound employment.

E-Verify supporters also ignore a simple truth found in most employer/employee relationships. Many employers are willing to do almost anything to hold onto a hard-working individual who produces results. Most employees are willing to do anything for the security of a regular paycheck and benefits. To them, if that means shifting to an under-the-table policy, then so be it. The Congressional Budget Office recently estimated that a mandatory E-Verify program would decrease federal revenues by $17.3 billion over 10 years due to the number of workers expected to depart the formal economy as a result of implementing E-Verify.

What Lies Ahead? Fortunately, the E-Verify provisions were stripped from the final economic stimulus package. However, reasons for skepticism remain. As of this writing, the stimulus package passed the House of Representatives, with an H-1B amendment sponsored by Congressman Bernie Sanders (V-I) that will restrict companies receiving Troubled Asset Relief Program (TARP) funds from applying for H-1B visas.

One must also give pause to President Obama's choice of former Arizona Governor Janet Napolitano as head of DHS, since it was she who signed into law the Legal Arizona Workers Act (LAWA), which is perhaps the most damaging and restrictive immigration enforcement law on the books mandating E-Verify.

LAWA requires all employers to use E-Verify as a means for the state to target those who hire undocumented workers. Its penalties for "knowingly or intentionally" hiring an undocumented worker are potentially devastating for business. An employer risks having its business license suspended for 10 days upon first violation, and mandatory revocation upon second.

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