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Immigration Newsletter

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This Month's Contents:

ICE Rebuked; Nevertheless, Enforcement Activities Continue as ICE Targets 180 Companies in the South

The enforcement arm of the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), made headlines recently for, in effect, failing to prioritize genuine threats to the community. In a leaked memo first reported in The Washington Post, ICE's director of Detention and Removal Operations complained about dwindling noncriminal deportations and outlined to field offices a new policy that emphasized high enforcement quotas rather than focusing enforcement on serious criminals. The memo caused quite a stir and outraged many because it represented a major shift in the Administration's central immigration policy of prioritizing enforcement on the most dangerous undocumented immigrants. ICE quickly moved to distance itself from the memo, reiterating its commitment to the removal of serious criminal offenders first and denying that it sets quotas. Nevertheless, immigration communities were not persuaded.

A week later, the DHS Office of Inspector General (OIG) issued a damning assessment of ICE's "287(g)" programs, named after a provision in the immigration laws that delegates ICE federal enforcement powers to local

law enforcement authorities. The OIG found that 287(g) programs have not prioritized serious criminal immigrants and that performance standards by which local officers are evaluated focus on the number of immigrants encountered, not the seriousness of their crimes.

For years, immigration, civil rights, and law and order advocates repeatedly have called for the termination of 287(g) and other programs that deputize local police officers to enforce immigration law. They have called for the termination of these programs for a variety of reasons, including ICE's failure to put into place mechanisms to prevent racial profiling. Community groups also have argued that these programs inherently undermine community relations by breeding mistrust and interfering with neighborhood policing. The report's findings of widespread misuse of these programs provide further support for these claims.

The OIG's report found fundamental flaws in the 287(g) programs, despite the Obama Administration's efforts to revamp ICE guidelines and oversight. Inconsistency among jurisdictions – there are some 66 programs in 23 states – poor training of deputized officers, inadequate public outreach, and inaction against law enforcement agencies in the face of program violations, are some of the deficiencies cited by the OIG.

Meanwhile, ICE continues to step up its workplace enforcement activities. In early March, ICE announced that it issued Notices of Inspection (NOIs) to 180 businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee. Employers beware. Even those who do not knowingly hire unauthorized workers can be breaking the law by not complying with I-9 employment eligibility verification requirements and completing forms properly. Employers also must take care not to violate the anti-discrimination provisions that prohibit discriminatory practices in the recruitment, hiring, and firing of persons authorized to work in the United States. With fines as steep as $100 to $1000 per violation, prudent employers are advised to audit their employment processes and records.

Five-Year Low for H-1B Visas Submitted During First Week of Filing Season; Employers Still Must Clear New Hurdles

On April 1st, employers began filing H-1B petitions for their employees who require a first-time H-1B visa for work that will commence on October 1, 2010. Perhaps a true barometer of America's current economic well-being, only 19,100 petitions were filed for the coveted work visa during the first week of April compared to 63,000 during the same period in 2009. And, in 2008 and 2007, all H-1B visas – limited to 85,000 per fiscal year – were exhausted the first day they became available. Last year, the remaining 22,000 visas were available until late December.

Besides the economy, this year there are new hurdles that confront H-1B employers and their employees. First, employers will need additional lead time to prepare their petitions. The required labor condition attestation (LCA), now processed under the Department of Labor's new iCert Portal System, takes at least seven days for an approval instead of just one. Second, U.S. Citizenship and Immigration Services (USCIS) has altered its definition of what constitutes a valid employer-employee relationship as it relates to H-1B workers, imposing new rules on the types of activities in which H-1B workers can engage. Third, USCIS appears to be closely scrutinizing the authorship of credentials evaluations where education and work experience are combined. The agency has been denying petitions where the record does not clearly demonstrate that the individual providing the evaluation qualifies as an authorized signatory.

Considering H-1B Visa Processing in Canada? Third Country Nationals Should Proceed With Caution

Third country nationals (TCNs) with foreign degrees who have not been previously issued H-1B visas from their home consulate may find it increasingly difficult to obtain their visa at a U.S. post in Canada and should consider returning to their home country for visa issuance. It seems that U.S. consular posts in Canada are increasingly reluctant to issue visas to such TCNs because of the Posts' distrust of degrees not from the U.S. or Canada and the Posts' inability to properly authenticate them. While not official policy, the U.S. Embassy's website for consular processing in Canada warns that officials may refuse to issue such visas and especially discourages such TCNs who last entered the U.S. on a visitor visa.

Supreme Court Protects Right to Accurate Immigration Advice

In a landmark decision on the rights of foreign nationals to obtain accurate immigration counsel, the Supreme Court ruled on March 31st that lawyers must advise their noncitizen clients about the risk of deportation if they accept a guilty plea. In doing so, the Court affirmed the right to counsel for noncitizens charged with committing a crime. The Supreme Court in Padilla v. Kentucky recognized that current immigration laws dramatically raise the stakes of a noncitizen's criminal conviction and impose harsh and mandatory deportation consequences for such convictions. "The importance of accurate legal advice for noncitizens accused of crimes has never been more important," the Court proclaimed.

The case involved a 40-year permanent resident, Jose Padilla, whose criminal defense lawyer advised him not to worry about the immigration consequences of pleading guilty to a crime. That advice was not only wrong but the guilty plea subjected Mr. Padilla to mandatory deportation from the United States. The Kentucky Supreme Court held that Mr. Padilla had no right to withdraw his plea when he learned of the deportation consequence. The Supreme Court reversed that decision and rejected the federal government's position – also adopted by several other courts – that a noncitizen is protected only from "affirmative misadvice" and not from a lawyer's failure to provide any advice about the immigration consequences of a plea. The Court held that Mr. Padilla's counsel was constitutionally deficient and affirmed that immigrants should not be held accountable when they rely on incorrect advice from their lawyers or where counsel fails to provide any immigration advice at all.
The Court also considered but discounted concerns that the decision would open the floodgates to the courthouse doors because "a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Nevertheless, the Court's decision will have broad application to immigrants seeking post-conviction relief, even though its precise reach and the practical reality for foreign nationals facing deportation (or having been deported) has yet to be determined. At a minimum, it will permit those foreign nationals who were not counseled by their lawyers on the immigration consequences of their guilty pleas to assess whether their case should be reconsidered.

Significantly, the decision also acknowledges in no uncertain terms that the increased criminalization and lack of flexibility of immigration law have led to harsh results. The Court concluded: "counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."

We will provide more guidance on the implications of Padilla in the upcoming weeks and months. In the meantime, contact us if you believe your case may benefit from a Padilla review.

Can Immigration Reform Happen in 2010? Here's the Latest

With health care reform finally enacted and pressure mounting to fulfill his campaign promise, will President Obama turn to comprehensive immigration reform next? Will Congress be able to muster enough Republican support to move a bill forward? These are the million dollar questions. Jobs, energy, and cap-and-trade each have the potential of thwarting the Administration's agenda in the run-up to the 2010 mid-term elections, derailing immigration in the process. So, what are the prospects for comprehensive immigration reform in 2010? The answer, like health care, lies in the degree of bi-partisan support that a bill can garner and the degree to which President Obama is willing to exert his political capital.

Senators Charles E. Schumer (D-NY) and Lindsey Graham (R-SC), longtime advocates for immigration reform, met with the President last month to chart a course forward for an immigration bill in the Senate. Such a bill is likely to include a path to citizenship for undocumented immigrants and tough, new enforcement provisions, including a biometric national ID card for all workers, citizens and immigrants alike.

Also in late March, 200,000 people packed the National Mall in Washington DC demanding comprehensive immigration reform. Providing a loud and cohesive voice on behalf of the nation's millions of immigrants and immigrant communities, the rally was the movement's largest show of strength since 2006, when mass rallies in favor of legalization erupted in cities across the country. Significantly, President Obama sent a televised message in which he pledged his continued commitment to immigration reform and warned of the cost of inaction. Some, including Representative Luis Gutierrez (D-IL), who introduced a comprehensive immigration reform package in the House in December, were inspired by Obama's speech, noting "a new focus on the part of the president." Hispanic groups were more circumspect and reacted with skepticism and demanded more urgency.

Then, over this past weekend, two top Senate leaders renewed their support and promised to move immigration legislation forward immediately. Senator Majority Leader Harry Reid (D-NV) pledged to supporters at a rally in Las Vegas that he would start working on an immigration overhaul as soon as lawmakers returned to Washington after their Spring Recess. He also told them that he has the 56 votes in the Senate needed to pass immigration reform. Senator Richard Durbin (D-IL) at a Chicago rally echoed Reid's promise, and said he'd work to secure Republican support for the legislation.

Those facing tough mid-term elections – as well as President Obama – are taking note of Hispanic concerns and can ill afford to alienate this key constituency. Hispanics represent the fastest growing segment of the electorate, and they played an important role in election victories in 2008. Many in the Hispanic community want reassurance not only that the President remains committed to immigration reform but they have demanded proof of action. Specifically, they want to know what exactly the President's commitment to immigration reform really means.

All the parties agree, however, that a broader coalition must be brought together before any real progress can be made. This means, at a minimum, that another high-profile Republican will need to join Schumer and Graham to co-sponsor a bill. This will be a tall order, as contentious mid-term elections are heating up in key districts. Even moderates like Senator Susan Collins (R-ME), the ranking member of the Homeland Security Committee, says immigration is not on her radar screen, and Senator John McCain (R-AZ), a key Republican immigration reform advocate in the past, faces a tough primary challenge from an anti-immigration-reform conservative and has been palpably absent from recent discussions. Further complicating the recruitment of a Republican immigration reform advocate is the rift that was created in the wake of the health care debate.

Senator Graham had warned that immigration reform could come to a halt for the year if reconciliation was used to push health care through. While Graham himself is staying the course, the wounds opened up during the dragged-out battle for health care reform may not be easily healed or forgotten.

There is no doubt that President Obama can bring much needed political capital to the table. There is also no doubt that President Obama supports an immigration overhaul. But, immigration reform will require strong bipartisan support, and all agree that there is little President Obama can do on the issue until there are more Republicans on board.

Was Graham merely sounding an alarm? Were the March and follow up rallies held nationwide successful in thrusting immigration reform back into the national spotlight? Can President Obama do more? Is the best hope for immigration reform a consensus around a measure that could pass sometime after the November elections? With legislators returning to Washington from their Spring Recess this week, we shall see.

Startup Visa Bill Introduced in Senate Aims to Promote Global Entrepreneurs

While the pro-immigration leadership in the Senate continues to seek bipartisan support for comprehensive immigration reform, just a couple of months ago Senate veterans John Kerry (D-MA) and Richard Lugar (R-IN) successfully drafted and introduced the Startup Visa Act of 2010, a bill aimed to create jobs in the U.S. while enhancing the United States' position in the global economy. Specifically, the Act would allow foreign entrepreneurs looking to start businesses in the U.S to qualify for permanent residency on a conditional two-year basis if a sponsoring U.S. venture capitalist invests $250,000 in the immigrant's startup company. After the conditional residency period, the foreign entrepreneur would need to demonstrate that the business generated at least five full time jobs in the U.S. and attracted a $1 million initial investment or reached revenues of $1 million in order to have the condition on residency removed. The new category would supplement and draw from existing visa numbers under the current, yet underutilized EB-5 employment creation (fifth preference) category for alien entrepreneurs.

Reportedly, the startup visa idea was born last fall when Dave McClure, a venture capitalist and former software entrepreneur, organized a Geeks on a Plane tour for entrepreneurs to visit Washington. The group saw the opportunity to help generate additional jobs in the U.S. while also enabling high quality entrepreneurs to generate successful businesses. Since their initial D.C. trip, McClure and company have rallied support for the idea. While it's unclear whether the bill has any legs, it could garner broad appeal as a way to facilitate global economic growth and stimulate the U.S. economy. In any event, it already has piqued the curiosity and support of bloggers on Twitter and Facebook, among others. And just last week, Thomas Friedman, in his April 4th Op Ed in the New York Times advocated for precisely this idea. "Start-Ups, not Bailouts," is the way to create jobs in America, he said. "Good-paying jobs don't come from bailouts. They come from start-ups. And where do start-ups come from? They come from smart creative, inspired risk-takers. How do we get more of those? There are only two ways: grow more by improving our schools or import more by recruiting talented immigrants." Friedman concludes that America must seriously and urgently think about the key ingredients that foster entrepreneurship. We couldn't agree more.

Wondering Why Your Removal Case is Taking So Long for Resolution? Answer: Immigration Judge Vacancies

A University of Syracuse research organization recently *reported* that pending cases at the nation's immigration courts reached an all-time high, up 23% from just seven months ago and 80% since 2000. With over 228,000 cases pending in the first few months since October 2009, the average wait time is well over one year. The Los Angeles Immigration Court has the longest backlog, with pending cases averaging almost two years.

Rather than an increase in cases, much of this backlog is due to the growing vacancies of immigration judges, which reached an all-time high in January 2010. While delays may enable those facing removal an opportunity to obtain counsel, mount a case and even get affairs in order before being sent home, backlogs of this nature ultimately compromise the statutory and constitutional guarantee of due process for each person facing removal and create immense pressure on sitting immigration judges to complete cases.

Greece to Participate in Visa Waiver Program

The U.S. Department of Homeland Security (DHS) recently added Greece to the list of countries authorized to participate in the Visa Waiver Program (VWP). Under the Visa Waiver Program, citizens and eligible nationals of participating countries may apply for admission to the United States at U.S. ports of entry as visitors for business or pleasure for a period of ninety days or less without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission. Such travelers, however, must obtain an approved travel authorization at least 72 hours in advance of travel via the Electronic System for Travel Authorization (ESTA). The ESTA web-based system is administered by DHS at *https://esta.cbp.dhs.gov* free of charge. ESTA authorization does not guarantee admission by a Customs and Border Protection official at a U.S. port of entry, and ESTA is not available to foreign nationals who have been previously refused a visa.

While the VWP streamlines travel for eligible foreign nationals, such travelers may not extend their stay beyond 90 days or change their status once in the United States. They also waive certain rights to review or appeal a decision regarding admissibility.

The 35 other VWP-designated countries include Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.