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Immigration Newsletter

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This Month's Contents:

Victory for Equal Justice and the Rule of Law: Court of Appeals Enjoins Enforcement of Arizona's Anti-Immigrant Law (SB 1070)

On April 11, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction against key and controversial provisions of Arizona's SB 1070, the law enacted nearly a year ago that requires police to demand proof of immigration status from anyone who they have a "reasonable suspicion" of being in the country illegally. The court thus denied Arizona's appeal of a U.S. district court's July ruling that prevented segments of the law from going into effect because it was likely that the law violated the U.S.

U.S. Courts for the Ninth Circuit: USA.gov

Constitution. Moreover, and significantly, the decision signals that the appeals court believes that the Department of Justice (DOJ) is likely to succeed in its challenge to the law's constitutionality.

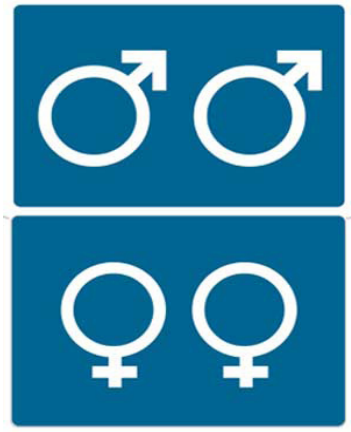

Photo: USgov

SB 1070 is the draconian state immigration law that was signed into law on April 23, 2010, after Arizona state legislators argued that they needed their own immigration enforcement tools to stem the tide of undocumented immigration into the state. Federal efforts, the state argued, were not enough. The law immediately sparked nationwide boycotts and protests as an unconstitutional attempt to usurp the federal government's right to enact and control immigration law and as a way to set the stage for abusive and illegal police activity, including profiling. DOJ sued and won an injunction on June 29, 2010, the day before the law was originally set to go into effect.

In its ruling, the Ninth Circuit rightly rejected Arizona's claim that state police have "inherent authority" to enforce federal immigration laws; in fact, the court held that Arizona's attempt to drive immigrants from the state interferes with the federal government's exclusive authority to enforce immigration law. Congress, the court held, intended state officers to "aid in immigration enforcement only under the close supervision of the Attorney General," which was not the case here. The court also recognized that the SB 1070 has negatively impacted U.S. foreign relations and reflects the dangers of allowing states to enact a patchwork quilt of conflicting laws and regulations. In the immediate aftermath of SB1070's enactment, a number of states considered or introduced copycat bills, but most states have now backed away from these measures.

While the fate of SB 1070 is likely to be decided by the Supreme Court, for now the court's decision is a victory not only for the Obama Administration in its ongoing effort to halt the Arizona law, but also for equal justice and the rule of law.

Will Same-Sex Married Couples Soon Receive Immigration Benefits? Not for Now

In a stunning move, President Obama and Attorney General Eric Holder announced in February that they would not continue to enforce the Defense of Marriage Act (DOMA) because they believe it to be unconstitutional. DOMA, passed in 1996, defines marriage for all federal purposes as the legal union between one man and one woman. Obama and Holder determined that the law, since it treated people differently based upon sexual orientation, must be able to withstand a heightened standard of constitutional scrutiny, not the relatively lower "rational basis" test that has been used in the past. The Administration found that the law could not withstand constitutional scrutiny under this higher standard and therefore violates the Constitution's guarantee of equal protection under law. Regrettably, at least for now, the Administration's announcement does not translate into any new immigration benefits for to same-sex couples.

For a brief period in March, same-sex couples thought immigration options were opening up to them, only to have their hopes dashed. Following the Obama/Holder announcement, USCIS and DOJ were reportedly holding in abeyance all enforcement and benefits processing for individual who may have a claim to immigration benefits if DOMA were no longer law. After only week of this presumed policy shift, USCIS released a statement that it would not hold same-sex marriage cases, and that agency would continue to process these petitions in accordance with DOMA.

In response to this latest development, a group of some 80 organizations urged DHS, in an April 6 letter, to adopt interim measures to prevent immediate and irreparable harm to American families caused by its continued adherence to DOMA. And, on April 14, Representatives Nadler, Lofgren, and other members of Congress formally re-introduced the Uniting American Families Act (UAFA), a bill that will give immigration benefits to the same-sex spouses of U.S. citizens.

But, for now, the reality for same-sex, bi-national couples has not changed. USCIS will deny green-card petitions filed by U.S. citizens for their same-sex spouses, and it will take years for their appeals to reach federal courts. Significantly, too, spouses of U.S. citizens and lawful permanent residents will continue to be removed from the U.S. for no reason other than that they are lesbian or gay. Yet, the recent pronouncements may be a harbinger of things to come, as the Obama Administration moves toward broader recognition of same-sex marriages. Keep an eye on this dynamic and important area of law as the fight over the future of DOMA continues.

Connecticut District Court Protects H-1B Employee from Wrongful Arrest; Holds Regulation That Extends Work Authorization Implicitly Extends Authorization to Remain in U.S. During Pendency of Timely Filed Extension Request

A federal district court in Connecticut ruled that the government may not arrest an H-1B employee for whom a timely filed extension application remains pending. U.S. District Judge Janet C. Hall in El Badrawi v. United States found that a federal immigration regulation allows H-1B employees to continue working for 240 days pending the adjudication of their extension applications and that that authorization is part of their authorization to be in the country, not a separate matter. "The government's proposed interpretation of the work authorization regulation . . . that it extends authorization to work in the country, but not authorization to be in the country," held Judge Hall, "cannot be squared with the text or purpose of that provision. . . ." Judge Hall also found that the government's proposed interpretation of the regulation at issue raises grave due process concerns. "The government has argued that. . .an alien who has filed a timely application for extension may remain in the country, but if he does, the government has discretion to arrest, detain, and remove him. There is a serious question as to whether this interpretation is consistent with the Fifth Amendment's Due Process Clause." Had the government provided clear, advance notice of the risk of detention, the court may have ruled otherwise.

The plaintiff, a medical researcher from Lebanon, was in valid H-1B status when his employer timely filed an H-1B extension. USCIS never adjudicated the petition and refused to respond to requests for information. Nearly seven months later, with the case still pending, Immigration and Customs Enforcement (ICE) agents arrested the plaintiff for allegedly "overstaying" his initial period of admission. He was placed in removal proceedings and detained for nearly two months. He sued the government for false arrest and abuse of process.

The court concluded that permitting the initiation of removal proceedings during this period would thus be unfair.

USCIS Restores H-1B Cap Exemption to Most Non-profit Entities Affiliated with Institutions of Higher Education

On March 16, the day before residency match positions are announced within the medical community, USCIS restored, as an interim policy, the H-1B cap exemption status for nonprofit entities that are related to or affiliated with an institution of higher education, provided the institution received a cap exemption after June 6, 2006. While the interim policy affects all institutions and their H-1B employees, it positively and disproportionately affects thousands of foreign national physicians, including medical residents and fellows. USCIS emphasized that cases must be filed with proof that a cap exemption was previously granted by filing copies of petitions and approval notices. It also stressed that these measures will only remain in place on an interim basis while the entire policy is being reviewed.

Update on H-1B Professional Visa Processing

Few H-1B Petitions Submitted to USCIS for FY2012 Processing: On April 1, employers began filing H-1B petition for their employees who require a first-time H-1B visa for work that will commence on October 1, 2011. As of April 7, approximately 10,400 H-1B cap-subject petitions were receipted by USCIS. These numbers are significantly down from past years, including 2010, when 19,100 petitions were filed for the coveted work visa during the first week of April.

This slow start to the H-1B filing season is not just due to the sagging economy; employers increasingly have been deterred from petitioning for their employees as more and more hurdles are thrown in their path. Last year, USCIS altered its definition of what constitutes a valid H-1B employer-employee relationship, imposing new rules on the types of activities in which H-1B workers can engage. It also began to closely scrutinize the authorship of credentials evaluations where education and work experience are combined and increased field audits of H-1B employers. More recently, USCIS has imposed a requirement that H-1B employers attest that they are in compliance with Export Administration and International Traffic in Arms regulations regarding the release of controlled technology or data. Few employers are affected but all must make a legally binding attestation, which in turn often requires input from counsel. This attestation may be delaying some filings and having a chilling effect for others.

New Electronic H-1B Registration Proposed by USCIS Would Take Effect Next Year: In an effort to administer the H-1B program more fairly and efficiently, DHS has proposed a change to the process of how cap-subject H-1B petitions are filed, which, if adopted, would affect the filing of H-1B petitions next year. The rule would require H-1B employers who seek to petition for H-1B cap-subject workers to first file electronic registrations with USCIS during a designated registration period. The proposal, says USCIS, could save U.S. businesses millions of dollars and make the process less cumbersome. USCIS estimates that the registration process would take 30 minutes to complete. Those employees selected can then complete the application process once they know that a visa is available. Employers are urged to provide their comments to USCIS by May 2, 2011. (The regulation can be found at http://edocket.access.gpo.gov/2011/pdf/2011-4731.pdf.)

Maryland School District's H-1B Program Under Fire: Maryland's Prince George's County School District (PGCSD), located just outside Washington, D.C., is facing a $5.9 million fine for major violations of the H-1B program over a five-year period. The Department of Labor (DOL), following a one-year investigation, announced that PGCSD illegally required teachers to pay thousands of dollars in filing fees that the school district was required to pay. DOL ordered PGSCD to reimburse teachers $4.2 million in fees and pay an additional $1.7 million fine for its conduct. The school system may also be barred from hiring any new foreign workers for two years.

Employment-Based Second Preference Advances a Couple of Months for Indian Nationals as Demand for Priority Workers Falls; Family-Based Backlogs Continue to Increase

Since October there has been a dramatic reduction in demand for employment-based first preference immigrant visas (EB-1 category). Consequently, the Department of State, in its May Visa Bulletin, has advanced the employment-based second preference (EB-2) category, making approximately 12,000 additional numbers available to the longest pending cases without regard to nationality. Indian nationals are the largest beneficiaries of the extra visa numbers: their cut-off date for EB-2, previously stuck for months at May 8, 2006, has advanced to July 1, 2006. Despite this trickle down of numbers, the overall impact on priority dates is not significant. Massive backlogs remain the order of the day.

On the family side, continued heavy applicant demand for numbers in the family-based first preference (F1) category (sons and daughters of U.S. citizens) has required the retrogression of priority dates across the board for most nationalities.

News in Brief

The following additional items may be of interest to our readers:

I-9 Special Alert: Are you compliant? The Obama Administration continues to make worksite enforcement a major priority by conducting a record number of I-9 audits. Most recently, Chipotle Mexican Grill, with more than 900 locations across the United States, has been the focus of ICE I-9 audits. In the Washington, D.C., area, some 400 employees were let go due to problems with their documents. Make sure you are ready when ICE comes knocking!

E-Verify Self-Check Goes Live: The E-Verify Self-Check system, which allows individuals to electronically check their own work authorization status and resolve any inaccuracies before an employer checks the system, was launched on March 21 as part of a test run in five states (Arizona, Idaho, Colorado, Mississippi, Virginia) as well as Washington, D.C. If you live in one of these jurisdictions, you can check your status at https://selfcheck.uscis.gov/SelfCheckUI/.

VIBE: A new beta-test of the Web-based Validation Instrument for Business Enterprise (VIBE), run by Dun & Bradstreet, allows USCIS to access commercially available information about companies that petition for U.S. workers. This means that businesses should be aware that such information will be accessed by investigators and become part of the review process conducted by USCIS. If the U.S. business entity's information on the petition is inconsistent with what is in VIBE, USCIS issues a request for evidence (RFE). Moreover, there have been reports that the VIBE system, which is based on publicly available information, too often contains inaccuracies, is unreliable, and requires a significant effort to update.

Improving Agency Efficiency: Following President Obama's Executive Order to improve the federal agency regulatory process, agencies involved in immigration regulation are engaging public comment about what can be done to streamline and cut wasteful bureaucracy. The Departments of Justice and State have already opened their notice and comment period, and others are expected to follow suit in the coming months. Whether this results in streamlined, more efficient immigration processing remains anyone's guess.

Emergency Measures in Place for Certain Countries, Expiring for Others: The U.S. government is offering temporary relief to citizens of countries affected by natural disasters, armed conflict, and other extraordinary conditions. At the same time, some emergency measures are expiring soon.

Japan: Japanese nationals may request expedited processing for immediate-relative immigrant petitions, for employment authorization, and for extensions of status for those currently in the United States following the March earthquake, tsunami, and nuclear disaster in Japan. Accommodations are also available to other Pacific Islanders affected.

Photo credit Navy Petty Officer 1st Class Matthew Bradley

Libya & Cote d'Ivoire: No official policy has been announced, but the ongoing conflicts will be considered by USCIS as a special factor in applications for expedited processing of extension or change of status, replacement of documents, and work authorization.

Haiti: DHS has resumed certain Haitian deportations after a more than year long moratorium following the devastating January 2010 earthquake.

Egyptian citizens arrive back home on a U.S. Air Force C-130J March 6, 2011. Army photo by Staff Sgt. Brendan Stephens

Egypt: While the U.S. Embassy in Cairo suspended visa services last month when the Egyptian military dissolved Parliament, it has resumed full visa and consular operations as of April 10. The Embassy announced that it will contact individuals with cancelled appointments. For more information, see http://egypt.usembassy.gov/pr040311.html.

El Salvador: USCIS announced that it sent some 4,500 Salvadoran TPS beneficiaries interim employment authorization documents (EADs) during the continued processing of their re-registration applications. The original expiration date for Salvadoran EADs was September 9, 2010; USCIS had automatically extended this validity period to March 9, 2011. See http://1.usa.gov/fvHma5.