Immigration Law Update: Summer 2007

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IMMIGRATION: THE NEW PINK ELEPHANT IN THE ROOM

Last month, the latest attempt to implement comprehensive immigration reform failed. The immigration reform bill, which would have a) provided legal status and an opportunity for citizenship to many of the twelve million undocumented aliens following the payment of fines and other administrative requirements, b) created a guest worker program, c) substantially increased border security, and d) implemented a merit-based point system to determine eligibility for a visa, could not overcome a procedural vote to end debate on the issue. While the development of the bill was a bipartisan enterprise supported by President Bush, its failure was equally a joint effort by Republicans and Democrats. With a presidential election looming in the distance, pundits believe it is unlikely any significant reform will happen before then.

As important as understanding how immigration reform failed is understanding why it failed. The question of immigration is not simply a question of which and how many immigrants should be permitted to enter and live in this country. The immigration issue is also a focal point for a number of social and economic issues that people believe (rightly or wrongly) are exacerbated or improved by immigration.

In the most recent debate alone, one study claimed immigrants improve real wages for native-born U.S. citizens, while another study cited evidence that real wages fell. Closely related is the question of jobs and unemployment, and the ongoing debate of whether immigrants are taking jobs from U.S. citizens or are filling jobs Americans would not perform. Some citizens and permanent residents take issue with the government granting relief to people who broke the law to enter the country, turning on its end the ideas of fairness and justice people attribute to the American legal system. Others refuse to support any legislation helping immigrants before the United States cares for its own citizens, with the lingering disaster of Hurricane Katrina as the prime example of the government's continuing failures. Additionally, overtones of racism and xenophobia are arguably present, particularly in discussions that describe Latinos and Hispanics as evidence of what is wrong with the current immigration policy.

How will the failure to address the immigration issue impact the United States? Already, individual States are beginning to enact laws targeting undocumented aliens, requiring employers to verify employee status, denying public services to illegal immigrants, and other measures. What may result is a collection of state laws that are not uniform and make it impossible for anyone engaged in interstate commerce to comply. It is

believed that undocumented aliens in the United States currently will go into hiding, further fragmenting society rather than encouraging them to embrace and contribute to American culture.

Employers with the need for skilled labor may feel a significant impact from the failure to implement comprehensive immigration reform. Industries facing a shortage of skilled labor are stuck with the current annual cap of 65,000 H-1B visas, which is woefully inadequate given the hundreds of thousands of skilled positions that go unfilled each year. American culture, economic well-being and way of life will all inevitably suffer from congressional inaction on immigration.

While, as some commentators claim, it may be too difficult to attempt to address all issues arising from and surrounding immigration in one bill, citizens should press their national representatives to begin addressing some of the issues that get wrapped into the immigration debate. For example, employers should continue to urge congressional representatives to address the cap on H-1B visas. From an economic standpoint, allowing more highly skilled foreign workers to enter the U.S. on H-1B visas will maximize the capacity of skilled labor industries, create more jobs, and increase the tax base. Employers do have a responsibility in this; they must be willing to play by the rules and pay the prevailing wage to their nonimmigrant employees. Yet by breaking down the immigration issue into manageable parts and addressing some of the smaller, standalone issues in a pragmatic, fair and just fashion, citizens and the lawmakers who represent them may be able to develop the consensus necessary implement needed immigration reform in this country.

TN VISA STATUS

The North American Free Trade Agreement (NAFTA) of 1993 created the TN professional visa for Canadians and Mexicans. TN professionals may work in the United States if (i) the applicant is a citizen of Canada or Mexico, (ii) the profession is on the NAFTA list, (iii) the position in the U.S. requires a NAFTA professional, (iv) the applicant will work in a prearranged full-time or part-time job for a U.S. employer (self employment is not permitted), and (v) the applicant has the qualifications for the profession.

Additionally, as nonimmigrants, applicants must demonstrate that their stay is temporary. The maximum period of admission into the U.S. is one year and extensions of stay are granted in one-year increments. Spouses and children of TN visa holders are issued TD visas. TD visa holders may not work, but are allowed to attend school.

The U.S. employer must provide the applicant with a letter of employment, indicating that the position requires the employment of a person in a professional capacity. The letter must further include the activity in which the applicant will be engaged, purpose of entry, anticipated length of stay, qualifications or appropriate credentials demonstrating professional status, evidence of compliance with Department of Homeland Security regulations, and/or state laws, and arrangements for pay.

Both the NAFTA treaty itself and U.S. Citizenship and Immigration Services regulations specify which professions qualify for TN status. Most of these professions require a baccalaureate or licenciatura degree, but some professions require more advanced degrees.

Requirements for Canadian citizens

Canadian citizens usually do not need a visa as a NAFTA professional, although a visa can be issued to qualified TN visa applicants upon request. A Canadian citizen without a TN visa can apply at a U.S. port of entry with the following documentation:

- Request to immigration officer for admission under TN status;
- Employment letter;
- Proof of professional qualifications;
- Proof of ability to meet license requirements;
- Proof of Canadian citizenship; and
- Fee of U.S. $50.

Requirements for Mexican citizens

Unlike Canadian citizens, Mexican citizens are not eligible to apply for a TN visa at a port of entry. They must apply for their TN visa at a U.S. embassy and undergo an interview. Each Mexican applicant for a TN visa in Mexico must submit:

- Nonimmigrant Visa Application, Form DS-156;
- Supplemental Nonimmigrant Visa Application, Form DS-157, for all male applicants between 16 and 45 years of age;
- A passport valid for travel to the U.S. with a validity date at least six months beyond the applicant's intended period of stay;
- One 2"x 2" photograph (a photograph is not required if applying in Mexico);
- A letter of employment; and
- Fee of U.S. $100.

AFFIDAVITS OF SUPPORT

Many applicants seeking entry to the United States must prove they will have adequate financial resources to support themselves while in the U.S. This is the case for certain nonimmigrant visas, particularly those where the applicant is not permitted to work while in the U.S., such as visitor visas. Form I-134, Affidavit of Support, is often used in this situation. People seeking to immigrate to the U.S. must demonstrate that they

will not become a "public charge" after entering the U.S.

A provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created a new Affidavit of Support, Form I-864, which is much more extensive than Form I-134, and creates a legal obligation on behalf of the person who signs it. This legal obligation means that the sponsored immigrants, the federal government or any state government can sue the sponsor if the sponsor fails to support the immigrant.

Affidavits of Support are required in all family-based immigration cases and in employment-based cases where the alien is related to the owner of the petitioning company. In a family-based immigration case, the petitioning family member must be the sponsor for the intended immigrant. Certain immigrant cases do not require Form I-864 Affidavit of Support, such as refugees, asylees, special immigrant juveniles, and applicants who qualify for Nicaraguan and Central American Relief Act benefits.

A sponsor or joint sponsor must be a U.S. citizen or lawful permanent resident, 18 years of age and live in the U.S. or a U.S. territory. The sponsor must also show sufficient income.

The key to the Affidavit of Support is the annual poverty level, determined by the Department of Health and Human Services. Sponsors must earn at least 125% of the poverty level, except for sponsors who are on military active duty, who must be able to show income equal to the poverty level. The poverty level varies with the number of members of a household. For the purposes of Form I-864, the household includes the sponsor and all persons related to the sponsor by birth, marriage or adoption living in the household.

To meet the poverty guideline, sponsors can use all sources of income. In the event that income is not sufficient to meet the income level required, the sponsor can rely on assets if it is possible to use the assets for the support of the immigrant and the assets are convertible into cash within one year. A sponsor who will use assets to meet the income requirements must provide evidence of those assets and that those assets are equal to at least five times the difference between the household income and minimum income requirement.

If the primary sponsor does not earn enough income or have adequate assets, cosponsor(s) may join the obligation for the intended immigrant by submitting Form I-864A, Contract Between Sponsor and Household Member. The cosponsor becomes legally obligated to provide the same support as the primary sponsor, and the obligation does not end for any sponsor until the immigrant's naturalization or the sponsored immigrant can be credited with 40 quarters of work, or leaves the U.S. permanently or dies. Divorce does not terminate the obligation.

In addition to all of the other obligations, sponsors and cosponsors must keep the U.S. Citizenship and Immigration Services informed of all changes of address. Fines can be imposed for failing to do so.

H-3 VISAS FOR TRAINEES

The H visa category has a classification for trainees, known as H-3, allowing trainees to be admitted to the United States for up to two years. H-3 regulations provide for "instruction in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment."

This does not include physicians seeking graduate medical training or education. However, an exception is available for physicians seeking an externship during a medical school vacation at a program approved by the American Medical Association or the American Osteopathic Association. Sponsored, licensed nurses can come for brief training not available in their home country as long as it benefits themselves and an overseas employer.

U.S. Citizenship and Immigration Services (USCIS) regulations set four conditions and eight supplemental restrictions for H-3 cases:

1. The proposed training is not available in the alien's home country;
2. The beneficiary will not be placed in a position that is in the normal operation of the business and in which citizens and resident workers are regularly employed;
3. The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
4. The training will benefit the beneficiary in pursuing a career outside the U.S.

A training program may not be approved that

1. Deals in generalities with no fixed schedule, objectives or means of evaluation;
2. Is incompatible with the nature of the petitioner's business or enterprise;
3. Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;
4. Is in a field in which it is unlikely that the knowledge or skill will be used outside the U.S.;
5. Will result in productive employment beyond that which is incidental and necessary to the training;
6. Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the U.S.;
7. Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or
8. Is designed to extend the total allowable period of practical training previously authorized to a nonimmigrant student.

Like other H classifications, an H-3 applicant's employer must file an I-129 petition with supporting documentation at the appropriate USCIS regional service center. A successful application must address the four conditions and eight restrictions outlined in this article.

MILITARY SERVICE

Since World War I, male U.S. immigrants have been required to register for military service. Nonimmigrants do not have this obligation, but permanent residents, refugees, parolees and even undocumented immigrants do. (During times of peace, however, only citizens and permanent residents may volunteer for military service.)

Registration is required for all males upon reaching the age of 18, or before reaching the age of 26 if entering and taking up residence in the United States after age 18. Those who obtain permanent residency after age 26 are not required to register. Failure to properly register could lead to criminal punishment and can also lead to denial of future immigration or naturalization benefits.

Leaving the U.S. to avoid military service or desertion from the military will make a person permanently ineligible for citizenship and cause a person to be inadmissible to the U.S. Immigrants can obtain an exemption from the military service requirement on the ground that they are not citizens, but doing so will render them permanently ineligible for citizenship. The only exception to this rule would be if the exemption were obtained under a treaty, and before seeking the exemption the immigrant had served in the military of his home country.

Just as failure to abide by the Selective Service laws can result in a denial of future benefits, performing military service can produce benefits. People who have served for a total of three years in the U.S. military and who, if no longer in the military, were honorably discharged, are exempted from standard residency requirements if the naturalization application is filed while still in the military or within six months of discharge.

Immigrants who served on active duty during military conflicts are also exempt from the residency requirements and may be naturalized regardless of their age. Permanent residents who died while serving in the U.S. military are eligible for posthumous naturalization if the application is filed no more than two years after their death. Immigrants on active duty are not deportable under a special agreement between the U.S. Citizenship and Immigration Services (USCIS) and the Department of Defense. Moreover, in many of these cases, the immigrant is given the opportunity to seek naturalization before the USCIS initiates deportation proceedings. Finally, at many times in the past, ceremonies have been held to naturalize permanent resident military personnel before they were sent overseas.

While all immigrants -- legal or undocumented -- are obligated to register with Selective Service, it is actually pretty difficult to join the military if you lack a green card or are not a citizen or asylee. The military is not supposed to accept undocumented individuals (though there are a number of cases where undocumented immigrants have made it into the military anyway) and none of the branches sponsor individuals for nonimmigrant or immigrant status (with some minor exceptions).

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