Siskind's Immigration Bulletin – May 4, 2009

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1. Openers

Dear Readers:

If the immigration reform debate were a football game, today would probably be considered the kickoff. The Senate Immigration Subcommittee held hearings that included a number of well known witnesses. On the pro-immigration side, Alan Greenspan, the former Chairman of the Federal Reserve testified on how critical immigrants are to the future of the country. He especially highlighted the need for more H-1B workers in the years to come. Also testifying in favor of immigration reform was Doris Meissner, the former INS Commissioner.

The Republican Party's ranking member on the committee- Senator Jon Cornyn of Texas, didn't do much to help restore his party's image with Hispanic voters by inviting the anti-immigrant law professor Kris Kobach who has crafted much of the anti-immigration legislation being passed around the country. After the Arlen Specter defection this week and the shellacking Republicans took in the election last year (mostly due to a dramatic shift in Hispanic voters to the Democratic Party), one is left to wonder whether the GOP is learning the lesson of the 2008 race or not.

The other big immigration news this week was the release of a press statement that the Obama Administration is shifting its immigration enforcement emphasis. It will move away from work site raids largely targeting illegally present immigrant workers to more civil and criminal actions against employers. But the White House is warning that workers will still be arrested. This could very well signal that the Bush Administration's Social Security no-match rule and the E-Verify contractor rule – both tied up in the courts – could be supported by the new President.

Finally, a number of extreme right wing pundits and news sites have been pounding the drum blaming immigrants for the Swine Flu epidemic spreading around the planet. The evidence is, of course, that Americans traveling in Mexico brought back the virus. But it is a reminder that anti-immigrants will blame just about every problem in the world on the immigrant. I'll put this in the same vein as stories put out recently by one anti-immigrant group that global warming was a consequence of illegal immigration. Amazing!

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President Obama finally named a new Director of US Citizenship and Immigration Services. He is Alejandro Mayorkas, a Cuban immigrant who most recently hails from Los Angeles, California. He's been a litigator at the large O'Melveny and Myers law firm and prior to that served as a US Attorney in Central California. Good luck, Mr. Mayorkas.

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In firm news, Elaine Witty, an attorney in our Memphis office, has just returned from speaking at the American Immigration Lawyers Association's Overseas Chapter meeting which was held in Tel Aviv, Israel.

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Finally, as always, we welcome your feedback. If you are interested in becoming a Siskind Susser client, please call our office at 901-682-6455 and request a consultation. We are a national immigration law firm and work on a broad range of immigration matters for clients locating across the country.

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2. The ABC's of Immigration, Employer Compliance Series: Part V – Unfair Immigration Practices

What are the Immigration and Reform and Control Act anti-discrimination and document abuse rules?

While employers need to be diligent about complying with IRCA's employment verification rules, they should not be so overzealous that they end up penalizing qualified employees. IRCA also has anti-discrimination rules that can result in an employer facing stiff sanctions. Employers of more than three employees are covered by the IRCA anti-discrimination rules (as opposed to the 15 or more employees required by Title VII of the Civil Rights Act). IRCA protects most U.S. citizens, permanent residents, temporary residents or asylees, and refugees from discrimination on the basis of national origin or citizenship status if the person is authorized to work. Aliens illegally in the U.S. are not protected.

Under IRCA, employers may not refuse to hire someone because of their national origin or citizenship status and they may not discharge employees on those grounds either. The employer is also barred from requesting specific documents in completing an I-9 Form and cannot refuse to accept documents that appear genuine on their face. But note that an employer must be shown to have had the intent to discriminate.

Employers can separately be sanctioned based on legislation passed in 1990 if they request more or different documents than required by the I-9 rules. Employers originally were held strictly liable for violations under this category, but in 1996 legislation was passed requiring a showing that employers intended to discriminate.

How is enforcement responsibility split between the Department of Justice's Office of Special Counsel and the Equal Employment Opportunity Commission?

The OSC and the EEOC split jurisdiction over national origin discrimination charges.

EEOC handles matters involving employers with 15 or more employees while OSC has responsibility for smaller employers with between 4 and 14 employees. OSC covers national origin claims involving intentional acts of discrimination with respect to hiring, firing and recruitment. EEOC has broader jurisdiction under Title VII of the Civil Rights Act.

OSC has exclusive jurisdiction to rule on citizenship and immigration status discrimination claims against employers with four or more employees. OSC also has jurisdiction over document abuse claims for employers with four or more employees.

How is a complaint made for an Immigration and Reform and Control Act anti-discrimination violation?

OSC accepts charges filed by individuals or their representatives who believe they have been the victims of employment discrimination. DHS officers may also file charges.

Discrimination charges must be filed with six months of the alleged discriminatory acts. After the claim is filed, OSC has ten days to notify the employer and then with either file a complaint with an ALJ within 120 days or notify the charging party that it will not file a complaint. The charging party may independently file a complaint with an ALJ within 90 days of getting this notice from OSC. OSC may also reverse its decision and file a complaint within this 90 day period. The judge then will have a hearing and issue a decision or the parties may independently reach a settlement agreement.

What is "document abuse"?

"Document abuse" refers to discriminatory practices related to the verification of employment eligibility in the Form I-9 process. Employers who treat individuals differently based on national origin or citizenship commit document abuse when they engage in one of four types of activity:

- improperly requesting employees produce more documentation than is required to show identity and employment authorization
- improperly asking employees to produce a particular document to show identity or employment eligibility
- improperly rejecting documents that appear to be genuine and belonging to the employee
- improperly treating groups of applicants differently (e.g. based on looking or sounding foreign) when the complete the Form I-9

All individuals authorized to be employed can file a claim under the document abuse rules if an employer has four or more employees.

What is "citizenship status discrimination"?

Citizenship or immigration status discrimination refers to when a person or entity discriminates against any individual (other than an unauthorized immigrant) with respect to the hiring, or recruitment, or referral for a fee, of the individual for employment of the firing of the individual from employment because of the individual's citizenship or immigration status.

What is "national origin discrimination"?

National origin discrimination refers to when a person or entity discriminates against any individual (other than an unauthorized immigrant) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment of the firing of the individual from employment because of the individual's national origin.

What are examples of prohibited practices?

DHS lists various examples of prohibited practices in the M-274 Handbook for Employers:

a. Setting different employment eligibility verification standards or require different documents based on national origin or citizenship status. One example would be requiring non-U.S. citizens to present DHS-issued documents like "green cards"
b. Requesting to see employment eligibility verification documents before hire and completion of the Form I-9 because an employee appears foreign or the employee indicates that he or she is not a U.S. citizen.
c. Refusing to accept a document or hire an individual because an acceptable document has a future expiration date.
d. Requiring an employee during re-verification to present a new unexpired EAD if the employee presented an employment document during the initial verification. Note: This appears to contradict earlier statements from legacy INS and in at least one court case stating that an employer may have a responsibility to ask an employee whether employment authorization has been extended. An employer should consult with counsel in such situation.
e. Limiting jobs to U.S. citizens unless a job is limited to citizens by law.
f. Asking to see a document with an employee's alien or admission number when completing section 1 of Form I-9.
g. Asking a lawful permanent resident to re-verify employment eligibility because the person's "green card" has expired.

Are employees protected from retaliation if they complain about discrimination?

Yes. Employers cannot retaliate against an employee who files a charge with OSC or the EEOC. The employee is also protected if he or she is witness or participant in an investigation or prosecution of a discrimination complaint or if the employee asserts rights under IRCA's anti-discrimination provisions or Title VII of the Civil Rights Act of 1964.

How does the Civil Rights Act of 1964 provide employees additional protections?

Title VII of the Civil Rights Act of 1964 bars employment discrimination based on national origin, race, color, religion, and sex. Only employers with fifteen or more employees for 20 or more weeks in the preceding or current calendar year are covered. Title VII covers discrimination in any aspect of employment.

What is the basis for regulating immigration-related unfair employment practices?

Section 274B of the INA specifically prohibits discrimination based on national origin or citizenship status.

Can employers discriminate against employees requiring visa sponsorship?

Non-immigrant aliens, whether work authorized or not, aliens not in legal status in the U.S. and others requiring visa sponsorship are not protected by the anti-discrimination provisions in IRCA. However, Title VII of the Civil Rights Act of 1964 offers some protections to these individuals in so far as employers who appear to be inconsistent in who they consider for sponsorship and who they don't may be found to have engaged in national origin discrimination under that law.

Can employers discriminate against employees with an expiring Employment Authorization Document?

No. Generally the existence of a future expiration date should not be considered in determining whether a person is qualified for a position and considering a future employment authorization expiration date may be considered employment discrimination. In other words, you may not refuse to hire a person because they only have temporary employment authorization. This does not, of course, preclude re-verification upon the expiration of employment authorization.

What information can be requested of an individual prior to the commencement of employment?

Employers who require applicants to complete Form I-9 prior to the beginning of employment need to be very careful because of the possibility of national origin discrimination. At a minimum, the employer should wait until an offer is extended and accepted before requesting completion of the I-9. After that, the employer can start the Form I-9 process. It is a smart practice to have a uniform policy regarding completion of the Form I-9 or if an exception is being made, there is a rational reason.

Who is a "protected individual" under Immigration and Reform and Control Act and can an employer discriminate against those not included?

"Protected individuals" under IRCA's anti-discrimination rules include anyone who is a U.S. citizen as well as individuals who fit in to the following categories:

- lawful permanent residents (green card holders)
- refugees
- certain beneficiaries of the 1986 legalization program (there are very, very few of these people left who have not become green card holders at this point)
- asylees

Employers are not required to consider applicants who are outside of this list under IRCA's anti-discrimination rules. Employers should be careful, however, to be consistent in applying the policy so as to avoid a finding that a particular group has been disparately treated. Such inconsistency could lead to a finding of national origin discrimination under the Civil Rights Act of 1964.

Can an employer maintain a policy of only employing U.S. citizens?

No. Employers must consider all protected individuals under IRCA. Discriminating against protected individuals under IRCA would be considered discrimination.

Can an employer require employees to post indemnity bonds against potential liability under the Immigration and Reform and Control Act?

No. Such a practice is specifically prohibited under DHS regulations. And that would include any other type of indemnification required by an employer against potential liability arising under IRCA. However, the regulations do say that an employer may still require an employee to agree to a "performance clause" where an employee unable to perform the job duties may be held accountable to the employer. Whether such a clause is enforceable or not is a question of contract and labor law, of course, and counsel should be consulted.

Can an employer not sure whether documents are valid for a new hire request Department of Homeland Security verification of the status of the employee?

Only employers participating in E-Verify can validate the status of an employee through DHS. Employers are permitted, however, to contact DHS if the employer has a reason to believe that the employee's documentation is suspicious. If DHS believed the matter to be worth pursuing, ICE could follow up to investigate the matter. Employers who contact DHS about documents they believe to be invalid would not be liable for discrimination if they genuinely believed the documents to be potentially invalid and the employer was not singling out an employee on the basis of appearing or sounding foreign.

Note that an employer *can* contact SSA to verify the validity of an SSN. Information on this online service can be found at www.ssa.gov/bso/services.htm.

Who may file a complaint under the Immigration and Reform and Control Act against an employer for violations of the employer sanctions rules?

Any person having knowledge of a violation or potential violation of IRCA may submit a signed, written complaint in person or by mail to the local DHS office having jurisdiction over the employer.

What is the procedure to file a complaint under the Immigration and Reform and Control Act against an employer for violation of the anti-discrimination rules? What about a complaint under Title VII?

The complaint must detail the allegations, identify the parties and list the relevant dates of the alleged violations. The complaint must be filed within 180 days of the alleged discriminatory act.

Individuals who believe they have been the victim of discrimination prohibited by IRCA can also call the Department of Justice's OSC employee hotline at 800-255-7688 or visit their web site at www.usdoj.gov/crt/osc/ for more information and to download a charge form. OSC also has a telephone intervention program where employers and employees can speak with an OSC representative and attempt to resolve a matter without resorting to the formal complaint process. The employer telephone number for this service is 800-255-8155 and the employee number is 800-255-7688.

Individuals seeking to file a complaint under Title VII of the Civil Rights Act of 1964 can call the EEOC at 800-USA-EEOC or go to www.eeoc.gov.

How does the Office of Special Counsel for Immigration Related Unfair Employment Practices investigate complaints?

First, OSC must determine if the claim may have merit. If OSC decides to investigate a complaint, it will notify the employer in writing about the opening of an investigation and it will request in writing information and documentation relating to the complaint. The documents may be subpoenaed if an employer refuses to cooperate.

OSC has 120 days to determine if the charge is true and whether to bring a complaint. If it makes this determination, it will issue a Notice of Intent to Fine or, instead, a Warning Notice. It can also send a letter to the complaining party during that 120 day period indicating it will not file a complaint.

The charging party may file a complaint directly with the Chief Administrative Hearing Officer within 90 days of getting the notification from OSC that it is not pursuing the case.

Employers who wish to contest the fine must file a written request for a hearing before a hearing officer or judge.

How many complaints does Office of Special Counsel for Immigration Related Unfair Employment Practices receive each year?

In 2007, OSC received 277 charges that it reviewed. OSC also handled 21,000 hotline calls. One half of all charges were voluntarily resolved.

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3. Ask Visalaw.com

If you have a question on immigration matters, write *Ask-visalaw@visalaw.com*. We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

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Q - Is your credit checked when applying for naturalization?

A - No, it is not.

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Q – Suppose someone is provided an offer of employment for six months, with a 2 ½ year extension of the contract if the probationary period is successful. Can the employer ask for a three year H-1B approval if the employer agrees to give the employee three to six months notice if the contract is going to be terminated?

A - This should be permissible, but the employer would have to agree to pay the return airplane ticket home for the employee if the employee ends up going home.

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Q - I am a Canadian, and my husband is a Chinese nationality. If I got an E-2 visa as a principle, can my husband work for my E-2 company? I know he can apply for an open work permit?

A - Yes, that should be permissible if your husband works on the basis of his employment card.

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Q - I have my I-140 approved and my priority date is March 8, 2006. I have submitted my I-485 in July 2007 and have a receipt date from the Nebraska Service Center set to Sept. 18, 2007.

Right now the "Department of State" has set the visa dates to "Unavailable" in my category, which is EB-3. Are the cases that were filed still being processed? Or is the process ended till September 30, 2009? Is the Nebraska Service Center going to keep processing cases or does "Unavailable" mean that they have no visa numbers to give anymore?

A - “Unavailable” means no new I-485 cases will be accepted in the EB-3 category until visas are again available. And pending cases will not be approved until numbers are available again. As for whether cases will be worked, my assumption is yes, though I have not seen the question addressed yet.

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Q - I became a naturalized citizen in 2003. After that, I brought my 7 year old son as a lawful resident in 2005. Is he a US citizen?

A - The child is a U.S. citizen if:

1) the child is under 18 years old;
2) the child has been admitted to the U.S. as a Legal Permanent Resident (green card holder);
3) the child is living with you and you have legal custody of the child;
4) you are a U.S. citizen, and;
5) you are the child's biological parent.

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4. Border and Enforcement News

The Associated Press reports that, despite a gradual decrease in reported border crossings over the past year, undocumented immigrant deaths along the US-Mexico have increased by nearly 7 percent in the past six months, according to Border Patrol statistics.

Immigration advocate groups said the number of deaths directly correlated to increased enforcement along the US-Mexico border. The increased death toll was "the direct result of more agents, more fencing and more equipment" said the Rev. Robin Hoover, founder of the Tucson-based Humane Borders, an organization that provides water stations for migrants crossing the Arizona desert. "The migrants are walking in more treacherous terrain for longer periods of time, and you should expect more deaths."

Border Patrol spokesman Omar Candelabra, who represents the heaviest-travelled Tucson sector, which saw a 30 percent increase in deaths from the same period a year before, said the agency could not explain why the death count has increased. Hoover said locations where many recent immigrant fatalities had been farther away from roads than in previous year, indicating the migrants were taking greater risks to avoid capture. "So they're going around the fences, the technology, and where the agents are," he said. "And the further you walk from a safe place, the more likely a broken ankle becomes a death sentence."

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The Arizona Republic reports that Arizona officials and ICE agents stopped a human trafficking ring in Glendale, Ariz., this month, leading to the arrests of 10 suspected human smugglers, as well as the rescue of nearly 30 undocumented immigrants who were held against their will. The smugglers are suspected of attempting to extort money out of the families of the undocumented immigrants, threatening to physically harm them.

Arizona Department of Public Safety spokesman James Warriner stated that many of the victims had already had paid $1,500 to $2,000 to be transported across the border. "Once they get here, (the smugglers) star extorting them by threatening to use violence…to get more money out of the families before they'll send them on to the next destination," Warriner said.

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Latinos' perception of the US legal system is one of mistrust among some, with a new report indicating that fewer than half of Hispanics in the US believing they will be treated fairly by the police or the court system. The report, released earlier this month by the Pew Hispanic Center, highlights increasing skepticism America's fastest-growing minority group has towards the sharp rise in immigration enforcement.

Specifically, 46% of the 2,015 Hispanics that participated in the survey were confident police would treat them fairly compared to other racial or ethnic groups.

Mark Hugo Lopez, associate director of the center, told *The Associated Press* that the results stem in part from Hispanics' fears of immigration prosecutions as well as a perception that police will be ineffective in helping them if they are victims of a crime. "Hispanic exposure to all parts of the criminal justice system has risen even faster than their rising share of the US adult population," he said.

The Pew report is available online at http://pewhispanic.org/reports/report.php?ReportID=106.

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The results from a recent Seton Hall Law School study indicate that a number of New Jersey police officers are abusing a 2007 directive by the state's attorney general, *The New York Times* reports. Specifically, the actions include questioning the immigration status of Latino drivers, passengers, pedestrians and even crime victims, reporting them to federal immigration authorities and jailing some for days without criminal charges.

The New Jersey directive ordered police to inquire about immigration status when arresting someone for an indictable crime or for driving while intoxicated. In the first six months after the directive was issued, the police referred 10,000 people to ICE, but only 1,417 of them were charged with immigration violations.

"The data suggests a disturbing trend towards racial profiling by the New Jersey police," said Bassina Farbenblum, a lawyer with the law school's Center for Social Justice, which gathered details of 68 cases over the past nine months in which people were questioned about their immigration status for no apparent reason, or after minor traffic infractions. Of the 68 cases, 65 involved Latinos, including seven instances in which Latinos who sought police help were questioned abou their immigration status, a direct violation of the directive.

In once case cited, police officers questioned a man at a Camden, NJ, train station after asking to see his ticket. Unable to show one he was arrested and held for seven days before being turned over to ICE. In another case, a man was transferred to immigration agents after being held for four months, cited only for driving without a license.

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The Salt Lake City Police Department has decided not to participate in a new state law that would allow local officers to enforce federal immigration law, *The Salt Lake Tribune* reports. The SB81 immigration enforcement provision, scheduled to take effect July 1, is completely optional, and has not been met with widespread acceptance by Utah police departments like the ordinance's framers had hoped for. "It's clearly voluntary by a law enforcement agency," said Utah Attorney General Mark Shurtleff. "Most law enforcement agencies are saying, 'No, we have to work with these other people regardless of their immigration status."

Salt Lake City Police Chief Chris Burbank defended his department's decision, saying there are good reasons why his agency will not participate in cross-deputization with ICE agents "If we start taking action based solely on [immigration] status, we would be making enforcement decisions based on race and ethnicity," Burbank said.

Salt Lake City Mayor Ralph Becker released a statement backing up Burbank's decision. "Salt Lake City police officers will not begin to enforce immigration law," Becker said. "Police cannot deter or solve crime if victims and witnesses are afraid to cooperate with the police because they might be deported."

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The US State Department has taken steps to tighten controls after an undercover agent for the Government Accountability Office was able to obtain US passports using fraudulent information last month, according to *The Washington Post*. In a GAO report released last week, State Department officials "agreed that our investigation exposed a major vulnerability in the department's passport issuance process and acknowledged that they have issued other fraudulently obtained passports in the past."

In response to the GAO's findings, the State Department suspended the adjudication authority of the four passport specialists who approved the phony applications. An audit of their past work is underway, and they are being given additional training. A State Department spokesman admitted that the GAO "certainly opened our eyes to problems," and that it plans to create more secure encryption measures for sensitive personal data, like social security numbers.

The full GAO report is available at: http://www.gao.gov/new.items/d09583r.pdf.

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5. News From the Courts

The US Supreme Court has made it easier for undocumented immigrants seeking to avoid deportation to get another chance at a court hearing. In *Nken v. Holder*, the court decided the case of Jean Marc Nken, a Cameroonian citizen who came to the US in 2001 and did not leave when his visa expired. According to *The Associated* Press, Nken has since applied for asylum, married a US citizen and had a child born in the US. However, immigration authorities and federal courts have repeatedly rejected his claims.

The federal courts split on what standard to apply to requests to temporarily block deportation while taking another look at immigration cases. The 4th US Circuit Court

of Appeals applied a tough standard to Nken's request for a stay, sending it to SCOTUS. In a 7-2 decision, Chief Justice John Roberts overturned the appeals court and ordered *Nken v. Holder* to be sent back for reconsideration.

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The Associated Press reports that a US District Judge has ordered DHS to reopen the cases of 22 people who were denied green cards because their American spouses died during the application process. Judge Christina A. Snyder ruled the "widow penalty" doesn't require that immigrants' permanent residency applications be denied simply because their American spouse has died. Snyder, citing a 2006 decision by the 9th US Circuit Court of Appeals, ruled that applicants do not lose their status as spouses of US citizens if the death occurs before the government rules on their applications.

The decision, if made final, could positively affect over 200 people across the country who have been affected by the penalty, said Brent Renison, the attorney who filed the class action suit. "The case is very significant because it's the first that follows the circuit court decision and gives guidance to the agency on what it can and cannot do in these situations," Renison said of the decision.

A DHS spokeswoman said she could not comment on the lawsuit, but she said addressing the widow penalty has been a priority in the department since new DHS Secretary Janet Napolitano took office earlier this year. "A review of our legal, legislative, and other possible means to address the problem is underway," she said.

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A federal judge dismissed a lawsuit that sought to use anti-mob legislation to stop a New Jersey property manager from renting apartments to undocumented immigrants, *The Associate Press* reports. Attorneys for the Federation for American and Immigration Reform, a group that calls for stricter immigration reform, argued that Connolly Properties, a large landlord with apartment buildings in New Jersey and Pennsylvania, rented so many apartments to undocumented immigrants that it constituted harboring under federal racketeering laws.

Judge William J. Martini dismissed the case. "The crux of Plaintiff's argument is that renting apartments to illegal aliens constitutes racketeering activity because it constitutes harboring, encouraging, or inducing an illegal alien in violation of the INA, he wrote in his decision. "However, no court in this circuit or in any other has ever found this to be the case … renting an apartment to an alien does not amount to harboring, encouraging, or inducing."

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6. News Bytes

A study published earlier this month reveals that Hispanics comprised nearly half of over 1 million people who became US citizens last year, *The Associated Press* reports. The study, conducted by the National Association of Latino Elected and

Appointed Officials, indicates that the number of Latinos who became Americans in fiscal year 2008 had doubled over the previous year, to 461,317.

NALEO based its findings on Homeland Security Department data on the number of new citizens last year who emigrated from predominantly Spanish-speaking countries. The DHS report attributed the record number of new citizens to the nearly 1.4 million citizenship applications it received in 2007. DHS attributed this to a rush to beat the sharp hike in citizenship application fees, as well as increased outreach by Hispanic media, community groups and a union with high immigrant membership, all of which urged eligible permanent residents to pursue citizenship.

"Latinos who naturalize are eager to demonstrate their commitment to America by becoming full participants in our nation's civic life," said NALEO president Arturo Vargas. "Despite the record number of naturalizations, there are still millions of eligible legal permanent residents who have not yet applied for US citizenship or who encounter barriers in the naturalization process," he added.

The NALEO report is available online at: http://www.naleo.org/pr/pr04-06-09.html.

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The Obama administration recently named Alan Bersin, a former Justice Department, as "border czar," a position designed to tackle the increasing drug-related violence and undocumented immigration problems along the US border with Mexico, *Politico* reports. The announcement occurred the day before President Obama embarked on a summit to Mexico to meet with South American leaders.

Bersin has relevant experience for the position; under the Clinton administration Bersin served as a US attorney for San Diego, and was appointed by Attorney General Janet Reno to focus on border law enforcement. Bersin was criticized by some immigrant groups for his role in Operation Gatekeeper, a federal government operation to crack down on undocumented immigration along the westernmost portion of the US-Mexico border. The program was a success at reducing uncontrolled immigration through that area, but forced smugglers of drugs and humans to shift eastward.

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Both New York senators said they plan to ask Congress to grant posthumous citizenship to victims of the recent Binghamton, NY massacre, *The Associated Press* reports. Democratic Sens. Chuck Schumer and Kirsten Gillibrand said that under legislation they are proposing, the honorary citizenship would be backdated so the victims would be considered citizens at the time of death.

The shooting, which occurred in an immigration center in upstate New York, claimed the live of 13 victims who were striving to become citizens and studying English when they were killed by the gunman. "We hope to honor the lives of those who were working so hard to become citizens and achieve the American dream," Gillibrand said.

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7. International Roundup

The UK Government has been advised to remove nearly 300,000 skilled jobs from the list of positions open to workers from outside the European Union, *The Herald Sun* reports. Its Migration Advisory Committee (MAC) says more than 100,000 skilled construction jobs, including managers and quantity surveyors, on large property projects should immediately be closed to foreign applicants.

Social workers involved in adult care are also set to be removed from the official shortage occupation list. But advisers say orchestra musicians, high-level contemporary dancers and special-effects animators for film and video should be added to the list of shortage skilled occupations so more overseas staff can be recruited.

MAC chairman David Metcalf said the new shortage list took account of the impact of the global recession on Britain, cutting the number of jobs open to skilled workers from outside the EU from 800,000 to 530,000. “We have looked critically at the evidence regarding the occupations under review and made recommendations which balance the needs of the UK workforce against those of employers,” Metcalf told *The Guardian*.

Home secretary Jacqui Smith was expected to implement the recommendations, which form part of the new points-based immigration system.

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The Japan Times reports that massive layoffs from the current economic crisis are falling heavily on foreign workers, many of whom are opting to leave the country to seek work back home. But for those who stay, there remain the difficulties of adapting to Japanese society, limited educational opportunities for their children and lack of medical support. Yet a rapidly aging Japan is unlikely to long remain the world's second-largest economy without them.

'Japan's immigration policy has always been a patchwork. We need to have proper laws and regulations in place when accepting people from abroad,' Susumu Ishihara, 57, president of the Japan Immigrant Information Agency, said during a recent interview with *The Japan Times*. Motivated by a sense of urgency, Ishihara recently spent ¥5 million of his own money to launch a quarterly Japanese-language magazine, called Immigrants, focusing on immigration issues. The goal is to provide more information on foreigners living here to Japanese people to bridge the gap between the two sides.

Counting some 600,000 Chinese and 590,000 Koreans, Japan was home to 2.15 million foreigners as of 2007, nearly twice as many as in 1990, according to the Justice Ministry. Separately, current Chief Cabinet Secretary Takeo Kawamura established a lawmakers' group to create a bill to support schools for foreigners living in Japan. In addition, the Cabinet Office set up an office especially to deal with problems facing foreigners here earlier this year.

'For a long time, the issue of foreigners here has been regarded as taboo in the political arena because working for foreigners' rights won't help politicians get elected, and it may even anger some Japanese who don't want to accept foreigners. So, I welcome such moves by politicians,' said Ishihara, who is also an expert on Korean residents in Japan. Behind such moves is the growing uncertainty about

Japan's future. Ishihara notes Japan's population is expected to drop below 90 million by 2050, 30 million to 40 million less than the 2005 level.

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One in 10 jobs is expected to be slashed from Australia's Immigration Department in this month's federal budget, according to *The Brisbane Times*. Despite the recent surge in boat arrivals, about 700 jobs will be cut from the department, which has 7000 staff in 100 locations in Australia and worldwide. The skilled migrant intake — slashed by 14 per cent in March to protect local jobs — is likely to be cut further in the budget. But Australia's refugee intake will increase by 250 to 13,750, as projected in last year's budget.

The department will also have to shave more than $50 million from its $1.1 billion annual budget, $20-$30 million from IT savings alone. But despite the savings required, the department has to spend millions of dollars processing asylum seekers on remote Christmas Island, which is 2600 kilometers from Perth. More than 200 people, including interpreters, lawyers and 38 department staff are on the island to support the 270 asylum seekers. The cost of a return ticket on a commercial flight to Christmas Island from Perth is almost $2000.

The Government imposed a 3.25 per cent 'efficiency dividend' this financial year, requiring each department to cut spending by that percentage. With a drop in the skilled migration intake, it is believed many of the cuts to Immigration Department staff could fall in visa-processing areas.

Less than a year after increasing the skilled migrant intake to record levels, the Rudd Government responded to the global financial crisis by reducing the intake from 133,500 to 115,000 for the 2008-09 financial year. That will be cut further in the budget, believed to be to fewer than 110,000. Employer applications for 457 visas have also slumped because of the global financial crisis.

Immigration Department secretary Andrew Metcalfe warned staff in March in a leaked memo that the department needed to reduce its budget. 'We have to start acting now to identify savings and reduce expenditure,' he said.

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8. Siskind's Legislative Update

The content in Legislative Update is crossposted from Siskind Susser's blogs, and follows the federal and state laws, regulations, and legislative proposals that impact the lives of immigrants. Check out our blog index for listings of the latest blog entries.

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NEBRASKA TOWN TABLES IMMIGRATION BILL AND REFERENDUM

The Fremont City Council has decided to indefinitely postpone consideration of a bill and a referendum that would bar hiring illegally present immigrants. City leaders argued that the measure is barred under federal law.

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MISSOURI HOUSE PASSES BILL TO REQUIRE GOV'T AGENCIES TO USE E-VERIFY

The bill passed by a 125-30 margin and now awaits consideration in the Senate.

*****

MISSOURI SENATOR EMBRACES TARGETING EMPLOYERS OF ILLEGALLY PRESENT IMMIGRANTS

The Houston Chronicle reports that Missouri Senator Claire McCaskill is backing the White House plan to crack down on illegal immigration by targeting unscrupulous employers rather than the immigrant workers.

*****

GEORGIA LEGISLATURE SENDS E-VERIFY BILL TO GOVERNOR

Georgia's Legislature has passed House Bill 2 which would require state employers and all businesses contracting or subcontracting with the state to use E-Verify.

The Atlanta Journal Constitution reports that Governor Sonny Perdue has not made up his mind yet whether he'll sign the bill.

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TEXAS EMPLOYERS PUSH BACK ON PROPOSED SANCTIONS BILL

A Texas television station reports on industry groups fighting Senate Bill 357 which would sanction companies that hire illegal immigrants and pay them in cash.

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SC COUNTY ORDINANCE STALLS WHEN IMMIGRATION SANCTIONS ARE ADDED

The Greenville News (SC) reports on efforts to pass a county ordinance that would require all businesses outside municipal limits to pay a $15 annual fee to register with the county. An attempt by Councilman Sid Cates to add a provision that would revoke a business license if a business employs illegally present immigrants and requiring businesses to sign a statement under penalty of perjury stating that they don't has drawn substantial opposition and the bill has now stalled.

*****

COURT STRIKES DOWN OREGON TOWN'S SANCTIONS LAW

A Colombia County, Oregon judge has thrown out a county ordinance that allows the county to fine or shut down businesses caught hiring illegally present immigrants. Judge Ted Grove found that the measure was unenforceable because it conflicts with federal and state law.

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COURT SIDES WITH RHODE ISLAND GOVERNOR IN E-VERIFY POLICY

A superior court in Providence, Rhode Island has ruled that Governor Carcieri's order requiring employers doing business with the state use E-Verify is legal. The state's ACLU chapter filed the suit saying the governor acted outside his gubernatorial authority. The ACLU has vowed to appeal the decision to the state's Supreme Court.

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9. Notes from the Visalaw.com Blogs

Greg Siskind's Blog on ILW.com

- Migration Policy Institute Reviews E-Verify
- Obama Promises to Push for Immigration Reform This Year
- White House Gearing Up for Employer Immigration Compliance Crackdown
- Extremists Blaming Immigrants for Flu
- Why is State Department Using Immigration Policy to Provide Foreign Aid to China?
- Pro-Immigration Specter Switching Parties
- US Consulates in Mexico Largely Shut Down Visa Operations until May 6th
- *Times:* Doctor Shortage Threatens Obama's Health Care Reform Plans
- ICE Still Deporting Americans (and not Apologizing)
- Netherlands Citizens to be Eligible for Expedited Entry to The US
- Senate Set to Start Hearings on Comprehensive Immigration Reform
- Poll: Americans no Longer All That Concerned about Immigration
- Heroic Translator Denied Visa to Come to the US
- Immigration Humor: Colbert Interviews Sheriff Joe
- Tea Party Interview with "Man Who Shot Two Illegals Burglarizing Home"
- Reporters who Exposed Sheriff Joe Win The Pulitzer Prize
- 21,000 H-1B Visas Still Unclaimed
- 1,000,000 People Now on US Terror Watch List

The SSB I-9, E-Verify, & Employer Immigration Compliance Blog

- Nebraska Town Tables Immigration Bill and Referendum
- White House Gearing Up for Employer Immigration Compliance Crackdown
- Missouri House Passes Bill to Require Gov't Agencies to Use E-Verify
- Missouri Senator Embraces Targeting Employers of Illegally Present Immigrants
- Postville Owner Seeks Dismissal of Charges

- Law.com Analyzes Impact of Asset Forfeitures on American Employers
- Georgia Legislature Sends E-Verify Bill to Governor
- Texas Employers Push Back on Proposed Sanctions Bill
- SC County Ordinance Stalls When Immigration Sanctions are Added
- Postville, Iowa Plant Manager Pleads Guilty
- Court Strikes Down Oregon Town's Sanctions Law
- Sanctions Supporters in Washington State Trying to Get 250,000 Signatures by July 3rd

Visalaw Healthcare Immigration Blog

- Nursing Green Card Black Out Exacerbates Nation's RN Shortage
- *Times*: Doctor Shortage Threatens Obama's Health Care Reform Plans
- Need for Nursing Immigration Bill Grows More Acute
- Number of Residence Slot Matches Increasing
- New Immigrants Pose Challenge for Hospitals
- New Study Shows Not Enough Nursing Program Applicants Being Accepted
- CGFNS and FCCPT Weigh In Against USCIS CSP PT Decisions

Visalaw Investor Immigration Blog

- Ohio Community Gets Ready for EB-5 Program
- New EB-5 Regional Center Approved for South Florida
- CMB Lawsuit Against California City Proceeds
- EB-5 Has Potential for South Florida
- Colorado Congressman Pushing EB-5 Reforms
- Victorville, CA EB-5 Program Subject of Legal Fee Dispute
- Vermont EB-5 Program Profiled in Television News Story

Visalaw Fashion, Sports, & Entertainment Blog

- Soccer Helps Immigrant Kids Acculturate
- Lebanese Filmmaker Granted Asylum in US
- Former Baseball Player Faces Deportation
- USCIS Works Out Solution for 10 Year Limit on P Athletes

Visalaw International Blog

- Canada: Ottowa Sued Over Marriage Fraud
- Canada: Supreme Court Restores Deportation Order Against Street Racer
- Canada: More Controversy over Former Board Member
- Canada: Bizarre Case Points to Systemic Flaws

The Immigration Law Firm Management Blog

- Lawyers in a Hurry
- Hey! Paste It
- Wiki Wiki
- Best of CES: Telephone and PDA Devices

- BEST of CES: Cameras
- Sending Big Files

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10. State Department Visa Bulletin for May 2009

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during **May**. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by **April 8th** in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits.

Only applicants who have a priority date **earlier than** the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First : Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second : Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third : Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth : Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT-BASED PREFERENCES

First : Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second : Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third : Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth : Certain Special Immigrants: 7.1% of the worldwide level.

Fifth : Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (**NOTE:** Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

Family	**All Charge-ability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	22SEP02	22SEP02	22SEP02	08OCT92	01AUG93
2A	08OCT04	08OCT04	08OCT04	01APR02	08OCT04

2B	15NOV00	15NOV00	15NOV00	01MAY92	01FEB98
3rd	08SEP00	08SEP00	08SEP00	22OCT92	22JUN91
4th	08JUN98	22MAR98	08JUN98	01MAY95	08JUL86

***NOTE:** For **May**, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01APR02. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01APR02 and earlier than 08OCT04. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Employment -Based					
1st	C	C	C	C	C
2nd	C	15FEB05	15FEB04	C	C
3rd	U	U	U	U	U
Other Workers	U	U	U	U	U
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105 - 139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19,

1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This reduction has resulted in the DV-2009 annual limit being reduced to 50,000**. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For **May**, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off this number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	32,400	Except: Egypt: 19,150 Ethiopia 17,750 Nigeria 11,550
ASIA	22,800	
EUROPE	24,900	
NORTH AMERICA (BAHAMAS)	10	
OCEANIA	825	
SOUTH AMERICA, and the CARIBBEAN	1,000	

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN JUNE

For **June,** immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **below** the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	39,600	Except: Egypt 20,650 Ethiopia 19,500 Nigeria 12,750
ASIA	30,350	
EUROPE	28,000	
NORTH AMERICA (BAHAMAS)	15	
OCEANIA	930	
SOUTH AMERICA, and the CARIBBEAN	1,100	

D. EMPLOYMENT FOURTH PREFERENCE CERTAIN RELIGIOUS WORKER AND EMPLOYMENT FIFTH PREFERENCE INVESTOR PILOT PROGRAM CATEGORIES

Legislative action which occurred during March has extended the Employment Fourth preference Certain Religious Workers, and Employment Fifth preference Investor Pilot program categories until September 30, 2009.

E. UNAVAILABILITY OF THE EMPLOYMENT THIRD PREFERENCE AND EMPLOYMENT THIRD PREFERENCE "OTHER WORKER" CATEGORIES

The cut-off dates for the Employment Third and Third preference "Other Worker" categories were held and the retrogressed in an effort to bring demand within the average monthly usage targets and the overall annual numerical limits. Despite these efforts, the amount of demand received from

Citizenship and Immigration Services Offices for adjustment of status cases with priority dates that were significantly earlier than the established cut-off dates remained extremely high. As a result, these annual limits have been reached and both categories have become "Unavailable."

Visa availability in these categories will resume in October, the first month of the new fiscal year.

F. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:
http://travel.state.gov

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:
Subscribe Visa-Bulletin *First name/Last name*
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address :

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

VISABULLETIN@STATE.GOV

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11. Health Care Employers and Immigration Compliance: What You Need to Know, by Greg Siskind

[Note: The following article by Greg Siskind was recently printed by Bloomberg Law Reports, and was later republished in the latest issue of the Visalaw.com Health Care Immigration Newsletter].

In 1986, Ronald Reagan signed into law the Immigration Control and Reform Act. The new law is remembered for the so-called "amnesty" that allowed nearly three

million immigrants illegally residing the country to gain permanent residency. The law had a flip side as well. It created a system requiring employers to act as deputies of the federal government by checking the identification and work authorization documents of all newly hired employees through the use of a new government form – the I-9. The politically sensitive topic of how to deal with the future needs for immigrant workers was set aside during the 1986 legislative debate.

The plan for legalizing millions of immigrants and, in exchange, making it a lot tougher for employers to hire illegal workers was supposed to provide a lasting solution to the immigration dilemma facing the country. But almost instantly it became obvious that illegal immigration was continuing and that IRCA was not having the intended effect of preventing unauthorized workers from finding employment. And that's likely because the immigrants legalized in the program had already been absorbed in to the economy.

During the prosperous '90s, the public largely ignored the issue of immigration. But the prosperity of those years also led to faster job growth than the domestic supply of workers could match. And so the number of illegally present immigrants shot up to an estimated 12 million. Employer enforcement during the decade remained largely theoretical as the number of worksite raids and government audits of I-9 records remained very low.

The 9/11 terrorist attacks and the economic downturn that followed marked the beginning of a new anti-immigrant wave in the country that led to efforts by Congress to impose strong new immigration enforcement laws. President Bush, like Ronald Reagan nearly two decades before, tried to push through an immigration reform deal that would legalized workers and also dramatically ram up immigration enforcement. But those efforts failed and the Bush Administration instead decided to address employer compliance first and then when illegal immigration was demonstrably under control, try again for legalization.

The result has been a dramatic crackdown on employers that is making headlines on a daily basis. The numbers tell the story. In federal fiscal year 2002, there were 25 criminal arrests and 485 administrative arrests associated with worksite immigration enforcement. In fiscal year 2008, there were 1,103 criminal arrests and 5,184 administrative arrests.

While people may think that immigration enforcement is something only of concern to construction companies and restaurants, all employers – including health care employers – need to be cognizant of the new enforcement environment and a variety of new laws and regulations.

Here are a couple of examples of employer compliance nightmares that have come across my desk in the very recent past:

Example A

Hospital X employs a Canadian nurse who entered the US five years ago on a TN visa. The nurse's stay expired after a year, but the nurse didn't bother to renew her authorized stay in the US and the hospital didn't bother to ask about it. Consequently, the nurse was working four years illegally before the hospital

discovered the problem when the nurse brought the matter to her employer's attention.

The hospital had an I-9 on file for the nurse, but it failed to re-verify the nurse's immigration status as required under IRCA. So in addition to the nurse being in illegal status, the hospital had also violated the rule requiring re-verification of the nurse's visa paperwork on her form I-9.

The consequences are serious. First, had the hospital re-verified the I-9 in a timely manner, they would have been alerted to the need to file an extension of the TN visa, something that would have kept the nurse in status and working legally. Second, an IRCA violation would have been avoided. And finally, and perhaps most worrisome, the hospital may be liable to being found to have knowingly employed the nurse illegally under a theory of "constructive knowledge". The hospital is located in a state that now allows for the revocation of a business license for an employer that knowingly employs illegally present workers. So, at least in theory, the hospital's license to operate could be pulled.

Example B

Hospitals and health care employers are also frequently bought and sold in corporate acquisitions. Unfortunately, immigration is rarely addressed in the due diligence. However, an I-9 review conducted as part of that process can help identify visa transfers that must occur prior to closing or, in some cases, workers who will be rendered out of status by virtue of the transaction and which may not be transferred.

In an asset acquisition of Hospital X, an I-9 audit reveals that there are a dozen doctors on H-1B visas employed by the hospital. Hospital X is a non-profit employer affiliated with a local university and the H-1B physicians are exempt from the H-1B cap as a result. But the acquiring employer is a for-profit entity and the new employer does not want to assume any liabilities from the selling company. Unfortunately, the new employer may not be eligible to file transfer applications. And at the moment of the signing of the closing documents, the twelve doctors are potentially illegal aliens. Aside from the immigration mess, one can reasonably foresee litigation from some seriously damaged physicians.

Health care human resource managers need to be cognizant of a number of developments in the immigration employer compliance arena. The following is a roundup of the hot topics in the field.

I-9s

Effective April 3, 2009, USCIS will be requiring employers to complete a new Form I-9. The form was originally set to take effect on February 3, 2009, but the new Obama Administration issued a 60 day moratorium on the implementation of all new rules. The new I-9 is largely similar except that it removes certain kinds of expired documents from the list of acceptable forms of proof of employment authorization. The new form can be found online at http://www.uscis.gov/I-9.

A big trend emerging in I-9s is the switching over to electronic I-9 systems from the traditional paper formats. USCIS began permitting the use of electronic I-9 systems when it issued a regulation in 2004 allowing for such systems for the first time. There are now more than a dozen electronic I-9 vendors offering systems that involve either the installation of software on a company's computers or a web-based subscription setup. For a list of vendors and contact details, email me at gsiskind@visalaw.com.

There are a variety of benefits that make electronic I-9 systems worth considering including:

- The systems generally prevent employees and employers from signing out of a form until it s properly completed
- Some of the systems are "intelligent" and ensure that the answers in the form are consistent (such as allowing only the appropriate document to be provided for Section 2 by the worker based on the status they listed in Section 1)
- Some systems allow for certain sections of the form that are the same from applicant to applicant to be pre-filled to save time.
- Some systems have help buttons located by each question to help employees and employers figure out how to properly compete the form
- Employers with multiple sites can more easily monitor I-9 compliance at remote locations
- Reverification is automated and employers are less likely to incur liability for failing to update an I-9. Some systems send emails when it is time to re-verify. Some of the systems also track visa and I-94 expiration dates.
- Employers can integrate the system with E-Verify so that the entire process is automated
- Using an electronic I-9 system reduce the risks of identity theft from the robbery of paper I-9 records (something I have recently had reported by more than one client)
- An electronic I-9 system can make it easier to respond quickly to an ICE audit.
- Electronic I-9 systems can be integrated with payroll and employee database systems which can make it easier to determine when I-9s can be purged.
- Instructions can appear in multiple languages making it easier for employees with weak English skills to complete the form.
- Electronically retained I-9s are more easily searchable and can save time over having to track down a specific employee's paper I-9.

There are some disadvantages worth noting. First, the systems are not 100% secure (though the law requires vendors to incorporate security measures). The systems don't totally stop identity theft since a person can present doctored identification and employment authorization paperwork. Paper I-9s are free (aside from costs for storage, training, etc.). And like any web-based software product, there are risks if an employer goes out of business. An employer should be sure to have back ups on their own system to avoid problems.

E-Verify

You may have seen advertising from the Department of Homeland Security touting the E-Verify electronic status verification system (formerly called the Basic Pilot Program). E-Verify is a free, Internet-based system that confirms the legal status of

newly hired employees. The system, a creation of the 1996 Immigration Act, compares Social Security Number and DHS immigration databases to the employee's name and other Form I-9 information. The system is fast – it takes just a few seconds to process – and will either confirm an employee's authorization to work or issue a tentative non-confirmation.

The controversy in the system largely centers around the accuracy of the databases. A recent report indicated that a high percent of naturalized US citizens show up in the system as being unauthorized to work, though DHS claims they have much improved the system. Many employers are reluctant to use the system because they agree to allow DHS and the Social Security Administration to make unannounced inspection visits.

E-Verify has been in the news a great deal over the last few months. The authorization for the program expired last September and Congress only saw fit to authorize it for six more months. As of the writing of this article, it is not clear whether the program will be extended beyond its March 6, 2009 authorization date.

Supporters of the program attempted to push through a measure that would have mandated E-Verify be used by employers receiving stimulus money in the giant package approved by the Congress in February 2009. In fact, such a provision passed in the House only to be stripped out in conference.

President Bush issued an Executive Order in 2008 mandating a high percentage of federal contractors – estimated at 167,000 employers – use E-Verify as a condition of their government contract. The regulation implementing that order has been challenged in the courts and the implementation date for the rule has now been pushed back to May 21, 2009. The rule covers contractors with contracts worth at least $100,000 and their subcontractors with contracts worth at least $3,000.

While DHS has not released a breakdown by industry of how many contractors are to be affected by the new rule, hospitals and health care companies will no doubt be affected in large numbers. Many, for example, have significant contracts to provide health care services to federal employees.

State laws

Over the last two years, nearly two dozen states have passed employer sanctions laws. And the pace of state lawmaking activity in this area has not slowed this year with a number of additional states considering such legislation.

The laws themselves are the subject of great controversy since many argue that the Constitution preempts states from regulating immigration. And, indeed, many of the tougher laws are now the subjects of battles in the courts. Nevertheless, employers need to assume that the laws are going to survive.

The laws vary, but there are a few common themes:

- Barring employers that knowingly hire unauthorized immigrants from doing business with the state

- Revoking E-Verify use by all employers, just contractors or just public employers
- Subjecting employers to fines or jail time for knowingly hiring unauthorized workers
- Creating a private right of action against employers for workers displaced by an unauthorized immigrant

For an overview of activity in each state, see the attached chart.

No match rule

In August 2007, the Bush Administration released a rule describing the obligations of employers who receive letters from the Social Security Administration that employees' names do not match the Social Security Numbers on record at the SSA or who receive a letter from DHS after an I-9 audit indicating that their workers may not be authorized to work. The rule provides a "safe harbor" procedure for employers to avoid a finding of having constructive knowledge that an employee is unauthorized to work by virtue of having received a no-match letter.

Almost immediately after the rule was released, a lawsuit was filed jointly by a group of organizations that included the US Chamber of Commerce, the American Civil Liberties Union and the AFL-CIO. A California US District Court judge agreed that DHS failed to meet administrative law requirements in the way it issued the rule and he enjoined the agency from implementing the regulation. DHS attempted to address the judge's concerns and re-issued a final regulation last fall, but the judge has not dropped the injunction (arguing that it wanted to give the new President an opportunity to weigh in). A final decision in the case could come this spring.

Assuming the Obama Administration is interested in proceeding with the regulation (and there is no indication that it is not interested in issuing the rule), employers will be required to:

- Within 30 days, check its records to see if the error was the employer's fault
- If this doesn't resolve the error, the employer must notify the employee within 30 days and the employee should attempt to correct the problem.
- If 90 days pass without a resolution of the discrepancy, the employer must have the employee complete a new Form I-9 (without a social security card being used to prove employment authorization).
- If the discrepancy is not resolved and the employee's identity and work authorization are not verified, the employer must either terminate the employee or face the risk that DHS will find constructive knowledge of lack of employment authorization. And an employer in this instance would face potential enforcement action from DHS.

Some experts believe as many as 4,000,000 workers could be working under false social security numbers, a number of whom are likely working for the nation's health care employers.

Conclusion

Recent statements by Secretary of Homeland Security Janet Napolitano indicate that the new President will continue President Bush's tough policies on employer compliance with the nation's immigration laws. Even if a major immigration reform

bill passes legalizing millions of illegally present immigrants, this will likely be paired with even tougher employer enforcement rules. The nation's health care employers have so far not been in the headlines, but they are far from immune from being subject to tough enforcement measures. And the environment is likely to get even tougher.

State Immigration Employer Compliance Laws

Type of Law	States
General bar on employers knowingly hiring unauthorized immigrants	AZ, CO, MS, MO, NH, SC, TN, WV
Revocation of business licenses of employers knowingly hiring unauthorized employees	AZ, MS, MO, SC, TN, VA, WV
Requires all employers in the state to use E-Verify	AZ, MS, SC
Requires all public employers in the state to use E-Verify	AZ, GA, MN, MO, MS, NC, RI, SC, VA
Requires all public employers to use either E-Verify or an equivalent government or third party status verification	OK, UT
Requires employers contracting with public employers to use either E-Verify or an equivalent government or third party status verification	OK, UT
Requires employers contracting with public employers to use either E-Verify or possess a qualifying state drivers license	SC
Bars employers in the state from using E-Verify	IL
State agencies are barred from contracting with employers who knowingly employ unauthorized immigrants	AR, CO, ID, MA, MO, SC, TN
Requires businesses contracting with state agencies to certify employees are legal	AR, CO, MA, MO, OK, SC, TN, VA
Requires business contracting with state to use E-Verify	AZ, CO, GA, MN, MO, MS, RI
Requires companies receiving subsidies or economic incentives from state agencies to certify all employees are authorized to work	CO, IA, MN, MO, PA, TX
Requires companies receiving economic incentives to use E-Verify	AZ
Employers using E-Verify gave favorable treatment in securing subsidies or economic incentives from state agencies	MN
Requires that public employer's employees by US citizens, permanent residents or have the right to work in the US for any employer	HI
E-Verify is a safe harbor protecting employers from prosecution for knowingly hiring unauthorized immigrants	AZ, MS, MO, OK, SC, TN
Employers requesting more or different documents than required under IRCA's Form I-9 are committing a civil rights violation	IL
Requires employers using E-Verify to sign a state law attestation	IL
Requires employers post a notice about state laws if they use E-Verify	IL
In considering a bid, a state agency may consider a potential contractors' use of non-citizens employees and whether the use of such employees would be detrimental to state residents or the state economy.	MI
Employers are required to maintain file copies of all documents reviewed as part of the Form I-9 process	CO
Employers subject to fines and jail sentences for violating state law	CO, NV, OK, WV
State harboring and transporting laws targeting employers	MO, NV, OK, SC, UT
Wages paid to unauthorized immigrants may not be deducted on employers' state income tax returns	CO, GA, MO, SC, WV
Requires employers to certify to the state that all employees are authorized	CO
Requires employers to withhold income tax payments for independent contractors who provide a taxpayer identification number	CO, GA
Creates a private cause of action for US employees when employer terminates to hire an unauthorized employee	OK, MS, SC, UT
akes it a felony to accept unauthorized employment	MS