



# Labor & Employment Law News

Spring 2010

---

## IMMIGRATION FOCUS 2010

---

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

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

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

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

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

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

Meanwhile, ICE continues to step up its workplace enforcement activities. In early March, ICE announced

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

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

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

Besides the economy, this year there are new hurdles that confront H-1B employers and their employees. First, employers will need additional lead time to prepare their petitions. The required labor condition attestation (LCA), now processed under the Department of Labor's new iCert Portal System, takes at least seven days for an approval instead of just one. Second, U.S. Citizenship and Immigration Services (USCIS) has altered its definition of what constitutes a valid employer-employee relationship as it relates to H-1B workers, imposing new rules on the types of activities in which H-1B workers can engage. Third, USCIS appears to be closely scrutinizing the authorship of

credentials evaluations where education and work experience are combined. The agency has been denying petitions where the record does not clearly demonstrate that the individual providing the evaluation qualifies as an authorized signatory.

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

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

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

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

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

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

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

Those facing tough mid-term elections – as well as President Obama – are taking note of Hispanic concerns and can ill afford to alienate this key constituency.

Hispanics represent the fastest growing segment of the electorate, and they played an important role in election victories in 2008. Many in the Hispanic community want reassurance not only that the President remains committed to immigration reform but they have demanded proof of action. Specifically, they want to know what exactly the President's commitment to immigration reform really means.

All the parties agree, however, that a broader coalition must be brought together before any real progress can be made. This means, at a minimum, that another high-profile Republican will need to join Schumer and Graham to co-sponsor a bill. This will be a tall order, as contentious mid-term elections are heating up in key districts. Even moderates like Senator Susan Collins (R-ME), the ranking member of the Homeland Security Committee, says immigration is not on her radar screen, and Senator John McCain (R-AZ), a key Republican immigration reform advocate in the past, faces a tough primary challenge from an anti-immigration-reform conservative and has been palpably absent from recent discussions. Further complicating the recruitment of a Republican immigration reform advocate is the rift that was created in the wake of the health care debate. Senator Graham had warned that immigration reform could come to a halt for the year if reconciliation was used to push health care through. While Graham himself is staying the course, the wounds opened up during the dragged-out battle for health care reform may not be easily healed or forgotten.

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

Was Graham merely sounding an alarm? Were the March and follow up rallies held nationwide successful in thrusting immigration reform back into the national

spotlight? Can President Obama do more? Is the best hope for immigration reform a consensus around a measure that could pass sometime after the November elections? With legislators returning to Washington from their Spring Recess this week, we shall see.

## **Greece to Participate in Visa Waiver Program**

The U.S. Department of Homeland Security (DHS) recently added Greece to the list of countries authorized to participate in the Visa Waiver Program (VWP). Under the Visa Waiver Program, citizens and eligible nationals of participating countries may apply for admission to the United States at U.S. ports of entry as visitors for business or pleasure for a period of ninety days or less without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission. Such travelers, however, must obtain an approved travel authorization at least 72 hours in advance of travel via the Electronic System for Travel Authorization (ESTA). The ESTA web-based system is administered

by DHS at <https://esta.cbp.dhs.gov> free of charge. ESTA authorization does not guarantee admission by a Customs and Border Protection official at a U.S. port of entry, and ESTA is not available to foreign nationals who have been previously refused a visa.

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

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

### **Andrea Godfread-Brown, Esq.**

If you have any questions concerning Immigration Law, contact Andrea Godfread-Brown, Esq., at 315-471-3151.

Ms. Godfread-Brown focuses her practice on immigration law, specializing in employment-based applications and is a member of the Firm's Immigration, Labor & Employment and Health Care practice groups. Prior to joining Hancock & Estabrook, she was at the International Center at Syracuse University handling work visa and green card applications for University employees, and in private practice. Ms. Godfread-Brown is fluent in Russian and worked in the Ukraine for the American Bar Association's Central and East European Law Initiative program. She is a member of AILA (American Immigration Lawyers Association). Ms. Godfread-Brown has conducted workshops for human resources professionals on I-9 compliance and work visa petitions. She is admitted to practice law in New York.

**HANCOCK & ESTABROOK, LLP**  
COUNSELORS AT LAW

SERVING CENTRAL NEW YORK FOR 120 YEARS

### **Labor & Employment Law Practice Group Attorneys:**

*Michael J. Sciotti, John T. McCann, Lindsey H. Hazelton, John F. Corcoran, Andrea Godfread-Brown, Wendy A. Marsh  
Laurel E. Baum, Maureen E. Maney, Melinda B. Bowe & Robert C. Whitaker, Jr.*

**"Labor & Employment Law News"** is published periodically and is the sole property of Hancock & Estabrook, LLP, with all rights reserved. The articles contained herein are for informational purposes only and are not intended as legal advice.