

Intubation and Incubation: Two Remedies for an Ailing Immigration Agency

By: Angelo A. Paparelli and Ted. J. Chiappari*

As Justice Louis Brandeis famously observed, “[s]unlight is said to be the best of disinfectants”¹ U.S. Citizenship and Immigration Services (USCIS) – the agency within the Department of Homeland Security (DHS) that decides which foreign entrepreneurs, investors, professionals and scientists are allowed to work in America – has chosen to employ other, more recently developed remedies. It has opted for intubation (a means of introducing fresh air into an afflicted body) and business incubation (a way of providing fresh ideas and a supportive, nurturing environment to fledgling, unstable but promising enterprises)² as the best ways to cure many of the maladies that chronically sap this nine-year-old agency.

On October 11, 2011 USCIS Director Alejandro Mayorkas unveiled a novel business incubator program, “Entrepreneurs in Residence.”³ Although not the first federal program to marshal the savvy of the entrepreneurial set (that feather apparently goes to the Food and Drug Administration),⁴ the immigration initiative “will utilize industry expertise to strengthen USCIS policies and practices” affecting foreign “investors, entrepreneurs and workers with specialized skills, knowledge, or abilities.”

The professed goal of EIR is to enhance USCIS’s “collaboration with industries, at the policy, training, and officer level, while complying with all current Federal statutes and regulations.” As Director Mayorkas noted, the EIR “initiative creates additional opportunities for USCIS to gain insights in areas critical to economic growth. . . . [In addition, the] introduction of expert views from the private and public sector will help us to ensure that our policies and processes fully realize the immigration law’s potential to create and protect American jobs.”

The Entrepreneurs in Residence (EIR) program is an outgrowth of various Obama Administration initiatives in 2011 to spur foreign investment and U.S. job creation, namely:

- **The President’s Council on Jobs and Competitiveness**,⁵ announced on January 21. Comprised of 27 business leaders, union executives and scholars, the Council’s mission is to “develop ideas to accelerate job growth and improve

1 The Brandeis quote, from *Other People’s Money*, Chapter V (“What Publicity Can Do”), is available [here](#). (All links are active as of October 18, 2011.)

2 For background on business incubation, see “Principles and Best Practices of Successful Business Incubation,” from the National Business Incubation Association, available [here](#).

3 See Oct. 11, 2011 USCIS news release, “USCIS Announces ‘Entrepreneurs in Residence’ Initiative,” available [here](#).

4 See October 6, 2011 article, “FDA Commissioner, Margaret Hamburg, is asking industry for help to reverse the lack of innovation,” available [here](#).

5 For background on the President’s Council, see [here](#).

the country's long-term position." On October 11 it issued an interim report⁶ which, among other proposals, offered its "[b]ottom line" on immigration: "Highly skilled immigrants create jobs, they don't take jobs. And in a competitive and interdependent 21st century economy, we must attract these entrepreneurs to the United States."

- **The SelectUSA Initiative**,⁷ established on June 15 by executive order and housed in the Commerce Department. Its stated mission is the facilitation of "business investment in the United States in order to create jobs, spur economic growth, and promote American competitiveness." The initiative creates an interagency working group and requires the cooperation and support of all executive-branch departments and agencies "that have activities relating to business investment decisions."
- **The Startup America Initiative**,⁸ announced on Jan. 31, as a set of five "entrepreneur-focused policy" action items, designed with the goals of: "Unlocking Access to Capital; Connecting Mentors; Reducing Barriers; Accelerating Innovation; and Unleashing Market Opportunities." This effort also includes steps to "[reduce] barriers and [make] government work for entrepreneurs" and to date has involved "efforts to realize the potential of current immigration laws to attract the best and brightest from around the world to grow the U.S. economy and create American jobs." As part of the Startup America effort, on Aug. 2 DHS Secretary Janet Napolitano announced a number of changes and clarifications intended to make current immigration laws and regulations more user-friendly for entrepreneurs, investors and startup businesses.⁹

The EIR program consists of two components:

1. A "series of informational summits with industry leaders to gather high-level strategic input" and
2. A "tactical team comprised of entrepreneurs and experts, working with USCIS personnel, to design and implement effective solutions."

During an October 11 telephonic press conference to answer media questions about EIR, Mr. Mayorkas declined to name any participants in the "informational summits" or "entrepreneurs and experts" who will serve on the "tactical team," noting that all of these individuals must first be screened for conflicts of interests.

Inordinately finicky conflicts screening, however, may doom this otherwise salutary effort. Undoubtedly, "industry leaders" and "entrepreneurs" will harbor a strong interest in an expansive reading of the employment-based immigration laws. Their likely interpretation would view the immigration laws as offering many opportunities to grow startup and established businesses in the U.S. by harnessing the innovations and skills of bright, energized and talented non-citizens. Prospective EIR participants with such interests and perspectives probably will have already used and intend to use again the employment-based immigration laws to secure USCIS's permission to hire foreign workers.

If the agency wants high-quality business incubation, USCIS should not use the potential benefits to be gained through the submission of pending or future work-visa petitions as a basis to "conflict-out" potential EIR team members from the private sector. Similarly, experienced business immigration lawyers should not be excluded, since they are most likely the best equipped to challenge agency policy-makers by showing the agency how to implement its policies and practices in a way that better "accelerate[s] job growth and improves the country's long-term position" while still "complying with all current

6 The Jobs Council's interim report is available [here](#).

7 Information on SelectUSA is available [here](#).

8 To learn more about StartupAmerica, see the White House website [here](#).

9 For a discussion and critique of the changes announced by Secretary Napolitano Aug. 2, see Karin Wolman, "USCIS Entrepreneur Initiatives—Do They Really Help?," Aug. 22, 2011, accessible [here](#).

Federal statutes and regulations.”

External EIR participants who survive the conflicts screening will likely be given the chance to gorge themselves on much low-hanging fruit. USCIS – one of three immigration agencies born of the Homeland Security Act of 2002 from the bad seeds of the much-maligned former Justice-Department agency, the Immigration and Naturalization Service (INS) – is beset with inherited, self-perpetuated and external problems that have gravely hurt entrepreneurs, startups, established businesses and investors. Although Director Mayorkas has laudably embarked on numerous salutary improvements and reforms like no predecessor at INS or USCIS before him, persistent problems within the agency include:

- **USCIS mission creep and mission miasma.** The Homeland Security Act (HSA) divided the immigration function – which had previously been the province of the former INS - in three ways: (1) border enforcement (conferred on U.S. Customs and Border Protection (CBP)), (2) interior enforcement (conferred on U.S. Immigration and Customs Enforcement (ICE)), and (3) the adjudication of requests for such immigration benefits as visa petitions, work permits, green cards and naturalization – a responsibility which the HSA conferred on USCIS. The HSA’s division of responsibilities likely results from earlier Congressional hearings on the conflicting missions (namely, immigration law enforcement and the grant of immigration benefits) and resulting dysfunctions of the INS. Having forgotten or ignored this prior history, USCIS established an investigative unit known as Fraud Detection and National Security (FDNS) which has conducted numerous, unannounced “site visits” of employers who petition for foreign workers. FDNS now employs over 700 internal investigators and an unknown number of private sleuths – a clear example of mission creep. Their investigations have resurrected the old tensions between enforcement and benefits that plagued and conflicted the INS, thereby clouding the focus of USCIS adjudicators – mission miasma – who should be intent upon granting immigration benefits to deserving parties and denying them to person or entities that are unqualified under the immigration laws. The duty of law enforcement and necessary investigation, on the other hand, should be confined to the appropriately tasked units under the HSA, namely, ICE and CBP.¹⁰
- **The USCIS’s failure to follow the rule of law or ensure procedural due process.** The Administrative Procedure Act (APA)¹¹ provides a process for notice of proposed rulemaking and the opportunity for comment by interested members of the public before an agency issues a final regulation. Similarly, the Regulatory Flexibility Act (RFA)¹² requires an analysis of a proposed rule in order to “minimize any significant economic impact of the rule on a substantial number of small entities.” Moreover, in enabling legislation over several years, Congress has tasked the agency with the responsibility to issue regulations offering its interpretation of the statute in question. Rather than comply with the APA, RFA and several substantive immigration laws creating new rights or new restrictions, USCIS has adopted a practice of issuing proposed guidance and offering the public a few weeks to respond before the guidance becomes agency “policy.” This abbreviated approach circumvents the protections of the APA and RFA, allows for no vetting of the rules by the public, no apparent role for the White House Office of Management and Budget, and no opportunity to analyze the agency’s rationale for the policy decisions and legal interpretations developed in policy guidance. Moreover, USCIS has not issued regulations or policies governing the conduct of its investigative unit, FDNS, whose practices are not consistent with agency regulations on prior notice to the petitioning business or its counsel of record and the conduct of interviews, thereby flouting procedural due process.
- **The lack of guidance and absence of employment-based immigration interpretations, policies and procedures.** At the outset of USCIS Director Mayorkas’s tenure, he wisely commissioned an analysis of agency “policies” and canvassed the public on the need for specific policy development and guidance. While the policy review has been

¹⁰ For background on the HSA and FDNS see Ted J. Chiappari and Angelo A. Paparelli, “*Looking for Fraud in All the Wrong Places—H-1Bs Working From Home*,” New York Law Journal (Aug. 24, 2011), and Angelo A. Paparelli’s blog, [here](#), (Paparelli Blog), “*A Cancer Within the Immigration Agency*,” Aug. 27, 2011.

¹¹ 5 U.S. Code § 500 *et seq.*

¹² U.S. Code § 601 *et seq.*

concluded, most of the extant policies from years back remain in place. Because these policies have largely been issued without notice-and-comment rulemaking, and are often poorly reasoned, incomplete, contradictory or wholly non-existent, the stakeholder community has been at the mercy of agency adjudicators who are free to menu-pick or simply “boldly assert and plausibly maintain”¹³ the ostensive legal basis underlying a denial of eligibility for the requested immigration benefit.

- **The proclivity of numerous USCIS adjudicators to go beyond the requirements.** The federal courts have repeatedly chided USCIS for adding extra requirements beyond the text of existing immigration law or regulations.¹⁴ Still, the fabrications persist. Three examples are the “out of the blue” reinterpretations of the L-1B (specialized knowledge) visa category for intracompany transferees issued in a 2008 unpublished Administrative Appeals Office (AAO) decision, known as the “GST decision,” which was not designated as a precedent,¹⁵ the revised successor in interest policy guidance depriving previously eligible First Preference green card applicants of permanent status,¹⁶ and the “employer-employee relationship” memorandum dramatically restricting use of the H-1B category by consultants and working owners of small businesses.¹⁷

The USCIS Adjudicator’s Field Manual, § 3.4B (“Binding Nature of Policy on Employees”) provides:

All material which is designated as policy material is binding upon all employees of USCIS, unless or until it is specifically superseded by other policy material. There are no exceptions to this rule. To the extent that one policy document appears to be in conflict with another, the “higher” authority is controlling, but clarifications should always be sought in such a situation.

Nonetheless, as the 2011 Ombudsman report noted, problems persist in the USCIS’s failure “to address unclear and conflicting guidance.”

- Inadequate initial and refresher training of USCIS personnel. The Office of the USCIS Ombudsman recommended in its 2010 Report to Congress that additional training be provided to USCIS adjudicators concerning the “more-probable-than-not” preponderance of the evidence standard to be applied in adjudicating immigration-benefits requests. “Missing from both USCIS’ training modules and the [Adjudicators Field Manual],” the Ombudsman noted, “are focused analyses of factual scenarios representing real world filings, with discussions arranged by petition and application type.” USCIS Director Mayorkas, in his response, agreed that his agency “recognizes the benefit of additional training for Immigration Services Officers (ISOs) on the standards of evidence, and USCIS is implementing this recommendation.” In her 2011 Report to Congress, however, the Ombudsman noted that the problem has not been adequately addressed:

13 Aaron Burr, Jr., U.S. Vice-President under Thomas Jefferson, and also remembered for having ended the life of Alexander Hamilton in a duel, reportedly has said that “[l]aw is whatever is boldly asserted and plausibly maintained.”(Source: Burton Stevenson, *Home Book of Proverbs, Maxims and Familiar Phrases* (1948).

14 See, e.g., *Kazarian v. USCIS*, 596 F.3d 1115, C.A.9 (Cal.), March 04, 2010 (NO. 07-56774).

15 A discussion of the AAO’s GST decision, together with a link to its text, can be found at Paparelli Blog in “Off-Message Immigration Bureaucrats Undermine the President’s Jobs Push by Refusing L-1 Specialist Visas to Indian Citizens,” accessible [here](#). The decision declined to treat as binding prior headquarters policy memoranda. More recently, USCIS Director Mayorkas maintained in a November 9, 2010 reply to the USCIS Office of the Ombudsman (AILA InfoNet Doc. No. 10112460) that the GST decision “does not conflict with” the prior L-1B policy memoranda but his response did not address the decision’s rejection of agency policy memoranda as binding guidance on which the public may rely. This may be because, as suggested earlier in the text, the agency, when it issues proposed policy guidance (in lieu of regulations) only provides the public with a limited opportunity to comment prior to its effective date. Public comment is of dubious value, however, if the public may not then rely on the ultimately published policy guidance.

16 See, Angelo A. Paparelli, “Bothersome Immigration Buzz Spells Trouble for M&A Deals,” *Business Law Today*, Jan.-Feb. 2010, available [here](#).

17 See Angelo A. Paparelli and Ted. J. Chiappari, “New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms,” *New York Law Journal* (February, 2010), available [here](#).

Elevated RFE [Request for Additional Evidence] rates are impeding legitimate business operations. Specifically, they have a corrosive impact on the “specialized knowledge” category as a viable means for employers to access essential personnel for U.S. operations. Focused and timely efforts are needed to address unclear and conflicting guidance, insufficient training on the application of the preponderance of the evidence standard, and quality assurance.

- **The high rejection rate of petitions by small businesses.** Immigration practitioners have complained for many years about a heightened level of USCIS scrutiny and rejection of work-visa and green-card petitions submitted by small business enterprises. The problem has worsened with the adoption of a third-party online verification system to assist in determining the *bona fides*, characteristics and viability of small business petitions known as VIBE (Validation Instrument for Business Enterprises).¹⁸ The third-party database often contains outdated, incomplete or incorrect information on small businesses. As a result, USCIS adjudicators routinely issue RFEs, which then require the petitioning small business to request hastily the updating of the third party's data (for an expedite fee) in order that a response to the RFE can be timely submitted to USCIS.
- **Funding deficiencies caused by poorly conceived legislation and unfunded mandates.** Congress is not without fault in the dysfunctionality that befalls USCIS. Often, new legislation is passed without regard to the burden on USCIS to implement the new law. Rather than authorizing appropriations, Congress has opted to require USCIS to adopt a user-fee funding vehicle which has often proved inadequate. EIR experts should pay careful attention to shortfalls in USCIS operations caused by inadequate funding and make clear to Congress that the agency's troops cannot fulfill their statutory mission without sufficient financial support.
- **Improper Congressional meddling in agency operations.** USCIS has its hands full in attempting to fulfill its statutory duties, while also responding to legitimate requests from the chairpersons and ranking members of the duly constituted oversight committees. The agency ought not be burdened, however, with demands from individual senators and representatives for time-consuming investigations and reports. Although such requests lack the force of law, they tend nonetheless to redirect USCIS resources. A prime example is the action of Sen. Charles Grassley who has caused USCIS to devote substantial resources in investigating what he perceives as high levels of fraud and technical violations of the H-1B visa category. This has led, in part, to the FDNS site visit program and its dispensation with appropriate rulemaking and compliance with existing regulations.¹⁹

* * *

Justice Brandeis was certainly right about the salubriousness of sunlight: Greater transparency at USCIS is sorely needed – particularly in connection with rulemaking and adjudicatory requirements and procedures. But for USCIS to be a healthy, vibrant participant in federal initiatives to make our nation stronger and more competitive, bolder steps must be taken. Entrepreneurial intubation and incubation may well be the first robust steps toward achieving healthier behaviors within the agency, and thus, greater economic vitality for the nation.

¹⁸ USCIS information on VIBE can be obtained [here](#). For critique of VIBE, see the USCIS Ombudsman's Annual Report to Congress, p. 23 et seq., June 2011, accessible [here](#).

¹⁹ For a recent example of Sen. Grassley's interference, see Paparelli Blog, "First, Do No (Immigration) Harm (to Business Visitors)", June 5, 2011, available [here](#).

***Angelo A. Paparelli** is a partner in Seyfarth Shaw in New York and Los Angeles. **Ted J. Chiappari** is a partner at Satterlee Stephens Burke & Burke in New York City.

This article is reprinted with permission from the October 26, 2011 edition of the New York Law Journal. © 2011 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the Journal for permission to reprint this article.

A Three-Point Immigration Manifesto For Chief Legal Officers And Outside Counsel

Angelo A. Paparelli, Partner, Seyfarth Shaw LLP

This article will help avoid assorted immigration nastiness from ruining an otherwise stellar legal career. The article is written to equip chief legal officers (CLOs) and outside counsel with a declaration of principles that, if diligently followed, will help prevent company executives from howling and growling: “Why were our lawyers asleep on immigration? Why did they let this immigration catastrophe happen?” Other purposes for writing are to assure lawyers reading this piece, who studiously apply the three immigration principles below, that they will never hear the Trumpian declaration (“You’re fired!”) or pull that dreaded Monopoly card (“Go to jail. Go directly to jail. Do not pass ‘GO’. Do not collect \$200.”).

Immigration has been described by some observers as the “third rail” of American politics. Other pundits have compared immigration to a downed power line that snakes along the ground, electrocuting all within its reach. This electrifying, career-destroying feature of immigration is not limited to American or foreign politicians. The damage and destruction that immigration – in all its aspects (law, policy, demographics, etc) – often wreaks must also concern in-house counsel and the corporate lawyers in private practice who advise business entities anywhere in the world.

In years past and still today, many CLOs or business lawyers have happily offloaded responsibility for immigration functions to others while candidly, if foolishly, proclaiming that they knew as much about immigration law as could fill a capacious thimble. In-house counsel would assign immigration “ownership” to the human resources department while the company’s outside counsel would task his employment-law practice group or an immigration solo practitioner or boutique to assist clients in procuring immigration “benefits” – work visas or permanent residency (described with chromatic inaccuracy as a “green” card).

Recent history teaches, however, that the insouciant delegation of responsibility for immigration-related legal issues is often dangerous and downright stupid. A CLO should appreciate how serious such matters can get. What the immigration police at US Citizenship and Immigration Enforcement (ICE), US Customs and Border Protection (CBP) and their counterparts in other countries dub “worksite enforcement” and “border security”, ordinary people describe as “raids” and “G-men” tactics. What the dispensers of work visas and employment-based green cards at US Citizenship and Immigration Services (USCIS), and their kindred bureaucrats abroad call immigration “quotas”, business executives see as artificial obstacles to profitability and red-tape impediments to the business mission.

Immigration, if wrongly managed, will disrupt business operations, damage the corporate brand, and lead to the imposition of civil and criminal sanctions, the plummeting of stock price and shareholder confidence, Sarbanes-Oxley headaches, and the loss of key personnel. If managed with a steady legal

hand at the helm, however, immigration can be a marvelous recruiting and retention tool and an enhancement to a counsel's career.

Here, then, are three key principles for enlightened immigration-related legal management:

1. Own and control the immigration legal function.
2. Choose your teammates wisely.
3. Put your house in order.

Own And Control The Immigration Legal Function

Have no doubt. The chief legal officer of any business entity will be blamed if immigration outcomes turn sour (even if culpability lies in another department or externally). The blame will also spread to the company's outside counsel who chanted the "cross-selling" mantra and incautiously handed off immigration legal services to the firm's employment lawyers or blithely referred the client's immigration work to an immigration-lawyer friend at the health club.

To paraphrase Colin Powell's warning to George Bush before the Iraq war, as CLO you own immigration; if it breaks, you still own it – and it's your fault.

Owning immigration does not mean mastering it. The subject is simply too complex and ever changing. Owning entails gaining a basic understanding of immigration law and procedure, devising sound policies, wisely choosing and leading others who possess both technical knowledge and a skill-set to manage the complex process, and creating a real-time immigration dashboard and feedback loop. Just as one need not be a mechanic to drive a car, a CLO – or even outside company counsel – need not know every aspect of the immigration process to own and lead the immigration legal function.

A simple way to stay up to date on immigration is to regularly peruse a few of the best online immigration websites and sign up for their newsletters. A good list of immigration sites would include those run by Bender's Immigration Bulletin – Daily Edition (www.bibdaily.com), Immigration Daily (www.ilw.com), the American Immigration Lawyers Association (www.aila.org), the Immigration Policy Center (www.immigrationpolicy.org), Compete America (www.competeamerica.org), the American Council on International Personnel (www.acip.com), and ImmigrationWorks USA (www.immigrationworksusa.org).

Choose Your Teammates Wisely

The second principle in this immigration manifesto is probably the most important.

The successful immigration team will include the CLO as its leader along with internal corporate resources and external professional and vendor support. The internal team should include an immigration manager and directly reporting subordinates whose numbers will vary depending on the size

and scope of the corporation's immigration mission, needs and strategies (discussed below). The immigration manager can be an in-house lawyer or seasoned human-resources manager, or perhaps a tag-team of the two. Other internal team members, full and part-time, who will not report directly to the immigration manager, may include one or more recruiters, technical managers, communications specialists, IT professionals, a business manager and a procurement officer.

Rare is the immigration solo practitioner with the depth of bench and the broad range of expertise in the many immigration sub-specialties that most businesses today require. Perhaps much the same may be said of many law firms or practices that repeatedly play the same tune – mass-produced, employment-based work, involving commoditized requests for routine immigration benefits. While in the past this music may have seemed sufficiently melodic, it likely will not harmonize with the future orchestral immigration needs of globally active corporations. Increasingly, as will be shown, globalised businesses will require a broader repertoire of immigration-related legal services that also include lobbying, litigation, audit, compliance, and “white-collar and government-enforcement” defense capabilities.

The CLO or outside counsel could conceivably rely on the availability in some jurisdictions, for example California and Texas in the US, of lists of lawyers with board certification in immigration and nationality law. While this may help to reduce the selection pool, immigration lawyers' practices often give significant weight to areas of only marginal interest to corporations, such as deportation and removal defense, asylum, etc. Similarly, membership in a recognized national immigration bar association, or in the immigration committee of a state, county or city bar association or lawyer-referral program may reveal little to differentiate among seemingly suitable immigration lawyers and firms.

Perhaps the best strategy is still the tried and trusted. Reliance on “relational capital,” coupled with vigilant cross-checking, is most often the wisest course. Relational capital has at least three facets.

The first involves review of publications, such as *The International Who's Who of Corporate Immigration Lawyers*, *Chambers Global and Chambers USA*, and *Best Lawyers in America*, that name the best-regarded immigration lawyers based on peer nominations, empirical research (derived through interviews of clients and competitors), or optimally, a combination of the two. Users of these guides should note, however, that they all list immigration lawyers by state or city. Increasingly, immigration law is national and transnational in scope of practice. While physical proximity to the corporate headquarters may be reassuring, it should not be the overriding criterion for the most suitable and competent immigration law firm, given the ready availability of webcams, videoconferencing and air transportation.

A second relational-capital strategy entails the CLO's or outside corporate lawyer's use of their old-fashioned Rolodexes or new-fangled contact-management software. Much valuable data can be gleaned merely by asking counterparts in businesses and law to offer feedback on the lists of peer-nominated immigration lawyers and firms, and on their own experiences with particular immigration law firms.

The third type of relational capital, perhaps less obvious, is that possessed by the immigration lawyers themselves. One recent development has been the growth of immigration-lawyer strategic networks,

such as the Alliance of Business Immigration Lawyers or IMMLAW, whose member firms serve as co-counsel in appropriate cases or share best practices in client service and can access real-time information on successful strategies and late-breaking developments through internal e-mail lists and training programs. Probing questions on the depth, quality and breadth of the relationships that the immigration lawyer or firm has cultivated over the years (in government and among colleagues and immigration service providers) should therefore yield a good harvest of useful data from which to select the optimal immigration firm.

One recent trend in law firm selection – the request for proposal (RFP) – should be used sparingly and with caution in the hiring of an immigration law firm. Much to the delight of corporate procurement officers who consider law firms as just another form of “vendor” providing a fungible commodity, the RFP process may yield useful data on cost, but only if adequate time is spent in advance to make sure that the request sent to the targeted firms precisely defines the scope of the work to allow for apples-to-apples and oranges-to-oranges pricing comparisons.

RFPs are less helpful, however, when making qualitative judgments about an immigration firm’s proactivity (the ability to anticipate and avoid or stem problems before they grow unwieldy or do harm), responsiveness, creativity (strategy formulation and problem-solving), and cost efficacy (the ability to apply just the right amount of added value – the appropriate amount of resources at a fair price that keeps both parties in business, for example, through high-level strategic counseling or lower-tier legal process outsourcing).

Put Your House In Order

National immigration laws affect all businesses. These laws restrict or prohibit foreign citizens from entering, living in, working in or bringing family members to a particular country, and penalize businesses and individuals who violate national immigration laws.

In the United States, the immigration laws impose a threefold duty on employers to: (i) verify the employment eligibility of all new applicants for employment without regard to country of birth; (ii) refrain from hiring or continuing to employ workers who the employer knows or should know lack employment authorization in the United States; and (iii) refrain from discriminating against, or impairing the wages and working conditions of, protected employees. Immigration laws and regulations will soon impose additional obligations on federal contractors and on companies engaged in business in selected states, like Arizona and Mississippi, to sign up for E-Verify, a computer-based program linked to two government databases that confirms whether all new workers and some current personnel are or remain legally employable.

Immigration laws also impose quotas, maximum periods of temporary residence, complex procedures to obtain work permission or permanent residency, and civil and criminal penalties for violations. Immigration laws likewise figure prominently in the present era because of (i) heightened government scrutiny of business activities under Sarbanes-Oxley legislation requiring transparency and accuracy in

the publication of corporate financial reports, including disclosure of any materially adverse effects that immigration violations can trigger; (ii) focus on homeland security and prevention of terrorism; (iii) brand-damaging publicity of every corporate wrong or mistake in the traditional media, social media and the “blogosphere”; (iv) the contentious anti- and pro-immigration views of the local populace; and (v) corporate sentencing guidelines which place a premium on the proactive creation of internal compliance and whistleblower programs.

All of these factors lead the prudent CLO and the company’s outside counsel to order the company’s internal policies, practices and strategies so that immigration serves rather than undermines the business mission. To put the company’s house in order in this respect, the CLO – in consultation with external corporate and immigration counsel – should:

- Adopt intelligent immigration policies. These policies must include an express commitment to immigration-law compliance, ongoing training of staff tasked with immigration-related functions, published standards on terms of sponsorship of employees and their family members for immigration-related legal benefits, periodic self-audits, and prescribed chain-of-command and procedures in case of government audits, investigations or other law-enforcement actions.
- Select immigration technologies cautiously. Immigration-related software vendors who promise wondrous benefits from automation and case management are proliferating. Government laws and procedures requiring or permitting electronic filing of petitions and applications, and electronic signature and storage of immigration-related business and legal documents are similarly burgeoning. In some situations, choosing to go digital may expose an obscure and inadvertent error that violates immigration law which would otherwise have remained uncovered in a mountain of paper files. The CLO, in collaboration with the corporate IT department and immigration counsel, should therefore conduct a thorough reality-check on the supposed benefits and carefully scrutinize the hidden burdens that immigration-related technologies provide before opting to acquire and use any particular software in managing the immigration legal function.
- Adopt best practices in immigration branding and messaging. As the ageing of populations accelerates the pace of global competition among nation states and transnational businesses for top talent, the CLO, in cooperation with internal recruiters, technical managers and communications professionals, must take a fresh approach to recruitment and retention. Immigration branding and messaging can play a vital role in attracting and keeping the brightest and best workers. The CLO and the internal and external immigration teams should reinforce the message that the particular corporation is an employer of choice, an employer with immigration-friendly policies that provide comprehensive support for immigration benefits. Payment of legal fees and the provision of top-notch immigration counsel are but first steps in this effort. Immigration seminars for employees and family members, the development of an internal immigration portal or intranet with FAQs and self-service features that provide up-to-the-minute

status reports, access to documents and opportunities for interaction with the immigration team members are also important.

- Consider immigration as “global mobility”. It’s not just about US immigration any more. Increasingly, global business requires global capabilities in migration management and mobility. The CLO and the company’s outside counsel must develop readily accessible centralized or regional mobility solutions and relationships with competent local immigration lawyers or government-certified migration specialists. The effort need not entail the creation of a country-by-country structure. Increasingly, immigration-lawyer alliances and some law firms offer one-stop project-management consulting services for the corporation’s global travelers and employment-based immigrants dispatched to a new homeland. The principles of immigration lawyer selection, discussed above, apply with even greater force on the global stage.
- Network with like-minded counterparts in immigration. CLO participation in immigration-related networking groups is not just helpful but essential. Informal immigration networking through existing corporate and professional channels is also necessary. Both stratagems avoid reinvention of the wheel, and provide access to the latest news and useful recommendations that should help to identify suitable immigration law firms and software vendors.
- Visibly support immigration-friendly laws and procedures. For the past three years at least, immigration observers have witnessed a variety of distressing developments: miserly immigration quotas running out within days of each annual allotment, long backlogs in case processing and security clearances, and draconian new restrictions and penalties imposed on businesses. Aside from a few leaders in the technology sectors, most corporations have opted to maintain a very low profile in the admittedly controversial debate on immigration. Today, timidity, reticence and obscurity are not winning immigration strategies. Modern business leaders, backed by enlightened CLOs and outside counsel, must stand up collectively and individually to speak out on the urgent need for enactment of business-friendly immigration laws and policies.

* * *

A manifesto on any subject is only as strong as the force of commitment behind it. The three points in this immigration manifesto will only work to heap praise rather than derision on the CLO and trusted outside counsel if their pledges of action are followed by meaningful and unflagging efforts. Ignore immigration at your peril. You have nothing to lose but your job and your freedom. Hyperbole? Maybe, maybe not. You decide.

Looking for Fraud in All the Wrong Places— H-1Bs Working from Home

By: Ted Chiappari and Angelo A. Paparelli

Conferences at 7 a.m. and 7 p.m. on the same day prompt an employee's request, approved by her manager, to work from home that day. Cause for concern? There is, if the employee is a "specialty occupation" worker in H-1B visa status. In a case the authors recently encountered, U.S. Citizenship and Immigration Services (USCIS) moved to revoke the employer's H-1B petition because the employee happened to be working from home on the day USCIS conducted a worksite inspection.

Unannounced worksite inspections are now fairly routine for H-1B workers and their employers—14,433 H-1B site visits were conducted in fiscal year 2010.¹ While not every petitioner gets visited, that's a large enough pool that site visits are now a standard verse in immigration lawyers' litany on H-1B compliance. Since 2005, USCIS has collected \$500 from employers for every new H-1B (and L-1 intracompany transferee) petition filed. Congress introduced this fraud prevention and detection surcharge, as the name implies, to fund USCIS efforts to combat perceived fraud in the H-1B and L-1 visa programs. These funds, amounting to tens if not hundreds of millions of dollars collected each year,² allowed USCIS to conduct a preliminary study, released in 2008, which was then used to justify hiring a crew of government contractors and assigning investigators from the ominously titled USCIS Directorate of Fraud Detection and National Security (FDNS) to pound the pavement and show up unannounced at the address indicated as the worksite on the H-1B petition.

Typically, the inspectors ask to speak with the H-1B worker or the employer representative who signed the petition papers, or both. They pose questions from a prepared list; in addition to asking about title, salary and number of employees, they may also ask to see payroll records and take pictures of the worksite location.

In principle, dispatching USCIS investigators out in the field to kick the tires makes a lot of sense. Voluntary compliance works best when there is consistent, transparent and not all too limited enforcement. But there is nothing consistent or transparent about an unannounced worksite inspection that results in an anxiety-producing notice of intent to revoke based on a list of erroneous legal conclusions including: the beneficiary is no longer employed by the petitioner in the capacity specified in the petition; the position is not a specialty occupation; the petitioner is not in compliance with the terms and conditions of employment; the statement of facts contained in the petition was not true and correct; the petitioner violated terms and

¹ USCIS Fraud Detection & National Security (FDNS) Director Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions (June 7, 2011), available to American Immigration Lawyers Association (AILA) members at AILA InfoNet (Doc. No. 11062243, posted June 22, 2011); copy on file with authors.

² In 2005, USCIS estimated annual revenues of \$39 million in connection with H-1B petitions, but based this estimate only on new H-1B petitions filed. USCIS Interim Rule with Request for Comments, Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23775, 23781 (May 5, 2005). Given that the \$500 surcharge is also collected on H-1B petitions filed for a change of employer where the beneficiary is already in H-1B status, and on new L-1 petitions, the actual revenues are much higher.

conditions of the approved petition; and the petitioner violated H-1B requirements. USCIS leapt to all these conclusions simply because of an uninvestigated fact, namely, that the H-1B worker stayed home one day because of conference calls.

Proper determination and disclosure of the worksite is essential to H-1B compliance: the salary H-1B employers must pay; the working conditions they must meet, and the notice they must provide to other workers are all keyed in to the “place of employment” or physical location where the work is actually performed. This aspect of H-1B compliance is governed by Department of Labor (DOL) regulations and a “labor condition application” that the DOL must certify before the employer may file the H-1B petition with USCIS. The DOL regulations provide an extensive definition of “place of employment” – a definition which specifically excludes locations where work is performed “on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding ... 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations.”³ So the employer, by acceding to its H-1B employee’s request to work at home for a day behaved in complete compliance with DOL regulations. This makes USCIS’s attempt to revoke the H-1B petition particularly irksome, since under the DOL definition of worksite no violation arose.

Heavy-handed, misinformed and wasteful approaches to enforcement are unfortunately consistent with how USCIS conducted its initial study to justify more expansive worksite inspections.

The USCIS’s Benefit Fraud and Compliance Assessment (BFCA) report, released in September 2008, purported to find a 13.4% fraud rate and a 7.3% technical violation rate, or a total violation rate of 20.7%.⁴ Critics of the H-1B program and immigration opponents cited to the study, in particular, the alleged 20.7% violation rate.⁵ Shortly thereafter, government contractors began to be dispatched to numerous H-1B worksites to ask questions. The fact that contractors – and not government employees – conduct the onsite inspection is relevant because those conducting the investigation have no adjudicatory or programmatic experience and no decision-making or further investigatory authority: they merely generate a report for USCIS to use in deciding whether to move to revoke the petition or not. (USCIS has apparently chosen to limit its contractors to a single site visit per petition, and to limit its range of responses to the site visit report to three options: reaffirm the petition approval; move to revoke the petition; or refer the case to Immigration and Customs Enforcement for further investigation of fraud.)

The 2008 BFCA report was based on a tiny pool of petitions selected for the study: only 246 petitions were chosen randomly from 96,827 petitions filed between October 1, 2005, and March 31, 2006.⁶ According to other data published by USCIS, 295,915 petitions were filed (and 270,981 approved) in the 2006 fiscal year (running from October 1, 2005, to September 30, 2006),⁷ and no mention was made in the study that the period studied accounted only for approximately 1/3 of the petitions filed in that fiscal year. So USCIS’s conclusions in 2008 about fraud and noncompliance rates were based on a selection of approximately ¼ of 1% (0.25%) of the petitions filed during that six month period and less than 1/10 of 1% of petitions filed (0.08%) and approved (0.09%) in one year. While USCIS claims that such a sampling was statistically valid, the Department of Homeland Security Office of Inspector General [OIG], in its Review of the USCIS Benefit Fraud Referral Process (published incidentally five months before USCIS published its BFCA report) reported other problems with the benefit fraud assessments conducted on the H-1B and other visa programs. The problems cited by the OIG included:

3 20 C.F.R. § 655.715. Where an H-1B worker is employed more than just casually at a location, the DOL regulations also include extensive provisions at 20 C.F.R. § 655.735 for short-term placement of H-1B workers at places of employment outside the areas listed on the labor condition application.

4 USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), available, e.g., [here](#). See also, Angelo A. Paparelli and Ted J. Chiappari, “Immigration Risks Imperil the New Government,” *New York Law Journal* October 27, 2008, and Angelo A. Paparelli, “Immigration Mission Creep and the Flawed H-1B Report on Fraud and Abuse,” available [here](#).

5 See, e.g., 2009 press release from Senator Chuck Grassley, announcing proposed legislation targeting the perceived fraud, [here](#).

6 USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), at 5

7 USCIS, Report on H-1B Petitions, Fiscal Year 2006, Annual Report, October 1, 2005 – September 30, 2006 (March 2008), available on the USCIS website [here](#).

- “[T]he methodology FDNS [the Office of Fraud Detection and National Security] developed had substantive weaknesses.”⁸
- “Insufficient planning and incomplete information on the caseloads under review, coupled with modifications of the original random samples, limited the reliability and relevance of the results of the benefit fraud assessments.”⁹
- “[T]o meet assessment deadlines, FDNS substituted files when the original [randomly selected] files could not be located within one to two weeks. The number of missing and substituted cases was not reported with the assessment results... ”¹⁰
- “FDNS limited the credibility of its findings.... [M]ost of the FDNS officers who were conducting the complex H-1B and L-1A temporary employment visas had never adjudicated these petitions, and did not have sufficient training or experience to evaluate them.”¹¹
- “FDNS officers at headquarters and in the field disagreed on whether the assessment had documented the level of fraud accurately.”¹²
- “FDNS had no written standards on what constituted fraud specific to each visa type, and had no specific test for the standard....”¹³
- In fairness, the OIG report also pointed out that some within FDNS thought the USCIS assessment underreported fraud: “FDNS initiated its review of employment visas and selected its sample before realizing that the petitions sampled included only approved petitions, leaving FDNS to speculate that actual levels would have been higher if it had reviewed denied cases as well.”¹⁴ Oddly, in USCIS’s BFCA published five months later, it is stated that the H-1B sample was “drawn from a total population of 96,827 approved, denied, or pending I-129 petitions filed between 1, 2005 and March 31, 2006.”¹⁵

In the case of the conscientious – and hapless – H-1B worker highlighted above, simple bad luck admittedly also played a role. The H-1B employee works from home only approximately one day every other month and had worked from home on only two occasions since the petition had taken effect, so the inspection on one of those rare days was truly an unfortunate coincidence. In addition, the human resources representative who had signed the H-1B petition papers had left the company, which the inspector also considered a negative factor. On the other hand, the employer is a well-established company with over 10,000 employees in the United States and multi-billion dollar annual revenues.

The USCIS website describes the site visit process in this way: “If FDNS cannot verify the information on the petition or finds the information to be inconsistent with the facts recorded during the site visit, the ISO [Immigration Services Officer] may request additional evidence from the petitioner or initiate denial or revocation proceedings.”¹⁶ It appears that “requesting

8 Department of Homeland Security Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted – Revised), OIG-08-09 (April 2008), p. 14. The OIG Review is available on the Department of Homeland Security website [here](#).

9 Id. at 15.

10 Id.

11 Id.

12 Id.

13 Id. at 15-16.

14 Id.

15 USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), at 5.

16 See the page titled Administrative Site Visit and Verification Program, [here](#).

additional evidence” in this context is a euphemism for giving the employer 30 days to respond to a notice of intent to revoke the petition. Given the resources wasted by both the USCIS to generate the notice of intent to revoke (and review the employer’s response to that notice), not to mention the resources wasted by the employer responding to the notice, a follow-up visit or phone call by the government contractor or investigator conducting the site visit would be a more sensible approach.

Litigators, pay heed. There are numerous potential grounds to challenge the USCIS visit policies and practices:

- Presumably, USCIS conceived and implemented its massive site visit program in consultation with its legal counsel. Since the H-1B employer and worker are both typically represented parties, unilateral direct or indirect contact by USCIS with the acquiescence or active encouragement of its counsel would seem to violate the rules of professional conduct. The “tainted fruit” of the field site visit, the investigator’s report, should therefore be excluded from the administrative agency record.¹⁷ USCIS recognizes that the prohibited-contact rule applies to its counsel.¹⁸
- Unlike its policy involving R-1 site visits involving religious organizations found at 8 CFR § 214.2(r)(16), USCIS did not publish an initial or final rule or a regulatory flexibility analysis allowing public comment on its field site visit policy. As a result, the agency seemingly has violated the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, and the Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.*, that requires agency to conduct an initial and final regulatory flexibility analysis in order ultimately to determine whether the policy would have a significant economic impact on small entities.
- Despite USCIS reliance on the petitioner’s consent provided on the H-1B petition Form I-129 (“I also recognize that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.”) USCIS site visits are routinely made in contravention of existing agency regulations, i.e., without prior notice to counsel of record or to the “petitioner” or “beneficiary” and without the scheduling of an interview as required by 8 CFR § 103.2(b)(9): “[A] petitioner [or] a beneficiary may be required to appear . . . for an interview . . . A petitioner shall . . . be notified when . . . an interview notice is mailed or issued to a beneficiary . . .”
- Immigration precedent decisions prescribe minimum due process standards of evidence required for an immigration appellate tribunal to fulfill its reviewing function and for a party seeking immigration benefits to respond to derogatory information challenging the party’s credibility. In *Matter of S-S-*, 21 I & N Dec. 121 (BIA 1995), the Board of Immigration Appeals (BIA) rejected a report of an immigration officer’s interview that was inadequate for review. Similarly in *Matter of Arias*, 19 I & N Dec. 568 (BIA 1988), the BIA rejected observations in an officer’s memorandum that were “conclusory, speculative, equivocal, and . . . irrelevant” to the legal issue.

* * *

As part of its review of USCIS’s 2008 Benefits Fraud and Compliance Assessment, the OIG included interviews of USCIS employees involved in the BFCA study. One of the interviewed FDNS officers concluded: “ ‘Congress has been told by FDNS that there is a bunch of fraud, so Congress is asking for the proof. HQ FDNS is asking the field to find the fraud so it can be shown to Congress. And I sense HQ FDNS’ frustration with the field because we aren’t finding it.... Some of the leadership personnel have never been adjudicators, so they are completely out of touch with reality.’ ”¹⁹

17 See ABA Model Rule 4.2, “Communication With Person Represented By Counsel.”

18 See undated Memorandum of Jeff Conklin, USCIS Chief Information Officer accessible [here](#). For cases adopting the “tainted-fruit” analysis, see, e.g., *Microsoft Corp. v. Alcatel Business Systems*, Civ. No. 07-090-SLR, 2007 WL 4480632 (D.Del. Dec. 18, 2007); *Commonwealth of Massachusetts v. Louhisdon*, No. CIV.A. 01-201-B, 2001 WL 360047 (Mass.Super. March 29, 2001); *Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192 (1998).

19 Department of Homeland Security Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted – Revised), OIG-08-09 (April 2008), p. 15.

In light of the recent spate of worksite visits and follow-up “assessments” leading to issuance of petition denials and notices of intent to revoke approved petitions, USCIS officials seem to be taking that frustration to heart – looking for fraud in too many wrong places and finding noncompliance where it likely does not exist.

* Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke LLP in New York City. Angelo A. Paparelli is a partner in Seyfarth Shaw LLP in New York and Los Angeles.

M & A Lawyers Beware: Immigration Risks Lurk in Your Next Deal

*By Angelo A. Paparelli and Ted J. Chiappari**

As the U.S. dollar swoons in value against major foreign currencies, the price of gold rises to historic heights. Long term U.S. interest rates dip and short term rates hover near zero. At the same time, U.S. corporate profits and cash accumulations ascend to their highest levels in 40 years. All of these conditions foretell a sharp upswing in merger and acquisition activity. Bargains are there for the taking. Indeed, a new M & A rush to acquire has already begun, with the value in acquisition activity increasing by 8.7% for the first six months of 2010 over the previous half year.

Against this backdrop, the Obama Administration, through the Department of Homeland Security, continues its drive to increase worksite enforcement of the immigration laws. Employers remain in the crosshairs of a DHS unit known, chillingly, as ICE (Immigration and Customs Enforcement). Meantime, Congress stalemates over comprehensive immigration reform, and the public perceives (and available data confirm) that the employment of unauthorized workers remains rampant across the country.

To be sure, the failings of worksite enforcement may not be so much the result of widespread and willful flouting by employers of the immigration laws. It may instead be caused primarily by a broken statutory system that delegates to employers the duty to verify employment eligibility in an environment rife with identity theft, the proliferation of fraudulent documents, and antidiscrimination laws that punish firms that probe too deeply into the verification process. Still, whether the gaping cracks in the immigration edifice are attributable to design flaws in statutes and regulations or to lawbreaking employers, the immigration-compliance risks inherent in M & A transactions remain.

Until recently, immigration-related due diligence in M & A deals has been considered only fleetingly (if at all) before buyer and seller sign the purchase agreement. During the Bush Administration, immigration-compliance surprises, discovered typically after the closing, were mainly seen as unpleasant and inexpensive droppings to be tidied up and shoveled away by the surviving entity. Today, however, a resounding drumbeat of ICE press releases announces the indictments, arrests and convictions of employers and company officials for immigration worksite violations. Understandably, the mind-set of buyers has changed. Potential immigration concerns lurking in the acquired stock or assets make them more skittish and risk averse.

While no industries are immune from ICE and Justice Department scrutiny, sectors employing historically high numbers of unauthorized workers are at heightened risk. M & A deals in industries such as agriculture, food processing, dining, construction, hospitality, manufacturing and retail probably carry the greatest exposure. Even household names are not immune, as shown in the recent \$1,047,110 fine settlement that ICE reached with teen-clothing retailer Abercrombie & Fitch for lapses in the software it used to confirm compliance with Form I-9 (Employment Eligibility Verification) requirements.

Given the increase in enforcement, deal lawyers must take steps to apprise clients of the immigration risks inherent in modern-day M & A transactions, while anticipating and protecting against costly, post-closing eruptions. This article outlines a variety of immigration concerns lurking in M & A deals and suggests precautions that counsel for buyers and sellers should consider when advising their clients.

At the outset, the acquirer's due-diligence checklists should be expanded to address all immigration concerns. Areas of focus relating to the seller's immigration compliance practices and policies should include:

- All of seller's I-9 forms for current, previously acquired, and terminated employees, and associated payroll and tax records, with focus on company policies, consistently or inconsistently applied, of (a) either refraining from maintaining copies or copying of original documents of identity and employment eligibility, (b) lawfully purging documents on separated employees no longer required to be kept once the I-9 "retention period" lapses, i.e., the later of three years from hire date or one year from separation date, (c) using paper-based I-9s or software allowing the electronic signature and storage of I-9 records that comply with DHS regulations, and (d) taking on the I-9 records and related liabilities of entities previously acquired by seller, or, treating acquired employees as new hires and doing new I-9s;
- Seller's possible adoption of, and compliance with, the E-Verify system that confirms employment eligibility through the online accessing of records maintained by DHS or the Social Security Administration (SSA), including whether the seller (a) has entered into federal contracts or subcontracts with mandatory E-Verify clauses, (b) operates in states where E-Verify is required, or (c) has voluntarily signed a Memorandum of Understanding with DHS to use E-Verify, and in any case involving E-Verify, whether the seller (d) has adopted E-Verify at specific sites or at all company locations, and only in cases of federal contractors, whether the seller (e) has confirmed through E-Verify the employment eligibility of solely current and prospective workers assigned to the federal contract or (f) has (as permitted) confirmed the employment authorization of all present and future employees at all company locations;
- The possibility that seller, through its supervisors or owners, has actual or constructive knowledge that any of its workers lack the right to work in the U.S., including (a) the receipt and handling of SSA no-match letters, (b) credible tips (whether the tipper's identity is anonymous or disclosed), (c) social security number discrepancies reported by third parties such as health insurers or pension providers, or (d) admissions against interest by unauthorized workers or renegade managers;
- Co-employment liability imposed by operation of law in cases where the seller's managerial staff direct and control the work of personnel provided by staffing agencies and consulting firms, especially where the seller relies on oral instructions to vendors rather than written agreements to obtain the services of contingent workers or consultants, or where the seller, under the circumstances, knew or should have known that the vendor relationship was a subterfuge to obtain the services of unauthorized workers;
- Potential liabilities arising in situations where the seller has made representations to government agencies and undertaken compliance obligations in the course of submitting petitions and applications seeking immigration-related legal benefits such as work and travel permits, labor certifications, labor condition applications, immigrant or nonimmigrant visas or green cards

(including employment law and contractual commitments made to employees to sponsor them for such immigration-related benefits); and

- Seller's prior history, if any, of immigration-related encounters with enforcement agencies.

Following preliminary due-diligence review, counsel for the seller should have a reasonably good sense of the range and types of immigration-related violations uncovered. In many instances, preliminary due diligence will reveal numerous (typically inadvertent but still "fixable") paperwork violations in the initial completion and reverification of I-9 forms. In the authors' experience, an I-9 paperwork error rate of 40% to 60% is not unusual even for businesses that strive to follow the law.

Some paperwork errors may be cured to minimize potential fines and demonstrate good faith, and to start the running of the five-year administrative limitations period on the imposition of fines. Others may be incurable, e.g., where the employee no longer works for the employer. These types of paperwork errors are usually divisible into two categories: (1) technical or procedural failures to comply despite an effort by the employer at good-faith compliance, or (2) substantive errors that cannot be cured, e.g., errors relating to the passage of time when an action was required such as the signing of the I-9 (section 1) by the employee on the date of hire or by the employer (section 2) within three days of the hire date.

Others may involve inconsistent compliance policies, failures to maintain required records, co-employment risks with contingent workers employed by vendors, constructive knowledge of potentially unauthorized employment that the employer has not investigated, or actual knowledge possessed by someone in management that one or more workers are not permitted to work in the United States.

Whether the discovered compliance errors are curable or incurable paperwork violations or more serious exposure risks, buyer's counsel should consider adopting a comparatively new approach first introduced in the vendor-management arena. Buyer should insist that the appearance of a range of immigration errors requires that an independent third-party, i.e., a law firm with employment-related immigration expertise, be retained to conduct a comprehensive immigration compliance audit of the seller. Although seller may resist buyer's demand for an independent audit, buyer could counter that the mere existence of even paperwork errors requires an assessment of the range of fines that ICE could conceivably impose. The argument for an audit is even stronger where other more serious compliance failures of the types described above have been uncovered through preliminary due diligence.

An independent immigration compliance audit would be helpful in flagging correctable errors that seller should cure before the closing, and in quantifying the potential fine range that ICE could impose (for which seller should indemnify buyer). An independent immigration audit might also reveal more serious violations, or could well trigger a loss of a significant cohort of the seller's workforce if I-9 reverification is required and workers either fail to show up for work or are unwilling or unable to complete the current version of the I-9 form by providing acceptable documents of identity and employment eligibility of the worker's choosing. This is because an employer might be presented with original documents of identity and employment authorization that appear to be genuine and relate to the worker but are in fact false or the worker is otherwise unauthorized for employment.

Substantial potential exposure to fines and civil or criminal immigration penalties might make the deal less enticing to the buyer or might result in a negotiated reduction of the purchase price (or a clawback provision that allows the buyer to retrieve a portion of the purchase price if ICE imposes monetary sanctions or the post-closing workforce proves insufficient to maintain the surviving entity's business operations). Alternatively, the buyer might proceed to buy at a correspondingly reduced purchase price, treat all of the seller's workforce as new hires, and require the completion of new I-9s so as to cut off liability for paperwork violations. This may work in an asset deal but not in a stock transaction, since the value of the underlying entity in a stock deal might well be less if ICE later imposed fines or ordered that a substantial component of the newly acquired workforce be terminated for lack of employment authorization. This result flows from the nature of a stock acquisition. The value of a company's stock is closely related to the value of the assets owned by the company. Those assets are diminished in value when immigration fines must be paid and workers terminated for lack of employment authorization. An asset acquisition, by contrast, allows the exclusion of liabilities at the outset. Hence, the excluded liabilities are not assumed by the buyer but instead are borne by the seller.

Moreover, other legal risks arising from immigration exposures might surface. At least one publicly traded company has been sued in a class action under the securities laws alleging that the entity misled investors concerning the financial impact of the loss of a third of its workers resulting from an ICE order to terminate their employment because they were unauthorized to work. Other risks might involve class action liability under federal and state anti-racketeering laws on the theory that an employer's hiring of foreign workers, with knowledge that they lacked the right to work, depressed the wages of lawfully employed workers.

As can be seen, U.S. immigration laws pose far greater risks today than ever before. Business lawyers advising clients in M & A transactions need to take pains to protect their clients and to limit exposure to fines and penalties that might otherwise befall a hapless seller or buyer if vigorous due diligence and a third-party immigration compliance audit are not pursued in the next deal. Otherwise, channeling Socrates, a deal lawyer who overlooks immigration concerns might well conclude that "the unexamined life is not worth living."

* Angelo A. Paparelli is a partner in Seyfarth Shaw in New York and Los Angeles. Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke LLP in New York City.

Reprinted with permission from the October 27, 2010, edition of the New York Law Journal. © 2010 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the Journal for permission to reprint this article.

The Year-End Immigration Roundup for Employers

By Ted J. Chiappari and Angelo A. Paparelli*

With the current acrimony and mean-spiritedness over immigration, no reader would be faulted for thinking that this article will report on plans by a posse of nativist vigilantes and rogue immigration officers to corral and string up a passel of American employers for perceived violations of visa rules. But that is not this article. Rather, the authors offer a recap for employers of key events this year in business immigration. With virtually no immigration reform legislation coming out of Congress, most legal developments in the immigration arena in 2011 have been in other venues: the courts, the agencies and various state legislatures which—by default—have tried to fill the vacuum caused by federal failures to regulate immigration.

1. H-1B employers are bullish on the economy. The annual H-1B visa quota for specialty-occupation workers was exhausted in November, much sooner than many observers had forecast—two months earlier in the cycle than last year and sooner than in any fiscal year since 2008, when the financial crisis led to a sharp downturn in hiring. Demand was up despite this being the first H-1B filing season since Congress imposed a \$2,000 supplemental U.S. Citizenship and Immigration Services filing fee on employers with 50 or more employees in the United States, more than 50 percent of whom are in H-1B or L-1 status.

The \$2,000 supplemental fee (on top of other USCIS filing fees that run to as much as \$2,325) affects primarily IT consulting operations based overseas, many of which in the past had filed hundreds of H-1B petitions on behalf of their overseas staff in anticipation of future professional service needs in the United States, so the uptick in demand this year would appear to be domestically driven.¹

The number of visas available each fiscal year is subject to a cap of approximately 65,000 for individuals with bachelor's degrees and foreign advanced degrees and another 20,000 for those with advanced degrees from U.S. universities. This cap—which Congress established in 1990 during very different economic conditions—was reached in November 2011, almost eight months after the H-1B filing season opened, four months before the next filing season begins and 16 months before Oct. 1, 2012, the start of the next fiscal year (when new H-1B beneficiaries can start working).

2. Friends without benefits—new Free Trade Agreements omit immigration provisions. This year Congress approved free trade agreements with South Korea, Colombia and Panama, but none included immigration or visa provisions. So the list of countries with special visa benefits for their nationals—Australia, Canada, Chile, Mexico and Singapore—allowing employment with U.S. employers, will remain unchanged (and short) for the foreseeable future.

¹By way of background, the H-1B (specialty occupation) visa category is the primary vehicle for U.S.-owned and U.S.-based employers seeking to hire foreign-born professionals and highly skilled workers. Other common visa options are only available if the U.S. employer has international operations or foreign ownership. For example, the L-1 visa for intracompany transferees requires one year of employment with a related corporate entity abroad, and the E-1/E-2 visa (for treaty traders and treaty investors) requires company ownership by a foreign person or entity.

When the Bush administration included an earmarked H-1B visa allocation for Chileans and Singaporeans in the Free Trade Agreements in 2004, and the E-3 (specialty occupation) visa classification for Australians in a 2005 deal, Congress responded angrily over immigration provisions “sneaking into” trade agreements.² Moreover, given the negative reception that greets most immigration bills in Congress, the Obama administration, not surprisingly, omitted immigration in the trade accords with South Korea, Colombia and Panama.

3. More friends, but with few benefits: Slow progress on immigration equality for same-sex partners. The federal Defense of Marriage Act (DOMA) is still in effect, precluding marriage-based immigration benefits for same-sex partners, even those lawfully married in jurisdictions that recognize same-sex marriages. But agencies in the Obama administration have taken steps toward accommodating the visa needs of same-sex partners (beyond the Justice Department’s well-publicized decision not to defend DOMA in court).

In February 2011, the State Department announced a new program allowing foreign same-sex partners of U.S. foreign service employees on domestic assignment in the United States to apply for J-1 (exchange visitor) visa status, a creative work-around to give U.S. foreign service employees comparable treatment to that afforded foreign diplomats in 2010.³ For its part, USCIS—a unit of the Department of Homeland Security—also issued a memorandum in August 2011 clarifying its policy on the extension of B-2 (visitor) status for accompanying family members, including “cohabitating partners.”

Long-standing agency policy had allowed such family members to come as visitors if they were ineligible for the derivative visa classification available to dependent family members of temporary workers. The 2011 USCIS memorandum clarifies that multiple extensions can be appropriate for family members of foreign nationals in the United States on extended work assignments. In addition, the media have reported that some immigration judges—a corps within the Department of Justice’s Executive Office for Immigration Review—have terminated removal proceedings against same-sex domestic partners of U.S. citizens.

4. Prosecutorial discretion is not amnesty or automatic work permission. A June 2011 memorandum from U.S. Immigration and Customs Enforcement (ICE) Director John Morton broadening the availability of prosecutorial discretion for low-level immigration violators has generated tremendous interest and controversy. But for employers in need of a fix, this is not it. Prosecutorial discretion (PD) by definition is exercised on a case-by-case basis, and employment authorization is a form of relief offered only in a limited subset of PD cases (involving individuals granted “deferred action” status).⁴

The government has announced a cross-agency task force to review some 300,000 pending removal cases for PD eligibility. At the same time, the Obama administration has deported more foreigners than any other in recent memory, particularly through the Secure Communities (S-COMM) program—a snare operated by the states when police arrest suspected criminals and run their fingerprint and identity data through federal law enforcement databases. S-COMM has been severely criticized as failing to remove serious felons who pose real dangers to communities but removing mostly picayune immigration law violators such as visa overstayers and illegal border crossers.

² Congress has entered into over 70 Treaties of Friendship, Commerce and Navigation and Bilateral Investment Treaties that allow for nationals of those countries to apply for E-1 (treaty trader) and E-2 (treaty investor) visas, but an E visa holder is limited to employment with a sponsoring entity owned by nationals of the treaty country.

³ In 2010, the State Department had expanded the definition of “immediate family” in its Foreign Affairs Manual to grant diplomatic visas to same-sex domestic partners of diplomats from countries that confer such visas to the domestic partners of U.S. diplomats.

⁴ For foreign citizens brought to America as children by their parents, but now here illegally—The DREAMers who would benefit from the DREAM (Development, Relief and Education for Alien Minors) Act were Congress to pass it—the only relief they received has been through selected state DREAM Acts, such as versions passed in Texas and California, and pending in New York, which would provide in-state tuition rates, but no right to work.

5. The EB-5 job-creation green card program for investors generated more interest than actual green cards. The investor or entrepreneur green card (permanent resident) program, also known as the EB-5 because it is the fifth employment-based program listed in the immigration statute, continues to attract attention from wealthy foreign nationals and capital-hungry developers and dealmakers in the United States. As initially designed, the program allows a foreign national to apply for a green card based on an investment of at least \$1 million in a new business that results in the creation of at least 10 new jobs for U.S. workers, so long as the foreign national remains active in the management of the business for at least two years or for as long as it takes for the application to be adjudicated, whichever is longer.

The Regional Centers program, in particular, appeals to many would-be investors, in large part because (a) the standard investment threshold of \$1 million is reduced to \$500,000 (since regional centers situate their projects in TEAs or Targeted Employment Areas with unemployment levels 50 percent above the national average), and (b) the requirements of playing an active role in the management of the investment and creating 10 new direct jobs through the investment are substantially relaxed (limited partner status suffices and new jobs may be directly or indirectly created).

Use of the EB-5 program has been stronger than in prior years, but it is still a difficult and risky process that will probably continue to pique the interest of many but will be used by relatively few. Prospective investors should investigate investment opportunities with great care. As *The New York Times* reported recently, some centers may promote potentially illegal TEA designations gerrymandered in a way to finance developments in areas with insufficient unemployment that would otherwise require the higher \$1 million investment minimum. In addition, as with many opportunities to part with money, a cottage industry of unlicensed brokers, finders and middlemen has arisen that seems to show little fidelity to the investors' best interests.

6. States continue to enact state-level immigration controls. Perhaps the biggest thorn in employers' sides, state-specific immigration rules now force employers to consult with counsel on compliance in multiple states. The rush of state-level immigration enforcement has been in the making for a number of years, and 2011 has finally brought the question of federal preemption of state immigration legislation to the Supreme Court, which agreed to review Arizona's controversial law, SB1070. Like Arizona, a number of states, including Alabama, Mississippi, Georgia, South Carolina and Tennessee, have passed laws that mandate employer participation in E-Verify (the federal program that allows employers to verify employment eligibility online) or otherwise regulate employers' hiring practices through state or local licensing provisions. In addition, over 20 more states have legislation pending that would regulate immigration at the worksite. As in the case of Alabama and Georgia, business interests have belatedly begun to urge revision or repeal of these state constraints.
7. I-9 enforcement remains painfully unpredictable. ICE's enforcement actions against employers suspected of noncompliance with the Form I-9 employment eligibility verification requirements remain spotty and impossible to predict. (Employers must verify every new hire's eligibility to work in the United States by inspecting documents that establish identity and eligibility to work, and this verification is made on Form I-9.)

If audited, employers can generally reckon with a hefty penalty. Even the most vigilant employers have encountered difficulty maintaining their I-9 compliance programs, in part because of a revolving door of HR personnel hired over the years who may lack adequate compliance training. Many of the I-9 paperwork violations involve the kinds of mistake that are largely inconsequential unless the employer faces the misfortune of an ICE I-9 audit.

Increasingly, employers are migrating their I-9 compliance programs over to electronic software that tends to catch recurrent errors before the form is finalized, but these still have not eliminated the risk of human error. Businesses are also digitizing, indexing and then dispensing with their legacy paper I-9s, while engaging outside law firm auditors to oversee remediation of correctable errors. Moving forward proactively—before ICE initiates an audit—is a sound strategy.

The year 2011 also witnessed the opening of ICE's first high-volume auditing facility, capable of targeting large employers. Known as the Employer Compliance Inspection Center, it is housed in Crystal City, Va., with an initial complement of 15 auditors who will support field investigators nationwide. At the same time, the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) continues its aggressive pursuit of employers suspected of violating the anti-discrimination laws. A recent highly publicized example involves an OSC administrative complaint against the University of California, San Diego Medical Center, alleging "document abuse" for reportedly requesting at time of hire more or different documents of identity or employment eligibility of certain classes of individuals based on citizenship status or national origin.

8. 2011 ends on a high (but false) note for India- and China-born employees. Green card sponsorship for noncitizen employees born in China or India has been a painful and slow challenge given the lengthy processing delays caused by oversubscribed visa quotas (due in large part to per-country limits on annual visa allotments). Persons born in India or China who graduate with advanced degrees typically face waits of five years or longer for the issuance of green cards, while nationals born in other countries can secure the coveted permanent resident card in one to two years or less. Those hailing from China or India with only bachelor's degrees may suffer delays of 10 to 20 years or longer, with the wait for other nationalities much shorter.⁵

Further happy news, at least for Indians and Chinese, was the House bill recently passed that would do away with those per-country limits. The bill has been stalled in the Senate through a hold invoked by Senator Charles Grassley, so its passage is far from certain. But if it does become law that would adversely affect nationals of all other countries seeking employment-based green cards in the EB-2 category (and also the EB-3 category for professionals and skilled workers), since only the per-country cap and not the absolute annual limit on visa numbers would be lifted.

With 2012 an election year, Congress will probably enact no major immigration legislation. So our attention will remain on the courts and the agencies, as well as state legislatures, in the coming year. We will also be on the lookout for any anti-immigration vigilante posses targeting passels of hapless employers. Our eyes are peeled.

* **Ted J. Chiappari** is a partner at Satterlee Stephens Burke & Burke LLP in New York City. **Angelo A. Paparelli** is a partner in Seyfarth Shaw in New York and Los Angeles.

⁵ Starting in October 2011, the State Department has rapidly accelerated the cut-off date each month for Indians and Chinese in the so-called EB-2 or second preference category (for those with job offers requiring advanced degrees). For example, the visa availability cut-off date for Indians and Chinese in the EB-2 category was April 14, 2007, in September 2011, and that cut-off date is now Jan. 1, 2009, (as of Jan. 1, 2012). The reason for the surge is that demand for visa numbers from USCIS has not been as great as the State Department had expected. It is possible that some in the queue have already obtained the green card through other means (for example, by marrying a U.S. citizen) or that, frustrated with the process, they left the United States, or that the sponsoring employer no longer has a job for them. In any case, for those who have been waiting patiently, this has been happy news.

Reprinted with permission from the December 29, 2011 edition of the *New York Law Journal*. © 2010 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the Journal for permission to reprint this article.

Informational Abundance and Scarcity in Immigration Worksite Enforcement

by Angelo A. Paparelli and Ted J. Chiappari*

A recent article published by the Nieman Journalism Lab (a group at Harvard billing itself as “an attempt to help journalism figure out its future in an Internet age”) bemoaned today’s challenge of “informational abundance.”¹ To employers and attorneys who try mightily to understand and comply with rapidly evolving state and federal immigration-compliance obligations, the proliferation of immigration data is likewise an all too familiar problem.

The writer of the Nieman piece, Maria Popova, maintains that the solution lies in content “curation,” a buzzword borrowed from the art world, that she considers a new form of authorship. “Curation,” she suggests, is the best “semantic placeholder” to describe the social media application, Twitter, and its *raison d’être*. What Twitter and other forms of social media accomplish, Ms. Popova asserts, is to serve as a “conduit of discovery and direction for what is meaningful, interesting and relevant in the world.” Content curation, then, is an attempt to filter and make sense of the digital world—an even more daunting challenge than trying to sip water from a gushing fireplug.

Unfazed by the plethora of immigration news, this column’s authors will attempt to “curate” a few of the most important developments in immigration-related worksite enforcement recently spewing forth as unfiltered “content” from smartphones, tablets, desktops and other mobile and stationary media. Be forewarned, however, that snippets of significance may exceed 140 characters. Yet rest assured that no anatomical parts will be exposed or salacious text offered.

Supreme Court

The U.S. Supreme Court opened the immigration hydrant with its recent decision in *Chamber of Commerce of the United States v. Whiting*, 563 U.S.— (May 26, 2011), giving the states freedom to piggyback federal immigration laws by catching a ride on E-Verify, the online employment-eligibility screening tool maintained by the Department of Homeland Security (DHS). A five-justice majority in *Whiting* declaimed (over heated dissents) that the exemption from federal sovereignty in the 1986 Immigration Reform and Control Act (IRCA) for “licensing and similar laws” allowed enactment of a 2007 state immigration law, the Legal Arizona Workers Act (LAWA).² That legislation required employers to use E-Verify in Arizona or suffer the suspension or loss of a business license to operate there. A number of states have passed LAWA copycats, most recently, Georgia and Alabama, all of which face court challenges by business groups and civil rights organizations.³

¹ Maria Popova, “In a New World of Informational Abundance, Content Curation Is a New Kind of Authorship,” June 10, 2011, accessible [here](#) (all hyperlinks last accessed on June 12, 2011).

² For actions employers may wish to consider in light of *Whiting*, see, Seyfarth Shaw LLP, “Strategy & Insights—How Will the Supreme Court’s Approval of Arizona’s E-Verify Law Affect Your Organization?—7 Action Items to Consider,” June 1, 2011, accessible [here](#). For a forecast by one of the authors concerning the likely aftermath of the Supreme Court’s *Whiting* decision, see, Angelo A. Paparelli, “10 Immigration Predictions: The Foreseeable Consequences of the Supreme Court’s Arizona E-Verify Decision,” NationOfImmigrants.com, accessible [here](#).

³ The Court also remanded a Hazelton, Pa., ordinance for reconsideration in light of *Whiting*. The city ordinance, *inter alia*, would suspend the property rental license of landlords found to be engaged in the “harboring” of an “illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”

Still uncertain, however, is the fate of SB1070, a more controversial Arizona immigration statute en route for inevitable Supreme Court review. Although SB1070 has been temporarily enjoined, the law as written would (a) allow police officers with reasonable suspicion of criminal conduct to stop and ask suspects about their immigration status, and (b) introduce state immigration scrutiny into worksites such as hospitals and schools. Critics charge that the Arizona legislation will invade the exclusively federal law-enforcement domain of immigration and lead to racial and ethnic profiling.⁴

Enforcement

Before and after the high Court's ruling, however, the nation's employers have continued to face unprecedented enforcement scrutiny by the Obama administration, as previously reported in this column.⁵ Recent high-profile actions have been targeted against Abercrombie & Fitch (settlement of civil violations concerning the digital storage of Forms I-9), American Apparel (a civil order to terminate several unauthorized workers), two restaurant chains, Chipotle and Chuy's Mesquite Broiler (separate actions involving allegations that the employer knew employees lacked work permission), an electronic I-9 software vendor, Lookout Services (an FTC enforcement action for alleged data breaches), and a multinational IT consulting firm, Infosys Technologies (claims that business visas were misused to gain entry and work in the United States). For publicly traded companies, these types of actions can create securities law risks and potential litigation exposure.⁶ For privately held firms, the risks may include extinction of the entity and incarceration of the principals.

Also likely to stir the immigration enforcement pot, the Social Security Administration recently announced that it would resume its practice of sending employers "no-match" letters reporting discrepancies between SSA records and employer-reported payroll data on individual workers or groups of employees.⁷ These notices report discrepancies in three data fields, viz., a worker's SSN and first and last name, but do not necessarily involve immigration violations, e.g., they may be data-entry errors or legitimate name changes.

Nonetheless, as DHS asserted in its since-withdrawn federal rule creating a safe harbor for no-match checks, an employer must investigate whether the worker is indeed lawfully authorized for employment. Failure to investigate can lead to a finding based on all relevant circumstances that the employer had constructive knowledge that one or more subject workers had no right to work in the United States. Ironically, employers that proactively verify SSNs for payroll-auditing purposes through the Social Security Number Verification Service (SSNVS), an online tool, end up checking additional data fields (gender and date of birth), thereby heightening the prospect that discrepancies will trigger a duty to investigate potential immigration worksite violations.⁸

DHS and SSA initiatives have also created tension between employers, labor unions and unionized workers. In particular, the Service Employees International Union (SEIU) has been perhaps the most outspoken and vigilant against employer compliance initiatives and federal and state worksite incursions under the immigration laws.⁹

As employers have proactively conducted internal immigration compliance audits, or responded to Social Security

⁴ Other states have taken different tacks. Illinois, Massachusetts and New York, with California perhaps not far behind, have announced their withdrawal from the federal Secure Communities program because "S-Comm" has not lived up to its promise to deport dangerous foreign felons, but instead has mostly removed nonviolent immigration law violators who have entered the United States without proper papers or overstayed their visas. Another state, Utah, has adopted its own guest worker program which, to be effective, would require a federal waiver.

⁵ See, Angelo A. Paparelli and Ted J. Chiappari, "*Goldilocks' Lessons for Dealing With Bearish Immigration Police*," New York Law Journal, Feb. 23, 2011.

⁶ See webinar, "*I-9 Compliance, Corporate Disclosure, and Shareholder Lawsuits: What's Next?*" Rock Center for Corporate Governance, Stanford University, accessible [here](#), June 1, 2011 (no charge, but registration required).

⁷ See, "RM 01105.027 Handling Inquiries Relating to SSA Letters on No-Match Names and Social Security Numbers (SSNs)," April 11, 2011, accessible [here](#); see also, Ted J. Chiappari and Angelo A. Paparelli, "*Social Security Is Again Sending No-Match Letters to Employers*," New York Law Journal, April 26, 2011.

⁸ See SSNVS's online Handbook chapter "SSNVS Results," accessible [here](#).

⁹ For the SEIU's statements on immigration policy, see the union's "Immigration" tab on its website, [here](#).

Administration no-match notices or I-9 inspection notices issued by U.S. Customs & Immigration Enforcement (ICE)—the immigration enforcement agency within DHS—the SEIU and other unions have resisted what they see as employers’ overzealous demands to unionized workers for acceptable documentary proof of identity and lawful immigration status.

Interestingly, many collective bargaining agreements (CBAs) drafted during the first heyday of immigration enforcement (from 1986 to 2000) prescribe explicit procedures and timelines for immigration compliance and the verification of employment eligibility. Pre-dating the growth of E-Verify and the Obama administration’s resumption of enforcement after a lull during the George W. Bush presidency, these CBAs have often led to the filing by unions of grievances under the National Labor Relations Act and the submission of disputes to arbitration. Labor arbitrators have thus become de facto interpreters of the immigration laws, issuing hotly contested rulings that may at times deviate from DHS regulations.¹⁰

Yet another federal subdivision, the U.S. Department of Justice, has issued two significant rulings that shed light on immigration worksite enforcement.

The first, by the Office of Special Counsel for Immigration-related Unfair Employment Practices (OSC), clarified that an employer, without risking a charge of citizenship status or national origin discrimination, may pose questions about the need for work-related immigration sponsorship to nonimmigrant applicants for employment. The advisory opinion issued by the OSC¹¹ reached this result by reasoning that nonimmigrants are not members of the protected class under IRCA, which only covers these forms of discrimination against U.S. citizens, green card holders, asylees, refugees and temporary residents under IRCA’s (now expired) legalization program. As a result of the OSC’s guidance, employers may either avoid or knowingly accept the cost of sponsorship for immigration benefits before the candidate is hired.

The second Justice Department action arose as a decision from the Office of the Chief Administrative Hearing Officer in *United States v. Snack Attack Deli Inc., D/B/A Subway Restaurant #3718*, (OCAHO Case No. 09A00025, Dec. 22, 2010).¹² In *Snack Attack*, ICE charged a franchisee of a national restaurant chain with 108 separate paperwork violations for failing to maintain Forms I-9 on the franchisee’s employees. The Administrative Law Judge sustained the charge, but the parties differed over the amount of fines to be imposed under the relevant statutory factors. IRCA, at 8 U.S.C. §1324a(e)(5), requires consideration of the following factors: 1) the size of the employer’s business, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer.

The ALJ rejected ICE’s proposed fines of \$111,078, and instead imposed fines totaling \$27,150. Although the court found that the employer had made virtually no effort to comply with the I-9 obligation, the workers in question were not unauthorized, ICE failed to establish that the franchisee was other than a small business, and the fines that ICE would have proposed far exceeded the ability of the employer to pay. *Snack Attack* thus offers a road map on how an employer may negotiate a reduction of ICE-proposed fines or seek fine mitigation before an Administrative Law Judge.

Proposal Expected

Not to be outrun in the zealous-immigration-enforcement sweepstakes, a GOP proposal soon to be introduced by Representative Lamar Smith will make E-Verify mandatory, increase employer compliance burdens and enhance penalties for

¹⁰ See, e.g., *Service Performance Corporation (Employer) and Service Employees International Union, Local 1877 (Union)*, McKay Case No. 04-292, Jan. 12, 2005 (union prevailed on claim that employer that assumed prior employer’s workers did not newly hire the workers; hence, a new Form I-9 (Employment Eligibility Verification) compliance process was unwarranted). Cf., *Wheatland Tube Company (Employer) and Sheet Metal Workers’ Local 37 (Union)*, Nov. 12, 2009 (employer acted properly in terminating workers who did not resolve SSN discrepancy over a two-year period). (Copies of both arbitration decisions on file with the authors.)

¹¹ The OSC’s opinion letter is an embedded link within a blog post by Angelo A. Paparelli, “The Right Immigration Question is at Last Approved by the OSC,” *NationOfImmigrants.com*, July 9, 2010, accessible [here](#).

¹² The case can be accessed [here](#).

immigration law violations.¹³ As described in a blog post by one of the authors,¹⁴ a June 8 “Discussion Draft” of the bill (titled the Lawful Workers Act, or LWA), if enacted, would dramatically alter the immigration landscape:

- **Mandatory Use Phased in.** Employers would be required to enroll and use E-Verify by a set deadline based on the number of current workers. From the date LWA is enacted (if ever), E-Verify would be required within: 30 days for covered federal contractors; six months (for employers of 10,000 or more personnel); 12 months (for firms with 500 to 9,999 employees); 18 months (20 to 499 workers); two years (one to 19 workers); and three years (for employers of farm workers).
- **E-Verify Use Only for New Hires.** Except for federal vendors who must verify current employees assigned to a covered federal contract, the LWA will only apply to new hires. Also, it will not apply to farm workers returning to a former employer.
- **No Preemption of Arizona-Style E-Verify Laws.** LWA would permit the proliferation of state laws and local rules mandating E-Verify use as recently blessed by the Supreme Court in *U.S. Chamber of Commerce v. Whiting*: “A State, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification system.”
- **Weakened Good Faith Compliance Defense.** The LWA enfeebles the Sonny Bono amendment, enacted in 1996, which gives employers 10 days to correct technical or procedural Form I-9 compliance failures after ICE points them out. Although the Smith proposal would extend the curative period to 30 days, it would apply the defense only to compliance errors that are “de minimis.” Good faith compliance would be available, however, for E-Verify queries that failed because the online system was unavailable at the time.
- **Criminal Penalties for False I-9 Attestations and Improper Use of E-Verify.** Individuals would face more serious criminal penalties, heftier fines and sentences of up to two years with sentences to run consecutively, unless the court exercises discretion to allow concurrent sentences for knowingly furnishing a Social Security number or DHS-approved ID or authorization number that does not belong to the person or submitting such a number in an E-Verify screening. Helpfully, however, the LWA waives a good faith first violation of the unlawful hiring rules.
- **Change in Retention Period.** Employers would now be required to hold on to electronic or paper verification records for the later of five years from date of hire (currently it’s three years) or one year from date of termination.

Not surprisingly, however, Mr. Smith’s proposal says nothing about how Congress would fund mandatory E-Verify nationwide, the expensive prisons needed to house immigration violators convicted under his bill, and the Federal Tort Claims Act discrimination suits the bill would authorize. Perhaps this would become the subject of another Republican proposal, introduced by Senators John Cornyn and Jon Kyl, which would require an analysis of national security risks arising from increased deficits and federal debts.¹⁵

Conclusion

So there we have it. An attempt at content curation with focus on immigration worksite enforcement, preserved and displayed for employers and their lawyers to inspect and consider. Does it meet author Popova’s prescript as a social media “conduit of discovery and direction for what is meaningful, interesting and relevant in the [immigration] world?” The ending of her article provides a possible answer:

13 The bill is available [here](#).

14 See Angelo A. Paparelli, “Immigration Voyeurism: An Early Peek at Rep. Lamar Smith’s Mandatory E-Verify Bill,” *NationOfImmigrants.com*, June 11, 2011, accessible [here](#).

15 See June 12, 2011, Tweet on Twitter from “@JohnCornyn”: “*Cornyn, Kyl bill requiring assessment of national security risk of mounting.*”

Ultimately, I see Twitter [and presumably other Web 2.0 innovations] neither as a medium of broadcast, the way text is, nor as one of conversation, the way speech is, but rather as a medium of conversational direction and a discovery platform for the text and conversations that matter. Until we find new ways to classify, codify, and talk about this medium—new language, new laws, new normative models—our understanding and use of it will remain a museum of empty frames. (Emphasis in original.)

“A museum of empty frames,” indeed. Without “new language, new laws [and] new normative models,” emptiness and scarcity—quite regrettably—also describe the state of immigration-related worksite enforcement in America today.

Angelo A. Paparelli is a partner in Seyfarth Shaw in New York and Los Angeles. **Ted J. Chiappari** is a partner at Satterlee Stephens Burke & Burke in New York City.

Reprinted with permission from the June 22, 2011 edition of the *New York Law Journal*. © 2010 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the *Journal* for permission to reprint this article.