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.

[1] By 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.

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[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.

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[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.