Immigration Issues for Cities

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In the ten years post the September 11 acts of terror against the United States (U.S.) and the more recent economic downturn in the U.S., the issue of immigration reform has been basically an anathema to the public and our legislators. Any interest in reforming antiquated immigration laws has been replaced with numerous border and national security initiatives to the almost total exclusion of reforming our dysfunctional immigration laws to improve the U.S. economy. In addition, since the federal government has been paralyzed on the immigration front due to reelection goals on the hill, the states, and even some cities, have certainly invaded the typical federal realm of U.S. immigration law.

States Legislating in a Federal Arena

In the first half of 2011, the National Conference of State Legislatures (www.ncsl.org) reported that state legislators in the 50 states and Puerto Rico introduced 1,592 bills and resolutions concerning immigrants and refugees. This number exceeded the number introduced in 2010 during the same time frame by 16%. As of June 2011, 40 state legislatures enacted 162 laws and adopted 95 resolutions related to immigration. The "top topic hits" for this legislation include: employment, identification/driver's licenses, and law enforcement.

Alabama, Idaho, Kansas, Michigan, South Dakota, and Utah enacted laws requiring sex offender registries that mandate proof of citizenship or immigration status. The State of Montana enacted a law to require their Department of Motor Vehicles to use the federal SAVE database to verify a driver's license or an identification applicant's lawful presence. Alabama, Georgia, Indiana, Louisiana, North Carolina, South Carolina, Tennessee, Utah, and Virginia all enacted E-Verify legislation, while Florida did so by executive order.

- **Health:** States are requiring that participants in state health benefit exchanges be U.S. citizens or lawfully present immigrants.
- **Identification/driver's licenses**: States restrict nonresidents' eligibility for driver's, commercial, and trade licenses.
- **Law enforcement**: Virginia established a criminal information exchange program with willing states that share a border with Canada or Mexico in order to share information about drugs, gangs, unlawful presence, and terrorism.
- **Employment:** E-Verify legislation was enacted in 10 states: Alabama, Florida, Georgia, Indiana, Louisiana, North Carolina, South Carolina, Tennessee, Utah, and Virginia. For additional

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information on E-Verify, please see NCSL's publication at http://www.ncsl.org/default.aspx?TabId=13127.

- **Resolutions**: Utah H.466 enacts the Utah Commission on Immigration and Migration Act, addresses integration of immigrants in the state, and provides for the creation of the Migrant Worker Visa Pilot Program. It also commissions a study of the impact of illegal immigration on Utah.

Utah, Alabama, Georgia, Indiana, and South Carolina all worked on omnibus laws copying Arizona's SB 1070 to some extent. Alabama's HB56 requires schools to verify an enrolling student's immigration status. These state efforts have pushed and are continuing to address the extent of federal preemption in immigration law. On September 28, 2011, this provision among several others was not enjoined by Judge Sharon Lovelace, Chief Judge of the Northern District of Alabama in her opinion.[2] The U.S. District Court in Alabama district court ruled on the U.S. government's request for preliminary injunction of 10 sections of Alabama's immigration enforcement law (HB56), enjoining four provisions and allowing six to go into effect pending the outcome of the lawsuit.

The 4 sections enjoined were:

- Section 11(a): creating a misdemeanor for an unauthorized immigrant to apply for or perform work;
- Section 13: making it unlawful to conceal, harbor, or transport unauthorized immigrants;
- Section 16: prohibiting businesses to take tax deductions for wages to unauthorized immigrants; and
- Section 17: creating a civil cause of action against employers for not hiring or firing a U.S. citizen or legal immigrant while employing an unauthorized immigrant.

The 6 sections that can proceed are:

- Section 10: creating a state misdemeanor for not carrying an alien registration document;
- Section 12(a): requiring a law enforcement officer to make a reasonable attempt to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is unlawfully present;
- Section 18: requiring law enforcement to transport a person arrested for driving without a license to a magistrate and if found to be unlawfully present the person shall be detained until prosecution or until handed over to immigration authorities;
- Section 27: barring courts from enforcing contracts with unlawfully present aliens;
- Section 28: requiring every public school to determine whether a student was born outside of the United States or to parents unlawfully present and report to the state board of education; and,
- Section 30: makes it a felony for an alien not lawfully present to enter into "business transactions" with state or local government (e.g., driver's licenses, business licenses, but not marriage licenses).

Georgia's omnibus immigration bill (HB87) was signed on May 13, 2011. The bill includes provisions on employment, law enforcement, and public benefits. On June 27, 2011 U.S. District Judge Thomas Thrash, Jr. granted a preliminary injunction on sections 7 and 8 of HB87

[2] *U.S. v. State of Alabama*; Governor Robert J. Bentley, (N.D. Alabama, Southern Division – Case No. 2:11-CV-2746-SLB) (Sept. 2011).

that would have gone into effect on July 1, 2011. Section 7 prohibits transporting, harboring, or concealing an illegal immigrant. Section 8 allows law enforcement to check immigration status, if the officer has probable cause the individual has committed another offense. The case reference is *Georgia Latino Alliance for Human Rights et al. v. Nathan Deal, Governor of Georgia et al.* in the U.S. District Court for the Northern District of Georgia, Atlanta Division. Indiana's SB590, signed May 10, 2011, covers several issues including law enforcement, E-Verify, public benefits, and a cost study of illegal immigrants. On June 24, 2011 Judge Sarah Evans Barker issued a preliminary injunction *in Ingrid Buquer, et al. v. City of Indianapolis, et al*., which enjoined the defendants from enforcing sections 18 and 19 of the new law until further order of the court.

- Section 19 of SB590 amends Indiana Code § 35-33-1-1(1), by adding new sections (a)(11)-(a)(13), authorizing state and local law enforcement officers to make a warrantless arrest of a person when the officer has a removal order issued for the person by an immigration court, a detainer, or notice of action issued for the person by the United States Department of Homeland Security (DHS), or has probable cause to believe the person has been indicted for or convicted of one or more aggravated felonies.
- Section 18 of SB 590, to be codified as Indiana Code § 34-28-8.2, which creates a new infraction under Indiana law for any person (other than a police officer) who knowingly or intentionally offers or accepts a consular identification card as a valid form of identification for any purpose.[3]

As to Utah, on May 10, 2011, U.S. District Court Judge Clark Waddoups granted a temporary restraining order that prevented HB497 from taking effect. (*See Utah Coalition of La Raza et al. v. Gary Herbert and Mark Shurtleff*).

So far, other than the issuance of driver's licenses, efforts by the State of Texas to enter the fray have been typically derailed (e.g. sanctuary city efforts). Although on September 1, 2011, an applicant for an identification card or a non-commercial driver's license, who is not a U.S. citizen, U.S. national, U.S. legal permanent resident, refugee, or asylee must present lawful presence documentation issued by the appropriate federal immigration authority. [4]

Cities As Immigration Law Enforcers

Several cities have also decided to enter the immigration experiment as well. The usual stated motivating factor is the desire to reduce costs during times of economic hardships and budget shortfalls. For example, the City of Farmers Branch, Texas, filed an appeal with the United States Court of Appeals for the Fifth Circuit requesting the review of a federal judge's decision that struck down a city policy to prevent landlords from renting housing to unauthorized immigrants.[5] The policy required all prospective tenants in Farmers Branch to obtain rental licenses from the city, which could deny licenses to those who did not hold lawful immigration status in the United States.[6] Since 2006, Farmers Branch passed three separate rental ordinances targeting unauthorized immigrants, all of which have been struck down as

[3] http://lawprofessors.typepad.com/conlaw/2011/06/indiana-immigration-law-enjoined-by-federal-judge.html.
[4] http://www.txdps.state.tx.us/DriverLicense/documents/ImmigrationStatusChart.pdf.
[5] http://www.farmersbranch.info/sites/default/files/2010-0715%20Notice%20of%20Appeal.pdf, *Villas at Parkside II et al. v. City of Farmer's Branch, Civil Action No. 3:08-CV-1551-B (consolidated with Civil Action No. 3:08-CV-1615-B)(N.D. Texas Dallas Division).*
[6] http://www.farmersbranch.info/sites/default/files/Ordinance%20No%202952.pdf.

unconstitutional by federal judges.[7] The city estimates that it has spent more than $3.7 million defending the measures.[8]

On October 4, oral argument in the Farmers Branch case was held before a three-judge panel of the Fifth Circuit, in New Orleans. Counsel for the city relied upon the recent U.S. Supreme Court guidance on preemption in the May 2011 decision rendered in *Chamber of Commerce v. Whiting*[9] concerning the ability of the State of Arizona to mandate the use of the federal E-Verify system to confirm work authorization and identity of new hires as well as to revoke business licenses for knowingly hiring unauthorized workers.[10]

In a similar city ordinance case concerning the City of Hazleton, Pennsylvania, on September 27, 2011 the city filed its brief with the Third Circuit explaining how the U.S. Supreme Court's recent decision in *Chamber of Commerce v. Whiting* invalidated the Third Circuit's prior holding in *Lozano v. City of Hazleton*.[11] Previously in May of 2011, the Supreme Court vacated the Third Circuit's prior holding and ordered the appeals court to reconsider its decision in light of *Whiting*. As background, on July 13, 2006, the City of Hazleton enacted Ordinance 2006-10, the "Illegal Immigration Relief Act Ordinance." Then, on August 15, 2006, the city enacted Ordinance 2006-13, the "Rental Registration Ordinance." On September 21, 2006, Hazelton enacted Ordinance 2006-18, the "Illegal Immigration Relief Act" ("IIRA") Ordinance, to replace Ordinance 2006-10. The IIRA Ordinance was subsequently amended by Ordinances 2006-40 and 2007-6.[12]

Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-6, (collectively, the "IIRA Ordinance") renders it unlawful for any business entity to employ unauthorized aliens, as that term is defined by federal law. The IIRA Ordinance does not permit any Hazleton official to determine independently whether a person is authorized to work in the United States. The city must rely entirely upon the federal government's verification of any person's employment authorization, through the DHS E-Verify program. The IIRA Ordinance also makes it unlawful to harbor an illegal alien by knowingly providing rental accommodations to an "illegal alien".[13]

In January of 2011, the Center for American Progress issued a report on the high costs of local ordinances passed related to immigration entitled, "Unconstitutional and Costly – The High Price of Local Immigration Enforcement."[14] The key cases outlined in the report are:

- Hazleton, Pennsylvania has reportedly spent at least $2.8 million with some estimates totaling $5 million as it has defended its ordinance all the way to the U.S. Supreme Court.
- Riverside, New Jersey endured a local economic downturn before the city rescinded its anti-immigrant ordinance and welcomed the return of immigrants.
- Farmers Branch, Texas has spent nearly $4 million in legal fees and is expected to spend at least $5 million to defend its anti-immigration statute.

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[7] *See* http://www.maldef.org/assets/pdf/FarmersBranch_Complaint_12262006.pdf.
[8] *See* http://fremonttribune.com/article_1d702148-6f1d-11df-9211-001cc4c002e0.html.
[9] 563 U.S. ___, 131 S. Ct. 1968 (2011).
[10] A recording of the oral argument is available at: http://www.irli.org/node/43.
[11] http://irli.org/system/files/3rd%20Cir_Lozano%20v%20Hazleton_City%20Letter%20Brief%20re%20Whiting_9-26-2011.pdf, See *Pedro Lozano, et al. v. City of Hazleton*, 3rd Cir.No. 07-3531, Sup. Ct. No. 10-772.
[12] *Id.*
[13] *Id.*
[14] Martinez, Gebe http://www.americanprogress.org/issues/2011/01/pdf/cost_of_enforcement.pdf.

- Prince William County, Virginia reduced the impact of its immigration ordinance after determining that the original version would cost millions to enforce and defend in court.
- Fremont, Nebraska increased the city's property tax to help pay the legal fees for its anti-immigration ordinance which it intends to defend.[15]

It is important to note that the Kansas Secretary of State, Kris Kobach, is serving as counsel to the cities of Farmer's Branch, Fremont, and Hazleton as he continues in his immigration enforcement quest.[16] The issue of federal preemption related to state and local immigration law ordinances though will continue to be important to monitor.

An Immigration Law Issue Briefing

With the background of the preemption fight in immigration by state and city, the remaining part of this article will be devoted to some basic concepts and references as well as to issues of note to help navigate the current immigration quagmire.

1. The Structure

The main agencies engaged in the application and enforcement of immigration laws at the federal level are as follows:

A. Department of Homeland Security (DHS) –
- Customs and Border Protection (CBP) - www.cbp.gov CBP combines the Border Patrol, inspectors at our ports of entry, the U.S. Customs Service, and the Department of Agriculture, Animal and Plant Health Inspection Service into one complex agency responsible for all land, sea, and air ports of entry as well as the task of border security between our land ports of entry. CBP also staffs pre-clearance operations outside of the U.S. It is the agency responsible for the inspection and admission of all foreign nationals seeking to enter the United States.
- Immigration and Customs Enforcement (ICE) – www.ice.gov ICE is responsible for immigration enforcement actions ranging from workplace violations, human trafficking and harboring, to visa abuse, document fraud, as well as detention and removal. ICE also works with law enforcement at the local, state, and federal levels as well as across international boundaries.
- U.S. Citizenship and Immigration Services (USCIS) – www.uscis.gov USCIS is responsible for a broad range of adjudications, including petitions filed by U.S. employers to bring in workers on a temporary or permanent basis to the United States. In addition, it processes petitions filed by qualifying family members seeking to bring close relatives to the United States. USCIS is also responsible for granting refugee and asylum status. USCIS in concert with the Department of State (DOS) is also responsible for determining U.S. citizenship. It adjudicates naturalization petitions as well. It also oversees E-verify, the Internet-based system which allows participating employers to electronically verify the employment eligibility of newly hired employees.

[15] See http://fremonttribune.com/article_1d702148-6f1d-11df-9211-001cc4c002e0.html.
[16] *Id.* See www.irli.org and the Southern Poverty Law Center report at http://www.splcenter.org/get-informed/publications/when-mr-kobach-comes-to-town.

B. Department of Justice (DOJ) – www.justice.gov In 2003, the establishment of DHS transferred many functions from DOJ to DHS, but some immigration-related functions remain.
   - Executive Office for Immigration Review (EOIR) - EOIR was created in 1983 to establish a separate agency where immigration judges preside over removal cases throughout the United States. EOIR includes the Board of Immigration Appeals (BIA) that hears appeals from decisions rendered by immigration judges as well as certain DHS based decisions in a broad range of proceedings. The Office of the Chief Administrative Hearing Officer (OCAHO) is part of EOIR and is responsible for the administrative law judges, who preside at hearings to adjudicate issues arising under employer sanctions laws, as well as cases concerning the prohibition of U.S. employers from knowingly hiring unauthorized workers and requiring verification of employment authorization. OCAHO also adjudicates immigration-related unfair employment practices and document fraud issues.
   - Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) – The OSC enforces the employer sanctions anti-discrimination provisions of the Immigration and Nationality Act (INA). The OSC provides educational programs and outreach to teach employers, potential victims of discrimination, and the general public about their rights and responsibilities under the anti-discrimination provisions of the INA.
   - Office of Immigration Litigation (OIL) - OIL has jurisdiction over all civil immigration litigation, and is responsible for the nationwide coordination of immigration cases before the federal district courts and circuit courts of appeals.

C. Department of State (DOS) – www.state.gov DOS has consular offices all over the world and oversight agencies in Washington, D.C. The Bureau of Consular Affairs (BCA) is the primary agency within DOS responsible for visa issuance. Consular officers primarily assist and protect U.S. citizens abroad and adjudicate visa applications by foreign nationals who wish to come to the United States on either a temporary or permanent basis. Most decisions by consular officers regarding visas are not reviewable by U.S. courts. DOS is also responsible for the issuance of passports to United States citizens.
   - National Visa Center (NVC) - In 1994, DOS opened a permanent immigrant visa processing facility at the NVC in Portsmouth, New Hampshire. The NVC processes approved immigrant visa petitions after they are received from USCIS and stores them until the cases are ready for adjudication by a consular officer abroad.
   - Visa Office (VO) - Each month, the VO establishes the cut-off dates or “priority dates” that determine whether an immigrant visa is currently available for a preference petition for permanent residence. Petitions may remain at the NVC for several months or even years depending on the immigrant visa category and the applicant’s country of birth. To view the most current qualifying priority dates, refer to the DOS Visa Bulletin online.
   - Kentucky Consular Center (KCC) - The diversity visa (DV) program is an annual visa lottery program administered by DOS. The KCC is located in Williamsburg, Kentucky.
   - Office of Legislation, Regulations and Advisory Assistance (Advisory Opinion Division) - Consular officers defer to the Office of Legislation, Regulations and Advisory Assistance in Washington, D.C. for legal opinions. Opinions are

rendered in response to a question of interpretation of immigration law from an embassy or consulate, but can also be provided following a request for review of a visa refusal by an applicant. Factual determinations are made by the consular officer.

D. Department of Labor (DOL) - The DOL assists in the determination of available work authorized job applicants in the processing of employment-based nonimmigrant petitions and petitions for permanent residence as well as labor condition applications (LCA) for H-1B nonimmigrant status.
   - Employment and Training Administration (ETA) - The ETA processes LCAs for H-1B petitions, modifies temporary labor certification processes for certain nonimmigrant categories, and certifies labor certification applications processed through PERM (Program Electronic Review Management) for permanent residence. The main general mission of these processes is to protect the interests of United States workers. To obtain a PERM labor certification, DOL must certify that there are no qualified and available United States workers to perform the job proposed. As to the LCA, the employer is basically required to make attestations that wages to be paid to foreign workers are the higher of the actual or prevailing wage for the proposed job in the area of intended employment, and that hiring a foreign worker will not adversely affect working conditions.
   - Office of Foreign Labor Certification (OFLC) - The OFLC has a national office in Washington, D.C., and is supported by two national processing centers in Atlanta and Chicago. The OFLC primarily accepts electronically filed PERM labor certification applications and LCAs.
   - Wage and Hour Division (WHD) – The WHD is responsible for compliance with labor standards to protect and improve the welfare of the United States workforce. WHD enforces wage requirements as well as workplace conditions and participates with DHS on issues related to workplace enforcement and immigration.
   - Board of Alien Labor Certification Appeals (BALCA) - The BALCA has jurisdiction over appeals from U.S. employers issued a denial or revocation of a labor certification.
   - Administrative Review Board (ARB) - The ARB hears appeals from decisions of administrative law judges or the administrator of WHD. The ARB issues final agency decisions for the Secretary of Labor in cases arising under a wide range of federal labor laws over areas such as immigration, seasonal and migrant workers, and federal construction and service contracts.

2. Laws, Regulations, and References

A. Key Statutes

   - McCarran Walter Act (Immigration and Nationality Act of 1952)—[Pub. L. No. 82-414, 66 Stat. 163]; S. Rep. No. 81-1515. Established the basic structure of present immigration law, codified at Title 8 of the U.S. Code.
   - Immigration Reform and Control Act of 1986 (IRCA)—[Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), 1986 S. 1200] Established sanctions against employers for hiring aliens not authorized to work in the United States; provisions

prohibiting discrimination based on citizenship/nationality; and legalization programs to grant residency to qualified foreign nationals.

- Immigration Act of 1990 (IMMACT90)—[Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), 1990 S. 358] Substantially altered preference system for permanent residence by establishing categories of employment-based immigration (including investors), placing an overall cap on immigration, redefining immediate relatives to include widows/widowers, and by establishing the annual diversity visa lottery program.
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—[Pub. L. No. 104-208, div. C; 110 Stat. 3009, 3009–46 to 724 (Sept. 30, 1996); HR Rep. 104-863 (Sept. 28, 1996), 104th Cong. 2d Sess.; HR Conf. Rep. No. 104-828, 104th Cong. 2d Sess. (Sept. 24, 1996); S. Rep.104-249, 104th Cong. 2d Sess. (Apr. 10, 1996); 142 Cong. Rec. S4730-01, §150 (May 6, 1996); 142 Cong. Rec. H2378-05, §309 (Mar. 19, 1996) at H10, 841–02] - Established unlawful presence bars; allowed the Attorney General to contract with state and local law enforcement to investigate and apprehend undocumented persons; and enhanced criminal penalties for smuggling, document fraud, unlawful reentry and unauthorized employment related to smuggling among other changes.

B. Key Regulations – Code of Federal Regulations (CFR)

- Title 8 - USCIS
- Title 20 - DOL
- Title 22 - DOS
- Title 28 - DOJ
- Title 42 - Health and Human Services (HHS)

C. Reference and Resources

- Kurzban, *Kurzban's Immigration Law Sourcebook* [AILA, new edition every two years]
- Gordon, S. Mailman, & S. Yale-Loehr *Immigration Law and Procedure* [Lexis Nexus]

D. Organizations and Institutes

- American Immigration Lawyers Association – www.aila.org
- American Immigration Council – www.americanimmigrationcouncil.org
- Migration Policy Institute – www.migrationpolicy.org
- Center for American Progress – www.americanprogress.org
- National Foundation for American Policy – www.nfap.com
- Council on Foreign Relations – www.cfr.org
- National Immigration Forum – www.immigrationforum.org

- National Immigration Law Center - www.nilc.org

3. Economics

A recent report released in June of 2011 by the Partnership for a New American Economy led by Mayor Bloomberg of New York and the Chief Executive Officer of Microsoft, Steven Ballmer, among other business leaders, highlights the opportunities that the U.S. may lose if future foreign entrepreneurs start their businesses in other countries due to the creation of a hostile investment environment in the U.S. for foreign nationals, including thousands of foreign students at our universities. This report outlines the following key findings:

- *More than 40 percent of the 2010 Fortune 500 companies were founded by immigrants or their children. Even though immigrants have made up only 10.5 percent of the American population on average since 1850, there are 90 immigrant-founded Fortune 500 companies, accounting for 18 percent of the list. When you include the additional 114 companies founded by the children of immigrants, the share of the Fortune 500 list grows to over 40 percent.*
- *The newest Fortune 500 companies are more likely to have an immigrant founder. A little less than 20 percent of the newest Fortune 500 companies — those founded over the 25-year period between 1985 and 2010 — have an immigrant founder.*
- *The revenue generated by Fortune 500 companies founded by immigrants or children of immigrants is greater than the GDP of every country in the world outside the U.S., except China and Japan. The Fortune 500 companies that boast immigrant or children-of-immigrant founders have combined revenues of $4.2 trillion. $1.7 trillion of that amount comes just from the companies founded by immigrants.*
- *Fortune 500 companies founded by immigrants or children of immigrants employ more than 10 million people worldwide. Immigrant-founded Fortune 500 companies alone employ more than 3.6 million people, a figure equivalent to the entire population of Connecticut.*
- *Seven of the 10 most valuable brands in the world come from American companies founded by immigrants or children of immigrants. Many of America's greatest brands— Apple, Google, AT&T, Budweiser, Colgate, eBay, General Electric, IBM, and McDonald's, to name just a few — owe their origin to a founder who was an immigrant or the child of an immigrant.*

4. Unlawful Presence

Alabama's new immigration law, HB56, contains section 27, which bars Alabama courts from enforcing a contract to which a person who is unlawfully present in the United States is a party. This section does not apply to contracts for lodging for one night, contracts for the purchase of food, contracts for medical services, or contracts for transportation for a foreign national to return to his or her country of origin. In addition section 28 of HB56 requires every public elementary and secondary school in Alabama to determine if an enrolling student was born outside the jurisdiction of the United States or is the child of an unlawfully present alien and qualifies for assignment to an English as second language class or other remedial program. Section 12(a) of the bill requires a law enforcement officer to make a reasonable attempt, when

practicable, to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is a foreign national, who is unlawfully present in the United States.

As noted above, the Department of Public Safety for the State of Texas is dealing with its own challenges in determining lawful presence for driver's license purposes, while we also wait to see how Farmer's Branch fairs concerning its lawsuit, which requires a review a lawful presence in the U.S. The American Immigration Lawyers Association (AILA) submitted an amicus brief in the Alabama case before the United States District Court in the Northern District of Alabama, which provides an excellent introduction and review of the issue of unlawful presence under federal immigration law. The INA does not contain any definition of "lawful presence" or "lawfully present." Immigration violations are typically civil in nature and violations result in exposure to inadmissibility to or removal from the United States. The definition of "unlawful presence" referenced in 8 USC §1182(a)(9)(B)(ii) relates to a ground of inadmissibility to the United States triggered in certain circumstances upon departure from the United States.

For employers, they have to determine an employee's work eligibility and identity within 3 business days of the hire date. USCIS publishes a 60 page employer handbook (M-274)[17] for the completion of the one page I-9 form.[18] In addition, ICE publishes a forensic guide to try to assist employers in determining if a document is fraudulent or not. This is not an easy task when the documents used to complete the I-9 form have morphed multiple times over the years. It is possible for a person to be lawfully present in the U.S., but not authorized to work. For example, the spouse of an H-1B nonimmigrant is classified as an H-4 nonimmigrant and is allowed to be present in the United States but he or she may not work. Consider the questions below:

1. My legal permanent resident card expired – Am I lawfully in the U.S.? **Yes, a legal permanent resident card is evidence of status, but it does not convey it. Of course, now a new hire cannot use an expired legal permanent resident card to prove work authorization for I-9 purposes.**
2. I am a spouse of a U.S. citizen – Am I lawfully in the U.S.? **No, marriage alone to a U.S. citizen does not convey lawful status. It does provide a means to apply to lawfully immigrate to the U.S.**
3. My H-1B visa to work in the U.S. has expired but my I-94 admission document is still valid and I am working for the H-1B employer who sponsored my visa. Am I lawfully in the U.S.? **YES. An H-1B nonimmigrant visa is a ticket for admission to the U.S., the I-94 admission document covers the period of authorized stay in the U.S. In addition, for H-1B visa holders, the status itself conveys work authorization for the sponsored employee. Of course, any change in employer, except for certain successor in interest employers, must be approved by USCIS.**
4. Can I be authorized to be in the U.S., but not authorized to work in the U.S.? **Absolutely, a spouse of an E-1 or E-2 treaty trader/investor may be authorized to be in the U.S., but not authorized to work without an Employment Authorization Document (EAD). An H-4 dependent of an H-1B employee can be authorized to be in the U.S., but not to work incident to their H-4 status.**

[17] http://www.uscis.gov/files/form/m-274.pdf
[18] See http://tinyurl.com/y4mhry.

5. I am the spouse of an E-2 nonimmigrant treaty investor with an E-2 visa? Can I be authorized to be in the U.S.? **Yes**, i**f you have an E-2 dependent visa and lawful admission in E-2 status evidenced by your I-94 admission document issued by CBP.** Am I authorized to work in the U.S.? **No, not without an approved EAD.**

6. I just entered on my laser visa from Cd. Juarez, am I lawfully in the U.S.? **Without an I-94, yes, if you are within 25 miles of the border and have not been in the U.S. for more than 30 days.** Am I authorized to work? **NO.** How long may I remain in the U.S without an I-94 admission document issued by CBP on my laser visa? **Without an I-94, you must remain within 25 miles of the border and limit your visit to the U.S. to no more than 30 days.** What if I came into El Paso yesterday using my laser visa, but today I am in Dallas with no I-94 --- Am I lawfully in the U.S.? **NO.**

5. Sanctuary Cities

Many cities and states across the U.S. have adopted policies to prevent police agencies from asking residents of the community who have not been arrested to prove their legal immigration status.[19]

The policies do allow state and local police to report foreign-born individuals who have committed criminal acts to the Department of Homeland Security. These policies are in place to improve community safety by promoting community policing. Thus, crime victims and witnesses, no matter their immigration status, are encouraged to cooperate with law enforcement agencies. The term "sanctuary city" for cities focused on encouraging community policing is misleading. According to the International Association of Chiefs of Police (IACP) and the Major Cities Chiefs Association (MCCA) without assurances to the immigrant community that civil law enforcement referrals would not occur upon reporting crime, critical community policing efforts would be destroyed.[20] The civil law enforcement reference often refers to those who have overstayed their period of admission to the U.S. and those who entered without inspection to the U.S. Of course, an overstay of a period of admission to the U.S. is not a federal crime. Back in the 1977 Texas Attorney General Opinion cited in my first blog entry, the Attorney General opined that since an illegal entry violation under 8 USC §1325 is a misdemeanor, the violation would not be considered a "breach of the peace" by Texas courts. Thus, local officers would not have warrantless arrest authority unless they witnessed the offense….

This issue though is more complex than just community policing in that local law enforcement is not trained to enforce complex federal immigration laws and wrongful arrests can result in costly lawsuits. Under 8 USC §1357, Immigration and Customs Enforcement (ICE) officers may, "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States" without a warrant. The ICE officer though does not have the right to detain the person for questioning without a warrant. So as long as a reasonable person in the position of the one being questioned would believe that he or she is free to leave, based on the totality of the circumstances, a Fourth Amendment seizure has normally not occurred and no probable cause or reasonable suspicion must be present. An arrest typically occurs when a reasonable person in the suspect's position would understand the situation to restrain his or her freedom of

[19] See http://tinyurl.com/6a7z2be and http://tinyurl.com/5rwrxx9.
[20] See http://tinyurl.com/6x2rp8x.

movement to a degree that the law associates with a formal arrest. The Fourth Amendment requires that all arrests be supported by probable cause. This information is from a Memorandum issued in 1996 by then Immigration and Naturalization Service (INS) Commissioner, Doris Meissner, regarding apprehensions in worksite enforcement actions.

This Memorandum counseled then INS officers that the mere statement that a person is lawfully in the U.S. is not conclusive and that for further questioning, the officer must have a "reasonable suspicion that the person is illegally in the U.S. or has committed an offense otherwise within the enforcement authority of the INS." Some examples provided in the Memorandum of facts to cause a reasonable suspicion were: officer's knowledge of high concentrations of aliens in the area; the industry or type of employment site involved; informers' tips; excessive nervousness or studied nonchalance of employees in the presence of officers; foreign manners of dress or grooming; apparent inability to speak English; employee statements or admissions; and inferences and deductions of the officer as a trained observer.

A portion of the preliminary training manual provided for the Arizona officers as to certain S. B. 1070 provisions includes these factors[21] :

FACTORS WHICH MAY BE CONSIDERED, AMONG OTHERS, IN DEVELOPING REASONABLE SUSPICION OF UNLAWFUL PRESENCE

Lack of identification (if otherwise required by law)

Possession of foreign identification

Flight and/or preparation for flight

Engaging in evasive maneuvers, in vehicle, on foot, etc.

Voluntary statements by the person regarding his or her citizenship or unlawful presence

Note that if the person is in custody for purposes of Miranda, he or she may not be questioned about immigration status until after the reading and waiver of Miranda rights.

Foreign vehicle registration

Counter-surveillance or lookout activity

In company of other unlawfully present aliens

Location, including for example:

- A place where unlawfully present aliens are known to congregate looking for work
- A location known for human smuggling or known smuggling routes
- Traveling in tandem
- Vehicle is overcrowded or rides heavily
- Passengers in vehicle attempt to hide or avoid detection
- Prior information about the person
- Inability to provide his or her residential address
- Claim of not knowing others in same vehicle or at same location
- Providing inconsistent or illogical information
- Dress

[21] See http://tinyurl.com/4smyxnm.

- Demeanor – for example, unusual or unexplained nervousness, erratic behavior, refusal to make eye contact
- Significant difficulty communicating in English

Back in 1992, in the case of *Murillo v. Musgades,* 809 F. Supp. 487 (W.D. Tex. 1992), U.S. citizens of Hispanic descent who resided, were employed, attended school, or traveled within the Bowie High School area in El Paso sought a class certification and received a preliminary injunction ending the right of INS (at the time) agents to stop and question them about their right to be in the U.S. The court noted that INS agents may not frisk any individual who has not been arrested, unless the agent has a reasonable suspicion, based on specific articulable facts involving more than the mere appearance of the individual being of Hispanic descent, of either being illegally in the U.S. or guilty of violating federal immigration laws for which the INS has jurisdiction. Judge Bunton stated in his decision that the illegal and abusive conduct of the El Paso Border Patrol was directed against staff and plaintiffs in the Bowie High School District solely because of their "immutable appearances as Hispanics." This was not a case about local law enforcement officials without federal immigration law enforcement training. It was about professionals trained in the area of immigration law.

6. The E-Verify Cure

As noted above, many states have passed laws mandating the use of E-Verify, which is normally a voluntary program for employers to use in the completion of the I-9 form. The I-9 form is used by employers for employment and identity verification of new hires.[22] E-Verify is an internet based system operated by DHS that assists businesses in determining the identity and work eligibility of their new hires.[23]

To participate in E-Verify, an employer must execute a Memorandum of Understanding (MOU) with DHS[24] in which the employer must agree to, among other requirements: take the E-Verify tutorial, not to use E-Verify as a pre-screening tool for hiring decisions, require the presentation of I-9 List B identity documents with photos, to copy I-551 (permanent resident cards) or I-766 (employment authorization document) if presented for I-9 List A purposes, have employees record their social security numbers in section 1 of the I-9 form, and "cooperate with DHS and the Social Security Administration (SSA) in their compliance monitoring and evaluation of E-Verify, including permitting DHS and SSA, upon reasonable notice, to review Forms I-9 and other employment records and to interview it and its employees regarding the Employer's use of E-Verify, and to respond in a timely and accurate manner to DHS requests for information relating to their participation in E-Verify."

What do employers get back for their participation in E-Verify?

1. "A rebuttable presumption is established that the Employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in good faith compliance with the terms and conditions of E-Verify."

2. "No person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith based on information provided through the

[22] See I-9 form at: http://www.uscis.gov/files/form/i-9.pdf.
[23] See E-Verify site provided by USCIS at http://tinyurl.com/yslx4b.
[24] http://tinyurl.com/43oxulo.

confirmation system. DHS reserves the right to conduct Form I-9 and E-Verify system compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity authorized by law." (from the MOU)

It is important to recognize that participation in E-Verify does not provide any sort of absolute protection from worksite enforcement actions or penalties. In fact, the data provided via employers into the E-Verify database is mined for enforcement actions. A useful analysis of the strengths and weaknesses of E-Verify was published in February by the Migration Policy Institute. [25] Recently, the House Immigration Subcommittee held a hearing on E-Verify.[26] The Immigration Policy Center in its report entitled, "How Expanding E-Verify in the Stimulus Bill Would Hurt American Workers and Business," noted that mandating E-Verify is bad for the U.S. economy and included the following points:

- The U.S. Chamber of Commerce concluded that a federal rule that would have similarly expanded E-Verify would result in net societal costs of $10 billion a year. Small businesses – which employ approximately 50% of the U.S. workforce – would be disproportionately affected.
- The Congressional Budget Office (CBO) estimated that a mandatory E-Verify program would decrease federal revenues by $17.3 billion over 10 years due to the number of workers leaving the formal economy and working in the unregulated, untaxed underground economy.

The Bait and Switch

Wise employers approach partnering up with the government on compliance projects with caution. The cautionary approach to E-Verify in particular is advisable. In the case of the federal E-Verify "protections" provided to good faith employers, it is important to take a look at a few recent postings the OSC, which has responsibility for the discrimination enforcement side of the house as to I-9 compliance.[27] The protection is illusory. Some examples are provided below of employers found liable by the OSC even though the E-Verify information provided to the employer by the E-Verify program was incorrect:

- On January 21, 2010, OSC issued a letter of resolution dismissing a charge of citizenship status discrimination filed by a U.S. citizen against Dillard's. This matter was originally handled by OSC as a hotline intervention. Dillard's ran an E-Verify query on the citizen, which eventually resulted in a final non-confirmation (FNC) and, as a result, the worker was fired. During OSC's intervention, it was determined that the charging party's name had been misspelled when the query was originally submitted to E-Verify. Following the intervention, the E-Verify query was resubmitted using the correct name and the citizen was rehired. However, because she had missed a week's work, she filed a charge with OSC seeking back pay. As part of the bilateral agreement between the parties resolving the charge, the charging party received $596.40 in back pay, representing the wages that she lost between her termination and the date she was rehired. (Estero, FL)
- On March 23, 2010, OSC issued a bilateral resolution dismissing a charge of document abuse and citizenship status discrimination filed by a lawful permanent resident against Crestwood Suites. The lawful permanent resident alleged that Crestwood Suites terminated him after it ran his name through E-Verify and

[25] See http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf.
[26] See http://tinyurl.com/44ppkl7.
[27] See http://tinyurl.com/435wjnk.

received a FNC. The parties entered into a settlement agreement resolving the charge under which the charging party was reinstated and received full back pay of $3,200. (Durham, NC)

- On June 18, 2010, OSC issued a letter of resolution to The Pantry, Inc. (Pantry), dismissing a charge of document abuse. The charge alleged that the Pantry terminated the charging party, a U.S. citizen, after he received a Temporary Non-Confirmation (TNC) from E-Verify. The charging party had been employed by The Pantry for seven months before he was improperly run through E-Verify. In response to OSC's investigation, the Pantry and the charging party reached an agreement providing that he would withdraw his charge in exchange for reinstatement and a payment of $3,500 to the charging party. The charging party rejected The Pantry's offer of reinstatement. (Hilton Head, SC)
- On July 12, 2010, OSC issued a letter of resolution dismissing an E-Verify-related charge filed by a naturalized U.S. citizen against Triumph Foods. The worker had changed his name when he naturalized but had not updated his SSA record to reflect the name change. OSC's investigation revealed that the worker received and contested an E-Verify TNC. When the worker went to SSA to resolve it, SSA failed to follow proper procedures, which required it to place the case in continuance to permit sufficient time for its records to be corrected. As a result, E-Verify issued an erroneous FNC and the worker was fired. After SSA corrected the information, Triumph Foods delayed rehiring the worker. The worker then contacted OSC and was rehired after OSC explained the situation to the employer. The worker subsequently filed a charge with OSC seeing compensation for the work he missed. As part of the charge resolution, the charging party received $3,000 in back pay and Triumph Foods agreed to provide training to its human resources staff on proper Form I-9 and E-Verify procedures. (St. Joseph, MO)

E-Verify must provide good faith employers with a true shield against penalties before any mandate should be passed. In addition, due to the complexity of immigration law, additional time (at least 120 days) to resolve legitimate claims to identity or work authorization errors in the database must be mandated. Employers are currently in a constant whipsaw of compliance between ICE and USCIS and DOJ with inconsistent guidance from the agencies.

7. Employers as Targets

Employers operating nationally face a veritable patchwork quilt of state and federal laws related to immigration. Some states require the use of E-Verify, which is an Internet-based system that allows businesses to determine the eligibility of employees to work in the U.S.[28] Others allow the use of the Social Security Number Verification Service (SSNVS) of the Social Security Administration (SSA) as an option.[29] Recently, the U.S. Supreme Court confirmed that Arizona's mandate of the use of E-Verify by Arizona employers, which is a voluntary program under federal law (except for certain federal contractors via an Executive Order), was constitutional and not preempted by federal law.[30] This decision is seen by many as a green

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[28] http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.

[29] http://www.ssa.gov/employer/ssnv.htm.

[30] See U.S. Chamber of Commerce v. Whiting, http://www.supremecourt.gov/opinions/10pdf/09-115.pdf.

light for such mandates by other states. Currently, Utah (employers with more than 15 employees), Mississippi, Arizona, and South Carolina mandate the use of E-Verify for all employers.[31] Alabama will follow suit in 2012 with Tennessee phasing in all employers with 6 or more employees in 2013.

ICE

In fiscal year 2011 under President Obama, ICE audited 2,338 businesses, which was an increase from 503 in 2008. [32] ICE also arrested 196 employers in 2010, compared with 135 in fiscal year 2008. [33] In the same period, the number of employees arrested by ICE decreased from 968 to 197. [34]

In fiscal year (FY) 2010, ICE initiated:

- *A record 2,746 worksite enforcement investigations, more than doubling the 1,191 cases initiated in FY 2008.*
- *ICE criminally arrested 196 employers for worksite related violations, surpassing the previous high of 135 in FY 2008.*
- *ICE also issued a record 2,196 notices of inspection to employers, surpassing the prior year's record of 1,444 and more than quadrupling the 503 inspections in 2008.*
- *ICE issued 237 final orders - documents requiring employers to cease violation the law and directing them to pay fines - totaling $6,956,026, compared to the 18 issued for $675,209 in FY 2008.*
- *The total of $6,956,026 last year represents the most final orders issued since the creation of ICE in 2003.*
- *In addition worksite investigations resulted in a record $36,611,320 in judicial fines, forfeitures, and restitutions.*
- *Finally, ICE brought a new level of integrity to the contracting process by debarring a record 97 businesses and 49 individuals preventing unscrupulous companies from engaging in future business with the government.*[35]

ICE has continued to redirect its focus on employers through the use of I-9 Notices of Inspection and criminal investigations against egregious employer violators.[36] Recent enforcement action press releases include:[37]

> HOUSTON - 5 managers and supervisors at Mambo Seafood indicted for harboring illegal aliens **-** Two current managers and three former managers or supervisors of Mambo Seafood were indicted on Wednesday on various charges related to harboring illegal aliens. These indictments were announced by U.S. Attorney Jose Angel Moreno and acting Special Agent in Charge John Connelly with ICE Homeland Security Investigations (HSI) in Houston.

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[31] See http://www.ncsl.org/?tabid=13127.
[32] Hallman, Tristan, "ICE focusing more on firms," *The Dallas Morning News* (July 5, 2011).
[33] *Id.*
[34] *Id.*
[35] Statement of Kumar Kibble, ICE Deputy Director regarding a Hearing on Worksite Enforcement before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, January 26, 2010.
[36] http://www.ice.gov/news/releases/1101/110120washingtondc.htm.
[37] http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=16.

ATLANTA - Employment agency owner sentenced in scheme to recruit undocumented workers in Atlanta - Chun Yan Lin, 44, of Doraville, Ga., was sentenced Thursday in federal court for conspiring to transport and harbor illegal aliens, following a joint investigation by ICE HSI, DHS, and the Federal Bureau of Investigation (FBI).

PHOENIX - 3 restaurant chain executives indicted on federal immigration, tax charges - The father and son owners of a regional Mexican restaurant chain, along with the company's accountant, will be arraigned in federal court in Tucson Thursday on tax and immigration violations contained in a 19-count indictment stemming from a lengthy probe by ICE HIS and the IRS. Mark Evenson, 58, of Paradise Valley, Ariz.; his son, Christopher Evenson, 39, of Oro Valley, Ariz., owners of Chuy's Mesquite Broiler restaurants with outlets in Arizona and California; and an accountant for the chain, Diane Strehlow, 47, of Tempe, Ariz., are charged with a variety of criminal violations, including the unlawful hiring and harboring of illegal aliens, conspiracy to defraud the IRS and tax evasion. If convicted of all the charges, Mark Evenson faces up to 86 years in prison and a $5.33 million fine; Christopher Evenson faces up to 81 years in prison and a $5.08 million fine; and, Strehlow faces a maximum prison term of 40 years and a $2 million fine.

DETROIT - Michigan dairy farmers plead guilty to employing illegal aliens, fined $2.7 million **-** A Michigan dairy farm and its two owners pleaded guilty on Tuesday to charges of employing illegal aliens; following an investigation by ICE HSI. Johannes Martinus Verhaar and Anthonia Marjanne Verhaar own Aquila Farms LLC., a dairy operation based in Bad Axe, Mich. Court records revealed that from about 2000 through 2007, the dairy employed 78 different illegal aliens, which constituted almost 75 percent of its workforce over that time period. Aquila Farms failed to conduct the necessary inquiries to determine the employment eligibility of its work force, as required by federal immigration laws. "Criminal charges and fines are among the government's most effective tools to ensure employers maintain a legal workforce," said Brian M. Moskowitz, special agent in charge of ICE HSI in Detroit. "The charges and significant fines here represent HSI's firm commitment to holding employers accountable."

SSA

Another federal agency, the SSA, effective April 6, 2011, pursuant to a directive from the SSA Commissioner, again started to send employers decentralized correspondence (DECOR) letters for tax year 2010.[38] These letters advise employers of possible incorrect withholding to a social security number (SSN). SSA had continued to send out an employee version of the DECOR letter to employees at their home address, if the name and/or SSN information listed on the employer's submitted Forms W-2 did not match the information in the SSA's database. Before 2007, if SSA did not have accurate address information for the employee, SSA had sent a different version of the DECOR letter directly to the last employer of record, asking the employer to provide the following information to SSA: employee's name, social security number, address, and whether or not the employee had ever used another name. Although the federal court hearing the challenge to the now-rescinded no-match regulation never prohibited SSA from sending no-match letters to employers, in 2007 SSA stopped sending the employer version of the DECOR letter because of litigation surrounding the rescinded no-match safe harbor

[38] See https://secure.ssa.gov/poms.nsf/lnx/0900901050.

regulations.[39] SSA stated that it will not send employers the letters that the agency held for tax years 2007 through 2009.

8. Worksite Compliance Options

IMAGE

The IMAGE (ICE Mutual Agreement between Government and Employers) program commenced in 2007 with the goal of assisting employers in providing a more secure and stable workforce and to enhance fraudulent document awareness. [40] The basic requirements for IMAGE are as follows: complete self-assessment questionnaire; enroll in E-Verify; enroll in Social Security Number Verification System (SSNVS); adhere to IMAGE best employment practices; undergo an I-9 audit conducted by ICE; and review and sign an initial IMAGE partnership agreement with ICE.

The IMAGE program has just increased the attractiveness of its program by offering the following benefits:

- Publicly recognize [Company Name] for participating in the IMAGE program;
- Not subject [Company Name] to a subsequent Form I-9 inspection for a period of two years, from the date of Form I-9 inspection completed as part of the IMAGE certification process, absence the existence of specific intelligence of unlawful employment;
- Mitigate/Waive fines if substantive violations are discovered on fewer than 50% of the Forms I-9. In instances where more than 50% of the Forms I-9 contain substantive violations, ICE will issue fines at the statutory minimum of $110 per violation; and
- Grant the participating employer ample time to resolve discrepancies discovered during the Form I-9 inspection regarding employees' documentation of identity and work eligibility.[41]

I-9 Central

On May 13, 2011, USCIS announced the availability of its new resource for employers regarding the completion of the I-9 form for new hires.[42] I-9 Central is frequently updated and all postings are allegedly cleared by ICE, USCIS, and the OSC. I-9 Central currently provides more detailed information on acceptable documents for I-9 completion, correcting I-9s, how to complete an I-9, which I-9 forms to use, a retention formula, etc. The Citizenship/Document Matrix under the heading, "Who is Issued This Document?" is a new resource as to work authorization documentation for the I-9.[43] One important point to remember is that I-9 Central does not have the force of law. USCIS will look to the M-274 *Handbook for Employers* as to the final word on I-9 compliance guidance. Thus, the utility of I-9 Central is still under review by employers and legal counsel alike. Any reliance by an employer on the contents of I-9 Central

[39] See DHS Rescission of Safe-Harbor Procedures for Employers Who Receive a No-Match Letter**,** 74 *Fed. Reg*. 193 (October 7, 2009).
[40] http://www.ice.gov/image/.
[41] ICE IMAGE MOU posted on AILA Infonet Doc. No. 11063064.
[42] USCIS Launches I-9 Central on USCIS.gov (May 13, 2011). http://tinyurl.com/6goo77z.
[43] USCIS Who is Issued This Document? Citizenship Status/Document Matrix http://tinyurl.com/5wmscx8.

should be documented in the employer's compliance file by retaining a copy of the relevant portions of I-9 Central used by the employer along with the date of the content.

Self Check

On August 16, 2011, USCIS expanded the Self Check[44] eligibility confirmation system to include 21 states and the District of Columbia. Self Check is an on-line service offered directly to the public via E-Verify to help employees verify their work eligibility in the U.S. It is voluntary. Self Check is available to workers over the age of 16 to confirm their eligibility to work in the U.S. and to submit corrections to their DHS and SSA records, if needed. Employers cannot require an employee or potential employee to use Self Check to prove work authorization. The main purpose of Self Check is basically as a tool to help improve the accuracy of E-Verify by allowing employees access to determine data accuracy of E-Verify regarding their individual records.

Best Practices

To gain an idea of what the government would like to see from employers, the stated ICE list of best employment practices for employers is as follows:

- Use E-Verify to verify the employment eligibility of all new hires.
- Use the SSNVS for wage reporting purposes. Make a good faith effort to correct and verify the names and Social Security numbers of the current workforce and work with employees to resolve any discrepancies.
- Establish a written hiring and employment eligibility verification policy.
- Establish an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9, how to detect fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS.
- Require the Form I-9[45] and E-Verify process to be conducted only by individuals who have received appropriate training and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process.
- Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- Ensure that contractors and/or subcontractors establish procedures to comply with employment eligibility verification requirements. Encourage contractors and/or subcontractors to incorporate IMAGE Best Practices and when practicable incorporate the use of E-Verify in subcontractor agreements.
- Establish a protocol for responding to letters or other information received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, no match letters received from SSA[46] and provide employees with an opportunity to make a good faith effort to resolve the discrepancy when it is not due to employer error.

[44] Self Check USCIS webpage www.uscis.gov/selfcheck.
[45] http://tinyurl.com/5rsp5mm.
[46] http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1127 and http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf.

- Establish a tip line mechanism (inbox, email, etc.) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to credible employee tips.
- Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin.
- Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.

ICE IMAGE Attachment Checklist

Before considering participation in IMAGE, employers must critically analyze their current practices for immigration compliance. For example, refer to the list of documentation below requested for review by ICE to be approved for the IMAGE program:

- Organizational chart and related department descriptions
- List of all locations with employees, including the number of employees at each location; if hiring is conducted at that location; and whether Forms I-9 are retained at that location
- List of all employees with Form I-9 certification authority
- Current employee application packet(s)
- Articles of incorporation
- Hiring policy
- Anti-discrimination policy
- E-Verify summary report
- SSNVS results page
- Company profile
- DOJ/OSC complaints
- SSA Employee Correction Requests (no-match letters) for the past 3 years
- Final Order issued by ICE or the former INS for violation of INA §274A
- List of contract company(s) used and a brief description of services provided by contractor(s)
- Internal Form I-9 audit reports

OSC Recommendations

The OSC admonishes employers to take the following 10 steps to avoid immigration related employment discrimination:[47]

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.
2. Accept documentation presented by an employee if it establishes identity and employment eligibility; is included in the list of acceptable documents; and reasonably appears to be genuine and to relate to the person.

[47] http://www.justice.gov/crt/about/osc/htm/facts.php#steps.

3. Accept documents that appear to be genuine. You are not expected to be a document expert, and establishing the authenticity of a document is not your responsibility.
4. Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.
5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.
6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.
7. Complete the I-9 Form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.[48]
8. On the I-9 Form, verify that you have seen documents establishing identity and work authorization for all employees hired after November 6, 1986, including U.S. citizens.
9. Remember that many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must reverify employment authorization and record the new evidence of continued work authorization on the I-9 Form. You must accept any valid document your employee chooses to present, whether or not it is the same document provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.

   Note: Permanent resident cards and identity documents should not be reverified.
10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process, unless acquired automatically. [49]

9. The Dysfunction of the Legal Employment Based Immigration

The National Foundation for American Policy (NFAP) just issued a report in October of 2011 documenting the ridiculous wait times created by our current employment based immigrant system for certain nationalities.[50] Section 203(b) of the INA provides 5 employment-based preferences: First Preference (EB-1, priority workers); Second Preference (EB-2, worker with advanced degree or exceptional ability); Third Preference (EB-3, professionals, skilled workers and other workers); Fourth Preference (EB-4, special workers, such as religious workers); and the Fifth Preference (EB-5, employment creation or investor visas). A total of 40,040, or 28.6 percent of the 140,000 annual quota is used by each of the first, second, and third preferences. The first preference category may use any visa numbers not absorbed by the fourth and fifth preferences, which are limited to 7.1 percent (or 9,940) each. The second preference (EB-2) can use any numbers not utilized by EB-1, while EB-3, the third preference, can use any visa numbers not utilized by the EB-2 category. Due to the demand for immigrant visa numbers in

[48] USCIS *Handbook for Employers* http://www.uscis.gov/files/form/m-274.pdf.
[49] DOJ OSC Dos and Don'ts for Employers http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employers.pdf.
[50] See http://www.nfap.com/pdf/WAITING_NFAP_Policy_Brief_October_2011.pdf.

the EB-3 category by certain nationalities, it may take Indian nationals with certain priority dates after November 22, 2005 21 to 70 years under current law to immigrate lawfully to the United States due to per country limits, visa availability, and demand.[51] A visa number is typically determined to be "available" for an individual with a priority date earlier than the date listed in the DOS most recent issue of the *Visa Bulletin*.[52] The priority date for most employment based immigration visas is based on the date a labor certification application or an immigrant petition is received by the federal government.

Rep. Jason Chaffetz (R-UT) and Judiciary Committee Chair Lamar Smith (R-TX) recently introduced H.R.3012, which would phase out the per country limits for employment-based immigrants over a four-year period. By the fourth year, the per country limit would be eliminated entirely for employment-based immigrants.[53] This modification of the current visa allocation system would hopefully reduce the departure of highly skilled immigrants due to the frustrating delays in our legal immigration process.

10. Border Security

Has the goal of immigration reform for our current dysfunctional system truly met its match in the constantly changing condition precedent of "Border Security?" The Secure Border goal has been a consistent roadblock thrown up against any form of immigration reform moving forward on the hill since 2007. Let's face it, even Secretary Napolitano of the Department of Homeland Security (DHS) is working hard to try to develop a quantifiable index to measure our border security level to establish the location of the goal post. In her testimony on May 4, 2011 before the Senate Committee on Homeland Security and Governmental Affairs hearing on "Securing the Border: Progress as the Federal Level," Secretary Napolitano noted that U.S. Customs and Border Protection (CBP) had begun the process of developing an index supported by CBP and third party data to measure security comprehensively along the Southwest border as well as the quality of life in the region.[54] In outlining her border security report card before the Senate, Secretary Napolitano noted the following accomplishments among a longer list:

1. DHS increased the size of the Border Patrol to more than 20,700 agents (double its size from 2004).
2. Mobile response teams including up to 500 agents provide new surge capabilities to areas on the Southwest border on an as needed basis.
3. DHS provided a record $123 million in funds for Operation Stonegarden in 2009 and 2010 to state and local law enforcement agencies in Southwest border states to pay for overtime costs and other border related expenses.
4. President Obama authorized the temporary deployment of up to 1,200 National Guard personnel to assist law enforcement agencies in targeting illegal smuggling networks of people, weapons, and money.
5. Predator Unmanned Aircraft System coverage had been provided for the first time along the Southwest border from California to Texas.
6. Using the $600 million allocated in the 2010 Emergency Border Security Supplemental Appropriation Act, DHS is adding 1,000 new Border Patrol agents

[51] *Id.*
[52] See http://travel.state.gov/visa/bulletin/bulletin_1360.html.
[53] *Id.*
[54] See http://www.dhs.gov/ynews/testimony/testimony_1304459606805.shtm.

by the end of FY 2011, 250 new CBP officers at ports of entry, and 250 new Immigration and Customs Enforcement (ICE) agents, who investigate transnational crimes.

7. DHS entered into partnerships with more than 60 law enforcement agencies in Arizona and the government of Mexico to deter and interdict those engaging in criminal activities posing a threat to the U.S. The program is called the Alliance to Combat Transnational Threats (ACTT).

8. In FY 2009 and 2010, ICE removed more unauthorized foreign nationals from the U.S. than ever in the past with more than 779,000 removals nationwide.

9. As to reducing the employment of undocumented workers, E-Verify (web based employment verification system), which is managed by U.S. Citizenship and Immigration Services (USCIS), is experiencing an enrollment of more than 1,300 new employers each week. In FY 2010, E-Verify processed 16.4 million queries as to employment authorization.

10. From January 2009 to May 2011, ICE audited more than 4,600 employers. It debarred 315 companies and individuals and imposed approximately $59 million in financial sanctions.

In concluding her testimony, she noted that illegal immigration attempts had decreased by 36% in the past two years based on Border Patrol apprehensions and that apprehensions are less than a third of what they were at their peak. In developing the new border "index," Secretary Napolitano indicated that to evaluate the condition of the border and the effectiveness of DHS efforts, the index would need to also incorporate metrics as to the impact of illegal cross-border activity on the quality of life in the border region along with traditional data such as apprehensions, contraband seizures, and crime statistics.

This effort to quantify was in part a response to a less than laudatory report issued by the GAO in February on Border Security entitled, "Preliminary Observations on Border Control Measures for the Southwest Border."[55] This report focused on the achievement of "Operational Control" of the border. Operational Control was defined by DHS as the number of border miles where Border Patrol had the ability to detect, respond, and interdict cross-border illegal activity at the border or after entry in the U.S. Border Patrol reported that it had achieved varying levels of operational control of 873 (44%) of the 2,000 miles of the southwest border by the end of FY 2010. The highest level of "control" for the rating applied if the Border Patrol had a high probability of apprehension upon entry versus after entry (controlled). Operational control was also established under the second rating of "managed," which applied if a high probability of apprehension was predicted after entry. Only 15% of the border miles under operational control were classified at the highest "controlled" level. This ability to detect and apprehend all illegal entries did not include the ability of the Border Patrol agents to detect those who use ultra light aircraft and tunnels. It is important to note that none of the southwest border miles received the lowest level of control label (remote/low activity), which applies when information is not available to develop a meaningful border control strategy because of inaccessibility or lack of resources.

On September 7, 2011, the GAO issued the following report entitled "Department of Homeland Security Progress Made and Work Remaining in Implementing Homeland Security Missions 10 Years after 9/11." As to performance measurements, the GAO opined that, "DHS strengthened its performance measures in recent years and linked its measures to the QHSR's missions and goals. However, DHS and its components have not yet fully developed measures for assessing the effectiveness of key homeland security programs, such as programs for securing the border

[55] See http://www.gao.gov/new.items/d11374t.pdf.

and preparing the nation for emergency incidents. While improvements have been made, the department needs to continue to work to strengthen its measures to more fully assess the effectiveness and results of its programs and efforts to inform any needed adjustments." Well, yes – we are well aware that it is extremely difficult to come up with an acceptable yardstick of metrics to measure border security performance, when it appears we cannot reach agreement on what the target goals must be. Therefore, how can DHS or Congress be held accountable?

To put border security accomplishments in historic perspective, the National Immigration Forum recently issued its 2011 Border Enforcement Resource Guide outlining border security actions,[56] while the U.S. Chamber issued a report entitled, "Steps to a 21st Century U.S.-Mexico Border,"[57] which emphasizes that, "The pressure on our border caused by wait times at ports of entries and consulates, and the discrepancy between temporary work visas and the demand for work in the United States must be addressed through a comprehensive immigration reform bill to truly secure our borders and make our immigration system work for our nation and not against it." Along that vein, the June 2011 report entitled, "The 'New American' Fortune 500" published by the Partnership for a New American Economy, indicates that more border security spending alone will not stop the flow of illegal immigrants and that a full path to legalization would add $1.5 trillion to the GDP based on the January 2010 report published by the American Immigration Council and the Center for American Progress ("Raising the Floor for American Workers").[58]

In August of 2011, the Center for American Progress in its report, "Safer than Ever A View from the U.S.- Mexico Border: Assessing the Past, Present, and Future,"[59] argues for the less myopic approach to border security, which has also been promoted by the American Immigration Lawyers Association and many other groups, including the Council on Foreign Relations (CFR) in the report issued by its Immigration Task Force (chaired by former Governor Jeb Bush and White House chief of staff, Thomas "Mack" McLarty) back in July of 2009.[60] The CFR report contended that, "No enforcement effort will succeed properly unless the legal channels for coming to the United States can be made to work better." Thus, "The U.S. government must invest in creating a working immigration system that alleviates long and counterproductive backlogs and delays, and ensures that whatever laws are enacted by Congress are enforced thoroughly and effectively."

It would seem that we would have implemented this answer now, but it appears that Lazarus has been resurrected again in recent political debates including the September 7 GOP debate in California, in which Governor Perry called for more border agents and criticized President Obama for failing to do enough with immigration reform. He actually stated that, "For the President of the United States to go to El Paso Texas and say the border is safer than it's ever been, either he has some of the poorest intel in the history of this county or he was an abject liar to the American people…It is not safe on that border." Former Governor Romney discussed continuing a fence along the entire U.S./Mexican border and adding more border patrol agents as well as stopping the magnet of employers willing to hire unauthorized workers. For those making these sorts of assertions, it is important to remember that:

1. In November of 2010, CQ Press named El Paso the safest city in the United States among cities with a population of more than 500,000. The rankings are based on FBI crime statistics.

[56] http://www.immigrationforum.org/images/uploads/2011/2011BorderEnforcementResourceGuide.pdf.
[57] http://www.uschamber.com/sites/default/files/reports/2011_us_mexico_report.pdf.
[58] http://www.americanprogress.org/issues/2010/01/pdf/immigrationeconreport.pdf.
[59] http://www.americanprogress.org/issues/2011/08/pdf/safer_than_ever_report.pdf.
[60] http://www.cfr.org/immigration/us-immigration-policy/p20030.

2. In 2010, El Paso (population approx. 625,000) had just five homicides while sister city in Mexico, Cd. Juarez had 3,000. Austin, the state capitol of Texas, with a population of approximately 796,000 had 38 homicides in 2010.

3. USA Today conducted an extensive survey of crime statistics in July 2011 of the U.S. southern border states. It found that violent crime rates were on average lower in cities within 30, 50, and 100 miles of the border.[61]

Conclusion

While it may be easy to assess the complex nature of our current immigration laws in the United States, it should be equally simple to understand the daunting task facing legislators with the will to try to improve our system. The failure to address this conundrum though only allows this particular cancer to spread to the detriment of our economy and basic due process. The current state by state and city by city entry into the immigration fray only further exacerbates the conundrum.

[61] See http://www.usatoday.com/news/washington/2011-07-15-border-violence-main_n.htm.