INTERPRETER RELEASES®
Report and analysis of immigration and nationality law
WEST®

Vol. 88, No. 2 • January 10, 2011

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THE RENEWED HOPE FOR IMMIGRATION LEGISLATION IN 2011

by Alan Lee, Esq *

Springing from the defeat of the DREAM Act[1] in the lame duck session comes renewed hope of immigration legislation in 2011. A number of forces will be in play both pushing and pulling for and against, but looking into the tea leaves, the author is prepared to say that the odds favor positive change in the new year.

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First, the President as catalyst has shown himself to be an effective leader during the lame duck session in repealing the "don't ask don't tell" policy on gays in the military; getting the Senate to approve the New START arms control treaty with Russia; and agreeing to an $858 billion tax cut package benefiting all Americans, along with his earlier achievements of health care and Wall Street reform and a $787 billion economic stimulus package in 2009 that probably saved the nation from a deflationary spiral. He stated a strong commitment on immigration on December 22, 2010, that perhaps his biggest disappointment was the failure of the DREAM Act, promising that in the next Congress, "I'm going to go back at it."[2] Renewed determination by a sitting president now getting higher marks for achievements will be an extremely positive factor.

Second, while on the negative side will be the influx of Tea Partiers and other conservatives into Congress, many of whom will not be willing to budge on immigration, enough reasonable members of Congress should be found willing to pass limited and focused legislation where there are extreme humanitarian considerations with high benefit to the nation such as the applicants for the DREAM Act or where the national interest of our food chain is at stake (and very few Americans willing to take on farm labor jobs) as the prospective applicants for AgJobs.[3]

Third, the political winds are more favorable for change in 2011 than they will be in the 2012 election year. It has always been more difficult to pass immigration legislation in election years, and limited immigration benefits legislation in a non-election year is more palatable to many members of Congress. Despite the divisive nature of the immigration debate, everyone is aware that the immigration system is broken and that this nation short of bankruptcy cannot afford the cost of deporting 10 to 11 million illegal immigrants. Improvement of the jobs situation in the country would provide a welcome tailwind to the effort for positive change.

Fourth, pressure from the Hispanic lobby will be central to obtaining legislative change. The Republicans with their concerted opposition to the DREAM Act realize that they have placed themselves in a box for the 2012 elections in which the Hispanic population, now the largest minority population in the nation, will be prepared to vote overwhelmingly for Democratic candidates because of the high value that it places on the immigration issue.[4] All minorities also realize that there must be a brake to the rolling tide of state legislatures making it easier to stop and harass all people of color. Unless the Republicans decide that they no longer as a party will court the minority vote with any sincerity, they must compromise on the immigration issue. 2011 is the year to do it since action in 2012 will either be seen as capitulation to the Democrats or the handing out of scraps to attract votes.

Fifth, what is the scope of possible change in 2011? The pro-immigrant lobby must accept the idea of lower expectations in light of the midterm elections. This corner does not see a massive immigration bill encompassing legalization coming anytime before the 2012 elections. The reality of the Democratic "shellacking" in November and the changing of leadership of the Immigration Subcommittee and Judiciary Committee make the writing and passage of a huge bill very difficult. However, there may be a way to gain significant immigration benefits for many without having to write and pass an encyclopedic piece of legislation. Besides the limited change espoused above for the DREAM Act and AgJobs, the pro-immigrant lobby should push for an updating of Registry[5] and/or Section 245 (i).[6] The author spoke of such in an Immigration Daily article, "Recommendations on Positive Immigration Options that the Administration Should Explore" in April 2010[7] when the atmosphere appeared much more favorable to positive change. At the time, these possible smaller steps were all but drowned out in the push for comprehensive immigration reform, but should now be given serious consideration.

Sixth, Registry is a device which has been on the books since 1952 and allows adjustment of status to permanent residence for those who have been in the U.S. for a long period of time; are persons of good moral character; are not ineligible for citizenship or deportable as terrorists; and are not criminals, procurers, and other immoral persons, subversives, violators of the narcotics laws, or smugglers of aliens. Currently it is available for those who can prove entry before January 1, 1972. That date was set by President Reagan in the Immigration Reform and Control Act of 1986.[8] Moving the date forward to at least within 5-10 years would rescue the provision from obsolescence and only require a change in date to be effective. A further recommendation is to include language automatically allowing forward movement of the date in subsequent years depending upon projected demand for numbers as established by studies conducted by U.S. Citizenship and Immigration Services (USCIS). This would allow for orderly registration of eligible illegal immigrants without significant burden to USCIS and in fact constitute a financial boon to the agency and U.S. government.

INTERPRETER RELEASES (ISSN 0020-9686) (USPS 191) is issued weekly (48 times per year except the weeks of May 30, June 20, November 28 and December 26). • Principal Attorney Editors: Beverly Jacklin, Melissa Funk and Carolyn Bower. • Published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. • **Address correspondence concerning content to:** Beverly Jacklin, Interpreter Releases, Thomson Reuters/West, 50 Broad Street East, Rochester, NY, 14694; (585) 627-2504; fax (585) 258-3772, Beverly.Jacklin@thomsonreuters.com • Customer Service: (800) 328-4880, ext. 65411 • http://www.west.thomson.com • For subscription information: call (800) 221-9428 • Periodicals postage paid at St. Paul, MN • POSTMASTER: Send address changes to INTERPRETER RELEASES, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

Seventh, INA § 245(i) is a far better known device first in effect in October 1994 with two current versions depending upon the dates that illegal immigrants applied for either labor certification or immigrant visa petition. The section covers most illegal immigrants' mode of entry with the most notable exceptions of J-1 visa holders still subject to the two-year foreign residence requirement and fiancees/spouses entering on the K visas. For applicants who filed on or before January 14, 1998, no prior physical presence in the U.S. is required. For those filing on or after January 15, 1998, and on or before April 30, 2001, physical presence in the U.S. on December 21, 2000, must be proven. Eligible applicants must pay a current fee of $1,000 to utilize § 245(i). The section has had three permutations plus a series of continuing resolutions to extend the provision over the years as past Congresses have considered it a device to be updated periodically. With the last permutation's eligibility date now almost 10 years in the past, it has fallen into almost the same obsolescence as Registry. In the Department of State monthly visa bulletin for January 2011, all immigrant visa categories' availability dates have exceeded April 30, 2001, with the exception of the F-3 category for married sons and daughters of U.S. citizens which has an availability date of January 1, 2001. It should be noted, however, that in the visa bulletin for December 2010, that category had actually moved to June 1, 2002, before retrogressing. Similar to Registry, the updating of § 245(i) does not require major legislative change—merely an advance in the date of an already existing law. Section 245(i) updating would yield a smaller class of individuals to be benefited than Registry, but would give hope to many illegal immigrants that they might ultimately have an avenue to gain legal status. It would further allow USCIS a steady stream of revenue by which it could largely fund its own operations. As opposed to Registry, § 245(i) updating would be to a date in the future instead of the past to allow applicants time to file the necessary paperwork for labor certifications or immigrant visa petitions. It should be noted that the first permutation following passage of the provision in August 1994 gave a three-year period starting from October 1, 1994, and sunsetting on October 1, 1997.

Eighth, there exists a school of thought that before any significant legislative effort is made, the President should first use his executive power to carve out administrative relief for certain classes of individuals, especially for those who would be eligible for inclusion in the DREAM Act. That school characterizes the use of such executive order giving legal recognition with the ability to work as a "down payment" on future legislation. We believe, however, that such administrative fiat should be used as a last resort when it is apparent that there can be no legislative relief. The handing out of extended voluntary departure and work authorization while meritorious would most likely be seen as "poisoning the well" by any conservatives who might wish to negotiate on immigration legislation. It should be noted that the Republicans raised such a hue and cry to threaten passage of the New START treaty with Russia when the DREAM Act legislation was introduced in the lame duck session. President Obama will not be able to bring in as effective counterweights ex-presidents, former secretaries of state, and members of the military leadership as he did in the New START push. Negotiations may prove painstaking, but first use of executive power will be a barrier rather than a persuasion of inevitable change.

The President can make a better case for himself to the American people as an honest leader seeking bipartisan accord if he prioritizes immigration as he promised and attempts to attain legislative compromise through most of 2011. If the effort fails, he can then state the merits of administrative relief to the nation at the time of his executive proclamation. He would of course be subject to criticism as abusing his executive power to enact change that was defeated or not acted upon not only in the current Congress, but in former ones, and for pandering to Hispanics for their votes. The best answer would then appear to be a declaration of executive order before Congress finally breaks for 2011 to lessen the charges of political pandering. The charge of abusing executive power would be the same whether he used the power at the beginning of 2011 or the end of 2011, but at least he could explain to the American people that he tried it legislatively and then give all the reasons for which he was issuing the executive order.

2011 will be a year of great uncertainty in the immigration debate. With some luck and dedication by the Administration and other reasonable parties, the prospect of positive change can burn bright.

Notes

[1] The Development, Relief and Education for Alien Minors Act, known as the DREAM Act, would provide a path to residency status for students entering the U.S. before the age of 16 who are present in the U.S. for five years before the date of enactment and have graduated from high school (or passed the GED). They can apply for a six year conditional residence status after which permanent residence can be approved if they graduate from college or complete two years in a degree program or serve in the armed forces. Persons are not eligible if under a final administrative or judicial order of exclusion, deportation, or removal, unless they remained in the U.S. under color of law or received the order before attaining the age of 16. Conditional residence can be terminated for lack of good moral character, criminal conduct, immigration fraud, national security concerns, dishonorable or less than honorable discharge from the armed forces, and for public charge grounds. Children at least 12 years old and enrolled full-time in a primary or secondary school would receive a stay of removal and employment authorization if in the U.S. for five years. To attract broader support for the

DREAM Act in the 2010 lame duck session, compromises were made which may be in future consideration of the Act such as a cut-off age of under 30 on the date of enactment, good moral character requirement dating back to time of entry rather than date of enactment, and a 10 year period of conditional non-immigrant status followed by three years of permanent residence before applicants can apply for naturalization. See 87 Interpreter Releases 2419 (Dec. 20, 2010).

[2] The *New York Times*, "For the President, a Moment to Reflect, and then to Depart," December 23, 2010.

[3] The Agricultural Job Opportunities, Benefits and Security Act, known as AgJOBS, would provide a path to residency status for farm workers in an earned legalization program allowing many undocumented farm workers and H-2A guest workers to earn a "blue card" temporary immigration status with the possibility of becoming permanent residents of the U.S. by continuing to work in agriculture and meeting additional requirements. As currently written, eligible workers are those who worked in U.S. agriculture for least 150 days or 3863 hours during the 24 month period ending December 31, 2008; are not excluded under certain immigration laws; have not been convicted of any felony and misdemeanor involving bodily injury, threat of serious bodily injury or harm to property in excess of $500; and pay the application fee and a $100 fine upon obtaining the blue card. Permanent residence is allowed for those performing agricultural work for at least 100 workdays per year for each of five years during the five-year period beginning on the date of enactment; or 100 workdays for one year and 150 work days per year for three years during the four year period beginning on the date of enactment of the Act; or 150 work days per year for each of the three years during the three year period beginning on the date of enactment. Applicants would also have to pay a $400 fine and application fee, and by the date of adjustment to permanent residence, establish payment of income taxes for work performed to meet the future work requirement.

[4] Pew Research Center, "The Latino Vote in the 2010 Elections", November 3, 2010, updated November 17, 2010, http://pewresearch.org/pubs/1790/2010-midterm-elections-exit-poll-hispanic-vote. See also *The Arizona Republic*, Latinos played important roles in 2010 elections, November 9, 2010, http://www.azcentral.com/arizonarepublic/opinions/article/2010/11/9/20101109 tue1-09.

[5] INA § 249 [8 USCA § 1259] record of admission for permanent residence in the case of certain aliens who entered the U.S. prior to January 1, 1972:

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a)(3)(E) or under Section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to January 1, 1972;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship and is not deportable under Section 237(a)(4)(B).

[6] INA § 245(i) [8 USCA § 1255(i)] adjustment in status of certain aliens physically present in U.S.:

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United State—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of the section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under Section 203 (d) of -

(i) a petition for classification under Section 204 that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under Section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of the beneficiary of a petition for classification, or an application for labor certification, described in subsection (B) that was filed after January 14, 1998, is physically present in the United States on the date of enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence..

[7] *Immigration Daily*, "Recommendations on Positive Immigration Options that the Administration Should Explore," April 16, 2010, "http://www.ilw.com/articles/2010, 0416-lee-shtm."

[8] Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986). ■

1. USCIS Posts Executive Summary of Its New Fee Schedule and Fee Waiver Form Stakeholder Meeting

On November 22, 2010, U.S. Citizenship and Immigration Services (USCIS) hosted a national teleconference at which USCIS Director Alejandro Mayorkas addressed several topics, including the publication of the new Form I-912, Fee Waiver Form, and reminded stakeholders of USCIS' new fees taking effect on November 23, 2010. USCIS has now issued an executive summary of that meeting. It is reproduced in Appendix I of this Release. ■