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I. Introduction

2008 was again a year without significant statutory enactments. Unlike 2007, no comprehensive legislative reform was even introduced. The legislation that was enacted largely extended or expanded non-controversial programs including those for religious workers, physician waivers of the home foreign residency requirement, and the Visa Waiver Program. Given the current legislative focus on the financial crisis and continued public concern with the wars in Iraq and Afghanistan, the very earliest significant immigration reform introduced will likely be at the end of 2009.¹ This article will focus on other developments in immigration law, including United States Immigration and Custom Enforcement (ICE) efforts under Section 287(g) of the Immigration and Nationality Act (INA), updates in asylee and refugee law, the effect of corporate restructuring on foreign nationals' status in the United States, and recent regulations regarding No Match Letters from the Social Security Administration (SSA).

II. Legislative and Regulatory Developments

A. ENACTED LEGISLATION

President Bush signed into law several pieces of legislation affecting visa and naturalization benefits. On October 10, 2008, the government extended the religious worker pro-

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1. Email from Jeanne A. Butterfield, Executive Director, ALLA, to Board of Governors Mailing List (Nov. 7, 2008, 14:36 EST) (on file with author).

gram for non-ministerial workers through March 6, 2009.² On October 8, 2008, Congress enacted legislation to extend the Conrad State 30 program through March 6, 2009.³ The Conrad State 30 program provides a waiver of the two-year foreign home residency requirement for physicians practicing in underserved areas. Further, under the Social Security Income Extension for Elderly and Disabled Refugees Act, signed into law on September 30, 2008, low-income elderly and disabled refugees, asylum seekers, and victims of trafficking, who are younger than eighteen or older than seventy, are eligible for SSI benefits for a period of up to nine years provided that they apply for citizenship during their period of eligibility.⁴

The immigration provisions of the National Defense Authorization Act of 2008, signed into law on January 28, 2008, provide certain benefits to qualified Iraqis, and military families.⁵ Under the Act, special immigrant visas were made available to certain Iraqis who worked directly with the United States Armed Forces or were employed by the United States Government through a separate bill signed into law on June 3, 2008.⁶ In addition, on October 9, 2008, Congress enacted the Military Personnel Citizenship Processing Act requiring that the United States Citizenship and Immigration Service (USCIS) issue a decision on a naturalization application within six months of receiving an application from a current or former member of the armed forces, or surviving dependents.⁷ In the interest of expediting the naturalization process, the law also establishes an FBI liaison office within the USCIS to monitor the FBI's progress in citizenship applications.⁸

The government also enacted legislation to change certain admissibility criteria. On July 24, 2008, President Bush signed a bill to repeal the HIV travel and immigration ban.⁹ The current health-related ground for inadmissibility no longer makes any reference to HIV, and the Department of Health and Human Services has the authority to decide whether individuals with HIV may enter the United States.¹⁰ On October 23, 2008, President Bush signed the Child Soldiers Accountability Act of 2008 making any alien who has recruited or used child soldiers inadmissible or deportable.¹¹

The Secure Travel and Counterterrorism Partnership Act of 2007 provided for the extension of the Visa Waiver Program (VWP) to nations that can demonstrate an alliance with the United States in the war on terror.¹² The VWP enables nationals of certain countries to travel to the United States for tourism or business purposes for up to ninety

2. Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008).

3. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 110-362, 122 Stat. 4013 (2008).

4. SSI Extension for Elderly and Disabled Refugees Act, Pub. L. No. 110-328, 122 Stat. 3567 (2008).

5. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 673, § 1243, 122 Stat. 3, 10, 15.

6. *Id.* § 1244.

7. Military Personnel Citizenship Processing Act, Pub. L. No. 110-382, 122 Stat 4087 (2008).

8. *Id.*

9. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 305, 122 Stat. 2918, 2963.

10. *Id.*

11. Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3735.

12. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 338-345 (2008).

days without a visa. In an effort to modernize the VWP, President Bush announced on October 17, 2008 that the expansion of the VWP would include the Czech Republic, Estonia, Latvia, Lithuania, Hungary, the Republic of Korea, and the Slovak Republic.¹³ This brings the total number of participating countries in the Visa Waiver Program to thirty-four, with an additional six nations on track to be admitted in the future including Bulgaria, Cyprus, Greece, Malta, Poland, and Romania.¹⁴

For admittance to the VWP, participating nations must agree to share information about threats to the United States and meet special criteria regarding machine-readable or biometric/e-passports. Additionally, foreign nationals must register through the Electronic System for Travel Authorization (ESTA) for online approval to travel. ESTA applications screen out potential security threats and may be submitted any time prior to travel to the United States. As stated in a November 3, 2008 press release from the Department of Homeland Security (DHS), the modernization of the VWP includes "better information sharing about international travel and border screening, improvements in information on known and suspected terrorists, timely and comprehensive reporting of lost and stolen passports, developing an air marshal program, and expanding operations for U.S. Federal Air Marshals."¹⁵

B. PROPOSED LEGISLATION

A continued failure of Congress to pass meaningful pro-business legislative reforms led to renewed efforts by U.S. employers, educational institutions, and even trade associations for the passage of three bills that would alleviate problems caused by outdated quotas and restrictions on the immigration of highly-skilled foreign nationals.¹⁶ Proponents of these bills cite significant risks to America's scientific and technological leadership if the restrictions on employment-based immigration remain in place.¹⁷ A September 9, 2008, letter to U.S. Senators from Compete America, the Alliance for a Competitive Workforce, states that waits of up to ten years for employment-based immigrant visas create a disincentive for the world's most talented professionals, thereby threatening the foundations of American innovation.¹⁸ H.R. 6039 would exempt the highly educated, foreign-born students earning advanced degrees in science, technology, engineering, or mathematics from a U.S. university from the employment-based immigrant visa quota system.¹⁹ H.R. 5921 would also amend the Immigration Nationality Act to eliminate the per-country limits for employment-based immigrants and end the spill-over of unused immigrant visa numbers be-

13. Press Release, President Bush Discusses the Visa Waiver Program; Office of the Press Secretary (Oct. 17, 2008), *available at* <http://www.whitehouse.gov/news/releases/2008/10/print/20081017-15.html>.

14. *Id.*

15. See Press Release, Dep't of Homeland Sec., DHS Signs Visa Waiver Program Interim Declaration with Romania (Nov. 3, 2008), *available at* http://www.dhs.gov/xnews/releases/pr_1225731352223.shtm.

16. See H.R. 6039, 110th Cong. (2008), H.R. 5921, 110th Cong. (2008), and H.R. 5882, 110th Cong. (2008).

17. Press Release, Compete America, Leaders of U.S. Innovation Economy Send Strong Message to Congress: Enact Critical Reforms for Employment-Based Green Card Program Now (July 17, 2008), *available at* http://www.competeamerica.org/news/alliance_pr_20080717_greenecard.html.

18. Letter from Compete America to U. S. Senators (Sept. 9, 2008) *available at* http://www.competeamerica.org/hill/letter_congress/index.html.

19. See H.R. 6039, 110th Cong. (2008), *supra* note 16.

tween employment-based and family-sponsored categories.²⁰ H.R. 5882 would recapture employment-based immigrant visas lost to bureaucratic delays from prior years.²¹

Finally, the Emergency Nursing Supply Relief Act, introduced by Representative Wexler, amends the American Competitiveness in the Twenty-First Century Act of 2000 to lift the numerical limitation for employment-based immigrant visas for nurses until September 30, 2011, subject to a cap of 20,000 visas per year.²²

C. REGULATORY DEVELOPMENTS: SHIFTING THE DEFINITION OF SPECIALIZED KNOWLEDGE

Over the past year, there has been a rise in the number of Requests for Evidence (RFEs) and denials issued by USCIS for L-1B visas. In July, the Administrative Appeals Office (AAO) issued an unpublished decision²³ that restricted eligibility for the L-1B category, causing alarm amongst employers.

The L-1B visa is available to a company that seeks to transfer employees with "specialized knowledge" of the company's operations abroad to work in the United States.²⁴ The transferee must have been employed abroad for one year within the past three years at a corporate affiliate of the U.S. entity prior to applying for admission to the United States.²⁵ This classification is often attractive to international companies as there is no limit to the number of L-1B visas issued annually, and it allows multinational businesses to transfer key employees to the United States.

One of the most difficult aspects of preparing an L-1B petition is determining what "specialized knowledge" is and whether the transferee possesses it. Pursuant to the INA, an employee with "specialized knowledge" is one that has "special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company."²⁶

In 1994, James Puleo, the Acting Executive Associate Commissioner of legacy Immigration and Naturalization Service, now the USCIS, issued a memorandum entitled "Interpretation of Special Knowledge" (Puleo Memo). The Puleo Memo²⁷ explained that an alien has specialized knowledge if he possesses knowledge that normally can be gained only through prior experience with that employer, or if he has knowledge of a project or process which cannot be easily transferred to another individual. The Puleo Memo further explained that the regulations do not require advanced knowledge in the company, but simply knowledge which is advanced.²⁸ In essence, the Puleo Memo noted that in adjudicating L-1Bs, USCIS must consider whether the L-1B possesses knowledge of the foreign entity's methods of operation to the extent that the U.S. entity would experience a

20. See H.R. 5921, 110th Cong. (2008), *supra* note 16.

21. See H.R. 5882, 110th Cong. (2008), *supra* note 16.

22. H.R. 5924, 110th Cong. (2008).

23. *In re* Technical Services, Inc., United States Citizenship and Immigration Service, Administrative Appeals Office, No. WAC-07-277-53214 (July 22, 2008).

24. Immigration and Nationality Act § 1101(a)(15)(L), 8 U.S.C. § 1184 (2008).

25. *Id.*

26. *Id.* § 214(c)(2)(B) (2008).

27. Memorandum on Interpretation of Special Knowledge from James A. Puleo, Acting Executive Associate Commissioner, INS, to all District Directors, et al., CO 214L-P (Mar. 9, 1994).

28. *Id.*

significant interruption of business in order to train a U.S. worker to assume those duties.²⁹

Unfortunately, the AAO has lost sight of the original intent of the L-1B classification, stating in its recent decision that it is not bound by agency memoranda such as the Puleo Memo. Rather, the AAO posits that it merely relies on statutes, regulations, dictionary definitions, precedent decisions, and legislative history to define specialized knowledge.

The AAO's decision restricts the L-1B visa to transferees with unusual duties, skills or knowledge beyond those of a skilled worker. The decision notes that work experience and knowledge of a company's technical processes or products alone do not rise to the level of specialized knowledge. Moreover, the AAO emphasized that the agency should look beyond the stated job duties to determine the importance of the transferee's knowledge of the company's products, services or operations.³⁰

The AAO made it clear that it does not consider itself bound by USCIS memoranda, opinion letters, policy statements, agency manuals, or enforcement guidelines. It stressed that unpublished AAO decisions are not binding and are to be treated as correspondence.³¹ USCIS guidance, on the other hand, is considered binding once published in accordance with 8 C.F.R. § 103.3(c). The AAO further expounded that when there is a conflict, the "higher authority" controls.³²

The implications of this decision for practitioners and clients have unfolded over the year. In the aftermath of the AAO's decision, there has been a significant increase in the number of RFEs for L-1B petitions and an inclination on USCIS to construe "specialized knowledge" narrowly. Practitioners have reported seeing unusual denials citing the AAO standards. Until clarifying guidance is issued by the Agency, this may be a trend for the adjudication of L-1B petitions.

Practitioners should be prepared for greater scrutiny of L-1B petitions and the likely inevitable RFE. It is critical to prepare well-documented submissions that clearly outline the transferee's duties in the United States and why they are needed under these new rigorous standards.

III. Preserving Foreign Employees' Status During a Corporate Restructuring

The global economic tumult of 2008 brought attention to the need to sensitize corporate attorneys to immigration issues that impact corporate restructuring transactions for multinational companies. The restructuring scenario that follows, which will be used throughout this section, shows the immigration pitfalls awaiting corporate clients.

Corporation A is a domestic business outsourcing corporation that plans to acquire the Canadian-owned Corporation B to obtain its higher credit rating through a possible stock purchase. A U.S. partner owns 51% of Corporation A with one Canadian partner, who

29. See also Memorandum on Interpretations of Specialized Knowledge from Fujie O. Ohata, Associate Commissioner, Service Center Operations, Immigration Services Division, HQSCOPS 70-6.1 (Dec. 20, 2002) (reiterating the Puleo Memo).

30. *Technical Services*, *supra* note 23.

31. U.S. Citizenship and Immigration Service, *Adjudicator's Field Manual*, Ch. 3.4 (redacted public version) (2009), available at <http://www.uscis.gov/propub/DocView/afmid/1>.

32. *Id.*

owns the remaining portion. Corporation A has no foreign offices. Corporation A also needs Corporation B's experienced project managers and software engineers, many of whom happen to be foreign workers that have H-1B, TN, L-1, and E-2 status.

Corporation A has a number of concerns about Corporation B. Company insiders have leaked information that Corporation B has had issues transitioning its Form I-9s as it began using the E-Verify program. Corporation A fears that some of Corporation B's I-9s and Labor Condition Applications (LCA) may be defective due to Corporation B's notoriously sloppy records. Also, former employees have filed a class action employment discrimination complaint against Corporation B, alleging national origin discrimination. Corporation A insists that it is essential for Corporation B's employees to join the payroll of Corporation A after the acquisition. If the workers cannot begin work immediately, the corporation may lose lucrative contracts.

A. THE CONSTANTLY EVOLVING AND AMBIGUOUS LEGAL STANDARD FOR ESTABLISHING SUCCESSOR-IN-INTEREST

Whether a company becomes a successor-in-interest depends on the extent of its assumption of its predecessor's assets and liabilities. The new employer clearly is a successor-in-interest for immigration purposes if it assumes all of the predecessor's assets and liabilities.³³ This determination is not as strong if the successor assumes only some of the predecessor's assets and liabilities.

Successor corporations frequently do not want to assume all of a predecessor's assets and liabilities. Luckily, USCIS letters, its *Adjudicator's Field Manual*, and its memoranda provide some informal guidance in this area. A new employer that assumes less than all of the predecessor's assets and liabilities generally qualifies as a successor-in-interest if it assumes at least all of the predecessor's immigration-related assets and liabilities.³⁴ USCIS has continued to follow this informal guidance for several years, but informal guidance is not binding precedent on an agency or a court.³⁵

Depending on the nature of the restructuring, the successor may have to take additional actions to amend the predecessor employees' nonimmigrant status. There should be a preliminary assessment of whether the transaction by its nature entails the assumption of the predecessor's immigration and liabilities. For example, a stock purchase inherently involves a buyer assuming the assets and liabilities of its acquired company. In the hypothetical, Corporation A will be a successor if its chosen restructuring event is a stock purchase, which would entail Corporation A acquiring all of Corporation B's shares and thus assuming all of its assets and liabilities.

On the other hand, if the restructuring does not inherently require the successor to assume at least the predecessor's immigration related assets and liabilities, preemptive action should be taken to protect workers' status. Returning to the hypothetical, if Corporation A were to assume only the immigration-related assets and liabilities including the

33. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Commissioner Oct. 23, 1986).

34. See Michael Aytes, USCIS Interoffice Memorandum, *AFM Update: Chapter 22: Employment-based Petitions (AD03-01)*, Ch. 22.2(b)(5), (Sept. 12, 2006), published on AILA InfoNet at Doc. No. 06101910 (posted June 21, 2007).

35. *Matter of Avila-Perez*, 24 I&N Dec. 78 (Feb. 9, 2007) (stating that agency memoranda are not binding but rather useful where appropriate).

LCAs, the asset purchase agreement should include a contractual provision where Corporation A assumes Corporation B's immigration related assets and liabilities.

B. MANAGING CHANGES IN NONIMMIGRANT STATUS UNDER THE SUCCESSOR

Most nonimmigrant visas entail employer sponsorship, limiting the foreigner's ability to work for non-sponsoring entities. Two common examples are the TN status under the North American Free Trade Agreement (NAFTA) treaty and the H-1B specialty occupation status.

Corporate restructuring effectively changes a TN or an H-1B sponsor such that the new employing entity must take steps to amend the identity of the worker's sponsor in most cases. Without the appropriate amending of the nonimmigrant status, workers will render themselves ineligible for work authorization in the United States.

Consequently, when the relationship between these visa holders and the sponsor ends, so ends the workers' ability to work in the United States without an amendment to the visa petition. In the hypothetical, if Corporation A needs the TN workers, then it must file an amended TN petition. Timing is critical because in order to amend the employees' status, the successor should file the amendment while the worker is in lawful status.³⁶

H-1B visas are a more ubiquitous business visa option than the TN in that they are available to any foreign national who qualifies to work in an occupation for which a Bachelor's degree in that field is required. Another advantage of this status is that the worker need not stop working during the pending of a timely-filed amendment³⁷ Federal law also provides that the new employer does not need to file an amended H-1B petition as long as the successor employer assumes the acquired entity's assets and liabilities in its purchasing agreement.³⁸ In addition, there must be no material changes to the H-1B worker's continued employment with the successor if the successor would like to avoid the necessity of filing amended petitions for acquired H-1B workers.³⁹

Accordingly, if the transaction entails the assumption of all assets and liabilities, or at least the immigration-related ones in keeping with USCIS guidance memoranda, there is no need to amend the H-1B. Absent such assumption, the successor must file an amended H-1B petition on behalf of the employees. In the fictitious fact pattern, Corporation B's employees will not have to amend their H-1B status assuming there are no material changes to employment.

There are instances where the corporate relationship or the nationality of the company is an additional requirement for visa eligibility. If a corporate restructuring terminates the qualifying corporate relationship or a company's qualifying nationality, then the new entity may not then employ the foreign employees unless the employees qualify under another nonimmigrant category.⁴⁰

36. Letter from Lawrence Weinig, Deputy Assistant Comm'r Adjudications, INS to anonymous subscriber (January 26, 1988), *reprinted in* 65 No. 8 INTERPRETER RELEASES 180 (West) Feb. 29, 1988.

37. 8 C.F.R. § 214.2(h)(2)(i)(E) (2008).

38. 8 U.S.C. § 1184(c)(10) (2005).

39. 8 C.F.R. § 214.2.

40. This may be the case with both L-1 and E visas. When the corporate change takes place, assess whether the successor possesses the qualifying relationship and, if necessary, amend the petition to reflect the changed sponsor.

The current economic times require thoughtful and timely action to address work authorization and maintenance of nonimmigrant status during corporate restructuring and lay-offs. Building an early and effective relationship between corporate counsel and immigration counsel will help ease the transition into the new corporate event and avoid exposing the successor company to liability and foreign workers to immigration consequences.

IV. 287(g) and Other ICE ACCESS Programs in 2008

A. SECTION 287(G) PROGRAM

This year saw a dramatic expansion of what ICE refers to as the ICE ACCESS Program (Agreements of Cooperation in Communities to Enhance Safety and Security).⁴¹ Under ICE ACCESS, the DHS entered into a range of agreements with state and local law enforcement agencies, which were promoted as targeting “criminal aliens,”⁴² but also allow these agencies to carry out immigration law enforcement functions that they had not previously been allowed to perform. The authority of state and local law enforcement agencies was previously interpreted as being limited to the enforcement of the INA’s criminal provisions, whereas the enforcement of the statute’s civil provisions was seen as the exclusive responsibility of federal authorities.⁴³

A key component of ICE ACCESS is the 287(g) Program, which takes its name from Section 287(g) of the INA. Under 287(g), ICE is authorized to enter into Memorandum of Understanding (MOUs), also referred to as Memorandum of Agreement (MOAs) with local governments, whereby ICE deputizes local law enforcement agencies to enforce federal immigration laws.⁴⁴

Currently, there are sixty-three active 287(g) MOUs in twenty states, with twenty-nine of these agreements having been signed in 2008 alone.⁴⁵ According to ICE, a total of 840 officers have been trained and certified since the first MOU was signed in 2002.⁴⁶ Since January 2006, over 70,000 people have been deported as a result of 287(g) Programs.⁴⁷

There are two basic types of MOU/MOAs: (1) the Task Force Officer (TFO) and (2) the Jail Enforcement Officer (JEO) models.⁴⁸ TFOs are local law enforcement officers who are empowered to check the immigration status of individuals they encounter in the course of their routine law enforcement duties. JEOs are authorized to check the immigration status of any individual who is arrested and brought into the county jail or other detention facility and is suspected of being in the country illegally. The difference between the two models may not be significant. A study of arrest data in Davidson County in Tennessee, which uses the JEO model of MOU, shows that the arrest rates for Hispanic defendants for driving without a license more than doubled after the implementation of

41. U.S. Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, Aug. 18, 2008, http://www.ice.gov/partners/287g/Section287_g.htm [hereinafter ICE Partners Website].

42. *Id.*

43. *Id.*

44. Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2008).

45. ICE Partners Website, *supra* note 41.

46. *Id.*

47. *Id.*

48. *Id.*

the 287(g) Program.⁴⁹ During the same period, arrest rates for driving with a license for non-Hispanics decreased by around 25%.⁵⁰ This raises the question of whether Hispanics are being arrested in circumstances in which non-Hispanics would not be detained so that 287(g)-trained correction officers can check their immigration status.

In promoting the 287(g) Program, ICE has emphasized its usefulness in removing dangerous felons from the community and countering the threats of terrorism. But many of those individuals arrested under 287(g) MOUs and subsequently deported have been charged with minor offenses including routine traffic violations.⁵¹ Unfortunately, detailed statistics on the offenses for which undocumented immigrants are arrested under the 287(g) Program are not available, in part, due to the fact that ICE has not developed a standardized statistical reporting format to keep track of this data.⁵² Each agency keeps its own statistics, leading to variations in what is reported and how this data is presented.⁵³

While the lack of detailed statistics makes it difficult to determine whether racial profiling exists, or if it exists, or how widespread the problem is, the statistics that are available show clear cause for concern. In some jurisdictions, local law enforcement authorities have refused to release statistics requested by public interest or civil rights organizations, which were seeking to determine if racial profiling was taking place.⁵⁴

B. IDENT AND THE SECURE COMMUNITIES PROGRAM

Along with 287(g) Programs, in 2008, ICE began pilot testing a new program that would link ICE's Automated Biometric Identifications System (IDENT) to the FBI's criminal database as part of the Secure Communities Program.⁵⁵ Under this program, all persons detained will have their fingerprints simultaneously checked through both databases.⁵⁶ The IDENT database contains millions of immigration records, and if a person's fingerprints raise suspicions about the person's immigration status, that person will be referred to ICE's Law Enforcement Support Center for further investigation.⁵⁷

While billed as intended to help "focus resources on assisting all local communities remove high-risk criminal aliens,"⁵⁸ statements by ICE officials raise questions regarding

49. Tennessee Immigrant and Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007* (2007) (on file with author).

50. *Id.*

51. Sarah Ovaska, *Immigrants Face Deportation If Arrested On Traffic Charges*, NEWS & OBSERVER, Nov. 15, 2007. See also Illegal Immigration Project of the North Carolina Sheriff's Association, Statement to the Joint Legislative Corrections, Crime Control and Juvenile Justice Oversight Committee, North Carolina General Assembly (Nov. 18, 2008) (explaining the statistics for arrests under the 287(g) program in North Carolina) [hereinafter NCSA Presentation].

52. NCSA Presentation, *supra* note 51.

53. *Id.*

54. Press Release, CASA de Maryland, *CASA Sues Fredrick County Sheriff's Office for Withholding Immigration Enforcement Information* (Nov. 25, 2008) (on file with author) (indicating that a majority of those detained by the Montgomery County Sheriff's office under the county's 287(g) Program were arrested for driving without a license, and that of the hundreds arrested, only fifteen felony charges were brought).

55. Susan Carroll, *Harris Jailers Can Access Huge Immigration Database*, HOUSTON CHRON., Oct. 27, 2008.

56. *Id.*

57. *Id.*

58. Press Release, Dep't of Homeland Sec., *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* (Nov. 19, 2008), available at http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

the way it will work in actual practice. Former Assistant Secretary of the Department of Homeland Security, Julie L. Myers, stated that while the program is focusing on those who have committed serious crimes, in cases involving less serious offenses, ICE would consider its staffing levels and resources in deciding how to proceed.⁵⁹ Myers also stated that those who have not had contact with DHS may not be included in the database, making additional investigation necessary to determine where the person is from and if the person has permission to be in the United States.⁶⁰ Whether this means that ICE will seek to hold these individuals in detention until their status can be determined was not clear at press time.

Immigrant rights groups have voiced their concerns about inaccurate or outdated information in the IDENT database.⁶¹ Further, immigrant rights groups have also voiced their concern that since the immigration check is run when a person is arrested, rather than after the person is convicted, an individual could be transferred into ICE custody even though the person is not formally charged or convicted.⁶²

While much of the criticism of cooperation agreements between ICE and local law enforcement has come from immigrant and civil rights groups, some of the strongest criticisms about enforcement of immigration laws by local police agencies have come from law enforcement leaders and personnel themselves. A report by the Immigration Committee of the Major Cities Chiefs Association (MCC), expressed the organization's concern that being called on to enforce federal immigration laws could undermine trust and cooperation with immigrant communities and divert resources from other law enforcement priorities.⁶³ The report also expressed concern over the complexity of federal immigration law, the lack of state and local authority, and the risk of civil liability.⁶⁴

The MCC further expressed concern that involving local law enforcement agencies in enforcing immigration laws would not only affect the relationship between their departments and undocumented immigrants, but would also adversely affect their ability to interact with legal immigrant communities.⁶⁵

V. Social Security No-Match Update for 2008

For the past two years, Social Security No-Match Letters have been one of the hottest topics in business immigration law. In 2008, there was significant movement in this area, but the battle between employers and the government over this issue continues.

59. Anabelle Garay, *Dallas County to Check Immigration Database*, ASSOCIATED PRESS, Nov. 12, 2008, available at <http://cbs11tv.com/local/Dallas.Immigration.Database.2.861891.html>.

60. *Id.*

61. *Id.*

62. Leslie Berestein, *County to Check Immigration Status of Arrestees in Jail*, SAN DIEGO UNION-TRIBUNE, Nov. 13, 2008.

63. Major Cities Chiefs Immigration Committee Members, *Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies*, at 5 (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf

64. *Id.*

65. *Id.* at 6.

A. SOCIAL SECURITY NO-MATCH RULE ENJOINED BY FEDERAL COURT IN 2007

The Social Security Administration (SSA) began issuing no-match letters to employers in 1994. When employers submit W-2 information that does not match the information in the Social Security database, SSA issues a no-match letter to the employer advising that there is no match and asking for corrected information.⁶⁶ So far, the letters have stated that receipt of a letter does not indicate that the employee is unauthorized work. However, in recent years, the government has been using SSA no-match letters as evidence in worksite enforcement actions⁶⁷ even though there was no official policy or regulation stating that receipt of SSA no-match letters would have immigration enforcement consequences.

On August 15, 2007, ICE and DHS issued a Final Rule which expanded the definition of constructive knowledge for knowingly employing unauthorized aliens.⁶⁸ The expanded definition included receipt of an SSA no-match letter as an example of constructive knowledge of employing someone who is unauthorized to work in the United States.⁶⁹ Knowingly employing unauthorized aliens can be a serious violation which may be punishable by heavy fines or even jail time.⁷⁰ The rule also outlined a safe-harbor procedure that employers may follow to protect themselves from liability involving SSA no-match letters.⁷¹

The American Federation of Labor and Congress of Industrial Organizations among others sued DHS to halt implementation of the rule.⁷² The plaintiffs argued that DHS did not have the authority to change prior policy regarding SSA letters through the rulemaking process, that the SSA database was unreliable, that lawfully employed workers might be wrongfully terminated, and that implementation could cause worker shortages in hard to fill professions.⁷³ The Court enjoined DHS from implementing the rule and stayed sending future SSA no-match letters.⁷⁴

B. NEW SUPPLEMENTAL FINAL RULE PUBLISHED BY INJUNCTION STILL STANDS

On October 28, 2008, DHS published a Supplemental Final Rule which made no substantive changes to the previous rule regarding no match letters, but instead clarified some of the issues addressed by the Court in the injunction.⁷⁵ In the Supplemental Final Rule, DHS sought to clarify its policy on the relevance of no-match letters in immigration enforcement actions, stating that its view of:

66. Social Security Administration, *Overview of Social Security No-Match Letters Process*, available at <http://www.ssa.gov/legislation/nomatch2.htm> (last visited Nov. 24, 2008).

67. Julie Meyers, Assistant Secretary, U.S. Immigration and Customs Enforcement, Statement at Hearing Before the Senate Comm. on the Judiciary, *Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986* (June 19, 2006), available at <http://www.aila.org/Content/default.aspx?docid=19780> (last visited Nov. 24, 2006).

68. See 72 Fed. Reg. 45611 (August 15, 2007) (to be codified at 8 C.F.R. § 274a).

69. *Id.*

70. Immigration and Nationality Act § 274a, 8 U.S.C. § 1324a (2008).

71. 72 Fed. Reg. 445614 (Aug. 15, 2007) (to be codified at 8 C.F.R. § 274a).

72. See *AFL v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007).

73. *Id.*

74. *Id.*

75. 73 Fed. Reg. 63843 (October 28, 2008) (to be codified at 8 C.F.R. § 274a).

SSA no-match letters has been that 1) SSA no-match letters do not, by themselves, establish that an employee is unauthorized, 2) there are both innocent and non-innocent reasons for no-match letters, but 3) an employer may not safely ignore SSA no-match letters, and 4) an employer must be aware of and comply with the anti-discrimination provisions of the INA.⁷⁶

Despite publication of the Supplemental Final Rule, DHS cannot implement the rule until the injunction and stay have been vacated. On November 6, 2008, DHS filed a motion with the Court seeking to vacate the preliminary injunction and order a judgment in its favor. A hearing is scheduled for December 12, 2008.

C. EMPLOYERS NEED WRITTEN NO-MATCH POLICIES TO AVOID LIABILITY

Employers need to be aware of other concerns involving no-match letters. While SSA no-match letters alone may not constitute knowing employment of unauthorized workers, SSA no-match letters are frequently being used as evidence in the government's civil and criminal cases against employers.⁷⁷

Another issue with which employers need to be concerned is improper termination of employees because of SSA no-match letters. In *Aramark Facility Services v. SEIU*, Aramark, a cleaning and food service company, received SSA no-match letters for forty-eight of its employees.⁷⁸ Aramark gave the employees three business days to demonstrate that they had gone to the SSA office to correct the error. Aramark subsequently terminated thirty-three employees who did not comply. The union filed a grievance arguing that the employees were wrongfully terminated.

Eventually the case was heard by the Ninth Circuit Court of Appeals which held that Aramark acted unreasonably when they terminated the employees because the company did not have adequate information to show the employees lacked employment authorization.⁷⁹ The Court stated that the receipt of the SSA no-match letter alone was not enough to show unauthorized employment.⁸⁰ The short window of three days to correct the problem also disturbed the Court, which is significantly shorter than the DHS safe harbor window of thirty days. *Aramark* exemplifies that while there are risks involved in ignoring SSA no-match letters, there are also risks involved in taking adverse action against employees before they have the opportunity to correct any SSA database errors.

As we move into 2009, the relevance of SSA no-match letters in immigration compliance actions remains uncertain. However, DHS's Supplemental Final Rule, the government's use of no-match letters in immigration compliance cases and the *Aramark* case make clear that employers need to have clear, written policies in place to deal with SSA no-match letters.

76. *Id.*

77. *Id.* at 63848.

78. *Aramark Facility Services v. Serv. Employees Int'l Union*, 530 F.3d 817 (9th Cir. 2008).

79. *Id.*

80. *Id.*

VI. Asylee Updates for 2008

U.S. asylum law is a complex system based on both international and U.S. laws. In response to the atrocious events that occurred during World War II, the United Nations Convention Relating to the Status of Refugees (the Convention) was adopted in 1951.⁸¹ The Convention describes individuals who may be considered “refugees” and establishes guidelines for nations that grant asylum. The Convention was supplemented by the Protocol Relating to the Status of Refugees of 1967⁸² which served to eliminate deadlines and geographic restrictions on asylum claims.

The Convention defines a “refugee” as a person who:

[o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having nationality and being outside the country of his [or her] former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.⁸³

This definition is critical in the discussion of the Iraqi refugee crisis which is of global concern. As the violence persists in Iraq, it is estimated that as many as 4,000,000 Iraqis have been internally displaced or have fled Iraq to neighbouring countries since 2003.⁸⁴ As many as 60,000 refugees per month head for Syria and Jordan. While officials in Syria and Jordan are committed to Article 33⁸⁵ of the Convention concerning the non-refoulement of refugees, a principle that states asylum-granting nations are prohibited from returning refugees to their countries of origin or any country at all that is at war, neither country will take official responsibility for the Iraqi refugees.⁸⁶ The refugees are merely allowed to stay until peace returns to Iraq. The refuge in these countries is close to exhaustion due to the strain on resources, security issues, and the incessant violence in Iraq.⁸⁷

Many Iraqis have resettled in neighbouring Arab countries with the more vulnerable resettling in countries including the United States, Australia, Canada, the United Kingdom, New Zealand, the Netherlands, Sweden, Denmark, Finland, Norway, and Brazil.⁸⁸ The vulnerable being ‘victims of detention. . . ; women at risk; those with medical condi-

81. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (April 22, 1954).

82. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

83. *Id.* (Art. I(2) incorporating by reference Article 1(A)) of the Refugee Convention).

84. PATRICIA WEISS FAGEN, IRAQI REFUGEES: SEEKING STABILITY IN SYRIA AND JORDAN, Institute for the Study of International Migration (ISIM) and Center for International and Regional Studies, 2007, *available at* <http://isim.georgetown.edu/Publications/PatPubs/Iraqi%20Refugees.pdf>.

85. Art. 33, *supra* note 81. Art. 33 states that “no contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. . . .”

86. Fegan, *supra* note 84.

87. *Id.*

88. RHODA MARGESSON ET AL., CONG. RES. SERV., RL 33936, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS (2009) *available at* <http://www.fas.org/sgp/crs/mideast/RL33936.pdf>.

tions and disabilities who cannot access treatment; . . . and those who are members of minority groups who have been targeted owing to their religious or ethnic background.⁸⁹

To address the resettlement of Iraqis in the United States., in January 2008, Congress passed the National Defense Authorization Act which specifies that:

- (1) Iraqis who were or are employed by the United States government, in Iraq; (2) Iraqis who establish to the satisfaction of the Secretary of State that they are or were employed in Iraq by—(A) a media or nongovernmental organization headquartered in the United States; or (B) an organization or entity closely associated with the United States mission in Iraq that has received United States Government funding. . . ; and (4) Iraqis who are members of a religious or minority community, have been identified by the Secretary of State, or the designee of the Secretary, as a persecuted group, and have close family members have close family members. . . in the United States [are eligible to seek refuge in the U.S.].⁹⁰

On June 3, 2008, President Bush signed into law S.2829,⁹¹ which made technical corrections to the Refugee Crisis Act, Section 1244 of the National Defense Authorization Act, for FY 2008. The fix made available immediately 5,000 special immigrant visas for Iraqi translators and certain others Iraqis who worked for the U.S. government.⁹² It also allows visas for other translators who applied under a previous SIV program and were wait-listed due to the limitation on the number of visas that could be granted under the program.⁹³

On June 9, 2008, it was announced that certain categories of Iraqis with U.S. affiliations could apply directly for consideration as a refugee, in Jordan, Egypt, and Iraq.⁹⁴ In addition, the Refugee Affairs Division, an organization within the USCIS, deployed more than 150 officers in the Middle East to interview more than 23,000 Iraqi refugee applicants. As of November 6, 2008, the United States surpassed its goal of 12,000 by admitting more than 13,800 Iraqi refugees to the United States during FY 2008. Further, the USCIS Refugee Affairs Division, in conjunction with overseas district offices, interviewed more than 100,000 refugee applicants from fifty-nine nations and admitted more than 60,000 refugees from around the world.⁹⁵ This amounts to a 25% increase over FY 2007—the highest level since FY 2001.⁹⁶

89. *Id.* at 10 (quoting United Nations High Commission for Refugees Assistant High Commissioner for Operations Judy Cheng-Hopkins, Migration Policy Institute Briefing, September 18, 2007).

90. Pub.L. No. 110-181 § 1243, (H.R. 4986) Jan. 28, 2008. The Iraqi refugee and special immigrant provisions in Pub.L. No. 110-181 are similar to those in the stand-alone Refugee Crisis Act. S.1651, 110th Cong. (2008).

91. National Defense Authorization Act for Fiscal Year 2008, 8 U.S.C. § 1101.

92. *Id.*

93. *Id.*

94. U.S. Department of State, Refugee Resettlement Program for Iraqis in Jordan, Egypt and Iraq with U.S. Affiliations, Fact Sheet (June 9, 2008), available at <http://iraq.usembassy.gov/root/pdfs/who-is-eligible-with-pictogram2.pdf>.

95. U.S. Citizenship and Immigration Services, Fact Sheet: USCIS Makes Major Strides During 2008, Nov. 6, 2008, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5a99bb95919f35e66f614176543f6d1a?vgnnextoid=2526ad6f16d6d110VgnVCM1000004718190aRCRD&vgnnextchannel=13e7aca797e63110VgnVCM1000004718190aRCRD>.

96. *Id.*

Regardless of the increased numbers, there is still more work to be done and much effort to be made on a global scale for the 4,000,000 displaced Iraqi refugees and others around the world.

