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Immigration Outlook: What to Expect in 2012


Irene M. Recio

The cynical short answer to the question of what developments we can expect in immigration law in 2012 is: Not much will happen this year. Historically, in the United States, dramatic changes in immigration policy or programs are unheard of in Presidential election years. It is even less likely that the Congress will pass any significant immigration legislation, given the divisions, finger-pointing, and impasses that we have seen from both political parties in Washington, in the year 2011.

However, we can expect the Obama Administration to continue to use its executive 'muscles' to push through more modest changes that are allowed through the regulatory process. On January 6th, the U.S. Citizenship and Immigration Services (CIS) announced a proposed change to its current process for the filing and adjudication of waivers of inadmissibility relating to unlawful presence. This would allow certain individuals, who are seeking permanent residence through their immediate relatives (U.S Citizens), to apply for waivers of inadmissibility before leaving the country for an interview at a U.S. Embassy or Consulate overseas.

Administration officials have also been meeting with advocacy groups seeking the extension of family-based immigration benefits to same-sex couples, particularly the ones who are legally wedded in any jurisdiction in the United States or abroad. This would come on the heels of a policy revision, announced in August 2011, to prioritize the enforcement and removal of criminal aliens, rather than low priority cases including the ones involving individuals who might not qualify for the immigration benefits they are receiving,

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A Process to Begin Settling American Certified Claims Against Cuba


Mauricio J. Tamargo

The current commerce and travel being transacted between Cuba and the United States should be subjected to a fee to be used to settle the debt Cuba owes our fellow Americans with certified claims. Settling and paying these claims will achieve a goal of both the pro-Cuba sanctions and the anti-Cuba embargo supporters, while simultaneously removing a significant obstacle to making progress in U.S.-Cuba relations.

This proposed solution calls for imposing at least a 10% fee on the value of all transactions between the U.S. and Cuba, including travel, sales or transfer of goods, services, and commodities, and remittances. Funds raised from this fee will be used to create a settlement fund at the Department of the Treasury. Americans with certified claims can tap this settlement fund for payments to fully satisfy the debt owed to them, including interest, in accordance with the certified claim issued to them by the Foreign Claims Settlement Commission, at the Department of Justice.

Resolving these claims is neither a pro nor anti economic sanctions proposal. It simply helps fellow Americans, who have been forgotten in this Cuba policy debate, find justice and peace at a time when many of them could use this compensation to find closure and start a new.

There are 5,913 certified and pending American claims against the government of Cuba which are currently valued at over $7 billion that have gone unpaid for over 50 years. These claims are based on real and personal property expropriated by the communist government of Cuba without compensation. These claims were all evaluated and certified by the Foreign Claims Settlement Commission, which I chaired for eight years, under the first and second Cuba Claims Programs.

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Federal Agency Enforcement Highlights

● A naturalized U.S. citizen, and resident of the State of Florida, who was born in the former Yugoslavia (Kosovo), was charged in connection with an **alleged plot to attack locations in Tampa** with a vehicle bomb, assault rifle, and other explosives. According to a January 9, 2012 Department of Justice press release, the arrest of Sami Osmakac was the culmination of an undercover operation during which Osmakac was closely monitored by law enforcement officials for several months. According to the complaint affidavit, in September 2011, the FBI received information from a confidential human source indicating that Osmakac had asked for al-Qaeda flags. In November 2011, Osmakac and the source discussed and identified potential targets in Tampa where Osmakac intended to carry out violent attacks. Osmakac allegedly asked the source for help in obtaining firearms and explosives for the attacks. The source indicated that he/she knew someone who might be able to provide firearms and explosives, and introduced Osmakac to an undercover FBI agent.

● At the request of U.S. Representative Randy Forbes (R-Va.), Chairman of the House Armed Services Readiness Subcomittee, the Pentagon has initiated an in-depth review to ascertain whether **a joint venture between General Electric and a state-owned Chinese company**, China Aviation Industry Corporation (AVIC) poses a security risk to the United States. Since late last year, Chairman Forbes has requested several times that a National Security Review be done to learn, among other things, what U.S. technologies have been transferred to AVIC, and what enforcement and compliance controls have been implemented by GE to prevent it. In a letter to Chairman Forbes, Acting Undersecretary of Defense for Acquisition, Tehnology and Logistics, Frank Kendall, indicated to Forbes that he had ordered an inter-agency review on the GE/AVIC joint venture and also on the broader issue of intragovernmental collaboration on these types of transactions. According to the numerous public accounts relating to this matter, the review will include other joint ventures between Chinese and U.S. companies.

● A Virginia man pled guilty last month to conspiracy and tax violations in connection with a decades-long **scheme to conceal the transfer of at least $3.5 million from the government of Pakistan to fund his lobbying efforts** in America related to Kashmir. The Department of Justice reports that Syed Ghulam Nabi Fai served as the Director of the Kashmiri American Council (KAC), a non-governmental organization in Washington, D.C., that held itself out to be run by Kashmiris, financed by Americans, and dedicated to raising awareness in the United States about the Kashmiri people's struggle for self-determination. On the contrary, according to court documents, the KAC was secretly funded by officials employed by the government of Pakistan, including the Inter-Services Intelligence Directorate (ISI).

● Wilson Tool International, Inc. (Wilson Tool) reached a settlement with the U.S. Treasury Department over an alleged violation of the U.S.-Iran sanctions. Located in White Bear Lake, Minnesota, Wilson Tool agreed to pay $15,000 to settle an alleged violation of the Iranian Transactions Regulations, 31 C.F.R. part 560, occurring on or about September 12, 2005. The Office of Foreign Assets Control alleges that Wilson Tool **sold and exported punch press tooling equipment to an entity in Iran without an OFAC license**. According to OFAC, the transaction value was $10,304. OFAC determined that Wilson Tool did not voluntarily self-disclose this matter to OFAC and that the alleged violation constituted a non-egregious case. The base penalty amount for the alleged violation was $25,000.

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● ASF Logistics Inc. (ASF), a Mobile, Alabama based company reached settlement with the U.S. Government over its alleged violation of Iran sanctions that occurred on or about May 2, 2006. The company has agreed to pay $5,400. The Treasury Department's Office of Foreign Assets Control had alleged that ASF was engaged in a transaction related to goods destined for Iran without a license, and **facilitated the exportation of goods from a third country to Iran by a foreign person**. OFAC says that ASF did not voluntarily disclose this matter to OFAC and that the apparent violation constituted a non-egregious case. The base penalty amount for the alleged violation was $10,000. According to OFAC, ASF personnel appeared to have lacked an OFAC compliance program at the time of the alleged violation; ASF had knowledge or reason to know that the goods were destined for Iran; ASF has not been the subject of an OFAC enforcement action in the five years preceding the transactions at issue; and the goods may have been eligible for an OFAC license.

Indian Country Sovereignty Protection Efforts Continue


Emily B. Hollenberg

In 2009, the U.S. Supreme Court ruled in Carcieri v. Salazar (Carcieri) that the Secretary of the Interior lacks the authority to put Indian lands into trust on behalf of tribes recognized by the federal government after 1934. This problem is affecting most Native American tribes and is resulting in unnecessary and expensive litigation actions. Not only does the Carcieri case threaten tribal sovereignty but it is also hurting the economic and governmental development of the affected tribes.

Native American tribes have been asking the Obama Administration and Congress to correct real-world effects that this decision can have on Indian country. Under the federal system, Indian tribes are sovereign governments and the Department of the Interior, Bureau of Indian Affairs, has a great deal of power to recognize tribes and put lands into trust on behalf of tribes. Meanwhile, Congress has plenary power over Indian affairs and has the authority to affirm, confirm, or restore the sovereignty of Indian tribes. The goal of a legislative fix is to clarify the Secretary of the Interior's authority to put Indian land into federal trust for tribes.

> Many fear that the Bureau of Indian Affairs will be forced to treat tribes recognized by the federal government after 1934 differently from tribes recognized before 1934.

Current legislative efforts include passing a freestanding bill, such as H.R. 3697, sponsored by Representative Tom Cole (R-Okla.), or amending the Indian Reorganization Act of 1934 by adding a legislative fix to some must-pass legislation, such as an appropriations bill. This type of legislative resolution, which is broadly supported by Indian country, and which President Barack Obama has repeatedly endorsed, is being opposed by some state and local governments based on a number of collateral and unrelated issues. There are also several Members of Congress who are trying to create some carve-outs, or special treatments, for tribes in their states, thereby delaying a permanent resolution of this matter.

If no legislative clarification is enacted into law, many fear that the Bureau of Indian Affairs will be forced to treat tribes recognized by the federal government after 1934 differently from tribes recognized before 1934. The Department of the Interior is also reported to be working on an administrative solution which may resolve this problem but which still must be fully tested in the courts. If an agreement cannot be reached before this summer, this issue could continue well past the fall election season into next year, leading to more litigation in the federal courts.

More Federal Agency Enforcement Highlights

- Late last year, a Houston, Texas man pled guilty that he was going to sell **U.S. Navy radar control equipment to a buyer in Germany without an export controls license**. The owner of a military surplus store, Ringmans Palace, Andrew D. Silcox pled guilty to one count of violating the Arms Export Control Act. The U.S. Attorney handling the case, Robert Pitman, said Silcox was in the business of purchasing surplus Department of Defense equipment and then reselling it. According to the Department of Justice, Silcox admitted to selling one Naval Radar Control Unit part, and tried to sell three more for $6,500 each to an undercover Immigration and Customs Enforcement-Homeland Security investigator. The Naval Radar Control Units were listed on the U.S. Munitions List and require a State Department license for exportation. The undercover agent told Silcox that he was a broker for a buyer in the United Arab Emirates. The undercover agent allegedly asked Silcox how he would get the export license. According to court documents, Silcox knew he needed a license to sell the Navy equipment. However, he never attempted to get a license, and instead attempted to use false information on the shipping labels to disguise the actual contents that he was exporting. Sentencing is scheduled for February, 2012.

- A Silver Spring, Maryland man was sentenced earlier this year to more than three years in prison for **conspiring to export $400,000 of nuclear-related items to Pakistan that are restricted from export by the U.S. government**. According to the U.S. Attorney, Rod Rosenstein, Nadeem Akhtar misrepresented what items he was selling and to whom they would be sold. Akhtar tried to sell nuclear radiation detectors, calibration devices and other restricted nuclear-related equipment to sources in Pakistan. The goods were purchased from different companies in several states including North Dakota, Pennsylvania, Maryland, Massachusetts, Tennessee, and Texas. Akhtar then created false shipping documents and shipped the products through front companies in Dubai and elsewhere to Pakistan. In addition to the calibration devices and radiation detectors, he also purchased resins used for water coolant purification as well as nuclear reactor components such as attenuators and surface finishing abrasives. Akhtar was receiving order from sources in Pakistan who would advise him on how to conceal the products and the intended end-user. According to the indictment, Akhtar's clients included Pakistan's Space and Upper Atmosphere Research Commission and the Chashma Nuclear Power plant—a Chinese manufacturing facility.

Immigration Outlook, *Continued from front page*

but who otherwise were of good moral character and / or had significant ties in the United States (including a same-sex partner).

Initially, many private attorneys around the country complained that the policy and reviews were not being implemented uniformly but, during the subsequent months, senior officials from the U.S. Immigration and Customs Enforcement (ICE), traveled around the country, and meet with agents and attorneys to develop an extensive and cohesive policy of prosecutorial discretion and training. They also undertook a revision of all of the cases in the immigration courts to identify the most eligible and ineligible cases for the favorable exercise of discretion.

In the area of business immigration, changes have been slower because many immigrants, particularly undocumented ones, emerge as a negative force in the unemployment debate. Immigrants are often seen to accept harsher working conditions and lower pay, thus filling jobs that would otherwise be available to unemployed persons legally authorized to work in the Unites States. This argument does not generally hold true, but it is still referred to by many politicians. Republicans used this argument to derail the Fairness for High-Skilled Immigrants Act that was introduced last year to eliminate per country limits on employment-based permanent residency. That bill might still be passed this year, but only after a much-heated debate occurs throughout the country.

We can certainly expect that immigration issues will be fodder for animated social and legal debates which will continue to surface on the front page news.

The current leading Republican candidate, Mitt Romney, has time and again stated that if elected as President he would not support the Development, Relief and Education for Alien Minors (DREAM Act). He insists that anyone residing illegally in the United States should go back to their country and apply for residency—in effect he is advocating for such persons to "get in line." The DREAM Act is a bi-partisan bill which was first introduced in the Senate in August 2001 to provide conditional permanent residency to certain illegal aliens of good moral character, who arrived in the United States as minors, and have lived here continuously for at least five years prior to the bill's enactment, and those who graduated from U.S. high schools. Notably, though, Romney's aggressive stances during the primaries, against illegal immigration may change when Republicans seek votes from immigrant groups and supporters during the general election, in November 2012.

This is not to say that Obama will have easy sailing in November with regards to immigration issues. The U.S. Customs and Border Protection is overhauling its policy regarding individuals who are caught while illegally crossing the 1,954-mile U.S.–Mexico border which includes a new border screening tool called the Consequence Delivery System (CDS). The Obama administration has also stepped up worksite enforcement actions, imposing thousands of dollars of fines and sanctions on employers who employ undocumented workers and / or fail to comply with relevant employment verification regulations. Recently, the Civil Rights Division's Office of Special Counsel (OSC) for Immigration Related Unfair Employment Practices, at the U.S. Department of Justice has entered into two significant settlements with the violators of The Immigration and Nationality Act's (INA) anti-discrimination provision. Under this provision, employers are prohibited from placing unfair documentary burdens on work-authorized employees based on their citizenship status or national origin during the hiring and employment eligibility verification process.

In December 2011, OSC filed a complaint alleging that the University of California San Diego Medical Center ("Center") failed to comply with proper employment eligibility verification processes for non-citizens. As part of the settlement, the Center has agreed to pay a civil penalty of $115,000, among other things. In another noteworthy case, OSC reached a settlement with BAE Systems Ship Repair Inc., a leading provider of ship repair services. BAE Systems Southeast Shipyards Alabama LLC, a subsidiary of BAE Systems Ship Repair Inc., which allegedly engaged in a pattern or practice of discrimination by imposing unnecessary and additional documentary requirements on work-authorized non-U.S. citizens while establishing their eligibility to work in the United States. BAE has agreed to pay a penalty of $53,900, and take other corrective actions.

On the business immigration front, CIS is improving the EB-5 immigrant investor visa program; implementing direct access for EB-5 Regional Center applicants to reach adjudicators quickly; and launching new specialized training modules for US CIS officers on the EB-2 employment-based visa classification for individuals holding an advanced degree or its equivalent, or a foreign national who has exceptional ability and the L-1B nonimmigrant intra-company transferees. These changes are part of Obama's "Entrepreneurs in Residence" initiative which seeks to work with the private sector to improve immigration policies and practices.

So, although we are unlikely to see any extensive immigration reform this year, we can certainly expect that immigration issues will be fodder for animated social and legal debates which will continue to surface on the front page news, as well as play an important role in the Presidential and Congressional elections of November 2012.

Claims Against Cuba, *Continued from front page*

Claims programs are not designed to remain unpaid for 50 years. Frankly, having the Cuba Claims Program go unpaid for 50 years makes a mockery of the international claims process. Typically these programs are settled after a few years and, while it may take a little longer, half a century sets a new and untenable precedent for future claims programs.

A comprehensive U.S. embargo, was initially imposed on the regime because of these claims, but it has been weakened over the years. While additional policy reasons have been added to U.S. law to justify economic sanctions against Cuba, the comprehensive embargo imposed by Eisenhower and Kennedy ceased to exist long ago. Meanwhile, conditions in Cuba have become more economically depressed due to the failed policies of the communist state. The new dominant policy goals for the embargo are improved human rights and democracy for the Cuban people.

The plight and suffering of the Cuban people has come to dominate the policy debate and become the primary justification for and against economic sanctions, while the property claims have mostly been forgotten. Under the premise of "support for the Cuban people," many exceptions for commerce have been created. For example, there are charter flights carrying thousands of travelers from most major U.S. cities to Cuba on a regular basis. This travel is allowed based on various exceptions, including family reunification, academic study, religious and humanitarian reasons, among others. During the last few years, travel to Cuba has been authorized even for marketing, in the telecommunications and healthcare industries.

Travel to Cuba results in money being paid to the Cuban government; as Americans pay tribute fees to the regime every time they visit and spend money there, including a healthcare fee. In addition, Americans send millions of dollars each year in remittances to relatives in Cuba. As you can see, these seemingly minor exceptions to the "embargo" add up. Another consequential exception to U.S. sanctions includes the cash sale of agricultural commodities to the Government of Cuba by American farmers. American companies also sell medicine, medical supplies, and telecommunications equipment to Cuba. Estimations of this commerce are hard to come by but, according to some experts, it is likely to be valued between 1 and 2 billion dollars annually (possibly a gross underestimation).

To some degree, normal trade and commercial relations between the U.S. and Cuba have already been restored. Cuba sends cash to the U.S., mostly in exchange for agricultural commodities, and such transactions are financed by remittences and travel to Cuba; yet, the government of Cuba has not been forced to pay the certified claims of our fellow Americans. To add insult to injury, this trade and travel uses, and is enabled by, the stolen property of the American claimants, which is why terming this charge on all qualifying commerce and trade a "user fee," is appropriate. The docks, ports, railroads, electrical grids, telephone grids, and many hotels, mines, farms, and businesses were all expropriated by the government of Cuba from Americans and are now being used to benefit the Cuban regime. American farmers, travel agencies, and many other U.S. businesses also profit from this trade.

It is important to understand that this proposed fee is neither pro-commerce nor pro-trade with Cuba, nor is it designed to reduce or stop commerce, remittances or travel. This fee simply completes the symbolic relationship between these trading partners. It is only fair that the trade, travel, and commerce that is using the confiscated properties should pay the uncompensated former owners for the use of these properties. Moreover, this fee will also finally begin to resolve and settle these claims and remove a long outstanding injustice committed against our fellow Americans. Also, by settling these claims, a major obstacle to progress in the relations between Cuba and the U.S. will be no more. Who knows? Resolving these claims may result in opportunities and progress in human rights and other issues in Cuba, as well.

Spotlight

Reminder: Filing Period for "New" H-1B Petitions Begins March 30, 2012

If your company plans to employ foreign professional workers for FY2013, now is the time to start planning for their visa entry process. Every year the U.S. government limits the number of professional visas (or H1-Bs). In 2012, there will be 65,000 visas available, plus an additional 20,000 for those workers holding Master's degrees from American universities.

The filing period for this "new" batch of H-1B petitions to be counted against the annual "H-1B cap" for FY 2013 starts on Friday, March 30, 2012. United States Citizenship and Immigration Services (USCIS) will accept cap-subject H-1B petitions for FY 2013 on Monday, April 2, 2012 for employment with a start date of October 1, 2012, or later.

ask

Can I use the Internet to purchase something from another country for shipment to a person or country sanctioned by the United States?

You can not do something indirectly that you can not do directly. An Internet transaction of this type can be viewed as trying to "evade" economic sanctions and is illegal. This would be similar to someone trying to travel to Cuba through a third country to avoid detection by U.S. authorities, which is also illegal.

Who must comply with the economic sanctions programs enforced by the Department of the Treasury, Office of Foreign Asset Control (OFAC)?

No matter where they are located, all U.S. citizens and permanent resident aliens as well as all persons and entities within the U.S. are subject to OFAC regulations. This includes all U.S.-incorporated entities. With regards to some sanction programs involving countries such as Cuba and North Korea, all foreign subsidiaries owned or controlled by U.S. companies are also impacted.

What are the fines for violating U.S. economic sanctions?

Fines can vary depending on the particular sanctions program as well as the gravity of the violation. In some cases, the fines can be significant. In addition to prison time ranging from 10 to 30 years, criminal fines can range from $50,000 to $10,000,000. Civil penalties range from $250,000 or twice the amount of each underlying transaction, to more than $1,000,000 for each violation.

Does my company need to purchase or utilize commercial screening computer software programs to comply with U.S. sanctions or export control laws?

There is no cookie cutter or turn-key system for compliance with U.S. trade security laws. Your compliance system is only as effective as your company's compliance culture and the adherence systems it has put in place. Therefore, educated personnel are your first and best line of defense. A system built with top management support should focus on these basic principals: designated trade security personnel; know what current and future product lines could be impacted by these regulations; procedures for early screening, controlling exports, as well as managing the handling and disclosure of violations; recordkeeping; and conducting periodic training as well as periodic compliance audits.

Did you know?

Economic sanctions are in the news these days, but the U.S. has used economic sanctions as part of its foreign policy arsenal since the 18th century. Dating back to the First Continental Congress of 1775, the U.S. was the first modern power to make extensive use of export and import controls. It was done mostly out of necessity. The U.S. could not afford a large standing army or navy. So we did as Americans always do, improvised and made due. As our Republic matured politically and economically, so did our tools to advance and protect U.S. global interests. This clever tool, however, became a mainstay and is used widely by many countries, to this day.

About PobleteTamargo

The law and public policy office of Poblete Tamargo is a Washington, D.C. based firm offering its clients premium legal and public policy solutions. We offer our clients a wide-range of services in unique practice areas with a concentration in providing commercial, regulatory and international litigation counsel as well as federal government relations. We are committed to resolving your legal, public policy, and information analysis needs and have extensive experience in law, the federal government, as well as the private sector.

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