Siskind's Immigration Bulletin –
March 8, 2006

Published by Greg Siskind, partner at the Immigration Law Offices of Siskind Susser, P.C., Attorneys at Law; telephone: 800-748-3819, 901-682-6455; facsimile: 800-684-1267 or 901-339-9604, e-mail: gsiskind@visalaw.com, WWW home page: http://www.visalaw.com.

Siskind Susser serves immigration clients throughout the world from its offices in the US and its affiliate offices across the world. To schedule a telephone or in-person consultation with the firm, go to http://www.visalaw.com/intake.html.

Editor: Greg Siskind. Associate Editor: Penny Egel. Contributors: Hadley Bajramovic, Maria Bjornerud.

To receive a free e-mail subscription to Siskind's Immigration Bulletin, fill out the form at http://www.visalaw.com/subscribe2.html. To unsubscribe, send your request to visalaw-unsubscribe@topica.com.

To subscribe to the free Siskind's Immigration Professional Newsletter, go to http://www.visalaw.com/sip-intro.html.

****

1. Openers
2. COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006

---

1. Openers

Dear Readers:

Our latest newsletter is another special issue covering a massive immigration reform package moving through Congress. As we have with the other major immigration bills, we are providing readers with a detailed summary of the key provisions.

The Specter bill is a compromise bill that is designed to bridge the gap between the enforcement-only approach of the House's Sensenbrenner bill and the broad legalization provisions found in the McCain-Kennedy immigration bill introduced last year. Most of the enforcement provisions from the Sensenbrenner bill remain, but the Senate bill provides for new guest worker programs designed to ensure employers can access needed workers and that the large undocumented population in the US can be put into legal status. The bill does not grant permanent residency to the undocumented, but it does make it possible for workers to get to the back of the line and pursue a green card legally.

The Specter bill is still being revised, but changes now being introduced are relatively modest compared. Important amendments may still be offered and the bill still may not pass in the Senate, but we decided to proceed with offering a detailed review of the 305 page piece of legislation.

If the Specter bill passes, the House will need to reach a compromise regarding how they will proceed. In December, the House passed the Sensenbrenner reform package. That bill

mainly focuses on immigration enforcement, while the Specter bill covers enforcement as well as legal immigration (including the creation of a guest worker program that would be available to out of status immigrants). Whether the House will go along with accepting those changes is far from certain at this point.

The Specter bill has already drawn fire from pro and anti-immigration groups. Certain harsh provisions from the Sensenbrenner bill (including making it a felony to fall out of immigration status) made it into the Specter bill. And the Specter bill includes two new guest worker visa programs – a general program and another for workers in the US without legal status.

While many, many more people will be able to legally work in the US and while green card quotas will rise significantly, it is still very likely that there will be long waits for green cards after the legislation passes. One can easily envision a system where it would take a decade or more for people to eventually achieve permanent residency status. Nevertheless, a long path to permanent residency will likely be seen by immigration advocates as preferable to no path at all. And the ability of illegal immigrants to be able to work, travel home freely and have family members with them in the US will probably convince many that this is a better alternative to the status quo.

We will be monitoring this legislation closely in the weeks and months to come. If I were a betting man, I would still put the odds at no better than 50-50 that the bill will pass. But the picture will become much more clear especially if Senator Frist is able to achieve his goal of getting the Specter bill to the Senate floor for a vote within the next month.

******

An excellent new resource available online to follow immigration issues is available at www.bibdaily.com. Bender's Immigration Bulletin, edited by the highly regarded Dan Kowalski, now has a daily web edition and you can sign up to get daily email alerts. This is an excellent way to stay on top of all the news in immigration. I happen to serve on the editorial board of the publication and am very pleased to announce the availability of this excellent new resource.

*****

As always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. We would love to discuss becoming your law firm. Just go to http://www.visalaw.com/intake.html to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

---

2. COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006

Title I – Border Enforcement

Subtitle A – Assets for Controlling United States Borders

This section of the bill authorizes a number of new border protection officers and inspectors for a multiyear period. Purchases of a number of technological assets like new unmanned aerial planes are authorized. (Section 102). New ports of entry are also authorized. (Section 105).

Subtitle B – Border Security Plans, Strategies and Reports

This section requires the Department of Homeland Security to prepare various reports on border security.

Subtitle C – Other Border Security Initiatives

This section requires DHS to integrate biometric databases by October 1, 2007. (Section 121). It also mandates DHS submit a timeline for the extension of the US-VISIT exit-entry system to all ports of entry. (Section 124)

All immigration-status documents, other than interim documents, issued by DHS must be machine-readable, tamper resistant and incorporate biometrics by October 26, 2007. (Section 126).

Section 127 of this bill would expand Section 222(g) of the Immigration and Nationality Act concerning the cancellation of visas after an alien overstays an I-94. The new provision would void ALL visas in possession of the immigrant and not just the particular visa that was tied to the overstay. In other words, an overstay on a work I-94 would trigger the cancellation of a visitor visa that may also be in the passport. The provision would, however, now allow a person to reapply for the visa in the country of last residence and not just in the country of nationality (as is currently required).

Permanent residents would now be required to provide biometrics upon entry and exit from the US just like non-immigrants. Failure to comply will be a new ground for inadmissibility. (Section 128)

Finally, this section requires DHS to prepare a report on imposing a barrier along both the southern border. (Section 129)

Title II. Interior Enforcement

Subtitle A – General Enforcement

This subtitle bars aliens inadmissible on terrorism-related grounds from receiving political asylum and also broadens the bar on availability of cancellation of removal, withholding of removal and voluntary departure as well as eligibility for admission for those found to be security threats. This section shall apply retroactively to those currently in removal and exclusion proceedings. (Section 201).

The Supreme Court decision in *Zadvydas v. Davis* is addressed. That decision strictly limits the ability of DHS to detain an alien ordered removed when the government has not managed to remove the alien (usually because the US does not have good relations with the home country). DHS would now have discretion with few limits to detain someone beyond

the removal period. DHS would have to certify every six months that the alien is likely to be removed in the reasonably foreseeable future, the alien poses a threat to the public (either for health or safety reasons). The Commissioner of Immigration and Customs Enforcement must personally sign off on the certification. This section also makes it more difficult to be released after an order of removal has been issued and while criminal proceedings are under way. (Section 202).

This section makes various changes to laws surrounding aggravated felons. First, it broadens the definition of "aggravated felony" to include convictions even when the sentence that is the basis of being an aggravated felony is tied to recidivist or other enhancements. (Section 203).

The definition of "aggravated felony" would be expanded in alien harboring and smuggling cases as well. Persons who knowingly hire at least ten individuals smuggled in to the US in a twelve month period would be guilty of an aggravated felony. Persons found guilty of buying or selling vehicles, vessels or aircraft used in alien smuggling would be guilty of an aggravated felony. (Section 203).

Marriage fraud and EB-5 fraud for which the term of imprisonment is at least a year would now be aggravated felonies. (Section 206).

Asylees convicted of aggravated felonies would no longer be eligible for waivers to adjust status to permanent residency. (Section 206).

"Good moral character" would not apply in cases where a person is convicted of a crime that is not defined as an aggravated felony at the time it occurs but is later classified as an aggravated felony unless the crime is more than ten years old and the applicant is granted a waiver by DHS.

Any alien who a consular officer or a DHS officer "knows or has reason to believe" is a member of a criminal street gang or has participated in a gang's activities is inadmissible. (Section 205)

Responsibility for the Temporary Protected Status program is transferred from the Department of Justice to DHS. DHS will have the authority to terminate TPS status for any reason and DHS will be authorized to extend TPS status in increments of up to 18 months. Bars gang members from TPS status and clarifies that a TPS alien's immunity from detention only extends to detention based on immigration status and not other grounds. (Section 205).

Section 205(c) contains one of the more controversial sections of the Sensenbrenner bill. It would criminalize providing material assistance to illegal aliens and would seemingly make felons out of non-profit and religious organization workers who provide housing, travel, food and medical assistance to illegal aliens. The bill does insert a provision that says religious organizations shall not be guilty of alien smuggling if the minister or missionary has been a member of the denomination for at least a year.

The penalty for certain people found guilty of hiring unauthorized workers is increased shall be increased to 10 years.

The other most controversial section of the Sensenbrenner bill makes it in to this Senate bill as well. Section 206(a) would make it a felony to knowingly be in the US unlawfully whether

by illegal entry or overstaying or violating the terms of a legal entry. The first violation is punishable by imprisonment of up to six months.

The summary of the legislation provided by Senator Specter speaks to Section 206 (c) which would increase penalties for marriage and EB-5 fraud. However, the actual text of the legislation does not contain a Section 206(c).

Section 207 makes it tougher to avoid criminal sanctions for illegally reentering the US after a deportation order. For example, the standard to attack an underlying removal order is increased. And it makes it a crime to aid or abet illegal reentry. However, this does not include providing humanitarian services such as providing food or medicine or transporting someone to a place where they could receive either.

The Specter bill has provisions creating a new crime for trafficking in passports. Furthermore, "willfully" making false statements in a passport application is a felony. The current standard requires showing a higher standard of intent. (Section 208)

The misuse of any immigration document would be criminalized in a manner similar to the Sensenbrenner bill. (Section 208 and 209)

Section 210 would allow states to hold illegal aliens for up to 14 days after completing criminal sentences in order to more easily transfer custody to Immigration and Customs Enforcement. The section would also extend the use of the Institutional Removal Program (IRP) which identifies removable aliens in Federal and State prisons.

Section 211 would tighten voluntary departure rules including shortening the affirmative voluntary departure period from 120 days to 60 days and the voluntary departure in removal proceedings from 60 to 45 days.

The statute of limitations for all immigration related crimes would be made a uniform ten years (Section 214).

The completion of any visa or status processing by DHS and the Justice Department will be barred while background and security clearances are pending. (Section 216).

TITLE III – Increased Worksite Enforcement and Penalties

Section 301 of the Specter bill covers the unlawful employment of aliens. Employers would now be required to not only comply with I-9 rules, but also with a new Electronic Employment Verification System that is a permanent implementation of the basic pilot program that has been in existence for the last few years. Implementation of the electronic system will be rolled out over several years with the largest employers being required to participate first and then smaller employers later. DHS is also permitted to charge employers taxes tied to use of the system. This section also recognizes DOL's authority to investigate employers under the Fair Labor Standards Act of 1938.

For civil enforcement purposes, employers who hire ten unauthorized workers within a calendar year are presumed to have known that the workers were unauthorized. Knowingly hiring unauthorized workers carries tougher penalties than unknowingly hiring unauthorized workers. Employers who attempted in good faith to comply with the I-9 rules do have a defense, however, until electronic verification system participation is required.

DHS may require an employer to certify employment verification compliance based on an internal review as an alternative to a DOL audit. An employer will be granted a 60 day deadline that may be extended in the discretion of DHS.

Section 304 mandates that false claims to either citizenship or nationality are grounds for inadmissibility. Currently, just the former is. This has been a defense in removal cases because the I-9 form asks if someone is a "citizen or national" of the US while immigration law only penalizes claims of false citizenship.

Title IV – Nonimmigrant and Immigrant Visa Reform

H-2C Visas

Section 401 creates a new H-2C visa. This visa appears targeted to workers either outside the US or currently in legal status in the US. A separate guest worker program targeted at out of status workers is outlined in Title VI.

The visa is available to those coming to the US temporarily to perform temporary labor or services other than labor or services covered in H-1B, H-1C, H-2A, H-2B, H-3, or L, O, P, or R visas. The applicant must have a residence in a foreign country which the applicant has not intention of abandoning. The visa will become available one year after the date of enactment of the law and shall apply to aliens outside the US on the effective date. Rules must be released by DOL within six months of the enactment of the law.

Section 402 outlines the H-2C requirements. The employer must be capable of performing the services that are the subject of the petition. The worker must show that the he or she has received a job offer from a qualified employer. The worker must pay a $500 visa issuance fee in addition to the cost of adjudicating the petition (and this is in addition to consular reciprocal fees). Workers must have a medical examination at the worker's expense. Workers must submit background information on health, criminal and security issues.

Changes of status to other visa categories are not permitted.

H-2Cs are available for an initial term of up to three years with a one time renewal for three more years. The alien is then required to depart the US for one year in order to qualify for additional H-2C time. Commuters into the US are not subject to the time limits.

H-2C status will be lost if a worker is unemployed for 45 or more consecutive days and the worker will be required to return to his or her home country. DHS may waive the return requirement.

Travel in and out of the US is permitted and return on an unexpired I-94 is allowed even if the visa has expired. Time spent outside the US shall not extend the period of authorized admission in H-2C status.

H-2C holders who fail to depart within 10 days after the H-2C status terminates are barred from most immigration rights.

Anyone who enters or attempts to enter the US without inspection after enactment of the H-2C provisions will be barred for ten years receiving most immigration benefits.

The H-2C is portable and workers can move to new jobs as long as the new employer complies with the terms for H-2C employment.

Denials of H-2C status may not be appealed.

H-4 visas many be granted to spouses and children. H-2C visa holders must pay a $500 family supplemental application fee plus normal visa costs. Dependents must also get medical exams and have background checks. H-2C visa holders must demonstrate adequate finances to support family members coming on H-4s.

Section 403 spells out an employer's obligations when hiring H-2C workers. Employers must attest that

- Hiring the H-2C will not adversely wages and working conditions for US workers.
- The employer did not and will not cause US workers to lose their jobs by hiring the H-2C worker. There is a 90 day look back and look forward provision.
- The worker will be paid the higher of either the actual or prevailing wage. Private wage data may be used.
- There is no strike or other form of work stoppage.
- The employer is covered by a state workers compensation program, the employer will provide at no cost to the worker insurance covering injury or illnesses arising due to the job. The insurance would need to be comparable to state workers compensation programs.
- Notice to workers is provided
- Unless DOL has precertified a shortage, the employer can show there are not sufficient workers able, willing and qualified and immediately available to perform the job. Good faith recruiting efforts must be undertaken in the three month period prior to filing (with recruiting ending at least 14 days prior to filing). The job must be advertised at the actual wage paid by the employer.
- The job must be bona fide.
- Employers must maintain public access files.
- The employer must notify DOL and DHS when an H-2C leaves the employer within three business days after the departure.
- The petition must be filed not more than 60 days before the date the services are needed.

DHS shall have the authority to audit employers to ensure compliance. Employers are required to retain records for five years from the date the petition is filed. (Section 403) They are also required to maintain records for at least one year that describe why US workers were not hired (Section 406).

Employers who misrepresent facts or fail to comply with the terms of the program can be barred for up to three years from sponsoring or employing H-2C workers. And punishing whistleblowing employees or former employees is prohibited.

Foreign labor contractors recruiting H-2C workers are required to disclose a variety of details to H-2C workers at the time of their recruitment including information on the proposed place of employment, the pay, the type of work, who is paying travel expenses, whether there is a strike or other similar labor dispute, whether the contractor is getting a commission based on the worker's services, details regarding insurance and worker's compensation coverage, and information on the risk of work related injuries. Foreign labor contractors are prohibited from charging the H-2C worker for their services.

Foreign labor contractors will be required to register with the Department of Labor and employers may only use the services of registered contractors. DOL will issue two year renewable certifications of these contractors. H-2C workers will also have the ability to lodge complaints against contractors with the DOL. The DOL will have the discretion to require contractors be bonded and may also deny certification if it determines the contractor lacks sufficient ties to the US to adequately enforce these rules.

Employers are subject to civil fines of $2000 up to $35,000 per worker depending on whether the violation is willful and whether a worker was harmed. Imprisonment of up to six months and additional fines of up to $35,000 are possible if a willful violation occurs and an individual suffers extreme physical or financial harm.

Under Section 404, DHS is required to set up an alien employment management system to manage and track the employment of H-2C immigrants. Employers shall be able to recruit and advertise employment opportunities through the system.

The Department of Labor must set up an electronic job registry that provides information on job opportunities for US workers in order to ensure US workers are not being passed over in favor of foreign workers. And DOL must set up a publicly accessible web page that provide a single Internet link to each State workforce agency's electronic registry of jobs available throughout the US. (Section 406)

The US shall negotiate bilateral treaties with countries sending H-2C workers requiring the countries to accept the return of nationals ordered removed from the US within three days of such removal. (Section 410)

Foreign Students

The Spector bill makes important changes regarding student visas. First, F-1 optional practical training time is now extended from one year to 24 months. (Section 408). A new F-4 student visa is created for students pursuing advanced degrees in math, engineering, technology or the physical sciences. F-4 students would need to either return to their country of origin or remain in the US and pursue a job in their field and then pursue permanent residency. F-4s will be dual intent and the status can be extended while the applicant pursues permanent residency through a labor certification or other means. The alien must be working in his field as well to qualify to adjust status. Applicants for adjustment under this new section would pay a fee of $1000 which will fund scholarships and fraud prevention.

Section 407 also would allow F-1 and F-4 students to accept off-campus jobs outside of the student's field if the student is enrolled and in good standing at their educational institution, an employer provides the school and the Labor Department with an attestation that it has spent 21 days unsuccessfully recruiting for the job and is paying the higher of the actual or prevailing wage, and the student will work no more than 20 hours during the academic term or 40 hours per week on vacations.

Section 409 exempts aliens who have earned advanced degrees in science, technology, engineering or math and have been working in their fields under a non-immigrant visa in the three years prior to filing for adjustment, recipients of national interest waivers, immediate relatives of aliens granted employment-based immigrant visas are exempt from green card quotas.

Section 409 waives the labor certification recruitment requirement for those with advanced degrees in the sciences, technology, engineering or math from American universities.

The H-1B cap is lifted for three years to 115,000. (Section 409). After that, the cap will remain at 115,000 but may rise up to 20% per year if the whole cap is used up in the prior year. If the cap is not reached, then the cap the next year will remain the same as the current year.

Title V – Backlog Reduction

Allows recapture of unused visa numbers and increases employment-based green cards from 140,000 to 290,000. Visas for spouses and children shall not be counted against the numerical limits. Immediate relatives would no longer be counted against the 480,000 annual cap on family-based immigration. (Section 501).

The per country limits are raised from 7% to 10%. (Section 502).

The allocation of family-sponsored visas is shifted as follows (Section 503):

10% - F1 unmarried sons and daughters of citizens
50% - F-2 spouses, minor children and unmarried adult sons and daughters of permanent residents (77% of these go to spouses and minor children of permanent residents)
10% - married sons and daughters of US citizens
30% - brothers and sisters of citizens

The allocation of 290,000 employment-based visas is shifted as follows (Section 503):

15% for EB-1 (was 28.6% but presumably many will now qualify in the new uncapped category for certain advanced degree holders)
15% for EB-2
35% for EB-3
5% for investors (redesignated as EB-4)
30% for new EB-5 for other workers (old EB-3 unskilled workers).

The immediate relative category is changed to let children of spouses and parents of US citizens to obtain legal status and travel to the US to be with their families.

Title VI – Conditional Nonimmigrant Workers

Subtitle A – Conditional Non-Immigrant Work Authorization and Status

In addition to the H-2C visa program described in Title IV, the Specter bill creates an alternative guest worker program called conditional non-immigrant status.

Anyone present in the US before January 4, 2004 and employed in the US since then will be eligible for conditional nonimmigrant work authorization and status. Applicants must submit to medical examinations and pay all back income taxes. Applicants must be submitted within a year of passage of this law. Employers are required to pay a $500 fee. (Section 601)

DHS is required to begin accepting applications within three months after the date of enactment. DHS shall process all cases within 18 months.

Despite prior status violations, recipients of these visas will have the ability to travel.

Spouses and minor children can accompany a conditional nonimmigrant if they submit a fee of $100 per family member. They may not work on the basis of being a dependent.

Failure to be employed for a 45 days stretch will render a person subject to the loss of their work status.

The conditional nonimmigrant visa is portable and employees can switch employers if they are complying with the terms of the conditional status.

An alien who fails to apply for this program will be ineligible for any relief unless the alien could not obtain such status due to reasons of age, mental impairment or physical disability.

While applications are pending, applicants will be considered to be in legal status and entitled to interim work authorization. Employers are also granted "safe harbor" status if they cooperate with an applicant seeking conditional non-immigrant status.

Subtitle B – Grant Programs to Assist Nonimmigrant Workers

Provides funding for grants and to underwrite various education and training campaigns.

Title VII – Immigration Litigation Reduction

Subtitle A – Appeals and Review

This provision would now require all immigration cases to be handled by the US Court of Appeals for the Federal Circuit and that court will be increased in size by three judges to 15. This provision only applies to decisions entered on or after the date of enactment of the new law. (Section 701)

The Board of Immigration Appeals is granted the authority to issue an order of removal without remanding the case to an immigration judge. (Section 703).

Decisions to revoke a visa and a removal order predicated on this is no longer reviewable except as it relates to questions of statutory interpretation or alleged constitutional problems. (Section 704).

Attorneys fees under EAJA are not to be paid in immigration cases for aliens who are removable, except when the DOJ or DHS determination regarding removability was not substantially justified. (Section 709)

Subtitle B – Immigration Review Reform

The President will now choose the Director of the Executive Office for Immigration Review. (Section 711). The Director shall choose appoint a Chief Immigration Judge. (Section 713). The Director, in consultation with the Chief Immigration Judge, shall appoint immigration

judges. Judges will be granted seven year appointments and can serve for up to 14 years. (Section 713).