



Fall 9-1-2006

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Recommended Citation

Mary E. Pivec, *A PRACTITIONER'S OBSERVATIONS ON U.S. IMMIGRATION POLICY CHANGES IN RESPONSE TO 9/11 AND THE WAR ON TERROR*, 13 Wash. & Lee J. Civ. Rts. & Soc. Just. 9 (2006).
Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol13/iss1/4>

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A PRACTITIONER'S OBSERVATIONS ON U.S. IMMIGRATION POLICY CHANGES IN RESPONSE TO 9/11 AND THE WAR ON TERROR

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For those of you who have enjoyed frequenting the Irish pubs of Boston and New York, there is bad news ahead. The *Washington Post* recently reported that Irish immigration to the U.S. has slipped into reverse due to post-9/11 security pressures on the undocumented.¹ This trend is not due to an increase in deportation activity among Irish nationals. According to U.S. immigration officials, only forty-three Irish aliens were deported from the United States in FY 2005.²

Perhaps one reason for the Irish departures lies in the identity verification provisions of Title II of the REAL ID Act of 2005, entitled "Improved Security for Driver's Licenses and Personal Identification Cards."³ The new law requires states to adopt stricter documentation requirements for issuance of driver's licenses by May 2008 to prevent illegal immigrants, criminals, aliens and terrorists from acquiring an identity document to facilitate work, banking and travel within the U.S.⁴ Under the new law, state motor vehicle authorities must require presentation and

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¹ See Michelle Garcia, *Irish Immigration Slips Into Reverse*, WASH. POST, Feb. 20, 2006, at A03 (citing the Census Bureau's report that between 2000 and 2004 the Irish population in the United States shrank by 28,500 people).

² *Id.*

³ REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005).

⁴ *Id.* 119 Stat. 312.

verification of at least four acceptable identification documents before issuing a license.⁵ Once effective, state motor vehicle authorities will be required to test the validity of at least four acceptable identification documents before issuing a license.⁶ Applicants must present an authentic copy of their birth certificate, a photo I.D., utility bills or other documentation to establish name and address as well as proof of a social security number.⁷ Each applicant must also demonstrate that he or she is a U.S. citizen or otherwise lawfully present in the U.S.⁸ Applicants who possess only temporary authorization to live or work in the U.S. can only obtain a driver's license valid for the period of their authorized stay.⁹

According to the American Association of Motor Vehicle Administrators, thirty-six states already verify social security numbers online, and twenty states have implemented the four forms of identification requirement for issuance of a driver's license.¹⁰ As a result, undocumented Irish mothers cannot obtain driver's licenses needed to transport their tiny tots to play dates or shop for the evening meal.¹¹ These visitors protest that Americans have mixed up terrorism and immigration.

I. Congress Goes After Foreign Students and Academic Researchers

One of the September 11 hijackers was in the U.S. on a student visa, and two were issued visas six months after the hijacking.¹² Title V of the Enhanced Border Security and Visa Entry Reform Act of 2002, enacted May 14, 2002, provides for greater scrutiny of all student visa applicants.¹³ As a result, travel to the U.S. has been delayed, particularly for foreign students pursuing graduate level studies, teaching or research in areas on the Technology Alert List published by the U.S. State Department.¹⁴ Regulated

⁵ *Id.*, 119 Stat. 312-13.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* 119 Stat. at 313.

⁹ *Id.*

¹⁰ See Dibya Sarkar, *Real ID Zips Through Congress*, FED. COMPUTER WK., May 11, 2005, available at <http://www.fcw.com/article88832-05-11-05-Web> (reporting that when the federal standards take effect, officials could stop people from boarding a plane or entering a building if they have a driver's license from a state that does not comply with the new law).

¹¹ See Garcia, *supra* note 1, at A03 (giving personal accounts of Irish aliens facing the new regulations).

¹² See Diana Jean Schemo, *Threats and Responses: Foreign Students; Electronic Tracking System Monitors Foreign Students*, N.Y. TIMES, Feb. 17, 2003, at A11 (stating that these discoveries exposed problems in the system for tracking foreign students).

¹³ Enhanced Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002) (codified as amended in scattered sections of 8 U.S.C.).

¹⁴ U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 9 § 40.31, Exhibit I (2005).

areas include conventional munitions, nuclear technology and related fields, rocket systems, navigation and avionics, chemical engineering, biomedical engineering and biotechnology.¹⁵

Students pursuing degrees in these technologies are required to comply with new, rigorous security checks at U.S. consular posts overseas—in many cases resulting in non-reviewable visa denials or late admissions.¹⁶ New forms have been introduced to supplement visa applications, such as Form DS-157, which must be completed by all males between the ages of 16 and 45.¹⁷ This form requires the visa applicant to disclose all countries visited in the past ten years; whether the applicant has ever had a passport lost or stolen; the applicant's employment history; a list of all professional, social and charitable organization to which the applicant belongs, has worked for or has contributed to; and whether the applicant has any specialized skills, including firearms, explosives, nuclear, biological or chemical experience.¹⁸ If the reviewing consular official forms a reasonable suspicion that an applicant is a terrorist, the visa will be denied.¹⁹

In general, there has been a substantial decline in the number of foreign students seeking advanced education in the United States.²⁰ Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), colleges are required to report all changes in a foreign student's educational program through the Student and Exchange Visitor Information System (SEVIS).²¹

II. Worse Days Lay Ahead If Congress Has Its Way

In December 2005, the U.S. House of Representatives passed The Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (BPAIIICA).²² BPAIIICA—an enforcement driven bill—dealt

¹⁵ See Dawn Levy, *Foreign Students Share Tales of Visa Woes in a Post-9/11 World*, STANFORD REPORT, May 25, 2004, available at <http://news-service.stanford.edu/news/2004/may26/visahell-526.html> (looking at the experiences of students experiencing the effects of the new regulations).

¹⁶ See *Visiting Scholars Stuck in Anti-Terror Screening*, CHI. TRIB., Dec. 26, 2003, at C24 (noting that those studying certain subjects can be screened for months before being allowed to enter the United States, even if they have previously studied or worked in the country for years).

¹⁷ Form DS-157, available at <http://foia.state.gov/FORMS/visa.asp> (follow "DS-157 Supplemental Nonimmigrant Visa Application" hyperlink).

¹⁸ *Id.*

¹⁹ See Levy, *supra* note 15 ("The decision to deny a visa is a personal one made by the visa officer.").

²⁰ See *id.* (reporting that nationally, graduate applications from international students for fall 2004 enrollment are down 32%).

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. No. 104-208, 110 Stat. 3009 (1996).

²² Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

exclusively with measures to improve border and interior enforcement, including significantly strengthening the nation's employer sanctions laws and penalties.²³ By contrast, in May 2006, the Senate passed the Comprehensive Immigration Reform Act, incorporating many of the tough enforcement measures contained in BPAIIICA but also offering new visa numbers to clear the backlog of qualified permanent resident applicants; an opportunity to achieve permanent resident status to approximately nine million unauthorized workers currently living in the United States; and a guest worker program to ease the nation's unskilled worker shortage.²⁴

To date, it seems there has been no movement by the leadership toward reconciliation of the differences contained in the House and Senate measures.²⁵ Indeed, the House and Senate have scheduled unprecedented post-passage legislative hearings across the country to buttress their opposing views on the future of immigration reform.²⁶ Many commentators predict that if immigration reform passes during this Congress, it will be during a lame duck session in December 2006 and will be limited to enforcement-only measures that the House and Senate both agree with.²⁷

Should such a scenario play out, an unlawful entry or reentry could become an aggravated felony, subjecting aliens accused of such crimes to mandatory detention and virtually no relief from deportation.²⁸ Aliens who are apprehended at ports of entry or along the international land and maritime border of the U.S. could be subject to mandatory detention until they are removed from the U.S. or a final decision granting their admission has been determined.²⁹ Under current law, presence in the U.S. without valid status is a civil, not criminal, violation.³⁰

Hardliners have urged Congress to expand the authority of the Secretary of Homeland Security to conduct expedited removal proceedings without being subject to judicial review.³¹ Under current law, the

²³ *Id.*

²⁴ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

²⁵ See, e.g., Frank James, *Immigration Debate Revived by House GOP; Republicans Contend Senate Stalling Reform*, CHI. TRIB., June 23, 2006, at C3 (noting cross-party blaming for the stall in immigration reform).

²⁶ See Nicole Gouette, *Congress' Immigration Fight Hits the Road*, L.A. TIMES, July 4, 2006, at 18 (stating that "House members are launching a summer-long sparring match" to impeach the value of the opposing bill).

²⁷ See, e.g., Lisa Hoffman, *Immigration Reform? What Immigration Reform?*, CAPITAL HILL BLUE, Jul. 29, 2006, available at http://www.capitolhillblue.com/artman/publish/article_9215.shtml (noting that after months of debates, Capitol Hill lawmakers are no closer to an agreement).

²⁸ See H.R. 4437, 109th Cong. § 203 (2005) (raising penalties in the Immigration and Nationality Act for unlawful presence in the U.S.).

²⁹ *Id.*

³⁰ Immigration and Nationality Act, 8 U.S.C. § 1325 (2000).

³¹ See H.R. 4437, 109th Cong. § 407 (2006) (vesting extradition power in the Secretary of Homeland Security rather than the Attorney General).

Department of Homeland Security (DHS) administrative personnel have authority to make non-reviewable decisions to deport Mexicans or Canadians who have not been admitted or paroled into the U.S.³² The latest proposals would expand that authority to include all aliens who entered without inspection, regardless of national origin, who are apprehended in the United States within 100 miles of an international land border and within fourteen days of entry.³³

Hardliners also advocate expanding the definition of alien smuggling, a felony,³⁴ to include entering into a labor contract for the hire of an unauthorized worker with knowledge or in reckless disregard of such status.³⁵ Being charged with alien smuggling would subject any property, real or personal, that has been used to commit or facilitate commission of the crime to seizure and forfeiture.³⁶ These are currently civil violations subject to civil money penalties.³⁷ The DHS is already moving toward criminalization of the workplace immigration laws, having initiated a program in April 2006. The program seeks to charge employers and their representatives with criminal conspiracies arising out of the employment of undocumented workers, including alien smuggling and transporting, harboring, and money laundering.³⁸

Reform legislation will also radically change the way in which employers verify the identity and eligibility of employees for work in the United States. It is likely that Congress will adopt a system of mandatory electronic verification.³⁹ To prevent identify theft, it is likely that Congress will mandate adoption of a biometrically secure social security card for all U.S. workers.⁴⁰ The recordkeeping requirements are also likely to be extended from three years to seven years and the civil money penalties available to deter violations are likely to rise substantially.

³² 8 U.S.C. § 1225(b)(1)(A)(i) (2000).

³³ H.R. REP. NO. 109-345, pt. 1, at 19 (2005).

³⁴ 8 U.S.C. § 1324(a)(1)(B) (2000).

³⁵ See H.R. 4437, 109th Cong. § 202(a) (2006) (including in the definition of "Alien Smuggling and Related Offenses" anyone who "assists, encourages, directs, or induces a person to come to or enter the United States, or to attempt to come to or enter the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to come to or enter the United States").

³⁶ H.R. 4437, 109th Cong. § 274 (2005).

³⁷ 8 U.S.C. § 1324(b)(2) (2000).

³⁸ See *Impacts of Border Security and Immigration on Ways and Means Programs: Hearing Before the H. Comm. on Ways & Means*, 109th Cong. § 6 (2006) (statement of Julie L. Myers, Assistant Secretary U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security) (stating that current worksite enforcement strategies include imposition of felony charges).

³⁹ See H.R. 4437, 109th Cong. § 701 (2005) (establishing a system of electronic verification for employment eligibility); S. 2611, 109th Cong. § 274 (2006) (mandating use of electronic verification by employer).

⁴⁰ See *id.* § 707 (2006) (requiring social security cards be made of a durable plastic or similar material and that include an encrypted, machine-readable electronic identification strip and a digital photograph of the individual).

III. Private Civil Suits On the Rise

As a labor and employment attorney, I have seen a dramatic increase in the use of the civil RICO statute to go after employers who apparently have large populations of foreign workers. These RICO cases are framed as class actions brought on behalf of U.S. workers who allege that their wages and benefits have been depressed by the availability of undocumented labor. The rewards can be great, for the attorneys at least, as RICO provides for the award of treble damages and attorneys fees.⁴¹ The statute of limitations is four years but can and does go back much further.⁴²

Federal law makes it a felony to hire ten or more individuals in any 12-month period, knowing that the individuals were aliens unauthorized to work for the employer.⁴³ It is also a felony to conceal, harbor, or shield from detection aliens who have illegally entered the United States or to encourage or induce an alien to come, enter, or reside in the United States, knowing that such acts would break the law.⁴⁴ Depending on the circumstances, employment can be a factor in a harboring charge.⁴⁵ In my experience, the plaintiffs in a civil RICO immigration class action typically claim that one or more persons employed by or associated with an enterprise engaged in interstate or foreign commerce has broken these immigration laws, resulting in harm to the class members.

In *Williams v. Mohawk Industries*,⁴⁶ a class of current and former hourly employees filed a complaint alleging that Mohawk employees recruited large numbers of undocumented workers at the United States border near Brownsville, Texas, and conspired with others to transport these workers from Texas to Georgia to work at Mohawk facilities.⁴⁷ The plaintiffs alleged that Mohawk knowingly employed these illegal workers directly, or used their services under contract through a temporary help agency, to reduce Mohawk's labor costs.⁴⁸ The complaint alleged that Mohawk paid both employees and third-party recruiters to locate

⁴¹ 18 U.S.C. § 1964(c) (2000).

⁴² See Ann K. Wooster, Annotation, *Statute of Limitations in Civil Actions for Damages Under the Racketeer Influenced and Corrupt Organizations Act (RICO)*, 18 U.S.C.A. §§ 1961–1968, 156 A.L.R. FED. 361 (2006) (explaining that although the U.S. Supreme Court has held that the four year statute of limitations of the Clayton Act should apply to RICO cases, it did not give guidance on accrual or tolling issues).

⁴³ 8 U.S.C. § 1324(a)(3)(A) (2000).

⁴⁴ *Id.* § 1324(a)(1)(A)(iii)-(iv).

⁴⁵ See *United States v. Myung Ho Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (determining knowing employment of an alien constitutes "harboring" an alien as prohibited under 8 U.S.C.S. § 1324(a)(1)(A)(iii)).

⁴⁶ *Williams v. Mohawk Industries*, 411 F.3d 1252 (11th Cir. 2005).

⁴⁷ *Id.* at 1255.

⁴⁸ *Id.*

undocumented workers, and that Mohawk concealed its efforts to hire and harbor illegal aliens by destroying documents and assisting undocumented workers in evading detection by law enforcement.⁴⁹

Mohawk tried unsuccessfully to have the case dismissed by the district court and the Eleventh Circuit Court of Appeals.⁵⁰ Mohawk petitioned for review in the Supreme Court, which granted the request⁵¹ and heard oral argument in April 2006. The Supreme Court, however, subsequently dismissed the petition and remanded the case to the Court of Appeals for reconsideration of its decision in light of the Supreme Court's decision in another case.⁵² In that non-immigration related RICO case, the Court found that to state a claim for relief, RICO plaintiffs must plead and prove a direct causal relationship between the alleged criminal conduct and the alleged injury to plaintiffs.⁵³ Notwithstanding this higher standard, on remand the Court of Appeals once again ruled that plaintiffs' assertion that their wages were depressed because of Mohawk's employment of undocumented workers was sufficient to withstand a preliminary challenge on the causation issue.⁵⁴

Competitors have also looked to the court to recover damages based upon alleged immigration law violations. For example, in California a temporary help company has brought suit against its client and a competitor claiming that it suffered a competitive disadvantage because defendants ignored the requirements of federal laws and knowingly referred and hired undocumented workers and subcontractors.⁵⁵ California has had an unfair trade practices statute on the books for many years,⁵⁶ but thus far it has not been used as a vehicle for attacking the workplace immigration violations. Should the plaintiff succeed in bringing such actions, she could obtain treble the actual damages she is able to prove at trial, in addition to their attorney's fees.⁵⁷

⁴⁹ *Id.*

⁵⁰ *Id.* at 1256.

⁵¹ *Williams v. Mohawk Indus.*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, 74 S. Ct. 3351 (2005).

⁵² *Mohawk Indus. v. Williams*, 126 S. Ct. 2016 (2006).

⁵³ *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

⁵⁴ *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006).

⁵⁵ *See Businesses Suing Competitors, Calling Illegal Workers Unfair*, N.Y. TIMES, Aug. 24, 2006, at A20 (reporting that several area companies plan to file suit against farms and factories that depend heavily on immigrant labor).

⁵⁶ CAL. BUS. & PROF. CODE §§ 17000–17101 (Deering 2006).

⁵⁷ *Id.* § 17082.

IV. Afterward

Without question, the 9/11 tragedy has caused Americans to question our *de facto* open door policy of the past and to insist upon much more rigorous standards for permission to live and work in the United States. Despite the lessons of the past, a new era of protectionism appears to be taking hold, demanding rigid border security regardless of monetary cost and lost business opportunities. Our unsuccessful mission in Iraq has no doubt contributed to the Country's desire to look inward and question the rights and privileges of our most recent entrants. In time, it is hoped that we will return to a more balanced approach to immigration that celebrates the benefits of pluralism.