# PUBLICATION

## Senate and Administration Bargain on Immigration Analyzed

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Planets suddenly and unexpectedly aligned last Thursday and Friday, reflecting an admirable bipartisan determination of representatives of the U.S. Senate and the Bush Administration to accomplish balanced immigration reform. Painstaking negotiations have led to a delicate compromise that will be tested on the Senate floor this week as the sponsors and leadership seek to limit debate and then fend off amendments. The level of opposition from different angles may be surprising the sponsors. Some interests expect the House to develop a different, more generous bill, but that is hardly certain, and House leaders may be forced to work closely from the Senate bill in order to have real chance of enactment.

Parties on either side are criticizing various provisions, a natural product of compromise, but most parties are hesitant to dismiss and oppose altogether what may be the last best hope of comprehensive immigration reform for several years, instead proposing substantial "tweaks" to the bill. Nevertheless, those farthest on either side of the issues will be tempted to oppose it: those favoring a complete and faster legalization program and more family immigration, and those who oppose anything even vaguely resembling amnesty. Legislators will be calculating the cost of alienating either group, but they must also calculate the cost of disappointing the quieter majority of voters who expect some action to improve our current dysfunctional situation. The biggest "big picture" issues for that silent majority and the very interested employer community will surround the bill's approach limiting long term permanent immigration to the more highly educated who need not even have a job offer, and limiting less skilled work to guest workers who must depart the U.S. for a full year after two years of work.

As a bill takes shape through the influence of the largest and most active coalitions, individual employers and industries may realize they have unique labor needs and objectives that differ from the larger business community and the business coalitions, and they may need to take special efforts to have their interests or views effectively represented or communicated to members of Congress and, even after enactment, to regulators interpreting and implementing legislation.

Baker Donelson has the unique combination of a high profile Federal Public Policy Group experienced in the legislative process in Congress and the White House, along with an expert Immigration Group led by the former Chief Counsel and Acting Director of U.S. Citizenship & Immigration Services. Our attorneys and senior advisors are in an excellent position to help our clients develop and execute a strategy to present most effectively their particular views during the fast-paced legislative deliberations now underway.

The bill sets up an expanded guest worker program, legalizes undocumented workers over a long period of time, decreases and narrows pure family immigration over time in favor of a "merit based" points system focused on education and employment offers, eliminates diversity lottery visas, upgrades employment verification to a national mandatory system, limits the scope but expands numbers for H-1B professionals, and establishes enforcement goals as targets that must be hit before the guest worker and legalization programs take full effect.

At the time of this Alert, the only text available has been a "draft" dated May 18 at 11:58 p.m. We have had very limited time to review the language and cannot pretend to have a perfect analysis, but we offer the following as our best quick effort to assess its function and effect:

## **Temporary worker program:** Expands a future flow of temporary workers in short supply in three categories:

- **Seasonal agricultural workers** (today's H-2A, now **Y-2A**) remain unlimited but have more streamlined processing. The employer makes attestations to DOL about recruitment and conditions that under the H-2A program had to be investigated first. Interestingly, a legalized "Z" visa holder is not considered a U.S. worker whose availability can preclude a Y-2A job opportunity. The Adverse employment wage rates (AEWR), typically higher than "prevailing wage" rates, are locked for 3 years at 2003 levels, then adjusted from that level for inflation but no more than 4% for two years. Meanwhile, the GAO and a commission of employer and union representatives will study the effect of this program on wage levels and the appropriateness of AEWR vs. other wage standards such as prevailing wages. A DOL investigation, arising from a union or worker complaint or DOL audit, can lead to debarment for up to three years, up to $90,000 fines, and back wages and benefits. An alien can bring a private action for unpaid wages or unmet conditions. An alien can be admitted for up to ten months to work for the sponsor, and may stay to work for subsequent employers for up to ten months each without having to wait for approval of their petitions (as with current H-1B "portability") for a total stay of up to 3 years from last admission. The bill contemplates that USCIS will adjudicate the petition to change employers and deliver a new work card within 60 days. An alien whose stay has expired without extension must remain outside the U.S. for 1/5 of the time of prior admission before returning in Y-2A. Sheep herders, goat herders and dairy workers are not subject to the requirements to remain outside the U.S. and may even pursue permanent residence after three years. Certain past unlawful presence can be waived for first reentry from abroad in Y-2A, but subsequent violations result in a five-year bar.
- **Non-agricultural seasonal workers**, currently set at 66,000 (today's H-2B, now **Y-2B**), increase to 100,000, subject to increase up to 15% per year to a maximum of 200,000. Y-2B workers may be admitted for no more than ten months followed by at least two months outside the U.S. before return.
- **New temporary workers**—the bill adds 400,000 **Y-1** workers, subject to increase up to 15% per year to a maximum of 600,000. One would think that Y-1 could be for work that takes place without interruption or seasonality, but the term used, "temporary labor or services," is the same language that currently limits H-2B visas to positions for which there is not an ongoing need (ostensibly one-time occurrence, intermittent, seasonal or peakload need). The bill requires Y-1 workers to spend one year outside the U.S. after two years in, limits total admission to 6 years, provides no bridge to residency, and only allows 20% to be joined by family. Those joined by family can only stay two years total. Daily commuters living abroad may be admitted for three years.
- **Spouse and children** may accompany or follow any Y worker in **Y-3** status only if the worker receives wages exceeding 150% of the poverty level for the applicable family size, and receives health insurance. But the family may apply for visitor visas subject to normal difficult rules about nonimmigrant intent.
- **Y-1 and Y-2B Processes.** A more aggressive SWA-assisted recruiting campaign is required during 90 days preceding the filing with DOL, but the DOL filing (probably web-based) will be only an attestation to be approved by DOL after review "only for completeness," subject to wide-ranging DOL post-audit authority. If the county of intended work has an unemployment rate of 7%, a waiver application must be more actively reviewed. The employer must pay the higher of the prevailing and actual wage (same as H-2B today) and workers' compensation insurance. Employers can be debarred from all immigration sponsorship for up to three years from seeking Y workers by virtue of misrepresentations and violations even of other laws such as FLSA and OSHA. Foreign labor

contractors must be registered online with DOL, may not assess a fee to workers other than "reasonable" transportation costs, and must disclose to them a wide array of information about the job arrangements. Violators and implicated employers may be assessed back wages, fines up to $35,000 per affected worker, and even imprisonment for extreme physical or financial harm. An employer will now pay fees to DOL based on the number of workers sought, along with a "secondary fee" ranging from $500 to $1,250 per worker, depending on the size of employer, that is waived for aliens who are provided health insurance. Unlike H-2B, DOL has the final word on the labor certification decision. DOL must create a job bank linking state workforce agencies' job banks, and a DOL registry with the wages, number of positions, start dates, and period of employment of certified jobs for which labor certifications have been granted. Ostensibly the employer also pays a fee to USCIS for processing the petition. The worker then also pays a normal visa application fee, a new DHS card/processing fee, a new state impact fee of $500 plus $250 per accompanying family member up to $1500 per family, and a doctor's fee for a medical exam not currently required of nonimmigrants. The worker starts with a single-entry visa but then receives an EAD-like biometric card that serves as a visa for reentry during the period of admission which continues to run even when the worker is unemployed or outside the U.S. Y-1 and Y-2B workers may change to another employer who has a current labor certification for the job. DHS must impose SEVIS-like, employer-assisted tracking of workers upon arrival or no-show at the workplace, termination of employment, arrival at a new employer, and change of U.S. residence address. Once DHS overcomes the systems challenges for such tracking, DHS will likely apply it to other categories of visitors. Workers cannot change to or between types of Y status within the U.S. but may change to something else. The numbers of workers to be allowed will be reviewed by a standing commission to make recommendations to Congress.

## **Legalization of undocumented aliens:** this is surprisingly generous in scope but slow in process for the estimated 12 million undocumented who have entered up to January 1, 2007.

- **Eligibility, Initial Applications and Probationary Status:** To be eligible, one must have been physically present and not in lawful status on and since January 1, 2007, not subject to the un-waivable inadmissibility grounds, eligible for waiver of any other inadmissibility grounds, and either (Z-1) employed on the day of filing the application and seeking to continue to perform labor, services or education, (Z-2) the spouse or over-age 64 parent of such a person or a spouse who was abused by such a person, or (Z-3) the child under age 18 (at the time of applying) of any of the preceding people. What is "not in lawful status" spurred numerous, still ongoing class action lawsuits from the 1986 amnesty, and in the absence of congressional direction a broad interpretation can be expected. It is curious how an undocumented alien will be able to show he is employed on the date of filing, given all the publicity of late concerning worksite enforcement. The bill prohibits evidence of employment for Z applications from being used for an immigration or tax investigation or prosecution, but gives no insulation from immigration-related discrimination provisions or "any other labor or employment law." As for the Z applicant, the bill provides for limited confidentiality to protect them from coming out of the shadows, but unlike in the 1986 amnesty the application can be used to pursue the alien's previous removal orders, to prosecute fraud in the application itself, and for other law enforcement purposes. A curious exemption from prosecution for use of false immigration documents does not protect the alien if the Z application is denied. The big question is how many of the current undocumented will deem the program sufficiently beneficial and not a "trap" so they will step out of the shadows and sign up. Federal, state and local agencies are supposed to provide needed documents to the alien and verify directly to DHS to show the alien's presence, employment and study, but the challenges from such a volume of inquiries about oft-stolen identities could be enormous. Less reliable and often falsified documents, such as affidavits, are also acceptable. Applicants begin with quick enrollment within the one-year initial period (which DHS may extend to

two years), application fee of up to $1500 per person, $1,000 fine and $500 State impact fee for the principal applicant and $500 fine for family members, and one-day security checks for provisional status. While biometrics must be taken for background checks, it is not clear that they must be embedded in the "counterfeit-resistant" probationary Z card. "Advance parole" may be issued in DHS discretion to allow travel abroad and return.

- **DREAM Act:** Z individuals can receive permanent residence after three years, rather than at least eight, apparently outside the normal limits on immigrant visa numbers, if they: are under age 30 on the date of enactment; were first brought to the U.S. while under age 16; have earned a high school diploma or GED, earned any college degree, or completed two years toward a bachelors degree or served two years honorably in the military. Such individuals also can be immediately eligible for student loans and work study programs, eventually exempt from Z process penalty fees, eight years from enactment eligible for naturalization.
- **Initial Approval and Extensions:** More complete background checks must be conducted before the alien can enjoy at least two, but potentially an indefinite number of, four-year periods of stay involving additional $1,500 filing fees per person and resulting in a more secure biometric card. By the first extension the alien must at least sign up for English classes, and to get the second extension the alien must actually pass the English and civics naturalization exam (which will surely be automated by then to handle the volume), with some exceptions relating to age and disability. All Z aliens have unrestricted authorization to work for any employer and may travel internationally without special permission. The principal Z-1 and a Z-3 child must show continuous work or study, except for cases of disability or *force majeure*, and it is not clear enough what happens to a Z-1 or Z-3 alien whose employment is terminated and is trying to find another job. Failure to have given DHS notice of change of address or to maintain required employment or study will, as well as disqualifying events such as criminal convictions, bar extensions and can result in termination and invalidation of the Z card in the DHS database against which employment is verified (another systems challenge for DHS). A dependent applicant may "change" status to Z-1 as an applicant, for instance if the marriage relationship to the principal Z alien ends or the principal Z alien's status is terminated, and apparently a principal who lost work could change to dependent of a working spouse. One cannot change from Z status to any other, and the only change to Z status can be from the Z-A agricultural worker (see below).
- **Permanent residence:** Only after eight years can the A-1 worker apply under the general point system (see below) to obtain permanent residence and be joined by family from abroad, and that involves another $4,000 penalty fee in addition to processing fees, and a trip outside the U.S. to file an "adjustment" application with a consulate abroad (normally an oxymoron). 80% of penalty fees may be paid by installments. Z-2 and Z-3 family may adjust as a direct or derivative beneficiary of an immigrant petition, no earlier than the Z-1, without traveling abroad and without a penalty fee. The special inadmissibility rules for Z applications apply at the adjustment stage, when a medical exam is first required, and tax obligations accrued during Z status (not before) must be shown to be satisfied. It is not clear what is meant that the applicant "must appear to be interviewed." DHS will clearly outsource or even privatize significant aspects of this program, but if a government official must actually interview each candidate for Z status the system almost surely will collapse. Z work authorization is not restricted to any particular employer.
- **Limited Review:** The Z applications, terminations and adjustments may be reviewed administratively, and limited judicial review may proceed only upon a final removal order arising from removal proceedings that the alien may demand.
- **AgJobs (Z-A visas):** Because this delicate compromise between farmowner and union interests was forged earlier, it is written separately, despite its similarities to the Z provisions. To be eligible, an applicant must demonstrate having worked 863 hours or 150 work days during the 24-month period ending on December 21, 2006, proved by preponderance of the evidence through "just and reasonable inference." Z-A applicants enjoy less restrictive inadmissibility grounds and a broader

waiver than Z applicants. Applications must be made during the 18-month period beginning around six months after enactment. The bill allows applications to be collected through "Qualified Designated Entities," a term that brings shudders of fear of fraud to those who experienced the 1986 amnesty. QDEs can charge only fees that DHS allows but their records are kept confidential from DHS. The bill exempts Z-A applicants from the ban on help to aliens by legal aid groups funded by the Legal Services Corporation. The bill sets a limit on Z-A visas at 1,500,000, not counting dependents, but they are not counted against general visa numbers. Applicants pay a $100 fine for Z-A visas and $400 for adjustment to permanent residence. Z-A holders are to be treated as permanent residents for any law other than immigration (i.e., welfare, but certain benefits are unavailable for five years anyway). An employer of Z-A workers must provide an annual report to DHS of their hours worked. If the employer terminates a Z-A holder except for just cause, the worker can seek credit only (not backpay, etc.) through federal conciliation and AAA arbitration procedures. It is not clear, given the stakes involved, what incentive an employer has to oppose the alien's claim for credit. Z-A status can be terminated for reasons similar to Z, but there is a clearer exception to the continuous work requirement: for "unable to work" due to "extraordinary circumstances." Adjustment of spouse and minor child does not appear to depend on principal. Otherwise, many of the processes and functions for Z aliens apply.

## **Family immigration** is curtailed.

- Over time the immigrant visa numbers decrease from 480,000 to 127,000, but spouses and children of U.S. citizens will remain unlimited. The bill allows 40,000 parents of U.S. citizens (currently unlimited) but creates a new temporary visa for 30 days' visit per year despite an intention to immigrate, compensated by a $1,000 bond, special exit monitoring, permanent bars on reentry and sponsorship, loss of Y status for the visited child, and possible elimination of the visas for nationals of countries with 7% violations. 87,000 of the limited numbers are for the spouse and children of permanent residents. Categories for adult children and siblings are eliminated, but beneficiaries of petitions filed by May 1, 2005 are grandfathered in the old system, must notify DHS of their continuing life, relationship and interest in sponsoring/immigrating, and will be offered permanent residence with 440,000 visas per year (broken out by category)— collapsing former visa number waits of 25-30 years. This dovetails deliberately with the eight years during which no Z visa holders will be able to immigrate (see below). These changes could take effect as early as October 1, 2007. Up to 5,000 visas per year can be granted to special hardship cases for aliens in eliminated family categories when no other option is available.

## **Employment immigration** turns to points.

- The current employment based green card system will be replaced by a "merit-based" system on a 100 point scale. Up to 34 points can be awarded for strategic employment; ten for U.S. experience; three for age between 25-39; 28 for education; ten for English language; and ten for relationship in an eliminated family sponsorship category. A job offer from an employer willing to pay half the filing fees brings only six points, perhaps the biggest change from the current program that overwhelmingly depends on job offers. Education and employment in science, technology, engineering, math and health tend to garner more points. Exactly how these factors will be assessed and take macro-effect will consume much debate and interpretation over time, but for now it is in USCIS' sole and non-reviewable discretion. Petitions will stand for up to three years and be denied if not approved by then, without prejudice to a new petition. The new system will probably take effect on October 1, 2008. 10,000 slots will always be reserved for "exceptional" Y visa holders. For the first eight years, up to 90,000 of the approximately 140,000 employment based numbers will be for those with old-system petitions pending or approved upon enactment. Once Z visa holders can begin to adjust, the EB numbers will increase to 380,000. In addition, exclusively reserved for Z holders will be, for the first

five years, 20% of the number of Z holders estimated to be prepared to apply, and, after the sixth year, up to that many per year until eligible Z holders are all adjusted.

## Other permanent numbers issues:

- Diversity lottery visas are eliminated.
- Per country limits for merit and family categories are expanded to ten from seven percent for countries and to three from two percent for dependent areas. Unused family numbers from petitions before May 1, 2005, can spill over for oversubscribed nationalities, and Z visa conversions are exempt from per country limits.

## Employment verification (I-9).

- The current web-based "Basic Pilot" electronic employment verification system is made national and mandatory, allowing it to merge with the I-9 process. Participation will be required for all employers within 18 months, and within three years for existing employees, or as soon as DHS is ready.
- The system also must project to the verifying employer via the internet the photo from the State ID, U.S. passport, or DHS permanent resident or work card to be compared to the photo on the card presented by the worker. Employers may choose also to collect and submit employees' fingerprints to be kept by DHS for only ten days unless needed for criminal investigation or unless a U.S. citizen makes written request for longer retention and use only for verification purposes in order to help prevent theft of his identity. The logistical and privacy challenges posed by the conception of this system are enormous.
- The range of documents will be severely limited in DHS discretion, and over time REAL ID-compliant state documents will be required, adding pressure to states to comply with the controversial and expensive REAL ID Act. DHS can provide grants, including coordinated contracted services, to help states with a REAL ID compliance plan. While a "national identity card" is not authorized, its approximation through REAL ID and mandatory employment verification is increasingly realized. Employers must copy all documents presented, as well as any SSA mismatch notification and documents reflecting efforts to resolve such mismatches. Employers must retain the documents for the earlier of seven years from hire or two years from termination.
- Verification may begin after hire even before the employment start date, but actual employment may not be conditioned on verification, and the employer must afford the employee staged opportunities to resolve a "non-confirmation" similar to today's Basic Pilot, subject to $10,000 DHS fine but not a private right of action by the employee. Individuals may seek to proactively verify their own data match in order to avoid unexpected problems, similar to credit bureau checks; they may "freeze" their SSN for verifications; and they may bring expedited administrative appeals to SSA or DHS to challenge final non-confirmations, followed by federal appeals court individual challenge. DHS has no liability, and may require a wide range of additional information from employers.
- Possible administrative penalties for knowingly or recklessly hiring or referring an unauthorized alien escalate from $5,000 to $10,000 to $25,000 to $75,000 per employee each time an employer is fined. Possible penalties for violations of the verification process (even for U.S. workers) escalate from $1,000 to $2,000 to $5,000 to $15,000 per worker. Unpaid fines may be collected as tax liens, and repeat violators may be debarred for two years from federal government contracts. A pattern or practice of "knowing hires" violations can lead to $75,000 fines per unauthorized alien worker (regardless of any past violations) and six months imprisonment. Penalties on employers for failing to submit correct W-4 forms are significantly increased, and exemptions are eliminated for high volume violators.
- State laws concerning employer sanctions and verification are preempted except for "licensing and similar laws," which will not necessarily end the recent scramble to enact a wide range of immigration-related state laws.

## Enforcement Triggers:

- The following aggressive enforcement benchmarks must be in place before temporary worker enhancements and legalization beyond probationary status may be implemented: various physical and "smart" border barriers, sufficient detention bed space to avoid "catch and release" practices, employment verification enhancements to provide digital photographs from the federal or state identification database tied to the document, and timely processing of probationary legalization applications with background checks. Appropriations and other special authorities still will be necessary to make these targets possible to reach in the expected 18 months from enactment. Other enforcement actions, staffing and studies are required or authorized (not yet funded) but are enhanced and not made "triggers." The triggers also give the government time to get ready for implementation, such as promulgating regulations, designing and acquiring capabilities, negotiating bilateral agreements, etc. The bill authorizes DHS to withhold Y visas from nationals of countries that do not cooperate with U.S. immigration enforcement efforts.

## SSA action:

- The Social Security Administration must share with DHS certain tax data about individuals whose data do not match or are duplicated in tax returns, or appear to be underage, dead or unauthorized, in order to aid DHS detection of identity fraud and employer collaboration.
- SSA must issue only tamper- and wear-resistant secure social security cards within two years, but that is not a "trigger." Biometrics, which would of course add security to the cards but would vastly complicate their production, are not required but are to be studied.
- SSA must promptly issue social security numbers to Y and Z nonimmigrants. SSA may not credit most workers for work preceding issuance of an SSN after 2007, so that legalized workers cannot benefit from prior unlawful work. It is not clear whether work under ITINs can be credited.

## Enforcement authorities in addition to those in triggers:

- The bill provides additional penalties for immigration, criminal and document violations, and a new provision penalizing misrepresentation about being an immigration attorney or "accredited representative."
- The bill exempts from rulemaking requirements the expansion of biometrics entry and exit processes.
- The bill "authorizes" funds in extraordinary but unknown amounts in order to carry out the grand purposes of the Act. The effectiveness of the compromise seems to depend on such funds being actually appropriated.
- New bars from unlawful presence: Stuck in the temporary worker provisions is a seemingly generally applicable, unrealistically harsh provision barring the following aliens from all immigration benefits except protection from persecution: An alien who seeks to enter unlawfully is permanently barred, and one who overstays is barred (aside from extraordinary circumstances) either permanently (Y visa) or for ten years (everyone else).

## Regulations:

- Interim regulations must be issued for Y and Z provisions within six months, and they expire unless a final rule is issued within two years more. This language relieves the agencies from issuing proposed rules and taking comment first.

## Labor Market Analysis:

- A bipartisan Standing Commission on Immigration and Labor Markets is created, appointed by the President and confirmed by the Senate, somewhat akin to the Federal Reserve Board, but without

authority on its own to adjust immigration levels as the Federal Reserve Board does interest rates. Instead, it only makes recommendations to Congress and the President.

## Other Temporary Visa Matters:

- **Students:** makes statutory the rules for optional practical training and allows it for 24 months instead of 12; allows graduate study in math, engineering, IT and natural sciences without the need to show intent to return to a home abroad; allows off-campus employment with an employer who attests it has recruited U.S. workers for 21 days.
- **H-1B:** the basic cap is increased from 65,000 to 115,000 for FY 2008 and can increase further to 180,000 in subsequent years; the degree required for the job must be a bachelors degree from an accredited U.S. school or from an equivalent foreign school; restricts the post-sixth year extensions under AC21 to workers for whom an EB-1 I-140 has been pending for 365 days and eliminates section 104(c) that was based on the unavailability of a visa number; applies to all jobs the non-displacement and good faith recruitment requirements previously applicable only to "H-1B dependent" employers, extends the period of displacement analysis from 90 to 180 days, prohibits recruitment focused on workers who are or will become H-1B workers, and prohibits employers larger than 50 workers from having more than half its workers be H-1B workers; expands DOL's authority to deny LCAs that are clearly fraudulent, to investigate H-1B noncompliance more freely, to share its findings with DHS, and to double the fines for violations.
- **L-1:** tightening of the requirements to get and keep a new office L-1 and limiting new office petitions to two one-year approvals; and increased investigative and penalty authority for DHS concerning L-1 fraud.
- **Doctors:** Until September 30, 2011, increases from 30 to 50 the "Conrad" J-1 home residency waivers based on medical practice in an underserved area for a state that used its limit the preceding year if all of the highly rural states either reached their guaranteed minimum (15 the first year, increasing by 3 each of the next two years if other states received more than 30 waivers) or otherwise waived their interest; prohibits use of H-1B for graduate medical education (residencies, fellowship), driving them all back to J-1 and the consequent two-year home residency rule, waiver for which most often requires practice for three years in an underserved area; H-1B cap exemption for doctors who have served J-1 waiver service and continuous five years.

### English, Civics and Integration:

- Applicants for naturalization age 75 or over are exempt from the English and civics requirements in all cases. The USCIS Office of Citizenship receives authorities to expand its civic integration efforts. The Secretary of Education is to set up an online English language training course.