

Immigration and Naturalization Law

QIANG BJORNBAK, JOHANNA K.P. DENNIS, KATHRINE GONZALEZ, JORDANA HART,
BENJAMIN A. KRANC, DJURDJA LAZIC, AND ROBERT WALSH*

This article summarizes developments in immigration and naturalization law during 2011.¹

I. Prosecutorial Discretion in the Wake of the DREAM Act

The failure of the DREAM Act² was a top story at the end of 2010, when the proposal fell one vote short of the necessary sixty votes in the U.S. Senate.³ Although the dream may have been put on hold indefinitely, the year 2011 brought some hope for undocumented students. On June 17, 2011, U.S. Immigration and Customs Enforcement (ICE) Director John Morton issued a memorandum (the Morton Memo) to provide guidance to immigration officials to “ensure that the agency’s immigration enforcement resources are focused on the agency’s enforcement priorities.”⁴ The memo also clarifies which agency employees can exercise prosecutorial discretion and which factors they should consider in doing so. The memo was written in hopes of refocusing agency resources on “deportation

* Qiang Bjornbak, vice chair of the Immigration and Naturalization Committee of the ABA Section of International Law, authored sections I, II.C.4, II.D and IV. Johanna K.P. Dennis, an Associate Professor at Southern University Law Center, was the committee editor of this article, the author of section III, and a contributing author of section I. Kathrine Gonzalez and Jordana Hart, attorneys at David J. Hart, P.A., authored sections II.A, II.B and II.C.1-3. Benjamin A. Kranc, Canada Country Manager for Emigra Ogletree Worldwide (EOW), authored section II.F. Djurdja Lazic, Managing Editor of International Legal Materials and International Law in Brief, and ASIL Insights at the American Society of International Law, was a contributing editor. Robert Walsh, Managing Partner of the Australian Practice of Fragomen in Sydney, Australia, authored section II.E. The authors and editors deeply appreciate Lisa Ryan’s support to the team.

1. For developments in 2010, see David W. Austin, *Immigration and Naturalization Law*, 45 INT’L LAW. 329 (2011). For developments in 2009, see Qiang Bjornbak, *Immigration and Naturalization Law*, 44 INT’L LAW. 435 (2010).

2. Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010).

3. U.S. SENATE, 111TH CONG., 2D SESS., *Vote Summary on Motion to Table the Motion to Proceed to S. 3992* (Dec. 9, 2010), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00268.

4. Memorandum from John Morton, Dir. of Immigration and Customs Enforcement (ICE) to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [hereinafter Morton Memo].

of undocumented immigrants who are dangerous criminals over [deportation] of individuals with no criminal record.”⁵

Critics labeled the Morton Memo a form of amnesty that granted ICE officials leeway to halt the deportation of certain illegal immigrants. But although the memo includes “many of the elements of the failed DREAM Act,”⁶ it does not provide any additional relief to non-citizens. Rather, the memo prioritizes limited agency resources to address immigration violations by permitting ICE prosecuting attorneys to exercise discretion in dismissing or foregoing prosecution of eligible cases.

“Prosecutorial discretion”⁷ can be exercised at different stages of the immigration process in performing many procedures, including, but not limited to: issuance/cancellation of a notice of detainer; issuance/cancellation of a Notice to Appear (NTA); decision to detain or release on bond, supervision, or personal recognizance; pursuance of expedited removal; settlement/dismissal of a pending case in removal proceedings; grant of deferred action; parole; stay of a final removal order; agreement to voluntary departure; withdrawal of an application for admission; pursuance of an appeal; execution of a removal order, etc.⁸ In exercising prosecutorial discretion, the Morton Memo lists several factors to consider including the alien’s age, health, ties to the United States, education, military service, prior criminal convictions, and length of physical presence in the United States.⁹

Three months after issuance of the Morton Memo, Secretary of Homeland Security Janet Napolitano and Morton went on the offensive to implement and press the policy in the field.¹⁰ To that end, ICE launched a comprehensive scenario-based training program in November 2011 to reinforce the training that had occurred in June 2011. ICE’s goal is that “[b]y January 13, all ICE enforcement officers and attorneys nationwide will have completed scenario-based prosecutorial discretion training.”¹¹ In addition, January 13 will be used as the end date for the “initial test run” of nationwide review of incoming cases in the immigration court by focusing on cases on the master calendar dockets and pre-NTA cases.¹² As for pending cases, ICE announced that it would launch six-week

5. Cristina Costantini, *Benita Veliz, DREAM Act Poster Child, Spared Deportation by Immigration Officials*, HUFFINGTON POST (Nov. 6, 2011), http://www.huffingtonpost.com/2011/11/06/benita-veliz-dream-act-deportation_n_1077046.html.

6. See Peter Schrag, *The Morton Memo: Is Obama Finally Making a Humane Move on Immigration?*, NEW REPUBLIC (June 24, 2011), <http://www.nnr.com/article/politics/90656/obama-immigration-memo>.

7. AMERICAN IMMIGRATION COUNCIL, UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW (May 26, 2011), available at <http://immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law> (“Prosecutorial Discretion’ is the authority of an agency or officer to decide what charges to bring and how to pursue each case.”).

8. Morton Memo, *supra* note 4.

9. *Id.*

10. Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html?pagewanted=1&_r=2&sq=Morton&st=cse&scp=2.

11. Memorandum from Dep’t of Homeland Sec. Immigration & Customs Enforcement, Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities (Nov. 17, 2011), available at <http://immigrationlegalblog.com/wp-content/uploads/2011/11/pros-discretion-next-steps.pdf>.

12. *Id.*

pilot programs in Denver and Baltimore in December 2011 to evaluate non-detained cases against the Morton Memo guidelines.¹³

Some individuals have benefited from the Morton Memo by avoiding deportation. These include two students from Georgia, who were the first apparent beneficiaries of the policy,¹⁴ and a college graduate, touted as a “poster child for the DREAM Act,” who was a National Merit Scholar, high school class valedictorian, and recipient of a full academic merit scholarship.¹⁵ Although some non-criminal aliens have been unsuccessful in raising arguments for prosecutorial discretion based on the Morton Memo,¹⁶ college students have tended to fare better thus far,¹⁷ and the policy and guidelines still stand to benefit up to 300,000 undocumented immigrants.¹⁸

II. Business and Immigration Law

The year 2011 saw new opportunities in immigration and business stemming from changes to existing employment visa issuance, processing and regulatory policies in the United States, Australia, and Canada, and a cornucopia of legislative proposals for investment in the U.S. economy.

A. ADMINISTRATIVE CHANGES

1. *Continuing Effect of the January 8, 2010 USCIS Memo*¹⁹

The debacle of the widely criticized change in U.S. Citizenship and Immigration Services (USCIS) policy in 2010 that narrowed the definition of “employer-employee” for H-1B visas continued unabated for most of 2011. The change served to freeze out owner-beneficiaries and certain workers placed at third-party sites in the H-1B context and, significantly, bled into the adjudication of owner-beneficiaries in nonimmigrant L-1A intra-company transfer and immigrant EB-1 multinational manager petitions. Meanwhile, a series of think-tank reports, editorials, and news articles warned of the United States slipping as a destination for foreign entrepreneurs and skilled workers, and urged immigra-

13. *Id.*

14. Cristina Costantini, *First Deportation Cases to Benefit from New Immigration Policy*, HUFFINGTON POST (Aug. 26, 2011), http://www.huffingtonpost.com/2011/08/26/first-deportation-cases-to-benefit-from-new-immigration-policy_n_937633.html.

15. Costantini, *supra* note 5.

16. See Susan Carroll, *Despite Policy, Friendswood Teacher Deported*, HOUSTON CHRON. (Aug. 27, 2011), <http://www.chron.com/news/houston-texas/article/Case-review-fails-to-spare-teacher-2143472.php> (Spanish teacher with legal work authorization and no criminal history, who was married to a U.S. citizen, had paid taxes, had a case pending before the Board of Immigration Appeals, and was in remission for prostate cancer and participating in a clinical trial, but had overstayed a visa fifteen years ago, was deported to Spain).

17. See Preston, *supra* note 10 (discussing cases of prosecutorial discretion exercised in favor of two twenty-four-year-old foreign-born college students without criminal records as compared to no discretion exercised for a forty-three-year-old overstay who sought to marry his U.S. citizen fiancée, but was detained and deported to Uruguay).

18. Costantini, *supra* note 14.

19. Memorandum from Donald Neufeld, Assoc. Dir., Serv. Ctr. Ops., U.S. Citizenship & Immigration Servs., On Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placement to Svc. Ctr. Dirs. (Jan. 8, 2010), *available at* <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

tion reform for the highly skilled.²⁰ In August 2011, Secretary Napolitano and USCIS Director Alejandro Mayorkas announced initiatives to spur job creation and startups.²¹ They referenced H-1B visa availability to entrepreneurs “if they can demonstrate that the company has the independent right to control their employment.”²² USCIS clarified the initiative in its revised FAQ in August, stating that “if the facts show that there is a right to control by the petitioner over the employment of the beneficiary, then a valid employer-employee relationship may be established.”²³ One way the petitioner could demonstrate the relationship would be to “provide evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise, or otherwise control the beneficiary.”²⁴

In October 2011, USCIS announced the creation of the “Entrepreneurs in Residence” initiative, a partnership with business experts to strengthen collaboration at the policy, training, and officer levels.²⁵ Since August, USCIS said it had also started special training of officers reviewing L-1B specialized knowledge petitions and EB-2 immigrant petitions for advanced degree workers.²⁶ Despite this apparent uptick in USCIS’s effort to help fuel the economy and create jobs by revising policy and educating adjudicators, “there has not been a significant improvement in adjudications reported.”²⁷ Given USCIS’s increased attention to training its adjudicators in visa categories affecting the highly skilled, including H-1B and L-1B specialized knowledge workers, 2012 may see some improved outcomes in adjudications.

2. Unannounced H-1B Site Inspections

USCIS continued its site visits in 2011 to ferret out fraud in the H-1B program. Petitioners are selected randomly by the USCIS Fraud Detection & National Security Unit.²⁸ The visits are part of the government’s larger anti-fraud enforcement efforts in response

20. PARTNERSHIP FOR A NEW AMERICAN ECONOMY, THE “NEW AMERICAN” FORTUNE 500 (June 2011), available at <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf>; see also Kurt Badenhausen, *The Best Countries for Business*, FORBES (Oct. 3, 2011), <http://www.forbes.com/sites/kurtbadenhausen/2011/10/03/the-best-countries-for-business/>.

21. Press Release, Dept. of Homeland Sec., Secretary Napolitano Announces Initiatives to Promote Startup Enterprises and Spur Job Creation (Aug. 2, 2011), <http://www.dhs.gov/ynews/releases/20110802-napolitano-startup-job-creation-initiatives.shtm>.

22. *Id.*

23. *Q&A: USCIS Issues Guidance Memorandum on Establishing “Employer-Employee” Relationship in H-1B Petitions*, USCIS (Jan. 13, 2010; rev. Aug. 2, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3d015869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>.

24. *Id.*

25. USCIS Announces “Entrepreneurs in Residence” Initiative, USCIS (Oct. 11, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bd537158910e2310VgnVCM100000082ca60aRCRD&vgnnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD>.

26. *Id.*

27. Deborah Notkin, *Making It Easier for New Immigrant Entrepreneurs—Changes in Policy and Law Can Facilitate Job Creation in the U.S.*, AILA LEADERSHIP BLOG (Nov. 7, 2011, 4:03 PM), <http://ailaleadership-blog.org/2011/11/07/making-it-easier-for-new-immigrant-entrepreneurs-%e2%80%93changes-in-policy-and-law-can-facilitate-job-creation-in-the-u-s/>.

28. *Administrative Site Visit and Verification Program*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD> (last updated Oct. 18, 2010); AM. IMMIGRATION LAWYERS ASS’N, USCIS FRAUD DETECTION & NATIONAL SECURITY (FDNS) DIREC-

to reported abuses of the H-1B visa program. The funding for this initiative is the \$500 Anti-Fraud filing fee paid by all first-time H-B and L-1 petitioners.²⁹ The most common H-1B offenses were not paying the prevailing wage, not performing a certified job, not working at a certified location, withdrawing a petition, and working at a business that did not actually exist.³⁰ Some eighty-six percent of 14,433 site visits in FY 2010 and eighty-six percent of 4,548 partial-FY 2011³¹ site visits resulted in a verified status. Of the 2,045 of H-1B petitions “not verified” and requiring further review in FY 2010, 495 of them were revoked. USCIS plans to expand the unannounced inspections to L-1 and E visa work sites in the near future.³²

3. *Validation Instrument for Business Enterprises (VIBE)*

In March 2011, USCIS introduced the VIBE Program to “enhance USCIS’s adjudications of certain employment-based immigration petitions.”³³ USCIS now imposes VIBE requirements on all employment-based petitioners, except O-1, EB-2 national interest waiver, EB-1 extraordinary ability, and EB-5 investors. VIBE requires employers to register or update their profiles with Dunn & Bradstreet (D&B), the for-profit business database that has a \$35.5 million contract with USCIS.³⁴ The agency issues broad Requests for Evidence (RFEs) when D&B data conflicts, even with well-documented employer data. Further, attorneys have reported that VIBE has failed to verify even well-established employers.³⁵ The USCIS Ombudsman reports that USCIS is reviewing the problems joint ventures and new companies have been experiencing in getting timely D&B profiles, as well as investigating the substantial \$299 to \$1,500 fee that D&B charges companies to expedite updating their existing profiles while they are often under a petition-filing deadline.³⁶ In April 2011, USCIS “informed the Ombudsman’s Office that it is not tracking the issuance of VIBE-related [Requests for Evidence] . . . which raises questions” about how USCIS will be able to assess whether VIBE will meet its intended goal of requiring less documentation of employers.³⁷

TORATE ANSWERS AILA ADMIN. SITE VISIT & VERIFICATION PROGRAM (ASVVP) QUESTIONS (June 7, 2011).

29. *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers: Hearing Before the H. Comm. on the Judiciary Subcomm. on Immigration Policy and Enforcement*, 112th Cong. (2011) (written testimony of Donald Neufeld, Assoc. Dir. Svc. Ctr. Ops. Directorate U.S. Citizenship & Immigration Svc’s.), available at http://www.uscis.gov/USCIS/Resources/Congress/Testimonies/2011/testimony_2011331_H-1B_Neufeld.pdf.

30. *Administrative Site Visit and Verification Program*, *supra* note 28.

31. In this case ‘partial-FY’ means from Oct. 1, 2010 to Mar. 31, 2011.

32. Notkin, *supra* note 27.

33. *Validation Instrument for Business Enterprises (VIBE) Program*, USCIS (Jan. 31, 2011), <http://www.uscis.gov/vibe>.

34. U.S. CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2011, 22-32 (June 29, 2011), available at <http://www.dhs.gov/xlibrary/assets/cisomb-annual-report-2011.pdf>.

35. *Q&A: USCIS American Immigration Lawyers Association (AILA) Meeting 8*, USCIS (Apr. 7, 2011), http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/April%202011/AILA%20_040711.pdf.

36. ANNUAL REPORT 2011, *supra* note 34, at 25.

37. *Id.*

4. *Requests for Evidence (RFEs)*

USCIS continues to issue RFEs that many say go well beyond what is required to prove eligibility for the benefit.³⁸ The agency launched the RFE Project in April 2011 and issued RFE templates for public comment for P and Q nonimmigrant visa categories and for the EB-1 extraordinary ability immigrant visa category.³⁹ The templates are meant to help officers craft RFEs that are consistent, yet tailored to the petition. But USCIS has yet to issue templates for the widely used H-1B, L-1A and L-1B categories, despite a documented steep spike in RFEs in these categories varying by USCIS service center, largely between 2006 and 2010.⁴⁰

B. PROPOSED ADVANCED REGISTRATION FOR H-1B AND OTHER CAP-SUBJECT VISAS

In March 2011, U.S. Citizenship and Immigration Services (USCIS) proposed advanced electronic registration for H-1B employees effective April 2012.⁴¹ Under the proposed rule, USCIS would establish an advanced registration system that would require petitioners of workers subject to the statutory visa cap to register electronically with USCIS. Before the petition filing period begins, USCIS would select the number of registrations estimated to exhaust all available visas. USCIS claims the plan would save employers from the currently imposed effort and expense of submitting H-1B petitions, as well as Labor Condition Applications (LCA), for workers who would be unable to obtain visas due to the statutory cap of 65,000. The proposal is intended to help USCIS manage intake and the H-1B lottery when demand exceeds visa availability.

But due to sluggish hiring, USCIS has not been experiencing the pressure that it did in prior years when the cap was met on April 1, 2011. It is also unclear whether U.S. employers who decide to file later in the H-1B season will be able to file if they did not register in advance. No details have been announced as to the implementation of the proposal.⁴²

C. PROPOSED LEGISLATION

1. *Fairness for High-Skilled Immigrants Act (H.R. 3012)*

In September 2011, Representative Jason Chaffetz (R-UT) introduced the "Fairness for High-Skilled Immigrants Act." The bill aims to eliminate the employment-based immi-

38. *Id.* at 26; see also *Q&A: USCIS American Immigration Lawyers Association (AILA) Meeting 1* USCIS (Oct. 5, 2011), http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/October%202011/QandA_AILA_Fall%202011_mtg.pdf (arguing that the USCIS evidentiary thresholds exceed the appropriate standard).

39. ANNUAL REPORT 2011, *supra* note 34, at 29.

40. *Id.*

41. *USCIS Announces Proposed H-1B Registration System to Reduce Costs for U.S. Businesses*, USCIS (Mar. 2, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ee87bbd04337e210VgnVCM100000082ca60aRCRD&vgnnextchannel=B56db6f2cae63110VgnVCM1000004718190aRCRD>.

42. See *id.*; *USCIS Seeks Public Comment on Proposed H-1B Registration System Fact Sheet*, USCIS (Mar. 2, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=b02864337e210VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD>.

grant per-country visa limitations, which currently causes severe backlog in green card availability for many highly skilled workers, particularly from China and India, and to “increase the per-country numerical limitation for family-sponsored immigrants.”⁴³ Currently, the law limits any one country to seven percent of employment-based permanent resident visas.⁴⁴ To eliminate the backlogs for legal immigrants from countries that provide the United States with large quantities of skilled immigrants, the Act proposes phasing out the existing per-country caps for employment-based immigrants.⁴⁵ In addition, the Act increases the per country caps for family-based visas from seven percent to fifteen percent.⁴⁶

2. *Immigration Driving Entrepreneurship in America (IDEA) of 2011 (H.R. 2161)*

Sponsored by Representative Zoe Lofgren (D-CA), this bill would dismantle longstanding roadblocks to permanent residence for international students and skilled workers.⁴⁷ Key among the proposed changes include allowing science, technology, engineering, and math graduates to apply for residence while in F-1 student status, exempting spouses/children from counting against numerical visa limits, eliminating per-country visa limits, and setting stricter procedural time limits for PERM labor certifications and processing.⁴⁸

3. *Startup Visa Act of 2011 (S. 565)*

In March 2011, Senators John Kerry (D-MA), Richard Lugar (R-IN), and Mark Udall (D-CO) reintroduced a bill to create a new EB-6 visa classification to allow foreign students in the U.S. with advanced degrees, H-1B visa holders, and entrepreneurs with or without an existing U.S. market presence, to launch businesses and earn conditional residence status.⁴⁹ The bill requires differing amounts of investment by a U.S. supporter, job creation, and revenue generation depending on the entrepreneur’s qualifying status. If the visa is sought by a student or H-1B professional, the individual would need to have an annual income of approximately \$30,000, or assets of approximately \$60,000,⁵⁰ and the U.S. supporter must invest at least \$20,000. Entrepreneurs without U.S. market presence could be stripped of conditional residence status if the revenue and job creation requirements are not satisfied by the end of the two-year period. The EB-6 category would be created by splitting the existing annual 10,000 available EB-5 investor visas.

4. *VISIT-USA Act (S. 1746)*

In October 2011, Senators Charles E. Schumer (D-NY) and Mike Lee (R-UT) introduced the VISIT-USA Act as a measure to attract foreign investors beyond the current EB-5 visa program. The bill would create a homeowner visa, renewable every three years, to “foreign nationals who invest at least \$500,000 in residential real estate in the United

43. Fairness for High-Skilled Immigrants Act of 2011, H.R. 3012, 112th Cong. (1st Sess. 2011).

44. 8 U.S.C. § 1152(a)(1)(2) (2011).

45. H.R. 3012.

46. *Id.*

47. Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011).

48. *Id.*

49. See Startup Visa Act of 2011, S.565, 112th Cong. (2011).

50. *Id.* These amounts are based on the federal poverty level.

States. At least \$250,000 must be spent on a primary residence where the visa holder will reside for at least 180 days out of the year while paying taxes to the [United States].⁵¹

Compared with investment immigration visas, the homeowner visas have considerable restrictions. Homeowner visa holders would not be eligible for employment or government benefits. Their status in the United States would be terminated once they sell their primary residence. Finally, the homeowner visa would not serve as a path to permanent resident status and citizenship.⁵² Even with these restrictions, if enacted, the bill would likely entice foreign nationals to invest in the U.S. residential property market.

D. U.S. INVESTMENT IMMIGRATION (EB-5) VISAS

1. *Current Situation*

There is a great increase in the popularity of the U.S. Investment Immigration Visa (EB-5 visa) program. According to statistics published by the U.S. Department of State, 793 EB-5 visas were issued in FY 2007, 1,443 in 2008, 4,218 in 2009, and 1,885 in 2010.⁵³ It is estimated that 3,706 EB-5 visas were issued in 2011.⁵⁴ The majority of EB-5 applicants come from the People's Republic of China, South Korea, and India. For example, in FY 2010, out of the 1,885 total visas issued, 772 visas were issued to Chinese applicants (40.9%), 295 to South Korean applicants (15.6%), and sixty-two to Indian applicants (3.3%).⁵⁵ The U.S. investment immigration visa program attracts affluent Chinese investors because they are interested in securing a better social environment and educational opportunity for their children. The 2011 *Private Banking White Paper* by the Bank of China revealed that fourteen percent of Chinese multimillionaires have emigrated or are in the process of emigrating. Another forty-six percent of millionaires are considering emigration.⁵⁶

The majority of EB-5 applicants obtained their visas through Pilot Regional Centers. Of the 1,885 visas issued in 2010, 1,321 visas were issued to immigrants who have invested in regional center pilot programs.⁵⁷ USCIS has approved 214 regional centers so far.⁵⁸

51. Press Release, Mike Lee, U.S. Sen. (R-Utah), Lee, Schumer Introduce Immigration Reform Bill (Oct. 20, 2011), <http://lee.senate.gov/public/index.cfm/press-releases?ID=7d71bb4f-3752-4e86-af5f-85ecc9c0c142>.

52. See VISIT USA Act of 2011, S.1746, 112th Cong. (2011).

53. DEP'T OF STATE, REPORT OF THE VISA OFFICE (2010), available at <http://www.travel.state.gov/pdf/FY10AnnualReport-TableV-PartII.pdf>; DEP'T OF STATE, REPORT OF THE VISA OFFICE (2009), available at http://www.travel.state.gov/pdf/FY09AnnualReport_TableV.pdf; DEP'T OF STATE, REPORT OF THE VISA OFFICE (2008), available at <http://www.travel.state.gov/pdf/FY08-AR-TableV.pdf>; DEP'T OF STATE, REPORT OF THE VISA OFFICE (2007), available at <http://www.travel.state.gov/pdf/FY07AnnualReportTableV.pdf>.

54. *EB-5 Immigrant Investor Program Stakeholder Meeting Presentation*, USCIS (Sept. 15, 2011), [http://www.uscis.gov/USCIS/Outreach/Upcoming National Engagements/National Engagement Pages/2011 Events/ Sept. 2011/September EB-5 presentation FINAL.ppt](http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/Sept.%2011/September%20EB-5%20presentation%20FINAL.ppt).

55. REPORT OF THE VISA OFFICE (2010), *supra* note 53.

56. *2011 China Private Wealth Management White Paper*, BANKOFCHINA.COM (Jan. 1, 2011), available at http://www.bankofchina.com/bocinfo/bi1/201111/t20111101_1580385.html?keywords=private+banking+white+paper.

57. REPORT OF THE VISA OFFICE (2010), *supra* note 53.

58. *Immigrant Investor Regional Centers*, USCIS, <http://www.uscis.gov/eb-5centers> (last updated Dec. 22, 2011).

2. Procedural Changes

The fee for the investment immigration visa petition (I-526 petition) has been increased to \$1,500. An application to establish a new regional center pilot program now requires completion of form I-924 and payment of \$6,230.⁵⁹ Approved regional centers are required to file Form I-924A within ninety days of the end of the fiscal year,⁶⁰ for data compilation purposes. The process of completing the I-526 procedure has been prolonged and now lasts six to eight months,⁶¹ on top of the increased Requests for Evidence (RFE), which further delay the I-526 petition process. USCIS has suggested premium processing in order to shorten the I-526 processing time to fifteen days,⁶² but this has not yet been implemented.

3. Selected Adjudicator's Field Manual (AFM) Updates

a. Material Change

The business plan in the initial I-526 petition may not be materially changed upon filing.⁶³ The Neufeld December 2009 Memo added chapter 22.4(c)(4)(G) to the AFM to address material changes of a business plan. If unforeseen circumstances cause the business plan to be changed after the approval of the initial I-526 petition, the alien "may file a new Form I-526 petition with fee that is supported by the new business plan and addresses all requirements of I-526 petition."⁶⁴ Upon approval, "the new business plan will be used as the basis for evaluating EB-5 eligibility at the I-829 stage."⁶⁵ The alien may request termination of the prior conditional permanent resident (CPR) status, if s/he has obtained CPR status, and obtain a new two-year period CPR status, or withdraw the initial I-829 petition if such I-829 petition was filed.⁶⁶ "If the new Form I-526 is denied, then the alien will have to file the I-829 petition and use the initial Form I-526 petition as the basis for the eligibility evaluation in the Form I-829 petition."⁶⁷ If the initial I-829 was filed prior to denial of the new I-526, "the initial Form I-829 petition will be adjudicated using the project plan in the initial I-526 petition as the basis for the initial I-829 eligibility evaluation."⁶⁸ The Neufeld December 2009 Memo does not address the issues of potential conflicts between the new I-526 application and the pending initial I-829 petition in case of material change.

59. *I-526, Immigrant Petition by Alien Entrepreneur*, USCIS, <http://www.uscis.gov/i-526> (last updated Jan. 31, 2011).

60. *I-924a, Supplement to Form I-924*, USCIS, <http://www.uscis.gov/i-924a> (last updated June 9, 2011).

61. *USCIS Processing Time Information*, USCIS, <https://egov.uscis.gov/cris/process/DisplayInit.do> (last visited Jan. 12, 2012) (select one of the four service centers listed next to "Service Center" and select "Service Center Processing Dates").

62. *Proposed Changes to USCIS's Processing of EB-5 Cases*, USCIS, at 2 (May 19, 2011), <http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Operational%20Proposals%20for%20Comment/EB-5-Proposal-18May11.pdf>.

63. See *In re Izzumi*, 22 I. & N. Dec. 169, 175 (B.I.A. 1998); see also 8 C.F.R. § 103.2(b) (2011).

64. Memorandum from Donald Neufeld, Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions (Dec. 11, 2009), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudicating%20of%20EB-5_121109.pdf.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 21.

b. Job Creation

The Neufeld June 2009 Memo amended chapter 22.4(c)(4)(D)(iii) to the AFM to clarify the meaning of “full-time position,” by clarifying that: (1) indirect jobs (including induced jobs) created through the regional center economic model do not distinguish between full-time and part-time jobs; (2) direct continuous construction jobs can be considered permanent jobs if they are created by the petitioner’s investment and last at least two years; (3) one full-time position may be filled by more than one employee through a job-sharing arrangement; and (4) multiple part-time positions may not be combined to create one full-time position.⁶⁹ The memo also clarified the timeline for job creation, such that for I-526 adjudication purposes, “USCIS will deem the two-year period described in 8 C.F.R. § 204.6(j)(4)(i)(B) to commence six months after adjudication of the Form I-526.”⁷⁰

c. Future Development

Regional Center Pilot Programs will remain attractive to foreign investors. Although Regional Center Pilot Programs will end on September 30, 2012,⁷¹ interested parties will continue to make efforts to keep such programs alive. Further, the Association to Invest in the U.S.A. (IIUSA) has petitioned Congress to authorize permanently the Regional Center Program to benefit the U.S. economy.⁷²

E. CHANGES TO TEMPORARY AND PERMANENT EMPLOYMENT RELATED VISA PROGRAMS IN AUSTRALIA

In 2011, the Australian Government introduced a number of changes to temporary and permanent employment related visa programs designed to more easily facilitate companies’ access to overseas workers where there is a clear demand.⁷³ Many of these changes were designed to respond to the shortages of skilled workers expected to result from the construction phase of the country’s many ongoing and future resource and infrastructure projects. Some of these changes are also relevant to companies that make regular use of visa programs to assign foreign workers to Australia as part of their normal course of business.

69. *Id.* at 14–5.

70. Memorandum from Donald Neufeld, EB-5 Alien Entrepreneurs - Job Creation and Full-Time Positions (Dec. 11, 2009), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/eb5_17jun09.pdf.

71. Department of Homeland Security Appropriations Act, H.R. 2892, 111th Cong. § 547 (2010), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2892>.

72. Letter from K. David Anderson, President, Ass’n to Invest in U.S.A., to Members of U.S. House Judiciary Subcomm. on Immigration, Policy, & Enforcement 1 (Sept. 14, 2011), available at <http://iiusablog.org/wp-content/uploads/2011/10/IIUSA-written-testimony-9-2011-final.pdf>.

73. *What’s New for Employee-Sponsored Workers*, GOV’T OF AUSTL., DEP’T OF IMMIGRATION & CITIZENSHIP, <http://www.immi.gov.au/skilled/whats-new-esw.htm> (last visited Jan. 21, 2012).

1. *Temporary Residence Visas*

a. Labor Agreements

Employers are able to negotiate and enter into Labor Agreements with the Australian Government, represented by the Department of Immigration and Citizenship (DIAC), to enable them to sponsor overseas workers to work in their businesses in Australia.⁷⁴ The primary benefit of entering into a labor agreement is that employers may be given some flexibility to sponsor people in occupations that are not on the approved list of occupations for the subclass 457 visa category and the employer may be able to negotiate amendments to other visa requirements such as English language ability or skill level.⁷⁵ The development of a more streamlined approach to the negotiation of labor agreements should result in reduced negotiation timeframes thereby providing a more responsive framework to ensure labor demands can be met efficiently.

b. Enterprise Migration Agreements (EMAs)⁷⁶

The introduction of EMAs is a major initiative to assist employers in major resource projects. EMAs are intended to facilitate the hiring of skilled and potentially semi-skilled foreign nationals to work on major resource industry projects that have a capital expenditure of more than two billion Australian dollars and a peak construction workforce of at least 1,500 workers.

EMAs will be negotiated between DIAC and the project owner or a prime contractor and will essentially act as an umbrella arrangement for the employment of overseas workers for a particular major resource project. The contractors on the project who need to employ workers from overseas will then be able to enter into Labor Agreements consistent with the terms of the EMA without the need for a lengthy negotiation period.

Project owners or a prime contractor will be able to negotiate with DIAC about the occupations that can be sponsored under the individual Labor Agreements, the level of required experience and English language skills, as well as wages and employment conditions for the foreign workers engaged to work on the project. The EMA will also cover the overall level of foreign workers on the project and the obligations that the project owner or prime contractor will have for the term of the EMA.

c. Regional Migration Agreements (RMAs)⁷⁷

RMAs are designed to assist regional areas where employers may face significant shortages as resources and other projects take workers from regional areas. RMAs “will bring together employers, local and state governments, and [labor] unions” to address skills shortages in regional Australia. Such agreements will be geographically-based mi-

74. *Labour Agreement Information*, GOV'T OF AUSTR., DEP'T OF IMMIGRATION & CITIZENSHIP (Oct. 2011), <http://skilledmigration.govspace.gov.au/files/2011/08/Labour-Agreement-Information.pdf>.

75. *Id.*

76. See *Enterprise Migration Agreement Submission Guidelines*, GOV'T OF AUSTR., DEP'T OF IMMIGRATION & CITIZENSHIP, at 2, 3, 5, 7, 8, http://www.immi.gov.au/skilled/_pdf/ema-submission-guidelines.pdf (last visited Jan. 14, 2012).

77. See Press Release, Chris Bowen MP, Minister for Immigration & Citizenship, Budget 2011-12: Skilled Migration Reform to Support Australia's Growing Economy (May 10, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb165287.htm>.

gration agreements created to assist with the reduction of current and anticipated labor skills shortages in the relevant regional area. The RMAs will prescribe the occupations and the number of foreign workers that can be sponsored by employers in a particular regional area.

d. Accredited Status for Business Sponsors⁷⁸

Effective November 7, 2011, employers using the subclass 457 program are able to access priority processing arrangements under a new accreditation scheme. To obtain this six year accreditation, businesses will need to meet certain additional criteria from the usual sponsorship requirements, including being an active subclass 457 visa sponsor for the past three years; committing to ensuring at least seventy-five percent of their domestic workforce is Australian; and having a proven history of filing decision-ready applications and complying with immigration requirements, sponsorship obligations, and industrial relations laws.

2. *Permanent Residence Visas*

In July 2011, the government announced the inclusion of Perth in the Regional Sponsored Migration Scheme and as a regional area for family-sponsored applications through the regional General Skilled Migration (GSM).⁷⁹ Because of these changes, employers in the whole of Western Australia can recruit and sponsor skilled workers for a much wider range of occupations than currently available under the subclass 457 visa program, and Perth will now have broader access to migrants under other permanent skilled visa programs.⁸⁰ These changes were in response to difficulties employers in Perth were experiencing in filling vacancies as significant numbers of workers take up employment in the resource projects in the northwest part of the state.⁸¹

The government has also made significant changes to the GSM program by introducing State Migration Plans (SMPs) and the Skilled Migrant Selection Model.⁸²

a. State Migration Plans (SMPs)⁸³

SMPs allow individual states and territories to sponsor applicants for a broad range of occupations to fill skills shortages within their labor markets. SMPs are “agreements, in the form of Memoranda of Understanding, between individual states or territories and the

78. See Press Release, Chris Bowen MP, Minister for Immigration & Citizenship, New Accreditation Scheme for 457 Visas (Nov. 2, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb179959.htm>.

79. Minister for Immigration & Citizenship, *Regional Certifying Bodies and Regional Postcodes*, IMMI 11/058, Aug. 29, 2011, 3; see also Press Release, Chris Bowen MP, Minister for Immigration & Citizenship, New Migration Measures Crucial to Mining Boom Success (July 19, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb168299.htm>; *Regional Classification for Perth*, GOV'T OF AUSTR., DEPT OF IMMIGRATION & CITIZENSHIP, at 1 (Aug. 2011), http://www.immi.gov.au/skilled/_pdf/regional-perth-aug-2011.pdf.

80. *Regional Classification for Perth*, *supra* note 79, at 1.

81. *New Migration Measures Crucial to Mining Boom Success*, *supra* note 79.

82. See *State Migration Plans*, GOV'T OF AUSTR., DEPT OF IMMIGRATION & CITIZENSHIP, <http://www.immi.gov.au/skilled/general-skilled-migration/state-plans.htm> (last visited Jan. 13, 2012); *SkillSelect—Skilled Migrant Selection Register*, GOV'T, OF AUSTR., DEPT. OF IMMIGRATION AND CITIZENSHIP, <http://www.immi.gov.au/skilled/general-skilled-migration/skillselect.htm> (last visited Jan. 13, 2012).

83. See *State Migration Plans*, *supra* note 82.

Minister for Immigration and Citizenship.⁸⁴ On March 3, 2011, New South Wales was the last state to implement an SMP.⁸⁵ Under the new priority processing arrangements, migrants nominated by a state and territory government under a SMP will be processed ahead of applicants for independent skilled migration.⁸⁶

b. The Skilled Migrant Selection Model⁸⁷

The government also announced another major reform to the GSM program: implementation of the new Skilled Migrant Selection Model (the Model), which will commence on July 1, 2012. The Model will be a two-stage process where prospective applicants who wish to migrate to Australia based on their skills must first submit an online expression of interest, after which they may be invited to make an application for a visa where they meet the requisite criteria. It is intended that the Model will also connect state and territory governments and Australian employers with potential skilled workers through the Skilled Migrant Selection Register, which could “assist in the resolution of skills shortages through quick and easy identification of prospective workers with the requisite skills and attributes.”

F. NEW MEASURES IMPACTING EMPLOYERS AND FOREIGN WORKERS IN CANADA

In April 2011, Citizenship and Immigration Canada (CIC) introduced new rules designed to strengthen the integrity of the temporary work permit program.⁸⁸ The temporary work program is a vital lifeline for many businesses and an important route to permanent residence for foreign workers.⁸⁹

1. *Temporary Work System*⁹⁰

The temporary work system is designed primarily to protect the Canadian labor market. As such, the starting point for a work permit application is an application by a prospective employer for a “Labor Market Opinion” (LMO)—a confirmation that the employer is entitled to recruit a foreign worker after being unable to locate a Canadian worker suitable to fill the position. Such applications are made to Service Canada, which administers the program on behalf of Human Resources and Skills Development Canada. While the process to secure an LMO is lengthy and complex, there are some exceptions that allow a worker to apply directly for a work permit without a prior LMO. Such exceptions include intra-company transfers, certain professionals under NAFTA or other international agreements, and persons bringing “significant benefit” to Canada.

84. *Fact Sheet*, GOV'T OF AUSTRALIA, DEP'T OF IMMIGRATION & CITIZENSHIP, at 1 (Oct. 2011), <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/statmig-fs.pdf>.

85. *State Migration Plans*, *supra* note 82.

86. *Fact Sheet*, *supra* note 84.

87. See *SkillSelect—Skilled Migrant Selection Register*, *supra* note 82.

88. Press Release, Citizenship & Immigration Can., New Rules to Strengthen the Temporary Foreign Worker Program (Mar. 24, 2011), available at <http://www.cic.gc.ca/english/department/media/releases/2011/2011-03-24a.asp>.

89. See *Steps to Hire Temporary Foreign Workers*, HUMAN RES. & SKILLS DEV. CAN., http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/temp_workers.shtml (last updated Aug. 26, 2011).

90. See *How to Hire a Temporary Foreign Worker (TFW)*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/resources/publications/tfw-guide.asp> (last updated May 31, 2010).

For those who are visa exempt, a work permit application can be made at a port of entry, with an allowance for a pre-screening before arrival; for those requiring a visa, application must be made at a visa post. In addition to satisfying the substantive requirements, e.g., meeting the test for 'specialized knowledge' in an intra-company transfer case, companies must also meet the compliance-related laws and regulations. Non-compliance with immigration laws and regulations could lead to serious consequences for the employers and the employees.⁹¹

2. *Considerations Effective April 1, 2011*

a. "Genuineness"

Although Canadian immigration laws always required that a job offer be genuine, immigration officers now have a list of factors to be considered to guide them through applications for visas.⁹² The factors to be assessed are the employer's "active engage[ment]" in the relevant business, the needs of the employer, the likelihood of the employer fulfilling the terms of the job offer, or the employer's past compliance with laws regulating employment or recruitment.⁹³

b. "Substantially the Same"

A work permit application (or a preceding LMO) will now trigger adjudication as to whether the employer has been consistent with previous Foreign Nationals (FNs) in the past two years.⁹⁴ Considerations include whether the employer has provided substantially the same wages, working conditions, and job offers to previous FNs.⁹⁵ Where an employer is found to have breached its commitments, the employer will be barred from securing the employment for another FN for a two year period,⁹⁶ and the application leading to the inquiry will also be refused. Finally, a list of ineligible employers will be posted at the government's website.⁹⁷ The law allows several justifications for noncompliance,⁹⁸ but it should be noted that an FN who enters into an employment agreement with an ineligible employer could lose immigration status in Canada.⁹⁹

91. R. Reis Pagtakhan, *What HR Professionals Need to Know about Immigration Law*, AIKINS LAW (Nov. 9, 2011), http://www.aikins.com/index.php/publications/article/what_hr_professionals_need_to_know_about_immigration_law_part_i_is_your_co.

92. Immigration & Refugee Protection Regulations, SOR/2002-227, §§ 200(1)(c)(ii), 200(5) (Can.) [hereinafter IRPR].

93. *Id.* § 200(5).

94. *Id.* § 203(1)(e)(i).

95. *Id.*

96. *Id.* §§ 203(5)-(6).

97. *Temporary Foreign Worker Program—List of Ineligible Employers*, CITIZENSHIP & IMMIGRATION CAN., <http://www.cic.gc.ca/english/work/list.asp> (last visited Jan. 13, 2012).

98. IRPR, *supra* note 92, § 203(1.1).

99. *Id.* § 200(3)(h).

c. Consistency with the Terms of Federal-Provincial/Territorial Agreements

A request for an LMO or an application for work permit will also trigger an assessment as to whether the issuance of the LMO is consistent with the terms of federal/provincial/territorial agreements relating to employers or the employment of FNs.¹⁰⁰

d. Cumulative Duration

Work permit durations are now usually capped at four years.¹⁰¹ But the provision only affects work starting from April 1, 2011. Therefore, no one can be impacted by this provision prior to April 1, 2015. In addition, all work—even work performed without a work permit—counts towards the cap. This is notable for occupations that do not require a work permit, such as clergy, certain foreign journalists, etc. The cap is determined by the actual time worked, not by the time granted on a work permit. For example, a FN who has a one-year work permit, but who has only worked in Canada for six months, has only used six months toward the cap. As a result, it is important that FNs maintain evidence of time spent in Canada to substantiate their claim. After reaching the cap, a FN can seek a work permit after forty-eight months of absence from Canada.¹⁰²

There are exceptions to the cap for workers present in Canada pursuant to an international agreement or seasonal agricultural worker agreements.¹⁰³ In addition, there is a requirement that temporary workers retain, at all times, temporary intent. Even where a worker has not reached the cap, it is possible that an immigration officer will deny a work permit if a FN cannot show temporary intent. This provision will have the most impact on lower skilled occupations.¹⁰⁴ For many higher skilled workers, these provisions are incentive to seek permanent residence at the earliest stage possible time to avoid possible future issues.

III. Post-*Padilla* Ineffective Assistance of Counsel Claims

Last year's U.S. Supreme Court decision in *Padilla v. Kentucky*¹⁰⁵ has received substantial application in the federal and state courts. The Supreme Court had held that a failure to advise a criminal defendant of the deportation consequences of a guilty plea constitutes ineffective assistance of counsel under the Sixth Amendment,¹⁰⁶ noting "[t]he importance of accurate legal advice for noncitizens accused of crimes."¹⁰⁷ Post-*Padilla*, private practitioners have had the duty to at least "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences,"¹⁰⁸ and when there are

100. *Id.* § 200(3)(f).

101. *Id.* § 200(3)(g).

102. *Id.* § 200(3)(g)(i).

103. *Id.*

104. See, e.g., HUMAN RES. & SKILLS DEV. CAN., NAT'L OCCUPATIONAL CLASSIFICATION (2006), available at <http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Welcome.aspx>.

105. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

106. *Id.* at 1486.

107. *Id.* at 1480.

108. *Id.* at 1477

clear deportation consequences, the practitioner's obligation to give clear and correct advice is paramount.¹⁰⁹

In the past year, *Padilla* has been discussed in every federal circuit and thirty-four states across several hundred reported and unreported cases, where defendants have argued ineffective assistance of counsel, and *Padilla* has been retroactively applied to permit the withdrawal of a guilty plea.¹¹⁰ Practitioners should continue to be vigilant in informing an alien criminal defendant of immigration consequences of a conviction, especially when the conviction subjects the alien to mandatory removal. Due to retroactive application of *Padilla*, we will continue to see guilty pleas vacated based on alien defendants' uninformed decisions not to go to trial.

IV. Asylum

A. CORROBORATION AND CREDIBILITY

Section 208(b)(1)(B)(ii)¹¹¹ of the Immigration and Nationality Act (INA) requires an asylum applicant to provide corroboration if requested by an immigration judge and the corroboration is reasonably available. In 2011, the Ninth Circuit limited the corroboration requirement by holding that it only governs the merits of asylum and that it does not apply "to the one-year filing deadline for asylum applications."¹¹²

Further, in a case involving Christianity as the basis for alleging persecution on account of religion, the Ninth Circuit reversed the Immigration Judge's (IJ) adverse credibility finding, which was based on the judge's belief that the petitioner failed to demonstrate credible evidence that he was a Christian. The IJ had primarily relied on the petitioner's evasive demeanor, inconsistent statements, and lack of documentary proof. The Ninth Circuit held that the general declaration of evasiveness or inconsistency did not go to heart of the petitioner's claim.¹¹³ The Court further noted that Chinese Christians may have difficulty responding to simple doctrinal questions due to lack of access to religious training and literature.¹¹⁴

B. EXCEPTIONS TO THE ONE-YEAR BAR

An asylum application must be filed within one year of an alien's arrival in the United States.¹¹⁵ "Extraordinary circumstances" can excuse the late filing of an asylum applica-

109. *Id.*

110. *See, e.g.*, *United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011) (alien was not advised of the "near certainty" of his removal, and plead guilty to offense requiring mandatory removal); *United States v. Bonilla*, 637 F.3d 980 (9th Cir. 2011) (alien who was not advised by attorney of possible immigration consequences of his plea, which advice was requested by alien's wife, successfully argued that such advice "could have at least plausibly motivated a reasonable person in [the alien's] position not to have pled guilty"); *Elizondo-Vasquez v. Texas*, No. 06-11-00143-CR, 2011 WL 4916610 (Tex. App.—Texarkana Oct. 18, 2011) (alien was advised of possibility that his guilty plea could "adversely impact" his immigration status, but was not given a "definitive answer" that the offense required mandatory removal).

111. 8 U.S.C. § 1158(b)(1)(B)(ii) (2009).

112. *Singh v. Holder*, 649 F.3d 1161, 1163 (9th Cir. 2011).

113. *Li v. Holder*, 629 F.3d 1154, 1160 (9th Cir. 2011).

114. *Id.* at 1157 (citing *Jiang v. Gonzales*, 485 F.3d 992, 995 (7th Cir. 2007)).

115. 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(i)(A) (2009).

tion if such “extraordinary circumstances” relate to the delay in the filing of an application.¹¹⁶ In *Viridiana v. Holder*, the Ninth Circuit held that fraudulent deceit by an immigration consultant, which directly caused the late asylum filing, constituted an “extraordinary circumstance” that could toll the deadline to file an asylum application.¹¹⁷

Pursuant to INA section 208(a)(2)(D), “changed circumstances” materially affecting the applicant’s eligibility for asylum can excuse the late filing of an asylum application. In interpreting this provision, the Ninth Circuit found that “changed circumstances” did not require an entirely new conflict in the applicant’s country of origin, nor did they preclude an applicant fearing persecution from seeking asylum because the risk of persecution had increased.¹¹⁸

V. U.S. Supreme Court to Rule on Arizona Immigration Law

The U.S. Supreme Court announced in December 2011 that it would rule during 2012 on whether a controversial immigration law in Arizona was constitutional. Although states usually defer to the federal government on matters of immigration law, Arizona enacted a state statute¹¹⁹ in 2010 that would require state law enforcement officials to determine “the immigration status of any person they stopped” if they suspected that the person was in the United States illegally.¹²⁰ The law would also require “that the immigration status of [persons] arrested be determined before [those persons were] released.”¹²¹ It also made it a state law crime for non-citizens to fail to register as required by federal law, or for illegal immigrants to seek employment in the state.¹²²

After Arizona enacted its controversial immigration law, the Obama administration filed suit against the state to prevent enforcement of four parts of the law.¹²³ A federal district court blocked the Arizona measure from entering into effect,¹²⁴ and the Ninth Circuit affirmed that decision.¹²⁵

Other states, such as Alabama, Georgia, Indiana, South Carolina, and Utah, also enacted state statutes that were characterized as protests against weak federal enforcement of immigration laws.¹²⁶ Some states enacting laws that target non-citizens found that some of their measures had unintended consequences. The state of Alabama, for example, arrested business executives from German and Japanese carmakers from which the state was

116. 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(4), (5) (2009).

117. *Viridiana v. Holder*, 630 F.3d 942, 943–44 (9th Cir. 2011).

118. *Vahora v. Holder*, 641 F.3d 1038, 1044–45 (9th Cir. 2011).

119. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (the “Support Our Law Enforcement and Safe Neighborhoods Act”).

120. See, e.g., James Politi, *Test for Arizona Immigration Law*, FINANCIAL TIMES, Dec. 13, 2011, at 6.

121. See, e.g., Adam Liptak, *Court to Weigh Arizona Statute on Immigration: Police Role is at Issue*, N.Y. TIMES, Dec. 13, 2011, at A1, A3.

122. *Id.*

123. *Id.*

124. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (2011).

125. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (2011).

126. See, e.g., David G. Savage, *Supreme Court to Weigh in on Immigration Battle*, L.A. TIMES (Dec. 12, 2011), <http://articles.latimes.com/print/2011/dec/12/nation/la-na-immigration-arizona-20111213>; Politi, *supra* note 120.

seeking foreign investment.¹²⁷ Arizona became the target of boycotts because of the new law. Additionally, Arizona voters recalled the Republican state senator who had introduced the controversial legislation.¹²⁸ The Supreme Court's ruling on the constitutionality of Arizona's law will be watched not only for the decision on the merits, but also for any potential impact the ruling may have on U.S. presidential elections in 2012.¹²⁹

127. See, e.g., Jess Bravin, *High Court to Rule on Immigration*, WALL ST. J., Dec. 13, 2011, at A2.

128. *Id.*

129. See Savage, *supra* note 126, at 1, 16.