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BUSINESS IMMIGRATION BECOMES MORE DIFFICULT

MICHAEL D. PATRICK*

I agree 100% about the benefits of separating adjudication from enforcement, and actually dialogue about this has been going on for a lot longer than four or five years. When I was back in the U.S. Attorney's office in the early 80s, we were talking informally within the government about the complete paradox, the inconsistency of having law enforcement people so intimately involved in adjudication of benefits. It did not mean that law enforcement should not take place; it just meant that the mentality that was being applied to the adjudication side made adjudications more difficult. Of course, back in the older days, including the early 80s, there were no massive centralized processing centers; adjudications all occurred locally at district offices, which created a whole other problem and benefit.¹ The benefit was that you could get things done very fast. It is amazing how before, when we had answering machines on telephones, not to mention all the technology that has followed since, you could get an advance parole or a preliminary authorization document in a few hours at the district office. Now, in 2004, it can take you four to six months to accomplish that, and we have all this technology.² But at the same time, one of the problems was that everything was locally driven and sometimes relationships became too cozy between and among people seeking the benefits and giving the benefits. And underneath that is part of what this is all about on the

* These remarks are an actual transcript of the author's comments at the St. John's Journal of Legal Commentary Symposium on Feb. 27, 2004.

¹ Leah Phelps Carpenter, Comment: *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553, 567 (2003) (affirming that the H-1B visa application process timeline varies depending on the regional processing center that handles the application).

² *Id.* at 574 (detailing that processing H-1B applications is backlogged and can take a significant amount of time).

adjudication side, and that is the value of the benefits being offered.

From an immigration practitioner's perspective, I guess that is the role that I am here to talk about. From a practitioner's perspective, this last year, the changing face of immigration can be summed up in one word, harder. It is harder to do what we do now than it has been in a very, very long time, and I would suggest that applies across the board to family work, as well as to asylum work, as well as to the business work. There is no question about it. By the way I do not mind it being harder, it is challenging. Although for those of you with business entrepreneurial minds out there, keep in mind that the immigration practitioner world is built on a theme model of transactional billing, which means I will charge you XYZ dollars to perform this task or to accomplish this goal. I will get that visa for you for \$3,000. It has been that way for decades and decades in part because it is also a volume practice and in part because a large part of what the immigration practice does can be very paralegal driven because once the strategy is set, you are involved in forms and data that you do not need a law degree to get the data and the forms filled out.

Well, if you start making that process a whole lot more difficult, start involving a whole lot more strategy, and a whole lot more legal thinking with problems that occur and that involve senior level lawyers to be able to solve them, it changes the dynamic. Normally, if it was an hourly basis like most lawyers charge, you would have a situation where it takes a lot more time to get it done and the client would have to pay their fee. In a transactional billing arrangement that forces the provider of the service to go back to the client and say well, this is going to cost more money because it is taking more time, it is more difficult.

Well, of course, this change has coincided with a huge economic downturn, where companies are actually beating the lawyers to the punch and saying, by the way all the stuff you have been doing for us lately, you need you to do it for 30% less. So it is harder not only getting the job done, but it is harder also in working with the clients whose expectations have not been lowered, they have only been increased and the client is under the gun internally because of the economic problems that we have.

That said, I love practicing immigration law, I think it is terrific. The challenges are part of what make every day very, very exciting. The opportunity to accomplish things for companies and for individuals I think is quite unique. One of the reasons why I love immigration compared to the litigation I used to do, including non-immigration litigation, is that you achieve something without it being at the expense of somebody else. However, overall, immigration in the past year has been a very, very tough area of practice.

Now let me just take a couple of minutes to talk about some specifics. This maybe a little too detailed for some of you who are not familiar with it, but I will just start off with some of them. H-1Bs are the professional visas that are used by companies and employers to bring people to the United States whether for a couple of weeks or for a couple months or even a couple of years.³ The H-1B category is a category, which through the late 90's and early part of this century, was being used heavily by engineering, computer organization type companies, whether Microsoft, IBM or whatever, because the U.S. talent base in that area simply was not producing the graduates.⁴ That is a whole other program, why are American kids not studying in areas that are needed so much in this world? Another program, another time. But in the area of engineering, no question that countries like India and China have figured out that if they can produce very smart people who can provide these skills, they can benefit. Now things have moved so fast that the benefit of coming to the United States to perform the work has now turned into staying home and performing the work in what we call, outsource off shoring or offshore outsourcing⁵ to places like India, where the work that only five or six years ago was being done here in the United States whether in New York, Toledo or Ohio, now gets done in Bangalore. And by the way, the wages that are paid in

³ See Yan Chen, Comment: *An Examination on Regulating the Employment of Foreign Skilled Workers in the United States*, 6 U. PA. J. LAB. & EMP. L. 179, 180-82 (2003) (offering an overview of the purpose, criteria, and requirements of the H-1B visa program).

⁴ See Luke Johnson, *Tangible Benefits in Education*, SUNDAY TELEGRAPH (London), Nov. 16, 2003, at 04 (highlighting clamp-down on student visas to United States after September 11th, 2001).

⁵ See *Tyco Juror Rancor Jurors in ...*, WASH. POST, Mar. 28, 2004, at F02 (debating that while more companies consider offshore outsourcing, there is suspicion about financial benefits and public backlash).

Bangalore are a whole lot less than the wages that are paid in New York or Toledo. This is a big issue; politically we see it on the radar screen. You cannot pick up the paper today without looking at immigration.

H-1Bs is the visa vehicle to bring foreign professionals to the United States, and the political reaction to all of this has been to make sure that we do not allow more H-1Bs in the United States. There was a cap of H-1Bs up to 195,000 seven years ago, but it was reduced by statutory preference to 65,000 this year and indeed, despite some suggestions that it be increased, the administration has no interest in increasing it.⁶ So it was reduced to 65,000 and has already been reached for the fiscal year that ends September 30, 2004.⁷ This means sitting here today on February 27th, 2004, if you are an employer, and you want to get a professional working visa for someone that you have not employed before, and who himself has not been employed before as an H-1B, you cannot get it until October 1, 2004. This is an imposition that is being imposed on American business and if you are the business by the way, what is one of your solutions? You will hire somebody abroad, so what are we accomplishing? Well, that is another topic, but that is one aspect of H-1Bs.

Then we have things like Green Cards. By the way the cards are not green, but are white and have nothing to do with green anymore; they used to be green and you could buy phony ones on 42nd Street. Now they have better security ones that are hard to produce from a forgery point of view, which I think is great.⁸ The government has done a lot of work in that area, which is terrific. But the problem with the Green Card process is a reflection of America's schizophrenia about immigration and I am hoping sometime in both the panels today that we will talk about it. It really is a fascinating schizophrenia and if you read a little bit

⁶ See generally Michael J. Pisani, *Michigan Can Reverse Job, People Losses*, DETROIT NEWS, Mar. 25, 2004, at 17A (positing that "nearly all H-1B visa holders possess a college degree, work in the computer, engineering, management or education fields, and are in their early prime working years").

⁷ See generally Ricahrd Santarelli, *Protect Economy from Foreign Predators*, BOSTON GLOBE, Nov. 9, 2003, at D10 (explaining that H-1B visa program brings in many foreign works in information technology and high-tech fields).

⁸ See Kevin McCoy, *Tamper-Proof Green Cards on Way*, DAILY NEWS (N.Y.), Apr. 16, 1998, at 22. (asserting government's efforts to shut down large underground markets in phony green cards by building anti-forgery safeguards into the green cards).

about the history of immigration in America, it is not new. We have been a country that has been both welcoming and negative at the same time, and it is often the last end of the most negative. This goes back not just decades, but centuries, and right now we are generally in a negative swing. And negative swings usually (putting aside 9/11 security) will accompany and follow economic downturns, for obvious reasons.

The President, to his credit I must say, has made a proposal for this temporary worker program,⁹ which in classic Bush fashion lacked all detail. But this temporary worker proposal was immediately attacked not only by the far extremes on both sides, but almost to the middle of both sides.¹⁰ It is fascinating to propose something that is supposedly politically advantageous to you and be attacked by probably more than 50%, meaning 25% on each side is pretty extraordinary. That does not mean it was a bad idea by the way, well of course, we will see how it plays out.

In fact, just a couple of weeks ago, the Director of U.S. Citizenship and Immigration Services testified before Congress,¹¹ explaining that in this whole program proposed by Bush, there are five critical points.¹² First, remember he is in charge of the adjudications and enforcement will be paramount. Second, American workers come first. Aren't you feeling warm and fuzzy if you are a company trying to bring people in? So second, American workers come first, not that MetLife is against American workers. Third, incentives for registration and for return to home country will be required. Is anyone hearing anything about adjudications yet? Fourth, the program should

⁹ See Jeffrey Zax, *The Reality of Temporary Worker Plan*, DENVER POST, Feb. 22, 2004, at E-01 (enunciating economic rationale of President Bush's proposed temporary worker program).

¹⁰ See generally Seth Kugel, *On the Job: Foreign Workers Assessing What a New Bill Will Mean*, N.Y. TIMES, Feb. 24, 2004, at 4 (noting that some hopefuls feel President Bush's temporary worker program will help small businesses, yet others are fearful that said program will have complicated legal or logistical processes).

¹¹ See American Immigration Lawyers Association, *Testimony of Eduardo Aguirre on Guest Workers Proposals*, available at <http://www.aila.org/contentViewer.aspx?bc=9,576,4682,4688> (Feb. 13, 2004) (presenting testimony from the Director of U.S. Citizenship and Immigration Services before the Senate Judiciary Committee's Subcommittee on Immigration, Border Security and Citizenship). See generally David Armstrong, *Customs Boss Seeks to Expand U.S. Role*, S.F. CHRON., Mar. 6, 2004, at A7 (outlining that Bush's temporary worker program would "beef up the number of customs inspectors and border patrol agents").

¹² See generally Bob Kemper, *Bush Greets Fox with Border Plan; Mexicans' Entry to U.S. to be Eased*, CHI. TRIB., Mar. 6, 2004, at 8 (affirming President Bush's strong commitment to such worker programs).

be fair, and not come at the expense of legal immigrants. We are in that protectionist thing, and that is okay so far. And fifth, the program should be simple and user friendly. Sounds like computer stuff, things should be simple and user friendly, one that can be effectively administered. I love that kind of language, that is great language and the other four are all important to America. I am just teasing here, but that gives you a sense of the political tone, the political motivation, and the mission of this temporary worker program.

As a lawyer at a law firm that represents half of the Fortune 500 in the business that we do, which is something we are very proud of, we are determined to do the best we can in working with Congress to get them to see and to keep them seeing that it is not in American Businesses' best interest to continue crushing and making more difficult for American business the opportunity to have people here either for permanent residence (meaning Green Cards) or to work temporarily. In fact, the studies will show that the more that American businesses are able to bring in talent and have that talent assist in the development of programs, research, and in the supply of services and products, not only does America benefit from the goods and services that those people who are here purchase, use, and obtain, but America benefits from the energy and the intellectual contributions that these people make.

The temporary worker program by the way, do not be fooled by this, is not just about people picking fruit. The temporary worker program, and also I think Bush was very smart on this, has never said that it would not apply all the way to the PhD.¹³ The kicker to the whole temporary worker program is what we call labor market test. It would have to be conducted before you would qualify for the program, again details to be supplied later.

But an important thing to understand is that this past year has shown that there is such an increased focus on all three elements of immigration that are represented by the three groups in terms of Citizenship Immigration Services, in terms of Immigration and Customs Enforcement and Border Patrol, and

¹³ See generally *Lethal Smuggling Cases Deserve Severe Penalties: Smugglers Who Recklessly Endanger Human Lives Should be Harshly Punished*, SAN ANTONIO EXPRESS-NEWS, Mar. 18, 2004, at 6B (noting that Bush's proposed temporary worker program would reduce flow of undocumented immigrants).

Border Protection. There is such an increased focus that in the end, the key is to sit in the dialogue and stay in the dialogue, not just sit on the sidelines. So St. John's has done a good job having a program on this because the dialogue right now is intense at all three areas; I thank you for inviting me.

