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**Prospects for Immigration Reform and the New York Perspective**

**By Austin T. Fragomen, Jr.**

## Prospects for Immigration Reform and the New York Perspective

By Austin T. Fragomen, Jr.\*

As the business of the 112th Congress gets underway, immigration reform is high on the agenda of legislators and the White House. In his State of the Union address, President Obama made immigration a facet of his “win the future” agenda. Echoing earlier speeches linking immigration and innovation, he called on Congress to work with the White House and pressed for immigration legislation that will allow the United States to retain talented foreign students rather than “send[ing] them home to compete against us.” In an implicit reference to the DREAM Act, which would provide a path to permanent residence for undocumented immigrants brought to the United States as children, the President appealed for reforms that would keep our country from “expelling talented responsible young people who could be staffing our research labs or starting a new business, who could be further enriching this nation.”<sup>1</sup>

These are laudable goals, and have the support of legislators on both sides of the political divide. But the path towards immigration reform is by no means clear. Past efforts to forge a bipartisan agreement have largely failed, and tensions persist between proponents of immigration benefits and restrictionists favoring enforcement-only measures. In the new Congress, with a Republican-controlled House and a Senate led by the Democratic caucus, finding consensus on comprehensive immigration reform (CIR) will remain a significant challenge.

But though a wide-ranging immigration reform bill is unlikely in the near term, advocates in New York and elsewhere should not assume that no immigration measures will be considered by this Congress. For many years, there was general agreement that reform should only be sought comprehensively, through a single broad-based bill that would address multiple areas of concern, including legalization of the undocumented, systems to detect and combat the hiring of unauthorized workers, the future flow of temporary foreign labor, the permanent residence system, and border and interior enforcement. But since 2009, federal legislators have been more willing than in the past to consider standalone bills that address specific immigration issues. This willingness is a double-edged sword for immigration advocates. While it theoretically means that there can be movement on specific favorable immigration measures, it also means that adverse legislation with few or no ameliorating provisions could be enacted. In fact, piecemeal bills enacted since 2009 have either preserved the status quo by reauthorizing expiring

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<sup>1</sup>A transcript of the 2011 State of the Union address is available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

immigration programs or placed additional restrictions on existing programs, particularly those used by employers to hire the highly skilled.

While many in Congress, like the President, recognize immigration as a critical element of U.S. competitiveness and economic recovery, achieving consensus will require a delicately balanced immigration policy. To that end, the Obama Administration has devised a dual policy of advocating reform while simultaneously calling for stricter enforcement. That has meant pursuing a strategy of, in the words of a White House blog post issued shortly after this year's State of the Union address, "strengthen[ing] our economic competitiveness by creating a legal immigration system that meets our diverse needs" while at the same time "holding businesses accountable" and calling for the undocumented to "take responsibility."<sup>2</sup> The risk is that the delicate balance will tip towards undue restrictions, particularly on skilled migration, that threaten to undermine the benefits of immigration reform.

In the new Congress, tough enforcement measures are likely to emerge from the Republican-controlled House. Though there is the risk that restriction-only proposals could proceed on their own, they can present opportunities for negotiating favorable provisions that could create a more balanced final legislative package. It will be up to immigration advocates in New York and elsewhere to lay the groundwork for beneficial reforms.

Comprehensive immigration reform bills and other proposals raised in previous legislative sessions may well serve a blueprint for immigration measures in the current Congress, and thus deserve the study of New York's immigration advocates. In the Senate, legislators were unable to craft a full bipartisan reform bill in the 111<sup>th</sup> Congress, but Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC) last year announced a draft framework for bipartisan consensus.<sup>3</sup> Though conflicts over the health care bill caused Sen. Graham to pull away from the immigration debate later in the year, Senate Democrats, led by Majority Leader Harry Reid (D-NV), Sen. Schumer and Sen. Robert Menendez (D-NJ) ultimately released their own proposal, Real Enforcement with Practical Answers for Immigration Reform (REPAIR).<sup>4</sup> In the House of Representatives, former House Immigration Subcommittee Chair Zoe Lofgren did not propose a comprehensive bill, preferring to wait for the Senate to take the lead. But Rep. Luis Gutierrez (D-IL), leading a coalition of immigration reform proponents that included the Congressional Hispanic Caucus and organized labor, spearheaded the Comprehensive Immigration Reform for America's Security and Prosperity (CIR ASAP) Act in December 2009.<sup>5</sup>

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<sup>2</sup> <http://www.whitehouse.gov/blog/2011/01/27/immigration-winning-future>

<sup>3</sup> Charles E. Schumer and Lindsey O. Graham, "The right way to mend immigration," Washington Post, March 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html>.

<sup>4</sup> The full proposal is available at <http://reid.senate.gov/newsroom/upload/REPAIR-proposal.pdf>.

<sup>5</sup> H.R. 4321, 111<sup>th</sup> Cong., 1<sup>st</sup> Session.

Though these proposals differed as to details, they all focused generally on a number of key components: legalization of the undocumented, worksite verification, high-skilled migration, and interior enforcement. Separately or in combination, these components will once again be in play as the 112<sup>th</sup> Congress resumes the immigration debate. The following sections will address each component and touch on its significance to New York.

## **Legalization of the Undocumented**

With its large immigrant community, and equally large population of undocumented workers, New York would undoubtedly stand to benefit from legalization measures. Plans to provide a path to permanent residence for the estimated 11 million undocumented immigrants have been a major part of comprehensive immigration reform bills in recent years, and have often figured as their centerpiece. But despite their ubiquity, they are the most controversial of all reform proposals. Proponents of legalization, mindful of the need for bipartisan appeal, have struggled to craft provisions that distance legalization from the often-decried amnesty program of the Immigration Reform and Control Act of 1986 – usually by balancing the benefit of regularized status with penalties such as civil fines and admissions of guilt for unlawful entry.

The most recent full-scale legalization plan was set forth in the REPAIR proposal of Senators Reid, Schumer and Menendez. Drawing elements from several previous initiatives, the proposal envisions a broad-based program that would encourage maximum participation. Both the undocumented and those in temporary protected status would be able to come forward and register and, if otherwise eligible, earn legal status. The legalization program would entail a two-step process. The first step would grant applicants the status of Lawful Prospective Immigrant (LPI), which would allow them to work and travel outside the United States. In the second step, LPIs would be allowed to petition for permanent residence but would be placed at the “back of the line” and would need to fulfill other obligations, including showing continuous residence in the United States, demonstrating basic citizenship and English language skills, paying federal income taxes, fees and civil fines, undergoing repeat background checks and registering for Selective Service. The second step would not occur until after current immigrant backlogs have cleared, which is estimated to take eight years under REPAIR’s plan to recapture and make available unused immigrant visas from prior years.

The Democratic legalization plan did not ripen into a full bill in the last Congress, but narrower regularization bills have been considered. The DREAM Act, which would provide a path to permanent residence for undocumented foreign nationals up to age 30 who were brought to the United States before the age of 16 children and who go to college or serve in the military, has been introduced numerous times

since 2001 and was last considered during the lame duck session of the 111<sup>th</sup> Congress. In its latest incarnation, it was passed by the House of Representatives, but it failed in the Senate. A similarly focused legalization program, the Agricultural Job Opportunities, Benefits and Security Act (AgJOBS), would provide a path to regularized status for farm workers who have performed agricultural work in the United States for a requisite number of hours during a three- to five-year period, pay income taxes and fines, and are not otherwise inadmissible to the United States.

Outside of a comprehensive reform scenario, a broad legalization proposal probably stands little chance of passage in the current Congress. Narrower measures like DREAM or AgJOBS could be a part of a larger negotiated package, but House Judiciary Committee Chairman Lamar Smith (R-TX) and Immigration Policy and Enforcement Subcommittee Chairman Elton Gallegly (R-CA) are vocal opponents of any so-called amnesty program. If a legalization program is to move forward, it would likely need to be reduced in scope – for example, DREAM Act provisions with stricter eligibility requirements – and attached to a broader reform bill.

Whether broad-based or focused, a legalization program would be well-received in New York because it would allow the city’s large population of undocumented workers – who are already part of the social and economic fabric of the community – to come out of the shadows. However, in order to fully benefit New York, legalization would need to be timed to take effect before any rigorous immigration enforcement program were implemented.

## **Worksite Enforcement**

Combating the employment of unauthorized workers and improving the efficacy of the federal employment eligibility verification program continue to be major goals of immigration reform proponents. There is widespread agreement that our current system, consisting of the mandatory Form I-9 employment eligibility process and the mostly voluntary E-Verify online verification program, is ineffective because it does not address the problem of identity theft. Under the present system, employers are largely powerless to detect unauthorized workers when they present facially valid but actually fraudulent employment authorization documents. The REAL ID Act of 2005 seeks to address the problem of fraudulent documentation by requiring states to ascertain the immigration status of applicants for driver’s licenses and state identification cards and to comply with document security standards, but the law has not been fully implemented to date.<sup>6</sup>

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<sup>6</sup> Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror and Tsunami Relief of 2005, Pub. L. 109-13 (May 11, 2005).

Though legislators are generally agreed that worksite enforcement is a priority, they differ on method. Earlier comprehensive immigration reform bills sought simply to expand the E-Verify system and make it mandatory for employers. But after an independent study commissioned by the government revealed flaws in E-Verify, including errors pertaining to the work eligibility of U.S. citizens and a high rate of failure in identifying undocumented workers,<sup>7</sup> more recent proposals have sought to completely replace the current system with newer technologies to positively identify new hires and verify their work eligibility.

New York's Sen. Schumer has been on the leading edge of this movement, and has proposed replacing the current employment verification system with a biometric card program. In the framework he developed with Sen. Graham and in the REPAIR proposal with Senate Democrats, he has proposed a tamper-proof biometric Social Security card that would contain a unique characteristic of the cardholder, such as a fingerprint or eye scan. Each card's unique biometric identifier would be stored only on the card, rather than in a government database, presumably to address the concerns of civil libertarians. Other proposals, such as the New Employees Verification Act (NEVA), proposed by Rep. Sam Johnson (R-TX) and Gabrielle Giffords (D-AZ), would eliminate the use of a card and the attendant problem of counterfeit documents by adopting technology to verify an individual's biometric features. Rep. Gutierrez's CIR-ASAP bill proposed a personal identification number to authenticate an individual's personal information, with an encryption code to allow employers to verify employment eligibility.

The REPAIR proposal and other biometric-based technologies might prove to be more effective than E-Verify and arguably simpler for employers to use than the current mix of traditional I-9 verification and E-Verify. But implementation could be a lengthy and difficult process. The possibility that every American worker could be required to carry a biometric Social Security card will undoubtedly trigger objections from civil libertarians, who oppose any measure resembling a national identity card on the grounds that it could diminish the ability of citizens to move freely, increase government surveillance and monitoring, and require creation of a potentially error-ridden database of all citizens. And employers who have spent years adjusting to I-9 requirements and implementing E-Verify would need to re-tailor their systems to brand new processes, albeit ones that could be ostensibly simpler to use in the long run.

Ultimately, Congress may be influenced by how widely E-Verify is used over time, and whether some of the current concerns about its effectiveness are more fully addressed. The federal government has already taken regulatory steps to expand E-Verify; a rule that requires most federal contractors to use the system was proposed by the Bush Administration in 2008 and implemented by the Obama

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<sup>7</sup> Westat, "Findings of the E-Verify Program Evaluation," December 2009, available at [http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09\\_2.pdf](http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf).

Administration the following year.<sup>8</sup> A number of state legislatures, with the State of Arizona at the lead, have also sought to mandate E-Verify use as a requirement to obtain or maintain a business license, out of frustration with federal inaction on immigration reform. The U.S. Supreme Court, in a decision expected later this year, will rule on whether these state measures are preempted by federal law, but it is by no means clear that they will be overturned, given provisions in the Immigration Reform and Control Act that allow for state employer sanctions that are connected to licensing and similar laws.<sup>9</sup>

Supporters of a broad E-Verify mandate have strong allies in the new House Republican leadership. Rep. Lamar Smith recently held House Judiciary Committee hearings on creating an E-Verify mandate for employers. Rep. Elton Gallegly, within days of becoming chairman of the House Immigration Policy and Enforcement Subcommittee, introduced two bills that would mandate expansion of E-Verify to employers who contract with the legislative and executive branches of government. These developments could add new momentum to the effort to expand the existing system.

Whichever method of worksite verification ultimately prevails, immigration advocates in New York and elsewhere will need to press for significant government investment to ensure that government databases are updated promptly and accurately and to ensure that technology is developed with enough sophistication to combat identity fraud.

Implementation of a new employment verification system will have a dual impact on New York. Large corporations stand to benefit from secure document and card-swipe verification programs, which would dispense with the cumbersome I-9 process and offer a more reliable system with safe harbors for employers. But the undocumented population, lacking the necessary documentation, could suffer significantly, as could their employers.

## **High-Skilled Migration**

Of greatest interest to New York's business community are proposals to change the current system for highly skilled migrants. The city's position as the world's knowledge capital in numerous industries and disciplines makes access to global talent in a wide range of fields essential. But despite President Obama's recognition that highly educated foreign nationals are key to U.S. economic competitiveness, there is widespread disagreement on this need and significant support for measures that are purely restrictive or that couple favorable provisions with restrictions.

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<sup>8</sup> 73 Federal Register 67651 (November 14, 2008).

<sup>9</sup> Chamber of Commerce v. Whiting, 09-115 (2010). The Immigration Reform and Control Act of 1986 expressly preempts state and local governments from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 USCA § 1324a(h)(2).

Skepticism towards the H-1B skilled professional visa and L-1 intracompany transferee temporary visa – categories essential to global mobility – has already resulted in two of the few immigration proposals to pass Congress in recent years. In early 2009, Senators Bernard Sanders (I-VT) and Charles Grassley (R-IA) successfully introduced the Employ American Workers Act, an amendment to the American Recovery and Reinvestment Act that subjects employers who accept Troubled Asset Relief Program (TARP) funds or funds under Section 13 of the Federal Reserve Act to additional employee recruitment requirements that in effect bar these employers from hiring skilled professionals under the H-1B program – arguably, the very employers who most stand to benefit from an influx of top talent.<sup>10</sup> In August 2010, Emergency Border Security Supplemental Appropriations Act of 2010 included hefty new fees for H-1B and L-1 petitioning employers who have 50 or more employees and more than 50% H-1B and L-1 workers.<sup>11</sup>

Other proposals aimed at restricting foreign skilled labor remain a possibility in the new Congress. Sen. Grassley and Sen. Richard Durbin (D-IL) have been on the forefront of this movement. In 2007 and again in 2009, the Senators introduced bills that would require all employers seeking to hire H-1B workers to first take good faith steps to recruit qualified U.S. workers and prohibit employers from displacing U.S. workers – obligations that under current law are imposed only on employers with high proportions of H-1B employees in their workforce and those who have willfully violated H-1B program rules. The Senators would also restrict the number of H-1B and L-1 workers in an employer’s workforce and broaden the authority of the Departments of Labor and Homeland Security to open H-1B and L-1 investigations and audit employers. In 2009, the Senators introduced the Employ America Act, which would require an employer petitioning for any visa on behalf of a foreign national to attest that it had not had a mass layoff as defined by the WARN Act and would mandate the expiration of all existing visas approved for the employer within 60 days after a mass layoff.

Several legislative proposals would ease procedures for certain highly-skilled graduates and their employers, but those provisions would come hand in hand with burdensome restrictions on existing temporary visa categories. A case in point is the REPAIR proposal. It includes many provisions that would be favorable to employers in New York and throughout the country, including a fast track to permanent residence for advanced-degree graduates in science, technology, engineering and math (STEM) fields who have job offers from U.S. employers, echoing earlier proposals to figuratively “staple” a green card to the diplomas of these graduates by exempting them from immigrant visa quotas. Foreign students entering the United States to pursue a course of study in a STEM field at an institution of

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<sup>10</sup> Employ American Workers Act, Division A, Section 1611 of the American Recovery and Reinvestment Act, Public Law 111-5.

<sup>11</sup> Public Law 111-230.

higher education would be permitted to initially enter the United States with the intent to pursue permanent residence. REPAIR would also create a market-based quota for temporary work visas, rather than the current arbitrary and politically motivated quotas. It would recapture unused immigrant visas from past years, and eliminate the per-country limits on employment-based immigrant visas. Finally, it would create a new visa category for entrepreneurs with bona fide U.S. investors in start-up ventures. But REPAIR's approach to the H-1B and L-1 temporary visas echoes the Durbin-Grassley bills and is far more restrictive than current law. It would include recruitment and non-displacement requirements for all H-1B employers, wage requirements and restrictions on the placement of workers at secondary worksites for the L-1 category, and increased agency scrutiny of H-1B and L-1 employers.

New York and its leading industries stand to gain most directly from an expansion of immigration programs for the highly-skilled. But the willingness of legislators to place restrictions on skilled worker visa categories is a trend that immigration advocates will have to work assiduously to combat in order to arrive at a rational skilled immigration policy. Advocates from the business community will need to educate legislators that additional restrictions on these categories frustrate the intent of Congress in creating them and work against the competitive advantage of the New York and the United States. In addition, advocates will need to point out that New York's need for highly skilled workers extends beyond the STEM fields that have received much attention in recent years, and stress that need for global talent is just as great in fields such as financial services, accounting, medicine, international trade, medicine and retail, among other industries critical to New York's economy. Expansion of existing highly-skilled worker proposals to include MBA graduates would particularly benefit New York, In recognition of the fact that one-third to one-half of the students at the top U.S. MBA programs are foreign nationals;<sup>12</sup> in fact, a bill currently being prepared by Rep. Zoe Lofgren (D-CA) would include advanced business degrees among the disciplines that could benefit from eased immigration procedures.

## **Interior Enforcement**

The movement to increase interior enforcement of U.S. immigration laws has proponents on both sides of the political divide. The Obama Administration has spent two years strengthening its enforcement efforts, including more frequent audits of worksites, a dramatic increase in the rate of deportation of undocumented foreign nationals, and revamped policies on immigrant detention (including expanding detention facilities in the New York area). In addition to their stated purpose of combating the violation of immigration laws, these efforts are clearly intended to recruit allies from the pro-enforcement side of

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<sup>12</sup> See Financial Times Global MBA Ranking 2010, available at <http://rankings.ft.com/businessschoolrankings/>.

the immigration debate, part of the long-term effort to craft a bipartisan coalition necessary to pass comprehensive reform.

A major facet of the administration's enforcement strategy is expansion of programs that promote cooperation between the federal government and state and local law enforcement. Among these is the Secure Communities program, which authorizes allow state and local police to access Department of Homeland Security databases so that they can check the immigration history and criminal records of arrestees. Recent news reports indicate that the Obama administration has been moving to aggressively to expand Secure Communities to hundreds of law enforcement agencies, though it is not clear whether local compliance with the program can be mandated.<sup>13</sup> Another is the Section 287(g) program,<sup>14</sup> which promotes more formal federal-state partnerships that enable local police forces to engage in direct civil enforcement of federal immigration law; depending on the scope of the specific agreement, state law-enforcement officers can be authorized to investigate, apprehend, and detain foreign nationals to the same extent as federal immigration officers, including the power to interrogate any person believed to be an alien as to his or her right to be or to remain in the U.S. and the power to arrest an individual whom the officer has reason to believe is in the U.S. unlawfully.

While the federal government works to strengthen partnerships with local law enforcement, state and municipal governments have been making well-publicized and controversial efforts to independently enact their own immigration enforcement programs. Arizona has been on the leading edge of this trend. In to its employer sanctions law, noted above, it recently enacted the Support Our Law Enforcement and Safe Neighborhoods Act, Senate Bill 1070, a law that sought to criminalize the presence of undocumented foreign nationals in the state and to give local law enforcement broad authority to check the immigration status of individuals where there is a "reasonable suspicion" that they are undocumented, among other provisions. S.B. 1070 was the subject of public outcry and no less than seven federal court challenges. The most controversial portions of the law have been preliminarily enjoined. The injunction is now on appeal to the U.S. Court of Appeals for the Ninth Circuit.

In contravention of the trend towards greater enforcement at the state level, New York has a long history of refraining from enforcement against undocumented foreign nationals who do not have criminal records. Mayor Michael Bloomberg's Executive Order 41 directs city agencies to protect the privacy of the undocumented, except criminal aliens. And longstanding New York federal court jurisprudence forbids the type of random enforcement that the Arizona law, among others, seeks to promote. In *Marquez v. Kiley*,<sup>15</sup> the Federal District Court for the Southern District of New York held that questioning

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<sup>13</sup> "Taking a Hard Line: Immigrants and Crime," New York Times, February 17, 2011, available at <http://www.nytimes.com/2011/02/18/us/18immigration.html?scp=1&sq=%22secure%20communities%22&st=cse>.

<sup>14</sup> For detailed information on the Section 287(g) program, see <http://www.ice.gov/287g/>.

<sup>15</sup> 436 F. Supp. 100 (S.D.N.Y. 1977).

by law enforcement agents based on mere “suspicion of alienage alone” cannot be made without reference to race and thus is prohibited as discriminatory.

It remains to be seen whether New York’s policies on enforcement and the undocumented will hold. Legislation like Arizona S.B. 1070 is unlikely to garner widespread support in the state. But federal pressure to participate in programs like Secure Communities – from which New York is considering opting out<sup>16</sup> – could provide difficult to resist. A return to enforcement policies like those that existed before *Marquez v. Kiley* would be extraordinarily disruptive to the city and its immigrant communities.

### **Immigration Reform and the New York Perspective**

At this stage of the debate, the most likely legislative scenario in the near term is a workplace enforcement bill that includes provisions for highly-skilled, advanced-degree holders, some recapture of unused immigrant visas from past years, and additional restrictions on the H-1B and L-1 categories. But whether reform comes in a comprehensive bill or through narrower measures, New York City stands to be heavily impacted by any federal immigration legislation because of the range of noncitizens who live and work here, from highly educated skilled migrants to undocumented laborers, and the businesses that employ them at all levels. At this critical time, it is fitting that Mayor Michael Bloomberg has created the Partnership for a New American Economy, a coalition of business and government leaders who support favorable immigration reform and who are committed to educating legislators about the need for it. Whether a final legislative package is harmful or beneficial to the New York and to the U.S. economy as a whole will depend on how effectively advocates for a rational immigration policy can counteract restrictionists.

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<sup>16</sup> See New York Times, *supra* n. 11.