

IMMIGRATION LAW

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With the spotlight on the new Arizona immigration law that was enacted recently, immigration law and reform has never been so intensely debated. This is especially true in Texas. To discuss this issue as well as other timely immigration topics, Texas Lawyer's business department has invited three top immigration lawyers to help us understand this issue as well as where things are headed in regards to various immigration laws. The following discussion has been edited for length and style.

MIKE ANDROVETT, moderator, attorney, and owner of Androvett Legal Media & Marketing, Dallas: ... *Panel members, over the last couple of weeks, as I've described to folks that this immigration roundtable was upcoming, the almost universal sentiment was, "Well, you've certainly picked a good time for it." So I'm excited to hear not only your opinions about the law but also some of the political and social forces that are coursing through Arizona, Texas and the United States. So without further ado, members of the panel would you introduce yourself and talk a little bit about the nature of your work, and what that work looks like on a daily or weekly basis.*

CHARLES C. FOSTER, co-chairman, Foster Quan, LLP, Houston: Thank you, Mike. I'm pleased to be on the panel. And as you say, it's very timely. I have practiced immigration law for more than three decades. We have one of the largest immigration law firms in the world, either the second or third. And we call ourselves the comprehensive immigration law firm, in that, we do all aspects of immigration law. And we're big enough with 56 immigration attorneys for them to have one or more subspecializations. So we do all of the regular legal immigration law work, representing large multinational companies to start-up companies, qualifying their foreign personnel for appropriate U. S. work visa status and permanent residency, but we also do a lot of work in Federal court litigation in particular, writs of mandamus, appeals and TRO's as well as defending people in proceedings in Immigration Court. We also have one of

the largest outbound/global immigration sections. Many of the big companies that we represent not only hire and transfer foreign nationals to the United States, but also send U. S. citizens and expatriates all over the world. So we have lawyers that specialize in the immigration laws of all of the major receiving countries of the world. And then we have one of the growth industries in our practice today, I-9 employment verification. And since '86 that's become a focal point of enforcement. So, we not only do a lot of major affirmative audits, some of the largest I think that have ever been undertaken in the United States, but we represent companies that have been subject to investigations. In terms of my background, I'm proud to say I'm a graduate of UT undergrad and law school. I was the first national president of the American Immigration Lawyers Association outside of the New York area. And I've been active on the policy side of and testified before the Senate and the House on immigration policy issues. I served as President Bush's principal policy advisor in both the 2000 and 2004 campaign on immigration policy. I did such things as prepare the talking points for the debates and also served as an immigration policy advisor for President Obama in the 2008 campaign. And the final point is, since Mike, you brought up immigration reform, I serve as chairman of the Immigration Task Force of the Greater Houston Partnership and its 501(c)(3), Americans for Immigration Reform. So each day I work on this topic of how to bring about comprehensive immigration reform.

JERRY REDMOND, senior associate, Conner & Winters, LLP, Houston: Good morning. I am an attorney with Conner & Winters, a regional law firm based out of Oklahoma with offices in various locations, including Texas. My practice consists primarily of labor and employment law and immigration. I assist corporations and individuals in obtaining various types of visas, including employment, family based, investor, intercompany transfer and visas for expatriate employees who may require visas to work in various countries where U.S. employers maintain operations. As Mr. Foster stated, the hot topic in immigration law currently is I-9, E-Verify and H-1B compliance.

As a result, I assist and counsel companies regarding, I-9, E-Verify, H-1B and L-1 intercompany transfer compliance, including implementing compliance and audit programs, and auditing companies' employment authorization programs, including their I-9, H-1B and E-Verify documentation. The current administration has made it clear where it is headed with respect to ensuring that employers are not employing unauthorized individuals, and as part of my practice, I make sure the employers that I represent are aware of the issues and the penalties, both civil and criminal, they may face if they fail to properly follow U.S. and state immigration laws and regulations, which may require that certain types of employment verification processes be implemented. In addition to assisting companies with all their immigration related needs, I also defend individuals in deportation proceedings and assist individuals with obtaining various types of visas ranging from employment to family based visas.

GEORGE R. WILLY, founder and principal, George R. Willy, P.C., Houston: My firm has been around for at least 25 years. We cover the whole waterfront on immigration and because of the nature of our firm's clients we've been able to tackle all kinds of cases from large to small, simple to complex, and everything in between. We pretty much do everything. But recently, because the immigration service has become a little inflexible, we have spent a lot more time going to Federal court to obtain mandamuses and such other relief that may be available to us in Federal court. And I think we've been pretty successful in doing that because we're willing to push the limits on those reliefs that we can obtain. The other thing that's unique about my firm is that we have former immigration officials and consular officers who serve as advisors to the firm, so that sometimes when we are stuck with a bureaucracy, we have people that have been there to help us navigate those tricky waters. Our small, maneuverable size — about five attorneys, also allows us to keep the costs down while providing personal service. And recently what we have done is we have opened an office in India so that we can outsource some of the routine type of work. And that's the posture we

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are at this point and looking forward to answering some questions of yours down the road.

ANDROVETT: *Gentlemen, before we get into a discussion about topics like compliance with the various I-9 provisions, the various audits that are out there, attracting and retaining foreign workers and helping workers in this country gain employment properly in other countries, I feel like we would somehow be missing the boat if we didn't start by talking about some of the forces that either indirectly or directly impact this conversation. So if I might, I'd like to start with the Arizona immigration law that was signed by the governor of Arizona last week or two weeks ago. It seems to be one of the broadest and most strict attempts to identify and prosecute illegal immigrants. There's been a lot of publicity about the reasonable suspicion provisions that authorize police to stop and arrest illegal immigrants. But if you read that statute, there are a lot of other provisions that may be equally noteworthy as I expect this law is challenged in the courts. The New York Times says that this is designed to control, prosecute and deport illegal immigrants. Will it work?*

FOSTER: It may have some impact if it ever goes into effect. I would imagine the employers, all the business organizations in Arizona, believe that it will work in a negative sense, that they will lose large numbers of employees that are necessary for their industries, that there's going to be a net outflow of workers. We can look at it from two different points of view: Is it constitutional? And I think we all agree that it will be challenged constitutionally on the grounds of vagueness and Federal preemption. I think it's really a sideshow that has sparked a very good, healthy debate. But from a policy point of view, it's a disaster. The Greater Houston Partnership did a study here in Texas and we have about 2 million undocumented workers. And if you enacted it here and if you can magically remove 2 million workers from the state of Texas or 250,000 workers from the Houston area, that would be an economic disaster and it would make our current economic recession look like a small blip. You would have huge industries that would go out of business: Construction industries, hospitality industries, agriculture. It would have a rippling effect

through the banking industry. So I think it is bad policy. I doubt if it will ever go into effect. There's been one positive side of that, and that is it spurred the logical conclusion that we should not have 50 states and many municipalities coming up with their own immigration laws. This is a Federal problem. And the real question is why hasn't Congress enacted comprehensive immigration reform at a Federal level? That's where the action should be and to the extent the Arizona debate helps spur Congressional action at a Federal level, maybe it will serve some good purpose.

ANDROVETT: *George, Jerry, isn't that one of the underpinnings of this? I know we've heard it in Farmers Branch, Texas; we've seen it in Arizona, local officials expressing frustration that: Hey, we're trying to achieve the solution because the Federal Government won't.*

WILLY: Yes. I think the Federal Government has failed in successfully making efforts to reform immigration. Therefore, the local governments, the state, the Farmers Branch in Fort Worth, have tried to do what they think is the right thing, but unfortunately that's caused a lot of trouble. And I think the Arizona law is going to cause even more trouble because it's statewide — already a number of Arizona city governments are starting to talk about how it negatively affects their ability to enforce law in their jurisdictions. The law just doesn't take into account the practical ramifications as it filters down

to the front line enforcers. It's a knee-jerk reaction born out of frustration, but it's not their purview. I serve on the National Advisory Council of the Asian American Justice Center, and we are filing an amicus brief, along with some of the lawsuits that have been filed, basically challenging the legality of this attempt here. But ultimately, I think this Arizona state effort is going to fail, because I don't think it's going to pass constitutional muster. It clearly is in the domain of Federal law, and I don't think the states can usurp it. There are some arguments being made that the 10th amendment somehow allows them some of these powers, but I don't think it does. Moreover, the real root of the immigration problem is two-pronged. On the one hand you have enforcement issues, but on the other you have businesses that have a real need for workers, specialized workers, and can't get them. It has to be an equally two-pronged solution. This is not that solution. For my part, yes, we're going to make noise and do what we can do and then attempt to block this in every point that we can.

REDMOND: I agree, the Federal Government has not done enough with respect to this particular issue. However, as we all are aware, the Federal Government has various laws in effect, which are designed to determine the employment verification of an individual and whether the individual is at least authorized to work in the United States. Unfortunately,



I do not believe there is one particular solution to the U.S.'s immigration related problems. Arizona's solution is obviously a little broader than what is necessary and raises several issues regarding the constitutionality of the Act. I think the Federal Government needs to take some action, and employers and business owners have requested that action be taken. I think that is why states such as Arizona, who already had a previous E-Verify law in effect prior to this recent enactment of the new law, and other states, such as Mississippi and South Carolina, have enacted different types of immigration compliance laws in an attempt to solve the problem with respect to employment authorization verifications. I am not sure that the Federal Government can do anything, short of profiling individuals, to determine whether Joe Blow who is operating a vehicle is actually legally authorized to be in the U.S., without facing a challenge to the constitutionality of any such law. I believe this is the most damaging portion of the Arizona Act, in that it creates the assumption that people of various ethnic races may or may not be authorized to be in the United States. In my opinion, not even the Federal Government has the power to institute such an act without the constitutionality of such a law being challenged.

ANDROVETT: *One last question about the Arizona law: In all the news coverage there is a lot of detail focused on what law enforcement authorities can do under this provision. What you don't see as often is coverage about language. Throughout the various subsections of that statute is this language: "That authorities may not consider race, color, or national origin in implementing this subsection, except to the extent permitted by the U.S. and Arizona Constitution." And then later in the same bill there is language that: "There is not a presumption not to be an alien, an illegal immigrant, if they carry a valid Arizona driver's license, a valid state nonoperating license, tribal enrollment card, valid state or government ID." So in light of that language, why is this law not okay constitutionally?*

FOSTER: I think they put that in there obviously trying to save the statute. Recently the sheriff of Pima County asked, as a practical matter, what is the reasonable

standard for determining someone appears to be out of status. And so it has to be based upon appearance, upon race, upon level of your income and whether you look prosperous or not. The other thing that's not been recognized is Arizona has effectively criminalized what the Federal Government has treated as a civil offense. As my colleagues know, very rarely would someone in an undocumented status be prosecuted criminally. And so the big city police chiefs, the sheriffs, except for one notable sheriff in Arizona, really do not want that additional responsibility. If they arrest someone for a criminal violation that they determine to be in undocumented status, they are already turning them over to Immigration. Now, if being in undocumented status is a criminal offense under Arizona law, they will have to detain them and prosecute them under Arizona law, a much bigger burden that they do not want.

WILLY: The provision that you just read was the amended version of the bill. The original bill that was signed by the governor did not have that language. It's a week later after all the shocked reactions that they came up with some of this foolishness that could skirt around the constitutional issues. And then the Governor resigned that bill. Obviously, there are grave problems. I really don't think anyone is looking at this legislation as if it's going to get passed or enforced, but just the fact that it rose to this point, it is a problem on a number of levels and for a variety of constituents. Yesterday there was some news coverage of the religious leaders across the country rising against this bill almost uniformly — the evangelicals, as well as the Catholic and the Episcopalians — all of whom were saying that this law should not be allowed to be enforced. So I think there's a ground swell of reaction to this. And the question at this point is will the Federal Government do something and when. And I see President Obama beginning to address the issue. He spoke yesterday after the Bishop of Los Angeles spoke. So I believe that there's going to be some movement, but let's hope it's in the right direction.

ANDROVETT: *The President suggested that Congress should move within the next six months, which politically would be pretty*



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tough. It does bring to mind in the health-care reform debate and one of the failings for many people was: What does this reform look like? Now, with immigration reform, what is that going to look like if it ever makes it out of Congress?

FOSTER: What's contained in immigration reform is no big secret. The working parts of that became known as "comprehensive" and it really goes back to the 2000 campaign. And this was something that was pushed by President George W. Bush. Most people do not realize that on September the 10th, 2001, the most important domestic policy initiative and foreign policy initiative of President George W. Bush was comprehensive immigration reform. He had just hosted a state dinner for President Fox. By the way, President Obama will host a state dinner for President Calderon on May 19th. So we're coming full circle. And so the morning of September the 11th, we were going to have comprehensive immigration reform. What was going to happen then is what's contained in the Schumer/Graham Conceptual Proposal for Immigration Reform. The Senate is where it has to start again. Its basic components were in the 2006 bill that passed the Senate. You have to address it at the work site. Ninety-nine percent of all the people come or stay here illegally do so for employment. And you can fix that at the work site. The failure of the '86 reform act was that Congress blinked and that the document that allows us all to establish that we're work authorized is the Social Security card, the same card as was printed in 1934. So the most basic part of comprehensive immigration reform will be to upgrade that card. Effectively it will make it a national ID, but we can't call it that politically. So it will be the Social Security card that will be upgraded so that employers can verify on the spot who is authorized. Right now our biggest defense against illegal immigration is employment verification, but anyone can run around that today by simply going to any flea market and getting a card that looks reasonably genuine on the face. That's the standard. The second part is we have to have a workable temporary workers' program to have circular immigration. Congress also failed to do that in '86. Senator Simpson said to me after the passage of the '86 act, we would never again have a single undocumented worker because he



thought everyone was going to be verified. No one would work illegally. But as the economy grew, there was no mechanism by which people could come in legally. Most Americans don't get that. When people say "Go back and get in line," there is no effective legal option by which people can come in legally and do low-skilled work. So we need a viable temporary workers' program so that we maintain circular immigration so people can work, go home, and maintain their family relations. Finally, you have the big, difficult issue is how do we address the 12 million? We have states like Arizona trying to criminalize that on the erroneous assumption that somehow 12 million people are going to walk back to Mexico or Central America. It will never happen. We're not going to remove 12 million people. If we could, it would be a disaster. So what's contained in comprehensive reform would be a provision by which undocumented workers would be required to register, in exchange for which they do not get citizenship, they do not get a leg up for the legal residency. They get an interim, temporary status that can be extended only by paying back taxes, paying a penalty because you violated the law, and to satisfy other political demands, registration, proof of English capability or registration in an English language class, probably also registration in a civics class and extending the temporary status only by proof of compliance. Those elements are well-known. The real problem isn't how to fix this. And more border security is not the only answer. Each administration since

Ford has more than doubled the border patrols. We actually are not fencing people out; we're fencing them in. And so the real problem is not what needs to be done legislatively, it's getting the political will to do that. If we don't pass comprehensive immigration reform, we're going to have other states and municipalities all trying to fumble around and deal with this issue.

WILLY: I was on a briefing by Louis Gutierrez, the congressman from Chicago. He introduced a bill on December 13th, 2009, which was supposed to be the blueprint of where we were going to go. It's a very generous bill, obviously in all what's there, but there were some things in that bill I think that would be interesting for us to look at. Charles just kind of ran down a list of those. But I think in general what came out of that bill and the thinking there was, number one, of course we have to stop illegal immigration. That's a given. We have to stop that. We're going to have to have strict borders. We cannot have the porous borders that we have had for so many years — it's a clear security risk. But once that's done, we have to look at the types of skills that we need. We obviously need unskilled workers as well, but right now we are losing skilled people at an enormous rate, and that's a major issue. There are fewer skilled folks coming into the United States because of our immigration system right now. We are not attracting the type of people that we used to attract in the good old days. The Ph.D.s, the Nobel Prize winners, the artists. All

of those folks are having great difficulty coming here, and sometimes even if they can come here, they don't want to come here because they're afraid of how they are treated through the process which can be very formalistic and very unforgiving in terms of how someone fits into certain criteria. So we're going to have to facilitate a more attractive option for the best of the best, and if we want the United States to be what it used to be, we're going to have to begin to bring those folks again. Today, several fine industries are led by some of the immigrants that came and gave us what they brought from countries of origin. We are losing these people to head the next generation of innovation, and we must stop that bleed. The other thing is we're going to have to facilitate students coming in. And that portion of reform also has had some difficulties. I think the consular folks are now a little more favorable towards student applications, but particularly after September 11, there was a huge shut down on them — which dried up a rich source of income and talent to our universities. So there are a slew of things that we need to deal with. And to answer your question, what will the new bill look like, I wish I had a crystal ball, but it most certainly is not going to look like Mr. Gutierrez's bill. That's a very generous one. But I think it's going to be a sort of compromised position between Gutierrez's efforts as well as the version Schumer and Graham are putting together, but I think Graham has dropped out after the health care wrangling. I think there was an outline that's been circulated by Senator Reid, Senator Menendez, and Senator Schumer, which the President has said he liked. So we'll see. We're all going to have to contribute today in whatever ways that we can. But what is important is that we're going to need the reform, and we're going to need it fast.

REDMOND: I agree with you. I don't think immigration reform will happen quickly, unfortunately. I do think the Federal Government has, in the past, attempted to institute laws, which allow professional and skilled workers and business visitors into the country. There are caps associated with the number of individuals that are allowed into the U.S. under an H-1B visa. Dealing with the

issue regarding illegal immigrants who are in the country and who are out of status, whether they entered the country illegally or whether they have remained in the country beyond their status is a continuing issue. However, I believe a larger issue exists regarding how the U.S. grandfathered in or deals with individuals who have been in the United States for multiple years and what relief it provides these individuals who are here working and attempting to contribute to our economy through their labor. Additionally, in light of the recent healthcare reform bill, I think discussions regarding immigration reform will likely increase. The current number of health-care workers available to provide care to patients is limited. This number will continue to decrease as the need for more nurses and doctors to care for the additional patients who will be allowed health insurance coverage in the coming years increases. As a result, I believe the Federal Government will be forced to face the issue of immigration reform sooner rather than later. Whatever reform is instituted will have to address several issues including, ensuring that unauthorized individuals who are contributing to our society are provided the same basic protections under the law that U.S. citizens are given, simply because they were born in the United States. Most of our border states like Texas, Florida, California and Arizona could not survive if immigration reform demanded that 12 million people were ordered to immediately return to their home country, as that type of reform would cripple our economy, and also create new issues regarding how the U.S. protects its borders and prevents these individuals from attempting to return to the country. As a result, I do not believe an immigration policy similar to that in effect in Arizona will ever be a part of immigration reform instituted by the Federal Government.

ANDROVETT: *Charles, last quick question on this: Nancy Pelosi has been in the news lately saying we need presidential leadership. If I were President Obama, I would probably be saying, "Thanks a lot, Nancy. I really needed that." You spoke to Nancy Pelosi in the last week. Can you offer any insights into what she perceives is likely to happen? There's a lot of talk in the press that something has got to come out of the Senate, not*



Jerry Redmond is a senior associate in the Houston office of Conner & Winters, LLP. Redmond concentrates his practice on labor and employment, immigration, and various areas of litigation defense. His experience in representing corporations in labor and employment includes the defense of discrimination, harassment, retaliation, and FLSA claims, traditional labor matters filed under the NLRA and union grievances, OSHA matters, trade secret and non-compete disputes, and ERISA litigation. He also counsels and assists corporations and individuals with immigration matters, including I-9 and E-Verify compliance issues, internal audits, government investigations, preparation of compliance programs, obtaining employment, investor, and family based visas, including temporary nonimmigrant "work visas" and permanent immigrant visas (commonly referred to as "green cards"), and represents individuals in deportation proceedings. Redmond was recognized by *Texas Lawyer* as a "Texas Rising Star" in 2005 and 2006.

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the House, but what's her take on it?

FOSTER: Several of us with the Americans for Immigration Reform met with her in her private conference room in late April. We previously met with the White House and with leadership of the Hispanic caucus. But what struck me in those meetings was just how flexible they were. They want Republican support. We're not going to have a House bill until the Senate takes action. And it appears that the Senate may try to make an effort like they did on healthcare without any Republican support, hoping that it will pick up Republican votes as they go. But what struck me with Ms. Speaker Pelosi is just how open she is in getting a legislation passed. They're willing to make a number of compromises to bring Republicans on board on the big, most sensitive issue for the Republicans, and that is: Will this legislation create a lot of Democratic voters? And we talked about how that language could be tweaked to satisfy Republican members of the Republican delegation.

ANDROVETT: *In the news coverage and the political debate, the focus is often on the illegal — not the highly-trained worker but the more menial jobs that no one else will take. One thing that I'm hearing in this conversation is: I'm the employer. I want to attract and I want to retain excellent employees. And maybe they were not born in this country, but I want to do that right. And, oh, by the way, as it seems that our government is becoming more intolerant, I certainly don't want to do something wrong. Can the three of you identify for us the key issues that*

employers are facing/coping with, with some varying degrees of success when it comes to attracting and retaining foreign workers?

FOSTER: First of all, we have talked about the big problem being undocumented, illegal immigration. But, in fact, as practitioners, that's not where we work. We work to qualify the highly skilled because in terms of our immigration selection system, that's what works. So the first point is I want to make to employers is we do have a workable system. There are problems, but the key point under our existing legal system is an employer can attract and hire highly-skilled individuals. The big issue in recent years has been that we cap out the very provision that allows us to hire professionals, that's the H-1B non-immigrant visa, at 65,000 plus 20,000 for foreign nationals with master's degrees from U.S. universities. That hasn't been a problem in the last two years because the economy has gone down. But before that, I was saying in speeches that in America you can hire bright people just one day a year. If you did not file that H-1B petition on April 1st, given the fact there could be 140,000 petitions filed on the first possible date, you had no chance. Even if approved, you then had to wait for an additional six months before that person could come to work. And you only get a 30 percent chance of being able to hire that person. It's a terrible system. So we need to fix the numbers with respect to the H-1B. There is also a significant backlog for those who seek permanent residency as professionals under all the categories, particularly those

applicants from India and China. And then the administration of immigration law has always been a real challenge just because it's a huge bureaucracy and that if they were adjudicating petitions benefiting U.S. citizens, Americans would not put up with the level and slowness of service. But because they're dealing with foreign nationals, by and large, we have a responsive level that would not be acceptable otherwise.

WILLY: I think it will be good for us to understand how the immigration system has been set up as we practice now. There is a nonimmigrant visa category and then there's the immigrant category. And if you want to get someone quickly, then you tend to go to the nonimmigrant side and look to see whether you can bring someone over in a short time. And an immigration short time is a long time for the standard employer but, nevertheless, you're going to do something because you need a worker that can't be found in the U.S. Well, like Charles was saying, there are H-1Bs and then there is the L-1 visa, which is quite a flexible one. There are no limits to the number of L-1s that you can bring. These are intercompany transferees that depend on there being a foreign parent and either a new start-up in the U.S. or a subsidiary. And then the visas go from A to, I think we're up to V now, Charles, aren't we? These temporary visas run the gamut from family to employment to certain enforcement-based visas that aid law-enforcement officials. Some of those visas are fairly well-known because they've been used so often. The Immigration Service knows them well and, therefore, we know the parameters within which we operate. On the permanent immigration side you have two categories as well, family-based immigration and employment-based immigration. Employers will look to employment-based immigration. And there we have five categories. In those five categories you have the first one, which brings in the extraordinary ability folk in the arts, sciences, and those who are managers in multinational corporations. And then you have EB-2 for those who have a master's degree or better. And then the third category is either bachelor's degree or skilled workers. And the fourth preference is for religious workers like priests and rabbis and all of that. And



then the fifth preference is for those who have at least a million dollars to invest in the United States. So we have those five categories. And among those, I personally think, that the EB-1, the extraordinary ability folk is a great tool for employers to bring in highly-educated folk with PhDs and with the national or international acclaim to be brought in here. And then if they're even permanent residency, that would be an attraction for some of these folks to come in here and help in whatever industries that the employer is in. Recently, however, there's been quite a bit of back and forth with the Service about the level of these individuals which has created a barrier to their entry. We've done a lot of wrangling with the Service over these points.

REDMOND: Following up on both of my other panelists' comments, the H-1B visa category is obviously the strongest category available for highly-skilled workers, to be admitted into the U.S. In the past, employers and lobbyist groups have complained about the caps associated with that particular visa category. And —

ANDROVETT: *Jerry, just real quick, why is it the strongest, because there's more availability?*

REDMOND: Well, there's more availability, and it is employer sponsored. Additionally, this visa category provides for something called dual intent, which allows an employee to file not only for a temporary work visa status but also to file the necessary paper work to become a permanent resident. Furthermore, an individual on an approved H-1B visa has the freedom to change jobs without having to leave the country or apply for an adjustment of status. H-1B visa holders can change jobs and have another employer sponsor them, without being subject to the H-1B visa cap or having to repeat the entire process required to obtain this visa status over. As a result, the H-1B is attractive to employees and employers, as it assists employers with obtaining highly-skilled workers. However, there still exists a problem with respect to unskilled laborers, in which the H-1B category may not assist employers. Particularly in manufacturing, industrial and oil and gas drilling industries employers are often faced with balancing the issue of compliance

with immigration laws against maintaining their workforce, which may consist of individuals who are not employment authorized. It is this category of individuals where it is sometimes difficult to figure out how to get these individuals into an employment-authorized status without affecting an employer's workforce. As you mentioned earlier, anyone can go down to the local flea market and obtain a Social Security card and present it to an employer to establish their employment authorization. Since employers are not required to be document experts and analyze the documents presented to determine whether they are what they purport to be, this is a frequent occurrence in highly industrial employment settings. As a result, these employers continuously grapple with the issue of how they deal with these employees and how they ensure that they are in compliance with federal or state immigration laws and how they prevent their compliance with these laws from adversely affecting their workforce or operations. These are difficult questions, and the types of questions I receive often from employers. I always counsel employers to err on the side of making sure that they are in compliance with the relevant immigration laws. This issue also makes the H-1B category more attractive to employers, because employers are assured they will be obtaining highly skilled workers, and the prerequisites required to obtain this status helps ensure that the employee is employment authorized.

ANDROVETT: *Do you find in your work that government regulators are more vigilant when a company is employing unskilled foreign workers or is the scrutiny the same if they employ also highly-skilled foreign workers?*

FOSTER: You're under greater scrutiny if you're in an industry that has large numbers of low-skilled workers. A construction firm is much more likely to be subject to an I-9 audit or to an investigation than a university or an IT company. An IT company may be subject to an investigation in terms of their H-1B employment practices and an audit of the labor conditions attestations, but Immigration and Customs Enforcement is now very focused on I-9 audits in industries which historically have had large numbers of undocumented workers.

REDMOND: Yes, the current

George R. Willy is the founder and principal of the firm of George R. Willy, P.C., a full service immigration law firm based in Texas. He graduated from South Texas college of Law in 1984 and was admitted to the Texas Bar in 1985. Willy's specialization in immigration began immediately after law school. Over the course of 25 years, he has built a five-lawyer firm now situated at the Copperstone Tower in Sugar Land, Texas. Under Governor Ann Richards, Willy was appointed to the Texas Department of Commerce, and he served the Clinton administration as an unofficial advisor on South Asian and immigration matters during numerous visits to the White House. As an advisory board member of the Asian American Justice Center, he continues to work with the White House and Congress for immigration reform. Willy is an AV-rated lawyer and a Fellow of the Texas Bar Foundation.

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Administration has increased the number of I-9 audit notices that are issued to employers of both skilled and unskilled worked. I-9 notices basically advise an employer that ICE intends to audit their I-9s. The employer is generally given three days notice of ICE's intention to audit its form I-9 documents. Since July of 2009 ICE has issued over 2000 notices to all types of employers from the manufacturing to the financial services industries, which are employers you normally wouldn't expect would receive an inspection or audit notice. The audits are designed to crack down on violations by employers who either fail to verify the employment authorization of their workers or who are harbor illegal aliens. The current Administration also has initiated H-1B audits, directed particularly to employers that appear to be H-1B dependent employers. Unlike I-9 audit, employers are not provided with three days notice prior to ICE or INS initiating an inspection or audit of their H-1B documents. ICE simply shows up at the employer's worksite and advises the employer that it wishes to inspect the employer's H-1B documentation immediately. As a result, employers need to ensure not only that their I-9's are properly prepared and maintained, but they also need to ensure that their H-1B documentation is correct, current and properly maintained so that they are prepared in the event they are audited by ICE.

WILLY: I think there was another component to your question and that was how do immigration examiners look at applications for highly-skilled workers and unskilled workers? And let me address that. I think within a set of parameters, and if you comply with the regulations and the policies that they have at the time, the examiners tend to treat either of those fairly. However, I have noticed that when there's a shift in the economy, like the recession we are in now, that there's a tendency to have greater scrutiny on, for instance, at this point, there's enormous amount of scrutiny on H-1Bs because unemployment rate is at 9.7. Clearly they wonder why we need foreign workers here. So, the examiner wakes up in the morning and his son-in-law lost his job and he's coming here to get somebody else's job. And I think that affects him.

So to that extent there is this shift and you can see the shifts going on. However, clearly the Immigration Service favors the highly-skilled folks. Therefore, there is a tendency that if you clearly prove that someone is highly skilled they will quickly turn around and approve. And clearly on the unskilled side there is this little hesitation in making sure that we do need these folks because after all, that's really not a favored category.

ANDROVETT: *Jerry, I want to just go back to the I-9 audits for a second because a lot of the employers really wrestle with this. I know, for example, some law firms sometimes advise their clients to let them do a mock audit, get in, and see what they find. When you get the letter that says, "Hey, we're going to come down for an audit," any specific protections that employers should utilize or any strategies that they should implement immediately if not sooner?*

REDMOND: I would say sooner. But if employers don't have a compliance program in effect once they receive the audit notice, then my advice would be to immediately contact the individual at the company who is responsible for handling I-9s, and contact the company's immigration counsel and request that counsel come in and perform an emergency audit of the company's I-9 and identify all potential problems so they can be corrected prior to ICE's visit. The audit can also be performed internally by the individual

responsible for handling I-9s, along with the assistance of counsel. In performing the audit, the employer should gather payroll records for individuals currently employed, so the company is aware of whom it has valid I-9s for and those individuals which they do not have valid form I-9s. Once all form I-9s are gathered, they need to be reviewed to ensure that there are not any technical or procedural problems with the I-9s. The fines for problems with I-9s range from a one hundred to, I believe, \$1000 per violation for minor errors and the fines are even larger for other errors, including failure to prepare an I-9 for an individual. If you are a small employer, it is easier for you to gather your I-9s and determine what issues may exist with the form I-9s prior to ICE's audit. Once you have performed an internal audit or had your counsel conduct an internal audit, any issues with the I-9s should be corrected and the employer should note on the form I-9 that the correction was made pursuant to a self audit so that ICE is aware that the employer recognized the problem and took the proper measures to correct the problem. I also suggest that employers should not allow ICE to speak with its employees regarding I-9s or other issues, without a representative from the company present when the interview occurs. Once the audit has concluded, ICE will issue its findings, which vary depending on whether fines will be associated with the I-9s violations.



Accordingly, so that employers are prepared for potential audits of their I-9s, I recommend that employers perform a self audit of their I-9s at least once a year to ensure they are in compliance with federal law. When an employer is performing an audit and an issue is found regarding the information supplied by the employee, remember the law does not allow employers to request that an employee provide a specific document to verify their employment authorization. The employee has the right to provide an employer with whatever list A, B or C document in their possession that verifies their employment status. Therefore, employers need to be vigilant in auditing and preparing their form I-9s.

ANDROVETT: *One thing that intrigues me and, Charles, maybe it was you that mentioned it, was it sounds like there's a separate track for foreign investors. And I see from time to time press releases that pop up in municipalities where they're talking about setting up an EB-5 regional center. Talk a little bit about that.*

FOSTER: Yes. This has really been a very important development in immigration law. And to put that into context, most Americans and most lawyers do not realize just how difficult it is to legally immigrate to the United States. And there's a lot of push factors. We know about the terrible conditions in Mexico. There are people that live in China that have made a lot of money that feel insecure in their part of the world, and many of them either for themselves or their families would like to immigrate to the U.S. And let's just imagine this person has a lot of money. I think every person would normally assume, well, what's the problem? This is an educated person with a lot of money. But it may be almost a legal impossibility for someone who would not have, as George outlined, the family ties, they may not have the traditional offer of employment. After all, they're living in China or Mexico or Iran or Venezuela or some other spot where they may want to relocate to the U.S. So when they look at legal options under our immigration system, they actually may not have any way to legally immigrate here. We're representing many wealthy Mexican foreign nationals who have come here for years as tourists, and all of a sudden now they're having

their tourist visas canceled because they're no longer viewed as tourists. They have a cat and dog and car and kids in school and are spending most of their time here. So the investor program, for some, if they have the money, is very good or only legal option. The basic requirement is \$1 million dollars in a new enterprise, creating ten jobs. And let's just say you have all the money in the world. That's still a big problem and we've gone through this hundreds of times. And if you're sitting in Beijing or Mexico City, and you're trying to run your business there, you've got a mental block as to how you go about creating a business, employing ten full time jobs, keeping them fully employed, and not losing that business. Congress first created the investor program in 1990 and in '93, EB-5 Regional Centers so that a business enterprise can apply to the U. S. Citizenship and Immigration Service to get approval of a business proposal that would allow you to create an EB-5 Regional Center that allows you to count both direct jobs and most important, indirect job creation. You can also establish that the enterprise is located in an area in a targeted economic zone, so rather than having to invest at the \$1 Million level, you can invest at the \$500,000 level. There are a number of these regional centers; about 80 of them have been set up. Our firm has set up the only one that's actually been approved in Houston, but we're in the process of setting up a number of others. With the creation of the EB-5 Regional Centers, many with a proven track record, what you can now do for the first time is tell someone: If you have \$500,000, you can qualify for residency for yourself and your immediate family, your spouse and your children. Now, the big problem is the investment risk. And we're very concerned that so many of these Regional Centers have been set up that there is considerable risk in terms of how you handle that aspect as an attorney. Do you recommend a particular EB-5 regional center? If so, what risk are you assuming? We tend to work with investment advisors because we don't feel like we have that competency. The problem with investment advisors is this is a relatively small pool that know very much about EB-5 Regional Centers. But there are a few investment advisors that focus



Mike Androvett is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. He can be reached at 214-559-4630 or mike@legalpr.com.

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on EB-5 regional centers. But it's still a very good tool when you're representing someone who cannot otherwise qualify through family or a traditional offer of employment or who do not really want to invest in their own business plan where they create that number of jobs naturally.

WILLY: I just wanted to add something to that. Matter of fact, there's one here in Houston. And Charles represents them. And the developer is a good, old friend of mine as well. But I think recently since 1990 — and I was involved in that with Governor Richards when she was alive — and at that time it was almost impossible to get one of these things through the Immigration Service. They would ask questions as to where the money came from. And, it was just impossible the number of questions that they asked. And finally the investor just gets tired and then just walks away. But now it's been streamlined, and these new products that are out there and new programs that are out there have really helped. I think finally there's progress at this point.

ANDROVETT: *Just a quick question on the H-1Bs. I know in previous years Congress would authorize an expansion of the availability to over a hundred thousand or so. Do you see that in the offing or does it really take a major change in the economy before there's a political will to do that?*

FOSTER: I was very much involved with the several prior expansions. The 65,000 was set by Congress. And it was increased to 125,000 and then 195,000 under the Clinton Administration. All the negotiations were with John Podesta, who was his Chief of Staff. There was a cost to that because we kept on adding additional filing fees that would go to a training fee that would satisfy some labor demands and a separate fraud fee. That 195,000 number in the H-1B sunset, but we were going to have a routine extension of it. And then 9/11 came along. And after 9/11/2001 the collective judgment was made that you did not want to bring up any immigration bill before Congress out of fear that whatever they were going to do, it was going to be more bad than good. So since it sunsetted back to 65,000, we've not been able to be in a political position to push a further extension. That will not be passed by itself as a single purpose bill.

It will have to be part of a comprehensive immigration reform. We're not going to have any good immigration legislation until we deal with all of these issues. By the way, the reason we often focus on the H-1B non-immigrant visa program is we, as Americans, politically say we want people to legally immigrate to America. We want them to come in legally. And then someone will turn around and say: Let's get rid of the H-1B program. But, essentially the H-1B program is the primary entry point into America unless you have a U. S. spouse. That's really it. There are some exceptions. In Congress you still have people stand up and say, "We want people to immigrate legally, but let's eliminate the H-1B program."

ANDROVETT: *Now, is there a provision in H-1B that this person coming in to fill a job is filling a job for which the employer cannot find a U.S.-based comparable employee with that training?*

WILLY: Well, there is no requirement that you test the market for an H-1B employee; however, I think in the LCA there information that you have to say that you could not find a U.S. worker for that position. It's just a statement by the employer, unlike the labor certification process, the for the permanent employment process.

ANDROVETT: *And how much work does an employer have to do to meet that standard?*

WILLY: For the H-1B, the employer just has to say that he has tested the market. And I have not seen in my experience an immigration service going out there and checking the records to see if he, in fact, did test the market for it. But unless the other panelists have any other views on that. But generally I think the H-1B process, as Charles said, is one of the most used visa category. And I think John Cornyn, our Senator here, had a good proposal during the reform bill that to let the market sort of set the limits of how many visas we were going to issue based on the demand the previous year, and set the numbers based on that. That proposal made the most sense to me. We went up to 195 during the dot-com boom. And then, of course, it was sunsetted, and then we went back to 65,000. But then it's stuck at 65,000. We should be able to, at least, have some flexibility on that. And I think

we need to have a Congressional effort on that area.

REDMOND: I think employers who are looking to hire H-1Bs should be aware that in the last two years the cap on the number of H-1B's allowed has not been met with in the first day or two in which filings are accepted. This past year, it took the Federal Government until December of '09 to reach the cap, and there have been very few H-1B filings this year since the period to file H-1B applications began on April 1, 2010. Employers who are considering H-1B candidates should also look to student workers who are here in an F-visa category and who are performing service in an OPT status and desire to adjust their status to an H-1B visa and obtain an H-1B visa, because those are attractive candidates as well. There are other visa categories, which allow individuals to become employment authorized that are not as regularly used as H-1Bs, such as the TN visa category and the E-3 visa category, which is specifically for Australian individuals. Additionally, as I referenced earlier, if you are healthcare employer, although an H-1B visa may not apply to a nurse you wish to hire initially, Congress has establish different ways in order for nurses to qualify for an H-1B if they are permanent residents, which allows these individuals to become employment authorized and seek permanent residency under the dual intent provision. This also applies to doctors. If an employer can get a doctor into the U.S. under the J-1 waiver program, then the doctor can file to adjust the doctors status, to an O-1 or an H-1B category. I think we will see a lot more of these types of filings being used in the future, as a result of health care reform.

AUDIENCE MEMBER: *I would like to have a little more information regarding the ED fine exemption or ability for someone to come in and get a resident status. The investor, is it sufficient that he's just a banker and loans money to either a startup or any existing business? Must he have an ownership relationship with that business? May he be a limited partner in that business? Must he actually be an active participant living within the same city as the business?*

FOSTER: The advantage of this is, yes, you can be a limited partner. You do not have to live in the same city. It is about

as close as you can get to being a passive investor. And under certain conditions — you've got to be very careful — the funds can be loaned, but there are a number of restrictions on that. So that provision is for individuals that have the money and that really do not have any other ties in the U.S. Sometimes it's the only option. And it's a very attractive option because in some other family or employer preferences we're talking about, there are backlogs under the quota of three, four, five years or longer. With the investor preference there's no backlog at all. We've had some of these petitions approved in as little a time as three or four months. So it's an attractive option, but it's also very risky because you have to remember if you have a client and this investment goes bad and the entity goes into bankruptcy, who do you think they're going to sue? So you've got to be careful how all this is structured.

WILLY: I just want to add a quick comment to that. I think you also wanted to know if individuals gave their money as an investor and then they bought or started a business and then they created the ten new jobs that they needed to create, under that version of the bill, of the statute of the regulations, the entrepreneur will have to be actively involved in the operation. And, unlike in the regional districts where you just throw the money in and you can go wherever you want. But if you are actively investing, then the law requires you to be involved in the operation and create the ten jobs in the next two years, and so forth, so on. So you have some obligations along the way. So you need to be careful with that part as well.

AUDIENCE MEMBER: *Well, I mention it because no one can borrow money these days and all the businesses out there, when they go to their bankers, they can't get funds. I've had quite a bit of experience with this. And I'm really kind of anxious. So I'm wondering if this is not a great opportunity for some businessmen to get some capital for their business.*

WILLY: Absolutely, I think it is. It has worked. There are several of my clients who own hotels and are building new hotels, and this is how they're funding it. They are bringing in folks with money, and they're giving them a controlling interest of that hotel. And they're expanding based



on foreign investment.

AUDIENCE MEMBER: *You said controlling interest —*

FOSTER: No controlling interest is required. In fact, as long as you can show the document that you put up the \$1 Million, unless you fall into a high unemployment area, which is by the way, very hard to find today because it's got to be one and a half times the national level of unemployment and when it was at 4 percent, showing 6 percent was easy. Now, trying to show 15 percent unemployment is very difficult.

AUDIENCE MEMBER: *I have a question that's kind of geared towards the smaller businesses. And I apologize if this is a basic question. But, is there a mechanism right now for an employer curing an undocumented worker? For example, they discover somebody is EWE. I understand you can use a 601 waiver, but that requires a qualifying relative. So if you're a small business owner, wake up and find you have a great employee but he's undocumented and you actually wanted to cure it up and he doesn't have anyone else here in the U.S., is there anything that can be done?*

FOSTER: You've got to go look through all those options. Family options are probably about the only thing that can work. If a person is already in proceedings, depending upon a variety of issues, you can look at cancellation of removal, but you never want to put a person in proceedings to try to get that discretionary benefit. There's always hope in the

terms of Congress passing comprehensive immigration reforms. But the old saying, "Do no harm as an attorney," when you have employers with employees like that, you want to be very careful. We often see attorneys that are not that experienced trying to follow paths that we know are going to end in a big dead end and that it could actually require the foreign national to commit fraud. For example, I've seen people working illegally and then someone will say: Well, we can qualify that person for an H-2B seasonal non-immigrant visa. Well, that's a terrible strategy, because that would require the person to go back, apply for the visa, and they're subject to a ten-year bar. So the basic answer is there may not be much you can do because why? Because Congress has failed to enact any reasonable immigration legislation that allows low-skilled workers. What is the annual quota for low-skilled workers that are coming here that are here to work in positions that are really indefinite? No one in the U. S. knows. The answer is 5,000 a year. We have an estimated 12 million undocumented workers who, even if you go through the permanent process, proving the unavailability of qualified U.S. workers, which is required, that's a dead end because of the back logs and the quota and the ten-year bar. So the best thing to do often is to do nothing.

AUDIENCE MEMBER: *As a quick follow-up, what advice would you guys give to employers of your clients who come in and*

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discover this problem? I mean, what penalties can they face realistically from ICE?

REDMOND: I receive this question quite often. Outside of the family-based visa category, there are not many avenues available for unauthorized workers. The advice I give employers is to evaluate their work force, and especially if you're a small employer, determine what type of effect this is going to have on your workforce once you make the decision to discharge this individual because they are not in an employment authorized status. There have been instances where I've counseled employers and declined to work with them because the employer has taken the position that they will continue to employ unauthorized works and wait until an actual notice is received before taking any action. The fines employers may be subject to include not only civil fines, but criminal fines as well. One such fine is a charge under RICO, a statute generally designed to prevent organized crime, which was expanded years ago to include violations of immigration laws, resulting in employers being subject to RICO actions for having what is considered a pattern and practice of employing unauthorized workers, which results in the wages paid to these employees affecting the wages that are paid to employment authorized employees. Therefore, employers should be diligent in making sure that whoever is looking at its I-9s or E-Verify documents, is carefully reviewing documents, obtaining the proper information and preparing the I-9s properly.

Because as I mentioned earlier, the fines issued are per violation and some are per employee, employers should not take the position that, oh I might receive a \$110 or I just received a thousand dollar fine for an I-9 violation, because those fines are for a single violation and the amount of fines employers could be subjected to will increase if there are numerous violations. Finally, no employer, whether it is a supervisor or the company, wants to be faced with potential RICO charges and the potential for any type of criminal sanctions that go along with it, including jail time.

WILLY: I just want to add just a ray of hope to your query. And that is sometimes if you question these folks, you know, well enough, and examine their family trees, sometimes you can find that, you know, one of the parents may have become a U.S. citizen at some point. And if it happened before this employee was 18, then there are some things you can do. Also you need to ask questions about whether the parents have filed an application prior to April 30th, 2001. If that is the case, the employee could benefit from the 245(i) provision. And then that way you can then start a labor certification process for that employee. So there are a few things, rare, few options there might be. And I didn't want you to think that everything was completely hopeless on that.

ANDROVETT: *I'm struck over the last 90 minutes at how limited access is for legal immigration into this country. How about going the other way, outbound, what do you face with U.S. workers wanting to work and settle in other countries? And I realize it's an unfair question to ask you with three minutes.*

FOSTER: We have a very large outbound/global immigration section. And that's a significant part of what we do. We all have been joking among ourselves that our most difficult clients are not necessarily the French, but American citizens because as Americans we're accustomed to traveling the world because we're primarily visa exempt. And that's true. We can go there as visitors. But here's the key point: If you're being relocated to Tokyo or Brussels or Beijing or London, those countries have their own legal regimens that are often just as strict or more restrictive than

the U.S., to protect their professional workforce. So you have to go through a legal process. We have the third largest Consular Corps in the United States here in Houston. The legal process could start with the Consular Post here in Houston. It could start in the appropriate agencies abroad. As a matter of practice, we have a number of lawyers often with foreign law degrees where we try to do all the legal work. We have corresponding attorneys in most of the major jurisdictions where the oil and gas industry is active. So you've got to evaluate those cases on a case-by-case basis.

REDMOND: I agree with Charles. You do have to evaluate that on a case-by-case basis. There are some very strict regulations in various locations, such as China, Algeria, Afghanistan, and Russia, that an employer has to meet in order to get a U.S. worker admitted to work in a particular country where it maintains operations. The process can be a little erroneous and immigration counsel is needed to assist in making sure that the employee has the right paperwork and right documentation in order to enter the country. I currently have an employee who is unable to return to the U.S., because he is now considered to be in the foreign country in an unauthorized status simply because the company failed to file the proper paper work prior to sending this employee abroad to work. As a result, he is stuck in a foreign country and we are trying to determine the proper manner to get him back to the U.S. As Charles stated, it is much easier to get a worker into the U.S. than it is to get U.S. workers relocated to a foreign country to work, because U.S. immigration laws are a little more lenient. ❖

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