July 2013 Immigration Alert

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By Robert S. Groban, Jr. and **Matthew S. Groban**

I. SCOTUS Holds DOMA Unconstitutional

On June 26, 2013, the Supreme Court of the United States ("SCOTUS") held that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. *United States v. Windsor, Executor of the Estate of Speyer*, No-12-307 (U.S. 2013). *Windsor* involved a federal estate tax refund claim by the survivor of a same sex-marriage recognized as valid by the State of New York. Ms. Windsor had sought a federal estate tax exemption as the surviving spouse, but the Internal Revenue Service ("IRS") denied the claim based on Section 3 of DOMA. 1 U.S.C. § 7. Section 3 defines the terms "marriage" and "spouse" for more than 1,000 federal statutes as follows: "marriage" means "only a legal union between one man and one woman as husband and wife," and "spouse" refers "only to a person of the opposite sex who is a husband or a wife." The IRS found that it was precluded by DOMA from recognizing Ms. Windsor's status as a surviving spouse.

Ms. Windsor sued the IRS, and both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit found that Section 3 of DOMA was unconstitutional. When Ms. Windsor appealed to the SCOTUS, however, the Obama administration advised both the House of Representatives and the SCOTUS that it agreed with the Second Circuit and would not defend the statute. In response, the House voted to intervene to defend DOMA's constitutionality.

The SCOTUS found that Section 3 of DOMA was unconstitutional as a deprivation of the equal protection guaranteed under the Fifth Amendment to the U.S. Constitution. In reaching this conclusion, the SCOTUS noted that both the definition of "marriage" and its regulation traditionally have fallen under the authority of the states. While Congress has enacted discrete federal laws to maintain a uniform federal definition of "marriage" that promotes a specific federal policy, DOMA provides a broad definition that affects more than 1,000 federal statutes without regard to any specific overriding federal policy. DOMA's effect, therefore, is to deny marital status to a class of persons that certain states, like New York, have sought to protect. The SCOTUS found that this was a violation of equal protection because it interfered with New York's constitutional power to regulate domestic relations.

The SCOTUS's *Windsor* decision already has had a direct impact on immigration cases, and this impact will expand as the federal government develops and promulgates regulations implementing it. Derivative immigration benefits are available to the "spouses" of sponsored foreign nationals ("FNs") in most immigrant (green card) and nonimmigrant classifications, and as part of derivative citizenship and naturalization applications. Sorting out the ripple effect of the SCOTUS's *Windsor* decision will not be an easy task. The U.S. Department of Homeland Security ("DHS") has announced that same-sex couples can apply for immigration benefits immediately if they were married in a state that recognizes the relationship. Presently, the Human Rights Campaign has identified 14 jurisdictions—13 states and the District of Columbia—that recognize same-sex marriages. On July 1, 2013, *The New York Times* reported that the U.S. Citizenship and Immigration Services ("USCIS") already has approved a green card application for a FN who applied for permanent residence based on a state-recognized same-sex marriage. On July 17, 2013, the Board of Immigration Appeals reversed the denial of an immediate relative I-130 petition and held that DOMA no longer is a bar to the recognition of same-sex marriages for immigration purposes as long as they are valid under the laws of the State where the marriage was celebrated. *Matter of Zeleniak*, 26 I. & N. Dec. 158 (BIA 2013).

There are a variety of relationships, both same-sex and heterosexual, which may equate to marriage under U.S. and foreign laws. Also, as in the *Windsor* case, there are other situations where the marriage took place abroad but was recognized by one of the 50 states. Thus, it may be hard for the USCIS to limit any federal definition of "marriage" for immigration purposes to just these 14 jurisdictions. The USCIS has a definite interest in establishing a definition of "marriage" that will apply uniformly under federal immigration laws, and this may survive the Due Process objections noted by the SCOTUS in *Windsor*. Developing and implementing the *Windsor* decision in this context presents major challenges, and USCIS proposals are likely to be the subject of major debate and challenge given the variety of the contexts out of which these claims arise and the highly charged nature of the issue. For this reason, those that apply for same-sex immigration benefits, or even those heterosexuals in non-traditional relationships, can expect delays as the USCIS develops the guidance required to adjudicate their applications.

The definition(s) of "marriage" and "spouse" developed by the USCIS and U.S. Department of State ("DOS") are likely to have a ripple effect beyond the immigration benefits they permit. More areas of law, such as employee benefits, estates and trusts, domestic relations, taxation, personal injury litigation, and others, may feel the effect of the USCIS decision. Remember, where FNs are concerned, it is typically the USCIS or DOS that first opines on their status when deciding whether they are qualified to enter the United States based on a marriage. The USCIS decision that an individual qualifies (or does not qualify) as a spouse may influence or control determinations that employers seek to make on the same issue in other legal contexts. For this reason, it is important for employers to consider the full range of implications attached to a decision to sponsor a FN and his/her spouse for immigration benefits. At Epstein Becker Green ("EBG"), we have formed a comprehensive interdisciplinary task force designed to assist employers with these issues. Contact your EBG representative, or any of the lawyers identified at the end of this alert, to take advantage of our knowledge and experience in this area.

II. Comprehensive Immigration Reform Passes the Senate

On June 27, 2013, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act." Also known as Senate Bill No. 744 ("S. 744"), this legislation is a broad-based proposal for comprehensive immigration reform ("CIR") of the entire U.S. immigration system. Originally written by a bipartisan group of eight Senators (known as the Gang of Eight), the bill contains five broad titles that address almost every aspect of the immigration process from border security to employer enforcement. These titles can be summarized as follows:

A. Title 1: Border Security

This section of S. 744 addresses the issues of border security, border oversight, and the security goals ("triggers") that must be achieved before the provisions of S. 744 relating to the legalization of undocumented aliens can be implemented. At the heart of this title of the legislation is its enormous investment into border security, including:

- the addition of a substantial number of new border patrol agents;
- implementation of mandatory electronic exit systems at all ports;
- the addition of another 700 miles of border fencing;
- the hiring of additional prosecutors, judges, and support staff;
- the development and implementation of technological advances to monitor the borders; and
- the addition of surveillance equipment required to maintain 24-hour monitoring of the borders.

S. 744 will require $43 billion to fund these security measures.

One of the primary objectives of S. 744 is to provide a path to legalization for undocumented aliens. The bill does this by establishing a new status for them called "Registered Provisional Immigrant" ("RPI") status. Before any RPI can apply for permanent residence, however, the new security measures must be implemented along the "Southern border" (the international

border between the United States and Mexico), all employers must enroll in the E-Verify program, the electronic exit-entry system must be implemented, and at least 38,405 full-time border patrol agents must be deployed on the Southern border. All of this will be supervised by an independent DHS Border Oversight Task Force, which will consist of 29 members appointed by the President, including 12 from the "Northern border" (the international border between the United States and Canada) region and 17 from the Southern border region. This Task Force also will be charged with making recommendations on new or revised border enforcement policies and procedures.

B. Title II: Immigrant Visas

This section of S. 744 addresses the provisions of the immigration laws that define the processes and procedures for securing permanent residence in the United States. Specifically, this section creates the RPI program for undocumented aliens and also includes provisions of the DREAM Act relating to undocumented young aliens brought to this country illegally as minors.

In addition, this section creates a controversial merit-based point system that will allow FNs to obtain permanent residence by accumulating points based on their skills, employment history, and education. This system would do the following:

- replace those provisions of current law that allow siblings and the adult married children of Americans to qualify as well as the current diversity lottery;
- eliminate current family-based quota backlogs by 2021;
- allow the parents of American citizens to bring their minor children with them when they immigrate; and
- permit immediate reunification of the spouses and minor children of permanent residents.

This system promises to affect the immigration strategies of many employers that seek to attract or retain FNs.

On the employment-based immigrant side, S. 744 eliminates the country-specific quota limits on green cards that have caused enormous backlogs for applicants from larger countries, such as China and India. This section of the bill will also exempt certain highly skilled and exceptionally talented FNs from the worldwide quota and, thus, free up additional numbers for those in line. Finally, S. 744 exempts FNs with STEM (science, technology, engineering, and math) degrees from the labor certification requirement and, therefore, facilitates their path to permanent residence.

C. Title III: Interior Enforcement

This section of S. 744 addresses enforcement and requires all employers to use E-Verify, but phases in this requirement over five years depending on the employer's size. This mandatory use of E-Verify would specifically preempt any state or local laws that contain provisions relating to this process. S. 744 also creates a mandatory exit and entry system at all airports and seaports to track the arrival and departure of FNs. Finally, this section of the bill makes changes in the removal process and the legal provisions that define who is eligible for immigrant or nonimmigrant visas based on their prior immigration, medical, or criminal history.

D. Title IV: Nonimmigrant Visas

This portion of S.744 makes changes to the nonimmigrant provisions of the immigration laws, which will affect many employers. The most significant proposal relates to changes in the H-1B and L-1 visa programs. In the H-1B area, S. 744 raises the quota for H-1B visas to one that fluctuates between 115,000 and 160,000 based on a market escalator formula that reflects employer demand and unemployment data. S. 744 also places added burdens on H-1B employers by raising the lowest wage that H-1B workers must receive, requiring employers to recruit before H-1B petitions can be filed, and placing additional limitations on employers where the H-1B workers might displace U.S. workers. In the L-1 area, S. 744 places further restrictions on the ability of employers to place L-1 visa holders off site with other employers.

S. 744 also creates a new "X" investor nonimmigrant visa for foreign entrepreneurs. To qualify, the FN must invest at least $100,000 in the business, and the business must create at least three jobs over two years and generate at least $250,000 in annual revenues by the end of its second year of operations. S. 744 also creates a new "W" nonimmigrant visa classification for less-skilled, non-seasonal, nonagricultural workers, such as those typically hired in the hospitality industry. The program would be administered by a new entity, the Bureau of Immigration and Labor Market Research, which will designate shortage occupations and provide data recommendations. "W" workers would be admitted for up to three years but could seek an extension for an additional three years.

E. Title V: Youth Jobs

This section of S.744 creates a Youth Jobs Fund dedicated to creating employment opportunities for low-income youths. Additionally, $1.5 billion would be allocated to the Youth Jobs Fund and would be recouped by a surcharge to employment-based immigrant and nonimmigrant visas.

The Senate's passage of S. 744 now places the issue of CIR in the House of Representatives, where its future is less than certain. In an effort to enhance its prospects, the White House just issued a report entitled "The Economic Benefits of Fixing our Broken Immigration System" (available at http://www.whitehouse.gov/sites/default/files/docs/report.pdf), which was prepared by the National Economic Council, the Domestic Policy Council, the President's Council of Economic Advisors, and the Office of Management and Budget. According to this report, S. 744 will benefit the U.S. economy in several respects, including:

- strengthening the overall economy and growing U.S. gross domestic product;
- fostering innovation and encouraging job creation and growth;
- increasing worker productivity and protections; and
- decreasing budget deficits and providing new workers to replace an aging population that will strengthen Social Security.

It remains to be seen how the House responds as the White House and various advocacy groups urge support for this legislation.

III. Second Circuit Forecloses Back Pay and Reinstatement for Undocumented Workers

On July 10, 2013, the U.S. Court of Appeals for the Second Circuit issued its decision in *Palma v. NLRB*, Docket No. 12-1199 (2d Cir. 2013). The *Palma* case involved a petition to review an order of the National Labor Relations Board ("NLRB") that denied back pay to undocumented workers who alleged that they had been discharged by their employer in violation of the National Labor Relations Act ("NLRA"). Relying on the SCOTUS decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the NLRB found that it could not award back pay to the petitioners because the NLRB's General Counsel had stipulated that they were undocumented workers to avoid discovery into their immigration status. The NLRB did not address the petitioners' claims that they also were entitled to reinstatement due to the employer's violation of the NLRA.

On appeal, the petitioners claimed that the NLRB erred in relying on *Hoffman Plastics* because the undocumented workers in that case had defrauded the employer during the Form I-9 process, while the employer in this case had failed to satisfy the Form I-9 requirements. The Second Circuit upheld the NLRB's decision and found that *Hoffman Plastics* precluded an award of back pay, regardless of whether the employer or employee was responsible for the Form I-9 violation. At the same time, the Second Circuit noted that the NLRB had failed to address the reinstatement issue. Here, the Second Circuit remanded the case to direct reinstatement only if the petitioning employees now satisfied the Form I-9 requirements.

Palma represents the latest Circuit decision interpreting *Hoffman Plastics* to bar all back pay claims by undocumented workers, regardless of whether the employer satisfied the Form I-9 requirements in the hire, and to foreclose reinstatement unless the employees could satisfy all Form I-9 requirements. The rules in many states, including New York, appear to permit back-pay claims where the employer failed to satisfy the Form I-9 requirements when the complaining employee was hired. Thus, *Palma* appears to provide employers with additional arguments in resisting these state law claims.

IV. Seventh Circuit Finds That Form I-9 Violation Bars Religious Bias Claim

On April 25, 2013, the U.S. Court of Appeals for the Seventh Circuit decided *Martino v. Western & Southern Financial Group*, No. 12-1855 (7th Cir. 2013). In *Martino*, the employee-plaintiff alleged that the employer illegally fired him for refusing to give up an outside position as a religious pastor. The plaintiff claimed religious discrimination under Title VII of the 1964 Civil Rights Act. The employer, however, claimed that the plaintiff actually was fired because he failed to satisfy the Form I-9 requirements. The U.S. District Court for the Northern District of Indiana granted summary judgment to the employer and the Seventh Circuit affirmed. In reaching this conclusion, the Seventh Circuit noted that the employer had offered a valid nondiscriminatory reason for the termination, which clearly was not a pretext. Thus, the plaintiff could not claim that he was the victim of religious discrimination.

V. OSC Warns Employers on Release of Form I-9 Information

On May 30, 2013, the U.S. Department of Justice's Office of Special Counsel ("OSC") issued a technical assistance letter addressing questions by an employer that asked whether Form I-9 information could be shared with third-party vendors. In its letter, the OSC noted that the regulations governing the Form I-9 process precluded release of information for any other

purpose, and, thus, employers could not share Form I-9 information with any third-party vendor, such as a payroll service or benefit provider, without the employee's written permission.

This letter serves as another warning to employers that may routinely share this information without considering the consequences. Employers faced with vendor requests for this information should consult with counsel to avoid the consequences from an unauthorized release and determine if there are alternatives to satisfying vendor requests that do not involve Form I-9 information.

VI. United States Charges 7-Eleven Franchise Owners with Criminal Immigration Violations

On June 17, 2013, the U.S. District Court for the Eastern District of New York unsealed two indictments that accused nine defendants who owned, managed, and controlled fourteen 7-Eleven franchise stores (10 stores in New York and four stores in Virginia) of identity theft, wire fraud, and criminal immigration violations in an alleged scheme to cover up the systematic hiring of illegal aliens. See *United States v. Baig*, No.2:13-cr-00351 (E.D.N.Y 2013) and *United States v. Zia*, No. 2:13-cr-00352 (E.D.N.Y. 2013). According to prosecutors, two of the defendants, a married couple, owned, managed, or controlled 12 of the 7-Eleven stores, while five defendants helped manage and control those 12 stores. The remaining two defendants owned and controlled two other 7-Eleven franchise stores in Suffolk County, New York.

The indictments alleged that these stores collectively and systematically employed over 50 undocumented workers since the year 2000. Rather than transmitting the true identification information to 7-Eleven headquarters, the defendants allegedly submitted stolen names and Social Security numbers to conceal the illegal workers. Then, when corporate headquarters transmitted the employees' wages to the defendants, they systematically stole significant portions of these wages. In addition to criminal penalties, the defendants face forfeiture of $1.3 million, the value of the franchise rights to the 7-Eleven stores that they owned or controlled.

VII. Health Care Professional Staffing Company Convicted of Immigration Fraud

On July 1, 2013, the Foreign Healthcare Professionals Group and its principals were convicted of 89 counts of mail fraud, visa fraud, human trafficking, and money laundering by a federal jury in Denver, Colorado. The convictions arose out of a scheme by which the defendants made false representations to the United States in connection with H-1B petitions, visa applications, and related documents that the FNs they sponsored were coming to the United States to work as nursing supervisors or instructors. In fact, many of the sponsored FNs did not have prearranged employment while others were coming to work as staff nurses at nursing homes and long-term care facilities and, thus, were not eligible for the H-1B classification. Sentencing is scheduled for September 23, 2013.

The convictions in this case serve as a useful reminder that most staff nursing positions are not eligible for the H-1B professional classification. This is because the H-1B classification only applies to positions that require a specialized bachelor's degree as the minimum entry-level requirement. In most cases, staff nursing positions require a two-year associates nursing degree.

Deceptive practices of unscrupulous staffing companies in this area can be expensive and disruptive. This prosecution serves as another warning about continued fraud in this area.

VIII. OSC Settles Discrimination Claims with Macy's Over Immigrant Employees

On June 27, 2013, the OSC announced that it had reached a settlement with Macy's Retail Holdings, Inc.; Macy's Florida Stores, LLC; Macy's Puerto Rico, Inc.; and Macy's West Stores, Inc. (collectively, "Macy's"), over claims that it discriminated against immigrant employees during the employment eligibility verification process. The OSC asserted that Macy's engaged in unfair documentary practices by refusing to accept documents that reasonably appeared to be genuine on their face and by asking for more or different documents in re-verifying the work authorization of these employees. Under the settlement, Macy's agreed to pay $175,000 in civil penalties and to set up a $100,000 fund to compensate any employees damaged as a result of its practices. Macy's also agreed to review and revise its employment eligibility verification and re-verification policies, train its human resources personnel in the employment eligibility verification process and proper use of the E-Verify system, be subject to monitoring by the OSC, and abide by reporting requirements for two years.

The Macy's settlement underscores the dangers that employers face if they focus too intently on compliance with the Form I-9 employment eligibility verification process. The immigration laws also contain anti-discrimination provisions and define unfair immigration-related employment practices that employers must avoid during the Form I-9 process. With the emphasis on Form I-9 compliance, many employers forget these provisions and the substantial penalties and other obligations that they carry. The Macy's settlement is but the latest reminder to employers on the importance of training staff on these other aspects of the Form I-9 process.

IX. DOL Penalizes Employers for Failing to Pay H-1B Legal Fees and Other Expenses

In the past years, the U.S. Department of Labor ("DOL") has been involved in two important actions that should remind employers of their obligations to pay legal and other expenses associated with the H-1B process. In a Prince George County School District case, the DOL claimed that the school district improperly required the 1,000+ H-1B teachers it sponsored to pay the legal expenses associated with their H-1B petitions. *Administrator, Wage and Hour Division vs. Board of Education, Prince George's County,* Case No. 2011-LCA-0026 (2011). In settling the case, the school district agreed to reimburse the sponsored teachers the total sum of $4,222,146, pay a civil fine of $100,000, and be barred from using the H-1B program for two years.

In *USDOL v. Kutty*, the DOL claimed that the defendant, a medical doctor with five clinics in Tennessee, violated federal law by failing to cover the expenses that H-1B employees incurred in securing the J-1 waivers that they needed to remain in the United States. *USDOL v. Kutty,* No. 3:05-CV-510 (E.D. Tenn. 2011). Under U.S. immigration laws, FNs who participate in medical residency programs here in J-1 status are subject to a two-year foreign residence requirement. They can avoid this requirement by seeking a waiver that involves, among other things, practicing in a medically underserved area. If they find a position in such an area, the employer can sponsor them for H-1B status while the J-1 waiver process continues. In the *Kutty* case, the DOL took the position that the costs of the J-1 waiver process were part of the expenses that the

H-1B employer was required to pay. This position was upheld by the DOL Administrative Review Board and by the U.S. District Court for the Eastern District of Tennessee. This decision presents new considerations for health care employers seeking to sponsor foreign medical graduates who must obtain J-1 waivers.

X. OSC and NLRB Execute Collaboration Agreement

On July 8, 2013, the OSC and NLRB executed a "Memorandum of Understanding" that will allow these agencies to share information, coordinate investigations, and refer matters to each other, where appropriate. The OSC is the office in the Justice Department's Civil Rights Division that enforces the anti-discrimination provisions of the immigration laws. The NLRB handles union representation proceedings and unfair labor practices investigations under the NLRA. The new memorandum will allow the NLRB to make referrals to the OSC when an unfair labor practice case suggests a possible violation of the immigration laws' prohibition against employment discrimination. Similarly, the agreement will allow the OSC to refer matters to the NLRB when the OSC believes that an employer's actions may have infringed on an employee's right to form, join, decertify, or assist a labor organization, and to bargain collectively. This collaboration comes from two of the agencies that are most aggressive in promoting their version of employee rights and, thus, needs to be factored into an employer's decision to deal with either agency.

XI. DOS Issues August 2013 Visa Bulletin

The DOS has issued its Visa Bulletin for August 2013. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. On the employment-based side, the August 2013 Visa Bulletin showed that the Second Preference ("EB-2") for China has reached August 8, 2008, and India has reached January 1, 2008. The EB-2 cutoff date for the rest of the world remains current. In the August 2013 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: January 1, 2009, for all chargeability, including Mexico and China. The EB-3 cutoff date for India is January 22, 2003, and for the Philippines is October 22, 2006. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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