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When Amnesty Goes National

Life after the grand immigration compromise.

By John Shadegg

The Senate has agreed to bring the immigration bill back upon the promise that proponents will throw more money at enforcement. Regrettably, if the Senate bill passes, enforcement dollars won't matter. Consider the following scenario that could easily go from hypothetical to reality if this bill becomes law:

On September 12, 2007, the Senate immigration bill, previously signed by President Bush, becomes law. Two days later, on September 14, at 3:20 A.M., Border Patrol Agent Len Stafford observes four individuals crossing the U.S. — Canada border, 30 miles northeast of Bellingham, Washington.

Agent Stafford apprehends the four suspected illegal aliens eight yards inside the U.S. border. Their names are Smith, Jones, Adams, and Brown.

Upon apprehension, Jones, knowing the law well, advises Agent Stafford that the four suspects are eligible for the new "Z" visa created by the Senate immigration bill. Agent Stafford informs them they are not eligible because only illegal aliens who were in the U.S. on January 1, 2007, may apply for a Z visa and that they must have been in the country continuously. Section 601 of the bill clearly states that an alien must maintain "continuous physical presence in the U.S. since January 1, 2007…"

Stafford points out that obviously they had not been in the U.S. continuously since January 1, as he watched them cross the border only minutes before. However, Jones advises Stafford that "continuous physical presence" as used in the bill, like countless other terms used in the bill but not defined, doesn't actually mean what it appears to say. Jones correctly states that under the law an alien can have left the country for less than 90 days on one trip or for multiple shorter absences totaling less than 180 days in any single year. Jones advises Stafford that all four suspects claim to have been in the U.S. on January 1 and that they have been out of the country for less than the permitted 180 days. Stafford radios his headquarters and is advised that Jones is right. The illegal aliens have jumped the first hurdle in establishing their "right" to legal status in the United States: they were merely "on vacation" outside the U.S.

Jones again asserts their right to apply for a probationary Z visa citing Section 601(h)(5) of the law, which states that an alien "apprehended between the date of enactment and the date on which the period for initial registration closes" for Z visas must be given a "reasonable opportunity to file an application" for a Z visa if they can establish "prima facie eligibility." Again, Jones is right; Stafford directs them to the Port of Entry office in Blaine, Washington.

That same morning, the four suspected illegals present themselves at the Blaine office to apply for their Z visa. In support of their applications they present the *prima facie* evidence the bill requires, including purported payroll records and other documents. All documents are, in fact, fraudulent, but the forgeries are reasonably well produced and are not detected. Because the documents appear to constitute "prima facie" evidence, all four illegals are qualified to apply for the benefits of a Z visa which allow them to remain in the country and work. The Department of Homeland Security (DHS) begins its background check on the four.

By close of business the next day, out of the four background checks, the agency is only able to complete Jones's. However, under the law, because the government wasn't able to complete the other three background checks, Jones and the other three are all entitled to a counterfeit-resistant document reflecting the benefits and status of probationary Z visas. Those benefits include: the right not to be detained, the right to work, and the right of exit and reentry to the U.S. (Section 601 (h)(1)).

A week later, Adams and Brown meet with a long time friend, Martin, who had been in the U.S. for slightly over a year having overstayed his student visa. Martin tells them he is thrilled with the new law. On the day it became effective, there was an ongoing administrative proceeding to deport him. However, because there was no "final order" of removal in that proceeding, it was dismissed. Section 601(h)(6) of the new law, which provides that if the Secretary determines that an alien in removal proceedings is prima facie eligible for a Z visa the proceeding against him must be dismissed. Martin immediately applied for a Z visa and now is lawfully entitled to remain in the U.S. possibly for the rest of his life.

Although Jones passed his DHS background check, no response has been received on the remaining three. They remain entitled to stay in the country, work, and hold their tamper-resistant ID cards.

All four proceed to apply for jobs with various employers. (Although they had submitted evidence of employment with their Z visa applications, they had no such jobs.) In each case, their new employers could not use the new Employment Eligibility Verification System (EEVS) to verify the ineligibility "prior to extending [them] an offer of employment," because Section 302 (d) only allows prospective employers to use the EEVS system *after* hiring an employee. Their employers submitted their names and Social Security Numbers to EEVS immediately upon hiring them.

Regrettably, EEVS responds with a "nonconfirmation status" for each of the four aliens. Their employers, by law, are unable to fire them because, "In no case shall an employer terminate employment of an individual solely because of a failure of the individual to have identity and work eligibility confirmed…" (Section 302 (d)). In fact, not only are employers unable to fire the employee, they may not reduce their salary or bonuses, suspend them without pay, reduce their hours, or deny them training (Section 302 (d)).

Weeks later, Smith is notified that he has been issued a final order of nonconfirmation from EEVS. He is therefore not work-eligible. However, he immediately notifies his employer of his intent to file an administrative appeal against EEVS's findings, and that under the law, "If the employer has received a final nonconfirmation regarding an individual, the employer shall terminate employment of the individual, *unless the individual files an administrative appeal*…" (Section 302 (d)). Because the law gives Smith these rights, he can keep his job, demand all scheduled raises, and employee training for as long as his appeal takes, even if that means months or years.

Still no information comes forward on the backgrounds of Adams or Brown. But two months later, as a result of the background check, DHS notifies Adams's employer and Brown's employer that they have been linked to terrorist organizations and are not eligible for employment. Adams and Brown also begin their appeals process and their employers, again, are powerless to do anything.

Brown loses initially in the administrative proceeding, but appeals to the U.S. Ninth Circuit Court of Appeals. Twenty-six months later, a final order is issued determining that Brown is named Pearson and that "Brown" was in fact an alias.

Regrettably, Pearson was killed the day before the court's decision was issued when a dirty bomb she carried into JFK airport exploded. And, the search for Adams, who quit his job and disappeared into the growing tidal wave of Z-visa applicants awaiting rulings on their administrative and judicial appeals, continues.

All of these factual circumstances and results are possible under the Senate bill as it exists as of this writing. The procedural due-process rights extended by the bill are mind-numbing and take effect immediately. I believe we need to address the problem of illegal immigration and border security and we should not seek to deport all of those currently illegally in this country. I support a functioning guest worker program and believe we should begin by enacting one now. But the current Senate bill is deeply flawed, provides illegals with limitless due-process rights, and is far beyond the ability of the federal government to dream of administering. It's a lawyer's dream come true; an invitation for litigation that will line their wallets, tie up our court system, and bog down our immigration services for years to come. We can and must do better.

— John Shadegg is a Republican congressman from Arizona.
