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SOME PRELIMINARY OBSERVATIONS REGARDING THE PROPOSED "BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT"

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As most readers of this blog are likely aware, earlier this week the U.S. Senate's "Gang of 8" – that is, Senators Charles Schumer (D-NY), John McCain (R-AZ), Richard Durbin (D-IL), Lindsey Graham (R-SC), Robert Menendez (D-NJ), Marco Rubio (R-FL), Michael Bennet (D-CO), and Jeff Flake (R-AZ) – introduced a proposed comprehensive immigration reform bill. A copy of the bill as introduced is available on Senator Schumer's website. Its short title is the "Border Security, Economic Opportunity, and Immigration Modernization Act", and so I will refer to it in this blog as BSEOIMA, although that acronym is somewhat more difficult to pronounce than previous well-known immigration bills such as 1986's IRCA and 1996's IIRIRA. (Personally I would tend to pronounce it "B'soyma", although Angelo Paparelli reports that Dan Kowalski, Editor-in-Chief of Bender's Immigration Bulletin, has dubbed the bill "BESSIE MAE".) Broadly speaking, it combines increased border security with a new "Registered Provisional Immigrant" (RPI) status available to much, but not all, of the current undocumented population – primarily those present in the United States since December 31, 2011 who lack any significant criminal record – and various provisions designed to handle the "future flow" of immigration somewhat differently than our current system, such as a merit-based system of awarding some immigrant visas to those who accumulate an appropriate number of "points" in a system reminiscent of that currently used in Canada.

The Immigration Impact blog of the American Immigration Council has already published some preliminary reactions to BSEOIMA, and AIC and the American Immigration Lawyers Association (AILA) have also released a detailed summary

of the bill. In this blog post, I do not claim to provide a comprehensive summary of the bill, which is after all 844 pages long, and which has already been summarized by AIC/AILA (and others as well). Instead, I will simply highlight some of the portions of the bill that caught my attention on a first read-through, with citations to the page number of the introduced bill on which they appear. Readers should keep in mind that this is a preliminary assessment of complex legislative language that may change in the future (assuming the bill passes at all), so it should not be taken as a precise description of the future final version of any provision; it is, so to speak, a first-draft reaction to the first draft of the bill. Because this is an entirely subjective list of some provisions that happened to catch my attention, it is also naturally skewed to the sorts of provisions that were of interest to me as an attorney practicing immigration law; I do not mean to deprecate the significance of the substantial provisions for increased border security with which the bill begins, for example, but since I am not in the habit of advising people to enter the U.S. unlawfully or smuggle in others, they are of less direct relevance to my practice and thus attracted less of my initial attention.And this is not even a list of every single provision that caught my attention on a first read—such a list would be a bit too lengthy for a blog post. With those preliminaries out of the way, here are some of the provisions that were interesting to me and may be interesting to readers as well:

Nonimmigrants who are lawfully present according to DHS or DOS records will not be eligible for the new RPI status, even if they have violated status or been employed without authorization—apparently making the analysis under BSEOIMA different from the one that was used under IRCA to determine whether applicants were known to the government to be here unlawfully by the key date and thus eligible for legalization. Pages 64-65. While nonimmigrants with a currently valid status as of the date of introduction of the bill are excluded from RPI status, however, if they have already been lawfully present for 10 years or finish accumulating that total period of consecutive lawful presence after the bill passes, they'll be able to apply for LPR status under the new merit-based system, about which more below.

Expunged convictions don't count for purposes of determining eligibility for RPI status, but otherwise any felony, an aggravated felony, or 3 misdemeanors will disqualify RPI applicants, except for convictions under state and local laws having immigration status/violations as essential elements—for example, some

crimes created by Arizona's recently infamous SB 1070. Pages 61-66.

There is a limited discretionary waiver under which some people could be eligible for RPI status even after previous departure or removal, at pages 71-72. While the language is complex, it appears that the waiver will be potentially available to certain "DREAMers" (those who would have been eligible for relief under the previously proposed DREAM Act that is in large part incorporated in BSEOIMA), spouses and children of U.S. citizens and LPRs, and parents of U.S. citizen or LPR children.

Employers will be able to continue employing people who they know are, or will be, RPI applicants, pending adjudication of the application for RPI status, without violating the INA. Page 78. This will help avoid the specter of employers being reluctant to assist with the RPI applications of their employees because, having come to know that their employee lacks valid immigration status authorizing employment, they would otherwise be supposed to fire them.

RPIs will not be able to be absent from the United States either for a continuous period of more than 180 days, or for more than 180 days in any calendar year, without extenuating circumstances; otherwise they will lose their status and not be able to adjust status to permanent residence. Pages 89-90, 94-95.

While there are limited exceptions based on age and disability, most RPIs will need to show that they have been continuously employed or had resources above 125% of the poverty line, or have been full-time students, in order to adjust to LPR. Pages 96-99.

The DREAM Act is present in modified form as proposed INA section 245D: the DREAMers will only need to be RPIs for 5 years before they can become LPRs, instead of the usual 10. There can be a "streamlined procedure" for those who have been granted Deferred Action for Childhood Arrivals (DACA). The DREAMers (including the DACA grantees) will be able to apply for naturalization as soon as they complete their 5 years of RPI and adjust to LPR (but not sooner). Pages 110-116.

The "AGJobs" bill benefiting certain agricultural workers, which like the DREAM Act has been floating around for a number of years, also makes an appearance in BSEOIMA. Like DREAMers, AGJobs "blue card" holders will be able to adjust after 5 years under certain circumstances, not 10 years like other RPIs. See

pages 150-255.

We learn on page 262 of BSEOIMA that while siblings of U.S. citizens and married sons and daughters over 31 would no longer be separate family preference categories, they would get points in the new merit-based system that will make up a substantial portion of future immigrant visa numbers. Although the diversity lottery in its current form would be abolished, the preference for diversity in the current lottery system also lives on somewhat in the form of an award of points to people from countries from which fewer than 50,000 nationals were admitted in the previous 5 years. (Page 263.) You will also be able to get points in the new system for things like speaking English, being between the ages of 18 and 37 (you get the most points for being between 18 and 24), having specific types of employment, or even civic involvement. See pages 260-265.

Beginning on October 1, 2014, people whose employment-based petitions and family-based petitions filed before the Act have been pending for more than 5 years will begin to become eligible for merit-based visas on that basis (although this eligibility will not be immediate for everyone affected, but will phase in over a 7-year period). People who have been "lawfully present" for not less than 10 years will also be eligible for this non-points-based side of the merit-based visa system. See pages 270-273. RPIs will not be able to adjust status to LPR except under this second merit-based track, based on 10 years lawful presence—a provision which may hopefully be changed before the bill is finally enacted, since it seems unnecessarily cruel to prohibit, for example, an RPI who marries a U.S. citizen from becoming an LPR in the same way that any other lawful entrant who became a bona fide immediate relative of a U.S. citizen could adjust status under section 245(a) of the INA (even if they had, for example, overstayed a tourist admission). Pages 108, 269-274.

Anyone, including RPIs and others, who was lawfully present and work-authorized for 10 years before becoming an LPR, will be able to naturalize 3 years after becoming an LPR instead of 5. Pages 109-110.

BSEOIMA will recapture previously unused visa numbers from past fiscal years, so that should also reduce the backlog of people awaiting immigrant visa numbers. Pages 276-279.

Spouses and children of Lawful Permanent Residents (LPRs) will become "immediate relatives" not subject to a visa number limit. Pages 280-281.

The BIA's highly dubious decision in *Matter of Wang, 25 I&N Dec. 28 (BIA 2009)*, rejecting automatic conversion and retention of priority dates under the Child Status Protection Act, would be overturned legislatively by a provision of BSEOIMA making even clearer how automatic conversion is supposed to work. Pages 287-288.

Priority dates from any approvable-when-filed immigrant visa petition will be transferable to any other petition, regardless of category. Page 288.

The numerical per-country limitations will be raised to 15% for family-based cases and eliminated for employment-based cases, which is good news for Indian and Chinese nationals who currently face substantial employment-based backlogs, and also (to a somewhat lesser extent) good news for Mexican and Phillipine nationals who currently face substantial family-based backlogs. Pages 294-296.

Visa number usage calculations would no longer include employment-based derivatives, the employment-based first preference (all three subcategories), aliens with a doctorate, or former J nonimmigrant physicians who have completed their 2-year foreign residence requirement under section 212(e) of the INA or obtained a waiver thereof. Pages 299-303. STEM graduates with a master's degree or higher (as a practical matter this just means masters since doctorates are separately exempt) would be able to be exempt from the visa number limits if they have a job offer from a US employer and earned their degree within the 5 years preceding the petition filed for them. These STEM immigrants would not require labor certification. Pages 304-312.

V visas will be extended to cover all family preference immigrants with approved petitions, but siblings and married children over 31 (whose family preferences are anyway being phased out under BSEOIMA) won't get work authorization if they come on V visas, and will only be allowed to be present for 60 days per fiscal year. The unmarried sons and daughters, and married ones under 31, will get work authorization with their V visas and will be able to stay on a longer-term basis. Pages 313-317. So for the family preferences that will continue to exist, this is like the old V visa; for siblings and over-31 married sons and daughters, it's more like a dual-intent B-2 tourist visa.

The cutoff for stepchildren will be parental marriage by 21 years of age, consistent with the other "child" definitions of most of the rest of the INA, instead of the current age-18 cutoff. Page 322.

The general cutoff age for adoptions valid under the INA will be extended from 16 to 18. Pages 322-323.

Immigration Judges and DHS would gain new discretionary authority to terminate removal proceedings or admit someone to the U.S. if removal or refusal of admission is against the public interest or would result in hardship to certain U.S. citizen or LPR immediate family members, although this new authority would not apply in the case of certain criminal removability grounds and certain other grounds of removability. Pages 328-331.

H nonimmigrant petition beneficiaries who entered the US before age 16 and had a baccalaureate or higher degree from a US institution would be exempt from the unlawful presence bars (that is, the 3- and 10-year bars). The unlawful-presence waiver for others, under section 212(a)(9)(B)(v) of the INA, would be extended to cover hardship to a U.S. citizen or LPR spouse, son, daughter, or parent. Pages 331-332.

J-2 spouses and children of J-1 exchange visitors would not be subject to the INA 212(e) foreign-residence requirement. Also, physician training even under a status such as a J-1, which ordinarily requires a foreign residence which one has no intention of abandoning, would be dual-intent (that is, would not require such a foreign residence). Pages 367-370.

The exemptions from the English and civics testing requirements for naturalization in the case of certain older immigrants would be expanded somewhat. Those who are over 65, and have lived in the US as an LPR for 5 years, would be exempt from the English/civics tests. The limited exemption from the English language requirement, under which the applicant is still required to take the U.S. civics test but can do so in their native language, would apply with 50 years of age plus 20 years as an LPR, 55 years of age plus 15 years as an LPR, or 60 years of age plus 10 years as an LPR. For those 60 years of age or older who had been LPRs for 10 years, the civics-test requirement could be waived on a case-by-case basis. Pages 393-394.

The one-year filing deadline for asylum claims would be eliminated, and people who have been granted withholding of removal but denied asylum because of the one-year deadline would be allowed to reopen their cases. Page 552.

Over the next three fiscal years, there would be 75 new Immigration Judges appointed each fiscal year, for a total of 225, in an effort to reduce the backlog

of immigration court cases. Pages 566-567.

H-4 spouses will be employment authorized so long as they are from a country that grants reciprocal benefits to U.S. citizens. Pages 663-664.

H-1B nonimmigrants whose employment terminates will have a 60-day grace period, and will also be considered to be maintaining H-1B status during the pendency of "a petition to extend, change, or adjust their status" that is filed during such 60-day grace period. Some low-risk H-1B nonimmigrants, as well as A, E, G, (other) H, I, L, N, O, P, R, or W nonimmigrants, can have their visas renewed in the United States at the discretion of DOS. Pages 664-667.

F-1 student status will be dual-intent for a bachelor's degree or above: that is, students applying for visas to study in bachelor's degree programs, doctoral programs and so on will not need to show intent to return to their home country afterwards, but can plan to remain in the United States and put their valuable knowledge to use here. Pages 725-727.

E-4 nonimmigrant visas, which would function like the current E-3 visas available to Australian nationals working in a specialty occupation, will be created for South Korea and other countries with which we have free trade agreements as recognized by DHS with the concurrence of DOS and the US Trade Representative. There is a limit of 5,000 E-4s per sending country, which does not include derivative spouses and children. Pages 732-733.

There will be E-3 visas created for Irish nationals which only require a high school education or at least 2 years of work experience in an occupation requiring at least 2 years of training or experience (a la the current diversity visa standard). Page 734.

O-1s will get portability between employers like what H-1Bs have now. Pages 736-737.

Nonimmigrants with a pending application for extension of stay and related work authorization are authorized to continue employment until the application is adjudicated (as opposed to the current limited regulatory extension of employment authorization). Page 738.

Canadians over age 55 will be allowed to come as B-2 visitors for up to a 240-day period out of any 365 days, and maintain a home here, as long as they also have one in Canada. Pages 742-744.

Retirees over 55 will be able to get a new Y visa, renewable in 3-year increments, if they use at least $500,000 to purchase one or more residences in the US which sold for more than 100% of the most recent appraised value (per their local property assessor), reside here for more than 180 days per year, and meet certain other financial requirements. Pages 744-746.

A limited number of new W nonimmigrant visas will be available for workers in O*Net Job Zone 1, 2, and 3 occupations, but they will not be available for higher job zones (requiring more than 2 years of preparation) or positions requiring a bachelor's degree or involving "computer operation, computer programming, or computer repair". Pages 776-778, 803-804.

W status is for an initial term of 3 years, renewable for additional 3-year periods. You have to first apply at a consular post abroad to be designated a "certified alien". If you are unemployed for more than 60 days, you have to leave. You can only work for a registered employer, and they have to first carry out recruitment for their desired registered position and fail to find a "qualified United States worker . . . who is ready, willing and able to fill such position". The recruitment is reminiscent of PERM recruitment for professional occupations, except that a "U.S. worker" would be defined more broadly than under PERM, to include anyone with unrestricted work authorization, rather than only U.S. citizens, LPRs, asylees, refugees, and temporary residents such as RPIs or their IRCA equivalent. Pages 785-786, 789-804.

The registered W-visa position continues to be registered if the employer has filed an I-140 petition for the W worker by the end of the 3-year period. It will cease being so if the petition is approved or denied, or the employment of the worker is terminated. Pages 805-806. This raises the question of what happens if the petition is approved, but the priority date is not current—is the worker then stuck in limbo? That may be an unintended flaw in the legislation that can be fixed as the bill moves forward.

W visas are, at least, dual-intent, page 828, so it isn't a problem that the W worker is anticipating such a petition being filed for him or her. But, W nonimmigrants will not be able to take advantage of the prong of the merits-based visa system that will allow others to become LPRs after being in lawful status for 10 years. Page 271. This, too, is an anomaly that may hopefully be fixed as the bill moves forward—why should W nonimmigrants be treated less favorably than absolutely everyone else who is lawfully present?

The W nonimmigrant may terminate his employment for any reason and take up employment with another registered employer in another registered position. Page 819.

There will be new X nonimmigrant visas, and a new immigrant visa program, for qualified entrepeneurs. The qualifications have to do with number of jobs created, financing devoted to your company by qualified venture capitalists etc., and/or your company's revenue. You will need to maintain nonimmigrant status for at least two years before you can petition as an entrepreneur immigrant (although not necessarily as an X nonimmigrant). Pages 828-844.

And thus ends this first list of some highlightsof BSEOIMA. Watch this space for additional blogging about BSEOIMA either from this author or from others at Cyrus D. Mehta and Associates, PLLC...