THE SHIFTING OUTLOOK FOR LEGAL IMMIGRATION TO THE UNITED STATES

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I. INTRODUCTION

Spurred by the terrorist attacks of September 11, 2001, the legal and administrative landscape of U.S. immigration and nationality law has changed dramatically. The Immigration and Nationality Act (INA or the Act) has been modified and supplemented in numerous ways. The Immigration and Nationalization Service (INS), the agency responsible for enforcing the Act for five decades following its passage in 1952, has been abolished. Pursuant to the Homeland Security Act of 2002, Pub.L.No.107-296, 116 Stat.2135 (2002), on March 1, 2003, the INS was dissolved and its functions transferred to the Department of Homeland Security (DHS), a newly created federal agency with a markedly different primary objective – combating terrorism and, by extrapolation, the threat of physical harm posed by foreign nationals.

Despite this shift in outlook, the essence of the U.S. immigration system is, as it has always been, the core structure established over half a century ago when the INA – then known as the McCarran-Walter Act of 1952 – was first passed. As such, the United States continues to permit for any of three purposes: labor and employment, family unification, and humanitarian needs. To these ends, the INA has established a bifurcated system pursuant to which foreign nationals may obtain temporary, nonimmigrant visas or permanent immigrant visas to enable them to work in the United States or join family members already here. Foreign nationals may also be allowed to come to the United States as temporary or permanent immigrants when warranted based on humanitarian needs. In addition, the U.S. issues approximately 55,000 green cards each year to winners of the Diversity Lottery.

This paper provides an overview of the current structure of U.S. immigration and nationality law and identifies the principal federal agencies involved. We then discuss recent legislative reforms, upcoming changes to our immigration laws, and the practical consequences these changes may have for your employees and business.

II. BACKGROUND: STRUCTURE OF THE CURRENT SYSTEM

A. A Bifurcated System

As already noted, the INA provides for entry into to the United States on either a temporary, nonimmigrant basis or for the purpose of permanent immigration. As discussed more fully below, the two systems operate independently of one another. Accordingly, even where the two systems identify similar or identical criteria for determining visa eligibility, it is entirely plausible that an applicant may be approved for a temporary visa but denied a green card based on the same evidence.

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1. "Nonimmigrant" or Temporary Visas

Our temporary immigration, or "nonimmigrant," categories, are designated by letters of the alphabet, from A to V, a veritable "alphabet soup." A nonimmigrant, or temporary visa holder, is by definition a foreign national who comes to the United States for a temporary purpose or an activity of a temporary nature. The nonimmigrant visa categories most commonly used by businesses are the following:

- B-1 — Temporary Visitor for Business — Although a business visitor may come into the U.S. for meeting or consultation, such a visitor may not perform productive labor in the United States

- E-1 or E-2 — Treaty Trader or Investor — This category provides for the issuance of Under this category, pursuant to treaties with the United States, foreign nationals from certain countries may enter the United States if they have founded, or are working for, companies engaged in substantial trade in goods or services within the United States, or companies that represent significant investments in the United States.

- H-1B — Professional Worker — These are foreign nationals with a college or higher education who are coming to work temporarily for a U.S. employer in a particular field of specialization which they have studied, or in which they have extensive experience.

- H-2B — Temporary Worker — H-2B workers may be skilled or unskilled workers coming to the United States to relieve a seasonal, peak-load, or temporary need, such as ski instructors, resort workers, or skilled technicians needed for a one-time service or job.

- L-1 — Intra-company Transferee — This category is designed for executives, managers and workers with specialized company knowledge who are being transferred to a U.S. company from related corporate entities abroad.

- O-1 — Extraordinary Ability Alien — O-1 visa holders are foreign nationals who possess extraordinary ability, have achieved international renown, and have risen to the apex of their fields of endeavor. A foreign national may possess extraordinary ability in any field, including the arts, business, law, medicine, the sciences and so on.

- TN — These are nationals of Canada or Mexico who, pursuant to the North American Free Trade Agreement ("NAFTA"), are authorized to work for a U.S. employer in a field specified on the NAFTA schedule for a period of one year.

- VW — Visa Waiver—Pursuant to reciprocal agreements, visitors for business or pleasure from certain countries may come to the United States for a period of 90 days

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without a visa sticker in their passports. While in the United States, they are barred from extending their stay beyond 90 days or changing to a different nonimmigrant visa category or status.

Historically, the concept of "intent" has been crucial to the distinction between temporary and permanent immigration. In general, a nonimmigrant must have a residence abroad to which he or she plans to return, and a demonstrable intent to remain in the United States on a temporary basis. An immigrant or green card holder must have the intention to reside permanently in the United States.

In recent years, a doctrine known as "dual intent" has been established with respect to certain temporary visa categories. Under this doctrine, although certain nonimmigrants may demonstrate that their short-term intent is to remain in the United States temporarily, they may harbor and express a long-term intention to remain here permanently. The practical effect of this principle is that these nonimmigrants may express their long-term desire to remain in the United States permanently, and may pursue permanent residence without jeopardizing their temporary status. Under the Immigration Act of 1990, H-1B and L-1 visa holders may have dual intent. (See 8 C.F.R.Section 214.2(h)(16), (l)(16).) By policy, the dual-intent doctrine also applies to E and O visa holders.

2. "Immigrant Visas" or Permanent Residence

Permanent employment-based and family-based immigration is organized according to "preference categories." This term is derived from the fact that historically these categories were grouped from the highest-preferred types of immigrants to the lowest. To a certain extent, the preference categories still reflect this hierarchy. For example, on the employment-based side, the "top" preference category is for aliens of extraordinary ability, multinational managers and executives, and outstanding professors and researchers.

The most commonly used permanent-immigration categories for employment are the following:

- First: As discussed above, this category includes aliens of extraordinary ability, multinational managers and executives and outstanding professors and researchers.
- Second: This category is for foreign nationals with master's degrees or higher, immigrating for jobs that require such advanced degrees.
- Third: This category includes foreign nationals with bachelor's degrees or two years of training, immigrating for jobs that require this background.

With respect to the second and third preference categories, an employer is required to conduct a labor market test, offering these positions to minimally qualified U.S. workers prior to filing a petition for immigrant worker on behalf of the foreign national being sponsored. This may add six months to a year to the green card process.

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The green card or permanent residence process also includes a final clearance process in which the immigration authorities review and evaluate the admissibility of the foreign national and his or her family for permanent immigration to the United States. During this process, the foreign national and his or her family members must address issues such as maintenance of lawful immigration status, criminal background, health-related problems, and future financial stability. It is entirely possible to have all immigration-related processes or applications approved up to this point, only to have the case founder during this final clearance process. With careful planning from the initiation of the case, however, problems in the final stage can be anticipated and addressed, and, in fact, most employment-based permanent-residence applicants have few problems completing the process.

C. Agencies Involved in the Immigration Process

1. The Department of Homeland Security

As noted earlier, the INS, once a branch of the Department of Justice, is no more. In accordance with the Homeland Security Act, the DHS has assumed the functions once performed by the INS and is now the primary agency responsible for the lawful admission of foreign nationals into the United States, patrolling the nation's borders to prevent illegal entry into the United States, and enforcing our immigration and employment laws with respect to those aliens already within the country. Pursuant to section 471 of the Homeland Security Act, the Secretary of Homeland Security may not delegate responsibility for these former functions of the INS to a single division within the DHS. Accordingly, U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE") – both divisions of the Directorate of Border and Transportation Security – have assumed responsibility for patrolling the border and for the internal enforcement of U.S. immigration laws, respectively, and U.S. Citizenship and Immigration Services ("USCIS") now adjudicates applications for immigrant benefits.

2. The Department of State

The role of the Department of State in immigration remains unchanged, notwithstanding the move of INS functions to DHS. The Department of State directs the nonimmigrant and immigrant visa issuance process at U.S. consular posts abroad. For most nonimmigrant visas, there is a petition approval process that must be completed through USCIS in the United Sates. Thereafter, a foreign national abroad may take his or her USCIS-issued approval notice to the U.S. consular post in his or her home country for visa issuance. A consular officer — a State Department employee — will review the approval notice and other documents presented by the foreign national to determine whether the visa should be issued. The consular officer will consider such factors as whether the applicant's intentions are consistent with the scope of the visa, and whether there are any grounds of inadmissibility (or unfitness) to enter the United States, such as misrepresentation, a criminal history, or, increasingly, a problem with the background check routinely done on visa applicants since 9-11. Consular officers are also involved in adjudicating certain applications for permanent residence. In general, the decisions of consular officers are not reviewable by any administrative board or judicial body. However,

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sometimes the Visa Office of the State Department can be consulted to provide assistance in resolving difficult consular issues or where there has been an abuse of discretion by a consular officer.

In addition to the visa issuance process, the State Department maintains jurisdiction over J-1 visas (for educational and cultural exchange visitors) as well as the J-1 exchange programs themselves. The State Department also controls the issuance of diplomatic visas, the issuance of passports, and some complex determinations of U.S. citizenship by birth.

3. The Department of Labor

In addition to the DHS and the State Department, the Department of Labor plays a significant role with respect to certain immigrant and nonimmigrant visa categories. Essentially, the mission of the Department of Labor with respect to immigration is to ensure that the admission of foreign nationals will not adversely affect the U.S. labor market. A lesser role of the Department of Labor is to facilitate the entry of certain foreign nationals in occupations that are deemed to be experiencing shortages in the United States. Finally, the Department of Labor's Wage and Hour Division is charged with ensuring that foreign laborers are not subjected to abusive conditions in the United States, and that the U.S. employers of foreign workers are abiding by certain attestations regarding the wages and working conditions of these workers.

With respect to certain employment-based immigrant visas, the Department of Labor Employment and Training Administration (ETA) oversees the required labor market test described above that precedes the filing of an immigrant visa petition. This involves a recruitment campaign by the employer and the submission of the results of that campaign to the ETA for review. Once the ETA has certified that the employer has adequately tested the market for U.S. workers minimally qualified to perform the job, the employer may then file a petition for immigrant workers with USCIS. The labor market test phase of the process is known as "labor certification." Since March 2005, a new, more uniform and streamlined labor certification system known as "PERM" has been in place. This online system, although much more complex than the prior system, has cut labor certification processing time down considerably.

The Department of Labor also oversees two programs for temporary workers to fill short-term, seasonal, peak-load or agricultural jobs. These programs are known as the H-2A program (for agricultural workers) and the H-2B program (for nonagricultural workers).

The Wage and Hour Division of the Department of Labor Employment Standards Administration is responsible for the enforcement of laws relating to Labor Condition Applications, a standard part of the H-1B (temporary professional worker) visa process. The Labor Condition Application is a set of attestations by an H-1B employer, promising that the hiring of the H-1B worker will not cause a disadvantage to the U.S. workforce, and that the H-1B worker will not be given lesser wages, benefits or working conditions than similarly occupied U.S. workers. There are similar attestations required for the hiring of certain foreign nurses, and the Department of Labor oversees these as well.

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III. LEGISLATIVE REFORM

Standing as a testament to the broad momentum to reform our immigration laws are a multitude of legislative proposals covering virtually every aspect of immigrant life in the United States. Subjects of recently enacted legislation include state issuance of driver's licenses, the cap on H-2B nonimmigrant visas, and the mechanics of the L-1 temporary visa program. In addition, various bills pending before the House and Senate have earmarked immigrant civil liberties, gang deterrence, and family reunification as possible areas for further change. Most notably, though, are existing proposals in both Houses calling for a comprehensive overhaul of U.S. immigration laws.

A. Recent Reform

1. L-1 Visas

In response to public concern that employers were abusing the L-1 visa program by subcontracting L-1B employees as cheap foreign labor to the detriment of U.S. workers, Congress amended certain provisions of the L-1 visa program in passing the Consolidated Appropriations Act of 2005 (Pub.L.No.108-477). The resulting reform delimits the appropriate uses of L-1B visas. Specifically, the new L-1 visa provisions clarify that L-1B visa beneficiaries working primarily offsite rather than on the petitioning employer's premises must remain under the petitioner's control and supervision and must be employed in a capacity which makes use of the specialized knowledge upon which the granting of the L-1B visa was based. Moreover, to ensure that these standards are met, the new legislation requires the DHS to maintain records on the filing of L-1 visa petitions and the number of L-1B petitions approved where the visa holder will be employed principally on the premises of a third party.

Besides clarifying the appropriate uses of L-1 visas, the new law standardizes the requirement that L-1 visa beneficiaries have been employed by the petitioning employer, or a qualifying related enterprise, for at least twelve consecutive months within the past three years. Although the issuance of L-1A and L-1B visas was already subject to this requirement, under the prior law foreign nationals might qualify for an L-1 blanket visa following a six-mondth period of uninterrupted employment with the petitioner. The new law establishes a uniform minimum period of qualifying intracompany employment.

Finally, all L-1 visa applications are now subject to a $500 anti-fraud fee in addition to the preexisting USCIS filing fees. In the case of a standard L-1A or L-1B petition, the employer is to pay this fee upon submitting the initial petition or applying for a change of status. Where the L-1 status is sought pursuant to an L-1 blanket petition, the applicant must pay the anti-fraud fee when filing his or her visa application at a U.S. Consulate abroad.

Significantly, the number of L-1 visas available remains uncapped.

2. Driver's Licenses

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On May 11, 2005, the President signed into law the Emergency Supplemental Military Appropriations Bill (Pub.L.No.109-13) and, with it, the REAL ID Act. Beginning in 2008, the REAL ID Act will require state departments of motor vehicles ("DMVs") to verify the citizenship or legal residency of each applicant for a driver's license before issuing the license. Notably, proof of citizenship or legal residency is already a prerequisite for obtaining a driver's license in most states. The REAL ID Act, however, creates a presumption that the applicant's proffered proof of identification is false and requires DMV clerks to independently verify the validity of each applicant's ID.

DMV clerks are generally considered to be low-skilled workers and are not competent to act as screens for undocumented aliens. According to one estimate, it would cost each state an average of $100 million to train its DMV officials to competently fulfill Congress' mandate. The legislation, however, provides for federal funding in precisely this amount to be split among all fifty states. Since inadequate training and incompetent enforcement are near certainties, even foreign nationals legally present in the United States should be aware of the significant hurdles they may encounter at the DMV. For example, an employee whose H-1B visa has been extended beyond its sixth year during the pendency of his application for permanent residence should assume that his local DMV clerks will not recognize his status as a legal alien. To avoid such difficulties, foreign nationals here on temporary visas would be well advised to consider applying for new or renewed driver's licenses in 2007 in anticipation of their future needs.

3. H-2B Visas

As noted above, the H-2B visa category supplies small and seasonal businesses with unskilled or semi-skilled foreign workers to fill short-term or seasonal nonagricultural positions for which no U.S. workers are available. After the 66,000-visa annual cap on the H-2B visa program was reached early for two consecutive fiscal years (FY 2004 and FY 2005), Representative Wayne Gilchrest (R-MD) and Senator Barbara Mikulski (D-MD) introduced companion bills in their respective Houses intended to ease the strain on small and seasonal employers caused by the inadequate supply of H-2B employees. Pursuant to this bipartisan initiative, the Save Our Small and Seasonal Businesses Act of 2005 (the SOS Act) signed into law on May 11, 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Pub.L.No.109-13).

The SOS Act extended the cap for FY 2005 by authorizing the issuance of up to 35,000 additional visas to new H-2B workers petitioning for work start dates on or before September 30, 2005. The legislation also exempted from the H-2B caps for FY 2005 and FY 2006 all "returning workers," which it defined as foreign nationals who had been counted against the annual H-2B cap in any of the three fiscal years preceding their proposed start date. Accordingly, anyone issued an H-2B visa for a work start date between October 1, 2001 and September 30, 2004 could return to the U.S. as a temporary worker on or before September 30, 2005 without being counted toward the modified 101,000-visa cap for FY 2005. Likewise, past beneficiaries of H-2B visas with work start dates between October 1, 2002 and September 30, 2005, would be exempted from the FY 2006 cap of 66,000 visas. Finally, the SOS Act provided

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that no more than half of the annual H-2B allotment could be allocated in the first six months of the fiscal year, when the cap reverted to 66,000 on October 1, 2005.

In addition to the temporary relief it has afforded from the numerical limits of the longstanding 66,000-visa cap on H-2B visas, the SOS Act institutes more severe sanctions and heavier fines to be assessed against employers who willfully misrepresent a material fact or otherwise fail to meet a condition of the H-2B petition. These new sanctions became effective as of the start of FY 2006, as did a new $150 fraud prevention fee to be paid in addition to the regular H-2B filing fees.

B. Legislative Horizon

1. Civil Rights

Beginning with the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (the IIRAIRA, Pub.L.No.104-208) and the Anti-terrorism and Effective Death Penalty Act (the AEDPA, Pub.L.No.104-132) that followed the first attack on the World Trade Center, a series of initiatives taken by the legislative and executive branches have substantially eroded the due process protections and civil liberties traditionally afforded foreign nationals living in this country. Among other things, the 1996 acts greatly expanded the available grounds for deporting foreigners lawfully present in the U.S., including long-time legal permanent residents (LPRs), and authorized the use of unseen (and thus unrefutable) evidence against aliens in immigration proceedings. Fueled by the events of September 11, 2001, the last four years have seen the blanket closure of all immigration proceedings, the automatic stay of all bond determinations, and numerous other flawed and ineffectual measures aimed at cracking down on terrorism.

In an effort to restore to noncitizens the most fundamental rights and safeguards that were lost as a result of the terrorist attacks, Democrats in both Houses introduced the Civil Liberties Restoration Act (CLRA) in June 2004. Undeterred by its failure to pass in the last Congress, one of the bill's original sponsors, Representative Howard Berman, reintroduced the bill as H.R.1502 on April 6, 2005. There is little chance that the CLRA will pass this session, though, since the companion bill has not been reintroduced in the Senate and the legislation does not enjoy bipartisan support.

2. Comprehensive Reform

On May 12, 2005, identical bipartisan proposals were introduced in the House of Representatives and the Senate to bring about a major overhaul in U.S. immigration law. Sponsored by Senators John McCain (R-AZ) and Edward Kennedy (D-MA) and Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ), and Luis Gutierrez (D-IL), this bill is designed to enhance our current border security and anti-terrorism measures, encourage undocumented aliens to come forward and register with the state, facilitate the lawful admission of necessary foreign workers to the U.S. while protecting the jobs and working conditions of our existing workforce, reduce the immense backlog for green cards, and promote family unity.

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Known as the Secure America and Orderly Immigration Act (SAOIA, S.1033/H.R.2330), the McCain-Kennedy immigration bill is a 150-page proposal which begins by addressing the need for increased border security. Recognizing that DHS's enforcement capabilities and efficacy have not increased even as the agency's federal funding and personnel have, SAOIA would require DHS to evaluate its current strengths and weaknesses and, in light of that assessment, develop a national strategy for border security. SAOIA would then provide Customs and Border Control and Immigration and Customs Enforcement with the additional funding necessary to implement this plan over a five-year period.

Recognizing that the U.S. labor supply is too limited to meet the needs of many employers for year-round unskilled or semi-skilled help and further acknowledging that the resulting gaps cannot be filled through the existing H, L, O, P, and R visa programs, SAOIA would create a new H-5A visa category for lesser-skilled workers. The H-5A category would operate in much the same way as the H-1B program in that the beneficiary's initial stay would be limited to three years but the visa could then be renewed for an additional three-year period. Like its H-1B cousin, the H-5A would be a dual-intent visa. The H-5A visa category would be subject to a much higher cap than the H-1B program (400,000 visas as opposed to 65,000), and would self-adjust to accommodate fluctuating labor and market conditions. Finally, although the H-5A visa would provide a path to permanent residency, the new visa program would include financial incentives to promote circular migration patterns.

The McCain-Kennedy bill would also create a second new visa category, the H-5B program, to encourage undocumented aliens to make their presence in this country known. Under this program, illegal aliens would be eligible to adjust to their status and become lawful temporary immigrants upon paying a $1,000 fine. Moreover, diligent H-5B workers could eventually qualify to adjust their status to LPRs based on their past hard work and their anticipated diligence as workers in years to come.

SAOIA would also greatly increase the number of family-based and employment-based green cards available each year and would cease counting green cards issued to immediate relatives against the annual cap on family-based permanent visas. Finally, the bill would reallocate the number of permanent visas available to each preference category and allow unused green card numbers from one year to be carried forward to the following year.

Obviously, SAOIA would radically alter – and improve – the landscape of U.S. immigration law if it were passed. Its passage could also signify a momentous shift in Congress' approach to immigration reform as such broad, forward-looking legislation would be a great departure from the existing legislative precedent of responding to long-term crises with short-term, piecemeal remedies, e.g. the temporary adjustment of the H-2B cap. No such change appears imminent, however. Although SAOIA has bipartisan backing, its supporters are not very numerous.

3. Agricultural Reform

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Although the Agricultural Job Opportunities, Benefits and Security Act of 2005 (AgJobs) would not provide for the same sweeping reforms as would SAOIA, AgJobs is particularly significant for two reasons. First, AgJobs has received widespread bipartisan support. Indeed, the House proposal, H.R.884, has forty-six (46) cosponsors and the Senate companion bill, S.359, has forty-nine (49) cosponsors. Thus, there is a good chance that AgJobs will soon become law.

Second, although it does not attempt to overhaul U.S. immigration law entirely, AgJobs is significant in that it takes a comprehensive approach to tackling a single issue: agricultural employers' vast need for immigrant labor. Specifically, AgJobs addresses both the short- and long-term concerns raised by the gross inadequacy of current provisions for the lawful migration of agricultural workers to the U.S. On the one hand, AgJobs addresses our need to know who is in this country by encouraging undocumented aliens to come forward and make their presence known. Illegal aliens doing so would be eligible to attain legal temporary immigrant status. On the other hand, AgJobs would discourage future waves of undocumented immigration by ensuring U.S. agricultural businesses an adequate supply of legal immigrant farm workers.

IV. Conclusion

The argument that immigrants are an essential element of sustained economic prosperity is not a new one, and the assertion is well supported in fact. New articles detailing the critical importance of immigrant labor for the sustained growth and vitality of the American economy add little to the debate. These articles have a common audience. We do not need to be convinced of the fact that H-1B and H-2B caps serve no useful purpose. It is unlikely that the wages of qualified U.S. workers would be undercut by cheap foreign labor, absent such caps, given the expenses (in terms of attorney and filing fees) involved in hiring a foreign worker over an American peer.

Statements to the effect that "[c]urrent concerns about the U.S. economy should not distract from an understanding that America's long-term economic success requires the nation to attract skilled professionals and workers of all skills levels to fuel the growth of the labor force" and "[l]ooking to the future is the task of policy makers and opinion leaders" miss the mark entirely.[1] The policymakers responsible for passing – or failing to pass – necessary immigration reform are politicians and, regardless of their public stance, most are probably aware of the fact that long-term economic prosperity and immigration are deeply intertwined. The issue, then, is whether reelection in the shortterm is possible if they advocate for long-term economic and immigration reform. If a politician's constituency is poorly educated and believes that immigrants steal jobs rather than create them, adopting an immigrant-friendly stance becomes politically untenable. Money spent lobbying Congress would thus be better spent persuading the public that a vote to increase the availability of work visas is not a vote against the American worker.

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[1] Stuart Anderson, *The Global Battle for Talent and People*, Immigration Policy Focus, Vol.2, Issue 2, September 8, 2003.

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The current bipartisan support for AgJobs and SAOIA suggests that positive change may be afoot and that the much-needed reform of our H visa programs may not be far off. Pending such reform, though, protecting our current supply of legal foreign workers is critical. This will become increasingly difficult as America continues to pass restrictionist legislation while countries such as Canada, Australia, Germany, and Japan reform their laws to make themselves more attractive to foreign professionals. After all, would it be so unreasonable for an H-1B professional to decide to take his highly coveted skill set elsewhere when faced with the inability to obtain a driver's license and the inherent difficulties and delays in obtaining a green card?

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