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Articles, continued

Immigration and Nationality Laws

THE RIGHT TO PROSCRIBE THE EMPLOYMENT OF ILLEGAL ALIENS, FEDERAL VS. STATE

(By Reuben S. Seguritan*)

This contribution by Reuben S. Seguritan is must reading for every practitioner involved in Immigration and Nationality laws. At one time or another immigration law practitioners will have to grapple with labor certification requirements as they apply to the employment of illegal aliens. The ensuing compilation of recent case law and analysis by Attorney Seguritan will hopefully illustrate and explain the current state of the law of whether or not it is lawful for a state to pass a law prohibiting and penalizing the employment of illegal aliens.

Within the framework of the federal system, is it lawful for a state to pass a law prohibiting and penalizing the employment of illegal aliens? A recent decision of the United States Supreme Court in the case of **DeCanas v. Bica** (February 25, 1976) No. 74;882, 44 Vol.33 **Law Week**, has ruled that it is constitutional. The law in question was a section in the California Labor Code prohibiting an employer "from knowingly employing an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."

The facts of the case are a little surprising, to think that the petitioners were immigrant migrant workers of Hispanic origin who would have been in the same shoes as those of the illegal aliens were it not for their lawful residence status. They alleged that they had not been rehired by their farm contractor because of the surplus in labor supply. This "surplus", the petitioners argued was due to the presence in the area of illegal aliens and their unlawful employment by farm contractors. Their joblessness was therefore an adverse effect on them and the direct consequence of the deliberate employment of illegal aliens.

The petitioners sought to get their jobs back and also wanted a permanent injunction imposed upon their contractor against the willful hiring of illegal aliens. The lower court of California, in an unreported opinion, struck down the section as unconstitutional. On appeal to the Court of Appeals of California, such ruling was affirmed.

It is worth the time and effort to study in some detail the Court of Appeals decision. First, reference was made to **Diaz v. Kay-Dix Ranch**, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443, where the Court of Appeals of California on a "balancing of equitable considerations" refused to enjoin the hiring of illegal aliens and concluded that it was a matter for the U.S. Congress. Since this case was decided before section 2805 of the California Labor Code was enacted, did it mean that **Diaz** had to be rejected on the ground that the state legislature had passed upon the matter? The Court of Appeals sustained the validity of the **Diaz** decision in consonance with the concept of federalism. Then, the Court drew attention to the case of **Purdy & Fitzpatrick v. State**, 79 Cal. Reptr. 77, 71 Cal. 2d 566, where the

California Supreme Court held that a section of the California Labor Code, prohibiting the employment of aliens on public works was unconstitutional because Congress possesses the exclusive right to regulate immigration and naturalization.

If one goes back to **Purdy & Fitzpatrick**, **supra**, a host of principles governing the federal framework are pretty obvious, with all the supporting United States Supreme Court decisions and specific references to the Constitution and the Immigration and Nationality Law. The basic premise was the existence and recognition of the area of immigration as a federal concern which state laws couldn't encroach upon. Such laws improperly interfere with the comprehensive regulatory scheme enacted by the federal Congress in the exercise of its exclusive power over immigration. The decision carefully notes down the three types of state laws which are "infringements upon the competence of Congress to act" in the area: "(1) A state may not attempt to regulate or control immigration as such. (2) A state law which burdens the general congressional power to admit aliens cannot be upheld. (3) When Congress has enacted a comprehensive scheme for the regulation of a particular aspect of immigration and naturalization, a state law may not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

In **DeCanas v. Bica, supra**, the California Court of Appeals strongly sustained the case of **Purdy & Fitzpatrick** despite the destinction that the statute in question in **Purdy & Fitzpatrick** addressed itself to all aliens, whether legal or illegal and in **DeCanas v. Bica**, the questionable section referred to illegal or undocumented aliens. Citing **Ekiu v. United States**, 142 U.S. 651, 12 S. Ct. 336, 35 L. Ed. 1146, the Court of Appeals stressed that "the

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federal Congress has the specific delegated power to regulate foreign commerce, make treaties and establish rules for naturalization and it has, as an incident of national sovereignty, the implied power to control the conditions for the admission of foreign nationals into the country. Therefore, "no area of governmental activity is more uniquely suited to federal regulation than the control of immigration."

Finally, the California Court of Appeals' decision in **DeCanas** goes beyond the immigration issue and cites controlling principles set forth in U.S. Supreme Court decisions involving labor management disputes in which the National Labor Relations Board has declined to assert jurisdiction and at the same time refused to concede jurisdiction to the states in this particular area. The creation of such "no-man's-land" is a federal prerogative in which, though presently an obvious vacuum, couldn't be left to the states to encroach upon because of the potential danger of conflict that it would entail.

The U.S. Supreme Court Decision in DeCanas

Using the foregoing discussion as background material, we are now ready and in a better position to discuss with some detail the U.S. Supreme Court decision in the **DeCanas** case.

We go back to our first question of whether a state's prohibition of the hiring of illegal aliens is constitutional. The U.S.Supreme Court in **DeCanas** answered this question in the positive. Its answer should of course be properly understood in the context of the particular section of the California Labor Code at issue. The first consideration, it would seem for the U.S.Supreme Court, in approaching the problem, is whether the area proscribed by section 2805 was at all an immigration area. If not, it could then be encroached upon by the state. It categorically observes that the statute has only "some purely speculative and indirect impact on immigration", thereby not making it a federal reserve. Likewise, California, in the exercise of legitimate police power, has the right to legislate on matters affecting its economy. There are no substitutes for accuracy in these respects than the very words of the Court itself: "...In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action, S 2805 would not be an invalid state incursion on federal power."

While this exercise of state police power may give way to paramount federal legislation, the U.S.Supreme Court refused to presume that the U.S. Congress "in enacting the INA (Immigration and Nationality Act), intended to oust state authority to regulate the employment relationship covered by S 2805 (a) in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was 'the clear and manifest purpose of Congress' would justify that conclusion.

Lastly, the U.S.Supreme Court tackles the question of whether, "although the INA contemplates some room for state legislation, S 2805 (a) is nevertheless unconstitutional because it stands as an obstacle to the accomplishment and execution of the full purposes of Congress' in enacting the INA. It finds that the record before them could not adequately make the Court address itself to the question. The California Court of Appeals did not actually reach the question that Congress had completely barred state action in the field of employment of aliens. Therefore, statutory construction may be called for, which the California courts should address themselves as for example if section 2805(a) as appropriately construed "can be enforced without impairing the federal superintendence of the field" covered by the INA, or in the appropriate definition of an "alien" who is "not entitled to lawful residence in the United States". The Supreme Court asks: "does the statute prevent employment of aliens who, although 'not entitled to lawful residence in the United States', may under federal law be permitted to work here?" It would seem that on its face, section 2805(a) would apply to such aliens and therefore would conflict with federal law. But then, it is pointed out that section 2805(a) should be limitedly construed on the face of the definition in the California Administrative Code, Title 8, part 1, c. 8, art. 1, S 16209(a) in that an alien "entitled to lawful residence shall mean any non-citizen of the United States who is in possession of Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work." Administrative Regulations promulgated by the California Director of Industrial Relations had limited the construction of section 2805(a) to this definition in the Administrative Code. It is not shown, however, whether such regulations were before the California courts and whether they at all had tackled the issue of conflict with federal laws.

The U.S. Supreme Court Decision and the California Court of Appeals Decision:A Re-Appraisal.

The definite diversion between the U.S. Supreme Court decision and that of the California Court of Appeals would lie in the interpretation of the area where the state of California had legislated upon. The former had found that it is only an area where immigration has a "purely speculative and indirect impact"; and area of police power or at least "in the mainstream of police power regulation"; and an area in which no concrete demonstration of explicit Congressional exclusion or preemption has been shown. The latter, on the other hand, had totally relied upon the perspective that a law prohibiting the employment of illegal aliens is an immigration matter and therefore should be left to the States. We are not to conclude this article with an affirmative conclusion as to which of the two perspectives is right. With the passage of a pending bill inCongress prohibiting the employment of illegal aliens, the issue can reach more definite proportions and perhaps a more definitive conclusion on the matter can also be reached.