

REAL ID Act To Become Law; Asylum, Drivers License Rules to Change

by Greg Siskind

After nearly a yearlong fight between Congressman James Sensenbrenner and his allies in Congress versus nearly 600 organizations advocating for the rights of immigrants, the controversial REAL ID Act of 2005 has become law. The measure is included in the Emergency Supplemental Appropriations package (H.R. 1268) that has been passed in Congress and signed by the President.

REAL ID has three major sections — one dealing with asylum applications and removal proceedings; another covering drivers license standards; and a third covering border security.

Asylum Provisions

Section 101 of the bill is entitled "Preventing Terrorists from Obtaining Relief from Removal." It makes a number of changes to evidence requirements in asylum applications, applications for withholding of removal and other forms of relief from removal. These changes will generally take effect when President Bush signs the law.

The bill requires asylum applicant so prove that one of the enumerated grounds for asylum was or will be "at least one central reason" for the applicant's persecution. This is actually a softening of earlier language that said that one of the five grounds was "the central reason" for persecution.

Immigration judges will now require asylum and withholding applicants to obtain corroborating evidence unless and applicant cannot reasonably obtain the evidence. The availability of corroborating evidence will be considered a finding of fact not easily reviewable by a higher court.

Asylum adjudicators and Immigration Judges making credibility determinations will make decisions viewing the "totality of the circumstances" and all relevant factors including "demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements..... the internal consistency of each such statement, the consistency of such statements with other evidence of the record.....and any inaccuracies or falsehood in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor."

The last part regarding whether an inaccuracy needed to be relevant to an asylum claim has been one of the most controversial provisions in REAL ID. According to immigrant rights advocates, minor inconsistencies are not unusual for asylum applicants who have experienced traumatic life events.

The standard above will also apply to withholding of removal cases, removal under the Convention Against Torture law, cancellation of removal, Violence Against Women Act cancellation cases, NACARA, Cuban Adjustment Act cases and other discretionary cases.

Courts will now be barred from reviewing discretionary decisions regardless of whether made as part of a removal process.

The final negotiated version of the bill included a provision stating that while there is no presumption of credibility, if no adverse credibility determination is explicitly made by at the time of the asylum determination, the applicant or witness shall have a rebuttable

presumption of credibility on appeal.

A very good piece of news in REAL ID is the elimination of the annual cap on the number of asylees who are eligible to adjust status to permanent residency. Also, the annual limit on the number of people eligible to be granted asylum as a result of being subject to coercive population control measures is now eliminated as well.

Border Fence

Section 102 of REAL ID waives all legal requirements the Secretary of Homeland Security deems necessary to proceed with the construction of security fences and barriers along the country's borders. Only constitutional arguments may be heard by district courts and only if claims are filed within 30 days of an action by Homeland Security. And the actions of district courts can only be reviewed by the US Supreme Court.

Terrorist Activities

Section 103 through 105 of REAL ID address terrorist activities and the removal of terrorists. Section 103 broadens the Immigration and Nationality Act's definition of "has engaged in a terrorist activity" and expands the grounds of inadmissibility for engaging in activities seen to be assisting "terrorist organizations." These provisions apply retroactively which means that cases may be reopened by USCIS that have already closed.

According to the American Immigration Lawyers Association, this provision breaks an agreement negotiated during the debate of the PATRIOT Act. Under the Patriot Act, according to AILA, a foreign national who supports a designated terrorist group is automatically deportable. Support of a non-designated group will result in deportation only if the foreign national supports the group's "terrorist activity." Under REAL ID, a person is deportable unless he can prove that he did not know that the group was engaged in terror activities. Also, according to AILA, the provisions would apply to spouses and minor children even if the spouse or child had no knowledge of the terrorist activity or association.

Habeas Corpus

The restrictions imposed on judicial review under anti-immigration provisions passed in the 1990s are further expanded in Section 106 of REAL ID. The new law will eliminate habeas corpus review wherever judicial review is eliminated under the Immigration and Nationality Act.

Only US Courts of Appeals can review claims under the Convention Against Torture Act as well as constitutional claims or questions of law. Cases pending at US District Courts on the day of enactment will be transferred to US Courts of Appeal.

According to AILA, this provision is likely to be litigated on constitutional grounds and it notes that this is the first such restriction on Habeas relief since the US Civil War.

Drivers' Licenses

While one might think that the elimination of habeas corpus relief or imposing new restrictions on asylum would be the most important provisions in REAL ID, the drivers' license sections have been the ones that have gotten most of the media attention.

Under Title II of REAL ID, the drivers license provisions of the Intelligence Reform Act

passed in 2004 are repealed and new requirements take its place. Beginning in 2008, federal agencies will be barred from accepting for official purposes a driver's license or state identification card unless the issuing state meets new federal requirements. That means no getting on airplanes, entering federal buildings, etc. without an approved license. Realistically speaking, every state will find itself compelled to comply with the law since failure to issue a complying license will have severe implications for a state's residents.

To meet the requirements of REAL ID, the license must include the following:

1. the person's full legal name
2. the person's date of birth
3. the person's gender
4. the person's license or identification card number
5. a digital photograph of the person
6. the person's address of principal residence
7. the person's signature
8. physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes
9. a common machine-readable technology

States must also set up systems to verify identity. License applicants must present a photo identity document or a non-photo document if it includes the person's full legal name and date of birth. The applicant must present documentation showing the person's date of birth. The applicant must present proof of their social security number or verification that the person is not eligible for a number. And the applicant must present documentation of their name and address.

Finally, a state must require evidence that the person is

1. a citizen or national of the US
2. an alien lawfully admitted for permanent or temporary residence in the US
3. has conditional permanent residence in the US
4. has an approved application for asylum or has entered the US in refugee status
5. has a valid, unexpired non-immigrant visa or non-immigrant status
6. has a pending application for asylum in the US
7. has a pending or approved application for temporary protected status in the US
8. has approved deferred action status or
9. has a pending application for adjustment of status to lawful permanent resident status in the US

If a person can prove they fit into at least one of these nine categories, they will be eligible for a temporary license or identification card that will only be valid during the period of time the applicant is authorized to stay in the US or, if there is no definite end to the period of authorized stay, for a period of one year. The fact that the documents are temporary would need to be prominently noted on the card.

In order to extend the validity of the card, applicant would need to present documentation of continuing legal status.

States will now be required to verify with the issuing agency the issuance, validity and completeness of each document presented. Foreign documents other than a passport may not be presented. States will have to sign agreements with DHS by September 11, 2005 to use the Systematic Alien Verification for Entitlements (SAVE) program to verify the legal presence of a person, other than a US citizen, applying for a license or identification card.

States will also now be required to use special digital photography technology, verify social security numbers, refuse to issue licenses to people holding out of state licenses unless the state confirms the license in the other state has been terminated, secure the storage and security of license materials, run security checks on people working at motor vehicle offices, and limiting the validity date of all licenses to know more than 8 years.

States failing to comply with the new requirements will be required to clearly state on their cards that they are not valid for federal purposes and they must use a unique color to alert Federal agencies that they are not acceptable.

States can continue to issue alternative identification documents — like Tennessee's driver's certificates — that state clearly that the document may not be accepted by any federal agency.

Privacy advocates are also concerned about a new database that will be made available to DHS and the states containing the information collected under this Act.

AILA also points out that this law would not have prevented any of the 9/11 hijackers from getting driver's licenses. All entered on valid visas that could have been used to secure licenses under REAL ID. The group that will largely be affected are Mexicans who enter the US without a valid visa.

There is a provision in the statute permitting the federal government to make grants to help states in the transition to REAL ID. However, there is a \$500 million estimated price tag associated with the new law and there is no statement in the law regarding just how much money might be made available.

Border Infrastructure and Technology Integration

DHS will be required to study for five years the technology, equipment and personnel needed to address security vulnerabilities within the US for each field office of CBP.

DHS will be required within six months from the date President Bush signs this law to begin a pilot program to use ground surveillance technologies to enhance border security.

Also within six months, DHS is required to develop along with the Transportation Department a plan to improve communications systems between the various federal departments and agencies and state and local agencies.

Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, P.C. - Immigration Lawyers, which has offices in the United States and around the world. He has experience handling all aspects of immigration and nationality law and has represented numerous clients throughout the world. He is an active member of the American Immigration Lawyers Association (AILA) where he recently served as chairman of the Physicians Committee. He is currently chairman of the Foreign Medical Graduate Taskforce. He is a member of the American Bar Association (ABA), where he serves on the Governing Council of the Law Practice Management Section and recently served as Chairman of the Law Practice Management Publishing Board. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is the author of *The Lawyer's Guide to Marketing on the Internet*, published by the ABA and a contributing author to *Immigration Options for Physicians, Second Edition*, recently published by the American Immigration Lawyers Association. He graduated *magna cum laude* from Vanderbilt University and received his law degree from the University of Chicago.