INSIDE THE LAW

Winter 2015

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OBAMA GRANTS IMMIGRATION RELIEF TO SOME

By Kirk A. Carter, Esq.
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On November 20, 2014, President Obama announced that he would take executive action to provide temporary relief to approximately 5 million undocumented workers. Frustrated by Congress's failure to enact immigration reform, the president announced that he would use his executive authority to provide temporary relief from deportation to certain classes of undocumented immigrants.

WHAT IS EXECUTIVE ACTION?

Executive action is not a new law. It is the president's interpretation of existing law. Several years ago the president asked the Department of Homeland Security to examine the existing law and provide him with a list of options available to him to improve the immigration system and provide relief to many of the long-term undocumented workers within the US. Previous presidents, including Reagan, George H.W. Bush and Clinton, have used executive action to extend immigration relief to classes not specifically covered by existing law.

WHAT IS PROSECUTORIAL DISCRETION?

In 2011 the administration announced that it was changing its approach to the removal and deportation of undocumented immigrants. Instead of exerting equal effort to remove all undocumented individuals, it would focus its limited resources on removing repeated immigration violators, those with criminal records, and those who posed a danger to the United States. While undocumented immigrants apprehended in the US or denied a benefit had previously been put into removal or deportation proceedings, Immigration and Customs Enforcement (ICE) was given a series of factors to consider when deciding whether to put someone into the backlogged immigration court system. For the first time ICE was encouraged to leave certain individuals alone if they were under or over a certain age, had been here in the US for an extended period of time, and posed no danger to the US.

WHAT IS DEFERRED ACTION?

In 2012 the president extended his executive action to include a program known as DACA, which granted deferred action to certain children brought here illegally by their parent when they were under the age of 16. These childhood arrivals were viewed as not being culpable in breaking the immigration laws. While the president doesn't have the authority to grant these individuals legal residence, he does have the authority to defer or delay their removal from the US. Under DACA, individuals' removal is deferred for two years, and they are granted work authorization during the interim.

COMPREHENSIVE IMMIGRATION REFORM

In 2013 the US Senate passed a comprehensive immigration bill with strong bipartisan support that would provide a pathway to legalization for undocumented individuals. Unfortunately, Republicans in the House of Representatives have blocked this bill from coming to the floor for a vote. More than 500 days have now passed without the House bringing to a vote any bill addressing immigration reform.

PRESIDENT OBAMA ACTS

Frustrated by the inability of Congress to pass immigration legislation, the president on November 20 unveiled a series of executive actions that he intends to implement. Among these actions are the following:

EXPANSION OF DACA

To qualify for DACA, currently an applicant must:

a. Be under the age of 31 as of June 15, 2012;
b. Have entered the US before June 15, 2007;
c. Have been younger than 16 at the time of arrival; and
d. Meet certain specific educational and public safety criteria.

On November 20 the president announced that the class of eligible individuals would be expanded by removing the age restriction. Thus, individuals brought here as children who are now over the age of 31 will soon be able to apply. It is anticipated that approximately 1.5 million will be eligible. The entry cutoff will also be advanced from June 15, 2007, to January 1, 2010. Lastly, a grant of deferred action will allow an individual to remain and work in the US for a period of three years, instead of two as previously provided. Filing for this expanded form of relief will not begin until late February 2015.

EXPANDING DEFERRED ACTION TO PARENTS OF USCS AND LPRS

The president also announced that deferred action and work authorization would be granted to certain parents of children who are either US citizens or lawful permanent residents. To qualify for this benefit, individuals must:

a. As of November 20, 2014, have a son or daughter who is either a US citizen or lawful permanent resident ("green card" holder);

b. Have resided in the US continuously since before January 1, 2010;

c. Be physically present in the US as of November 20, 2014, and at the time of making application for benefits; and

d. Be undocumented and not fall within the category of individuals who are "enforcement priorities."

It is expected that approximately 3.7 million will be eligible to file for this form of relief. Applications will not be accepted until May 2015.

WHAT IS THE NATURE OF THE RELIEF BEING GRANTED?

Individuals granted deferred action under the president's executive action do not become legal residents of the United States, nor will they receive green cards. The program does not lead to citizenship. Individuals are merely granted "deferred action," meaning that the government will not seek to deport or remove them for a period of three years and will also provide them with the right to work. While current DACA holders are beginning to renew their deferred-action status for a second two-year period, there is no guarantee that deferred action will be embraced by future presidents; thus, the grant of new cases could end once Obama leaves office on January 20, 2017.

CAN THE PRESIDENT REALLY DO THIS?

Most constitutional scholars believe that the president has the authority to move forward with this program, based on precedent and the fact that no permanent benefit is being extended. However, certain members of Congress are likely to challenge the president's constitutional authority, and this could ultimately end up at the Supreme Court. Additionally, Congress might seek to pass a law that would block the president's ability to implement this law, possibly by denying him funding through the budgetary process.

SHOULD I FILE FOR THIS RELIEF?

Those who are eligible are best advised to proceed with caution. At this point we do not know whether Congress will find a way to block the program before implementation. Nor do we have guidance as to how, exactly, the program will be implemented. While it is anticipated that a variation on the form currently used for DACA applicants will be used for both the expanded DACA program and the Deferred Action for Parental Accountability (DAPA) program, no forms exist yet, nor will anyone be able to file until sometime next year. To apply, an individual must disclose his or her name and address. There is obviously concern about what happens if a future president discontinues the program.

For the first time ICE was encouraged to leave certain individuals alone if they were under or over a certain age, had been here in the US for an extended period of time, and posed no danger to the US.

Could he or she use the list of those granted deferred action to immediately start removing and deporting people? Most think this is unlikely, but certainly one must weigh the benefit of this program against the risk.

WHAT ELSE DOES THE PRESIDENT'S EXECUTIVE ACTION COVER?

The expansion of DACA and the new DAPA program offer relief to the largest number of individuals. However, the president's announcement covers a number of other initiatives, including a reclassifying of the administration's removal priorities, the discontinuation of the Secure Communities Program and its replacement with a new Priority Enforcement Program (PEP), and an expansion of the Provisional Waiver Program (previously restricted to the spouses and children of USCs) to include the spouses and children of lawful permanent residents. There are also some special provisions that apply to skilled workers, entrepreneurs, and those in the US on advance parole.

BEWARE OF NOTARIOS

Individuals who would like to obtain relief under the president's executive action should be most careful of those who might seek to take advantage of them. These include "notarios," individuals who claim to be lawyers in their home country, and others who are just seeking to make a quick buck. Many will make big promises, overcharge for filing basic applications, and often just take the money and run. Worse yet, some will file applications for individuals containing false information that may come back to haunt the applicants in the future.

DO I NEED A LAWYER?

Consulting a qualified immigration attorney can help prospective applicants make sure that they meet eligibility requirements, since application for deportation relief does not provide confidentiality. Applicants should remember that everything disclosed in an application filed with USCIS can be used against them in the future. **FT**

GOING SMOKE-FREE: MORE CONDOMINIUMS AND APARTMENT COMPLEXES ARE BANNING SMOKING IN HOMES

By Donna Toman Salvidio
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One unit owner complains about the smell of smoke infiltrating her unit and claims that it is aggravating her asthma. She wants the smoker stopped and is threatening suit against the condominium board if it fails to take action. The smoker claims he has a legal right to smoke inside his unit, and his rights aren't limited to cigarettes anymore. Since January 1, 2013, qualified individuals are permitted to smoke medical marijuana as well. What is a condominium board to do? Secondhand smoke is a hot topic, and it isn't going up in a puff of smoke anytime soon.

The uproar over secondhand smoke has led to lawsuits, both against unit owners who smoke and condominium associations. How can property managers address the concerns of unit owners; respect the rights of smokers, including those using medical marijuana; and avoid legal liability?

A condominium association's duty to unit owners is defined by its condominium documents. If there is a ban on smoking in place, the condominium has an obligation to enforce it uniformly. Where there is no express restriction on smoking, unit owners have based their lawsuits on a failure to enforce boilerplate nuisance policies typically found in most condominium bylaws, which prohibit offensive noises, odors, fumes or hazards to health. To date, no Massachusetts condominium association has been held liable when there is no restriction in place prohibiting smoking in units. However an increasing number of cases have been settled because litigation is expensive and risky; and under the condominium lending guidelines implemented by FHA, Fannie Mae and Freddie Mac, any pending litigation can stall sales, loans and the refinancing of units.

An existing condominium association interested in restricting smoking must have the support of the unit owners. Since such a ban regulates the interior of a unit, it would need to come in the form of an amendment to the master deed and/or declaration of trust, and typically 67% or more of the interest of unit owners and a majority of the trustees must vote to pass such an amendment. In addition, the restriction must be reasonable and rationally related to the achievement of a legitimate purpose. In order to garner the requisite number of votes to pass a ban on smoking in units, many condominiums are grandfathering in existing smokers while requiring that they take steps to mitigate the effects of smoking by installing air filtration systems and the like. Moreover, proposing such a ban might reduce a condominium's risk of liability, as all a board of trustees can do is propose a ban and not guarantee its passage – which requires a supermajority vote of the unit owners.

It is becoming more common for developers of new condominiums to impose a smoking ban at the time of the creation of the condominium. Such a bylaw would be difficult to challenge since all purchasers would buy with notice of the smoking prohibition and could choose to live elsewhere if they did not approve of the ban. In the single reported case in the country thus far, a Colorado district court held that smoking is not a constitutionally protected right. The court noted that a condominium's authority to restrict legal activities within residential units is strengthened where private activities are so negatively impacting the remainder of the condominium community. While the Colorado case is not binding, it follows the trend of upholding laws designed to protect persons from suffering the adverse effects of secondhand smoke in indoor areas.

Smokers will surely object to limitations placed on smoking in their homes, but condominiums are a special type of property ownership, and the Massachusetts Condominium Act provides a strong basis for the imposition of reasonable rules, regulations and bylaws designed to protect the peaceful enjoyment of units. See G.L. c. 183A, § 11(e). As Massachusetts courts have stated, "[c]entral to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'" Noble v. Murphy, 34 Mass. App. Ct. 452, 456 (1993), quoting Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975).

As with cigarette smoke, medical marijuana smoke can also seep into neighboring units. The new Massachusetts statute allows individuals with "debilitating medical conditions" to use marijuana and possess a 60-day supply without being subject to criminal and civil penalties. The law also allows users to cultivate marijuana if their access to authorized dispensaries is limited. How then is a property manager to balance the competing interests of someone with a legal prescription to smoke marijuana against the asthmatic neighbor next door?

Condominium associations may adopt a bylaw to govern marijuana the same way it would for any other use restriction. Marijuana is still a prohibited drug under federal law, which contains no medical exception. As such, condominiums might argue that the Massachusetts law only protects individuals from state prosecution but it does not regulate the actions of private entities or overrule their own drug

policies. This argument has carried the day in the employment context when employers have been allowed to terminate employees who use medical marijuana. Whether Massachusetts courts will adopt this rationale in the housing context remains an open question, however.

Short of adopting a definitive rule addressing the use of medical marijuana, a condominium could elect to treat medical marijuana requests the same as other accommodation requests under the Fair Housing Act. Such requests require a good-faith effort to identify an accommodation that meets the needs of the patient without unduly burdening the condominium or harming other residents. The evaluation process could include verifying the patient's need for medical marijuana through documentation from the prescribing doctor as well as determining whether other drugs could provide comparable relief. If the information gathered shows that medical marijuana is the only appropriate treatment, the condominium association could request that the patient lessen the effects of smoking by installing a smoke filter or consuming the marijuana through other means. Even if a unit owner who is denied accommodation through this process files suit, the condominium's exposure to liability would be lessened if it carefully followed its duly adopted procedures.

As for smoking in apartments, bills have been filed in Massachusetts that would limit smoking to detached single-family homes, but each time they have died quietly or sent to committee for more study. In the meantime, some local apartment complexes and public housing developments, along with the Worcester Housing Authority, have banned smoking in certain buildings. It's clear that smoking reform will continue to evolve within the housing context.

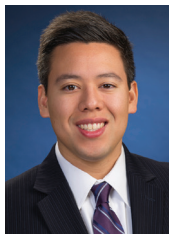
Property owners need to understand the options available to them to address the dangers of smoking. With the requisite level of unit owner support, or at the inception of a project, condominiums have the ability to restrict the smoking of cigarettes within units and in the common areas and facilities of the condominium. The rights surrounding the use of medical marijuana are still cloudy, but given the patient's right to reasonable accommodation, condominiums would be well-advised to adopt procedures for addressing such accommodation requests on a case-by-case basis.

For further information about adopting smoke-free policies for interested condominium associations, the Massachusetts Department of Public Health, in conjunction with the Boston Public Health Commission, published a condominium association guide, *click here to see guide*. In addition, the attorneys at Fletcher Tilton would be happy to advise those property owners who are considering implementing a smoking ban. **FT**

FIRM **NEWS**

FLETCHER TILTON WELCOMES ATTORNEYS ATTIA AND PONTE

Mary Kaddis Attia joined the firm in October 2014 as an Associate whose practice concentrates in immigration law. Her focus is on family-based immigration matters, such as fiancée visas, and green card petitions based on marriage to a US citizen and other family relationships, including complex cases needing waivers of inadmissibility. She also has extensive experience with asylum cases before Unites States Customs and Immigration Services (USCIS) and immigration court. Attorney Attia is fluent in Arabic and is admitted to practice in the Commonwealth of Massachusetts and before the First Circuit of the US District Court. She is resident in the firm's Framingham office and can be reached at *508.532.3512* or *mattia@fletchertilton.com*.



Adam C. Ponte joined the firm in November 2014 as an Associate and concentrates his practice in civil litigation. He regularly represents businesses and individuals in various complex matters including business litigation, construction disputes and personal injury. Mr. Ponte received his law degree from Boston University School of Law and received his B.A. in Political Science and Mandarin Chinese at the College of the Holy Cross in Worcester where he also served as Class President. He is admitted to practice in Massachusetts State and Federal Courts. Mr. Ponte works out of the firm's Worcester office and can be reached at *508.459.8012* or *aponte@fletchertilton.com*.

FLETCHER TILTON JOINS FORCES WITH HUDSON BASED FIRM YATES LAW OFFICES

Founded in 2002, Yates Law Offices has provided exceptional service to individuals, businesses, and other entities throughout Massachusetts in the areas of: Real Estate, Estate Planning, Civil Litigation, Immigration, Estate Administration, Business Formation, Landlord/Tenant, and Commercial Collections.

"As we looked to grow our business and better meet our clients' needs, aligning with a larger regional firm like Fletcher Tilton, would enable us to provide more resources to meet the ever-changing, more complex issues that our clients increasingly require," says Principal Christopher Yates.

On January 1, 2015, we welcomed Attorneys Christopher P. Yates and Nelson Luz Santos to our Fletcher Tilton family.

Christopher P. Yates has joined the firm as an Officer who concentrates his practice in residential real estate, commercial lending, land use permitting/zoning, estate planning, and business formation. Mr. Yates is a member of the Massachusetts Bar Association, Real Estate Bar Association of Massachusetts, Assabet Valley and Marlborough Regional Chambers of Commerce, Hudson Business Association, and the Hudson Rotary Club. He earned his B.A. from Assumption College and earned his J.D. from the Quinnipiac University School of Law. Mr. Yates is admitted to practice in the Commonwealth of Massachusetts and the U.S. District Court of Massachusetts. He resides in the firm's Framingham office and can be reached at *508.532.3524* or *cyates@fletchertilton.com*.

Nelson Luz Santos has joined the firm as an Associate whose practice concentrates on civil litigation, immigration, estate planning, and business law. He earned his Bachelor's of Science in Resource Economics from the University of Massachusetts – Amherst with minors in Portuguese and Information Technology. He earned his Juris Doctorate from Massachusetts School of Law. Attorney Santos is admitted to practice in the Commonwealth of Massachusetts and before the United States District Court of Massachusetts. He is committed to community involvement and actively participates as a member of the Hudson Portuguese Club; the Marlborough Regional Chamber of Commerce; the Rising Young Professionals Group; the Assabet Valley Chamber of Commerce; and Main Street Business Connections, a local business professionals group in Hudson, Massachusetts. Mr. Santos resides in the firm's Framingham office and can be reached at *508.532.3525* or *nsantos@fletchertilton.com*.

ATTY SAMANTHA MCDONALD HONORED AS THE YEAR'S PRO BONO PUBLICO AWARDEE

October 2014 was designated by the American Bar Association as a month for all Bars to recognize and honor the commitment of its members who provide pro bono Services. Our own Samantha P. McDonald was honored for her exemplary work with the Lawyer For the Day Program at Worcester District Court/Small Claims session. Established in 2012 through a joint partnership with the Mass Justice Project and members of the Worcester County Bar Association's Committee on Services to the Poor and Homeless, the Lawyer for the Day Program Attorneys provide legal representation on a limited access basis to indigent debtors in Small Claims Sessions of the District Court. The award ceremony was held on October 29th at Tuckerman Hall in Worcester.

ONCE AGAIN, FLETCHER TILTON HAS RECEIVED A TIER 1 RANKING IN THE 2015 EDITION OF U.S. NEWS – BEST LAWYERS "BEST LAW FIRMS."

This Tier 1 ranking was determined through the firm's overall evaluation, which was derived from a combination of our client's impressive feedback, the high regard that lawyers in other firms in the same practice area have for our firm, and the information that was provided in response to the law firm survey.

FLETCHER TILTON LOST A DEAR FRIEND AND COLLEAGUE

Robert R. Kimball, Esq.
1945-2014

On October 13, 2014, we lost our dear friend Bob Kimball. He was a beloved attorney at Fletcher Tilton PC for 44 years. He retired in 2014 as an Officer with the firm whose practice included commercial lending and financing, banking, real estate and probate law. He was also the past practice group leader of the firm's commercial lending group. Bob had many friends here and will truly be missed. Our thoughts and prayers continue to go out to his family.

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