

Memorandum URGING DISAPPROVAL International Law Section Committee on Immigration and Nationality

International #1 - GOV

August 5, 2013

S. 786-A
A. 158-A

By: Senator Diaz
By: M. of A. Crespo
Senate Committee: Consumer Protection
Assembly Committee: Governmental Operations
Effective Date: 90th day after becoming law

AN ACT to amend the general business law, in relation to implementing the immigration assistance service enforcement act.

LAW AND SECTION REFERRED TO: General Business Law Section 460-h

THE COMMITTEE ON IMMIGRATION AND NATIONALITY OF THE INTERNATIONAL LAW SECTION OPPOSES THIS LEGISLATION

The Committee is concerned that the Governor's long, widely-respected work fighting immigration fraud will be jeopardized by this bill.

I. The bill is preempted by federal law.

Through the Code of Federal Regulations (C.F.R.), Congress indicated its intent to preempt the practice of immigration law by narrowly defining what constitutes its practice,¹ the parties that may so practice,² and by constructing scheme for enforcement.³

This bill would set out new requirements for and punishments against organizations that are recognized by the Board of Immigration Appeals (BIA). These organizations are overseen and regulated by a federal agency. If New York seeks to regulate these organizations, it would do so at the risk of a legal challenge for preempting the C.F.R., in the same way that the state of Arizona was prevented from drafting and enforcing its own immigration laws.

Given the significant amendments and timeframe within which the bill was passed, it has not been thoroughly reviewed for potential legal challenges. However, it is immediately clear that the bill fails to account for what BIA recognized organizations are and what

¹ 8 C.F.R. §§ 1.1(k)-(m), 1001.1(k)-(m) (2012)

² 8 C.F.R. §§ 292.1 (DHS) & 1292.1 (EOIR) (2012).

³ See, generally, *Arizona v. United States*, 132 S.Ct. 2492 (2012).

services they may provide, as opposed to members of the general public who wish to pursue a state license to provide immigration services.

Firstly, BIA accredited representatives are not “Immigration Service Providers” in the sense understood by GBL Ch. 20 Art. 28-C, §§460-a – j. BIA accredited representatives are, in fact, allowed to provide full representation of an immigrant client before the Executive Office of Immigration Review (EOIR—the division of the Department of Justice that includes both the BIA and the Immigration Courts) and the Department of Homeland Security (which consists of, among other agencies, USCIS, US CBP, US ICE, etc.) An “Immigration Service Provider”, on the other hand, is limited, under the C.F.R., to providing strictly clerical services, such as mere translations, appointment making, etc.

Additionally, and as alluded to above, this bill seeks to punish licensees for fraud, by, for example, prohibiting them from filing suit against their client for legal fees. Yet it is quite clear that, under the federal scheme, BIA accredited representatives may only charge fees that are nominal (extremely small).⁴

Another layer of confusion is added by the manner in which the bill would penalize individuals for acting as an “Immigration Service Provider” without such a license. However, as described herein, such activity is already regulated and prohibited by federal law. If the bill intends to require a license for strictly clerical activities, then there is no purpose to requiring BIA accreditation, which requires representatives to meet strict requirements.

In fact, the federal agency overseeing BIA recognition is now revising the compliance requirements for accreditation. The New York State Bar Association Special Immigration Committee is one of many groups preparing comments for the Executive Office of Immigration Review about these processes. If New York has concerns with the regulation of BIA recognized organizations, it would be best to submit comments on the revised compliance requirements detailing the concerns, rather than through bypassing procedural norms to pass the subject legislation.

II. This bill would frustrate enforcement by creating ambiguity regarding permissible activities.

This bill represents a step backwards by providing a license to organizations in the business of providing the undefined term 'immigration assistance services'. The breadth of permissible activities related to immigration has been defined by federal law and by prior actions of the Attorney General. Indeed, the Governor’s own Office for New Americans publishes information instructing immigrants on ways to avoid scams, including links to the United States Citizen and Immigration Services (USCIS) web-page. By relying on generic terms such as ‘immigration assistance services’, this bill only serves to deepen confusion and complicate enforcement.

⁴ 8 C.F.R. §§ 1.1(k), 1001.1(k) (2012)

III. The bill would burden and seek to punish organizations that it should support.

Worse yet, the mere existence of a license serves to lend legitimacy to unauthorized providers while failing to enhance enforcement. This bill would only apply to individuals who have been accredited by the BIA. These individuals represent a very low risk of fraud, and only very rarely defraud immigrant clients as they are only permitted to charge nominal fees. While it could be postulated that this bill would lend legitimacy to BIA accredited representatives, this is not true. Such organizations typically operate at maximum capacity with a high caseload, because they serve a massively underserved population. In essence, BIA accredited representatives do not benefit from a New York State law that serves to burden and punish them.

IV. The bill would be impossible to comply with.

As a threshold matter, the bill would be impossible to comply with on its face. The mandatory application for registration and the mandatory written contract cannot co-exist.⁵ The bill bares the hallmarks of poor public policy.

V. The bill would complicate enforcement efforts.

Historically, and as we have seen in many states that do provide a license for the provision of immigration services (many of which advertise in New York), the very existence of a license opens the door to storefront operations and “notarios” to mislead that they have such a license, when in fact they do not. These businesses typically avoid prosecution, given their small size. As described below, federal law is very clear as to whom is permitted to provide legal services and what those services consist of. The mere existence of a state license greatly, and unnecessarily, complicates this scheme.

Furthermore, a license will lead immigrant clients to believe that the New York can remedy deficient legal services. It is assumed that a licensed body will be overseen by a

⁵~~S~~ 3. The general business law is amended by adding two new sections 460-k and 460-l to read as follows:

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S 460-L. REQUIREMENTS FOR REGISTRATION OF IMMIGRANT ASSISTANCE SERVICE PROVIDERS. 1. ANY PERSON, FIRM OR CORPORATION SEEKING A CERTIFICATE OF REGISTRATION AS AN IMMIGRATION ASSISTANCE SERVICE PROVIDER SHALL FILE WITH THE DEPARTMENT OF STATE AN APPLICATION FOR REGISTRATION IN SUCH FORM AND DETAIL AS THE DEPARTMENT SHALL PRESCRIBE, INCLUDING THE FOLLOWING: (A) THE NAME AND RESIDENCE ADDRESS OF THE APPLICANT; (B) THE BUSINESS NAME, IF OTHER THAN APPLICANT; (C) THE FEDERAL BOARD OF IMMIGRATION APPEAL ACCREDITATION OF THE APPLICANT;

....

S 4. The opening paragraph and subdivision 8 of section 460-b of the general business law, as added by chapter 463 of the laws of 2004, are amended to read as follows:

The written contract shall be in plain language, in at least twelve-point type and shall include the following:

The statement: "The individual providing assistance to you under this contract is not an attorney licensed to practice law or accredited by the board of immigration appeals to provide representation to you before the bureau of citizenship and immigration services, the department of labor or any immigration authorities and may not give legal advice or accept fees for legal advice".

reviewing board, but the bill makes no reference to who will oversee issues related to the practice of law. For example, if an immigration client receives unethical or ineffective assistance of counsel, who will review and respond to that complaint? Will undocumented immigrants be expected to reach out to the Secretary of State, who will then presumably merely direct the immigrant to the Board of Immigration Appeals? As such, it is unclear what benefit the licensing bill provides that is not already made clear by federal law, other than the additional burdens and punishments against BIA accredited representatives.

VI. Far better alternatives exist for remedying immigration fraud.

Rather than creating of a new body of individuals and businesses to regulate and burdening and punishing capable organizations that charge only nominal fees, the immigration population of New York would be better served by measures seeking to improve and vigorously enforce existing laws. A model bill would instead focus on creating new crimes and adding new enforcement mechanisms to target those who are not authorized to practice law or provide legal services, while encouraging, and not discouraging, well-intentioned organizations to apply for recognition from the Board of Immigration Appeals so that they can provide quality, low-cost representation and legal services to the immigrant community.

Rather than enacting this bill into law--a bill that sows confusion regarding permissible activities, seeks to punish organizations that it should be supported, complicates enforcement efforts, is subject to challenges of federal preemption, and is impossible to comply with on its face--a better approach would be to carefully examine laws and measures existing elsewhere.⁶

A model law would create far more effective mechanisms for enforcement, clearly define legal services and providers in a manner consistent with federal law, and clearly distinguish between willful violators and innocent parties, while providing mechanisms to encourage well-intentioned organizations to apply for recognition from the BIA. Such a law should be drafted in close consultation with both organizations representing the immigration community as well as the Office of the Attorney General to ensure that it targets the correct individuals, is clear, effective, and easily enforceable.

Based on the foregoing, the Committee on Immigration and Nationality of the International Law Section urges the Governor to **DISAPPROVE** the bill.

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⁶ See, for example, Wash. Rev. Code § 19.154.010 (2011) (as amended by S.S.B. 5023).