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AG Opinion 2010-10

Re: The Consolidated Natural Resources Act of 2008 does not preempt the Commonwealth from administering, and revoking, an alien's Commonwealth immigration status during the Act's two-year transition period.

This opinion is intended to correct confusion resulting from differing legal opinions regarding the preemptive effect of the Consolidated Natural Resources Act of 2008 ("CNRA"). The Commonwealth retains authority over certain immigration status¹ issues regarding aliens lawfully in the Commonwealth as of the CNRA's effective date, November 28, 2009. This is because the CNRA provides a two-year transition period, during which Commonwealth immigration status must be respected and, by implication, the Commonwealth maintains jurisdiction to administer, and in a proper case, revoke that status. This opinion clarifies the legal basis of the Commonwealth's continuing jurisdiction to administer aliens' Commonwealth immigration status during the transition period.

I. Legal Issues

Does the CNRA preempt the Commonwealth from administering, and revoking, the Commonwealth immigration status of aliens lawfully present in the Commonwealth on November 28, 2009, during the CNRA's two-year transition period?

II. Short Answer

The CNRA does not preempt the Commonwealth from administering, and revoking, the Commonwealth immigration status of aliens lawfully present in the Commonwealth on November 28, 2009, during the CNRA's two-year transition period.

¹ "Immigration status," as discussed in this opinion, means the Commonwealth immigration status of aliens legally present in the Commonwealth on November 28, 2009, at 12:00 a.m., including compliance with the express provisions set forth in the permits issued by the Commonwealth. The CNRA permitted this status to continue for up to two years. "Immigration status" simply means an alien's legal status while in the Commonwealth, and does not relate to entry and deportation of aliens from the Commonwealth. Aliens with independent U.S. federal immigration status are not subject to this opinion.

III. Background

The CNRA placed the Commonwealth's immigration and deportation functions under federal control. However, the CNRA created a two-year transition period in which aliens with valid Commonwealth immigration status may not be deported from the Commonwealth and, if they have valid Commonwealth work authorization, may continue to work. The transition period began on November 28, 2009, and will continue through November 27, 2011. The relevant provisions of the CNRA are as follows:

(a) Application of the Immigration and Nationality Act and establishment of a transition program

(1) In general

Subject to paragraphs (2) and (3), effective on the first day of the first full month commencing 1 year after May 8, 2008 (hereafter referred to as the "transition program effective date"), the provisions of the "immigration laws" (as defined in section 101(a)(17) of the Immigration and Nationality Act (8U.S.C. 1101(a)(17)) shall apply to the Commonwealth of the Northern Mariana Islands (referred to in this section as the "Commonwealth"), except as otherwise provided in this section.

...

(e) Persons lawfully admitted under the Commonwealth immigration law

(1) Prohibition on removal

(A) In general

Subject to subparagraph (B), no alien who is lawfully present in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of section 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)), until the earlier of the date-

(i) of the completion of the period of the alien's admission under the immigration laws of the Commonwealth; or

(ii) that is 2 years after the transition program effective date.

(B) Limitations

Nothing in this subsection shall be construed to prevent or limit the removal under subparagraph 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)) of such an alien at any time, if the alien entered the Commonwealth after the date of enactment of the Consolidated Natural Resources Act of 2008, and the Secretary of Homeland Security has determined that the Government of the Commonwealth has violated section 702(i) of the Consolidated Natural Resources Act of 2008.

(2) Employment authorization

An alien who is lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of the date-

(A) of expiration of the alien's employment authorization under the immigration laws of the Commonwealth; or

(B) that is 2 years after the transition program effective date.

...

(f) Effect on other laws

The provisions of this section and of the immigration laws, as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)), shall, on the

transition program effective date, supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth.

48 USCA § 1806.

IV. Analysis

STATUTORY CONSTRUCTION

A basic principle of statutory construction is that statutes must be construed according to the plain meaning of their words. Where the plain language, supported by consistent judicial interpretation, is as strong as it is here, ordinarily “it is not *necessary* to look beyond the words of the statute.” *TVA v. Hill*, 437 U.S. 153, 184, n. 29, 98 S.Ct. 2279, 2296, 57 L.Ed.2d 117 (1978); *In re Estate of Rofag*, 2 N.M.I. 18, 29 (1991). See also *Commonwealth v. Saburo*, 2002 MP 3, ¶ 12, 6 N.M.I. 355, 358 (“It is a clear principle of statutory construction that the intention of the legislature is to be sought for primarily in the language used and when the language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture.”). No principle of statutory construction is more firmly established.

Section (e)(2) of the CNRA, which extends the Commonwealth employment authorization legal framework during the two-year transition period, provides:

(2) Employment authorization

An alien who is lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date **shall** be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of the date-

(A) of expiration of the alien's employment authorization under the immigration laws of the Commonwealth; or

(B) that is 2 years after the transition program effective date.

48 USCA § 1806(e). (emphasis added).

The word “shall” is a mandatory command, “which normally creates an obligation impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes &*

Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 962 (1998). Analyzing the plain language of this section, it is evident that an alien with lawful Commonwealth status and work authorization on the transition date must be considered by federal authorities “lawfully present and authorized to be employed” in the Commonwealth until either the employment authorization expires or two years pass.

Part and parcel of preventing the expiration of Commonwealth immigration status and employment authorization, however, is continued compliance with Commonwealth law, administered by Commonwealth agencies. For example, while an “umbrella permit” conditionally grants employment authorization until November 27, 2011, the authorization may expire early if the permit holder fails to appear before the Commonwealth Department of Labor on an earlier date specified in the permit. The alien may also lose Commonwealth status, which may result in deportation by the federal authorities.

PREEMPTION

“Where a state statute² conflicts with, or frustrates, federal law, the former must give way. U.S. Const., Art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is “the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490 (1983).” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S.Ct. 1732, 1737 (1993).

A federal statute’s express preemption clause indicates Congress’ purpose. If a statute contains an express pre-emption clause, a court’s “task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 63, 123 S.Ct. 518, 526 (2002) (internal citation and quotation marks omitted). However, “[t]he fact that an express definition of the pre-emptive reach of a statute “implies”- *i.e.*, supports a reasonable inference - that Congress did not intend to pre-empt other matters does not mean that the express clause

² “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Federal Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982). As no federal regulations to the CNRA have yet been successfully promulgated, this opinion does not discuss regulatory preemption. Nonetheless, it bears mention that federal regulations “must give effect to the unambiguously expressed intent of Congress” or be “based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781 (1984).

entirely forecloses any possibility of implied pre-emption.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S.Ct. 1483, 1488 (1995). Implied preemption may occur via field preemption or conflict preemption.

Field preemption may be found when states regulate a subject area that federal law also regulates. The test for implied field preemption “is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 67 S.Ct. 1146, 1155 (1947). The Supreme Court emphasized, however, that its holding in this regard applied only to the nine areas specifically regulated by the amendments to the United States Warehouse Act and that the States were free to enact local laws on other aspects of the warehouse business not addressed by the federal law. *Id.* at 236-37.

Conflict preemption may be found when state statutes conflict with federal statutes. “[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 2293 (2000). Implied conflict preemption exists “where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 1487 (1995).

State statutes regulating aliens may be constitutionally permissible. “Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.” *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936 (1976).

Here, the issue is whether the CNRA preempts the Commonwealth from administering and revoking the Commonwealth immigration status of aliens lawfully present in the Commonwealth on November 28, 2009, during the CNRA’s two-year transition period. States may regulate aliens unless preempted from doing so. *Id.* So long as Commonwealth law regulating aliens passes the express preemption test, implied field preemption test and implied conflict preemption test, it is not preempted by federal immigration law. Each of those tests is discussed, in turn, below.

Because the CNRA has an express preemption clause, we first look to its plain language to determine if Congress intended to preempt the CNMI’s foreign worker program. The CNRA’s preemption clause states:

The provisions of this section and of the immigration laws, as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)), shall, on the transition program effective date, supersede and replace all laws, provisions, or programs of the Commonwealth relating to the *admission of aliens* and the *removal of aliens* from the

Commonwealth.

48 USCA § 1806(f) (emphasis added).

The plain language of 48 USCA § 1806(f) indicates that Congress intended the CNRA to preempt *only* Commonwealth law regarding admission and removal of aliens. The administration and revocation of Commonwealth immigration status does not relate to the entry and deportation of aliens. These administrative activities include, for example, review of aliens' employment applications,³ revoking the status of knowing participants in sham employment schemes, and the like. None of these administrative activities relates to the admission of aliens because the U.S. federal government exclusively controls the Commonwealth's borders. Further, none of these activities relates to the removal of aliens because the U.S. federal government exclusively controls deportations. Thus, the CNRA does not expressly preempt the Commonwealth from administering and revoking Commonwealth immigration status.

Similarly, the CNRA does not preempt the field of Commonwealth immigration status administration and revocation because the CNRA does not regulate the area. Rather, the CNRA expressly provides that Commonwealth immigration status may continue during the transition period. Maintenance of Commonwealth status is dependent on compliance with Commonwealth law. In order to insure compliance, the Commonwealth must to continue to administer and revoke that status during the transition period. Thus, by allowing Commonwealth status to continue during the transition period, the CNRA implicitly directs the Commonwealth to continue to administer and revoke that status as required by Commonwealth law.

Likewise, there is no actual conflict between the CNRA and the Commonwealth's administration and revocation of Commonwealth immigration status during the transition period. First, it is possible for the Commonwealth to administer and revoke Commonwealth immigration status without violating the CNRA. This is because the CNRA preserves Commonwealth status, which is dependent on compliance with Commonwealth law, during the transition period. Commonwealth agencies, including the Department of Labor, ensure legal compliance. The federal government, however, does not. Second, Commonwealth administration and revocation of Commonwealth immigration status during the transition period would not be an obstacle to the CNRA's purposes and objectives. This is because: (1) border security would not be adversely

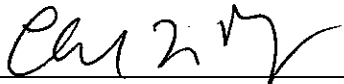
³ The Commonwealth's foreign national worker program requires the Commonwealth Department of Labor to approve the employment of all aliens with Commonwealth "foreign national worker" status. This is to ensure: (1) a legitimate business need for the worker; (2) that no U.S. citizen or person with U.S. federal employment authorization can be found to fill the position; (3) that the employer can afford to pay the worker's salary, medical expenses and repatriation expenses; and (4) that the employer purchases a bond insuring the employer's obligation to pay the worker's salary, and medical expenses and repatriation expenses.

affected; (2) the Commonwealth's foreign national worker program would be phased-out in an orderly manner; (3) federal immigration responsibilities would be phased-in in an orderly manner; (4) potential adverse economic and fiscal effects of phasing-out the Commonwealth's foreign national worker program would be minimized by the orderly transition; and (5) the Commonwealth's potential for future economic and business growth would be maximized by the orderly transition.

Indeed, it would be illogical and unjust to allow aliens to remain in the CNMI for up to two years by virtue of their Commonwealth status without a mechanism for administering that status. For example, participants in the Commonwealth's foreign national worker program hold a work-dependent status. If that status is not administered and individuals lose their jobs, there would be an increased risk of unemployment, unpaid medical expenses⁴ and associated societal ills. Additionally, immediate relatives of foreign national workers, who also have Commonwealth status, would have no means of support in the Commonwealth. This would unduly burden the Commonwealth. The two-year transition period was created precisely to avoid these problems. But in order for the transition period to be successfully implemented, Commonwealth immigration status must continue to be administered and, if necessary, revoked by the responsible Commonwealth agencies.

V. Conclusion

The CNRA does not expressly or impliedly preempt the Commonwealth from administering and revoking aliens' Commonwealth immigration status during the CNRA's two-year transition period. Therefore, the Commonwealth may administer and, if appropriate, revoke the Commonwealth immigration status of aliens lawfully present in the Commonwealth on November 28, 2009, during the CNRA's two-year transition period.



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3.15.10

Date

⁴ Under the Commonwealth foreign national worker program, employers must cover workers' medical expenses.