

Siskind's Immigration Bulletin – January 15, 2008

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1. Openers
2. ABCs of Immigration: Overview of the US Immigration System for 2008, By Greg Siskind
3. Ask Visalaw.com
4. Border and Enforcement News
5. News From The Courts
6. News Bytes
7. International Roundup
8. Legislative Update
9. Notes from the Visalaw.com Blogs
10. Campaign '08
11. USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2008
12. Pew Survey: Most Latinos Fear Raids, Deportation

1. Openers

I've just returned from my annual trip to Las Vegas where I attend the Consumer Electronics Show, the Super Bowl of gadgetry. I attend as a member of the media because I write regularly on law office technology topics. This year I was more organized and have already produced a major article on the show which will be run in the late winter in Immigration Law Today, the American Immigration Lawyers Association's magazine. I'm also producing an article for the American Bar Association as well as numerous posts for my law office technology blog.

Technology is a fun diversion from my day to day immigration law practice, but increasingly a comfort with technology is becoming more and more important to immigration lawyers. Cases are prepared in elaborate case management systems, forms are submitted electronically, the status of a matter is tracked on the Internet

and lawyers are using electronic versions of their research publications and searching the web for the latest news on the law. Sure, seeing the new 150 inch plasma television is cool. But there are many, many hardware and software products that are coming out every year that can make lawyers more productive and provide more effective service to our clients.

January marked the beginning of enforcement of the new Tennessee and Arizona laws which allow for the revocation of a state's business license when an employer knowingly employs unauthorized immigrant workers. There are a number of new laws under consideration around the country and the Department of Homeland Security has dramatically stepped up enforcement as well. Plus, we're expecting the Social Security no match rule to eventually come back either with a court win, legislation in Congress or a new rule released by DHS. Employer enforcement is going to be one of the key issues in 2008.

To help our readers and clients keep up with all of the developments in this fast changing arena, I have started a new blog on employer immigration compliance. The blog will track legislative developments, provide details on Form I-9 compliance, discuss ICE's enforcement of immigration laws and more. This blog is very possibly the first of its kind (at least as far as I know) and I expect to introduce a lot of new information products on the subject as 2008 moves along. You can find the new blog at <http://immcomp.blogspot.com/> .

Immigration continues to be a key subject in the news, something that is hardly a surprise given what we saw in 2007. The topic continues to come up in the presidential campaigns in both parties. But some of the conventional wisdom may have been turned on its head based on last week's New Hampshire primary. I'm speaking specifically of the decisive win by Senator John McCain. McCain has continued to back comprehensive immigration reform and is perceived by the public as being pro-immigration. The assumption that immigration would be THE issue of the presidential campaign and that the more anti-immigration the candidate, the better he or she would do has clearly been challenged. Polls showed that immigration ranked only fourth with Republicans. Furthermore, the assumption that Republicans who care about immigration uniformly favor the extremist anti-"amnesty" positions of some of the candidates has also been challenged.

What is clear is that the most pro-immigration candidate in the GOP is now the frontrunner.

Finally, as always, if you are interested in becoming a Siskind Susser Bland client, please feel welcome to email me at gsiskind@visalaw.com or contact us at 800-748-3819 to arrange for a telephone or in person consultation with one of our lawyers.
Regards,
Greg Siskind

2. The ABC's of Immigration: Overview of the US Immigration System for 2008, By Greg Siskind

INTRODUCTION:

There are five (5) Major Immigration Status/ Visa Categories and for the purposes of this paper, the first three will be discussed.

1. Non-Immigrant Visas – temporary visitors (work, student, visitor, etc.)
2. Immigrant Visas – lawful permanent residents (green card holders)
3. Asylees and other special groups – Asylum, refugee, and TPS status holders
4. Citizens
5. Undocumented – illegal immigrants

1. NON-IMMIGRANT VISAS

There are several types of non-immigrant visas. Non-immigrant visas are usually designated by letters. Below are brief summaries of the most common ones:

H-1B Visas – Available to people in “specialty occupations”

1. Do you have a university degree?
2. Do most people in your field in the US have university degrees?
3. If you lack a degree, do you have several years of work experience in your field?
4. Do you have an employer in the US willing to hire you?
5. Does the job pay as much as similarly employed American workers?
6. Does the employer typically only hire people with university degrees for the job?
7. Does the employer guarantee that they will have continuous work available to you?
8. If the occupation requires a license, do you have the necessary license?

General Notes: Valid for up to six years; can simultaneously have green card application pending; spouses and children not allowed to work; do not need to maintain ties to your home country; limited to 65,000 people per year (but many H-1B workers are exempt from this cap and there is an additional quota of 20,000 for people holding masters degrees or higher granted by a US university); can change employers quickly, but need new visa approval for each new employer; self-employment permitted in limited circumstances; if applicant lacks appropriate degree, equivalent work experience must be demonstrated and evaluation from expert obtained; companies employing many H-1B workers may be subject to additional requirements; USCIS must approve before consulate can issue visa; filing fees are expensive and vary significantly depending on the employer and the need for expedited processing; NOTE: over the past few years, H-1B visas have been used up very quickly and advanced planning is always advisable.

B-1/B-2 Visas – Available to Short term visitors for pleasure or business

1. Do you have a job that pays well and which you can leave for a few weeks on a vacation?
2. Do you have close relatives who will be remaining in your home country when you come to the US?
3. Are you coming for a short visit?
4. Do you have assets in your home country?

5. Do you own property in your home country?
6. Do you have a set itinerary for your trip to the US?
7. Do you have a roundtrip plane ticket?
8. Do you have close community ties in your home country?
9. Do you have money or proof of support from friends or relatives in the US to show adequate financial arrangements to carry out purpose of trip?
10. If you are coming for business, is the work you are doing work that would typically be done by an American worker?
11. If you are coming for business, is the main place where profits are earned outside the US?
12. If you are coming to the US on business, is your payment going to be made abroad rather than in the US?
13. If you are coming as a B-2 visitor for pleasure, are you coming for one of the following purposes?:
 - a. Tourist
 - b. Social visits to friends/relatives
 - c. Health purposes
 - d. Participants in conventions of social organizations
 - e. Participants in amateur musical, sports or similar events with no pay
 - f. Spouses and children of people in the US armed forces
 - g. People accompanying B-1 business visitors
 - h. Coming to marry a US citizen but the person plans on departing after the wedding
 - i. Coming to marry someone on a non-immigrant visa
 - j. Non-spouse partners (regardless of gender) that accompanies an E, H or L visa holder
 - k. Parent seeking to accompany an F-1 student visa holder
 - l. Language students in course of short duration when the course of study is under 18 hours per week
14. If you are coming on a B-1 business visitor visa, are you coming for one of the following purposes?:
 - a. Engaging in commercial transactions not involving employment (negotiating contracts, litigation, consulting with clients or business associates)
 - b. Participating in scientific, educational, professional, religious or business conventions
 - c. Religious workers coming to do missionary work in the US, ministers exchanging pulpits but who are paid by their own church abroad, and ministers on evangelical tours
 - d. Domestic servants accompanying returning US citizens temporarily assigned to the US or who permanently reside in a foreign country
 - e. Domestic servants accompanying non-immigrant visa holders if the applicant has worked for the employer for a year or more
 - f. Professional athletes only receiving tournament money
 - g. Foreign medical students seeking to take "elective clerkship" without pay
 - h. Serving on a board of directors of a US company
 - i. Coming to the US to set up a US subsidiary and explore investment opportunities
 - j. Installing equipment as part of a contract
 - k. Participating in a volunteer service program if religious only
 - l. Attending an executive seminar
 - m. Observing the conduct of business
 - n. Domestic partner of a person on a non-immigrant visa.

General Notes: Usually can get an authorized stay of up to six months; chances improve if a shorter trip is requested; no USCIS approval required before consulate issues visa; not allowed to work while on a visitor visa; visa must be granted by consular officer except in most cases if the national is from one of more than two dozen countries granted Visa Waiver status allowing such persons to enter the US for up to 90 days. Visa Waiver entrants cannot have their status extended and cannot change to other non-immigrant categories while in the US. Nationals of the following countries were eligible for the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

F-1 Visas – Available to Students

1. Do you have a residence in your home country you don't intend to abandon?
2. Have you been admitted to study full-time in a degree program or an English language program?
3. Is the school where you intend to study approved for students to attend on student visas?
4. Do you have proof of adequate financial resources to attend school full-time without the need to work in the US?
5. If you are not going to the US an English language program, are you proficient in English?
6. Will the education you obtain in the US improve your career prospects in your home country?

General Notes: Must be enrolled full-time; has limited on-campus work eligibility; off-campus employment is prohibited unless the student fits under limited exceptions and the employment authorization is granted by the school or the USCIS; can get up to a year of work authorization upon completion of program; can remain in the US for a period needed to complete the educational program; spouses and children not entitled to work; children can enroll in K-12 education, spouse cannot study unless he or she has a separate student visa; no USCIS approval required before consulate can issue a visa.

J-1 Visas – Exchange Visitors

1. Are you coming to the US to participate in an exchange program designed by the US State Department?
2. Do you have fluency in English and sufficient funds to live here if the program does not pay J-1 visa holders?
3. If you are looking at the au pair program, have you registered with one of the eight designated au pair programs in the US?
4. If you are a doctor seeking to train in the US, are you admitted into a medical residency or fellowship program and have you obtained sponsorship from the Educational Commission on Foreign Medical Graduates?
5. If you are coming for a business trainee or intern visa, have you found an employer to provide you with a training opportunity?
6. If you have found a training opportunity, have you found a program sponsor?

General Notes: Available to trainees, interns, professors or research scholars, short term scholars, foreign doctors, camp counselors, au pairs and students in

work/travel programs in the US; often requires person to return home for two years before switching to another visa; time limits vary depending on type of program (training – 18 months; interns – 12 months; scholars and professors – up to three year; au pairs – 12 months; medical residents – up to seven years; students are not limited); students eligible for up to 18 months (36 if post-doctoral work) of post-graduate work authorization; students must be enrolled full-time; spouses and children entitled to work authorization; no USCIS approval required before consulate can issue a visa.

O Visas – People with extraordinary ability in the sciences, arts, crafts, education, business, athletics or any field of “creative endeavor”

1. Are you one of the top people in your field in your country?
2. Do you have an employer, manager or agent in the US who can sign your application?
3. Is there a peer organization willing to say that they have no objection to your being granted an O-1 visa?
4. Can you show that you have won a major international award OR at least three of the following?:
 - a. Documentation of the alien’s receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - b. Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - c. Published material in professional or major trade publications or major media about the alien, relating to the alien’s work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
 - d. Evidence of the alien’s participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - e. Evidence of the alien’s original scientific, scholarly or business-related contributions of major significance in the field;
 - f. Evidence of the alien’s authorship of scholarly articles in the field, in professional journals or other major media;
 - g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - h. Evidence that the alien has commanded and now commands a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

General Notes: Can be admitted for up to three years at a time; no need to maintain residence abroad; can have green card application pending while on O-1 status without problems; USCIS approval required before the consulate can issue visa.

L Visas – Intra-company Transfers

1. Are you coming to the US to work for a company that has offices both in the US and outside the US?
2. Have you worked for the company abroad full-time for at least one year of the last three?

3. Are you coming to the US as an owner, executive, manager or an employee with special knowledge of the company's operations?

General Notes: Seven year stays for owners, executives and managers; five year stay for special knowledge employees; easy to get green card for owners, managers and executives; spouses are allowed to work; USCIS must approve before consulate can issue visa; difficult for workers working on a contract basis at other employers.

E Visas – E-2 Treaty Investors and E-1 Treaty Traders

1. If you are seeking an E-1 Treaty Trader visa, are you currently working for a business that has a substantial volume of trading business with the United States (more than 50%)?
2. Are you a national of a country that has a bi-lateral trade treaty with the United States?
3. Are you coming to the US to work as an owner, executive, manager or "essential skills" employee?
4. Is at least 50% of the business owned by foreign nationals who are not US citizens or permanent residents?
5. For E-2 visas, are you investing a "substantial amount" of money in a commercial investment in the US?

General Notes: No limit on total time in E visa status; spouses can work; no initial USCIS approval required; permanent residency applications do not adversely affect E visas. More information about the E visas and a list of treaty countries may be found at: <http://www.visalaw.com/abcs.html>

R Visas – Religious Workers

1. Are you coming to the US to work as a minister or work in a religious vocation or occupation?
2. Have you been a member of the religious denomination for at least two years?
3. Is the employer a "nonprofit" organization (most churches, synagogues and mosques qualify as well as institutions affiliated with them)?

General Notes: Valid for up to five years; convertible to a green card after two years of work in R-1 status unless the applicant has worked in the job for two years prior to entering the US; no USCIS approval required for consulate to issue visa; change of status petitions can take a long time since USCIS conducts extensive reviews of these cases including conducting site visits.

TN Visas – NAFTA Visas for Canadians and Mexicans

1. Are you coming to the US to work in an occupation listed within the NAFTA occupation schedule? <http://www.visalaw.com/03dec3/2dec303.html>
2. Are you a citizen/ national of Canada or Mexico?
3. Do you meet the minimum job requirements for that position as listed in the TN NAFTA Schedule?

General Notes: Valid for a year; can be extended in one year increments; is a non-immigrant visa, therefore the beneficiary cannot have immigrant intent; is employer specific; there are no prevailing wage requirements; experience cannot be used as a substitute for the degree requirement; there is no annual limit to the visas issued; Canadians can apply for the status at the port of entries with "TN offer letters" and Mexicans can apply directly at the US Consulates; extensions and change of status applications may be filed in the US (only at the USCIS' Nebraska Service Center). Note that most jobs require a degree in the field; management consultants do not, but these cases are closely scrutinized.

E-3 Visas for Australians

1. Are you Australian?
2. Do you have a university degree?
3. Do most people in your field in the US have university degrees?
4. If you lack a degree, do you have several years of work experience in your field?
5. Do you have an employer in the US willing to hire you?
6. Does the job pay as much as similarly employed American workers?
7. Does the employer typically only hire people with university degrees for the job?
8. Does the employer guarantee that they will have continuous work available to you?
9. If the occupation requires a license, do you have the necessary license?

General Notes: The new E-3 visa for Australians combines elements of the H-1B and the E-2 and E-1 visas. Like the E-1 and E-2, E-3 applications can be filed directly at a US consulate abroad and do not require advance USCIS approval. Also, spouses of E-3s can obtain an employment authorization document when they accompany the E-3 to the US. Like the H-1B, the visa is only available to people in specialty occupations. Also, a Labor Condition Application is required and the prevailing wage must be paid. And like the H-1B, E-3s are limited in number. However, the quota of 10,000 per year has not been reached in the past. Unlike the H-1B (and like the E-1 and E-2) there is no limit on the number of years an E-3 can hold E-3 status. Note that premium processing is not yet available for those seeking to change to E-3 status from within the US.

This list is not an exclusive list of all the non-immigrant visas. Currently there are over 25 major non-immigrant visa classifications and the above discussion includes only the most common ones. More information about these and other non-immigrant visas may be found at our website <http://www.visalaw.com/abcs.html>

2. IMMIGRANT VISAS ("GREEN CARD")

There are four (4) basic categories of immigrant visas:

1. Family sponsored immigrants
2. Employment based immigrants
3. Diversity immigrants
4. Refugees and Asylees

Family Sponsored Immigrants

1. Immediate relatives – no quotas, faster processing
 - a. Are you a spouse of a US citizen?
 - b. Are you a child under 21 years old of a US citizen?
 - c. Are you the parent of a US citizen over the age of 21?
2. Preference categories*
 - a. First Preference – Are you the adult unmarried child of a US citizen? Wait: five to seven years (or more for the nationals of Mexico and Philippines)
 - b. Second Preference A – Are you the under 18 child of a green card holder or the spouse of a green card holder?
Wait: Five to seven years (or more for the nationals of Mexico and Philippines)
 - c. Second Preference B – Are you the adult unmarried child of a green card holder?
Wait: Nine years (or more for the nationals of India, Mexico and Philippines)
 - d. Third Preference – Are you a married child of a US citizen?
Wait: Seven years (or more for the nationals of Mexico and Philippines)
 - e. Fourth Preference – Are you a brother or sister of a US citizen?
Wait: Eleven years (or more for the nationals of China, India, Mexico and Philippines)

*The above waiting periods are based on the US Department of State's Visa Bulletin published on January 2008. The US DOS publishes the Bulletin monthly and announces the current waiting periods therein. The above periods should be considered as estimates and for accurate waiting periods, the current Visa Bulletin must be checked. General Notes: Must file petition with the USCIS to get a place in the queue; marriage to a US citizen is scrutinized to make sure the marriage is genuine; petitions based on green card holder automatically switch to higher preference category when the green card holder becomes a citizen; cases may convert automatically from one category to another when a person's age and marital status change; certain rights and priority dates may be retained for children when they turn 21. The Visa Bulletin can be found at <http://www.travel.state.gov>.

DV Visas – Green Card Lottery

The US government allocates 50,000 visas a year for people to receive through a random computer drawing. Information on the green card lottery can be found at www.visalaw.com/greencard.html. Entry applications are submitted online. The application is linked at <http://www.travel.state.gov>.

1. Are you a high school graduate?
2. Do you work in a field typically requiring two years of work experience and you have at least two years of work experience in the field?
3. Were you born in an eligible lottery country?

General Notes: Very low odds (fewer than 1 in 40 applicants will succeed); easy to enter; entry period is limited and usually is in the last quarter of the calendar year (October to December); must have job available in US or proof of ability to support self financially. Congress is seriously considering ending the program.

Employment-Based Green Cards

EB-1-1 – Persons of Extraordinary ability in the sciences, arts, education, business or athletics

1. Are you one of the top people in your field?
2. Can you show that you have won a major international award OR at least three of the following?:
 - a. Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - b. Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - c. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation;
 - d. Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - e. Evidence of the alien's original scientific, scholarly or business-related contributions of major significance in the field;
 - f. Evidence of the alien's authorship of scholarly articles in the field, in professional journals or other major media;
 - g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - h. Evidence that the alien has commanded and now commands a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

General Notes: No employer required, but you'll need to show you intend to pursue work in your field; fast category except there is multiyear backlogs for Indian and Chinese nationals (and all other nationals likely to face backlogs soon).

EB-1-2 – Outstanding Professors and Researchers

1. Are you recognized internationally as outstanding in a specific academic area?
2. Do you have three years experience in teaching or research in your area?
3. Are you coming to the US to work in a tenure or tenure-track teaching position or a long term research position?
4. Can you present evidence that you are recognized internationally in your academic field by presenting evidence of at least two of the following?:
 - a. Receipt of major prizes or awards of outstanding achievement
 - b. Membership in an association which requires outstanding achievement
 - c. Published material in the professional publications written by others about your work
 - d. Evidence of your participation as a judge of the work of others
 - e. Evidence of original scientific research
 - f. Authorship of scholarly books or articles in the field

General Notes: Fast category but there is multiyear backlogs for Indian and Chinese nationals and all other nationals likely to face backlogs soon.

EB-1-3 – Multinational Executives and Managers

1. Category is virtually identical to L-1 intracompany transfer non-immigrant visa
2. Key differences
 - a. Not available to specialized knowledge employees
 - b. US branch must be operating for at least a year

General Notes: Current for all nationals, but backlogs for China and India are not unusual.

EB-2 – Members of the Professions Holding Advance Degrees or People With Exceptional Ability

1. Do you have a degree beyond a bachelors degree or do you have a bachelors degree plus five years of work experience in your field?
2. Or do you meet the definition of exceptional ability by showing three of the following:
 - a. Degree relating to the area of exceptional ability
 - b. Letter from current or former employer showing at least 10 years of experience
 - c. License to practice profession
 - d. Person has commanded a salary or remuneration demonstrating exceptional ability
 - e. Membership in professional association
 - f. Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization
3. Do you have a job offer and labor certification or are you basing your green card application on benefiting the nation's interest?
4. If you are planning on basing your green card application on a labor certification, do you work in a field where there is a shortage of American workers in the local area where you intend to work?
5. If your claim is based on a labor certification, are you going to be paid the prevailing wage for similarly employed workers in the city where you are going to work?
6. If your claim is based on a labor certification, has your employer attempted to recruit workers to fill the position?
7. If your claim is based on a national interest waiver, do you meet the following tests?:
 - a. The person seeks employment in an area of substantial intrinsic merit
 - b. The benefit will be national in scope
 - c. The national interest would be adversely affected if a labor certification were required

General Notes: Processing times vary but labor certification cases typically take one to two years and national interest cases take six months to a year and a half; Employer not required in national interest waiver cases; multiyear backlogs for Indian and Chinese nationals and all other nationals likely to face backlogs soon.

EB-3 – Skilled Workers, Professionals and Other Workers

General Notes: Available to university graduates and people working in jobs requiring a worker with at least two years experience can file this category if the employer gets a labor certification (see above). There is a sub-category for unskilled workers that does not have a work experience or education requirement, but still requires a labor certification. The EB-3 category is backlogged for multiple years for all nationalities.

EB-4 – Special Immigrants – Religious Workers

General Notes: Basically the same requirements as the R-1 religious worker non-immigrant category except that the applicant must have been working in the field for at least a two year period. No backlogs in this category as of January 2008 and none are predicted.

EB-5 – Investor Employment Creation Visa

1. Are you investing in a business in the US?
2. Is the business new or are you buying into a restructured business?
3. Are you investing at least \$500,000 if the business is in a rural, high unemployment area or designated target investment area or \$1,000,000 if located elsewhere?
4. Is your investment in the form of cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the entrepreneur?
5. Is the investment "at risk"?
6. Can you document that the source of the funds is legitimate?
7. Will the investment result in the creation of at least ten full-time jobs for American workers?

General Notes: The USCIS scrutinizes these cases carefully. While technically the investment and job creation need not take place until after granting the green card, in practice, the USCIS will deny unless the investment and job creation take place before the application was submitted. Applicants can avoid having to show direct job creation by investing in a pre-approved regional investment center. Applicants applying through regional centers also do not need to show they are involved in management. More information about immigrant visas may be found at our website <http://www.visalaw.com/abcs.html>

3. ASYLEES AND REFUGEES

There are certain protected groups of aliens in the US. Most common are the asylee and refugees. Under the 1980 Refugee Act, a refugee is defined as "any person who is outside of any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Both refugees and asylees must satisfy this definition. Indeed, in almost every way, the requirements for refugee status and asylum are the same. The most

important difference is that an asylee makes their application while in the US, while the refugee applies outside of their home country, but also outside of the US. Asylees and refugees are eligible for employment authorization and have special paths to permanent residency. There are other protected groups like the TPS (temporarily protected status) aliens, and more information about these special groups and others may be found at our website <http://www.visalaw.com/abcs.html>

*Gregory Siskind is a founding partner of Siskind Susser Bland, P.C. – Immigration Lawyers and has been practicing immigration law since 1990. He can be contacted via email at gsiskind@visalaw.com and via telephone at 1-800-343-4890 and his detailed bio can be found at: <http://www.visalaw.com/gsiskind.html>

3. Ask Visalaw.com

If you have a question on immigration matters, write Ask-visalaw@visalaw.com. We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

Q - My father applied for me in 1992 and the petition was approved. I got married in 1996. My father was still a resident alien. My father just became a US Citizen and my priority date is now current. But since I got married I was told that the I-130 is no longer available. Will USCIS respect my priority date of 1992? My father filed a new I-130 and it was approved. But the priority date is 2000 as a married daughter of US Citizen. Can I file now using priority date of 1992? Or do I have to wait for the new application of 2000.

A - Unfortunately, when you married your 1992 petition became automatically revoked. This is because US Permanent Residents cannot petition for their married children. The fact that your father later became a US citizen did not correct this. You are unable to recapture your 1992 priority date and must wait for your 2000 priority date to become current.

However, if you are in the United States, you should retain your approval notice from the 1992 petition, as this will allow you to file your green card application under the 1998 "amnesty" as opposed to the 2001 "amnesty", when your priority date becomes current. The 2001 law has the added requirement of proving that you were in the US on December 21, 2000, which you are not required to prove under the 1998 law.

Q - I have been in H-1B status for the last two years. I am planning to attend graduate school again in F-1 status.

After completion of graduate school, if I apply for an H-1B again, will that H1 be valid for 4yrs or will it be valid for 6yrs?

A - If you have been outside the US for more than a year, you would be entitled to six more years of H-1B status when you complete your F-1 studies. Otherwise, you'll

only be entitled to the balance of what was left on your H-1B before you moved in to F-1 status.

Q - I have a situation which I cannot find addressed at the USCIS website.

I entered the US as a baby in 1960 (from Canada). I have an old I-151 green card. It does not have an expiration date on it. I have just become aware that I now need an I-551 Permanent Resident Card.

What form do I need to fill out in order to get my I-151 updated into a I-551?

A - You'll need to submit an I-90 form which you can find at www.uscis.gov.

Q - I am a permanent resident and I am about to foreclose my house. Can it affect my citizenship application? Do they check my credit report?

A - I'm sorry to hear about your financial problems. Fortunately, credit problems will not factor in to your getting a green card as long as you can otherwise show you're making an adequate income and have not accepted any type of public assistance.

Q - I am trying to find out if J-1 visa holders are exempt from paying into FUTA or just FICA withholding on an employee's paycheck. .

A - J-1s are exempt from FUTA. You can see which groups are exempt at <http://www.irs.gov/businesses/small/international/article/0,,id=131639,00.html> .

4. Border and Enforcement News

Due to an ongoing lawsuit from a coalition of labor and business organizations, the Social Security Administration announced last month that it will delay mailing out 'no-match' letters this year to some 138,000 employers nationwide, the Atlanta Journal Constitution reports. The rule, first proposed by the Department of Homeland Security in August, gives employers 90 days to terminate workers whose paperwork could not be reconciled once they receive the no-match letter.

The rule is on hold after a federal district judge in California issued an injunction in October. The case is currently on appeal to the Ninth District Court of Appeals. Labor groups, including the AFL-CIO, as well as the American Civil Liberties Union argued in the lawsuit that legal workers and others might be fired unfairly. They also said the government did not consider the impact on small businesses.

The suit criticized the number of Social Security mismatches in the DHS database, which may target innocent citizens instead of the undocumented immigrants that DHS seek out. As a result, DHS said they would revise the rule. "We are in no way abandoning the no-match rule," DHS spokeswoman Veronica Valdes said.

In the year since Costa Mesa became the first Southern California city to have a federal immigration officer at its jail full time, 360 suspected undocumented immigrants who lived in the city have been deported, the Los Angeles Times reports. The crackdown, introduced in 2005 by Mayor Allan Mansoor, came from support from Immigration and Customs Enforcement (ICE), who offered officers to check the immigration status of its inmates. Following Costa Mesa's lead, Anaheim, Fullerton and Los Angeles County jails now also have ICE agents.

According to ICE statistics, 520 suspects in the Costa Mesa jail facilities were referred to the agency, and that the 360 of those deported came from these referrals. An additional 114 are "going through proceedings that will lead to their removal," said Jim Hayes, ICE director for Southern California.

Some immigrants in Costa Mesa, including many immigrants here legally, say they now fear city police and know of others who have moved because of it. Eduardo Ramirez, manager of a Costa Mesa store that caters to immigrants, said many of his customers are nervous; he asked that his store's name not be published. "They think that there's a greater chance that they will be picked up by police, and that's true for those who are legal and illegal."

Since 2006, the City Council has focused on undocumented immigration. In that year, it closed the Costa Mesa Job Center, which helped immigrants find work, disbanded the 18-year-old Human Relations Committee, designed to address acts of discrimination, because it cost \$3,700 annually and, according to council members, was too liberal.

5. News From the Courts

Mendoza-Mazariegos v. Mukasey, (9th Cir., Dec. 6, 2007)
AILA InfoNet Doc. No. 08010865.

In 1998, Petitioner was placed in removal proceedings in Arizona pursuant to INA §212(a)(6)(A)(i), for being present in the U.S. without inspection since 1985. Petitioner was granted a change of venue to Los Angeles. Between 1998 and 2003, proceedings were continued on a number of occasions due to conflicts on the immigration judge's calendar and for the benefit of Petitioner's attorney. At each hearing, the IJ instructed the attorney to submit all supporting documents at least two weeks in advance of the next scheduled hearing and also informed the attorney that a criminal background check would be required to verify Petitioner's eligibility for cancellation of removal. In September 2003, Petitioner appeared for a hearing on his cancellation application accompanied by a new attorney whom he had retained just one day earlier. Petitioner informed the IJ that he had tried to contact his

original attorney on a number of occasions prior to the hearing but had been unsuccessful.

The IJ told Petitioner that earlier that day, Petitioner's original attorney had appeared at his office and told him that he had been unable to contact Petitioner. The IJ briefly questioned Petitioner on his lack of cooperation, but repeatedly cut him off and ultimately accepted the attorney's version of events. After a brief recess, the IJ rejected the request of Petitioner's new attorney for a brief continuance to familiarize himself with the facts of the case. At the IJ's encouragement, the attorney withdrew from the case but stayed in the courtroom to observe. The IJ then "engaged in an extended monologue," lecturing Petitioner for not responding to his attorney and for not replacing him sooner. The IJ's review of the merits of Petitioner's cancellation application "lasted mere minutes" and resulted in a denial. The BIA affirmed the IJ's decision to deny the continuance and rejected Petitioner's ineffective assistance of counsel claim.

Respondents in removal proceedings are guaranteed a right to counsel at their own expense. INA §292. There must be a "knowing and voluntary waiver of the right to counsel" for an applicant to appear pro se. *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). To obtain such a waiver, the IJ must "(1) inquire specifically as to whether petitioner wishes to continue without a lawyer; and (2) receive a knowing and voluntary affirmative response." *Id.* In the present case, the court noted that not only did the IJ not inquire as to whether Petitioner wished to proceed pro se, "[i]t was clear that [Petitioner] did not want to proceed pro se from the fact that he brought another attorney to the hearing."

The court then considered whether, despite the absence of a knowing and voluntary waiver of the right to counsel, the IJ could nevertheless refuse to continue proceedings. In *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007), the court concluded that "[w]hen an immigrant has engaged counsel and the IJ is aware of the representation, if counsel fails to appear, the IJ must take reasonable steps to ensure the immigrant's statutory right to counsel is honored." The analysis of an IJ's refusal to grant a continuance requires an individualized inquiry. *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005). The court noted that Petitioner did not speak English, did not seek to delay proceedings in bad faith and was only seeking a short continuance. Moreover, the IJ/BIA decision was based on the erroneous conclusions that (1) Petitioner was responsible for his case having been previously continued multiple times; and (2) Petitioner was negligent in pursuing his case. The latter conclusion, the court noted, was based in large part on an ex parte communication with his former attorney. Finally, the court found that the IJ's denial of the motion was driven by the reality that an additional continuance would result in a further two-year delay. The court found that none of these were sufficient reasons to deny a continuance, thus requiring Petitioner to proceed without counsel.

The court then found that Petitioner was "clearly prejudiced" by the denial of his statutory right to counsel because the IJ's denial of relief rested principally on the fact that Petitioner had not completed a criminal background check, a task that the IJ had specifically assigned to Petitioner's prior attorney. Moreover, Petitioner testified that he had no criminal record, and the government did not contest this fact. Had Petitioner been able to provide the requested record check through an attorney, he would have been given the opportunity to demonstrate hardship to his family. The petition for review was granted.

6. News Bytes

On December 26th, USCIS began requiring use of a new Form I-9 Employment Eligibility Verification Form. The Form I-9 must be completed by every employee in the country in order to demonstrate to an employer or certain recruiters and referrers the employee's identity and that the employee is authorized to work in the United States.

The Form I-9 is a creation of the 1986 immigration bill and has rarely changed over the years. Back in 1996, Congress approved legislation reducing the number of documents that are acceptable to prove identity and employment authorization. The legacy INS passed a regulation carrying out the 1996 law, but it has taken ten years to actually update the form.

On June 5, 2007, USCIS released the new Form I-9 and began requiring that this new version be used beginning December 26, 2007.

Five documents have been removed from List A, the list of documents that serve to prove both identity and employment eligibility. They are

- Certificate of US Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt (Form I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

An unexpired Employment Authorization Document was added to the list of acceptable List A documents and the other employment cards (I-688, I-688A, I-688B and I-766) have been consolidated as one item on List A.

List A also changed to reflect that when an I-94 is coupled with an unexpired foreign passport, the I-94 must contain an endorsement showing the non-immigrant is authorized to work for the employer completing the Form I-94. The old Form I-9 only mentioned that the I-94 should indicate an employee had unexpired employment authorization, but did not tie that status to a particular employer.

Employers may now only accept documents contained in the instructions on the new form. Employers re-verifying Forms I-9 for current or re-hired employees must use the new version of the form for re-verification. The employee would not have to fill out a new form, however. Rather, the employer would fill out the Section 3 re-verification section in the new form, write the employee's name in Section 1 and attach the new form to the old Form I-9 in the employee's Form I-9 file.

Congress has delayed a bill which would require people entering the US from Canada, Mexico or the Caribbean, to show a passport when arriving by land or sea. According to CNN, the bill, which if signed into legislation, would not require visitors from these countries to show a passport if entering the U.S. by land or sea until June 2009.

Despite the one-year delay, the Department of Homeland Security plans to require most people from the U.S., Canada, Mexico, and the Caribbean to present a birth certificate or some other document establishing citizenship when they enter the U.S. on or after January 31, 2008.

The delay stems from Sen. Patrick Leahy (D-VT), who halted the requirement by one year by amending a budget bill Congress passed last week. The passport requirement, according to Leahy, would hurt commerce between the U.S. and Canada while doing little to safeguard the country. Leahy told CNN that the terrorists are "not going to come across with a valid passport" and that the passport requirement will only "stop the people who want to come to the United States to spend money and the people who want to involve themselves with business or travel, education, healthcare – whatever – between the U.S. and Canada," he said. "It won't deter a single terrorist."

7. International Roundup

In a ruling that could affect up to 1,000 foreigners who are parents of Irish-born children, the Supreme Court of Ireland has overturned a landmark High Court ruling which found that the rights of five Irish-born children had been breached when their parents were refused permission to remain there under the Irish-Born Child Scheme.

The Irish Independent reports that the five-judge court said the Minister for Justice had acted correctly when he sought to deport the parents and said their challenge to the minister's actions was 'misconceived'. It also said the Constitutional and European Convention rights of the foreign-national parents and their children are unaltered by its decision.

The ruling was greeted with dismay by the parents, who now face deportation, and immigrants' rights groups who criticized the Government for failing to introduce an independent appeals mechanism for the parents. The Immigrant Council of Ireland said the Supreme Court decision effectively meant an Irish child's rights would now not need to be considered until his or her parent was threatened with deportation.

Visitors to China will no longer have to fill in health declaration forms from next month as a way of simplifying entry procedures ahead of next year's Beijing Olympics, according to Chinese state. Instead, visitors would have to tell border officials of any illness. 'The move aims to simplify immigration procedures and improve efficiency,' it quoted a joint issued by the national quarantine watchdog and civil aviation regulator as saying.

The China Daily says that the health forms were started during the outbreak of Severe Acute Respiratory Syndrome (SARS), which began in the southern province of Guangdong in late 2002. Passengers would still have to fill in entry and customs declaration forms, the newspaper added.

'The complicated procedures have led to growing public complaints as passenger flows increase rapidly,' it said. Olympic organizers expect 70 million visits by

foreigners next year, up from 44 million in 2006. "The rapid increase in passenger traffic poses a challenge. So we're making great efforts to simplify immigration procedures," the report quoted quarantine official Xia Wenjun as saying.

8. Legislative Update

A new Arizona law, considered to be among the nation's toughest against employers who hire undocumented immigrants, went in to effect Jan. 1 after federal judges last week refused to block it. The New York Times reports that the US Court of Appeals for the 9th Circuit deferred on a decision on an injunction until after the Jan. 19 hearing by Federal District Court Judge Neil Wake's ruling on the case, provided a "decision is reached with reasonable conference." Wake struck down the injunction, stating that the law would not burden businesses in the short run.

Julie Pace, legal council for the business and civil rights groups that filed the suit, said they accepted the decisions and would now focus on Judge Wake's hearing, but she predicted that having the law go into effect, with the possibility it could later be rejected, would cause more confusion.

For more information on the new Arizona law, see our analysis from our last issue at <http://www.visalaw.com/07dec2/index.html>.

A new North Carolina law that went into effect last week allows police officers to expedited the process of arresting undocumented immigrants and begin removal proceedings. Charlotte, NC's News 14 reports that the 287 G program now requires all sheriff's deputies to ask anyone arrested for a felony or for driving impaired if they are legal US citizens.

Mecklenburg County Sheriff George Wilhelm says his department already asks inmates about their citizenship, but this is the backup he needs from the state. He says he believes that about 5 percent of the inmate population, a number he says is too much. "Illegals(sic) in our country is a problem," said Wilhelm.

The Latin American Coalition in Charlotte worries that their clients are being specifically targeted with this new law. "There are certainly a lot of other individuals that are here from the other parts of the world that are undocumented and committing crimes," said Angeles Ortega-Moore, coalition director.

Sheriff Wilhelm hopes the law will show undocumented immigrants that North Carolina is tough on crime and prevent them from moving here. Ortega-Moore does not expect the law to stop them from moving to the state. "This doesn't really solve anything," said Ortega-Moore. "Immigration reform will."

Indiana appears to be the next state to seriously consider legislation that would place the duty of screening undocumented immigrants on businesses. The Indianapolis Business Journal reports that such a bill is likely to be introduced in the state's next General Assembly.

This comes at a time when Indiana's foreign-born population increased 41.3 percent, to 263,607, between 2000 and 2006, according to the Washington D.C.-based Migration Policy Institute. These figures rank the state 10th in the nation.

9. Notes from the Visalaw.com Blogs

Greg Siskind's Blog on ILW.com

- Immigration Voice Launches Administrative Changes Campaign
- Pass the Microphone to the People in the Middle
- Who's Gonna Build Your Wall?
- Immigrant of the Day: Glenda Bailey - Fashion Designer
- USCIS to Hire Back 700 Retired Workers to Process Citizenship Applications
- Deport Pearce?
- Travel Industry Pushes to Get International Tourist Issues in to Presidential Campaign
- Will McCain's Immigration Views Help Him Win Florida?

The SSB Employer Immigration Compliance Blog

- Conservative Commentator: Arizonans Aren't Rushing to Enforce New Law
- No-Match Letters Won't Be Sent out by SSA
- Fence Builders Forfeit \$5 Million as Fine for IRCA Violations
- Maryland Employers Convicted for Hiring Unlawful Workers
- New Tennessee Law Means It's Time for Businesses to Get I-9s in Order
- Nebraska Bill Would Target Employers' Tax Breaks
- Minnesota and Indiana Consider Business License Revocation Laws for Employers of Unauthorized Workers

Visalaw Health Blog

- Las Vegas Sun Follows Up on J-1 MD Exploitation Series
- Arizona Hospitals Protest Birth Certificate Proposal
- Report: Undocumented Latinos Access Health Care Less than the Native Born
- More Links to Las Vegas Sun J-1 Physician Abuse Stories
- Nurse Immigration Measure Included in Senate Budget Bill

Visalaw International Blog

- 2007 - Spain's Year in China
- Spanish Government and Unions Sign an Agreement to Improve Working Conditions for Foreign Personnel Working in Spain
- US Congress Delays Passport Requirement
- Canada: Foreign Adoptions Made Easier
- Right-Wing Christoph Blocher Removed from Swiss Government
- Canada: Sergio R. Karas Quoted in Globe and Mail Newsletter

Tech Notes - The Immigration Lawyer Blog

- The World of the Future: 1999
- How to Dispose of an Old Cell Phone
- Voltaic Backpack: Your Bag Becomes Your Power Source
- AMLAW Technology Marketing Slides

Visalaw Fashion, Sports, & Entertainment

- UK Could Deport African Soccer Star
- Art Against the Wall
- Finland's Top Musician Tells of Border Entry Ordeal
- US and UK Sports Firms Team Up to Promote Athletes in Both Regions

10. Campaign '08

Hispanic activists who once viewed former Arkansas Gov. Mike Huckabee as a voice of moderation on immigration say they have been taken aback by the changed stance he's adopted as a presidential candidate. According to The Associated Press, Huckabee, while governor, attracted great support from Hispanic leaders by denouncing federal immigration raids and suggesting that some anti-undocumented immigration measures were driven by racism. During his tenure, he also advocated making children of undocumented immigrants eligible for college scholarships; this particular issue has become an issue from his presidential rivals, who accuse him as soft on immigration.

The stances made by Huckabee during the presidential election has taken a more stern tone; this month he unveiled a plan to seal the Mexican border; he has touted the support for his candidacy from the Minuteman Project, an anti-immigration group whose volunteers patrol the Mexican border. His new tone has made Hispanic leaders concerned. "He's trying to be tougher on immigration than we've ever seen him before," said Carlos Cervantes, the Arkansas director of the League of United Latin American Citizens. "That's kind of worrisome now. He was willing to work with the communities. I don't see that he's willing to work with us now."

Former LULAC President Hector Flores said he admired Huckabee's leadership on immigration. "I thought he was doing the best thing to chart the course for Arkansas in a more moderate fashion, being open to new ideas." However, Flores said he's troubled by Huckabee's more recent stance. "I think he's getting bad advice," Flores said. "I don't know who he's listening to. That's not the progressive attitude that I sensed and observed two years ago in Arkansas from Governor Huckabee."

The Chicago Tribune recently collected the stance on immigration of every presidential candidate, via their websites:

Republicans:

- Rudy Giuliani: Favors path to citizenship for some undocumented immigrants, supports border fence.
- Mike Huckabee: Favors border fence, rules out a pathway to citizenship unless undocumented immigrants first return to country of origin. As Arkansas governor, backed in-state tuition for illegal immigrants.
- John McCain: Co-sponsored Immigration Reform Act of 2006, which would provide a path to citizenship for some undocumented immigrants and fence construction along part of the U.S-Mexico border.
- Mitt Romney: Opposes any 'special pathway' to legal status, favors fence.
- Fred Thompson: Opposes path of citizenship for undocumented immigrants, favors fence.
- Ron Paul: Favors deportation of undocumented immigrants, wants to end birthright citizenship.

Democrats

- Barack Obama: Voted for Immigration Reform Act of 2006
- Hillary Clinton: Voted for Immigration Reform Act of 2006.

- John Edwards: Favors path to citizenship for some undocumented immigrants and border fence in some areas.
 - Dennis Kucinich: Favors legal status for "hard-working, tax-paying undocumented workers."
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11. USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2008

U.S. Citizenship and Immigration Services (USCIS) announced this week that it has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the second half of Fiscal Year 2008 (FY2008). Via press release, USCIS is hereby notifying the public that January 2, 2008 is the "final receipt date" for new H-2B worker petitions requesting employment start dates prior to October 1, 2008. The "final receipt date" is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 33,000 H-2B workers for the second half of FY2008.

The cap was reached with existing totals for that day. USCIS will reject petitions for new H-2B workers seeking employment start dates prior to October 1, 2008 that arrive after January 2, 2008.

USCIS will apply a computer-generated random selection process to all petitions which are subject to the cap and were received on January 2, 2008. USCIS will use this process to select the number of petitions needed to meet the cap. USCIS will reject, and return the fee, for all cap-subject petitions not randomly selected. Petitions for workers who are currently in H-2B status do not count towards the congressionally mandated bi-annual

H-2B cap. USCIS will continue to process petitions filed to:

- Extend the stay of a current H-2B worker in the United States;
- Change the terms of employment for current H-2B workers and extend their stay; or
- Allow current H-2B workers to change or add employers and extend their stay.

12. Pew Survey: Most Latinos Fear Raids, Deportation

As the federal government steps up measures on immigration enforcement, Latinos are increasingly concerned about deportation, according to a survey released last week. A little more than half of Latinos worry that they, a relative or close friend could be deported, according to the survey conducted by the Pew Hispanic Center, a nonpartisan research organization in Washington D.C. The survey of 2,003 randomly selected Latino adults asked their opinions on deportation, work-site raids and other issues related to immigration enforcement.

According to the survey's results, nearly two-thirds of the nation's Latinos say the battle over immigration has made life more difficult for all Latinos, including those here legally. Over half said they had experienced at least one negative impact from a list that included not finding work, not finding housing more demands to prove immigration status, reluctance to use government services, and deciding not to travel out of the country.

Unsurprisingly, the Pew survey suggested far more Latinos oppose increased enforcement than non-Latinos; a separate national poll of 1,009 adults surveyed the general population to provide a comparison. About 75 percent of Latinos disapproved of workplace raids. About 51 percent of non-Hispanics in a separate survey said they support the raids, which have increased almost tenfold in six years. "We do not conduct random sweeps," ICE officials said in a written response to the Pew survey. "However, anyone in the country runs the risk of being detained and placed into removal proceedings if encountered by law enforcement."

Jose Calderon, a professor of Sociology and Chicano studies at Pitzer College, echoed the survey's findings that discrimination is a major problem affecting Latinos. "A lot of the enforcement that is being aimed at immigrants is also affecting legal residents and citizens," Calderon said. "That is turning a large majority of Latinos more strongly in favor of policies that support immigrants."

The Pew Hispanic Center report is available online at:
<http://pewhispanic.org/reports/report.php?ReportID=84>