SISKIND'S IMMIGRATION BULLETIN

15 SEPTMEBER 2000

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1. A MESSAGE FROM SISKIND, SUSSER, HAAS & DEVINE

Dear Readers:

As I am writing this, the final preparations for the 2000 Olympics in Sydney are taking place. The Olympics are the one time every four years where xenophobia seems to subside and people from all countries are willing to come together for a common purpose. There are always immigration stories that come out of the Olympics. Four years ago in Atlanta, there were visa problems and the defection of several Cuban athletes. This year, there is already a story worth noting. American swimmer Lenny Krayzelburg is expected to win several medals. Krayzelburg entered the US in the 1980s as a refugee from the former Soviet Union. The swimmer's family was fleeing Anti-Semitism and entered the US through the Lautenberg program which has helped thousands of Russian Jews over the last two decades who have left for a better life in the US. I happen to sit on the Board of Directors for the agency that settles those refugees, the Hebrew Immigrant Aid Society, and it is a great feeling to see one of the agency's clients do so well.

While most people are watching the events in Washington, we are also keeping an eye on Washington, D.C. Congress is in its final weeks before breaking for the year. There is still no progress to report on the H-1B bill or other immigration bills pending right now. Many observers expect that any immigration legislation that passes will be incorporated into budget bills or a single massive omnibus budget bill. We'll keep you posted.

This week we've got many of our regular features including Border News, News from the Courts, News Bytes, Government Processing Times, Ask Visalaw.com and Legislative Update. We also have an ABCs of Immigration article on the EB-1 category for outstanding researchers and professors.

And finally, as always, we remind readers that a law firm that represents clients throughout North America publishes this newsletter. If you are interested in scheduling a telephone consultation to discuss immigration questions you may have or to discuss the possibility of Siskind, Susser, Haas & Devine handling your immigration case, please go to http://www.visalaw.com/intake.html. In most cases, we are able to schedule a consultation within two days and we can often accommodate evening

and weekend appointments.

Thanks again for you continued loyalty,

Greg Siskind

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2. LEGISLATIVE UPDATE

This past week saw the American Immigration Lawyers Association make significant efforts to urge Congress to address the important pending immigration legislation before the end of the session. On September 13, AILA members were in Washington to meet with members of Congress, and all week people were calling Senators, Representatives, as well as the Bush and Gore campaigns. Among the issues AILA urged Congress to attend to were the restoration of Section 245(i), increasing the H-1B cap, establishing parity among all aliens covered by the Nicaraguan Adjustment and Central American Relief Act, updating the registry date, and restoring many of the due process protections eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act.

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Despite these efforts, and even though both Houses of Congress were scheduled to deal with pending immigration bills, none were addressed. It seems that even with only a few weeks left in the legislative session, Congress is still not concerned about making any meaningful changes to immigration laws.

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3. H-1B PROGRAM CRITICIZED IN GENERAL ACCOUNTING OFFICE REPORT

The General Accounting Office has issued a report detailing a number of flaws in the H-1B visa program. The report concludes that the program is "vulnerable to abuse" and is rife with administrative problems. The report also notes the claims of some that a high-tech worker shortage is greatly exaggerated, although it expresses no opinion on the issue.

The report cited what it called "increasing instances of program abuse," including employers filing for positions that do not really exist, workers who use fraudulent credentials, and workers who are not paid the required wage. The report also noted the failure of the INS to properly run the program, including the issuance of 20,000 too many visas last year.

The report will doubtless be referred to extensively as Congress finally returns to the H-1B visa issue. Numerous pieces of H-1B legislation are on the table, but all of those introduced in the House remain stalled in the Immigration Subcommittee chaired by Rep. Lamar Smith (R-TX). Actually, the Smith bill was passed in committee. The problem is that the House has not yet worked out a compromise on the Lofgren-Dreier bill. What may happen is that there will be an amendment offered on the House floor to substitute the bipartisan bill's language for Smith's language in that bill. S. 2045, the Hatch-Abraham bill to raise the annual cap has been approved by the Senate Immigration Subcommittee and could be debated in the full Senate in the coming weeks.

The report is not yet available to the public electronically, but when it is it will be available on the GAO's website at www.gao.gov.

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4. FORMER JUSTICE DEPARTMENT EMPLOYEES ACCUSED OF VISA FRAUD

Two former Justice Department employees have been accused of misconduct, including mishandling classified documents, disobeying regulations, and lying to obtain US visas. In the report from the Office of the Inspector General, most of the accusations are leveled at Robert K. Bratt, who held a variety of positions in the Justice Department between 1992 and 1997, when he was transferred to the INS.

According to the report, Bratt went to Russia four times in 1996 and 1997 to obtain visas for two women he met through a dating service. The report claims that with the assistance of Joseph R. Lake, the second Justice Department employee accused of misconduct, Bratt was able to secure visas for the women by certifying that granting them would be in the best interests of the US. Bratt stated that the women would be working for the Justice Department. Bratt later admitted to investigators that he had been sexually involved with one of the women. Neither woman ever used the visas they were issued.

Because both Bratt and Lake have since retired from their government positions, they likely will not face punishment. However, investigators have recommended that Lake be required to repay the $25,000 severance package he received.

Bratt has issued a statement in which he denies that he abused his position and says that the Inspector General could not find any evidence that he committed any illegal action.

During Bratt and Lake's tenure with the Justice Department, they worked within the Criminal Division in three offices involved in training law enforcement, judges and prosecutors in developing countries. According to the Inspector General's report, these offices have had a history of problems. In 1994 there was an investigation into charges of favoritism. This latest investigation does nothing to improve the offices' reputations.

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5. CAMPAIGN 2000

Last week the House Immigration Subcommittee held a hearing on the problems with the Citizenship USA program. The Citizenship USA initiative was implemented in 1995 to deal with a backlog of naturalization applications. The program was rife with errors, and resulted in the naturalization of many people with criminal records. Critics of the program further contend that it was motivated by a desire to get new voters who would be likely to vote Democratic in 1996.

At the hearing, Robert Ashbaugh, deputy inspector general in the Justice Department, completed a report earlier this summer in which he concluded that improper political motives did not influence the program. In testimony before the Immigration Subcommittee, Ashbaugh again blamed the problems with the program not on political concerns, but on systemic problems within the INS, saying "It was a mess when Republicans were in office and is a mess with Democrats in office."

The Citizenship USA program was part of Vice President Al Gore's reinventing government efforts, and many have used this connection to impute improper political motives to the program. Indeed, this aspect of the issue reared its head in last week's hearing, with Democratic members of the Subcommittee asking why they were again addressing the Citizenship USA program, which was the subject of hearings last year. Subcommittee chair Rep. Lamar Smith (R-TX) said that the report had findings that had not been fully publicized, and that the report did say that there were mixed motives behind the program.

The report on the Citizenship USA program released this summer is available online at http://www.usdoj.gov/oig/igspecr1.htm

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At a campaign stop in Milwaukee, Wisconsin, Hadassah Lieberman, the wife of Democratic Vice Presidential candidate Joseph Lieberman, spoke about the important of immigrants for the economy. Working alongside

Jose and Amparo Lopez, owners of Lopez Bakery, who immigrated to the US in 1966, she compared her family's immigration experiences. In interviews after the event she stressed the importance of a strong economy for improving the situation of all people in America, including recent immigrants.

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In comments made last Monday to Florida newspapers during a brief interview session at an airport, Republican presidential nominee George W. Bush said that if elected, he would not change US immigration policy toward Cuba, specifically that he would not retreat from the Clinton Administration's wet-foot/dry-foot distinction. While he reminded people that he has not studied the issue in detail, Bush said that he viewed it as a border enforcement issue.

By Thursday, a Bush letter to Rep. Lincoln Diaz-Balart had been released in which Bush promised to revisit all executive decisions made by President Clinton with regard to Cuba. Diaz-Balart is the chair of Bush's campaign in Florida and has long been critical of Clinton's policies toward Cuba. He sought the letter after the Monday comments. In the letter Bush writes that "The United States should not allow Castro to dictate out country's immigration policy." The letter did not address Bush's position on the wet-foot/dry-foot issue.

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6. NUCLEAR PHYSICIST RELEASED AFTER REACHING PLEA AGREEMENT

Nuclear physicist Wen Ho Lee was finally released from nine months of solitary confinement after reaching a plea deal. Lee, who formerly worked for the Los Alamos National Laboratory, was imprisoned last December after being charged with 59 counts of mishandling nuclear secrets. Despite these charges, which could have resulted in Lee's imprisonment for life, the government agreed to a plea deal in which Lee pled guilty to one count of downloading classified information to an unsecure computer and was sentenced to time served.

While announcing the deal, the judge in the case had some very harsh words for the government, saying that its actions had the effect of "embarrassing our entire nation." The case against Lee has been the subject of intense criticism almost from the time he was arrested. Many charged that the government singled him out because of his ethnic background. Lee was born in Taiwan and became a US citizen almost 30 years ago. The judge's comments when Lee was released indicate that he may have grown to share this suspicion. He apologized to Lee "for the

unfair manner you were held in custody," and urged the Departments of Energy and Justice to also apologize to him. The judge added that he had been misled by the government last December when he ordered Lee's pre-trial solitary confinement.

Many see the plea deal as an attempt by the government to save face as its case against Lee appeared to suddenly collapse. Initially, Lee was set for release, to be kept under house arrest until his trial. The government appealed this order and Lee continued to be detained. Now, less than two weeks later, Lee has not only been released, he is not going to be tried.

Government officials maintain that Lee was not a victim of racial profiling, but was prosecuted for his actions. Asked by reporters if the Justice Department would apologize to Lee, Attorney General Janet Reno said no, and blamed Lee for his treatment, saying "I think Dr. Lee had the opportunity from the beginning to resolve this matter and he chose not to." President Clinton, on the other hand, has expressed concern about the case, saying "All of a sudden they reach a plea agreement which will, if anything, make his alleged offense look modest compared to the claims that were made against him. So the whole thing was quite troubling to me."

Because a plea agreement has been reached, no further action will be taken on Lee's selective prosecution claim. The judge had ordered the government to turn over many documents related to that claim. It now seems that, unless the Justice Department conducts an internal investigation, the extent to which Lee's ethnic background was a factor in the prosecution will go unknown.

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7. FEDERAL JUDGE AGAIN ORDERS BOND HEARING FOR PALESTINIAN HELD ON SECRET EVIDENCE

A federal judge has again ordered the INS to provide a meaningful bond hearing for Mazen Al-Najjar, the Palestinian professor who has been detained for more than three years on secret evidence. As she did earlier this year, Judge Joan Lenard has ordered Immigration Judge Kevin McHugh to hear and rule on the public evidence before examining the secret evidence.

Two weeks ago IJ McHugh terminated Al-Najjar's bond hearing after defense attorneys objected to his intention to look at the secret evidence before ruling on the sufficiency of the public evidence. The attorneys filed an emergency motion before Judge Lenard, asking her to ensure that Al-Najjar receives a fair hearing. On Tuesday, September 12, Judge Lenard reiterated her order from May 31 to give Al-Najjar a bond hearing and to

examine the secret evidence only if the public evidence is insufficient to continue his detention.

Judge Lenard refused to grant defense attorneys request that they be allowed to see an unclassified summary of the withheld evidence before it is presented to IJ McHugh, leaving that decision to McHugh. She did, however, stress that some way must be found to protect AL-Najjar's rights and to provide him with some information about the evidence that is being used against him.

No date has yet been set for the new hearing.

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8. BORDER NEWS

Over the first month of Operation Denial, the INS program targeted at preventing alien smuggling through the Phoenix and Las Vegas airports, more than 2,700 people were arrested. However, agents say that they have not seen any decrease in the number of arrests at the Las Vegas airport, which surprises Marc Sanders, the assistant Officer in Charge at the INS Las Vegas office. Agents are reporting increased numbers of arrests on highways across the Southwest, indicating that some smugglers, at least, are changing their tactics.

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Last week we mentioned a cargo ship whose crew thought they heard noises from within one of the containers on board. The ship was diverted to a remote Alaskan port and many INS agents were flown in to inspect the ship. A thorough inspection of the ship revealed that there were no stowaways on board. It seems that perhaps the INS, eager to win public favor with a rescue of people trapped in a cargo container, made more of the situation than was warranted before learning all of the facts.

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A neo-Nazi wanted for a parole violation in Germany is seeking asylum in the US in an effort to avoid deportation. Hendrik Mobus, 24, was convicted of a racially motivated murder in 1994. In his asylum application he argues that the German government wants to persecute him for his political views. Along with the parole violation, the German government has accused him of more crimes committed while on parole, including a public statement that he would never surrender to authorities, and a statement that the murder of which he was convicted was not a crime because his victim was not Aryan. Mobus is not likely to be successful since he will likely be

excluded from the US based on security grounds.

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Last June Mexican television cameras recorded the drowning of two men in the Rio Grande. People on both sides of the border were shocked that although there were US Border Patrol agents and Mexican Grupo Beta agents on both sides of the river, no one jumped into to save the men. Responding to pressure following the incident, Border Patrol agents have been receiving training on how to conduct water rescues. Agents are under no obligation to rescue border crossers from the river, but it is hoped that the new training will reduce the number of drowning deaths along the lower Rio Grande, where 18 people have died this year. The Mexican government is spending more than $1 million on equipping and training its agents to perform water rescues.

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An immigration inspector at Nogales has been accused of illegally searching US Customs databases for references to friends, including two who had criminal records. Searching such a database without an official reason to is in and of itself a crime. The inspector is the fifth based in Nogales to be charged with corrupt acts since January 1999.

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An INS agent in Los Angeles has pled guilty to charges to conspiring to move undocumented immigrants from detention and release them to smugglers. The smugglers would then hold them until family members paid the smuggling fee, between $1000 and $2000. Jesse Gardona, who had worked with the INS for 15 years, would receive $300 for each person. He faces up to five years in prison when he is sentenced later this year.

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9. NEWS FROM THE COURTS

Mahadeo v. Reno, First Circuit

In this case, the court ruled that the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 do not eliminate the habeas corpus jurisdiction of the federal courts.

Soondar Mahadeo, a native of Trinidad and Tobago, has been a permanent resident of the US for 26 years. In 1984 and in 1991 Mahadeo was convicted of possession of marijuana with intent to distribute. In May 1997, the INS began deportation proceedings against him. The Immigration

Judge and Board of Immigration Appeals rejected his argument that he should be able to apply for a discretionary waiver of deportation as it existed at the time of his convictions and ordered him deported. Mahadeo filed a petition for a writ of habeas corpus with the district court, seeking an order that would allow him to seek the waiver. The district court ruled that the permanent rules of the IIRAIRA eliminated habeas corpus jurisdiction as a means to review immigration proceedings. Mahadeo filed this appeal with the First Circuit.

The IIRAIRA made such sweeping changes to the structure of judicial review of immigration cases that the changes were phased in. After September 30, 1996, when the IIRAIRA was enacted, the transitional rules were in effect. On April 1, 1997, the permanent rules went into effect. These rules apply only to cases in which deportation proceedings were started on or after April 1, 1997. Therefore, Madaheo's case was governed by the permanent rules.

In 1998, the First Circuit ruled that habeas corpus jurisdiction survived under the IIRAIRA transitional rules. In this case, the court ruled that the failure of the transitional rules to specifically mention habeas corpus meant that it was not repealed. This ruling was based on a Supreme Court case decided just months before the IIRAIRA was enacted that held that if Congress wants to repeal habeas corpus jurisdiction, it must specifically mention it – in other words, that habeas corpus jurisdiction may not be repealed by implication.

In this case, the INS argued that there were provisions in the IIRAIRA permanent rules that, unlike the transitional rules, did work to repeal habeas corpus. Several provisions in section 242 of the Immigration and Nationality Act, the judicial review provision, were relied on. Section 242(a)(2)(C) provides that "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony]." This provision, the court found, did eliminate its ability to review Mahadeo's case on an appeal directly from the BIA.

The INS also relied on section 242(g), which states "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate case, or execute removal orders." Second, the INS relied on section 242(a)(1), which provides that "Judicial review of a final order of removal is governed only by the Administrative Procedures Act." The APA vests federal appeals courts with exclusive jurisdiction to review agency decisions. Finally, the INS cited section 242(b)(9). This section provides that "Judicial review of all questions of law or fact, including

interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States shall be available only in judicial review of a final order under this section." The INS argued that these provisions, read in combination with the rest of the judicial review provisions, indicated Congress's intent to eliminate habeas corpus.

The First Circuit found that none of the provisions, either singly or in combination, repealed habeas corpus. None of these provisions specifically mention habeas corpus, and given the Supreme Court opinion released only months before the enactment of the IIRAIRA, Congress was on notice that a specific mention was required. While the permanent rules do not specifically preserve habeas corpus, such a mention is not necessary to preserve it. Instead, specific mention is required to repeal it.

Having determined that habeas corpus jurisdiction continues under the permanent rules of the IIRAIRA, the court ruled that the district court erred in dismissing Mahadeo's petition for lack of jurisdiction. It remanded the case to allow Mahadeo to present his arguments on why he should be allowed to seek a waiver of deportation.

The opinion is available online at http://www.ilw.com/lawyers/immigdaily/cases/2000,0913-Mahadeo.shtm.

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US v. Dailide, Sixth Circuit

In this case, the court upheld a court order of denaturalization.

The US government sought to denaturalize Algimantas Dailide as a first step to deporting him because of his alleged participation in Nazi persecution. Dailide immigrated to the US in 1950 under the Displaced Persons Act. Under this Act, visas were not available to people who were involved in persecuting civil populations. An application for a DPA visa was a three-step process. First, the applicant had to qualify as a refugee within the "concern" of the International Refugee Organization (IRO). Second, the applicant had to be determined to be a displaced person by the Displaced Persons Commission (DPC). The third step was the formal visa application.

After a person qualified as a refugee, the US Army Counter Intelligence Corps (CIC) would investigate their background. As part of this investigation, applicants filled out a questionnaire that asked about their wartime activities. This question was not repeated on the visa application. On the questionnaire, Dailide indicated that from 1941 to 1943 he was a

forester practitioner. The investigation did not reveal any reason that Dailide should be barred from immigration to the US, and in 1950 he entered the US as a permanent resident. In 1955 he became a US citizen.

Following the fall of the Soviet Union, many wartime records have become available, and have been used to denaturalize and deport many Nazi persecutors who previously escaped detection. Some of this information regarded Dailide, a native of Lithuania. According to this information, Dailide was a member of the Saugumas, a security force that worked with the Nazi government. On the basis of this, the US sought to denaturalize Dailide, specifically on the ground that he was ineligible to receive an immigrant visa because he had willfully misrepresented a material fact on his visa application.

The US government sued in federal district court to denaturalize Dailide. It presented evidence regarding the role of the Saugumas, and that Dailide was a member, and filed a motion for summary judgment. Summary judgment is a mechanism by which judgment can be entered without a trial. For summary judgment to be entered, all of the facts, taken in the light most favorable to the party seeking to avoid summary judgment, must leave no genuine issue of fact. The district court granted the government's motion, and entered an order denaturalizing Dailide. Dailide appealed to the Sixth Circuit.

According to the court, there were two issues. First, were the Saugumas involved in the persecution of civilian populations? And second, did Dailide assist the Saugumas in the persecution? Documents presented by the government detailed the role of the Saugumas, which showed that it had assisted the Einsatzkommando 3 in arresting and investigating people. The Einsatzkommandos were special SS squads that were deployed in Eastern Europe to eliminate the Jewish population. Evidence showed both that the Saugumas was actively involved in rounding up Jews for mass murders and that on some occasions Saugumas members had killed people themselves.

The court then examined whether Dailide assisted the Saugumas in the persecution. Dailide did not deny being a member of the Saugumas, but had argued that he was a merely a clerk, and that while he was armed, he had never used the weapon. The court found that Dailide's role in interrogating prisoners was sufficient to establish that he was involved in persecution.

Having found that Dailide was involved in persecution, the court then examined whether he had misrepresented this fact in applying for an immigrant visa. On the CIC questionnaire Dailide indicated that he was a forester practitioner, a clear misrepresentation. This misrepresentation

was included in Dailide's DPC report. Dailide argued that because he did not make the misrepresentation to an organization charged with administering the Displaced Persons Act, the misrepresentation did not make him ineligible for the visa. The court disagreed, finding that his misrepresentation was relied on by the DPC and by the State Department in issuing a visa. Having determined that no issue remained in dispute, the court affirmed the summary judgment order denaturalizing Dailide.

There was a vigorous dissent in which it was argued that many issues did remain in dispute, and that summary judgment was an improper way of disposing of a case involving something as important as US citizenship. In particular, while not disputing the role of the Saugumas or Dailide's role within the Saugumas, the dissenting judge argued that it had not been established as a matter of law that Dailide had been involved in persecution, and that much more discussion of the misrepresentation was required. As the dissent stated, there remained issues about whether Dailide knew his misrepresentation would be relied on by the DPC and the State Department. Also, Dailide had stated that the reason he lied on the CIC questionnaire was fear of being turned over to the Soviet Union. A misrepresentation will disqualify a person from receiving an immigrant visa only if it is made with the purpose of gaining admission to the US. The dissenting judge, knowing that his opinion could be received the wrong way, concluded his opinion by noting that this case was not about "whether Dailide is a nice man, or whether Nazis are evil. The sole issue before us now is whether a trial is necessary."

The opinion is available online
http://www.ilw.com/lawyers/immigdaily/cases/2000,0908-Dailide.shtm.

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US v. Cruz-Padilla, Eighth Circuit

In this case, the court upheld an order granting a new trial on the basis of improper remarks made about the defendant's immigration status.

Cruz-Padilla was convicted of possession of methamphetamine and intent to distribute. After the jury verdict, the trial judge granted Cruz-Padilla's motion for a new trial based on improper prosecutorial arguments. The government appealed.

The heart of Cruz-Padilla's argument was that the repeated references made by the prosecutor to the fact that Cruz-Padilla is undocumented tainted the jury and made it impossible for them to render an impartial verdict. At closing arguments the prosecutor said the following: "The government contends that the reason you should not believe Mr. Cruz-

Padilla is the fact that basically from the outset Mr. Cruz-Padilla had been living a lie ever since he came to this country. He is here under fraudulent and illegal circumstances, and as such, he is basically from day to day living a lie. . . . The fact that he's here illegally and is basically living a lie from day to day makes it easier for him on a day-to-day basis to continue to lie."

In its appeal the government argued that while the prosecutor's closing argument was in part related to Cruz-Padilla's ethnicity, it was merely designed to link his use of a false identity and his ability to lie. The court did not find this argument persuasive. It found the repeated references to Cruz-Padilla's status reinforced for the jury the fact that he was foreign while adding nothing of any legitimate evidentiary value. Not only were these statements improper, they were, the court found, unfairly prejudicial to Cruz-Padilla. Therefore, the court upheld the trial court order granting a new trial.

The opinion is available online at
http://www.ilw.com/lawyers/immigdaily/cases/2000,0911-CruzPadilla.pdf

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Shoafera v. INS, Ninth Circuit

In this case, the court ruled that rape committed because of the victim's ethnicity could be grounds for asylum.

Nigist Shoafera, a native of Ethiopia, sought asylum in the US. Shoafera is of Amharic ethnicity. She claimed that a man for whom she worked, who was of Tigrean ethnicity, raped her because of her ethnic background. The Immigration Judge and the Board of Immigration Appeals, while finding her testimony credible, found that she had not established that the rape was because of her ethnicity, and that it was more likely simply the violent act of a person who thought they had the authority to get away with it. Shoafera appealed to the Ninth Circuit.

The Ninth Circuit, relying on the lack of an adverse credibility finding, found that the IJ and BIA had not given sufficient weight to her testimony. Where the IJ and BIA had found her claim that she was raped because of her ethnicity to be purely speculative, the Ninth Circuit found there was no basis for the conclusion that her claim was speculation.

In the absence of any evidence to counter Shoafera's claim that she was raped because of her ethnicity, the court found that she had established past persecution on the basis of ethnicity. The court remanded for hearings on whether changed country conditions meant that Shoafera

could return to Ethiopia without fear of facing persecution.

The opinion is available online at
http://www.ilw.com/lawyers/immigdaily/cases/2000,0911-Shoafera.shtm

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Andreiu v. Reno, Ninth Circuit

In this case, the court ruled that a stay of deportation cannot be entered unless the deportation order is clearly contrary to law.

Dan Marius Andreju, a native of Romania, came to the US in 1991. In 1997 the INS placed him in deportation proceedings, and Andreju sought asylum. An Immigration Judge found that his testimony was not credible and denied asylum. The Board of Immigration Appeals affirmed this decision. Andreju appealed this decision to the Ninth Circuit, and requested that the court stay his deportation pending the court's decision on the merits of his case.

Prior to 1996, stays of deportation while a case was pending before a court of appeal was routine. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, however, ended the practice of automatic stays. The circumstances in which a stay will be issued after the IIRAIRA was the topic of this case.

The government argued that section 242(f)(2) of the Immigration and Nationality Act prevents any court from enjoining the removal of an alien subject to a final order of deportation unless there is clear and convincing evidence that the deportation order is prohibited as a matter of law. Andreju contended that this section does not apply to stay requests, but only to injunctions.

The court found that the word enjoin as used in section 242(f)(2) encompassed the concept of a stay. The court examined dictionary definitions of these two words, and found that issuance of a stay was the same as an injunction. The court also determined that for it to issue a stay of a deportation order, the alien must prove that the order is manifestly contrary to law.

There was a dissent in which the judge took the majority to task for so confusing the concepts of a stay and an injunction. The dissenting judge also pointed out that this opinion means that asylum seekers who may later proven to have valid claims can be sent to the country where they face persecution before their case has been decided by a court.

The opinion is available online at http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=9th&navby=case&no=9970274.

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10. GOVERNMENT PROCESSING TIMES

Nebraska Service Center Processing Times

Jurisdiction: Alaska, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

The following is the Nebraska Service Center Processing Time Report for the period ending August 31, 2000:

Application/Petition Type	Date of Cases Pending Initial Adjudication	Range of Total Processing Times by Days	
		From	To
I-90 Replacement Card	07/11/00	60	90
I-90-A SAW	06/30/00	105	120
I-102 Replacement of Arrival Document	05/05/00	120	150
I-I29	07/28/00	45	60
I-130 Immediate Relative	04/25/00	140	170
I-130 other	03/15/99	570	600
I-131 Advanced Parole	07/31/00	45	60
I-131 Reentry Permit	05/19/00	120	150
I-131 Ref. Travel Doc.	08/14/00	30	45

I-140 Immigrant Worker	08/03/00	60	75
I-360 Pet. for Widow/Spec. Imm.	08/09/00	45	75
I-485	06/01/99	450	465
I-485 Asylee	06/02/98	795	810
I-485 Refugee	02/26/99	550	565
I-485 HRIFA	06/11/99	425	440
I-539 Change/Extend NI Status -	06/08/00	90	120
I-724 All Waivers	01/19/00	240	270
I-730 Refugee/Asylee Relative Petition	02/23/00	180	210
I-751 Remove Conditions	03/20/00	180	210
I-765 (c)(8) Initial	07/27/00	80	95
I-765 Employment Authorization-Other	06/06/00	80	95
I-817 Family Unity	06/30/00	60	90
I-821 TPS	04/10/00	120	135
I-824 Actions on Approved Petitions	06/07/99	450	470
N-400 Naturalization – Initial Processing	Not adjudicated	370	385

Source: American Immigration Lawyers Association

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Texas Service Center Processing Times

Jurisdiction: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee and Texas.

The following is the Texas Service Center Processing Times Report for the period ending June 30, 2000:

Application/Petition	Date of Cases Pending Initial Adjudication	Number of Cases Pending
I-90 Replacement Card	07/11/00	19,949
I-90A SAW	07/24/00	1
I-102-Replace Arrival doc	Current	0
I-129	07/06/00	5,355
I-129(F) Fiancé(e)	06/06/00	554
I-130 US Citizen Petitioner – Visa Number Available	03/21/00	19,470
I-130 Other	12/16/97	73,447
I-131 Advanced Parole	07/01/00	321
I-140	05/12/00	3,638
I-360 Pet.Widow/Spec. Imm.	04/29/99	336
I-485 Adjustment	03/01/99	37,398
I-526 Investor	Current	0
I-539 Chg/Ext NI Status	Current	4,379
I-724 Waivers	Current	0
I-751 Remove Conditions	08/14/00	152
I-765 EA-Asylum Based	Current	690

I-765 EA-Other	Current	520
I-817 Family Unity	01/01/98	451
I-821 Temporary Protected Status	Current	2,439
I-824 Actions Apprd Petitions	07/25/00	329
I-829 Remove Cond/Investor	07/28/98	334
N-400 Naturalization – Initial Processing	Current	0

Source: American Immigration Lawyers Association

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Local INS Office Processing Times

Last Updated 20 July 2000

District or Suboffice	Permanent Residence Filing Until Approval I-485 (1)	Naturalization Filing Until Swearing In (2)	Advance Parole Approval (3)	Work Authorization Approval (4)
Albuquerque	540-730	270-365	14-21	7-14
Atlanta	730-1095	90-730	30-90	75-90
Baltimore	600	365	1	80-90
Boston	n/a	n/a	1	1
Buffalo	270	90-365	15	1
Charlotte	730	480-950	30-45	60-90
Chicago	540-720	45-90	1	90-120
Cincinnati	360-450	150-510	21	1
Cleveland	365-450	365	30	1
Dallas	900-940	210-600	120-150	150-180
Denver	660-720	660-720	1-5	1
Detroit	450-480	480-540	45-60	60-90
El Paso	660	810	7-14	7-14
Harlingen	1138	820	162	91

Hartford	150-180	180-365	10	60-90
Honolulu	240-300	30-60	3-7	1
Houston	1215-1300	600-650	45	90
Indianapolis	180-365	180-365	1-21	1
Kansas City	90-150	120-220	21	1
Las Vegas	450-550	300-350	N/a	90
Louisville	900	720	60	60
Los Angeles	910-950	30-90	60-90	30-40
Memphis	900-960	360-390	28-45	80-100
Miami	300-360	360-540	3-5	90-110
Milwaukee	855-948	330-485	30-60	15-30
Newark	360-420	270-540	1	60-90
New Orleans	270-360	300-450	3-15	10-90
New York	540	330-720	85-90	80
Oklahoma City	90-150	120-210	30-60	7-14
Omaha	730-910	300-365	20-30	20-30
Orlando	540	720	50	90
Phoenix	1140-1200	1080-1110	90-120	90
Philadelphia	75	330-365	4-7	1-2
Pittsburgh	180-270	365-425	4-7	1
Portland	1050	240	21-30	21-30
Sacramento	420-480	290	1-30	1
Salt Lake City	480-500	240-300	14-30	45
San Antonio	600-660	180-220	60	60
San Diego	960-1000	480-960	60-90	90
San Francisco	420-450	365-540	1-10	1
San Jose	960-1080	720-1170	10-21	1-2
Seattle	120-180	360-390	10-20	20-30
St. Paul	90-150	60-120	3-5	1
Tampa	550-600	365-600	10-14	80-90
Wash, DC (Arlington)	720	365	30	90

Further Instructions of 1-4:

(1) I-485 Filing Until Approval
(2) Naturalization Filing Until Swearing-In
(3) Advance Parole Approval
(4) Work Authorization Approval

Source: American Immigration Lawyers Association (not approved by INS)

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11. NEWS BYTES

On occasion we publish notices from reporters looking for sources for their work. This week we have received such a notice, as follows:
A newspaper reporter is seeking interview subjects who have experienced abuse or been cheated by employers or bodyshops while working with an H-1B visa. You can be anonymous if necessary. Please e-mail reporter-inquiry@visalaw.com as soon as possible if you're interested.

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Lenny Krayzelburg will be swimming for the US in the Sydney Olympics over the next week. He is the world record-holder in the 100 meter and 200 meter backstroke. He is also a US citizen who came to this country in 1989 as a refugee from Ukraine. He and his family were beneficiaries of the Lautenberg Amendment, a provision of the Immigration and Nationality Act that makes it easier for Jews and other religious minorities in the former Soviet Union to obtain refugee status in the US. He became a citizen in 1995.

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Effective September 8, 2000, the State Department will be requiring advance payment of the visa issuance fee at ten consulates. Te consulates are: Bogota, Ciudad Juarez, Freetown, Georgetown, Guangzhou, Manila, Montreal, Port au Prince, Santo Domingo, and Tirana. For cases in which visas are to be issued at these consulates, a notice requiring payment of the fee will be issued with the Packet 3, and the payment must be received before an interview will be scheduled.

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Problems continue to plague the Krome Detention Center in Miami. Just after a guard was charged with rape of a detainee, a supervisor at the

center has been charged with taking a $1000 bribe.

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An immigration attorney in Miami has pled guilty to charges of fraud in preparing immigration applications. According to the US Attorney's Office, Avi Carmel misrepresented clients' work experience and falsified information about potential employers. According to prosecutors, the clients were not aware of the fraud, and were themselves conned into believing they had valid applications. Carmel faces a maximum of five years in prison and a $250,000 fine. He has also surrendered his license to practice law.

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David Jewell Jones, a Little Rock, Arkansas businessman, and four others will again face charges for allegedly importing two women from China for sexual purposes. A trial earlier this summer resulted in a mistrial after the jury failed to reach a verdict. Charges have been resubmitted to a grand jury and a new indictment issued. The new charges do not include any allegation of rape, which many believe was what prevented the government from being successful in its first prosecution. The new charges also leave out counts of falsifying visa applications and obstruction of justice.

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The number of foreign nationals in federal custody has reached a 60-year high, according to statistics recently released by the INS. On an average day, the INS has more than 20,000 people in detention. This is the highest number of foreign-born people in federal government custody since World War II, when the government detained nationals of the Axis nations, including over 100,000 Japanese and Japanese-Americans.

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A study by the Fund for Immigrants and Refugees, a Chicago-based assistance organization, indicates that immigrants are increasingly settling in the city's suburbs rather than the inner-city. Along with showing a shift in where immigrants settle, the study also reveals substantial differences within the immigrant community. Both wealthy and impoverished immigrants have headed to the Chicago suburbs, creating an unusual suburban mix. The social service infrastructure that welcomes immigrants in cities has not yet been developed in the suburbs, and groups have had difficulty raising money to provide services to immigrants in the suburbs. The Fund for Immigrants and Refugees hopes that this study will make that easier by increasing awareness of the presence and needs of immigrants in

the suburbs.

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Hispanic advocacy organizations are planning a march on Washington to urge Congress create an amnesty for two million undocumented immigrants living and working in the US. The National Coalition for Dignity and Amnesty, an umbrella organization representing hundreds of other groups, hopes that the demonstration, scheduled for October 16, makes an impact not only with Congress but also with the public at large. Undocumented immigrants are extremely vulnerable to discrimination and abuse because fear of deportation keeps many from reporting crimes committed against them. Because this is an election year, it is unlikely that any amnesty legislation will be passed. However, there is growing pressure for Congress to address the issue, so we many see serious debate on the amnesty issue following the elections.

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On Sunday, September 17, a made for TV movie about the Elian Gonzalez custody battle will air. According to representatives of the Miami family, the movie is wildly inaccurate, in particular in its depiction of the raid in which INS agents took Elian from his Miami relatives to reunite him with his father. The movie apparently depicts agents as politely asking to be let into the house. Attorney Greg Craig, who represented Elian's father, said the scene showing the reunion between Elian and his father was also inaccurate. Neither side was consulted about the movie. In related news, even though Elian has been in Cuba since June, the Miami relatives are still fighting the custody battle. They recently filed an appeal of the state court decision denying them temporary custody of Elian.

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As the federal investigation into allegations of corruption and sexual abuse at the Krome Detention Center in Miami continues, one of a dozen officers implicated has resigned. While Michael Uzzell has not been charged, a former guard at Krome who recently resigned made filed many complaints alleging that Uzzell was engaged in illegal activities, including theft, destruction of files, and trying to organize a Ponzi scheme.

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The District Attorney in Brooklyn, New York, has charged two men with defrauding hundreds of immigrants. Stephen Andrews and Andre Mason are alleged to have organized a phony church, the Faith Dynamics Center, and promised immigrants that for donations, they would be able to obtain

special religious worker green cards. The victims were charged $1000 to enroll in a training program, and were also required to buy "fund raising" tickets, and pay tithes to the church. The church filed 473 applications for religious worker immigrant visas between 1997 and 1999.

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The husband of Gloria Steinem, the famous feminist activist, is facing deportation for overstaying his visa. David Bale's deportation hearing is not until next February, at which point he and Steinem will have been married for almost six months. Many were surprised at the recent marriage, as Steinem has long maintained that she would never marry. Because of the marriage, Bale, a citizen of South Africa, will probably be able to avoid deportation.

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12. THE ABC'S OF IMMIGRATION – FIRST PREFERENCE EMPLOYMENT BASED IMMIGRATION – OUTSTANDING PROFESSORS AND RESEARCHERS

Last week we discussed the first subcategory within the first preference employment-based immigration category, aliens of extraordinary ability. This week we discuss the second subcategory, outstanding professors and researchers. The evidentiary requirements for this category are as follows:

- **International recognition as outstanding in a specific academic field**
- **At least three years teaching or research in the field. The teaching or research experience can be gained while in pursuit of an advanced degree, but only if the alien had full responsibility for the courses taught, or the research is recognized as outstanding.**
- **An offer of employment. There are three forms this offer can take:**
  - **A tenure or tenure-track teaching position or a comparable research position, or**
  - **A research position with no fixed term in a position where the employee would generally have the expectation of permanent employment, or**
  - **A research position with a private company if the employer has at least three full time researchers and has documented research accomplishments in the field.**

Unlike aliens in the extraordinary ability subcategory, aliens in the outstanding professor or researcher subcategory must have a job offer. However, as with all first preference employment petitions, no labor certification is required.

International Recognition as Outstanding

An alien demonstrates that their work has been recognized as outstanding in the international arena by presenting evidence similar to that required to show extraordinary ability. Two of the following types of evidence are required:

- **Receipt of a major international prize or award for outstanding achievement in the academic field,**
- **Membership in associations that require outstanding achievements of their members,**
- **Material in professional publications written by others about the alien's work,**
- **Participation as a judge of the work of others in the field,**
- **Original contributions in the field, or**
- **Authorship of scholarly books or articles in journals with international circulation.**

There, of course, are types of evidence that are more useful than others. A book published by a vanity press will not be given much weight, nor will mentions of the alien's work without evaluation. Strong evidence includes peer-reviewed publications and participation as a peer-reviewer. As always, one of the strongest types of evidence is the submission of letters from academic peers.

Also, the alien must submit letters from past employers documenting at least three years of teaching or research experience.

Qualifying Employment Offer

Along with the petition, the potential employer must submit a letter outlining the employment offer. The letter must include the basic terms of employment, including the salary offered. More difficult is describing the position. If the position offered is a tenured position, or a tenure-track position, then it is simple. However, few research positions are tenured. Qualifying research positions, therefore, can include positions that do not have a fixed duration but are the sort of position in which the alien can expect permanent employment.

Private employers face additional requirements. The employer must show that they employ three full-time researchers and that research conducted by the employer has resulted in documented accomplishments. INS rules provide no information on how a private employer can document research accomplishments. The best evidence possible should be submitted, which would include any patents issued to researchers at the institution, and articles published by employees.

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13. GUEST COMMENTARY – ONLY NIXON COULD GO TO CHINA, BY GARY ENDELMAN

August 29, 2000
Hon. Al Gore
Washington, DC

Dear Al:

Kudos on the successful convention! Only a true Alpha (or is it Beta?) male could have kissed Tipper for that long! While your prospects down here in the Lone Star state do not appear luminous, it seems the political silly season is going to be more fun than I first thought for which I am truly grateful.

Al, I was worried that you thought I had gone over to the Republicans since I wrote the Shrub before you. Not so. I am resolutely undecided but I did want to share my thoughts with you before Labor Day when the hunt for votes shifts into overdrive.

Al, in your acceptance speech, you said that, "sometimes we have to take the hard right rather than the easy wrong." This is not only logical but also good politics which makes it doubly delicious. I know you have been looking for the perfect issue that you can do this with and, as a fan, I have found it for you: Immigration!

Historically, Al, big business has pushed for more immigrants while the unions fought to close the Golden Door. It all seemed to be a fight over wages with immigrants as pawns in the middle. But, Al, something has changed recently and you may have been too busy becoming authentic to realize it. The suits in the executive washroom now look upon immigration as their best and most reliable source of high tech talent. The rest of the world, Al, is kind of like our farm system sending up top brains to the American economy for the creation of new wealth and the expansion of opportunity. In the information age, the focus has shifted from the cheapest worker to the most productive. That is where immigration comes in.

Big labor is also changing, Al. This past February, the AFL-CIO came out in favor of a new general amnesty for undocumented workers whom the unions want to organize. Just as management sees international ingenuity as a core economic asset, labor is beginning to smell the coffee and look at these same foreign workers as a vast source of new members who can be mobilized to reverse the decline of trade unionism as a political force in

American life. The Labor Boys understand that depriving foreign workers of protection will only give unscrupulous employers even greater incentive to hire them.

The problem, Al, is that the unions still do not understand that immigration is not social work. They still think that our immigration policy should be built on extending these poor folks a helping hand; in return, they will be grateful for being allowed to stay here and sign up. They continue to think of immigration as a problem not an opportunity. They continue to worry that immigrants will take away current jobs but give little or no thought to the possibility that the larger impact will be the enormous creation of new ones in industries that have yet to emerge. Labor looks at the economy solely in a domestic context; for them, the rest of the world really does not exist. What counts is here at home. Since the global economy does not resonate with the unions, arguments that immigration will improve America's ability to participate in, and set the agenda for, this new world order, fall flat on their face. They want the security of an economic reality frozen in time where the winds of change will not intrude to challenge cherished assumptions. Rather than marry greater labor market controls with more immigration, the AFL-CIO supports the former to make the latter go away. What to do, Al? This really is a toughie.

I, labor needs to support employment-based immigration for many reasons. First, their traditional source of members, non-Hispanic white males, is declining as a percentage of the population and there is no chance of reversing this trend. Second, the immigrants are going to come anyway, Al, and nativism is only guaranteed to piss them off and make them hate unions for a long time. Third, at a time when there is essentially full employment, the argument that immigrants are stealing jobs is not very persuasive to your classic disinterested third party. Fourth, if the immigrants do not come here, either US employers will go to them or they will work for our competitors in Asia and Europe. Fifth, immigration is the most, perhaps the only, successful formula we now have for the revival of urban America, and the cities, Al, are the home of the union movement. If the cities die, so do the unions. Sixth, if immigration is choked off, you can bet that the resulting wage pressures will re-ignite inflation. At first, the Labor folks will like that but for how long? Remember how many steelworkers used to work in Ohio and Pennsylvania? Well, Al, those steel workers now live in Korea or Japan. It might be hard for them to vote absentee! The United Steel Workers lost 500,000 members in the last 20 years. The artificially high wages forced on the industry by union pressure and government policy helped a favored few but mostly paid the way for these good jobs to go overseas. The same thing will happen with the high tech industries of our knowledge-based economy if the immigration pipeline is shut down. Seventh, there is no place where labor can hide, Al. The market is out there and it matters. Either labor can learn to think more

about how to use immigration as an asset to be engaged, or Wall Street will surely figure out how to do so.

Who is going to talk turkey with Labor and explain why backing more employment-based immigration is good for them? That is not a job that most politicians would envy or accept. Sure, we could send the Shrub over to John Sweeney but why send a Bush to do a man's job? Besides, Al, it's going to take a good prairie populist like yourself to make the sale. They will never believe a Republican. If you doubt that, Al, remember this: Only Nixon could go to China.

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14. PERCENTAGE OF FOREIGN BORN US POPULATION AT NINETY YEAR HIGH

According to data released this week by the Census Bureau, ten percent (26.4 million) people living in the US are foreign born, with about half of them coming from Latin American countries. While new arrivals from Latin America are essential to the current economic boom, there are concerns that they will not be able to experience the ideal immigrant experience of working hard, getting better jobs, and see their children have a better life. Many immigrants work in low level service jobs, where advancement is difficult.

Also, because wages in service jobs tend to be so low, recent arrivals are forced to work multiple jobs, leaving them with little time to take English classes and to integrate into US society. This creates a cycle in which their children are caught up. Children of parents who don't speak English are more likely to drop out of school, increasing the chances that they themselves will end up in a job that provides little chance of advancement.

While there are a record number of foreign-born people in the US, as a percent of the population it is no where near the record. In 1910, 14.7 percent of the population was foreign-born. This number remained steady until the 1930s, when the Great Depression slowed immigration.

Details of the Census Bureau report are available online at http://www.census.gov/Press-Release/www/2000/cb00-147.html.

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15. MULTIPLE RAIDS SIGNAL END OF PROSTITUTION RING

Police and federal authorities conducted raids in four cities last weekend as they appear to near the end of a two-year investigation into a ring

suspected of smuggling Asian women into the US for prostitution. Raids were conducted in Las Vegas, Los Angeles, Minneapolis and New York City. The two-year probe, known as Operation Jade Blade, has also resulted in the indictment of eight people.

According to the indictment, which was recently filed in Las Vegas, the smugglers would arrange for the women's entry into the US and would then force them into prostitution to pay off the smuggling debt. The indictment also states that the women were moved to new cities at least once a month, resulting in the widespread raids of last weekend. Seven of those indicted have been arrested, while one remains at large.

Federal authorities are not revealing much information about the case because of pending criminal trials, but an FBI agent involved with the investigation said the ring brought in a "significant number" of women each month.

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16. ASK VISALAW.COM

Each week we answer questions provided to us by Y-Axis as well as from our web site's message board. Y-Axis is an H-1B jobsite that provides a direct interface for the H 1B holders and aspirants with leading Consulting Firms and US End-Clients/Recruiters. The website is www.y-axis.com.

Can you help me with some of my queries? These are:
1) Is a contract for working for a body shopper for a certain period of time legal in the US?
2) What authority does the body shopper have if he hasn't mentioned anything like this in the appointment letter he gave me?
3) What if the body shopper has agreed on certain things verbally but are not mentioned in the offer letter?
Thanks, Gurpreet

Most of these questions deal with issues of contract law, not immigration law, but for foreign nationals working in the US, and for immigration attorneys working with them, a familiarity with contract law is essential. Body shopping involves the practice having an entity petition for an H-1B worker and then contracting the worker out to other firms. The petitioning organization pays the worker. In many circles body shopping has a negative connotation, as in many cases the workers are being taken advantage of. However, not all such arrangements are inherently flawed.

A contract to work for a specified period of time is not illegal. However, the employee can, at any time, leave the employment, and the employer can fire the employee. This is known as breach of contract and the party that did not breach the contract, the employer if the worker quit, or the employee if he was fired, can sue for damages. In such a case the only damages available will be money – the employer cannot force the employee to return to work, but would be able to recoup any monetary loss it could show was caused by the employee. Of course, whenever a nonimmigrant worker leaves their employment, maintaining proper immigration status is vitally important.

A contract can include a provision to work for a specified period of time without being mentioned in the offer letter.

The question of the effect of things discussed but not included in the contract is one of the most debated in contract law. It has given rise to one of the most arcane rules of law, known as the parole evidence rule. The parole evidence rule is beyond the scope of this discussion, but suffice it to say that whether the things discussed but not included in the contract is a complex question. One would have to see the contract to answer the question, but it should be kept in mind that the written agreement will generally be presumed to be the entire agreement.