

SISKIND'S IMMIGRATION BULLETIN

March 23, 2001

E-mail subscribers as of 23 March 2001 – 29,158 persons (50 states/144 countries).

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

Dear Readers:

We have been asked a great number of times over the last several months what the chances are that the H-1B quota will be hit this year. While we did not have statistics, my instincts have told me that we would be in good shape. This week, the INS released data on H-1B usage for the current fiscal year and my instincts are probably correct. Just over 70,000 H-1B visas have been counted toward the 195,000 quota for this year. Another 66,000 cases are in the pipeline right now. The INS predicts that about 80% of these applications will count to the cap. That means a little over 120,000 visas are to be counted to the quota. 15,000 applications were submitted in February and with seven months left to go in the uncounted, we are likely to go most of the year without a gap. The effects of the economic slowdown do seem to be affecting the numbers. The INS clearly noted a downward trend in the number of applications filed. But for those who have been citing recent articles on layoffs as evidence that raising the H-1B cap last year was a bad idea, it is interesting to note that the new H-1B cap will be right on target for this year. If the economy heats up again next year, we could find out the raised H-1B cap was still not enough.

Speaking of the H-1B visa, we remind readers that we are doing another Teleseminar on April 9th. This time the topic will be changes in the H-1B program. We'll cover the new H-1B law passed last fall as well as examine the new Labor Department H-1B regulations. To sign up, please go to <https://secure.telalink.net/gsiskind/teleseminar.html>.

There also are many other important stories in the news this week and we cover all of them in this week's issue. We also include our regular features like News from the Courts, Government Processing Times, Ask Visalaw.com and an ABCs of Immigration article on immigration options for same sex couples.

And finally, as always, we remind readers that this newsletter is published by Siskind, Susser, Haas & Devine, a law firm that represents clients throughout North America. 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. We have a number of our lawyers working overtime to accommodate the recent surge in interest in the new LIFE Act and will do so until the April 30th 245i filing deadline.

Thanks again for your continued loyalty.

Greg Siskind

2. LEGISLATIVE UPDATE

[S. 562](#), the Working Families Registry Act, introduced by Sen. Harry Reid (D-NV), would move the date for the registry, a means by which long time undocumented residents can obtain permanent residence from January 1, 1972 to January 1, 1986. It would also update the registry date for the next five years.

[H.R. 1028](#), introduced by Rep. Frank Pallone (D-NJ), would amend the Immigration and Nationality Act to eliminate the presumption that a filed immigrant visa petition is evidence of the intent to abandon one's residence in applications for student and visitor visas by spouses and children of permanent residents.

A bill was recently introduced in the Georgia State General Assembly that would allow undocumented immigrants in the state to obtain driver's licenses. The representative who introduced the bill does not expect it to be passed, but says that she introduced it so that the topic would become a subject of debate. Advocates of such a proposal say that it would improve road safety and decrease the number of uninsured drivers. Opponents say that undocumented immigrants would use the license to obtain other government services and possibly to create fraudulent documents.

3. DESPITE ECONOMIC DOWNTURN, H-1B USAGE STILL HEAVY

Last week we reported on the likelihood that the 195,000 cap on H-1B visas for fiscal year 2001 would not be reached due to a combination of

economic factors (<http://www.visalaw.com/01mar3/17mar301.html>). This week the INS confirmed that report in a release of the number of visas approved thus far.

As of March 7, 2001, approximately 72,000 visas had been approved, leaving well over 100,000 visas remaining available during this fiscal year, which ends September 30, 2001. The cap is set to remain at 195,000 through 2003, after which time it will go back to 65,000. The INS says that about 66,000 visas are in the pipeline, but how many are subject to the cap will not be known until the applications are adjudicated. It is estimated that about 80 percent are cap cases.

The number of H-1B visa applications filed in February dropped significantly from previous months. 33,000 applications were filed in November, 53,000 in December, and 30,000 in January. February saw only 15,000 applications filed. Part of the reason for this decline could be the economic slowdown, but part of it is also doubtless due to the H-1B visa fee increase from \$500 to \$1,000 in the middle of December.

Along with the economic trends that have led to a decline in H-1B visa applications, certain changes in INS policy toward counting H-1B visas may be impacting the number of applications approved under the cap. Last year's count was never firmly settled, and the INS came under sharp criticism for its inability to say how many new visas it had issued. Because of this, the law that raised the cap last year made applications that were filed before September 1, 2000 not subject to the cap. Also, people employed by institutions of higher education and some research organizations are not subject to the cap. The INS has also improved rules for reading applications that help to ensure that people who have previously been issued an H-1B visa and are not subject to the cap are not counted toward the cap.

During an interview on CNET News.com, Efren Hernandez, the business and trade director of the INS, provided some clear statements about the status of H-1B workers who are laid off. In recent days, there have been a number of rumors about this, and a number of confusing INS statements. According to Hernandez, an H-1B worker who is laid off is out of valid status at the moment of the layoff. There have been a number of rumors about a 10-day grace period. Hernandez made clear that this grace period does not apply in a lay off situation. It only cover people who have reached their time limit in H-1B status and must return to their home country. Laid off H-1B workers are deportable, but are not considered an INS priority.

Another point made by Hernandez is that the portability rules regarding H-1B visas and changing employers are not applicable to laid off workers. Unlike workers who are moving directly from one employer to another, who

can begin working for the new employer as soon as the visa application is filed, workers who are laid off must wait for the approval of the new visa before they can begin work. Because they have been out of status, in most cases they must obtain this visa at a consulate abroad. The worker can apply for a change of status within the US, but must demonstrate that there are exceptional circumstances warranting such treatment. The INS has no policy on what constitutes exceptional circumstances, and addresses such situations on a case-by-case basis. Hernandez indicated, however, that the agency was sympathetic to the plight of laid off workers and some INS watchers have noted an increased flexibility in the agency's use of its discretion.

4. H-1B PETITIONS WITHOUT APPROVED LABOR CONDITION APPLICATIONS ARE CONSIDERED PROPERLY FILED

Bill Yates, the Deputy Executive Associate Commissioner for the Immigration Services Division of the INS, this week told the American Immigration Lawyer's Association that it will continue to accept H-1B applications with a copy of the ETA-9035 Labor Condition Application ("LCA") and evidence that the LCA has been filed with the Department of Labor. This news was happily received by those in the immigration community, who had been wondering how to address this issue in light of the failure of the Department of Labor to approve LCA in the promised 24 hours.

When the Department of Labor released its rules on H-1B visas last December, it included a provision that took many immigration lawyers by surprise. Along with creating a new LCA form, the rule also stated that the INS would not be able to accept LCAs that had not been approved. Many felt that this rule was outside the jurisdiction of the Department of Labor to make, and they also wondered what would happen if the Department was not able to approve the LCAs in a timely manner.

As anticipated, the Department of Labor processing times on LCAs have gotten worse since they switched over to the new form on January 19th. Waits of over a month have become common. Even before the switch, the Department frequently experienced problems with the LCA faxback system. Understanding this, the INS has for many years accepted H-1B applications that have not yet been approved, but that have been submitted to the Department of Labor. The INS asked for a copy of the approved LCA before it will render a decision on the application, but in most cases by the time it is

requested, the Department of Labor has finally responded to it.

Mr. Yates noted that because H-1B applications filed with only evidence that the LCA has been submitted are considered to be properly filed, beneficiaries of them who were already on H-1B visas and are switching employers will be able to take advantage of the portability rules enacted last December.

Finally, Mr. Yates said that while there has been discussion of changing the policy of accepting H-1B application with only a filed LCA, if such a change is made it would be announced in the Federal Register and would only apply to applications filed after the policy was changed.

5. 2000 CENSUS SHOWS IMMIGRANTS HAVE SIGNIFICANT IMPACT ON US POPULATION

According to statistics from the Census Bureau, immigration is changing the face of big cities in the US. For example, New York City, which, for the past few decades, has experienced population declines, was, according to the 2000 Census, home to more than eight million people for the first time in 2000. According to the Bureau, the population gain was solely because of Asian and Hispanic immigrants – the black population did not change and the number of non-Hispanic whites actually declined.

Chicago experienced a similar phenomenon, with its population increasing for the first time since the 1950 Census. There are now 2.9 million people living in Chicago. Large cities that have not attracted large numbers of immigrants, such as St. Louis and Pittsburgh, saw their populations continue to decline.

However, advocacy groups in larger cities say that even with the improved count in the 2000 Census, many people were missed. Los Angeles, Chicago, and San Francisco, along with other cities, have filed a lawsuit seeking to have the results of the census statistically adjusted to account for people who were missed in the official count. New York City is not officially part of the suit, but a number of city politicians have joined it.

Other results from the Census confirm that the number of undocumented immigrants in the US is more than six million, the previously accepted number. While researchers are not sure how many undocumented immigrants live in the US, estimates are between nine and eleven million. There are a number of factors that make the researchers believe that the number is larger than expected. First, labor and wage pressures never

became as bad as many thought they would during the recent economic boom. Second, Census Bureau estimates from before the Census showed that the US population would be about 275 million. The Census showed it to be 281 million. A post-Census survey gave the figure at 285 million, a one to one and a half percent undercount. The undercount was particularly significant among the Hispanic population. Before the headcount, the Census Bureau had estimated the Hispanic population at 32.8 million. The headcount showed 35.3 million Hispanics living in the US, an eight percent difference.

It is not clear whether there was a wave of undocumented immigration during the 1990s or if the Census just did a better job of reaching undocumented residents. Experts say it is probably a bit of both. The Mexican economic collapse of 1995 and the US boom in recent years doubtless contributed to immigration from Mexico. Also, special efforts were made to help the Census count all residents. For example, the INS agreed to avoid areas in which the Census was being conducted, and these efforts likely also led to the higher than expected count.

The large discrepancy between the Census figures and the post-Census survey has created added pressure in the fight between those who want to use the Census figures in federal funding and apportionment and those who want to use a figure that has been statistically adjusted to take into consideration people who were missed in the head count.

6. BUSH TALKS IMMIGRATION WITH CONGRESSIONAL HISPANIC CAUCUS

This week the 18 members of the Congressional Hispanic Caucus had their first meeting with President George W. Bush. The Chair of the Caucus is Rep. Silvestre Reyes (D-TX). Before running for office, he was the chief of the Border Patrol's El Paso sector. There, in 1993, he implemented a new strategy of stationing agents at the border to apprehend some of the estimated 8,000 undocumented border crossers each day rather than conducting raids to catch those who had already entered. The policy was very successful and won widespread public approval.

The Caucus, because it is so small, does not wield much power, and its influence is often diminished by disagreement among members. While all the members are Democrats, a number of Republicans have left in recent years, saying that the Caucus refused to take a unified position on a number of issues. Even with the all-Democratic membership, there are a wide variety of viewpoints represented. However, on immigration issues the Caucus members tend to speak with one voice.

As the Hispanic population in the US grows (the Census showed that there are more than 35 million Hispanics in the US) in both number and influence, the Caucus hopes to bring issues of importance to the forefront. Among these issues are economic development and business growth in Hispanic communities, immigration, and increasing the political power of Hispanics.

Reyes is considered an expert on border control issues, and because of his experience with the Border Patrol he probably has more first hand knowledge of what works and what does not than any other congressperson. He also does not hesitate to break with the Democratic Party. For example, he sides with Republicans in calling for the INS to be split into two agencies, one for services and one for enforcement. But he has consistently opposed calls from Republicans to station military forces on the border, saying that such a proposal does not reflect a real understanding of border related issues.

7. STATE DEPARTMENT VISA BULLETIN – APRIL 2001

FAMILY NUMBERS

Family	All Chargeability Areas Except Those Listed	China	India	Mexico	Philippines
1st	01MAR99	01MAR99	01MAR99	22APR94	22MAY88
2A*	22SEP96	22SEP96	22SEP96	22OCT94	22SEP96
2B	22JUN93	22JUN93	22JUN93	15OCT91	22JUN93
3rd	08MAY96	08MAY96	08MAY96	15JUL95	15NOV87
4th	08OCT89	08OCT89	08MAR88	08OCT89	01AUG1979

EMPLOYMENT NUMBERS

Employment-	All Chargeability	CHINA-Mainland	INDIA	MEXICO	PHILIPPINES
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Based	Areas Except Those Listed	born			
1st	C	C	C	C	C
2nd	C	01SEP00	01NOV00	C	C
3rd	C	01JUN99	01FEB98	C	C
Other Workers	01OCT97	01OCT97	01OCT97	01OCT97	01OCT97
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas	C	C	C	C	C

DV NUMBERS FOR APRIL

Region	All DV Chargeability Areas Except Those Listed Separately	
Africa	AF 14,100	
Asia	AS 6,800	Except: Bangladesh AS 5,225
Europe	EU 14,700	Except: Albania EU 8,380
North America (Bahamas)	NA 15	
Oceania	OC 750	
SOUTH AMERICA, CENTRAL AMERICA, and the CARIBBEAN	SA 1,530	

ADVANCE NOTIFICATION OF RANK CUT-OFFS WHICH WILL APPLY IN MAY

Region	All DV Chargeability Areas Except Those Listed Separately	
Africa	AF 14,750	
Asia	AS 9,520	Except: Bangladesh AS 5,225
Europe	EU 16,550	Except: Albania EU 11,542
North America (Bahamas)	NA 15	
Oceania	OC 800	
SOUTH AMERICA, CENTRAL AMERICA, and the CARIBBEAN	SA 1,550	

8. BORDER NEWS

A group of people from Bisbee, Arizona calling themselves Border Justice Clean-Up have spent the past nine months providing aid to migrants crossing the desert. Along with picking up trash left by the migrants, which helps to eliminate the hostility of landowners, the volunteers have set up aid stations with food, water, clothes and blankets. The Border Patrol has praised the humanitarian effort, but cautions the volunteers to avoid breaking any laws.

The first INS detention center designed to house entire families has opened in Leesport, Pennsylvania, about 55 miles northwest of Philadelphia. The center will house only families who are seeking asylum, and represents a significant improvement over the current way the INS deals with families. Children and their parents are often separated, or are kept in hotel rooms. There are already 10 families from Colombia living at the center.

INS agents from the Anti-Smuggling Unit in Los Angeles recently discovered 27 Mexican immigrants and about \$18,000 in cash in an

apartment in south Los Angeles. Officials believe that the apartment was used as a drophouse where smuggled migrants are housed until family members can come up with money for the smuggling fee. The immigrants were all taken into custody and will be deported.

Two armed men hijacked a delivery truck carrying 6,000 border crossing permits outside Tijuana last week. The men stole the cards, which were being transported to US consulates for distribution to Mexican citizens. Officials assume that the cards will now be sold on the black market. The cards allow Mexican nationals with business or family in the US to enter the US for 72 hours. They are limited to travel within 24 miles of the border.

A faction of the Sierra Club, an environmental organization, is mailing a proposal to the 600,000 members of the group that will allow them to vote on whether immigration to the US should be limited to protect the environment. The leaders of the organization, who have faced this issue three times in the past ten years, are not supportive of the proposal. Instead, the organization supports improved planning and land use as well as other broader initiatives to end perceived environmental abuses. They also say that the problems of urban sprawl, one of the areas that concerns the dissident faction, is caused more by native born Americans than by immigrants.

Police in Idaho arrested 23 undocumented immigrants last weekend in what is being called the largest such arrest in the past ten years. Troopers stopped a rental van for speeding, and while letting it go, contacted the Border Patrol to report suspicions that many in the vehicle were undocumented.

The Coronado National Memorial on the Arizona-Mexico border will be receiving three additional rangers in order to address perceived increases in drug and immigrant smuggling through the park. The National Park Service, which runs Coronado, is also looking into a Border Patrol request that a surveillance tower be erected in the park. According to the Superintendent of the National Park Service, Jim Bellamy, there are conflicting opinions about such a tower, with one view being that it would be a blight on the landscape, and the other being that it is necessary to prevent both smuggling and the environmental degradation that it causes.

The number of undocumented immigrants and the amount of drugs coming through the park has tripled over each of the past two years.

Two people pled guilty this week in federal court of smuggling undocumented immigrants. Under the plea agreement, the maximum sentence for Hyo Young Park, a Canadian citizen, will be 37 months, and will be 52 months for Yu Feng Liu, of Pennsylvania. Five other Canadians are still awaiting trial. All of the defendants were arrested after and INS investigation dubbed Operation Squeeze Play that also reached into China, leading to the indictment of a Chinese government executive and a high ranking police officer.

The US Attorney and the District Attorney of Cochise County, Arizona, are investigating a report that a local rancher fired a gun at a group of migrants he was detaining. This is not the first time that Roger and Don Barnett have been involved in incidents of migrant detention. Since April 1999, they have, on at least 14 different occasions, detained groups of migrants crossing their ranch outside Douglas, Arizona. In the latest incidents, members of a group of migrants say that while they were walking, two men brandishing guns approached them and when one ran, one of the men fired a shot into the air. The brothers then called the Border Patrol, who picked up the migrants and allowed them to voluntarily return to Mexico.

Two water stations meant to help migrants crossing the Arizona desert opened this week. They are the first of hundreds that have been planned. The 65-gallon tanks, which are marked with blue flags that are visible for miles, were set up by a humanitarian group, Humane Borders, looking to prevent deaths among migrants crossing the desert during the summer. Last year 41 migrants died of dehydration. Border Patrol officials say that they will not stake out the stations to catch the migrants.

9. NEWS FROM THE COURTS

Griffiths v. INS, First Circuit

In this case, the court remanded for clarification of the sentence imposed.

Alwyn Griffiths, a citizen of Jamaica and resident of the US since 1985, was

convicted in 1991 of carrying a firearm without a license. He was sentenced to six months in prison and one year on probation. The INS placed him in deportation proceedings, and at the first hearing in 1992 Griffiths conceded his deportability, but said that he wanted to avoid deportation by applying for adjustment of status and a waiver of inadmissibility based on hardship to US citizen family members. In 1993, with his deportation case still pending, the trial court granted his motion for a new trial on the firearms offense because there was some question about whether Griffiths had received the required immigration warnings. He was convicted again, but of a lesser offense.

Griffiths then sought to terminate the deportation proceedings, saying that he was no longer convicted of the offense for which the INS sought to deport him. He also argued that the new conviction was not yet final enough to be the basis for deportation. The Immigration Judge disagreed, and denying Griffiths' requests for relief, ordered him deported. Griffiths appealed to the Board of Immigration Appeals. While the appeal was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which, among other things, provided a definition of conviction. The Board found that under this definition, Griffiths' second conviction was clearly final and could be used to deport him. It upheld the denial of relief, and ordered him deported. Griffiths then appealed to the First Circuit.

The First Circuit first addressed the conviction issue. Under the definition created by the IIRAIRA, there may be either a formal and final finding of guilt, or there may be a finding of guilt, although it may be later vacated upon completion of punishment. The court concluded that the Board found that Griffiths had been convicted under the second provision. The court found that this was proper.

However, the court noted that there was a question as to whether Griffiths had been sentenced to a form of punishment. The INS argued that the probation he served for the first conviction, which was in essence the same as the second conviction. The court concluded that there was sufficient evidence in the record to determine whether any punishment had been imposed on Griffiths. It therefore remanded the case to the Board for an examination of this issue.

The First Circuit also addressed Griffiths' request for relief from deportation. It found that the form of relief that the Immigration Judge and the BIA had denied him was not in fact the type of relief he sought. Nonetheless, because Griffiths had not been in the US for long enough to be eligible for the relief he sought, the court found that he was ineligible for it and did not remand the issue.

The opinion is available online at
<http://laws.lp.findlaw.com/1st/001694.html>.

Abdille v. Ashcroft, Third Circuit

In this case, the court addressed issues of firm resettlement in the asylum context.

Mohamed Abdille, a citizen of Somalia, entered the US in 1999 and filed an application for asylum. He had been orphaned shortly after his birth, and for this reason did not know to which clan in Somalia he belonged. The clan structure is very important in Somalia, and those, like Abdille, who cannot show to which clan they belong are often believed to be hiding something and are assumed to be members of a rival clan. These problems became even worse after 1991, when the government of Somalia collapsed. After 1991, militias organized on clan lines came to control the country, and Abdille lost his job and was repeatedly detained and assaulted because of his lack of clan membership. In 1998 he fled Somalia for South Africa.

In June 1998 he was granted asylum in South Africa. This status was valid for only two years, after which he would have to have his status reauthorized. He was given a South African passport. In South Africa, Abdille worked as a street vendor. During the year he was there, he was twice assaulted and beaten. The police did little to apprehend the guilty parties. Abdille decided to leave South Africa and in April 1999 arrived in the US.

His application for asylum was rejected on two grounds. First, he could no longer seek asylum from Somalia because he had firmly resettled in South Africa. Second, he was not eligible for asylum from South Africa because he had shown neither past persecution nor a well-founded fear of future persecution. The Board of Immigration Appeals upheld this decision and Abdille appealed to the Third Circuit.

Since 1996, the firm resettlement of an asylum seeker in a third country has been a bar to a grant of asylum in the US. Under INS regulations, "firm resettlement" exists if "prior to arrival in the US, he or she entered into another nation with, or while the nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." Firm resettlement will not be found if the applicant establishes that they were in the third country only to arrange travel and that no substantial ties with the country were created, or that their residence in the country was so restricted that they could not be said to be

resettled.

The Third Circuit found that by the terms of this regulation, the essential point in the firm resettlement inquiry is whether the applicant has been offered permanent residence in a third country. While the INS argued that the inquiry should look at all of the circumstances, the court found that under the regulation, other factors do not enter into the inquiry unless there is a debate about the offer of resettlement.

The South African government did grant Abdille asylum for two years, after which period he could pursue extension of that status or otherwise seek legal status in South Africa. The BIA interpreted this as an offer of permanent resettlement because even though his status as an asylee was limited to two years, he could thereafter continue to legally reside in South Africa.

The court disagreed with this interpretation, finding that there was no evidence of an offer of permanent resettlement, and that, if anything, the two-year limit on the grant of asylum indicated that the offer was for only temporary residence. However, the court also acknowledged that it was by no means an expert on South African immigration law. Because the record did not contain the necessary information to determine the effect of the two-year grant, the Third Circuit remanded the case so that more information about it and the legal status of Abdille in South Africa could be determined.

To avoid having to hear the case again, the court also outlined the procedure by which the inquiry into South African law would be conducted. It is a general principle that the party seeking to rely on foreign law has the burden of proving it. According to the court, the INS has this burden as part of its burden of producing evidence that the firm resettlement bar applies. Once the government produces evidence that there may have been firm resettlement, the burden shifts to the applicant to prove that he or she was not firmly resettled. At this point, the court noted, the applicant may also have to prove foreign law.

Abdille had also sought asylum from South Africa. The court found that while he had been harassed in South Africa, the BIA was correct in ruling that it did not rise to the level of persecution. The groups that harassed him were not connected to the government, and there was no evidence that the government refused to attempt to control them. The court also found that Abdille failed to show that the attacks were because of a protected ground and not simply generalized violence.

On the issue of whether Abdille had a well-founded fear of future persecution, the Third Circuit agreed with the BIA that while he genuinely

did fear being returned to South Africa, this fear was not reasonable. There was no evidence that he would face problems everywhere in South Africa. Therefore, the court upheld the denial of asylum from South Africa.

The case was remanded for a determination of the firm resettlement issue.

The opinion is available online at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=3rd&navby=case&no=001659>.

US v. Herrera-Ochoa, Fifth Circuit

In this case, the court reversed the conviction of being unlawfully present in the US.

Tomas Herrera-Ochoa was arrested in a high crime area of El Paso, Texas, after trying to avoid a policeman. During the arrest, the police officer was told by a dispatcher that Herrera was possibly in the country illegally following deportation for an aggravated felony. Herrera was indicted for this offense, and was convicted on the basis of an INS file that showed he had been deported in 1997.

On appeal, Herrera argued that his arrest was unconstitutional and that because of this, his INS file should have not been admitted into evidence, and that the government had failed to prove that he had been found in the US, as required by the statute under which he was convicted. The Fifth Circuit found that the INS file was properly introduced. On the other issue, the government argued that since Herrera appeared for his trial, his presence in the US at the time of the arrest could be assumed.

The indictment charged Herrera with being unlawfully in the US on a specific date, the date of his arrest. Herrera did not admit to being in the US on this date, and the only evidence to prove that he was in the US on the date in question was a notation in the record noting the date of his arrest. Being unlawfully in the US on the particular date is an essential element of the offense, and one the government must prove beyond a reasonable doubt. In the absence of any testimony that Herrera was in the US on the date in question, the government argued that the Fifth Circuit should take judicial notice of the notation in the record. The court found that such a thing was not proper for judicial notice because it was an element of the crime, and taking notice of it eliminated Herrera's right to have each element of the alleged crime proven beyond a reasonable doubt. Therefore, it reversed the conviction.

The opinion is available online at
<http://www.ilw.com/lawyers/immigdaily/cases/2001,0321-Herrera.shtm>.

10. GOVERNMENT PROCESSING TIMES

California Service Center Processing Times

Jurisdiction: Arizona, California, Hawaii and Nevada.
(Just In Time Report)
03/16/01

Petition Type	Case Date	Data Entry
I-90	01-066	01/03/01
I-102	00-121	03/20/00
I-129 L	01-109	02/20/01
I-129 H1B COS/CN	01-066	01/03/01
I-129 H1 EOS	01-097	02/06/01
I-129 H2/H3	01-121	03/05/01
I-129 E	01-097	02/06/01
I-129 O/P/Q	01-123	03/07/01
I-129 R	01-060	12/26/00
I-129 F	01-119	03/02/01
I-130 (IR) Spouse	00-258	09/08/00
I-130 (IR) M/C	01-090	01/29/01
I-130 (IR) Other	00-186	06/07/00
I-130 Pref. Spouse	98-077	01/22/98
I-130 Pref. M/C	99-055	12/17/98
I-130 Pref. Other	98-060	12/26/97
I-131	Vacant	Vacant
I-140 A& B, E-1 – E-2	01-059	12/22/00
I-140 C E1-3	01-086	01/25/01
I-140 D E2-1	01-062	12/28/00
I-140 E E-3	01-094	02/02/01
I-140 G EW – 3	01-086	01/25/01
I-360 FPL/Widows/Widowers	01-055	01/18/01
I-360 BPL/Religious	01-083	01/22/01
I-526	01-074	01/11/01

I-539	00-196	06/20/00
I-485 Ready to Adjudicate	Varies	Varies
I-751	00-169	03/17/00
I-765 30 day	01-100	02/09/01
I-765 90 day	01-103	02/12/01
I-817(initial)	98-095	02/17/98
I-817(extensions)	99-027	11/06/98
I-824 DIVI	Vacant	Vacant
I-824 DIVII	01-116	02/27/01
I-824 DIVIII	98-177	06/11/98
I-829	99-056	11/23/98
<p>"Case date" means the fiscal year and the number of the day of the year (e.g. 001 = January 1st) "Data entry" means the receipt date of the last case taken from the shelf assigned to the officer as of the date of the JIT Report. It does not mean that the case is adjudicated on that date. "Work days" exclude Saturday, Sunday and holidays.</p>		

Source: [American Immigration Lawyers Association](#)

11. NEWS BYTES

The trial of four people in the first prosecution under the Victims of Trafficking and Violence Protection Act of 2001 has been postponed until this summer. Noting the difficulty being experienced in finding potential witnesses, the judge issued a three-month delay of the trial that was to start this week. The case involves six Russian women who were brought to Alaska, allegedly to perform cultural folk dances. After their arrival, they were made to work as strippers at a nightclub. The defendants are charged with a variety of crimes, including visa fraud, kidnapping, forced labor, witness intimidation and transportation of minors across state lines for immoral purposes.

Union officials with a local plumbing union have accused a plumbing

contractor in Bingham Farms, Michigan of hiring undocumented immigrants. They also say that the developer of a new apartment complex where the immigrants were working has been importing Mexican workers, many of whom are undocumented. Representatives of the development say that there have been no undocumented workers on the construction project. They also say that accusing developers of hiring undocumented workers is often a tactic unions use to force employers to hire unionized workers.

An ongoing series of INS raids in Atlanta has shifted its focus from undocumented immigrants to those who profit from smuggling by employing workers. So far more than 100 immigrants have been arrested, and eight people have been arrested for smuggling and employment violations. The immigrants are being interviewed in hopes that they can provide evidence against those who employed them.

In Chicago last week Juanita Zamora was sentenced to four years in prison for arranging fraudulent marriages for immigration purposes. Five of her partners in the scheme were also sentenced, as were ten people who had participated in the fraudulent marriages. Most were sentenced to three years' probation, although those involved in the phony marriages will face deportation proceedings in the next month or so. The INS is also investigating about 50 marriages to determine if there was fraud involved.

Nine teachers from the Philippines will be teaching in Boston public schools during the next school year. Faced with a shortage of math and science teachers, the school system looked to the Philippines, where English is the predominant second language.

Undocumented workers in New York's Suffolk County continue to be a community flashpoint. This week the County Legislature debated the creation of a center for hiring day laborers, many of who are undocumented. Supporters of the bill say that providing a centralized location would eliminate many of the problems associated with hiring day laborers, including traffic and quality of life concerns. Opponents say that it would sanction the hiring of undocumented workers, something they call "treason."

A recent survey conducted by the Christian Science Monitor shows that immigration continues to be an issue on which there is no apparent consensus of public opinion. According to the survey, 44 percent of respondents oppose an amnesty program, and while 26 percent said they supported it, 30 percent said that they did not know enough about the issue to say. On a guest worker program with Mexico, 39 percent opposed creating one, 38 percent support one, and 23 percent said they were unsure. On the issue of opening the border with Mexico, there was widespread opposition – 65 percent said it was a bad idea, and only 16 percent said they would support such a move. Asked about whether current level of immigration should be decreased, 41 percent said yes, 33 percent said no, and 8 percent of respondents said current levels of immigration should be increased.

The former principal of a junior high school in Colorado Springs, Colorado, was sentenced this week to 10 months in prison for making false statements to illegally obtain visas for Russian nationals. Martin Hoskins pled guilty last September to lying to help secure visas for 47 people. For this he received \$88,000. According to prosecutors, Hoskins said that the visa applicants were coming to the US to learn about educational systems, knowing that the applicants did not intend to engage in such study, and that they did not plan on returning to Russia after their visas expired.

This week Charles Oppenheim of the State Department announced that the employment-based second preference category numbers for India and China will likely become current soon, perhaps as early as May or June. Numbers in the third preference will advance more slowly, for China at a rate of about five months per month, and for India at about four months per month. Mr. Oppenheim did predict, however, that EB-3 numbers for all nationalities could become current later this year.

12. THE ABC'S OF IMMIGRATION – OPTIONS FOR GAY AND LESBIAN COUPLES

As the world becomes a smaller place through globalization, more and more people are traveling abroad, for pleasure, for school, and for employment. One result of this change has been an increasing number of marriages between people of different countries. For the majority of US

citizens in a relationship with a foreign national, the answer is straightforward – get married and file an application for a green card for the spouse. For some, however, there is no clear answer.

Because federal law recognizes marriage as existing only between a man and a woman, a US citizen cannot petition for a green card for a same sex partner. This is true even if the couple has entered into a legally binding arrangement, such as the civil unions now performed in Vermont, or other similar domestic partnerships found in other countries. For the past two years, legislation has been introduced in Congress that would allow US citizens to petition for same sex partners, but given the anti-homosexual bias that is dominant in Congress, such legislation has little hope of passage. So people in a gay or lesbian relationship with a foreign national face extreme difficulty in remaining together.

In this article, we outline some of the ways people in such a predicament can stay together. Detailed information on the visa categories mentioned below is available in other ABC's of Immigration articles which can be found online at <http://www.visalaw.com/abcs.html>.

Student visas

Assuming that they otherwise qualify, the foreign national can enter the US on a student visa. They must, of course, comply with the terms of the visa, and the visa will eventually expire, meaning that the person must either leave the US or find another visa status.

Work visas

Work visas allow a person to live and work in the US for, in some cases, an indefinite period of time. The primary drawback to most common work visas is that they allow the person to live in the US only for a limited period of time. For example, the time limit on H-1B visas is six years and for L visas it is five or seven years. There are some work visas that may be renewed indefinitely. The O visa for people of extraordinary ability can be issued in three-year increments for an indefinite period of time, as long as the visa holder is doing work in the area of their extraordinary ability. The E visa, for people making an investment to start a business in the US, can be issued in five-year increments for an indefinite period. TN visas for Canadian and Mexican professionals can also be renewed without limit.

Regardless of how long a person can live and work in the US on a work visa, however, there will always remain the fact that they are not permanent residents, and could be separated from their loved one on the whim of an employer or a down turn in economic conditions.

Green cards

Because a US citizen in a same sex relationship with a foreign national cannot file for his or her immigration, the foreign national has to seek a green card through another route. If they have a qualifying family member (for example, a US citizen parent or sibling) the family member can apply for their immigration. This is, however, a long process. Currently (March 2001), immigrant visas are being issued for unmarried adult children of citizens in cases filed in March of 1999. For applications made by a sibling, visas are being issued in cases initially filed in October of 1989. Permanent residents can file for their adult children, but in these cases visas are being issued for applications initially filed in June of 1993.

Often, a quicker way of obtaining permanent residence is through an employer who is willing to sponsor the foreign national.

The foreign national can also apply for a green card through the diversity visa lottery if they are from a qualifying country. Given that only 50,000 visas are available each year and the fact that there are millions of applicants, this is by no means a sure way of getting a green card.

Asylum

A final way that the foreign national in a same sex partnership can remain in the US is through an asylum application. In recent years asylum claims on the basis of persecution because of one's sexual orientation have become more widely accepted. However, such cases are more difficult than most asylum cases, and require substantial proof of persecution.

The bottom line is that couples in same sex relationships must be creative in devising workable visa strategies. If you are interested in learning more about immigration issues that affect the gay and lesbian community, visit the website of the Lesbian and Gay Immigration Rights Task Force at <http://www.lgirtf.org>.

13.ASK VISALAW.COM

by [Marc Topoleski](#), Partner in SSHD's Detroit, Michigan office.

Do I have to work for my employer in H-1B status for one year before starting the green card process?

There is no requirement under immigration law that requires a company or individual to wait a certain period of time after entering the US in H-1B

status before pursuing Permanent Residence. Under the immigration laws, the nonimmigrant and immigrant visa systems are virtually separate, and if an employer is willing and able, the process of green card sponsorship can be started at any time. One should note, however, that employer sponsorship generally requires you to stay with that employer until the green card is finally issued. And, due to the current uncertainty in processing delays, it is probably best to begin as soon as you and your employer are comfortable that the employment relationship is going to be long-term.

I am an H-1B visa holder. If I get laid off, is it true that there is a 10-day grace period for me to remain in legal H-1B status after leaving my sponsoring employer?

This is probably one of the most popular misconceptions in immigration law. Technically, there is a 10-day grace period for a person to legally remain in the US beyond the expiration of their period of authorized stay, as indicated on the individual's I-94 card. This 10-day grace period does not apply in situations where your employment ends prior to the end of the I-94 period, as in a layoff situation. In this situation, you are out of status as of the date your employment is terminated. Therefore, if you feel you are in danger of being laid off, you should take steps to obtain an alternative status, whether through a new employer or in a different visa category, prior to being laid off so you do not experience a lapse in status.

If an individual or employer decides to file a petition with the INS for permanent residence for either themselves or their employee before April 30, 2001 to take advantage of the temporary restoration of Section 245(i) under the LIFE Act, are they putting themselves at risk for INS problems?

Conceivably, the INS, in the case of an I-130 petition, or the DOL, in the case of a Labor Certification, could use information contained in a filing to scrutinize an individual's or employer's legal status. However, in practice, this very rarely occurs. The INS service personnel and enforcement personnel operate almost exclusively in an independent fashion, making it highly unlikely that the two branches would share information. The enforcement division of INS has stated on numerous occasions that its highest priority is going after criminal aliens, and that realistically it just does not have the resources to conduct investigations of individuals or employers based on information contained in immigration filings. Employees should be cautioned that if an employer learns that you are out of status and was not aware that this was the case, you may find yourself out of work.

14. MEXICAN PRESIDENT VICENTE FOX RAISES IMMIGRATION ISSUES DURING CALIFORNIA TRIP

This Wednesday, Mexican President Vicente Fox was the first Mexican President to visit Silicon Valley, California. Fox visited the Valley during a three-day tour of California, in which he had two primary focuses. One was working toward the development of high-tech industries in Mexico, and the other was the treatment of Mexican workers in the US, both by the US and Mexican governments.

It was also Fox's first visit to the US since taking office last December. Mexicans in the US all want something from his presidency, but what they want varies tremendously depending on their status. Undocumented workers are looking toward Fox for a push to guarantee them legal rights, including the right to work, to travel freely, and help in dealing with money transfer services, which have been sued over the often exorbitant exchange rates they charge. They hope that Fox will be able to use his personal influence with US President George W. Bush to help create a guest worker program that would allow many undocumented Mexican workers to obtain legal status.

Mexican high tech workers, both in the US and Mexico, and Americans in the industry, look to Fox to improve economic stability in Mexico and to improve primary education in the country so that it will better be able to participate in the worldwide high tech economy. It is also believed that improved economic conditions in Mexico would do much to slow immigration, but legal and undocumented.

There are already more than 40,000 Mexicans employed in high tech work in Mexico, primarily in the state of Guadalajara, home to an IBM plant since 1975 and Hewlett-Packard plant since 1982, as well as a growing number of new manufacturers. It is in large part because of high-tech manufacturing in Mexico that it has become the number one trading partner with California. Of the \$19 billion in exports from Mexico to California last year, high tech products accounted for \$3.6 billion. However, many criticize the conditions in the Mexican factories, saying that the hours are long, and the wages low, in some cases barely six dollars a day.

15. BOARD OF IMMIGRATION APPEALS CHAIRMAN STEPS DOWN

This week, the Executive Office of Immigration Review (EOIR) announced that Paul W. Schmidt, the Chairman of the Board of Immigration Appeals, was stepping down from that post effective April 9, 2001. Schmidt, who has been the Chairman since being appointed to the Board in 1995, will remain a member of the Board. According to Schmidt, he has spent much

of his time on the Board focused on case processing, and would now like to devote himself to hearing cases on a full-time basis.

During this time as Chairman, the Board expanded from 5 to 21 members and issued decisions in more than 130,000 cases, almost 200 of which were designated as precedent decisions, meaning they provide binding statements on immigration law. During Schmidt's tenure the Board also developed a unitary Clerk's Office for filing appeals and changed the procedure by which the entire Board hears a case. The Board also became more accessible to the public during this time, holding its first sessions outside its home in Virginia.

Until a new Chairman is appointed, Lori L. Scialabba, a current Vice Chairman, will serve as Acting Chairman.

16. DETENTION WATCH NETWORK OFFICIALS MEET WITH INS

Last January, the Detention Watch Network, a group comprised of numerous immigrant advocacy organizations that monitor the detention of noncitizens, met with officials from the INS to discuss detention issues. Among the topics of discussion were the parole of immigrants into the US, alternatives to detention, conditions in detention, the situation of individuals in long-term detention, and the transfer of detainees.

On December 28, 2000, the INS published an interim regulation clarifying the authority of the Attorney General to grant parole. The regulation set up a system under which this authority is delegated to the INS Commissioner, who in turn delegates it to the INS District Directors. There is no appeal from a parole decision.

Another regulation is being considered by the INS. This regulation would grant Asylum Officers the authority to grant asylum after the credible fear interview. While the INS stated that part of the reason it was withdrawn was opposition from non-governmental organizations, the advocacy groups at the meeting said that they supported such a rule, but wanted to ensure that it provided adequate protection for people who are not granted asylum at that stage.

One primary goal of the Detention Watch Network is to have as few people in detention as possible. One way to accomplish this is to provide alternatives to detention. The use of a supervised release program is one such alternative. While the Detention Watch Network supports such programs, it wants to ensure that detainees are provided with the ability to contact legal assistance. According to the INS, directors in San Francisco,

New Orleans, and Kansas City are interested in a supervised release program. Also, funding for such a program is online, but the transition to the new presidential administration is delaying its implementation.

The Detention Watch Network requested a number of memoranda from the INS on detention standards, but was told that most of them do not exist. The INS was asked to create such memos so that those working with the agency would know what the standards and procedures are. The other memos were internal and not available to the public. One of the biggest issues for detained immigrants is that the INS often transfers them from one facility to another, separating them from their families, and from their legal representation. Often, attorneys are not even notified of the transfer. Members of the Detention Watch Network provided the A numbers for many of these people and the INS said it would look into these cases.

Another large concern for the Detention Watch Network is the status of people in indefinite detention who have final orders of deportation but cannot be deported because the US does not have a deportation agreement with their home country. At the meeting, the INS representative said that negotiations were continuing with Cambodia, Laos and Vietnam on ways to return nationals from those countries. The Detention Watch Network secured a promise from the INS that detainees who were ordered deported before the United Nations Convention Against Torture was passed be notified of the available relief under the convention.

The next meeting between the INS and the Detention Watch Network will be in April.

17. US ARMY MEMBER FIGHTS TO WIN NATURALIZATION

Ramdeo Singh, a citizen of Trinidad and Tobago, has been trying for the past year to become a US citizen. He is a sergeant in the Army Reserves, and while on active duty was stationed in Kosovo. He is seeking citizenship under a provision that allows people who have served in combat zones to become naturalized citizens even if they are not permanent residents of the US. By executive order, former President Clinton designated Kosovo as a combat zone.

While this would seem to make it clear that Singh is qualified to apply for naturalization even though he does not have a green card, the INS takes a different position. The agency says that the presidential designation was meant to deal only with the parts of the tax code that address combat duty because it does not specifically refer to immigration issues.

Before he joined the Army, Singh had tried to get permanent residence under the class action lawsuit LULAC v. INS, which dealt with the INS' mishandling of the 1986 general amnesty. He received work authorization and joined the Army, but never received his green card. The INS now says that he is undocumented, but this is doubtful because the Army requires proof of residency before it will allow a person to join. His Army files indicate that he was a permanent resident when he joined.

Immigration attorneys note that the provision under which Singh is seeking citizenship is not often used, and that the people who perform initial reviews of applications may not be familiar with it. They worry that people who are not as determined as Singh may simply take INS workers word as the truth and not seek benefits to which they are entitled.

Singh has contacted many politicians for assistance with his case, and has received favorable replies. His representative, Gregory Meeks (D-NY), has been told by the INS that it is investigating Singh's case. One of his senators, Charles Schumer (D-NY), has said that his office would assist him in any possible way. But for now, Singh continues to live in limbo, where the INS says he is undocumented, but because of his membership in the Army Reserve, he could be called into combat for the US.
