

SISKIND'S IMMIGRATION BULLETIN
October 25, 2002

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SSHD serves immigration clients throughout the world from its offices in the US, Canada and the People's Republic of China. To schedule a telephone or in-person consultation with the firm, go to <http://www.visalaw.com/intake.html>. Editors: Amy Ballentine and Greg Siskind. Contributors: Karen Weinstock, David Delgado and Mick Wright.

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1. OPENERS

Dear Readers:

This week's big immigration news concerns a Department of Labor ruling against an employer for multiple violations of labor condition applications for H-1B employees. The employer, a physician with clinics in Tennessee and Florida, failed to pay employees who had received H-1B visas but, for various reasons, were not working. According to the opinion, the employer never intended to pay the employees the wages stated on the labor

condition applications. In addition to discussing this case, we have an ABC's of Immigration article on labor condition applications.

In other news, the General Accounting Office has issued a report criticizing the State Department Visa Office for its policies and procedures. Since the terrorist attacks last year, visa issuance has become a hot topic of debate, and this report is sure to add fuel to the fire.

We also have all our regular features, including the most recent State Department Visa Bulletin.

Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients. We would love to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Kind regards,

Amy Ballentine

2. THE ABC'S OF IMMIGRATION – LABOR CONDITION APPLICATIONS

This week the Department of Labor issued a decision finding an employer liable for \$1 million in back pay and \$100,000 in civil fines for various labor condition application violations. We thought it would be appropriate to run an article on the requirements of the labor condition application (LCA).

The requirement of a LCA was imposed by the 1990 Immigration Act. It serves two related purposes – ensuring that US wages are not depressed by the hiring of foreign labor and that foreign workers are not exploited. The employer makes specific representations regarding the conditions under which the foreign worker was hired and will be employed. These attestations are as follows:

- The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position
- The employment of H-1B workers will not adversely effect the working conditions of US workers
- When the LCA was filed, there was no strike, lockout or other work stoppage because of a labor dispute
- The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted in a conspicuous place notice that an LCA was filed.

A few new requirements were added in 1998, when the annual H-1B cap was raised. However, these requirements apply only to "H-1B dependent" employers, a concept also created in 1998. Whether an employer is H-1B dependent depends on the following guidelines:

- If the employer has over 50 employees, the employer is H-1B dependent if at least 15% of the workforce is comprised of H-1B visa holders

- If the employer has 26-50 employees, the employer is H-1B dependent if it employs more than 12 H-1B workers
- If the employer has 25 or fewer employees, the employer is H-1B dependent if it employs more than seven H-1B workers

While in most cases the new requirements apply only to H-1B dependent employers, they also apply to employers who have been found to have committed a willful failure or misrepresentation with regard to any attestation made on the LCA. Also, H-1B dependent employers are not subject to the new requirements when they are filing an LCA that covers only "exempt" H-1B workers. Exempt workers are those who are paid at least \$60,000 annually or who have obtained a master's degree or higher in a field related to the intended employment. If the employer is H-1B dependent, it must comply with these requirements:

- The employer must attest (swear under oath) that it has not and will not "displace" a US worker during the period from 90 days before the H-1B petition is filed until 90 days after it has been filed.
- The employer must attest that it has taken "good faith steps" to recruit US workers for the job, and that they have offered it to any US worker who applied that was at least as qualified as the H-1B nonimmigrant.

Once the LCA has been filled in, it is submitted to the Department of Labor (DOL). Under the 1990 law, the DOL is supposed to certify the LCA within seven days of submission, but there is little way to enforce this. The reality is that even with a new automated faxback system, the Department of Labor still frequently takes more (sometimes much more) than seven days to certify an LCA.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, including its source, whether the state or a private survey is used, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

In addition, the employer must keep other information that need not be made available to the public. This includes payroll data for all employees in the same occupations as the H-1B worker, a calculation of the actual wage paid the H-1B worker, the raw data behind the prevailing wage determination, documentation of any fringe benefits provided workers, and evidence that the H-1B worker has been given a copy of the LCA.

Once approved, an LCA is valid for three years.

3. ASK VISALAW.COM

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

Q - For 90 days, immigration allowed everybody file form I-140 with form I-485 To adjustment of status. This regulation will end October 31. My question is: This regulation will be extend after 10/31/02 or not?

A - You are mistaken. The new regulation allowing simultaneous filing of I-140s and I-485 petitions does not expire after 90 days. This is a permanent change.

Q - I have H-1B Visa (exp 11/31/2002), my I-140 and I-485 pending. Do need to apply for extension of my H-1B. Thank you.

A - You will not be work authorized after 11/31/02 unless you have an employment authorization document through your adjustment application or you have extended your H-1B. So make sure you apply for the H-1B extension if you have not received the work card by the expiration date.

Q - Hi, I have a question. If I am a citizen of Kyrgyz Republic (Kyrgyzstan) but currently live in US - should I write on the application form my US address or the address where I live now? Thank you very much!

A - I would use a US address if it were me. But you can put any address you want. This is the address they will send the winner's package to so be sure it is one that will work for a while. Don't count on the State Department having your packet forwarded.

Q - We stayed in US in J-1 visa, after finishing this visa, we moved to Canada (not moved to citizenship country to fulfill J-1 exchange visitor visa condition. But now we like to get H1visa in US. So we need waiver from my citizenship country. Now we are outside of USA, so we are eligible to apply waiver? If any special application form is available? Please inform me. Thank you.

A - You can apply for the waiver from inside or outside the US. As for what your best options for a waiver might be, I'd really need to interview you to determine them.

Q - My mother became permanent resident (Green card holder) of USA in Nov 2001. On 14th of Feb 2002 she went to India (her home country) for a visit. She is planning to come back in the month DEC 2002. Her stay in India (Outside USA) has been more than six months but within 1 year. Does that affect her status of permanent resident? Has she over stayed outside of USA that can affect her status as permanent resident? Can she be denied re-entry based on overstay outside USA, if any?

A - She probably will get nothing but a stern warning, but she should nonetheless be prepared to document her ties to the US. You might find the article on my web site at <http://www.visalaw.com/01jan4/12jan401.html> helpful. And she should plan on spending most of her time here if she wants to keep her green card.

Q - My girlfriend just got a B2 visa valid for 10 years, how long can she stay/ask before she has to go back to her home country 6 month, 12 month, more?

A - Actually, the INS typically will only grant a 30-day stay unless you provide a good reason for needing longer (this is merely a proposed rule, but the INS has been acting as if it is final). The maximum they can grant is six months at a time.

Q - Hi, I want to apply for visa green card lottery but I'm belong from Pakistan (Pakistan not eligible for entry). But right now I'm studies in USA so I have a question that can I apply for green card lottery or no.... thanks for reply.

A - You are not eligible merely because you are currently residing in the US. Your eligibility is normally determined by the country of your birth.

Q - Hi. I am a physician on J1 visa doing my residency in US. Can I emigrate to Canada after I complete my training if I don't find a waiver?

A - I am not an expert on Canadian law (try Leonard Pearl in our Toronto office at lpearl@visalaw.com). But I can tell you that probably cannot satisfy the home residency requirement in Canada. The only way you could is if you were residing in Canada before coming to the US or you are a Canadian national.

Q - Could you possibly answer the following question? I have heard that the time needed to get a green card in EB-1 category has recently increased considerably. How long does it take on average these days?

A - I don't necessarily agree that I-140s are a lot slower than they used to be. Times seem to be about what they have been for some time. You can see I-140 times by going to our web site at www.visalaw.com/processing.html. The times seem to range from 2 to eight months depending on the service center in question.

Q - My H-1B status expires soon. Can I keep working while it is pending? When should apply for an extension. And how about the green card.

A - You automatically have your status extended while you wait so from the point of view of being allowed to continue working, just file before the I-94 expires. On the other hand, if you need to travel abroad while the extension application is pending, you could have trouble reentering the US. Since the application will take 3 or 4 months to approve and you are allowed to apply up to six months prior to expiration of the I-94, I probably would apply somewhere between four and six months ahead of the expiration date.

As for starting the green card process, I would apply for that sooner rather than later just because the process takes so long that you don't want to be stuck well into the process

having to start again. If the market is tight for teachers right now, I would start sooner rather than later.

Q - When my mother was naturalized, my sister's category was changed from F2B to F1. We would like to request that their category be returned to F2B as the wait will be shorter (Philippines). Where do we send the request to? Please advise.

A - According to a memo released a few weeks ago by the State Department, "At this time, it is not known how this request to the Attorney General will be made or what formalities will be required." We will need to wait a bit longer to see how the INS and State Department intend to implement the new law.

Q - I would like to know if two people can get married by phone in another country?

A - Depends. First, the marriage ceremony conducted via telephone would need to be legal in the place it is performed. Second, the marriage will actually need to be consummated by cohabitation between the parties after the ceremony. The Immigration and Nationality Act defines "spouse" in a manner that excludes parties that are not physically in each other's presence. So this would exclude telephone, proxy, radio, video and similar absentee marriages unless they have been consummated.

Q- I am a US citizen and my fiancé is here on a work visa from Mexico. What steps do I need to take to get legally married in the US? We are both 19.

A - You might find the article on my web site at <http://www.visalaw.com/00jul4/12jul400.html> helpful.

Q - If I change jobs can I transfer the processing (H1-B and green card) to the new company (if the processing is not complete by then), or at which stage of the green card processing can I transfer it to the new company or will I have to start the entire green card process again with the new company?

A - You should be able to switch H-1B employers with a change of status application, but you risk having to start the green card process all over again if you leave now. There is a provision that would allow you to move employers six months after you file for your adjustment of status if you are going to a job in the same or a similar occupation. But even this is risky.

Q - Could you please inform me if there are any exceptions to the two-year home-country physical presence requirement for those who were on J-1 visa in the US and are married to a citizen of the US? Thank you!

A - There is a waiver available based on a hardship to a US citizen if the J-1 visa holder has to satisfy the home residency requirement. Merely being married to a US citizen would not be enough to avoid the home residency requirement, but if there are genuine hardships that would result from having to comply with the home residency requirement, then you might have a case. The State Department would require you to show a hardship if the two of you are separated AND a hardship if both of you go abroad to satisfy the home residency requirement.

Q - I would like to acquire the following information:

1-When applying for green card lottery, would it be possible to put a U.S. address (a relative address) for mail returns, to make sure that I will be getting the answer to the green card lottery, since I am an Iranian citizen and the mail services in this country are not reliable.

A - Yes, you can use any return address you like for the lottery and using a return address in the US is not a problem.

4. BORDER NEWS

A woman recently pled guilty to charges of immigrant smuggling, the first of the six people charged in the scheme to do so. Four others have pled not guilty, and are scheduled for trial next month, and one person remains a fugitive. Officials say that the scheme, which began in 1996, took advantage of the Transit Without Visa program, which allows people to enter the US without a visa if they need to do so to catch a connecting international flight.

State troopers in Texas recently apprehended a group of 25 undocumented immigrants locked in a tractor-trailer. The truck was stopped for speeding and the trailer inspected after officers found drugs, cash and a gun on the driver. Officials say the immigrants, who were all in good health, had been locked in the trailer for about 10 hours.

Border Patrol agents recently rescued two undocumented immigrants who alerted agents to their presence by activating a distress beacon in the desert outside of Yuma, Arizona. This is the second time the beacons have been used since they were installed last spring.

Officials in California believe that a group of Chinese men apprehended in Monterey entered the US in a lifeboat after overpowering the captain and engineer of a fishing boat. A few hours before their arrests, the Coast Guard had located the fishing boat, finding the two men tied up. The ship was registered in Taiwan, and Taiwanese authorities reported the vessel as missing ten days before. INS officials say that a crackdown on smuggling has led to an increase in incidents such as this.

Authorities are investigating whether two undocumented immigrants killed in Pinal County, Arizona last week were the victims of vigilante justice. According to a migrant who was part of the same group that had stopped by a pond, two men wearing military fatigues ambushed the group, shooting at them with a handgun and an automatic rifle. Officials are also investigating whether the violence was the result of a clash between two different smuggling organizations. Advocates doubt this scenario, observing that in recent years there has been a dramatic increase in the number of so called citizens' patrols in border areas.

This week Border Patrol agents rescued 51 undocumented immigrants locked inside a tractor-trailer. They were discovered when the truck was stopped at an immigration checkpoint near Laredo, Texas and a dog alerted agents to the possible presence of people in the trailer. The driver of the truck, who admitted to being paid \$2,000 to drive the migrants through the checkpoint, was arrested on charges of human smuggling.

5. NEWS FROM THE COURTS

Farm Labor Organizing Committee v. Ohio State Highway Patrol, Sixth Circuit

In this case, a group of migrant workers filed a class action lawsuit, alleging that the Ohio State Highway Patrol violated their constitutional rights by assuming that, because of their ethnicity, they were unlawfully in the US. The case focused on one incident in particular. Two people driving through Ohio were stopped by state troopers who seized their green cards, not returning them for four days. The primary issue before the court was whether the doctrine of qualified immunity, which shields government employees from personal liability when their conduct does not violate clearly established rights, applied in this case and shielded the troopers from liability.

The plaintiffs argued that the troopers singled them out because of their ethnicity, which would clearly violate their constitutional rights. The troopers argued that their inquiries were motivated by the plaintiffs' inability to speak English, which, they claim, is a neutral basis for an investigation. The court found that there was more than enough evidence to conclude that Ohio state troopers routinely treated Hispanic motorists differently from white ones. Noting that while the troopers can argue in future hearings that other facts would have led them to make the same sort of investigation regardless of the plaintiffs' ethnicity, the court found that there was enough evidence of racial discrimination to allow a trial on the issue. The court also found that keeping the plaintiffs' green cards for four days was clearly unreasonable and a violation of plaintiffs' constitutional rights. Therefore, the court denied qualified immunity for the troopers, who will face trial.

The opinion is available online at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=6th&navby=case&no=02a0361p>.

6. GOVERNMENT PROCESSING TIMES

Local INS Office Processing Times

Current through September 2002

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	400-450	180-240	30-60	30-60
Atlanta	456-516	365-730	30-60	60-90
Baltimore	365-486	243-365	30-60	60-90
Boston	120-150	180-270	1	1
Buffalo	150-180	240	14-21	1-14
Charlotte	243	426	30	30-50
Cherry Hill, NJ	180-390	240-360	3-7	90-120
Chicago	183-548	183-365	30	45-90
Cincinnati	98-120	60-90	30-60	1
Cleveland	150-190	500-530	75-120	75-120
Dallas	240-430	240-365	60-90	60-90
Denver	540-720	360-540	1-5	1-28
Detroit	365-380	365-400	60-90	60-90
El Paso	210-240	300-365	60	21
Harlingen	1138	820	162	91
Hartford	183-243	183-365	15	90-120
Honolulu	243	243	10	30-45
Houston	1245	455	30	90
Indianapolis	243-274	243-274	21-28	1
Kansas City	150-210	210-240	1-21	60-90
Las Vegas	365-426	365-426	90	80-90
Louisville	365	365	60	60
Los Angeles	213	243-364	42	50
Memphis	334	365	40-56	60
Miami	210-270	210-240	3-4	80-110
Milwaukee	150	210	60	30
Newark	90-180	300-360	1	90-120
New Orleans	150-360	360-470	7-30	30-90
New York	578	334-426	125-130	90-95

Oklahoma City	150-180	180-210	30-60	30-60
Omaha	300-365	300-365	30-60	14-21
Orlando	365	365	120	120
Phoenix	1004	334	120	90
Philadelphia	270	365	7-10	15-30
Pittsburgh	122	365	3-10	1
Portland	1050	240	30-60	30
Sacramento	150-180	180	10-14	1
Salt Lake City	480-500	150-180	14-21	1-45
San Antonio	180-660	150-210	60-90	30-90
San Diego	277	210	1	1
San Francisco	243	304	10	10
San Jose	183	213-274	21-28	21-28
Santa Ana	152	234-304	N/a	56
Seattle	380	243	1-30	40
St. Paul	122-183	183	7	1
Tampa	304-365	183-365	30	90
Wash, DC (Arlington)	365-396	213-365	30-90	60-90

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

These are not official INS times, nor are they endorsed by the Central Office.
Source: American Immigration Lawyers Association (not approved by INS)

Texas Service Center Processing Times

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

10/15/2002

Application/Petition Type	Date Based on Pending Initial Adjudication
I-90 to replace lost, damaged or destroyed I-551	4/1/2002
I-90 to renew expiring I-551	n/a
I-102	8/7/2002
I-129/H1B	7/5/2002
I-129/H2A	as received
I-129/H2B	8/30/2002
I-129/H3	8/8/2002
I-129/L	9/9/2002
I-129/Blanket L	9/9/2002
I-129/O	7/16/2002
I-129 /P	8/9/2002
I-129/Q or R	Q Current - R 5/28/2002
I-129/TN	n/a
I-129F	9/11/2002
I-130/Spouse, Parent or Child of US Citizen	5/14/2001
I-130/Spouse of Lawful Permanent Resident	4/3/1998
I-130/Other Relative	4/3/1998
I-131/Advance Parole	8/16/2002
I-131/Advance Parole/HRIFA	n/a
I-131/Reentry Permit	n/a
I-131/Refugee Travel Document	n/a
I-140 A	4/19/2002
I-140 B	4/19/2002
I-140 C	4/19/2002
I-140 D	5/13/2002
I-140 E	5/14/2002
I-140 I	6/26/2002
I-140 G	5/3/2002
I-212	n/a
I-360	7/23/2001
I-485 Asylum-based	n/a
I-485 Refugee-based	n/a
I-485 Employment-based	10/1/2000
I-485 (HRIFA)-based	n/a
I-526	6/4/2002

I-539/F or M non-immigrant	9/17/2002
I-539/J non-immigrant	N/A
I-539/L or H non-immigrant	9-17 or date of I-129
I-539/other non-immigrant	9-17 or date of I-129
I-612	9/17/2002
I-730	n/a
I-751	7/18/2002
I-765/initial asylee or asylum applicant authorization	6/26/2002
I-765/employment authorization associated with Hurricane Mitch TPS	6/17/2002
I-765/employment authorization associated with El Salvador TPS	7/26/2002
I-765/employment authorization while I-485 is pending	7/10/2002
I-765/all other employment authorization	7/31/2002
I-817	12/29/1998
I-821/El Salvador	4/13/2001
I-821/Hurricane Mitch countries	8/17/1999
I-824	8/8/2002
I-829	3/22/1999
I-914	n/a

7. NEWS BYTES

The Florida Immigrant Advocacy Center recently sent a letter to the INS containing allegations that the medical needs of many female detainees are going unmet, and that conditions at the Sarasota County jail are generally inadequate. The charges are being investigated by the local sheriff's department.

Just weeks after creating an uproar by calling for the deportation of an undocumented high school student and his family, Colorado Republican Tom Tancredo is drawing more criticism for more outspoken remarks on immigration. Tancredo recently called on the INS to round up people waiting for identification cards at the Mexican consulate in Denver on the theory that the only people who need such cards are undocumented. INS spokespeople say that the agency cannot target groups of people for immigration checks without cause, and that doing so here would likely be found unconstitutional.

In South Carolina, nearly 30 women recently pled guilty to charges of marrying

undocumented immigrants so they could obtain legal status in the US. The women received between \$1,000 and \$6,000 for participating in the sham marriages. They were among more than 100 women arrested recently on similar charges.

This week Ronald Bogardus was sentenced to more than eight years in prison for his role in a scheme to defraud immigrants and the US government. Bogardus, a former contract employee of the State Department, and Samuel Kooritzky, an attorney were arrested last summer on charges of filing thousands of fraudulent labor certification applications. The scheme came to light when one of the employers being used received correspondence from the Labor Department and had no idea what it was about. Bogardus has also been ordered to make restitution of more than \$4 million to the victims. Kooritzky is scheduled to go on trial in December.

Earlier this month the INS deported 11 Cambodian nationals who came to the US as refugees. One of the group was Kim Ho Ma, who sued the INS protesting indefinite detention and won. The Supreme Court said that it was unconstitutional for the INS to detain deportable immigrants when there was no evidence that they would be soon deported. In the case of Cambodians, deportations have been rare because of the lack of a repatriation agreement between the US and Cambodia. Earlier this year the two countries reached an agreement that has paved the way for deportations.

A federal grand jury in Maryland recently indicted a couple on charges of enslaving a Ghanaian woman they brought to the US through visa fraud. Also indicted was the wife's mother, Grace Coleman, a high-ranking official in the government of Ghana. They allegedly forced Margaret Owusuwaah to work as a domestic servant without pay for 17 months.

Nine Indian women are suing Lakireddy Bali Reddy, seeking to recover financial damages for being smuggled into the US and forced to provide sex and cheap labor. Reddy and several family members were convicted of smuggling charges after two girls died in an apartment owned by Reddy. Reddy is currently serving eight years in prison.

8. INTERNATIONAL ROUNDUP

Iraq Expels Foreign Journalists

Thursday the Iraqi government said it was expelling foreign journalists and will enact tough new visa restrictions on foreign news people in the future. CNN's Baghdad bureau chief, Jane Arraf, the only Western correspondent permanently based in Baghdad, along with others, was told to leave the country by Monday. CNN has maintained a bureau in Baghdad for 12 years.

The move follows coverage of last week's unprecedented anti-government demonstration outside the Iraqi Information Ministry in Baghdad. The government had recently invited newsmakers to cover an October 15 referendum which showed unanimous support for President Hussein remaining in power.

Iraqi officials say they will admit a small number of foreign journalists, one per news organization, and each visitor will be permitted to remain in Iraq for a maximum of 10 days at a time.

5,000 March In Paris For Immigrant Permits

In the fourth demonstration of its kind since September, more than 5,000 people marched through Paris Saturday to demand residency permits for illegal immigrants. Similar marches were held in Marseille, Lille, Le Havre and Clermont-Ferrand. Demonstrators were joined by Communist and Green party leaders.

The immigrants are known as "sans-papiers," or, "those without documents." They have lived illegally in France for many years, depending on the charity of others for survival, or working for little pay.

The French Interior Ministry has offered to examine their cases on an individual bases, but not as a group, as the demonstrators demand. Monday, President Chirac presented a plan to provide them job training and French language courses.

Senior Hong Kong Immigration Official Jumps To His Death

A senior immigration director in Hong Kong killed himself Monday by jumping from his 10th-floor apartment. His duties were said to include dealing with illegal migrants from China. Lai Chun-ting, 46, left no note to family members. Reports have suggested Lai had been struggling with work-related stress related to the immigration department's struggle to repatriate thousands of migrants from mainland China who were denied residency, and that may have been a factor that prompted Lai to take his life.

Hong Kong returned to Chinese rule in 1997, but the former British colony retains separate government and strict border controls. Authorities have deported hundreds of migrants in recent months, though nearly two thousand others are believed to remain in Hong Kong illegally.

Philippine Government Passes Dual Citizenship Bill

Wednesday, the Philippine Senate passed a bill granting dual citizenship to Filipinos who have lost their citizenship. The bill is expected to benefit nearly two million naturalized Filipinos in the United States alone. The new law provides that natural-born Filipinos who have become foreign citizens shall retain their Philippine citizenship unless they freely renounce under oath.

9. DEPARTMENT OF LABOR FINDS EMPLOYER LIABLE FOR \$1 MILLION FOR LABOR CONDITION APPLICATION VIOLATIONS

For every H-1B petition an employer files, there must be a valid labor condition application (LCA). This form is used by the Department of Labor to ensure both that employers do not use foreign workers to depress wages, and that the foreign workers are not exploited by their employers. The LCA system is not independently policed, and the Department of Labor will generally get involved in an investigation only if complaints are made. In a recent case, the Labor Department investigated a physician in Tennessee for numerous LCA violations. In one of the biggest such rulings ever, the physician, Mohan Kutty, was ordered to pay more than \$1 million in back wages to 17 doctors, in addition to fines of more than \$100,000.

Dr. Kutty had a successful practice in Florida. Seeking to expand his business, in 1998, he began work in Tennessee by opening a clinic in a rural area. According to his statements during the investigation, he expected the clinic to lose money for a few years, and planned to use his income from Florida to subsidize the Tennessee business. Eventually he opened five clinics and signed employment contracts with 18 doctors. Each contract was for three or five years, and was made contingent on the physician receiving a license to practice medicine in Tennessee. Each contract called for an annual salary of \$80,000.

All but one of the doctors had entered the US on J-1 visas, and had obtained waivers of the home residency requirement based on their promise to work for three years in a medically underserved area. After obtaining the waiver, INS regulations require them to begin work, in H-1B status, within 90 days of receiving it.

After a couple of years, it became clear that the Tennessee clinics were losing money. Dr. Kutty accused the physicians of trying to undermine his business, and began withholding their salaries. Eight of the doctors retained an attorney, who demanded their full salaries. At this point, Dr. Kutty stopped paying them altogether. Even before then, he had been paying the doctors well less than the \$80,000 specified in the contracts, and below the \$115,000 rate specified in the LCAs filed with the Department of Labor. The eight then filed a complaint with the Labor Department.

During the Labor Department's investigation, investigators found that Dr. Kutty did not maintain the public access files required under law, nor were LCAs posted as required. Back wages and penalties were calculated, and the matter was set for a hearing.

At the hearing, Dr. Kutty argued that because there is a one-year statute of limitations on Labor Department investigations, back pay and penalties could not be assessed except for the one year period before the complaint was filed on February 28, 2001. The officer hearing the case disagreed, finding that the statute of limitations referred to the time in which a complaint must be filed, not the time in which back pay can be awarded. The officer also rejected the argument that because the doctors were either not yet eligible to work or were not working full time as a reason to withhold salary. This is clear from the American Competitiveness and Workforce Improvement Act, when the practice of "benching," placing an H-1B employee on leave and not paying them, was specifically prohibited. Under the law, unless the employee is not working because of "non-work-related factors" the employee must be paid as specified in the LCA. Nor, the officer found, was low clinic income or failure by the doctors to abide by the terms of their contracts a legal basis for

withholding wages.

The officer also found that in a number of cases, Dr. Kutty had improperly retaliated against the doctors who filed complaints with the Labor Department by withholding salary and firing them. There were also numerous violations of regulations requiring the employer to maintain public records, for which each violation received a \$800 fine. In addition, many violations were found to be willful. In short, Dr. Kutty never intended to pay the doctors the wages stated on the LCAs. For each of these violations, a fine of \$4,000 was assessed. In addition to the fines, Dr. Kutty was barred from petitioning for an H-1B visa for two years.

http://www.ilw.com/lawyers/immigdaily/dol_news/2002,1022-kutty.pdf

10. STATE DEPARTMENT VISA OFFICE CRITICIZED IN CONGRESSIONAL REPORT

The State Department Visa Office was the subject of a harshly critical congressional General Accounting Office report issued this week. According to the report, which was requested by Rep. Christopher Shays (D-CT), the chair of the National Security Subcommittee of the House Government Reform Committee, major security problems continue to plague the Visa Office.

After it was learned that all 19 of the September 11th hijackers had been issued visas, some attention was diverted from the INS's failure to ensure that those whose visas had expired were no longer in the US to the fact that they had even been issued visas. Indeed, the fallout led to the resignation of Mary Ryan, the head of the Bureau of Consular Affairs, which oversees the visa issuing process. According to this report, the State Department has not yet provided clear guidance as to when a visa should be issued, nor has it adequately trained visa officers.

The report found that there is conflict among consulates as to the "role of the visa process in ensuring national security." There is also no agreement between the State Department, which issues visas, and the Justice Department, which has final say on whether a person will be admitted to the US, on what type of evidence is necessary to deny a visa based on suspected ties to terrorism. The Justice Department maintains that any applicant whose name appears in the terrorist tracking database should be denied a visa, while the State Department argues that the consular office must have specific information regarding the suspected ties to terrorism before he or she can deny a visa.

The GAO did find that the State Department is working more closely with the FBI and the CIA in intelligence sharing. However, increased security measures have, in large part, means that there is little obvious effect from the improvements. Because so many applicants are subject to increased security screening, the process frequently takes more than 30 days. According to the report, under pressure to issue visas in a reasonable time, in 200 cases the State Department issued visas to people who were later found listed in terrorist databases. The State Department says that all those visas were revoked, and that it no longer imposes a 30-day limit on security checks.

The report did find that the State Department has made significant improvements since September 11th. For example, according to the report, most of the visa applications submitted by the hijackers who obtained visas in Saudi Arabia were not filled out completely. Also, 13 applicants were issued visas without interviews. The GAO report says that these visas should never have been issued.

The GAO report acknowledges what many observers know – that the visa issuing process is highly politicized, and that pressure from outside sources often makes it difficult for the State Department. Many consulates are understaffed and overwhelmed with applications. Moreover, there is near constant pressure from government officials, including members of Congress, to issue visas promptly.

The report was commissioned as part of the congressional debate over what to do with the Visa Office. Many wanted to relocate it in the new Department of Homeland Security. The House of Representatives voted to leave it in the State Department, but the legislation is still pending before the Senate, and it is possible that this report could lead to changes.

11. STATE DEPARTMENT VISA BULLETIN – NOVEMBER 2002

Priority Dates for Family Based Immigrant Visas			
	All Chargeability Areas Except Those Listed	MEXICO	PHILIPPINES
Family			
1 st	15MAR99	01JUN91	01FEB90
2A*	15AUG97	01MAR95	15AUG97
2B	01MAR94	22OCT91	01MAR94
3 rd	15NOV96	15AUG92	01NOV89
4 th	01NOV90	15AUG90	01NOV81

Priority Dates for Employment-Based Immigrant Visas				
	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Employment-Based				
1 st	C	C	C	C
2 nd	C	C	C	C
3 rd	C	C	C	C

Other Workers	C	C	C	C
4 th	C	C	C	C
Certain Religious Workers	C	C	C	C
5 th	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C

DV NUMBERS FOR NOVEMBER

Region	All DV Chargeability Areas Except Those Listed Separately	
Africa	7,800	
Asia	3,300	
Europe	14,000	
North America (Bahamas)	87	
Oceania	150	
SOUTH AMERICA, CENTRAL AMERICA, and the CARIBBEAN	4756	

ADVANCE NOTIFICATION OF RANK CUT-OFFS THAT WILL APPLY IN DECEMBER

Region	All DV Chargeability Areas Except Those Listed Separately	
Africa	9,800	

Asia	4,075	
Europe	15,850	
North America (Bahamas)	10	
Oceania	200	
SOUTH AMERICA, CENTRAL AMERICA, and the CARIBBEAN	625	

12. LEGISLATIVE UPDATE

[H.R. 5649](#), introduced by Rep. Henry Hyde (R-IL), would make it easier for North Koreans to apply for asylum or refugee status by specifying that they are not to be considered nationals of the Republic of Korea (South Korea). Sen. Sam Brownback (R-KS) introduced a companion bill in the Senate, [S. 3122](#).
