

Siskind's Immigration Bulletin
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Siskind Susser serves immigration clients throughout the world from its offices in the
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1. Openers

Dear Readers:

The last article in our newsletter this week deals with an issue we've barely covered
in the nine+ years we've been online. It involves the ability of immigration lawyers
to maintain national practices. The article involves a Texas-based immigration lawyer
who relocated her immigration practice from New York. The lawyer in the case
maintained a New York license, but the Texas Bar targeted her for the unauthorized

practice of law in the state. We're happy to report that Texas backed down and the lawyer won her fight.

It is probably tougher for a lawyer licensed in one US state to practice in another than a lawyer in one European Union country to practice in another. Each state is charged with licensing the practice of law in the US and, even though the laws and legal procedures don't vary dramatically from state to state, many states make it very difficult to relocate one's practice. The ostensible reason for these restrictions is to protect consumers from lawyers who are not familiar with the laws of a particular state.

The problem for immigration lawyers is that there are no state immigration laws. The US Constitution states specifically that only Congress can regulate immigration to the US. So the argument that immigration lawyers need to be highly familiar with state laws is somewhat tenuous. The US Supreme Court understood this and held 40 years ago that lawyers engaged in federal practice only need to satisfy the federal agencies in front of which they are satisfying that they are qualified practice.

In the case of immigration lawyers, the INS/BCIS and the Board of Immigration Appeals have specific rules for lawyers seeking to practice immigration law. Those agencies are best suited to protect consumers because they are the agencies that administer the immigration system. Those agencies happen to require that a lawyer at least be licensed in one state thus assuring that consumers also have the ability to register complaints with the state bar where the lawyer is licensed.

Consumers benefit from immigration lawyers practicing nationally. First, consumers living in a state without an expert in a particular area of immigration law have the ability to get help from a national expert rather than from someone in their state who may not know the subject as well. For example, I have a niche practice assisting physicians seeking waivers of their J-1 home residency requirement. There are only a small number of immigration lawyers in the US with substantial experience in this area and it is more common for clients to seek out of state lawyers than local ones. Second, national competition empowers consumers by forcing lawyers to be more competitive in their fees and level of service.

We think the restrictions on multijurisdictional practices for immigration lawyers are more about protecting a state's lawyers from competition than about protecting consumers. There are other states seeking to go down the same path as Texas. Fortunately, Texas backed down. Hopefully, that will signal other states to do the same.

We also report the rest of the news this week on immigration including a short ABCs of Immigration article on the new F-3 and M-3 visas for commuting students from Canada and Mexico.

In firm news, I will be moderating a series of immigration telephone seminars conducted by ILW.com. The series is entitled "Immigration for the Spirit, Body and Soul: Entertainers/Artists/Athletes, Chefs/Cooks/Hospitality Workers, and Religious Workers." The first program will take place on August 27th and will cover sports and entertainment immigration. You can sign up for the program by going to www.ilw.com/lawyers/seminars/august2003.shtm.

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.

Regards,

Greg Siskind

2. The ABC's Of Immigration – F3 and M3 Nonimmigrant Visas

This week the Department of State published a final rule creating two new nonimmigrant visa categories - F3 and M3, for residents and citizens of Mexico and Canada. The visa will allow Canadian and Mexican commuters to enter the United States to attend an approved F or M school.

What is the background of these new visa classifications?

The Department of State's amendments were drafted in order to implement the "Border Commuter Student Act of 2002," which was signed into law on November 2, 2002. The bill was introduced by Rep Jim Kolbe of Arizona in the House and Senator Kay Bailey Hutchinson of Texas in the Senate.

The law allows Mexican and Canadian citizens traveling across the border to take classes part-time or full-time in the United States to be admitted. Previously, part-time students from Canada and Mexico were allowed to enter the US as visitors, but in the aftermath of Sept 11, the Department of Homeland Security found such students not eligible for admittance as visitors since their purpose was to attend class, and they were also not eligible for F-1 (academic) or M-1 (non-academic or vocational) visas because those classifications require students to attend full-time.

Do the new visa classifications allow for any activity other than part-time study?

Students classified under the F-3 and M-3 are permitted to study on either a part-time or a full-time basis, but family members are not entitled to derivative F-2 or M-2 status.

When will the rule take effect?

The rule took effect August 11, 2003.

The Border Commuter Student Act of 2002 can be viewed online at:
http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h4967rds.txt.pdf

3. Ask Visalaw.com

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

Q - My status is illegal right now. Can I get married with a US citizen if I am illegal here?

A - You can always marry even if you are illegal. The question you probably want the answer to is can you get a green card based on the marriage. If you entered the US legally and overstayed your visa or fell out of legal status, you can apply for the green card under Section 245(a) of the Immigration and Nationality Act based on your marriage to a US citizen. If you entered illegally and have remained more than six months, you would need to leave the US and apply for a waiver of a reentry bar.

Q - I came into the United States in 1998 on a B-2 Visa. I got married to a US citizen same year and applied for a change of status to permanent resident, however my application was rejected sometime this year. But I've also been a student for over one year in a university in the US and based on this I applied for another change of status to F-1. My question is will I be denied the application for possibly been out of status since my initial change of status application was denied?

A - It sounds pretty likely that your F-1 will be denied. First, you would have had to have continued to remain in valid B-2 status in order to qualify for a change of status. Second, the fact that you applied for a green card will be a major negative in terms of showing you had intentions to return to your home country. Third, changing from a B-2 to an F-1 visa in the US is normally extremely difficult even in the best of circumstances.

Q - Can i apply for the green card lottery if i was born in United Arab Emirates and i am national of Pakistan or Visa versa?

A - You would be able to apply based on your country of birth. Doubtful the other way around unless you are married to a national of another country or, in certain cases, if your parents were both born in an eligible country.

Q - I am working as an embedded systems engineer for a Fortune - 500 multinational corporation in the US at their design centre in India. I've joined on 5th May 2003; so I'm relatively fresh. I was required to be at the global HQ in the US for about 8 weeks from the summer in order to obtain much needed acquaintance with

software development procedures and practices. I applied for a B1 visa on 17th June. My application was turned down on grounds of "potential immigrant". I'd like to know whether applying for a j1 visa for the second time would improve my chances of obtaining a visa.

A - Probably not. You were denied the B-1 visa on 214(b) grounds and that same category applies to J-1 cases. My guess is that once you are with the company for 6 months, you might be able to enter the US in L-1 status. Employees of larger companies are eligible for L-1s in six months rather than a year under the blanket L-1 programs many of these companies use.

Q - I am currently holding F1 visa and recently got married to an Asylee applying for a green card. My spouse got his asylum status in 2000 and have applied for an adjustment of status to Permanent Resident under I-485 (Asylum) category since 2001. Is there any way for me to stay in the US without holding F1 status? My nationality differs from my spouse's. Is that be a problem?

A - Unfortunately, you would have had to have been married to your spouse before your spouse got asylum status in order to adjust to permanent residency as part of your spouse's petition. Your spouse would have to file an I-130 as an F-2A spouse after the adjustment application is approved. That category is backlogged several years, however. So you will need to plan on maintaining your status independently for the next few years in all likelihood.

4. Border News

Two Pakistani men were detained in Seattle late last week, after an airline employee at the Seattle-Tacoma International Airport discovered that one of the men's names was included on a terrorist no-fly list. Both men paid cash for a one-way ticket to New York, purchased from two different airlines. Both men used Pakistani passports.

One man, age 36, was carrying a Canadian driver's license and bought a ticket for John F. Kennedy International Airport in New York. When the airline employee dialed 911, the man took off and left his ticket at the counter. The second man, age 29, bought a flight into Kennedy Airport. Police detained both men and turned them over to the FBI, where they are now being held on investigation of immigration violations.

No criminal charges have been filed against the men, and their names have not been released.

US Border Patrol Chief William T. Veal said he was surprised by border agents' criticism of a memo he wrote ordering them not to arrest or question an illegal immigrant except along the border and at highway checkpoints in Orange and Riverside counties. Agent Veal said his memo was merely a reminder of a four-year standing policy and denied that it was a response to criticism of recent arrests in San

Juan Capistrano. Some critics accused the Border Patrol of making neighborhood sweeps, according to the Los Angeles Times.

"His directive stirred a firestorm of criticism. Talk show hosts called for his resignation, editorials condemned the memo and agents charged that the chief was, in effect, ordering them to stop doing their jobs," the Times wrote.

Veal said BICE agents are responsible for enforcement in cities, places of employment and residential areas, and that Border Patrol agents are prohibited from taking such action even while traveling between assignments or assisting local police.

5. News From The Courts

Third Circuit Reverses IJ's Denial of Asylum Application

In 1993, Konstantin Ignatov, a national of Russia, filed an application for asylum or withholding of removal to the INS stating that he was being persecuted for his religious beliefs. In April 1996, he received a written notice advising him of his right to obtain counsel at the deportation proceedings. He appeared before the IJ and was granted a continuance to obtain counsel.

On October 29, 1996, counsel appeared on behalf of Ignatov and requested a continuance to prepare the case. The master calendar hearing was scheduled for October 17, 1997.

On October 14, Ignatov's counsel filed a motion to withdraw since Ignatov never entered a contract for representation, refused to pay additional counsel fees, and never contacted counsel to prepare his case following the October appearance.

The court neither granted nor denied the motion, and on October 17, counsel did not appear at the master hearing. The IJ at this time granted counsel's motion and proceeded with the hearing, denying Ignatov's request for a continuance in order to obtain counsel.

Under 8 U.S.C. § 1362, a petitioner in a removal proceeding has a statutory right to be represented by counsel at his own expense.

The court held that if a claim for asylum is appears to be without merit, then it is reasonable and proper for an IJ to consider the lack of merit in the claim when deciding whether to grant a continuance. On the other hand, when a claim appears facially meritorious, counsels' presence at the hearing could have made a difference to the outcome of the case.

In this case, Ignatov did appear to introduce a facially meritorious claim for asylum. As a result, the court found that the IJ violated Ignatov's statutory right to obtain counsel at his own expense by granting counsel's motion to withdraw on the day of the hearing.

Benjamin Alvarado-Ochoa v. John Ashcroft
 United States Court of Appeals for the Ninth Circuit

Benjamin Alvarado-Ochoa appealed the district court's denial of his habeas petition requesting relief from removal. The Ninth Circuit rejected the government's argument that Alvarado is an aggravated felon. Alvarado's state conviction for transportation of cocaine is not considered to be an aggravated felony, because although his conviction was a felony in California, it is not punishable under the Controlled Substances Act. In order for a drug offense to qualify as an aggravated felony, it must be a felony *and* be punishable under the Controlled Substances Act. Also, because Alvarado's state conviction for possession was expunged from his record, the immigration consequences of his conviction do not apply. The Ninth Circuit reversed the district court's decision.

6. Government Processing Times

Vermont Service Center Processing Time Report 8/01/03		
Form		We are now processing cases with these receipt dates:
<u>I-90</u>	To replace lost, damaged or destroyed I-551	7/26/2002
<u>I-102</u>	For replacement/initial nonimmigrant arrival/departure form	6/26/2003
<u>I-129</u>	Petition for Nonimmigrant Worker H-1B Cap	5/15/2003
<i>I-129</i>	Petition for Nonimmigrant Worker H-1B Ext	5/22/2003
<i>I-129</i>	Petition for Nonimmigrant Worker H-2A	7/28/2003
<i>I-129</i>	Petition for Nonimmigrant Worker Other (H-2B, H3, O, P, Q, R)	5/22/2003
I-129	Nonimmigrant Worker L (not based on a blanket petition)	6/20/2003
I-129	Nonimmigrant Blanket L	6/20/2003
I-129F	(Fiancée)	7/28/2003
I-212, I-601, I-612	Waivers	7/28/2003
I-130	Immediate Relatives Classes	9/20/2002

I-130	Preference Classes	1/4/1999
I-131	Application for Travel Document	6/13/2003
I-140	Immigrant Petitioner for Alien Worker E11	6/3/2002
I-140	Immigrant Petitioner for Alien Worker E12	6/5/2002
I-140	Immigrant Petitioner for Alien Worker E13	4/24/2003
I-140	Immigrant Petitioner for Alien Worker E21 (National Interest Waivers: 5/18/2002)	9/11/2002
I-140	Immigrant Petitioner for Alien Worker E31, E32, EW3 (Nurses: 4/18/2003)	10/1/2002
I-360	Petition Widowed/Special Immigration	7/28/2003
I-360	VAWA	11/25/2002
I-485	Application to Register Permanent Residence or to Adjust Status	1/1/2002
I-539	Application to Extend/Change Nonimmigrant Status	7/1/2003
I-687		N/A
I-698	Application to Adjust Status from Temporary to Permanent Resident	N/A
I-751	Petition to Remove Conditions on Residence	12/1/2001
I-765	Employment Authorization (C) (8)	6/12/2003
I-765	Employment Authorization (C) (9)	6/10/2003
I-765	Employment Authorization Other	5/27/2003
I-817	Application for Family Unity Benefits	N/A
I-821	Application for Temporary Protected Status – El Sal	4/30/2001
I-821	Application for Temporary Protected Status – Nicaragua/Honduras	5/28/2002
I-824	Application for Action on an Approved Application or Petition	2/11/2002
I-914	Application for T Non-Immigrant Status	7/28/2003
N-470, N-565, N-643		4/4/2003

N-600		4/4/2003
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These are not official INS times, nor are they endorsed by the Central Office.

Source: [American Immigration Lawyers Association](#)

7. News Bytes

According to the Connecticut chapter of the American Immigration Lawyers Association (AILA), the Hartford BICE is revoking bonds of respondents who do not win at their merits hearings. BICE employees in some districts have said this is a pilot program that the DHS hopes to expand nationwide.

There is still no designated consular district at which Iraqi nationals may apply for nonimmigrant and immigrant visas, according to the State Department's Visa Office and AILA's State Department liaison committee. Some Iraqis have begun applying for visas at US consulates in surrounding countries, as Iraqi nationals can apply for visas in any consular district in which they are physically present. The Visa Office also warns that many Iraqi passports have either expired or are no longer considered valid. More information about Iraqi passport issues is available online at: http://www.cpa-iraq.org/regulations/passport_update10JULY03.html.

The Congressional Research Service has issued a report to Congress titled "Visa Issuances: Policy, Issues and Legislation," summarizing changes in the Government's visa issuance policy since the Sept 11 terrorist attacks. The report reexamines the legislative path which led to the current division of authority between the new Department of Homeland Security and the Department of State and offers a preview of related issues that are likely to be addressed in the 108th Congress as it oversees the implementation of the new policies which appeared under the Homeland Security Act of 2002. Issues on the horizon include the extent to which the various immigration service agencies will be allowed to share screening and background data, a proposal that would maintain that a foreign national should be immediately removed if the visa that enabled his or her entry has been revoked, and the signing of a memorandum of understanding (MOU) between DOS and DHS on how DHS agents will be assigned to consular posts abroad, as necessitated by the Homeland Security Act of 2002.

To view this report in pdf format, click here:

<http://www.visalaw.com/03aug3/crsreport.pdf>

The American Immigration Lawyers Association (AILA) has issued a "backgrounder" report to address certain "myths... in the immigration debate," including: Immigrants take jobs away from Americans, Most immigrants are a drain on the U.S. economy or treasury, America is being overrun by immigrants, Immigrants aren't

really interested in becoming part of American society, and Immigrants contribute little to American society. "[Immigrants] are an integral part of our society, its goals and its values," the report reads, "they set us apart from every nation in this world."

To view this report pdf format, click here:

<http://www.visalaw.com/03aug3/ailabackgrounder.pdf>

The Bureau of Citizenship and Immigration Services has approved the I-526 Petition for Alien Entrepreneur for the California Consortium for Agricultural Export's first immigrant investor applicant, according to a recent CCAE news release, online at <http://www.ccax.com/approval.php>

The Service Centers' Premium Processing Units have new e-mail addresses that petitioners should use to send their inquiries:

Vermont - vsc-premium.processing@dhs.gov

Texas - tsc-premium.processing@dhs.gov

California - csc-premium.processing@dhs.gov

Nebraska - nsc-premium.processing@dhs.gov

The American Immigration Law Foundation (AILF) announced this week that the BCIS has begun approving a larger number of asylee adjustment applications than in prior years, in response to the class action lawsuit *Ngwanyia v. Ashcroft*. After an all-time low of 2,532 asylee adjustments in 1999, the immigration agency adjusted 9,713 asylees in 2002 and has shifted additional resources to asylee adjustment cases for the remainder of this fiscal year. The *Ngwanyia* Plaintiffs demanded that the BCIS use all 10,000 adjustment slots set aside by the President for FY 2003.

According to a recent Department of State cable, the DOS's proposal to eliminate the crew list visa and require all crewmen to obtain individual visas is in the final stages of the interagency clearance process. The Department said it will grant a temporary exception to the policy on waiver of personal appearance to accommodate crew list applicants, and encouraged consular posts to facilitate applications from individual seamen, including those who are unable to apply in their countries of residence.

A Washington state inspector has confirmed reports of a new processing procedure that requires L-1 visa holders to display the tear off portion of the I-797 approval notice at their point of entry.

One in four North American immigrants who have arrived in Israel since 1989 have permanently left the country, according to an analysis of Interior Ministry border control statistics by Ha'aretz. The study found that the highest proportion of immigrants who leave are from North America, followed by South Africa, Britain and France. The relatively high rate of departure among North American immigrants comes as a shock to many, because they generally move to Israel by choice, out of identification with the country, rather than to escape bad economic or political conditions.

Australia's High Court has once again criticizing the Government's controversial asylum-seeker laws, as it rejected an appeal to a ruling by the Federal Court that limited the Administration's powers to detain asylum-seekers. The Government was attempting to appeal the High Court's ruling, which found that those whose asylum claims have been rejected can not be held in detention indefinitely.

Belgium has sentenced a man believed to be the country's biggest ever people-smuggler to eight years in prison. Mhill Sokoki, 35, was described by the presiding judge as "the spider in the web" of an organization which passed up to 12,000 illegal Albanian immigrants into the UK. Sokoki was also fined EUR 125,000. Twenty-four other accused members of the smuggling operation received jail sentences of a minimum of three years.

Canada's Citizenship and Immigration Minister, Denis Coderre, said the Cabinet is divided over whether to adopt a national identification card. A new poll conducted by the government found that around 70% of Canadians support such a card, which would include biometric data such as fingerprints and eye scans. Lawmakers are waiting for recommendations from a Commons committee and a two-day national forum this fall before making a decision, Coderre said.

9. Legislative Update

California Governor Gray Davis is set to sign Senate Bill 60, which would allow illegal immigrants to obtain a drivers license. The bill, sponsored by State Senator Gil Cedillo, has been approved by the legislature for three consecutive years. Davis has rejected the bill on previous occasions for what he called "security reasons," but advocates such as the Service Employees International Union expect the bill to be made law this time around. Davis is currently facing a recall election, and political analysts say the Governor will sign the bill because he cannot afford to alienate the Hispanic community.

The following bills were recently introduced in Congress:

[S.1510](#), A bill to amend the Immigration and Nationality Act to provide a mechanism for United States citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States, and for other purposes. Sponsor: Sen Leahy, Patrick J. [VT] (introduced 7/31/2003). Latest Major Action: 7/31/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

To see what immigration-related legislation is pending in Congress, visit our legislative chart at www.visalaw.com/advocacy.html.

10. Bush Voices Support For Guest Worker Bill

President Bush met in Tucson this week with the two authors of the Border Security and Immigration Improvement Act, Senator John McCain and Representative Jim Kolbe, both Republicans of Arizona.

The Act would allow millions of guest workers to live and work in the United States with temporary visas, including illegal immigrants already in the country.

Supporters of the bill say the legislation will reduce migrant deaths along the US-Mexico border and provide a supply of low-skilled labor to employers across the nation.

The President said he supported the controversial bill during talks with the legislators, with whom he also addressed the nation's forest fire policy.

"The president was enthusiastic about the bill," Rep. Kolbe told the Tucson Citizen. "He is supportive and told us to take the legislation up with his staff."

President Bush has long made his support for a guest-worker program clear, but the idea lost momentum after Sept 11. Senior members of the White House have been in ongoing discussions with Mexican officials who are pushing for the program's passage.

11. BCIS Director Makes Speedier Processing Top Priority

In an interview with Government Executive, BCIS director Eduardo Aguirre said he's "taken the first steps toward reducing a massive and long-standing backlog of immigration benefits applications." Aguirre said his main priority is to reduce wait times on immigration benefit applications to no more than 6 months by the end of 2006. The agency is conducting research in order increase its efficiency and significantly reduce wait times, and the BCIS will be increasing its investments in technology, Aguirre said.

"We have a long, long way to go before we get to the level of technology that we need to be able to function as a world class operation," Aguirre said. "We are having to do more manual work than we should. Much of the technology we have right now is several generations behind what the state-of-the-art is in the commercial world."

The agency will rely on \$500 million of congressionally appropriated funding to research technology systems that will reduce processing times, which ballooned since the Sept 11 attacks to a point where applicants for US citizenship now may wait a year or more before receiving a response from the immigration bureau.

12. New York Immigration Lawyer Wins Battle To Practice In Texas

The Texas Bar's Unauthorized Practice of Law Committee has dropped a lawsuit that sought to prohibit New York-licensed immigration lawyer Dakshini Senanayake from practice in her new home of Houston. Ms. Senanayake was accused in the suite of engaging in the unauthorized practice of law in Texas because she lacks a Texas license.

Ms. Senanayake fought back by filing a counter-suit in federal district court arguing that as long as she limits her practice to immigration law and does not practice in Texas state courts, she has the right to practice in Texas or any other state. She pointed to existing federal regulations and Supreme Court cases.

The Texas UPLC and Ms. Senanayake recently dropped their suits. The Texas UPLC commission is said to have been influenced by the fact that no clients of Ms. Senanayake complained about her work.

The question of lawyers engaging in multijurisdictional practices (MJPs) is one that is being vigorously debated nationally. The American Bar Association last year issued a report arguing for states to reform their rules and make it easier for lawyers to cross state lines. Some argue that preventing lawyers with licenses in other states from practicing is needed to protect consumers. Opponents counter that the rules are designed to protect lawyers from competition and, in reality, there have been few problems with lawyers who have worked in other states. Furthermore, proponents of MJPs argue that consumers should have a choice and limiting their choices in the name of consumer protection is really paternalistic and does not actually result in better results for clients.

Immigration lawyers have had national practices for decades. Defenders of such practices point out that immigration lawyers are governed by the grievance systems in the states where they are licensed - every immigration lawyer must be licensed in at least one state - as well as separate rules on professional conduct issued by the Board of Immigration Appeals. The BIA rules cover the conduct of all immigration lawyers regardless of whether the lawyer is engaged in litigation before the BIA.

Immigration lawyers also have powerful legal arguments to make in favor of national practices. The US Constitution specifically bars the states from regulating immigration. That means that Congress creates the law in this field and immigration law is largely uniform around the country. So the traditional arguments made regarding protecting consumers from lawyers not familiar with the rules of a particular state are not particularly persuasive. Also, the Agency Protection Act in the US Code specifically states that only a federal agency has the right to determine who can practice in front of a particular agency. That's why, for example, the Bureau of Citizenship and Immigration Services, allows certain non-lawyers working for accredited non-profit organizations to practice in front of the agency. State

unauthorized practice of law statutes would not permit these non-lawyers from handling immigration cases, but federal law trumps here.

Finally, the US Supreme Court ruled 40 years ago in the case *Sperry v. State Bar of Florida* that a state could not prohibit a person engaged in a strictly federal practice area from practicing in that state if the federal agency in front of which the person practices approves of that person. In the *Sperry* case, an individual passed the patent bar and received approval to practice in front of the US Patent and Trademark Office. The State Bar of Florida sought to prohibit Sperry from practicing in Florida because Sperry, not a law school graduate, lacked a Florida license. Sperry won the case because the Supreme Court found that Florida had no right to interfere with the USPTO in determining who could practice in front of the agency.