

Siskind's Immigration Bulletin
December 15, 2003

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Siskind Susser serves immigration clients throughout the world from its offices in the US, Canada, Mexico, Argentina 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>. Editor: Greg Siskind. Associate Editor: Esther Schachter. Contributors: Penny Egel, Paola Palazzolo, Maryam Tanhaee and Megan Turngren.

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1. Openers

Dear Readers:

A decade has now passed since the implantation of the North American Free Trade Agreement. There is already much analysis going on in the press concerning the success of the agreement. From an immigration standpoint, the story is largely the movement of people across the US-Canadian border. Mexicans have not been using the TN visa at all. That is largely because the procedures for getting TN visas for Mexicans has been harder than for Canadians. But that is about to change. Come January, the process for getting Mexican TN visas gets much easier. Instead of the process resembling the H-1B category, it will start to look more like the process for Canadian TNs. Applicants won't be able to get in just by bringing their documents to a port of entry. But they can apply at a consulate without having to first file an I-129 petition in the US. Also, the 5,500 limit on Mexican TNs will go away (though that limit was never close to being reached in the last ten years).

Another story we report on this week is the re-opening of the US Department of Health and Human Service's J-1 physician waiver program. The program was closed down shortly after it was opened last summer. The program was one that held the promise of alleviating an ever-worsening physician shortage in this country. We can pretty much forget count this program out, however, due to some new requirements added to the program which will dramatically curtail the number of positions that will qualify for waivers. Positions in Medically Underserved Areas will no longer qualify. Positions with most for-profit private employers will no longer work. And not even all Health Professional Shortage Area communities will qualify. Communities must meet a HPSA score of 14.

Advocates for foreign physicians have long complained that the US Department of Health and Human Services has taken a hostile view of international medical graduates for decades. When the US Department of Agriculture waiver program was closed last year, the US Department of Health and Human Services a few months later volunteered to become the new national waiver program. That news was greeted suspiciously by the immigration bar. But when the HHS released the rules for the program in June of this year, immigrant physician advocates were pleasantly surprised that the program was one that could probably work. But after just a couple of months of operation, HHS closed down the program. When it reopened this week, the new program looked a lot like what immigration advocates originally expected – a waiver process so restrictive that it would work only for perhaps a few dozen doctors a year. HHS owes it to the thousands of communities across the country struggling to provide access to health care why it is making the rules tougher when all the data coming out is showing that the physician shortage is getting worse.

In firm news, we held our second annual Holiday Open House this week. It was great seeing everyone who came. At the party we first honored paralegal Soky Von Dett for five years of devoted service to the firm. And then we followed with the announcement that attorney David Jones has become a partner in the law firm. Congratulations Soky and David!

Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. 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: NAFTA Visas for Canadians and Mexicans

[We are taking a break from our J-1 Flowchart Series because the North American Free Trade Agreement - NAFTA - is about to celebrate its tenth anniversary. There are several key provisions involving Mexican visas that will change on January 1, 2004 and we are updating those changes in this article. Those provisions will make the TN visa application process for Mexicans more closely resemble the process for Canadians and less like the H-1B visa.]

The TN nonimmigrant visa was created after the passage of the North American Free Trade Agreement (NAFTA) in 1993. The agreement eased trade restrictions between Canada, the US and Mexico, and called for some new immigration rules. It eased restrictions on E and L visas, and created a new type of visa, the TN.

Business Visitor Visa under NAFTA

NAFTA also expanded the grounds upon which Canadians and Mexicans can enter the US as business visitors. The activities that can be engaged in on a business visitor visa under NAFTA are as follows:

- Research and design – covers technical, scientific, and statistical researchers conducting independent research for an enterprise located in Canada or Mexico
- Growth, manufacture and production –
 - Harvester owner supervising a harvesting crew admitted under applicable law (applies only to harvesting of agricultural crops: grain, fiber, fruit, and vegetables)
 - Purchasing and production management personnel conducting commercial transactions for an enterprise located in Canada or Mexico
- Marketing –
 - Market researchers and analysts conducting independent research or analysis, or research or analysis for an enterprise located in Canada or Mexico
 - Trade fair and promotional personnel attending a trade convention
- Sales –
 - Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in Canada or Mexico, but not delivering goods or providing services
 - Buyers purchasing for an enterprise located in Canada or Mexico
- Distribution –
 - Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were

loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with United States operators, is not permitted.)

- Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada
- After-sales service –
 - Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)
- General service –
 - Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 to Annex 1603 of the NAFTA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 1603 of the NAFTA
 - Management and supervisory personnel engaging in commercial transactions for an enterprise located in Canada or Mexico
 - Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in Canada or Mexico
 - Public relations and advertising personnel consulting with business associates, or attending or participating in conventions
 - Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in Canada or Mexico. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)
 - Tour bus operators entering the United States:
 - With a group of passengers on a bus tour that has begun in, and will return to, Canada or Mexico
 - To meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in Canada or Mexico
 - With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to Canada or Mexico
 - Translators or interpreters performing services as employees of an enterprise located in Canada or Mexico

As with all business visitor visas, the visa holder must be compensated from a source outside the US, must be engaged in activities that are international in scope, and must not seek to enter the US labor market.

TN Visas

The TN visa is similar in requirements to the H-1B visas, although it has both substantial benefits and drawbacks to that visa category. The ways in which a TN visa is more advantageous than an H-1B are as follows:

- TN visas are not subject to an annual cap
- TN visas can be renewed indefinitely
- TN visas cover a broader range of job descriptions, which will be detailed later in this article
- There is no prevailing wage requirement for TN visas
- Canadian citizens can obtain a TN visa at the border, meaning there is no wait for the visa
- A TN visa can be obtained by a person who has held H-1B status for the full six years without fulfilling the requirement of spending one year outside the US, a requirement that must be complied with before obtaining other nonimmigrant work visas

While these advantages makes the TN visa seem an ideal substitute for the H-1B for Canadian and Mexican citizens, there are some drawbacks that must be considered, such as:

- Unlike H-1B visas, the TN visa is not a “dual intent” visa. That is, where a person on an H-1B visa may pursue permanent residency without having their visa revoked because they now have immigrant intent, a person on a TN visa cannot pursue permanent residency without risking their TN status.
- Experience cannot be used as a substitute for the degree requirement
- A TN visa can be denied if the Department of Labor certifies that there is a strike or other work stoppage, the resolution of which would be adversely affected by the admission of the TN nonimmigrant

TN visas provide for the admission of those who will be engaged in “activities at a professional level” in the US. “Activities at a professional level” are defined as those that require at least a bachelor’s degree or credentials and experience demonstrating that the person is a professional. Self-employment is not permissible on a TN visa, but the TN visa holder can work for a company in which they have an ownership interest, even a controlling interest.

Both the NAFTA treaty itself and INS regulations specify which professions qualify for TN status. These are the professions and the degrees required:

- Accountant--Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A

- Architect--Baccalaureate or Licenciatura Degree; or state/provincial license
- Computer Systems Analyst--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate and three years' experience
- Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)--Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
- Economist--Baccalaureate or Licenciatura Degree
- Engineer--Baccalaureate or Licenciatura Degree; or state/provincial license
- Forester--Baccalaureate or Licenciatura Degree; or state/provincial license
- Graphic Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience
- Hotel Manager--Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management
- Industrial Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- Interior Designer--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- Land Surveyor--Baccalaureate or Licenciatura Degree or state/provincial/federal license
- Landscape Architect--Baccalaureate or Licenciatura Degree
- Lawyer (including Notary in the province of Quebec)--L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar
- Librarian--M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
- Management Consultant--Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement
- Mathematician (including Statistician)--Baccalaureate or Licenciatura Degree
- Range Manager/Range Conservationist--Baccalaureate or Licenciatura Degree
- Research Assistant (working in a post-secondary educational institution)--Baccalaureate or Licenciatura Degree
- Scientific Technician/Technologist--Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
- Social Worker--Baccalaureate or Licenciatura Degree
- Sylviculturist (including Forestry Specialist)--Baccalaureate or Licenciatura Degree
- Technical Publications Writer--Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- Urban Planner (including Geographer)--Baccalaureate or Licenciatura Degree
- Vocational Counselor--Baccalaureate or Licenciatura Degree

MEDICAL/ALLIED PROFESSIONALS

- Dentist--D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license
- Dietitian--Baccalaureate or Licenciatura Degree; or state/provincial license
- Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States) -- Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- Nutritionist--Baccalaureate or Licenciatura Degree
- Occupational Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license
- Pharmacist--Baccalaureate or Licenciatura Degree; or state/provincial license
- Physician (teaching or research only)--M.D. Doctor en Medicina; or state/provincial license
- Physiotherapist/Physical Therapist--Baccalaureate or Licenciatura Degree; or state/provincial license
- Psychologist--state/provincial license; or Licenciatura Degree
- Recreational Therapist--Baccalaureate or Licenciatura Degree
- Registered nurse--state/provincial license or Licenciatura Degree
- Veterinarian--D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license

SCIENTISTS

- Agriculturist (including Agronomist)--Baccalaureate or Licenciatura Degree
- Animal Breeder--Baccalaureate or Licenciatura Degree
- Animal Scientist--Baccalaureate or Licenciatura Degree
- Apiculturist--Baccalaureate or Licenciatura Degree
- Astronomer--Baccalaureate or Licenciatura Degree
- Biochemist--Baccalaureate or Licenciatura Degree
- Biologist--Baccalaureate or Licenciatura Degree
- Chemist--Baccalaureate or Licenciatura Degree
- Dairy Scientist--Baccalaureate or Licenciatura Degree
- Entomologist--Baccalaureate or Licenciatura Degree
- Epidemiologist--Baccalaureate or Licenciatura Degree
- Geneticist--Baccalaureate or Licenciatura Degree
- Geochemist--Baccalaureate or Licenciatura Degree
- Geologist--Baccalaureate or Licenciatura Degree
- Geophysicist (including Oceanographer in Mexico and the United States)--Baccalaureate or Licenciatura Degree
- Horticulturist--Baccalaureate or Licenciatura Degree
- Meteorologist--Baccalaureate or Licenciatura Degree
- Pharmacologist--Baccalaureate or Licenciatura Degree
- Physicist (including Oceanographer in Canada)--Baccalaureate or Licenciatura Degree
- Plant Breeder--Baccalaureate or Licenciatura Degree
- Poultry Scientist--Baccalaureate or Licenciatura Degree
- Soil Scientist--Baccalaureate or Licenciatura Degree
- Zoologist--Baccalaureate or Licenciatura Degree

TEACHERS

- College--Baccalaureate or Licenciatura Degree

- Seminary--Baccalaureate or Licenciatura Degree
- University--Baccalaureate or Licenciatura Degree

To obtain a TN visa, the following documentation must be collected:

- A letter from the prospective employer
- Diplomas (if the degree is from Canada or Mexico, it must be evaluated)
- Licenses and professional memberships, if applicable

A letter should also be submitted that outlines the following:

- The nature of the professional activity in which the visa holder will be engaged
- The proposed length of stay
- The beneficiary's educational credentials
- That the beneficiary has the necessary state licenses, if applicable
- Arrangements for the beneficiary's salary

Canadian citizens (landed immigrants do not qualify for TN visas) can present this documentation at a port of entry or pre-clearance station at an airport. They do not need to present a petition approved by the INS, or a labor condition application. They will be given an I-94 valid for multiple entries over one year. Once in the US, the TN visa holder can apply for an extension at the Nebraska Service Center, which is also where application to change status to TN are filed. A new application is not required for a change in the place of employment, but is required for a change of employer.

The procedures are different for Mexican citizens . Until December 31, 2003, the following rules (which are fairly similar to the H-1B visa process) apply:

- The employer must apply for a TN visa at the Nebraska Service Center, and must present a labor condition application, or if the visa is for a nurse, a labor attestation.
- While Canadians can extend the TN visa indefinitely, TN visas for Mexicans are limited to one year.
- There is also an annual limit of 5,500 TN visas that can be issued to Mexican nationals.
- Mexicans must obtain the TN visa at a US consulate, because they cannot seek one at the border like Canadians can.

After January 1, 2004, the following rules apply to Mexicans:

- Mexicans can now apply for a TN visa directly at a US consulate in Mexico and do not need prior approval from US Citizenship and Immigration Services.
- There is no longer an annual limit on the number of TN visas that may be issued to Mexicans

- Mexicans applying for extensions in the US no longer need to file a Labor Condition Application with their I-129 petition

Note that unlike Canadians, even after January 1, 2004, Mexicans cannot process their TN applications at ports of entry. Nevertheless, the TN category for Mexicans is likely to become more popular with these changes.

Spouses and children of TN visa holders are given TD visas. Work is not authorized under a TD visa. TD visa holders are, however, allowed to attend school.

E Visas

NAFTA also reaffirmed treaty-trader and treaty-investor status for Canadian citizens, and extended it to Mexicans. The requirements for E-1 and E-2 visas under NAFTA are the same as they otherwise are, with the exception that entry may be denied when it would adversely affect the settlement of a labor dispute in the US. This provision is only triggered when the Department of Labor certifies the existence of a strike or work stoppage, and does not apply to E visa holders already in the US. Both Canadian and Mexicans require a visa for entry in E status, making this one of the few categories in which Canadians are required to have a visa for entry into the US.

L-1 Visas

NAFTA also made slight changes in the requirements for L-1 intracompany transfers between the US and Canada and Mexico. As with all entries under NAFTA, entry in L-1 status can be barred if the Department of Labor certifies the existence of a strike or other work stoppage in the region of intended employment. The other change is that Canadians can apply for L-1 status at the border. Mexicans are required to have a pre-approved visa.

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 - I am a travel agent and my client, while legally here, has an expired visa stamp in his passport. Would he be able to travel to Puerto Rico and be permitted to come back to Virginia, since for most purposes these days Puerto Rico is considered part of the US?

A - Flights to Puerto Rico are considered to be domestic flights. Therefore a passport is not necessary. However, if someone is flying to Puerto Rico from a foreign country, then it will be an international flight, and the person will need valid US immigration documents to enter the island. In the case of your customer, if he is departing from a US airport and flying directly to San Juan, all he needs is his driver's license to board the plane.

Q - I heard rumors that there is a time restriction on how long a visitor can stay. My mum is coming to visit the USA. She is over 70 yrs. old. She already has a US tourist visa. Can she stay for about 2 months with me? I am a permanent resident here.

A - While the Department of Homeland Security considered a regulation that would have shortened the standard amount of time visitors are granted on a normal visit. But they did not go through with the change. Immigration inspectors still normally authorize stays of six months. Extensions are possible on any given trip. What is always key in these cases is whether a visitor can show that they have strong ties abroad and will go home when their authorized stay in the US is over.

Q - My spouse and myself are in H1 and H4 visas. Can either one of us start a small business on our own?

A - The only way you can earn money in a side business would be to get a separate H-1B for that business to employ you. You can go through the preliminary steps of setting up a business without violating your visa status, but actually working in the business once operations commence could cause you to be found to be working without authorization even if you forgo being paid.

Q - I need help. I lost my passport and visa. I'm a foreign student. I need to know what should I do in order to get a new one?

A - You should contact your home country's consulate/embassy in the United States for a replacement passport. You must do this immediately. You can find information about every foreign embassy in the US at www.embassy.org If you also lost your I-94, you must file for a replacement using the immigration form I-102. I suggest that you contact your international student for assistance with that. If you lost your I-20 as well, then you must contact your advisor to get a new one immediately. Unfortunately, there is no quick solution for the visa. Because you are already in the US, you do not need a valid visa. You only need a valid passport, I-94, and I-20. Because you don't need to renew your visa while in the US, there is no way of doing it. Therefore, you will not be able to get a new visa until you leave the country and apply for a new visa using your new passport.

4. Border and Enforcement News

In an effort to stop fraud, U.S. embassy officials will begin using new biometric visas to record fingerprints from almost everyone applying for a visa to travel to that country. They will allow security background checks on an applicant in seconds, and will include a fingerprint and photograph.

The U.S. Coast Guard sent home 361 Haitians found on a 54-foot boat last week that was en route to the Bahamas. 348 of the migrants were adults. They were picked up near Great Inagua Island in the Bahamas as Tropical Storm Odette was heading east.

Undercover U.S. Border Patrol agents busted a smuggling ring run by a federal inmate at a Florence prison last week by arresting four of its members. Ringleader Reynaldo Garcia Vera, already serving two years for an alien-smuggling conviction, is now facing new charges of conspiracy to smuggle aliens.

The group allegedly used rented cargo vans and trucks to move illegal immigrants into the United States via the Arizona border and is believed to have smuggled about 500 people into the country illegally.

"Operation Predator", the nationwide effort to apprehend immigrants involved in child abuse and pornography caught 14 foreign sex offenders in metro Phoenix. ICE said eight of the suspects had prior records. The sex offenders came from Cuba, Ecuador, El Salvador, Mexico and Vietnam. One of the men has already been removed from the US; the rest will be placed in removal proceedings.

Since "Operation Predator" began in July, over 1,500 foreign child predators and sex offenders have been arrested throughout the US. There have been 46 arrests made in Phoenix. "Operation Predator" has a 24-hour hotline for information on sex offenders at 1-866-DHS-2ICE.

5. News From The Courts

Milbin v. Ashcroft, et al.
No. 3:02cv2227 (JBA)
US District Court for the District of Connecticut
2003 US Dist. LEXIS 21624

Rikesnson Milbin, a lawful permanent resident and Haitian national, filed a habeas petition on December 17, 2002, which challenged the constitutionality of his mandatory detention and sought to vacate the Board of Immigration Appeal's (BIA) order of removal. The Court found that Milbin was not removable because his criminal conviction did not qualify as an aggravated felony.

In March 2001, Milbin pled guilty to assault in the third degree. He received a one year suspended sentence and two years of probation. In September 2001, Milbin violated his probation, causing his suspension to be lifted and his sentence to be changed to six months in prison. After his sentence was completed in February 2002, Milbin was taken into INS custody and issued a deportation order for having

been convicted of an aggravated felony, defined as a "crime of violence...for which the term of imprisonment is at least one year."

An Immigration Judge (IJ) ordered Milbin to be removed for his conviction. Milbin appealed to the BIA arguing that his conviction was not a "crime of violence" and that he did not receive sentence of imprisonment for one year. The BIA dismissed his appeal. Milbin filed his petition with the Connecticut District Court, which issued a stay of removal on March 19, 2003.

Citing *Chrzanoski v. Ashcroft*, 327 F. 3d (2d Cir. 2003), the Connecticut District Court decided that third degree assault is not a crime of violence and granted Milbin's petition for a writ of habeas corpus and ordered the he should be released from custody.

Nwakanma v. Ashcroft
No. 03-4317
US Court of Appeals for the Sixth Circuit
2003 US App. LEXIS 24769; 2003 FED App. 0436P

Godfrey N. Nwakanma, a native and citizen of Nigeria, sought asylum, withholding of removal and relief under the Convention Against Torture (CAT). An immigration judge (IJ) denied all such relief and this was affirmed by a Board of Immigration Appeals (BIA) decision. The BIA did grant Nwakanma voluntary departure within 30 days of the removal order. Nwakanma petitioned the Sixth Circuit for review of the decision.

Nwakanma filed two motions on the last day before the expiration period for voluntary departure: 1) a motion to stay voluntary departure pending adjudication of the petition for review, and 2) a motion to stay removal pending judicial review. The Attorney General stated that he did not oppose the stay of removal but did oppose the stay of voluntary departure.

The Sixth Circuit stated that it had previously decided that a stay of removal may be granted (*Bejjani v. INS*, 271 F.3d 670, 688, 6th Cir. 2001), the circuit had not dealt with stays of the period allowed for voluntary departure. The only circuit dealing with this issue held that the equitable power of courts of appeals "extends to stays of voluntary departure" (*El Himri v. Ashcroft*, 344 F.3d 1261, 9th Cir. 2003).

The court asserted that "voluntary departure is a discretionarily granted alternative to mandatory removal" where immigrants can avoid the penalties of forced removal. Immigrants who do not voluntarily depart the US after voluntary departure has been granted face additional penalties. An immigrant who has been granted voluntary departure and who chooses to have his/her case reviewed may suffer penalties if he/she does not receive a stay of voluntary departure.

Attorney General Ashcroft argued that the Sixth Circuit did not have the jurisdiction to grant Nwakanma's motion. However, the Sixth Circuit asserted that it did have the jurisdiction to grant a stay of the "immediate effectiveness of the relief already granted by the [Attorney General]...to allow [Nwakanma] to receive appellate review."

By applying the factors for injunctive relief, used to determine whether a stay of removal may be granted, the Sixth Circuit found that "the balance of harm supports a stay of removal" and because "a stay of removal is appropriate, a stay of the period for involuntary departure is also appropriate." The court granted the motion to stay removal and the motion to stay the period for voluntary departure. The stays expire when a final decision in this case is given or as otherwise ordered by the court.

6. Government Processing Times

Processing times are available this week for the following service centers:

California (12/08/2003): <http://www.visalaw.com/california.html>

NBC-Missouri (12/08/2003): <http://www.visalaw.com/missouri.html>

Texas (11/30/2003): <http://www.visalaw.com/texas.html>

Vermont (12/08/2003): <http://www.visalaw.com/vermont.html>

7. News Bytes

The United States has eased its deadline for all European countries to begin issuing biometric passports to their citizens by December 2005. This is difficult because biometric technology is not ready for mass production, so machine-readable travel documents will be acceptable.

21 countries are on the Visa Waiver Program, which allows their citizens to enter the United States for short periods without obtaining a visa at an American consulate overseas. All European Union states except Belgium have introduced the standard.

U.S. Senator John Kyl (R-Arizona) wrote in a weekly column he distributes to statewide media that Congress should not consider any legislation that would legalize undocumented immigrants or allow foreigners to enter the country as guest workers until the federal government enforces the laws that have already been set forth.

Three Arizona republicans, Senator John McCain and Representatives Jim Kolbe and Jeff Flake, are currently backing passage of their Border Security and Immigration Reform Act, which would create a nationwide guest worker program. Many undocumented immigrants would get the chance to become legal residents if the legislation passes. The purpose of the McCain-Kolbe-Flake bill is to reduce migrant deaths on the US-Mexican border, fill low-skill labor needs of businesses nationwide and include national security.

A federal pilot program has been installed that will provide free services such as orientation sessions and citizenship preparatory classes and host families for newcomers to the United States. By March, up to five cities will be selected to participate in the pilot program. If successful, it could be rolled out nationwide within four years. The program's goal is to soften the image of federal immigration agencies.

Inspectors are instructed to ignore OI 214.2(b)(1) and question business visitors about their source of compensation, whether their services are part of the U.S. labor market and if the services help the U.S. entity. This is according to a Western Region Field guidance memo that is undated however believed to have been issued in 2000.

U.S. Citizenship and Immigration Services celebrated the 212th anniversary of the Bill of Rights by welcoming new Americans from 35 different countries at a naturalization ceremony. The ceremony took place in the Rotunda for the Charters of Freedom Room in the National Archives and Research Building, which contains the original Bill of Rights, U.S. Constitution and Declaration of Independence.

The visa counter is a major obstacle is keeping U.S. products out of China. Delays in issuing visas have held up many Chinese business delegations heading to the United States as applications submitted in China make their way through new security checks in Washington.

New visa guidelines state that applicants whose business interests relate to sensitive technology must have their names cleared by the U.S. Department of Homeland Security before a visa is issued.

To help smooth visa approvals, U.S. embassy visa officers are urging companies to plan travel schedules far in advance and provide detailed lists of equipment that customers may want to buy as well as the research background of Chinese executives.

The US-VISIT program integrates and enhances the capabilities of existing systems such as the Arrival and Departure Information System (ADIS) and the Enforcement Operational Immigration Records (ENFORCE/IDENT) system. This week, the Department of Homeland Security announced that portions of these two systems will be used to support US-VISIT to record information relating to the arrival and departure of both immigrants and nonimmigrants to and from the US by collecting biometric and biographic data.

Security clearances under the Visa Mantis program, the security clearance based on a person's field of work, will now be valid for twelve months. Visas issued to Chinese

or Russian nationals must be issued as single entry visas valid for not more than three months.

8. International Roundup

On December 5, 2003 the Macedonian parliament adopted a new citizenship law that qualifies foreign nationals for Macedonian citizenship after eight years of legal residence instead of 15 years. The parliament also voted down a proposal to give preferential treatment to ethnic Macedonians living abroad.

Interior Minister Avraham Poraz plans to change Israel's immigration policy to allow certain foreigners who are ineligible for citizenship, (such as an individual who separated from his/her Israeli spouse), to obtain Israeli citizenship. Poraz also wants to grant citizenship to individuals who have contributed to Israeli society in certain ways, such as athletes, artists or scholars.

Poraz believes these changes are necessary and will "resolve the distress of many of the new immigrants and their families, and of veteran Israelis who are married to foreign spouses."

The migration of Russians from the Far East to the West seeking higher standard of living has transformed the demography of the Russian Far Eastern region. Many North Koreans are moving into that area in order to revive the economy. The local politicians and President Putin support the opening of the Far Eastern border of Russia and allow a certain number North Korean to immigrate to the area.

Putin is supported by some U.S. officials who believe this to be a humanitarian act, and more importantly, that this move could create a reasonably affluent group of North Korean society who may eventually help force a change in the North Korean regime.

9. Legislative Update

Representative Jim Kolbe (R-AZ) believes that immigration will be an important issue in the upcoming 2004 presidential election. He says that while Congress is unlikely to enact immigration legislation in 2004, an election-year debate could lead to reforms in immigration legislation in 2005.

Representative Kolbe and fellow Arizona lawmakers Senator John McCain (R-AZ) and Representative Jeff Flake (R-AZ) support a guest worker program that would allow immigrants to temporarily work in the US as well as provide illegal immigrants with a way to obtain legal status.

The following bills were recently introduced:

[H.R.3651](#): To account for all aliens unlawfully present in the United States by providing incentives for such aliens to register with the Secretary of Homeland Security, to provide immunity from criminal prosecution for the employer of such an alien if the employer pays all taxes and penalties owed by reason of such employment, and for other purposes.

Sponsor: Rep Issa, Darrell E. [CA-49] (introduced 12/8/2003)

Committees: House Judiciary

Latest Major Action: 12/8/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.3700](#): Private Bill for the relief of Benjamin Cabrera and Londy Patricia Cabrera.

Sponsor: Rep Roybal-Allard, Lucille [CA-34] (introduced 12/8/2003)

Committees: House Judiciary

Latest Major Action: 12/8/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

For a review of all the immigration bills introduced this year, visit our legislative chart at www.visalaw.com/advocacy.html.

10. Guest Column - Not All H-1Bs Are Created Equal, by Gary Endelman

Gary Endelman practices immigration law at BP America Inc. The opinions expressed in this column are purely personal and do not represent the views or beliefs of BP America Inc. or Visalaw.com in any way.

The H-1B has become the test case for all employment-based immigration. If we cannot articulate a rational policy here that serves the nation well, we will not be able to do it anywhere else. The ongoing H-1B debate is really about the direction that the American economy will take in the digital age and whether we will voluntarily surrender the high ground that America now occupies. It is hard to imagine when in recent history a more sweeping unilateral surrender has been contemplated. Both supporters and opponents of the H-1B talk a lot about the "global economy" but act as if we lived solely in a domestic one. We want a seamless movement of trade and ideas across national boundaries but seem to believe that people must stay behind. Give us your money and intellectual capital, but be sure to remain where you are! To the extent that Congress thinks about the economic implications of what it is doing, or failing to do, it looks not to the future but to a static present, ignoring the dynamic nature of the American economy as an engine of job creation. Yet, Congress is not alone for all sides, friend and foe alike, are seemingly unable or unwilling to decide if the presence of large numbers of H-1Bs is necessarily antagonistic to the legitimate interests of American workers. Indeed, regardless of what side of the barricade they are on, the loudest voices in the H-1B controversy often fail to ask or answer this question, or even to appreciate the need to raise it as an organizing principle of future inquiry. How our economy is going to

change over the coming decades and what we can do to align immigration policy with these anticipated needs does not seem high on anyone's agenda.

Failure now ensures frustration for the foreseeable future on other immigration battlefronts. What is striking about recent Congressional scrutiny of the L-1 intra-company transferee visa is the extent to which those leading the charge against the L, a stranger to controversy since its creation in 1970, are really most upset about alleged H-1B abuse. Indeed, the most damning charge these critics fling at the L is that employers are turning to it precisely to avoid H-1B restrictions. That is why they want to reconfigure the L in the image of the H. All of the legislative proposals to crack down on the L apply the compliance regime fastened upon the H by the American Competitiveness Workforce Improvement Act ("ACWIA") of 1998. Those who seek to drive out foreign workers do not distinguish between the H and L visas. Their rejection of the H leads them to reject the entire body of immigration law whose purpose is to enable the U.S. to engage in a global competition for talent and people.

The best protection for any U.S. worker is the job mobility that comes from having a genuine stake in society not dependent on any particular employer. Congress has endorsed the concept of H-1B portability, but it has only taken a few baby steps down this road. Let's take some giant ones. Why not allow the H-1B alien to file the petition in their own name, much as they can now file a national interest waiver or extraordinary ability immigrant petition? The H-1B approval would then truly belong to the alien visa holder and not to the employer who immediately loses any leverage that the market would not otherwise provide. Armed with such a weapon against unreasonable employer demands, the H-1B alien has no further need for protection by the USDOL. The entire forest of ACWIA-inspired regulations becomes instantly irrelevant. Honest employers with good jobs will still get the workers they need.

The market, not Congress, sets the real H-1B limit. It is the law of supply and demand that counts. When fewer H-1Bs are needed, fewer H-1B petitions are filed. Immigration is, it seems, joined at the hip to the rhythms of the business cycle. If this is so, and it is, then the whole focus of the H-1B debate has been wrong. Numbers are not what the conversation should be about. We need neither more nor less H-1Bs but a different kind of H-1B. Why should all H-1Bs last the same amount of time? What is the economic rationale for such uniformity? Do all sectors of the economy and all regions of the nation need the same number of H-1Bs at the same time and for the same validity? If the three year or six year limit makes economic sense, we should keep it. If, however, it does not, what is there to say that we violate natural law by changing it? Take the Conference Board, the Bureau of Labor Statistics, whatever set of numbers you like, and hold them up before God and everybody. In those places where it is hard to attract H-1B talent, or for those occupations that are growing and creating new jobs for Americans to fill, make the H-1B longer and give them more of the H-1B quota. Correspondingly, if a region has no need of imported expertise, or if an industry is stagnant or has even fallen back into negative growth, then cut back on the validity of the H-1B approval or even ban it entirely until growth resumes or at least rises to whatever level Congress deems acceptable. The whole point, indeed the sole justification, for having the H-1B, or any other employment-based visa, in the first, last and only place is to serve the economy. Let the economy decide who gets the H-1Bs and for how long.

Does the economy have the same need for all H visas? The question answers itself. Without the need for Congress to do anything, Commissioner Aguirre can have the

U.S. Citizenship and Immigration Services ("USCIS") invoke the Negotiated Rulemaking Act to convene experts from business, labor, academia and consumers to prepare a list of occupations that would be deemed inherently beneficial to the economy and for which H-1B pre-approvals were granted. Such a list would be similar to that "Schedule A" that has long been adopted by the USDOL for blanket labor certification purposes. Known colloquially as "reg neg", negotiated rulemaking emerged in the 1990's as an alternative to traditional adversarial rulemaking. "Reg neg" allows affected parties direct input into the drafting of the regulation, thus enhancing the prospects for the resultant rule to be pragmatic, easily implemented and responsive to the realities on the ground. Do not throw up your hands and say "Oh No! The H-1B morass is simply beyond redemption!" Negotiated rulemaking has proven most successful in highly polarized situations where the inherent radioactivity of the issues made them stubbornly resistant to more traditional cures. For reg neg to work on the H1B mess, USCIS must not be held back by any institutional reluctance to engage in intense collaboration with the regulated community. Business and labor, in turn, as well as the immigration bar, must display a genuine willingness to compromise on specifics in order to reach unanimity on the overall H-1B list of favored occupations. The creation of such a list will help keep jobs in the United States, protect American workers, and enrich employers who can afford to increase hiring and spur economic recovery. Periodic revision of the list will be required to keep it current.

What about those occupations that do not make it onto such a list? Do they lose out entirely? No, but their H-1B would be valid only for one year, not three. They would not be exempt from the presumption of entering the U.S. as an intending immigrant. Section 214(b) of the Immigration and Nationality Act, known colloquially as the "guilty until proven innocent" provision would continue to apply. Only those occupations pre-approved for H visa treatment would continue to benefit from the doctrine of dual intent under which H visa holders from Third World countries can come temporarily to the USA while exploring their green card options after arrival. There is nothing particularly radical in such notions since this is precisely how Congress structured the 6,800 H visa numbers allotted to Singapore and Chile under their respective free trade agreements just recently concluded. As Daniel Horne observed in the current issue of Bender's *Immigration Bulletin*, such a straitjacketed H option will likely not attract much interest unless more attractive alternatives fail to present themselves. This has, Dan Horne reminds us, been the fate of the TN-2 visa for Mexican nationals created by NAFTA where the annual limit of 5,500 visas has never come close to being reached. There is therefore no need to apply any ACWIA-based constraints to these H visas since the demand for them will be inhibited not by USDOL oversight but by the inflexibility of the visa itself.

The benefit of different kinds of H-1Bs should not blind us to the transparent need to change their method of delivery. That is why we need a Blanket H-1B program much as we have a Blanket L intra-company transferee program. Once USCIS approves a Blanket H petition filed by an employer, the USDOL would be asked to certify a labor condition application and the alien beneficiary could then apply for the work visa at the US Consulate in their home country. Once again, as Daniel Horne aptly points out, this is precisely how the Singapore and Chile H-1Bs work since there is no petition required in either case here. As of January 1, 2004, TN-2 Mexican visas will also not require a petition. One insight into how a Blanket H visa might work is provided by the House Report that accompanied the United States-Chilean Free Trade Implementation Act:

After the Department of Labor approves an employer's attestation, a State Department consular official will decide whether to grant visas to alien applicants, dependent in part on whether the prospective job meets the standards of a qualifying occupation and whether the alien meets the educational standards of a qualifying employee. H.R. Rep. No. 108-224, Part 2, at 15(2003).

Eligibility for this Blanket H - 1B should depend on the number of approved H-1B petitions in the past year, the percentage of full-time equivalent H workers in their employ, and documentation of their demonstrated ability to pay the prevailing wage. No H-1B dependent employer, or any company found guilty of a willful or material labor condition application violation could file a Blanket H-1B petition.

To do most, or even part of this, we will all have to take a huge leap of faith and start talking not just to ourselves but also with our adversaries who do not agree or even like us. Unwilling to do that, not much will happen. Nativists will continue to argue against globalization as a surrender of national sovereignty. They are bound to lose this argument; it is only the time, place and nature of their retreat that can be negotiated or postponed. Pro-immigrant advocates will continue to concentrate on incremental advances that will, in turn, inevitably create their own problems without coming to terms with the central reality that an immigration system that is not transparently in the national interest will not prosper or long endure. It is not a matter of H-1B numbers or more dollars for all the funding or USCIS staff in the world cannot rationalize a system that does not understand the economy it is supposed to serve. While we honor Thomas Jefferson's dictum on the rights of man and however politically correct his elegant phraseology seems, the fact remains that not all H-1Bs should be created equal.

11. Illegal Workers Entitled to Compensation

The Arizona Supreme Court ruled recently that workers who hurt themselves on the job are entitled to compensation, even if they are in the United States illegally. The Court upheld an appellate court ruling that Fermin Torres is entitled to payments despite his illegal status.

The Court of Appeals had said that refusing benefits to those in the country illegally would persuade employers to hire more illegal immigrants. Friday's Supreme Court action made that ruling stand, potentially affecting the rights of the 283,000 "unauthorized residents" the U.S. Bureau of Immigration and Customs Enforcement estimated in 2000 to be in Arizona.

Torres was injured during his first week of employment at Tiger Transmission when a piece of metal flew into his left eye.

Thomas Luikens, the attorney representing Tiger Transmission argued that the Immigration Reform and Control Act makes it a crime for anyone not in the United States legally to be employed within its borders, making Torres ineligible for benefits. Luikens said that federal law overrides the fact that neither citizenship nor legal entry is a prerequisite under state law for workers' compensation.

Luikens also proposed that a ruling made by the Arizona Supreme Court last year means those here illegally are not entitled to the protections of various laws designed to protect workers. In that case, the U.S. Supreme Court said the National Labor Relations Board could not award back pay to an undocumented worker who had been laid off after engaging in protected union activity.

The Court of Appeals rejected these arguments, saying federal immigration policy does not contradict Arizona's constitutional mandate of providing benefits to workers who are injured in the workplace. The purpose of the law is to place the burden of on-the-job injury and death on industry.

12. Lieberman Criticizes DHS in Letter

In a letter to the Department of Homeland Security Secretary Tom Ridge, Governmental Affairs Committee Ranking Member Joe Lieberman (D-Connecticut) said the DHS broke the law by failing to measure the privacy impact of new technology to be set up at airports next month because they didn't conduct and make public a "privacy impact assessment (PIA)" on the biometric technology developed for use by US-VISIT.

The E-Government Act of 2002, authored by Lieberman, requires federal agencies to conduct privacy impact assessments before developing and purchasing new technologies that will collect personal information electronically. DHS has begun an assessment, but the technology that will make the US VISIT system work has already been purchased and sent to airports around the country.

The Department of Homeland Security refuted Lieberman's letter, declaring that DHS is not developing or purchasing any new technology for the first phase of US-VISIT but rather is using existing technology.

Representatives from DHS also said a draft PIA is under review and will be approved and made available to the public by the end of the year. In his letter, Lieberman acknowledged knowing about the draft PIA, but said it was his understanding that the department developed new biometric systems soon after it unveiled plans for US-VISIT last April, and new equipment for the system has already been purchased and sent to United States airports.

DHS Chief Privacy Officer Nuala O'Connor Kelly said in a public response that she wants the PIA done before the first phase of the project begins, even though the department is not legally required to have it, and that the PIA will be updated for the next phases of the project and as new technology and equipment is acquired. Lieberman encouraged DHS to finish the privacy assessment for US-VISIT as soon as possible and observe the privacy law in all future information technology projects.

US-VISIT will collect fingerprints and photographs from millions of visitors entering and exiting the United States every year. The biometric systems will collect fingerprints and photographs from millions of visitors entering and exiting the United States every year.

13. Ridge Endorses Legalization of Undocumented Immigrants

Secretary of the Department of Homeland Security Tom Ridge has announced that the US should legalize the millions of undocumented immigrants in the US. According to Ridge, illegal immigrants do contribute to the country and to the communities where they reside. Ridge stated that while he supports legalizing these immigrants, he does not propose granting them citizenship "because they violated the law to get here."

Ridge made this declaration at a town hall meeting at Miami Dade Community College when he was asked about offering amnesty to illegal immigrants. Ridge responded that he believes the majority of undocumented immigrants currently in the US do not pose a threat to national security and should be granted "some kind of legal status."

Ridge has been heavily criticized for his remarks. Representative Tom Tancredo (R-CO), who recently introduced a guest worker bill and who is a critic of legalization, stated that granting amnesty to these immigrants would be dangerous to homeland security. "The administration ought to dedicate more energy to enforcing our existing immigration laws and less on finding way to allow millions [of illegal immigrants] to skirt them."

Mark Krikorian, Director of the Center for Immigration Studies, a think tank that supports restrictive immigration policies, said that he believes legislation allowing for the legalization of millions of undocumented immigrants will overwhelm the Department of Homeland Security, which according to Krikorian doesn't "have the capacity to do the job they have now."

However, many have viewed Ridge's statement as a sign that the Bush administration is considering immigration reforms for illegal immigrants. White House officials have said that the administration supports a temporary-worker program that would allow some workers to receive legal status, but White House Spokesman Scott McClellan declared that Ridge's statements do not mean that the Bush administration supports "any broad amnesty" proposal.

Lawmakers in both the House and Senate support legalization as well. Arizona legislators Senator John McCain and Representatives Jim Kolbe and Jeff Flake have introduced HR 2899 that would legalize undocumented immigrants. Another bill, S 1545, would make it easier for illegal immigrants who entered the US as children to obtain lawful permanent resident status. However, many agree that Congress will probably not approve any major immigration legal reforms in 2004.

Estimates of the undocumented population in the US range typically from 8 million and 12 million.

14. Eduardo Aguirre Speaks at Forum on US-Canada Relationship

The director of U.S. Citizenship and Immigration Services (USCIS) Eduardo Aguirre spoke to the Summit Institute's international forum on the US-Canadian relationship.

In his speech Aguirre compared America's principles to Canada's, saying both countries were founded according to similar main beliefs, such as freedom and democracy. Aguirre reconfirmed the USCIS's commitment to working with Citizenship and Immigration Canada (CIC) to both increase both countries' homeland security and to uphold liberty.

Director Aguirre noted significant developments on information sharing and bilateral coordination on refugee and asylee matters. A complete and suitable information exchange on asylum seekers will be established in accordance with the Statement of Mutual Understanding between USCIS and CIC and its pending Asylum Annex. This information exchange will result in a more proactive identification of the individual in question and a more immediate verification of any potential security or criminal threats.

Aguirre also spoke about the Safe Third Country Agreement, and how it will allow both the United States and Canada to better facilitate the flow of asylum seekers once it is implemented. The agreement would regulate an asylum seeker's ability to choose a country of refuge. The seeker would then be able to be required to present their claim in the country they are in at the land border ports of entry.

Both the initiatives Aguirre discussed accompany the December 2002 Smart Border Action Plan, which was signed by Deputy Prime Minister John Manley and then-Governor Tom Ridge.

On Aguirre's two-day trip to Ottawa, he met with Deputy Minister Michel Dorais, CIC, Associate Deputy Minister Jonathan Fried, Department of Foreign Affairs and International Trade and the U.S. Ambassador to Canada, Paul Cellucci.

15. Changes in TN Classification for Mexicans

Due to a provision of the North American Free Trade Agreement (NAFTA), on December 1, 2003, the 5,500 annual numerical cap and visa petition procedures for the TN nonimmigrant visa category for Mexican citizens will end. The NAFTA provision set a 10-year period for the cap and petition procedures. From January 1, 2004 onwards, Mexican citizens who want TN classification will apply for a visa at a US consulate without a need for prior approval from USCIS or the Department of Labor.

Provisions of NAFTA and the Immigration and Nationality Act (INA) allow citizens of Canada and Mexico who are qualified in specific professions to temporarily enter the US under TN nonimmigrant status, and their dependent family members are granted TD nonimmigrant status. The requirements for Mexican TN professionals differ from those of Canadian TN professionals.

Requirements for Mexicans are similar to those of H-1B professionals. The employer is required to obtain approval of Form I-129 from USCIS and approval of a labor condition application (LCA) from the Department of Labor. After these petitions are

approved, Mexican citizens can receive a TN visa from a US consulate. New Mexican TN admissions are currently subjected to a 5,500 annual cap.

In contrast, Canadian professionals go through a simpler process. They do not have to submit an I-129 or LCA or obtain a visa from a US consulate. Canadians can enter the US at a port of entry by providing documentation demonstrating that they have a designated TN profession and that they have the required educational background for that profession. There is no cap on the number of Canadian professionals admitted under TN status.

Beginning on January 1, 2004, Mexican TN procedures will change. Those Mexican citizens seeking TN status will apply at a US consulate in Mexico and will not need prior approval of Form I-129 or LCA. The Department of Homeland Security plans to publish an interim rule that will provide information on the new procedures.

16. New Law Extends Immigration Benefits to Military Personnel and Their Families

A new law recently enacted adds new immigration benefits for members of the armed forces. The National Defense Authorization Act for Fiscal Year 2004 (H.R. 1588), a Department of Defense appropriations bill, became law on November 24, 2003. Title XVII of the bill outlines the new benefits.

The new legislation amends the Immigration and Nationality Act (INA) by reducing the required qualifying service to apply for naturalization from three years to one and exempts visa applicants serving in the military from paying fees associated with immigration, such as application fees and naturalization fees. The section also adds a provision allowing citizenship granted under the section to be revoked if the immigrant is released from the military "under other than honorable conditions" before he/she has served for five years.

Immigrant members of the armed forces can file their applications, have their interviews, oaths, ceremonies and any other proceedings associated with naturalization through US embassies, consulates and military installations overseas.

The law also has provisions regarding the immigrant spouse, children and parents of a US citizen who died while in the armed forces, and the spouse, children and parents of lawful permanent residents who serve in the military. The legislation retains the immediate relative status for the immigrant spouse, child, or parent of a US citizen who dies from injury or disease incurred in or aggravated by combat and requires that petitions be filed within two years of the death.

Further, the law states that an application for status adjustment by the immigrant spouse, child, or parent of an immigrant who served in the military who was granted service-related posthumous citizenship may be adjudicated as if the death had not occurred, but the application must be filed prior to the death. Also, the spouse, child, or parent of a lawful permanent resident who was granted service-related posthumous citizenship is considered as a valid petitioner for immediate family status if the petition was filed within two years of the death. Additionally, these immigrant relatives may apply for permanent resident status adjustment.

These amendments to the INA take effect as if they were enacted on September 11, 2001, except for the amendments regarding naturalization fees and overseas naturalization proceedings, which take effect on October 1, 2004.

17. HHS Reopens Physician Waiver Program With Significant New Restrictions

The US Department of Health and Human Services this past week reopened its J-1 waiver program for physicians working in underserved areas. The program was closed several months ago without warning or explanation. When it reopened, several additional rules were announced that will significantly reduce the number of physicians that will be eligible for waivers:

- Only facilities in Health Professional Shortage Areas with a score of 14 will qualify (previously, facilities in any Health Professional Shortage Area as well as Medically Underserved Areas were eligible)
- The only qualifying facilities will be health centers qualified under the Public Health Service Act, rural facilities as defined by the Social Security Act and Native American/Alaskan Native tribal facility

Critics of the program have questioned why HHS felt it necessary to reduce the number of eligible facilities when only a few dozen applications were received under the more liberal rules. According to HHS, only 43 applications were received in the several months the program was active even after the program received a great deal of publicity. And the timing is even more awkward given the very public reversal this week of the American Medical Association on the question of the nation's physician shortage. Coupled with the publication of an article in JAMA – The Journal of the AMA – of a study showing medical school deans deeply worried about the future supply of doctors, the AMA confirmed that the nation is facing a severe physician shortage – particularly for specialists – and immediate action is needed. An abstract of the JAMA report can be found online at <http://jama.ama-assn.org/cgi/content/abstract/290/22/2992>.