Siskind's Immigration Bulletin
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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:

Rumors abound regarding when the H-1B cap is going to be hit. We know it is coming soon. Only about half of the 65,000 H-1B visas available for this fiscal year were available when the new quota started on October 1st. That was because some visas were reserved for Chileans and Singaporeans under a new free trade agreement. And other visas were already claimed based on applications pending before the fiscal year started. The USCIS is telling the American Immigration Lawyers Association that several weeks remain before the cap will be hit. Other sources are reporting that the cap could be hit even before December is over. Readers are warned to heed this prediction and act accordingly to secure a visa quickly.

Once the cap is hit, the reality of nine months with few H-1B visas being issued will hopefully force Congress to deal with the problem. Even in the recession that has existed for the past three years, a quota of 65,000 would not have been adequate. It has been easy for people to attack the H-1B quota when visas have been available. The debate may change when medically underserved communities cannot find their doctors. It may change when school systems don't have teachers in the classroom when the school year starts next fall. It may change when key business personnel are not able to enter the US to carry on key functions for American companies. And as the technology sector recovers, we'll be back in the situation of the late 1990s when American workers were fully employed and H-1B workers were crucial to the success of an industry. Wait and see…

This is our last issue of the year since next week we'll be taking a week off from publishing. The last half of December is usually a quiet period for most immigration law firms. With the Christmas holiday, school vacations and the phone ringing less than usual, many of our people choose to take vacations or work reduced hours. That includes me. I'll be taking the family on a road trip to visit family in a warmer climate.

To all our readers, we wish you a happy holiday season and hope that 2004 is happy, prosperous and healthy.

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

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2. The ABC'S Of Immigration: ITIN Application Revisions

The Internal Revenue Service (IRS) has announced several steps to restrict the issuance of Individual Taxpayer Identification Numbers (ITINs). According to the IRS, these changes will ensure that ITINs are issued for their intended tax administration purpose for administering the tax code. The changes are important in the immigration context because many people who cannot get Social Security

Numbers depend on an ITIN for various financial matters like opening up a bank account, purchasing property and more.

What is an ITIN?

An Individual Taxpayer Identification Number (ITIN) is a nine-digit, tax processing number issued by the IRS. An ITIN always begins with the number 9 and has either a 7 or 8 as the fourth digit. Individuals must have a filing requirement and file a valid federal income tax return to receive an ITIN, unless they meet an exception.

The IRS issues ITINs to individuals who are required to have a US taxpayer identification number, but cannot obtain a Social Security Number (SSN) from the Social Security Administration (SSA). ITINs are issued regardless of immigration status because both resident and nonresident aliens may have US tax return and payment responsibilities under the Internal Revenue Code.

What is the purpose of an ITIN?

ITINs are for federal tax reporting only, and are not intended to serve any other purpose. An ITIN does not authorize work in the US or provide eligibility for Social Security benefits or the Earned Income Tax Credit. ITINs are not valid identification outside the tax system.

IRS issues ITINs to help individuals comply with the US tax laws, and to provide a means to efficiently process and account for tax returns and payments for those not eligible for Social Security Numbers.

Who needs an ITIN?

IRS issues ITINs to foreign nationals and others who have federal tax reporting or filing requirements and do not qualify for SSNs. A non-resident alien individual not eligible for an SSN, who is required to file only a US tax return to claim a refund of tax under the provisions of a US tax treaty, needs an ITIN.

If you do not have an SSN and are not eligible to obtain an SSN, but are required to provide a federal tax identification number or file a federal income tax return, you must apply for an ITIN. By law, an individual cannot have both an ITIN and an SSN.

Are ITINs valid identification?

No, ITINs are not valid identification outside the tax system, and should not be offered or accepted as identification for non-tax purposes. Since ITINs are strictly for tax processing, IRS does not apply the same standards as agencies that provide genuine identity certification.

What are the changes to ITIN application standards?

Effective immediately, each ITIN applicant must now:

- Apply using the revised Form W-7, Application for IRS Individual Taxpayer Identification Number; and
- Attach a federal income tax return to the Form W-7.

Applicants who meet an exception to the requirement to file a tax return (see the instructions for Form W-7) must provide documentation to support the exception.

What documents are used as proof of identity and foreign status?

There are now 13 acceptable documents:

- An original passport is the only document that is accepted for both identity and foreign status.
- If you do not have a passport, you must provide a combination of current documents that contain expiration dates, show your name and photograph, and support your claim of foreign status.

IRS will accept a combination of two or more of the following documents, in lieu of a passport:

- National identification card (must show photo, name, current address, date of birth, and expiration date)
- US driver's license
- Civil birth certificate
- Foreign driver's license
- US state identification card
- Foreign voter's registration card
- US military identification card
- Foreign military identification card
- Visa
- US Citizenship and Immigration Services (USCIS) photo identification
- Medical records (dependents only)
- School records (dependents and/or students only)

How do I apply for an ITIN?

Use the December 2003 revision of Form W-7, Application for IRS Individual Taxpayer Identification Number to apply. Attach a valid federal income tax return unless you qualify for an exception, and include your original or certified proof of identity documents.

Because you are filing your tax return as an attachment to your ITIN application, you should not mail your return to the address listed in the Form 1040, 1040A or 1040EZ instructions. Instead, send your return, Form W-7 and proof of identity documents to the following address (also listed in the Form W-7 instructions):

Internal Revenue Service
Philadelphia Service Center
ITIN Unit, P.O. Box 447
Bensalem, PA 19020

You may also apply using the services of an IRS-authorized Acceptance Agent or visit an IRS Taxpayer Assistance Center in lieu of mailing your information to the IRS in Philadelphia. TACs in the United States provide in-person help with ITIN applications on a walk-in or appointment basis. Applicants outside the United States should

contact an overseas the IRS office to find out if that office accepts Form W-7 applications. The IRS's ITIN Unit in Philadelphia issues all numbers by mail.

When should I apply for an ITIN?

You should complete Form W-7 as soon as you are ready to file your federal income tax return, since you need to attach the return to your application.

If you meet one of the exceptions and do not need to file a return, submit Form W-7, along with the documents required to meet your purpose for needing an ITIN, as soon as possible after you determine that you are covered by that exception.

You can apply for an ITIN any time during the year; however, if the tax return you attach to Form W-7 is filed after the return's due date, you may owe interest and/or penalties. You should file your current year return by the April 15 deadline to avoid this.

When will I receive my ITIN?

If you qualify for an ITIN and your application is complete, you will receive a letter from the IRS assigning your number within four to six weeks. The IRS is changing their practice of issuing an ITIN card to an authorization letter to avoid any possible similarities with a Social Security Number card. Current ITIN holders' cards will not be replaced; they should continue to use the numbers previously issued when they need to supply identifying numbers for tax purposes.

If you have not received your ITIN or other correspondence six weeks after applying, you should call the IRS to find out the status of your application.

For help and additional information, call the IRS toll-free at 1-800-829-1040, or by making an appointment at IRS Taxpayer Assistance Centers (TACs) in the United States, which provide in-person help with ITIN applications on a walk-in or appointment basis. Applicants outside the United States may contact an overseas IRS office to find out if that office accepts Form W-7 applications. You can also use the services of an IRS-authorized Acceptance Agent (List of Acceptance Agents).

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3. Ask Visalaw.com

Ask Visalaw.com will return in our next issue. You can email questions for consideration to ask-visalaw@visalaw.com. We can't answer every question, but do our best to provide offline help wherever possible. Keep in mind that some questions are complex and more appropriately answered in a consultation rather than by email.

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4. Border and Enforcement News

An immigrant smuggler from Tijuana, Anselmo Pedroza, was sentenced to 21 years to life in prison for the murder of three immigrants killed when a pickup truck

crashed, even though he was not driving the truck. Experts believe this may be the first such case in the country.

Pedroza, who has been apprehended by immigration officials 45 times since 1998, claimed he told the driver to slow down. But witnesses state that he urged the driver to speed up to get away from immigration officials. The driver was sentenced to 15 years to life in prison last month.

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Over the last three months a Live Oak, Florida, inspection stations set up to check agriculture products coming in and out of the state for pests and disease are proving to be valuable in other ways. Inspectors have found undocumented immigrants as well as millions of dollars in cocaine and marijuana, 60 widescreen TVs, $157,000 in stolen computer parts and $500,00 of stolen medicine.

Live Oak finds so many illegal items because it is the first station on Interstate 10 for trucks coming in from the west. Since September 11, eight dog teams, a new training officer and four gamma ray trucks that allow inspectors to look through the sides of other vehicles have been added to the inspection station.

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In accordance with the United Nations commemorating the signing of the Universal Declaration of Human Rights in 1958, the US Immigration and Customs Enforcement (ICE) is strengthening its commitment to human rights protection. ICE is announcing this week that it is fortifying its dedication to America's fundamental principles of freedom, equality and opportunity. ICE has authority under the Immigration and Nationality Act to determine who is admissible to the United States and who can receive status to remain in the country. Currently, ICE has more than 200 open cases against potential human rights violators residing in the United States.

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Two Mexican nationals who were registered sex offenders were deported to Mexico last week. Alfonzo Snell Rodriguez and Rodolfo Olague Armendariz were convicted of aggravated sexual assault of a child in the 1990s. ICE agents in El Paso tracked them down last week.

Both men were legal permanent residents of the United States, but since they were not US Citizens, they can be deported and barred from the United States after they serve their time. The two were allowed to stay in El Paso while fighting their deportation with the Board of Immigration Appeals, but they failed to turn themselves in to the deportation processing center when their appeal was denied.

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Immigration officials allowed four Ecuadorians to be brought into the United States as part of a rare sting operation to test whether the owner of five travel/shipping stores was willing to open a new alien smuggling route. Storeowner Wilson Marcelo Lopez along with three others allegedly involved in the smuggling were arrested last week on charges of illegal smuggling and held without bail.

Immigration and Customs Enforcement, based on information originally provided by the Suffolk County district attorney's office, ran the sting according to federal court documents. The four people who were smuggled in from Ecuador had been monitored while they were in the United States and were in the process of being arrested. The smuggled Ecuadorians will be returned to their native country.

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5. News From The Courts

Mengesha v. Ashcroft
US Court of Appeals for the Ninth Circuit
2003 US App. LEXIS 24923

Petitioners Afework Mengesha and Abebech Sisay petitioned and were granted review of a Board of Immigration Appeals order denying their motion to reconsider for abuse of discretion.

The Ninth Circuit Court of Appeals held that aliens in deportation hearings are entitled to the Fifth Amendment right to due process. The Fifth Amendment requires, among other rights, the right that notice of deportation proceedings be reasonably calculated to reach the alien. The government in this case, therefore, had the duty to provide notice to the alien's last known address. Once the plaintiff in a case provides such notice, there is a rebuttable presumption that the notice reached the alien. The court held in Salta v. INS that the presumption may be rebutted "where a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing," then the petitioner's affidavit stating that he did not receive notice.

The Ninth Circuit held that the petitioners had no motive to fail to appear or file a brief. In fact, their failure to do so resulted in their appeal being dismissed. As a result, the petition for review was granted, and the court reversed for an evidentiary hearing to resolve the issue of whether the petitioners received notice.

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Arizona v. Johnson
2003 US App. LEXIS 25298
No. 02-10285
9th Circuit Court of Appeals

The United States Court of Appeals for the Ninth Circuit upheld the convictions of a US Border Patrol Agent charged with kidnapping and sexual assault of an illegal immigrant who was taken into custody after crossing the US-Mexico border.

After picking up a group of individuals who crossed the US-Mexico border illegally, the defendant instructed one female from El Salvador to get into his patrol car. Johnson failed to announce that he was a male agent transporting a female alien, as was the necessary procedure. The female remained the car, eventually being driven to an isolated spot in the desert. Conflicting accounts are offered of the next encounter. The female claimed that the defendant forced her to perform oral sex. The defendant claimed that the actions were consensual. Following the encounter,

instead of driving the female back to the station where the defendant was assigned, he drove her close to the border crossing and told her which way she should go to cross the border. A Mexican border official contacted the US Border Patrol, who determined from her statements and the testimony of other agents who were at the site when she was initially picked up that the defendant had been in contact with her. When questioned, the defendant changed his story many times, only acknowledging "consensual" sexual relations when told that physical evidence of the encounter existed.

The defendant was charged with sexual assault and kidnapping. He was convicted of both counts after a five-day jury trial and sentenced to concurrent prison terms of seven years for sexual assault and five years for kidnapping. The Court of Appeals affirmed on all counts.

Among the issues upheld on appeal were that the district court (1) did not abuse its discretion in answering a question from the jury during its deliberations; (2) did not abuse its discretion in admitting testimony of prior consistent statements under Federal Rule of Evidence 801(d)(1)(B); (3) properly rejected a Sixth Amendment claim that the government had acted in bad faith in deporting aliens who might have been material witnesses; and (4) properly refused to dismiss the kidnapping charge as unsupported by the evidence.

On Issue 3, the defendant must present evidence to show (1) that the government departed from its usual procedures, or (2) that it purposely deported the witnesses to gain an unfair advantage at trial. However, the Court held that this claim was not proven since the female's companions were returned to Mexico before anyone in the government was aware of the sexual encounter between the defendant and the female.

On Issue 4, the Court determined that while the defendant had legal authority to detain the female when she was first apprehended, he had no legal authority to continue to confine her in the back of his patrol car, to drive her to a remote spot in the desert, to handcuff her while she performed oral sex, and then to take her to the Naco border crossing roughly twenty-five miles west of his ordinary duty station.

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6. Government Processing Times

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

Texas (12/1-15/2003): http://www.visalaw.com/texas.html

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7. News Bytes

On Wednesday, December 17, 2003, the US Citizenship and Immigration Services naturalized the oldest immigrant to become a naturalized US citizen on record. Shlema Khaimovich Livshits, a 104-year-old Russian immigrant, came to the US as a refugee based on a fear of persecution in Czarist Russia as a result of his Jewish ancestry.

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The National Commission on Terrorist Attacks Upon the United States recently had their fifth public hearing. Thomas Kean chaired the third panel, and panel speakers consisted of Professor Jan Ting, Professor Khaled Medhat Abou El Fadl, and Professor David Martin. The panel professors discussed their papers individually and then engaged in a dialogue with members of the panel.

The issues raised included border controls, enforcement of the law against the employment of illegal aliens, detention and the Padilla case, the impact of the war against terrorism on the American Muslim/Arab community and the American Jewish community, Muslim profiling in immigration and granting visas, and the enforcement of immigration laws.

The full text of the hearing can be found at
http://www.9-11commission.gov/hearings/hearing6.htm

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Leonel Salazar, formerly a clerical worker at USCIS California Service Center in Laguna Niguel, California, is on trial for shredding thousands of documents pertaining to active immigration and naturalization applications. The shredded documents included marriage certificates, checks, money orders, immigration applications and passports issued by other nations.

The trial is to determine whether Salazar intentionally destroyed the documents to eliminate an overflowing backlog. Salazar's attorney claims that Salazar merely acted at the orders of a supervisor. The trial of the supervisor, Dawn Randall, is expected to begin in March.

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Beginning in January, driver's license applicants in Virginia will be required to prove that they are in the United States legally. The new "legal presence" requirement has cost Virginia $2 million to hire more personnel, train staff to recognize immigration documents and educate the public about the change.

Virginia's Department of Motor Vehicles agents will be required to inspect thousands of immigration documents in order to verify the applicant's legal status. The DMV is already warning of long delays for renewals and encouraging applicants to use the DMV's web site or the phone if possible.

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The director of Field Operations at USCIS has stated that as of December 4, 2003, for employment authorization purposes, asylees may rely on I-94s as an alternative to the renewable, fee-based EAD. An asylee may go to a local CIS office to receive an I-94 endorsed with evidence of asylum status for free.

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Last week a new feature was added to InfoPass, an Internet-based system that allows people to set up appointments at Florida's immigration offices online. People

are now able to cancel and reschedule appointments as well as provide more detail about what help they are seeking.

InfoPass is available only for appointments at immigration offices in Florida. Before the additions, about 25 percent of the people who make InfoPass appointments for the Miami office did not appears and had no way of telling immigration officials of their cancellation.

In addition to the online upgrades, immigration officials have added a walk-up window for people to pick up forms at the immigration building.

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This year marks the first graduation of students of Florida International University's Foreign Physicians-to-Nursing program, the only one of its kind in which foreign-born physicians are educated about United States medical practices. The program was launched two years ago, and students can waive certain basic courses in the bachelor of sciences in nursing curriculum and test out of others. Hospital Corporation of America, which owns hospitals nationwide, provides $600,000 for the program, which gets no public money.

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The wife and son of a US soldier about to be deployed will not be deported to Mexico in his absence, thanks to Senator Dick Durbin (D-IL). His office worked with the US Citizenship and Immigration Services to resolve a problem that was holding up her application for permanent residency.

Army Reserve Spec. Jorge Monarrez and his wife incorrectly signed the forms for the 245i program in April 2001. Although they initially met the deadline, by the time the corrected application was received on July 7, 2001, it had apparently missed the April 30 cut off date. Monarrez and his wife were notified last month that immigration authorities would recognize the original filing date and allow his wife to be considered under the 245i program.

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8. International Roundup

The Belgian Senate has voted to give regional-level voting rights to non-European immigrants. The bill passed with a vote of 41 to 29. The bill allows non-European immigrants in Belgium to register in communal elections if they have lived in Belgium for at least five consecutive years.

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In July of this year, British Home Secretary David Blunkett announced new rules for student visas. Foreign students who returned to schools in September had to complete new applications to extend their visas and send their passports to offices throughout Britain for processing. The students were promised that 70% of the applications would be processed within three weeks and all applications would be processed within thirteen weeks.

However, delays in processing and the misplacement of several passports by the British Home Office may leave foreign students at British boarding schools trapped in Great Britain for Christmas.

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A new immigration law in Spain will make it easier to deport illegal immigrants. The new law, which came into effect this month, will also require anyone entering Spain from a non-European Union country, especially Morocco, to apply for a visa before they arrive.

More than 100 illegal immigrants have been killed in 2003 trying to reach Spanish shores and according to official figures, between January and November, almost 18,000 illegal immigrants were detained before reaching Spanish land. Many of these illegal immigrants come from Morocco.

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Justice Ministry officials in Japan have announced that the government will tighten visa requirements for foreign students for the next academic year due to the number of crimes allegedly committed by students who overstayed their visas. The new requirements will apply to universities and Japanese language schools, where it has been discovered that many students have overstayed their visas, as well as to prospective students from countries with a record of overstaying problems, particularly China.

The new measures will also assess the credibility of language proficiency certificates submitted to Japanese schools by the student's home institutions, and may blacklist those schools that issue certificates to students who lack the proper Japanese language skills. Officials say that these steps are aimed at ensuring that the students have sufficient funds to live in Japan, and that the primary purpose of their stay is to study.

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9. Legislative Update

The following bills were recently introduced:

S.1985: A Private Bill for the relief of Benjamin Cabrera-Gomez and Londy Patricia.
Sponsor: Sen Feinstein, Dianne [CA] (introduced 12/9/2003)
Committees: Senate Judiciary
Latest Major Action: (12/9/2003) Referred to Senate committee.
Status: Read twice and referred to the 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.

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10. Guest Column - Choice of Entity Considerations for the Immigrant Entrepreneur, By Steven Weiser

Steven Weiser is a tax lawyer with a practice focusing on international tax matters. His contact information and information on his practice can be found on his web site at http://www.lw-law.com/.

Very often we field questions from aspiring entrepreneurs who immigrate to the United States seeking new business opportunities. Establishing a US entity or permanent establishment is not always the best and immediate answer for entrepreneurs; especially where business risk can be minimized through other business arrangements such as distributorship agreements with US-based representatives for foreign manufacturers. However, where a formal US presence is necessary the decision concerning the type of business entity through which to conduct business can often be complex and confusing.

Generally, the choice of business entity is often dictated by two primary concerns: (1) limitations on the business owner's personal liability for debts and obligations of this business, and (2) tax considerations. When working with immigrant entrepreneurs, residency status can also become a significant factor.

The purpose of this article is to provide a brief overview of the most common types of US legal entities used to conduct business. It is not an exhaustive review of the law or issues for consideration in making the determination of what type of entity is appropriate for you.

Historically the principal forms of business entities consisted of (1) sole proprietorships, (2) partnerships, and (3) corporations. However, in recent years this list has expanded to include, among other things, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and S-corporations. The need for professional assistance in selecting the correct type of entity has become more necessary than ever.

Sole Proprietorships

The sole proprietorship is perhaps the most basic form of doing business in the US. A single individual without the creation of a separate legal entity operates the proprietorship. A sole proprietorship ordinarily operates under a business name, but for legal and tax purposes is treated as if the individual owner is conducting business herself. The individual owner is liable for all debts and obligations of the business and no protection is provided for the business owner's personal assets.

For tax purposes, the business owner is treated as if directly engaged in the business activity since a separate entity has not been formed. A separate tax return is never needed and instead, the business owner reflects all results of business operations on her own individual tax return.

A sole proprietorship is the simplest business entity to form, operate and dissolve, but is also the riskiest entity to operate due to the owner's unlimited personal liability for the debts and obligations of the business. With the availability of S-corporations and limited liability companies (both discussed below) for single person owned businesses, no one should ever assume the risk of unlimited liability by operating as a sole proprietorship.

General Partnerships

A general partnership is like a sole proprietorship in many respects, the main difference being that it has multiple owners. Some tend to think of a general partnership as a collection of sole proprietors.

A general partnership is often operated in accordance with a written partnership agreement. A partnership agreement generally outlines the terms for the sharing of profits and losses among partners, each partner's ownership interest, management and dissolution of the partnership, the ability to incur debt or other liabilities in the name of the partnership, and the transfer of partnership interests. To the extent these matters are not addressed in a partnership agreement, state laws tend to dictate how these matters are resolved.

Like a sole proprietorship, the general partnership comes with substantial risks. Most notably among those risks, are a partner's unlimited liability for debts and obligations of the partnership, including those that arise on account of actions taken by another partner. Sophisticated business owners may hold their interests in a general partnership through entities that provide some form of liability protection to shield them from risk.

General partnerships are nearly as easy to create and dissolve as sole proprietorships, save for the creation of a partnership agreement, if any. Generally, there is no need to file a document with a state government to create a general partnership. For federal income tax purposes a partnership is recognized as a separate entity, and must file an annual information return with the Internal Revenue Service (IRS), though the partnership itself pays no tax. Profits and losses of the partnership "flow-through" to the partners who pay income taxes on their share of profits or deduct their share of losses in arriving at their individual taxable incomes. However, where a partner is a non-resident alien the partnership is generally responsible for collecting and remitting to the Internal Revenue Service (IRS) a withholding tax charged against such partner's allocable share of partnership income.

<u>Limited Partnerships</u>

A limited partnership is a partnership of one or more general partners and one or more limited partners. Like partners in a general partnership, the general partner in a limited partnership has unlimited liability for the debts and obligations of the partnership. General partners are in charge of the management and operation of the partnership. Limited partners, on the other hand, are viewed as passive investors in the enterprise and are generally prohibited from managing the partnership's business. In exchange, the limited partner is not liable for the debts and obligations of the partnership and may lose no more than his investment in the enterprise (provided the limited partner does not participate in the management of the enterprise in his capacity as a limited partner).

A limited partnership is a creature of state law. Unlike the sole proprietorship and general partnership, a limited partnership must file a certificate of limited partnership or similar document with the appropriate state agency (often the Secretary of State). If the entity fails to file the certificate of limited partnership it will be treated as a general partnership instead. It is recommended, but never required, that the partners enter into a limited partnership agreement that outlines the terms for the sharing of profits and losses among partners, each partner's ownership interest,

management and dissolution of the partnership, the ability to incur debt or other liabilities in the name of the partnership, and the transfer of partnership interests.

Limited partnerships are extremely flexible in terms of structure. Often, the general partner is given complete control over almost all operational aspects of the partnership while holding a minimal ownership percentage as a general partner (e.g., a 1% general partner interest). This structure is ideal for a business owner who wants to control the operational aspects of a business in which he or she may have outside investors, even though the business owner has little capital at risk. It is also possible for a partner to own a minimal interest as a general partner *and* a greater interest as a limited partner (e.g., a 1% general partner interest <u>and</u> a 10% limited partner interest). This is ideal where the partner wishes to control the entity, will provide some capital to the partnership, but has other investors that will provide the bulk of capital. To limit the general partner's liability, some form of limited liability entity is often interposed to provide some form of personal liability protection.

A limited partnership is also an ideal entity through which real estate is owned (but be aware of the Foreign Investment in Real Property Tax Act, reviewed in the April 14, 2003 issue of *Siskind's Immigration Bulletin*). Appreciating real property can easily be transferred to, and distributed from, a partnership without creating a taxable event, whereas it is difficult to do the same with a corporation or S corporation.

Limited partnerships are taxed in the same manner as general partnerships. Items of income, gain, loss and deduction flow through to the partners without the imposition of income taxes at the entity level. Like the general partnership, the limited partnership must file an annual information return with the IRS, and must withhold and remit taxes with respect to non-resident alien partners.

<u>Limited Liability Partnerships and Limited Liability Limited Partnerships</u>

Several states, like Colorado, have two other forms of partnerships known as limited liability partnerships (LLPs) and limited liability limited partnerships (LLLPs). Both are creatures of state law. General partnerships and LLPs are nearly identical. An LLP is simply a general partnership that has filed a certificate of registration (or similar document) with the appropriate state agency. LLPs enjoy the advantage of shielding their partners from debts and obligations arising from the acts of other partners in the course of partnership business.

A LLLP is similarly formed when a limited partnership files a certificate or registration with the appropriate state agency. LLLP status insures that a general partner is protected from debts and obligations arising on account of the actions of any other partner.

When operating in a state that recognizes LLPs and LLLPs, there should be no reason to ever form a general partnership or limited partnership. Business owners wishing to form partnerships in these states should always take advantage of the liability protection afforded by filing a certificate or registration. However, LLP and LLLP partners should beware when conducting business in states that do not recognize LLPs and LLLPs. For example, a Colorado LLP doing business in a state that does not recognize LLPs will generally be treated as a general partnership in the other state, exposing all partners to unlimited liability for partnership debts and obligations.

Corporations

A corporation is another creature of state statute. A corporation must be formed in accordance with state law and the requisite documents (generally the articles of incorporation) must be filed with the appropriate state agency. A corporation is a separate legal entity. In general, the owners of a corporation (known as shareholders or stockholders) are not liable for the debts and obligations of the corporation. Shareholders may lose nothing more than their investment in the corporation. However, in certain circumstances, US courts have disregarded the corporate form and held shareholders liable for certain acts or losses of the corporation. This is known as "piercing the corporate veil." To prevent this from occurring, the corporation should not intermingle its operations, property and records with its shareholders, should observe corporate formalities, be adequately capitalized, and should not hold itself out as the "alter-ego" of its shareholders.

State corporate laws are generally well developed and provide a framework for forming and operating a corporation. These laws often require the appointment (by shareholders) of a board of directors and certain officers responsible for the day-to-day operation of the corporation. Annual shareholder meetings are another example of corporate formalities imposed by state laws.

As stated above, a corporation is a separate legal entity. This is particularly true with regard to the tax laws where corporations are viewed as taxpaying entities. A corporate income tax is imposed upon the earnings of a corporation. Additionally, when corporate earnings are distributed to shareholders in the form of dividends, a separate shareholder level income tax is imposed. The concept of separate corporate and shareholder level income taxes has come to be known as the "double taxation" of corporate earnings. The double taxation of corporate earnings is historically a primary reason why business owners often choose to operate through a "flow-through" entity (e.g., sole proprietorships, partnerships, and limited liability companies). However, the Jobs and Growth Tax Relief Reconciliation Act of 2003 reduced the tax generally imposed on dividends received from a corporation to 15-percent, thus mitigating the harsh tax consequences associated with conducting business through a corporation.

S Corporations

The S corporation is a creature of federal law. Congress enacted the S corporation provisions in response to the concerns of small business owners who wanted the liability protection formerly available only to ordinary corporations, but were severely hurt by the double taxation or corporate earnings.

An S corporation is a corporation formed under state law, for which the shareholders have made a federal tax election to be taxed as an S corporation. As a result, an S corporation is taxed in much the same way as a partnership (no double taxation) and is still entitled to liability protection granted to shareholders of a corporation under state law. An S corporation is operated in the same manner as an ordinary corporation. Today, very few closely held businesses operate as ordinary corporations because of the double taxation of corporate earnings, and instead choose to operate as S corporations.

In order to be eligible to make an S corporation election, the corporation may have no more than 75 shareholders. Additionally, S corporations may issue only one class

of stock (although flexibility is available with regard to differences in voting rights), and *shareholders are limited to US citizens and resident aliens* (see the February 14, 2003 edition of *Siskind's Immigration Bulletin* for a review of the definition of "resident alien"), certain trusts and other S corporations that own 100% of the subsidiary S corporation. Changes in ownership structure can result in the loss of S corporation status (for example, when a resident alien shareholder transfers stock to a nonresident alien shareholder).

Limited Liability Companies

Limited liability companies (LLCs) are creatures of state law that have been gaining popularity and familiarity with people in recent years. LLCs were designed to combine the best of the corporate, partnership and sole proprietorship worlds. The LLC is a single entity of which all owners (known as "members") have liability protection from the debts and obligations of the LLC, much like the protection afforded to shareholders in a corporation. Earnings of an LLC flow through to its members without the imposition of an entity level income tax much like a partnership (two or more members) or sole proprietorship (one member). However, members of the LLC can elect to have the LLC taxed as a corporation (as can sole proprietors or partners in a partnership).

To create an LLC, articles of organization (or a similar document) must be filed with the appropriate state agency. It is recommended, but not necessary, to also execute an operating agreement that governs the operation of the LLC and the rights of its members, much like a partnership agreement does for a partnership. Members in an LLC may choose to operate the entity themselves, or they may choose to appoint a manager to operate the business for them.

LLCs that have two or more members must file annual partnership information returns with the IRS (unless the members elect to have the LLC taxed as a corporation). An LLC with a single member is taxed as a sole proprietorship (unless the member elects to have the LLC taxed as a corporation).

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11. Courts Decide Terrorist Suspects Have Right to Court Hearings

On December 19th, two federal appellate courts ruled in two separate cases that terrorist suspects are entitled to full court hearings and that the government lacks the authority to indefinitely detain prisoners without access to lawyers or to the evidence against them. The ultimate decision regarding prisoners in the war on terror will be made by the Supreme Court.

The Ninth Circuit Court of Appeals, the most liberal appellate court, decided that a detainee at the Guantanamo Bay prison, Salim Gherebi, a Libyan, should be granted a court hearing and be represented by an attorney. The 2-1 decision has given way to the anticipation that other prisoners at Guantanamo will be given "habeas corpus" hearings in a US Court.

However, some legal observers say that this case will become insignificant when it is heard by the US Supreme Court in addition to similar pending cases.

The decision, written by Judge Stephen Reinhardt, stated that the government should not have "the unchecked authority to imprison indefinitely any person, foreign citizens included...without permitting such prisoners recourse of any kind to any judicial forum."

In November, the Supreme Court agreed to hear another pending case. Prior to this decision, previous federal court decisions regarding the Guantanamo prisoners stated that the prisoners had no right to habeas corpus hearings.

In a separate 2-1 decision made by the Second Circuit Court in New York, the court ruled that President Bush does not have the authority to indefinitely detain a United States citizen arrested in the US on suspicion of terrorism by declaring him "an enemy combatant." Jose Padilla has been identified as an al-Qaeda operative who entered the US to set off a "dirty bomb."

The Court declared that while Congress may be able to authorize the detention of a US citizen, "the president, acting alone, possesses no inherent constitutional authority to detain American citizens seized within the United States, away from the zone of combat, as enemy combatants."

In addition to hearing the Guantanamo cases, the Supreme Court is expected to rule on the issues raised in the case of Jose Padilla, the American declared an enemy combatant. The court is also expected to announce next week whether it will hear a related case involving Yaser Esam Hamdi, who has been held alongside Mr. Padilla in the naval brig in Charleston, South Carolina. Mr. Hamdi, who is believed to be a United States citizen as well as a Saudi, was arrested in Afghanistan and is being held as an enemy combatant, an action that was upheld by an appeals court based in Richmond, Virginia.

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12. H-1B Cap May Be Reached Earlier Than Anticipated

For Fiscal Year 2004, the H-1B cap is limited to 65,000, down from 195,000 visas allotted for the previous fiscal year. Unofficial reports from USCIS indicate that this cap may end earlier than expected because H-1B numbers are being used up quickly. It is now anticipated that USCIS may have enough approved and pending H-1B cases to meet the cap for 2004 by January or even before the end of this month.

Once USCIS believes it has enough cases to reach the limit that are either approved or pending, it will publish a notice in the Federal Register announcing that new cases that are subject to the H-1B cap will not be accepted for the 2004 fiscal year. It is also assumed that Premium Processing for H-1B cases subject to the cap will be suspended before the end of this month or early in January.

Cases that have been received but not adjudicated on the date published in the Federal Register Notice will continue to be adjudicated until the cap is reached. Once the cap is actually reached, another notice will be published in the Federal Register announcing that the cap was met and that any unadjudicated petitions will be processed at the beginning of Fiscal Year 2005, which begins on October 1, 2004.

The limit on H-1Bs is expected to be reached so early due to the reduction in visa numbers, an increase in H-1B usage, a backlog of H-1B cases at the beginning of the fiscal year, many premium-processing cases and a reduction in numbers because of the Singapore and Chile Free Trade Agreements.

There are H-1B cases that are not subject to the cap. Only those petitions regarding what USCIS considers to be "new employment" count against the cap. These cases are those filed on behalf of foreign nationals who are not currently in H-1B status. Extension of status cases, even if the foreign national changed employers, do not count against the cap. Also, a case that has been counted against the cap for the previous six years does not count against the cap limit, unless the applicant would be eligible for a full six years of authorized admission at the time the petition is filed.

Other cap exemptions include individuals who are employed at higher educational institutions and individuals employed by non-profit research organizations or government research organizations due to the American Competitiveness in the Twenty-First Century Act (AC-21), enacted in 2000. Also exempted from the cap are J-1 nonimmigrants changing to H-1B status who received waivers through the Conrad State 30 Program.

AILA-USCIS Liaison Chair Bob Deasy contacted the Deputy Director, Citizenship and Immigration Services, William R. Yates, for information on the H-1B cap. Mr. Yates responded that USCIS is

> "not near the cap at this time...[and] will release information at the end of January regarding where we stand and at that time will decide whether we need to notify customers of a projected 'cap date.' Of course it is theoretically possible that we could reach the cap by the end of the calendar year but we would have to receive record levels of filings... I still believe that we will hit the cap this spring, but I won't be more specific until I see the numbers in January."

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13. Republicans Divided Over Immigration Reform

Comments by Homeland Security Secretary Tom Ridge refueled the immigration debate among Republicans this week. Despite the introduction of several bills this summer, the debate has not been prominent since September 11, 2001.

Ridge said that the government should try to give the millions of illegal immigrants currently in the country "some kind of legal status." This comment has angered many of the conservatives in the party, with Colorado Representative Tom Tancredo, one of the most-outspoken proponents of tougher immigration law, saying that Ridge was "way out of line" with his comments.

The Bush administration attempted to quiet the clamor by saying that the matter is under review. The issue is expected to play a key role in the upcoming presidential election, with Bush wanting to earn the growing immigrant vote, while holding onto the social conservatives who want more stringent immigration reform.

Several bills have been introduced in Congress in recent months relating to immigration reform, with Democrats and Republicans sometimes co-sponsoring measures that would deal with the millions of undocumented immigrants currently in the US. Also, a group of Congressman are pursuing a bill that would make state and local police departments responsible for pursing illegal immigration. Called the CLEAR Act (Clear Law Enforcement for Criminal Alien Removal), the measure is cosponsored by 112 members of the House, 105 of them Republicans. CLEAR is opposed by many local governments, including New York City.

A bill supported by the White House that would legalize illegal immigrants who can prove they have worked in agriculture for 100 days in the last 18 months, has support from 81 House members and 50 senators. Lobbyists and farmworker advocates are pressing for a vote on the bill before the election campaigns begin.

Democratic Presidential candidate Howard Dean has announced that undocumented workers should be able to become citizens, voicing his support for earned legalization. He also expressed his doubts about a guest worker bill sponsored by Arizona Republicans Senator John McCain and Representatives Jim Kolbe and Jeff Flake.

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14. Report on the Enhanced Border Security and Visa Entry Reform Act Released

The first report to systematically examine the implementation of the Enhanced Border Security and Visa Entry Reform Act of 2002 was published this week. The report, which was published by the Center for Immigration Studies ("CIS") and NumbersUSA Education and Research Foundation, states that the Administration has missed a majority of the deadlines set by Congress in the 2002 visa-tracking law. CIS and NumbersUSA are both organizations that actively against immigration to the US.

According to the report, of the 22 mandated deadlines that have already passed, more than half (13) were missed. Four of the required forms from the 13 missed deadlines were eventually implemented, while the other nine still have not been implemented.

The Administration's failure to report any progress on the development of an integrated biometric-based database, or Chimera, was cited as the most important missed deadline. This database would give the State Department and the Department of Homeland Security real-time access to law enforcement, immigration, and intelligence information on every alien.

Another problem arises with the government's failure to check the names of all aliens from "visa waiver" countries against terrorist watch lists at ports of entry. This system was supposed to be implemented with the enactment of the visa tracking law due to its importance to national security since US consulates do not vet visa waiver aliens prior to arrival.

In addition, most ports of entry along the US-Mexico border are still awaiting installation of machines that can read and compare biometric information on Border Crossing Cards. This delay greatly increases the chance of fraudulent use of the cards.

There have been significant provisions that have been successfully implemented. Among those are:

- Creation of an interim data-sharing system between government agencies;
- Development of a biometric technology standard to verify the identity of noncitizens;
- Establishment of terrorist lookout committees in US missions abroad;
- Advance electronic submission of passenger manifests by all commercial airlines and vessels;
- Implementation of the foreign student tracking system (SEVIS); and
- Submission of an annual report on alien absconders who fail to show up for removal following a final order of deportation.

The deadlines missed following the implementation of the Act are blamed on limited government funds for a massive reorganization project. The Act, which was signed into law in May 2002, was part of a response to the Sept. 11 attacks, along with the USA Patriot Act.

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15. Proposed Bill Requires Hospitals to Report Illegal Aliens

A proposal will be introduced in Congress next month that will force hospitals to report illegal immigrants who come to the emergency room to USCIS.

Republican Representative Dana Rohrabacher will introduce this plan in response to the new Medicare law that is designating hospitals throughout the nation an estimated $1 billion over 10 years to treat undocumented aliens. It is the opinion of Rohrabacher that hospitals should not get taxpayer money for treating illegal immigrants unless they are willing to turn in undocumented patients to the INS.

According to a 1986 federal law called the Emergency Medical Treatment and Active Labor Act, hospitals in the United States that offer emergency care must treat all patients who walk into the emergency room regardless of their economic or immigration status. Under Rohrabacher's proposal, hospitals would continue to be required to treat undocumented patients, but the hospitals would be required to turn them over to immigration officials within two hours of providing treatment.

Because of a deal Rohrabacher made with leaders in November during a debate over a Republican-backed Medicare bill, it is likely that his bill will get to the House floor for a vote. Rohrabacher's vote was needed, as he often influences other conservative congressmen. It was decided that Rohrabacher would support the Medicare bill and House leaders would allow him to bring his INS-reporting bill to legislators for a vote in January.

Some of those who oppose Rohrabacher's bill have said the bill could trigger a public health crisis, especially in areas with large immigrant populations. They have said that scaring immigrants away from hospitals would eventually cost hospitals more money by forcing people to put off medical care until they are deathly ill.

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16. Ninth Circuit Rules Sikh Activists Will Not Be Deported

The Ninth Circuit Court of Appeals ruled that a Sikh lawyer-activist and his wife are eligible to avoid deportation. In reaching the decision, the panel determined that a militant action against a foreign government will not always be a threat to the security of the United States.

Harpal Singh Cheema claimed that Indian officials tortured him. He claims that they have beat him, broke his leg twice, stretched his body with a pulley, subjected him to electric shock and broke his muscles with a solid steam roller.

He and his wife, Rajwindur Kaur, are committed to the formation of an independent Khalistan, which is an area of northern India including the state of Punjab and, perhaps, some of Pakistan. This area would be designated for Sikhs. Cheema has raised money for families injured trying to cross into Pakistan and aided Sikh militants. Kaur claims to have only aided Sikh widows and orphans.

While the Immigration and Nationality Act offers asylum protection to individuals who may face fear of death or freedom upon return to their home country, the attorney general can also deport an individual if "there are reasonable grounds for regarding the alien as a danger to the security of the United States."

The Board of Immigration Appeals ruled that both Cheema and Kaur could be deported because by raising money for terrorist groups they necessarily harmed the lives of United States citizens and compromised the defense of the United States. However, the Ninth Circuit panel reversed, 2-1, saying that Cheema and Kaur do not pose a threat to US security.

The decision cited other situations where what one person considered a "terrorist" effort was actually an attempt to liberate an oppressed people. The opinion cited the Contras in Nicaragua and Nelson Mandela's encouragement of guerrilla tactics against the apartheid regime. The dissent viewed the opinion as making the United States a safe haven for individuals who want to cause international problems abroad.

Under the USA Patriot Act, a person supports terrorist activity if he or she intentionally gives money to an organization that the government considers to be a terrorist. Experts believe that the case may have the effect of narrowing that broad provision.

The case was remanded to the immigration judge to determine if Cheema and Kaur should be granted asylum.