

Siskind's Immigration Bulletin  
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Siskind Susser serves immigration clients throughout the world from its offices in the  
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1. Openers
2. The ABC's Of Immigration – Understanding Social Security Tax,  
Totalization Agreements and Your Benefits, by Steven Weiser
3. Ask Visalaw.com
4. Border News
5. News From The Courts
6. Government Processing Times
7. News Bytes
8. International Roundup
9. Legislative Update
10. DHS Announces Legal Immigration Figures For FY 2002
11. Guest Article: How To Win A Motion To Reopen, by Karen Weinstock
12. House Introduces Two L-1 Visa Bills
13. Temporary Protected Status for El Salvador Extended

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1. Openers

Dear Readers:

This week we are pleased to present the third in our series of ABCs articles on the  
interplay between the Social Security Administration and the immigration system.  
Our article this week covers tax issues and is guest written by our friend Steven

Weiser, tax lawyer extraordinaire. We're also happy to plug Steven as an excellent tax professional and well worth contacting if you are shopping for the services of a tax lawyer.

We also include an article describing the provisions of two new bills introduced in Congress concerning the hot topic of the moment - the L-1 visa. One, sponsored by Congressman Mica would seek to bar L-1s from working as contract employees. The other bill, introduced by Congressman DeLauro is much more extreme and would impose an annual limit of 35,000 on L-1 visas (about half the current number used) and impose most of the same labor condition requirements as the H-1B visa.

We also include all of our regular weekly features this week and cover the rest of the news.

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

Regards,

Greg Siskind

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2. The ABC's Of Immigration – Understanding Social Security Tax, Totalization Agreements and Your Benefits, 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/>.*

Upon their move to the U.S. many foreign nationals, whether immigrants or temporary residents, often ask whether they are responsible for paying social security taxes and/or whether they are eligible for U.S. social security benefits. Foreign nationals employed in the U.S., even on brief business trips, often find themselves paying or liable for social security taxes in the U.S. *and* their home country. Often, these individuals find that they fail to qualify for social security benefits in both the U.S. and home country because payments into the U.S. system do not qualify towards benefit eligibility in the home country, and vice versa.

To remedy some of these inequities, the Internal Revenue Code (the "Code") provides several exemptions for foreign nationals from social security taxes. If an exemption is unavailable the foreign national can look to one of several social security "totalization" agreements that the U.S. has entered into with other countries. Totalization agreements also address the often more important issue concerning benefit eligibility. Finally, many foreign nationals actually plan to pay the U.S. social security tax and avoid their home tax because U.S. tax rates tend to be lower than those of other countries, especially where payments into the U.S. system qualify for benefit eligibility in the home country.

## **Background**

Before we delve deeply into these topics let's step back and first try to gain an understanding of the U.S. social security tax structure and benefits. The social security tax is divided into two separate tax systems. The first system is covered under the Federal Insurance Contributions Act ("FICA" on your wage withholding statements) and requires equal contributions by the employer and employee. The second system applies only to self-employed individuals (for purposes of this article we'll focus only on the FICA system). FICA consists of two separate taxes: (i) the tax for old-age (retirement), survivors, and disability insurance ("OASDI"), and (ii) the tax for Medicare. The OASDI and Medicare taxes are imposed against both the employer and employee in amounts equal to 6.2% of the first \$87,000 of gross wages paid to the employee (OASDI), and 1.45% of total wages paid to the employee (the Medicare portion). The employee portion of the FICA tax is not deductible for U.S. income tax purposes.

Generally, an individual is not entitled to U.S. social security benefits unless she completes a minimum number of "quarters" of coverage. For 2003, a quarter of coverage is accumulated when wages subject to social security taxes equal or exceed \$890. A maximum of four quarters of coverage can be earned each year. Thus, an individual earning \$3,560 or more in 2003 earns the maximum four quarters of coverage (even if all wages are earned in one calendar quarter). Once an individual accumulates at least 40 quarters of coverage she is "fully" insured and entitled to a wide variety of benefits. Individuals covered for the equivalent of six out of the previous 13 quarters are treated as "currently" insured and eligible for a lesser level of benefits.

Even though benefits are payable to a person under the law, in certain instances the payment of those benefits may be reduced or even halted. The most common reason for the reduction or nonpayment of benefits occurs because the individual chooses to work beyond normal retirement age while receiving benefits. Also, an alien residing outside the U.S. for six months may have benefits halted until she returns to the U.S. for at least 30 consecutive days (or unless certain additional exceptions apply).

The social security tax is non-refundable. If a foreign national pays the tax, but is later ineligible for benefits, a refund is unavailable. Therefore, foreign nationals employed in the U.S. that do not expect to accumulate enough quarters of coverage to be eligible for U.S. benefits often want to avoid paying the social security tax in the first place. On the other hand, some foreign nationals that hope they or their descendants will be entitled to receive social security benefits may want to pay the social security tax. Finally, some foreign nationals actually desire to pay U.S. social security tax as a means of insuring their rights to similar social security benefits from their home countries, while also taking advantage of lower U.S. tax rates.

### **Who Must Pay?**

If a foreign national works as an employee in the U.S., she must pay social security taxes unless an exemption applies. This is true even in cases where the foreign national is working in the U.S. on a short business trip, has income exempt from U.S. *income* taxes, receives her salary in a foreign currency, in a foreign bank account, and from a foreign employer with no other business contacts within the U.S. The foreign employer should deduct these taxes from wages even if the foreign national does not expect to fully qualify for future benefits. However, in practice a foreign national generally pays no social security tax unless she wants to and the foreign employer generally withholds and remits no tax. This is because the Internal

Revenue Service (IRS) usually does not attempt to collect the tax unless federal income taxes are also due on the foreign national's wages.

Still a foreign national, particularly those working in the U.S. for an employer situated here should rely have some legal basis on which to claim relief from the tax. Many exemptions from the U.S. social security tax can be found in the Code, income tax treaties or social security "totalization" agreements.

For example, under the Code a broad exemption from the social security tax is applied to all F, J, M and Q visa holders, provided the "employment" giving rise to wages is performed by a nonresident alien (click [here](#) for a definition of "nonresident alien") to carry out the purpose for which the alien was admitted to the U.S.

A complete review of the available exemptions from the social security tax is beyond the scope of this article. However, IRS Publication 15, Circular E, Employer's Tax Guide, (available through the IRS website at [www.irs.gov](http://www.irs.gov)) has a summary in Section 15 concerning the Code's social security tax exemptions for various types of employment of citizens, resident aliens, and nonresident aliens. Portions of this summary are attached to this article.

If the Code provides no exemption from the social security tax for a foreign national an income tax treaty that the U.S. has concluded with another country may provide an exemption. However, it has been the U.S. Treasury Department's policy in recent years to exclude social security taxes from the list of taxes covered by income tax treaties (only the income tax treaties with South Korea and Canada, confer an explicit exemption from social security taxes).

If an explicit or implicit exemption from social security taxes is unavailable through an income tax treaty a foreign national can look to a social security "totalization" agreement.

### **Totalization Agreements**

A social security "totalization" agreement is similar to a tax treaty, and has the same force and effect as a tax treaty under U.S. law. A totalization agreement eliminates double taxation that may occur where earnings are subject to the social security taxes of multiple jurisdictions. A totalization agreement also provides benefit protections for workers dividing their careers between the U.S. and other countries. Employees working in the U.S. and abroad often find that they have not worked long enough in any jurisdiction to meet eligibility requirements. The totalization agreements allow such workers to qualify for benefits based on combined coverage credits from multiple countries.

The U.S. currently has totalization agreements in force with the following countries:

|           |                 |                |
|-----------|-----------------|----------------|
| Australia | Germany         | Portugal       |
| Austria   | Greece          | South Korea    |
| Belgium   | Ireland         | Spain          |
| Canada    | Italy           | Sweden         |
| Chile     | Luxembourg      | Switzerland    |
| Finland   | The Netherlands | United Kingdom |
| France    | Norway          |                |

A totalization agreement provides that an employee is subject to social security taxes only in the country where she works. For example, a citizen of Norway on temporary business in the U.S. is subject to U.S. social security taxes, not Norwegian social security-type taxes, on wages earned from U.S. employment. A “detached worker” exception to this rule provides that if the foreign national is “sent” to the host country (the U.S. in our example) by an employer in the home country, the foreign national is subject to tax only in the home country. The detached worker exception is not available if the foreign assignment is expected to last more than five years.

Often, a foreign national employed in a host country will neither qualify for host country social security benefits, nor home country benefits. However, totalization agreements allow such individuals to elect a “totalized” benefit from either country. In other words, payments made into the social security system of one country count as credits towards eligibility of the other country. For example, each year paid into the social security system of Canada counts as a year (four quarters) towards U.S. eligibility. Computing the amount of benefits is only slightly more complicated.

For example, if an individual accumulates six years of coverage under the U.S. social security system and ten years of coverage in another country’s system that requires 15 years of coverage for full benefit eligibility, both countries will treat the individual as if a total of 16 years had been completed under each system. However, the U.S. benefit would be 5/16 of the benefit computed on the basis of earnings in both countries during the 15-year period (and 10/16 in the other country).

When a foreign national transfers from his home country to the U.S. and wishes to remain subject to his home country social security tax under the terms of the totalization agreement, she must apply for a “coverage certificate” from the appropriate home country governmental authorities. The coverage certificate should *not* be given to the IRS or Social Security Administration. Instead, it should be furnished to the U.S. employer who must retain a copy of it. Often, a coverage certificate is obtained after U.S. employment has already begun. In almost all instances, the certificate is retroactively effective to the starting date of employment.

## **Summary**

Determining whether a foreign national should pay into the U.S. social security system should include giving consideration to current eligibility status under foreign or U.S. systems, level of earnings and expected benefit, length of stay in the U.S., and the effect of any totalization agreements. Because U.S. social security tax rates tend to be less than those of other countries it is not unusual for a foreign national to seek exemption from home country taxation and subject himself to the U.S. social security tax.

## **Social Security Taxation for Various Types of U.S. Compensation and Employment**

### **Compiled from portions of IRS Publication 15, Circular E, Employer’s Tax Guide**

Note: This summary does not take into account the provisions of any income tax treaties or totalization agreements.

| <b><i>Classes of Employment or Individuals</i></b>   | <b><i>Application of Social Security Tax</i></b>   |
|--|--|
|  |  |
| <b>Nonresident Aliens</b>  | ·Taxable on income attributable to services performed in the U.S., unless a specific exemption under the Code applies.   |
| <b>Resident Aliens</b><br>·Service performed in the U.S.<br><br>·Service performed outside the U.S.  | ·Same as a U.S. citizen<br><br>·Taxable if (1) working for an American employer, or (2) an American employer agrees to cover U.S. citizens and resident aliens employed by foreign affiliates. |
| <b>Deceased worker</b><br><br>·Wages paid to beneficiary or estate in the same calendar year as the worker's death<br><br>·Wages paid to beneficiary or estate after the calendar year of worker's death   | ·Taxable<br><br>·Exempt  |
| <b>Disable worker's wages</b> paid after the year in which the worker became entitled to disability insurance benefits under the Social Security Act.  | ·Exempt if the worker did not perform any services for the employer during the period in which the payment is made.  |
| <b>Employer business expense reimbursement:</b><br>·Accountable plan:<br>·Amounts do not exceed government specified per diems or standard mileage<br><br>·Amounts in excess of government specified per diems or standard mileage<br><br>·Nonaccountable plan | ·Exempt<br><br>·Taxable<br><br>·Taxable  |
| <b>Family employees:</b><br>·Child employed by parent (or partnership in which each partner is a parent of the child)<br><br>·Parent employed by child<br><br>·Spouse employed by spouse   | ·Exempt until age 18 (or 21 for domestic service)<br><br>·Taxable if in the course of the child's business<br><br>·Taxable if in the course of the spouse's business                           |
| <b>Foreign government employees and</b>  | ·Exempt  |

| <b>employees of international organizations</b>   |   |
|---|---|
| <b>Homeworkers:</b> <ul style="list-style-type: none"> <li>·Common law employees</li> <li>·Statutory employees</li> </ul>   | <ul style="list-style-type: none"> <li>·Taxable</li> <li>·Taxable</li> </ul>  |
| <b>Hospital employees:</b> <ul style="list-style-type: none"> <li>·Interns</li> <li>·Patients</li> </ul>  | <ul style="list-style-type: none"> <li>·Taxable</li> <li>·Taxable (except for state or local government hospitals)</li> </ul>   |
| <b>Household employees:</b> <ul style="list-style-type: none"> <li>·Domestic service in private homes</li> <li>·Domestic service in college clubs, fraternities and sororities</li> </ul>                           | <ul style="list-style-type: none"> <li>·Taxable if paid \$1,400 or more in cash in 2003. Exempt if employee is under 18 at any time of the calendar year and is not the principal occupation of employee.</li> <li>·Exempt if paid to regular student; also exempt if an income tax-exempt employer pays the employee less than \$100 in a year.</li> </ul> |
| <b>Insurance for employees:</b> <ul style="list-style-type: none"> <li>·Accident and health insurance premiums under a plan for employees and their dependents</li> <li>·Group-term life insurance costs</li> </ul> | <ul style="list-style-type: none"> <li>·Exempt</li> <li>·Exempt, except for cost of insurance that is includible in the employee's gross income. Special rules apply for former employees.</li> </ul>   |
| <b>Insurance agents or solicitors:</b> <ul style="list-style-type: none"> <li>·Full-time salesperson</li> <li>·Other salesperson</li> </ul>   | <ul style="list-style-type: none"> <li>·Taxable</li> <li>·Taxable only if a common law employee</li> </ul>  |

|   |  |
|---|--|
| <p><b>Newspaper carriers and vendors</b><br/>Newspaper carriers under age 18; newspaper and magazine vendors buying inventory at fixed prices and retaining receipts from sales to customers</p>  | <ul style="list-style-type: none"> <li>·Exempt</li> </ul>  |
| <p><b>Noncash payments:</b></p> <ul style="list-style-type: none"> <li>·For household work, agricultural labor, and services not in the course of the employer's trade or business</li> <li>·To retail commission salespersons ordinarily paid solely on a cash commission basis.</li> </ul>  | <ul style="list-style-type: none"> <li>·Exempt</li> <li>·Taxable</li> </ul>  |
| <p><b>Officer of an S corporation</b><br/>Distributions considered as wages to the extent amounts are reasonable compensation for services to the corporation</p>   | <ul style="list-style-type: none"> <li>·Taxable</li> </ul>   |
| <p><b>Partners</b><br/>Payments to members of a general partnership</p>   | <ul style="list-style-type: none"> <li>·Exempt</li> </ul>  |
| <p><b>Railroads</b><br/>Payments subject to the Railroad Retirement Act</p>   | <ul style="list-style-type: none"> <li>·Exempt</li> </ul>  |
| <p><b>Retirement and pension plans:</b></p> <ul style="list-style-type: none"> <li>·Employer contributions to qualified plans</li> <li>·Elective employee contributions and deferrals to a qualified cash of deferred compensation arrangement (e.g., 401(k))</li> <li>·Employer contributions to individual retirement accounts under simplified employee pension plans (SEP)</li> <li>·Employer contributions to 403(b) annuities</li> <li>·Employee salary reduction contributions to SIMPLE retirement accounts</li> <li>·Distributions from qualified retirement and pension plans and 403(b) annuities</li> </ul> | <ul style="list-style-type: none"> <li>·Exempt</li> <li>·Taxable</li> <li>·Exempt, except amounts contributed under salary reduction SEP agreement</li> <li>·Taxable, if paid through salary reduction agreement</li> <li>·Taxable</li> <li>·Exempt</li> </ul> |
| <p><b>Salespersons:</b><br/>·Common law employees</p>   | <ul style="list-style-type: none"> <li>·Taxable</li> </ul>   |

|  |   |
|--|---|
| <ul style="list-style-type: none"> <li>·Statutory employees</li> <li>·Statutory nonemployees</li> </ul>  | <ul style="list-style-type: none"> <li>·Taxable</li> <li>·Exempt</li> </ul>   |
| <b>Severance or dismissal pay</b>  | ·Taxable  |
| <b>Service not in the course of the employer's business</b> , other than a farm operated for profit or for household employment in private homes   | ·Taxable if employee receives \$100 or more in a calendar year  |
| <b>Sick pay</b>  | ·Exempt after the end of 6 calendar months after the calendar month services last performed.  |
| <p><b>Students, scholars, trainees, teachers, etc.</b></p> <ul style="list-style-type: none"> <li>·Student enrolled and regularly attending classes, performing services for: <ul style="list-style-type: none"> <li>·Private school, college or university</li> <li>·Auxiliary nonprofit organization operated for and controlled by school, college or university</li> <li>·Public school, college, or university</li> </ul> </li> <li>·Full-time student performing services for academic credit, combining instruction with work experience as an integral part of the program</li> <li>·Student nurse performing part-time services at nominal earnings at hospital as incidental part of training</li> <li>·Student employed by organized camps</li> <li>·Student, scholar, trainee, teacher, etc., as nonimmigrant alien holding F-1, J-1, M-1, or Q-1 visas</li> </ul> | <ul style="list-style-type: none"> <li>·Exempt</li> <li>·Generally, exempt</li> <li>·Generally, exempt</li> <li>·Taxable</li> <li>·Exempt</li> <li>·Taxable</li> <li>·Exempt if service is performed for purpose specified in section 101(a)(15)(F), (J), (M), or (Q) of Immigration and Nationality Act. However, taxes may apply if employee becomes a resident alien.</li> </ul> |

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### 3. Ask Visalaw.com

*If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto: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.*

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Q - What states constitute the new BCIS Missouri Service Center's jurisdiction?

A - It is a national service center. For the limited types of cases it handles, it services the entire country.

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Q - I am an international university student in the US. I read your article and am very impressed by the depth of matter that you have covered. However I have one question regarding your discussion on this point "Can a student get an additional year of practical training if the student enrolls in a new program at a higher educational level?" My question is: Can I get an additional year of practical training if I enroll in another masters program ?" I am currently pursuing my masters degree in Computer Science and planning to start another masters in Economic Development. so can I get an additional PT year.

A - You need to go for a higher level degree to get another year.

\*\*\*\*\*

Q - I heard there is going to be a change in the Green card processing from October onwards and its going to be a premium processing where we get the Labor cleared in 15 days.. is it true? If so will the currently waiting members can shift to that process?

A - You are thinking of the proposed PERM program. The Department of Labor is now estimating the program will go into force early next year. Under PERM, employers will file cases with the Labor Department and the DOL will randomly as well as by profile select cases for supervised recruiting while most cases (probably 6 out of 7) would get approved with no further action necessary. The PERM program's proposed regulation has been criticized by many for containing many provisions that have nothing to do with PERM's goals and which would make the overall process much tougher, particularly for small business owners. So its delay has been delayed as, presumably, the Labor Department is addressing the raised issues.

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Q - I had a question. I have an H1B visa and will be applying for my green card. My question is that if I were to get married (my spouse will have H4 visa) will he be able to pursue studies in the US under that status?

A - Yes, H-4s are permitted to study.

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Q - I know that i have to be in United States for 5 years to apply for citizenship. I have a Green Card already and I am planning a trip outside USA for 6 months. Is that time going to count against me and am I going to have to make up that time here in USA. Does it mean that I m going to have to stay here for 5 years and 6 months and then apply for citizenship? Thank you.

A - Aside from having to have a green card for five years, there are three residency requirements that must be met:

1. You need to reside for 90 days in the location where you are applying for citizenship
2. You need to have been physically present in the US for at least half of the five year required residency period; and
3. You must have resided continuously in the US. Any break of more than six months of continuously staying in the US will create a presumption that you have broken your residency.

So if you can avoid any trip of more than 180 days, that will help you avoid naturalization problems.

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#### 4. Border News

During the past weeks, twenty-five foreign-born convicted sex offenders (mainly from Mexico and Latin America) have been arrested in the Houston area. BCIS agents have been conducting background checks of registered sex offenders. The crimes of these offenders allow authorities to deport them without a hearing. Most were convicted of sex offenses against minors. Since 2001, agents have arrested 155 foreign-born sex offenders in a national effort to protect minors from sexual predators.

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In order to be more vigilant about alien criminal threats to the United States, The Bureau of Immigration and Customs Enforcement (ICE) has created a Top Ten Most Wanted list. This list is comprised of foreign nationals around the world who have been convicted of serious crimes committed in the United States. These aliens are deportable, but have managed to elude law enforcement officers.

As of June 2003, all ten of the Top Ten Most Wanted criminal aliens have been located. Nine of the criminal aliens have been arrested over the past month and the tenth has fled to Iran. Their crimes include attempted murder, aggravated assault, aggravated criminal sexual assault, manslaughter, rape, sexual abuse, receiving stolen property, and first degree murder. ICE prioritizes its Most Wanted fugitives based on the degree of threat they present to the public. The list can be viewed at the ICE website: <http://www.bice.immigration.gov>.

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Allegations have been made by Mexican parents that their son, Francisco Javier Platt Medina, was killed as a result of a beating given by the U.S. Border Patrol. Medina died on the night of July 6, one week after he was in the custody of the Border Patrol and returned to Mexico. An autopsy showed that he died of liver and kidney failure and his midsection was covered in bruises.

Medina climbed the border wall on the night of June 29. According to his parents, a Border Patrol agent confronted him, shot him with a pepperball gun, sprayed him with pepper spray and then beat and kicked him.

The Department of Homeland Security's Office of the Inspector General is investigating these allegations.

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In a four-day sweep that began on July 8, thirty foreigners under deportation orders because they have criminal records were arrested. The twenty-five men and five women were arrested in a roundup that was part of collaboration between the Department of Homeland Security and local police agencies. A total of 150 people have been arrested through the six roundups that have taken place in Florida.

None of the thirty arrested fugitives are believed to have terrorist links. Their convictions include cocaine smuggling, child neglect, statutory rape and many misdemeanor offenses.

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The Department of State (DOS) has lifted the restriction on the use of U.S. passports for travel to, in, or through Iraq, effective July 14. The DOS maintains that there is still a high security threat for U.S. citizens in Iraq and warns those Americans in Iraq that it has limited emergency services. For more information, visit the DOS's Bureau of Consular Affairs web site: <http://travel.state.gov>.

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There have been 93 deaths of undocumented immigrants in Arizona this year. Since July 11, agents have found seven dead bodies in the desert. The majority of deaths was attributed to the harsh terrain and extremely hot temperatures.

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## 5. News From The Courts

Eshghan Khodagolian v. John Ashcroft  
United States Court of Appeals for the Ninth Circuit

Eshghan Khodagolian, a native and citizen of Iran, petitioned the court for a review of a decision by the Board of Immigration Appeals (BIA), which affirmed a ruling by an immigration judge that he was subject to removal because he had abandoned his status as a lawful permanent resident (LPR). The Ninth Circuit ruled that as the government failed to show that Khodagolian gave up his LPR status, Khodagolian is not subject to removal.

Khodagolian received his LPR status on July 5, 1993, along with his wife and two children. When they first came to the U.S., Khodagolian was unsure of whether they would stay. Because of this, they brought little with them and did not sell all of their property in Iran.

Between July 1993 and September 1998, Khodagolian made several trips to Iran. In September 1993, Khodagolian left the U.S. for Iran for four months in order to sell some property and gather documents needed for the children's schools and other purposes in the U.S. In 1995, Khodagolian went to Iran for five to six months to care

for his dying mother and his recently orphaned nephews. In June 1997, Khodagolian went to Iran to sell the family's house. When he arrived in Iran, he was stopped by police and notified that he had to pay certain taxes before he would be allowed to leave. Khodagolian was stuck in Iran until April 27, 1998, which the immigration judge conceded. However, Khodagolian did not return to the U.S. in September 1998. He argued that he had been forced to borrow money in order to pay the taxes and stayed in Iran until he could repay the loan. When he attempted to reenter the U.S., INS authorities suspected that Khodagolian was ineligible as a "returning resident" because he did not return within the one-year period required to reenter the U.S. without a reentry permit.

In October 2002, an immigration judge found that Khodagolian had abandoned his LPR status and was subject to removal. Khodagolian's last trip to Iran was the main point in the argument that he abandoned his LPR status. Khodagolian appealed to the BIA, which affirmed the decision of the immigration judge.

While the immigration judge found that cumulatively, all three absences were sufficient to show abandonment, the Ninth Circuit, citing *Chavez-Ramirez*, 792 F. 2d at 936-37, concluded that Khodagolian's absences, "whether viewed cumulatively or individually...do not support a conclusion that he abandoned his permanent resident status in the United States." Khodagolian was present in the U.S. for a substantial amount of time between entry in 1993 and the removal proceedings. His absences did not demonstrate the intent or desire to give up his LPR status because he sold off assets and put his affairs in order while he was in Iran. Also, Khodagolian's wife and children remained in the U.S. for almost the entire time. In addition, the immigration judge conceded that Khodagolian was forced to remain in Iran involuntarily for half of his third trip.

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## 6. Government Processing Times

Please click on the links below to view new processing times charts:

Texas – <http://www.visalaw.com/texas.html>

Missouri – <http://www.visalaw.com/missouri.html>

Nebraska – <http://www.visalaw.com/nebraska.html>

Vermont – <http://www.visalaw.com/vermont.html>

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## 7. News Bytes

Three illegal immigrants were arrested last week after Chicago police discovered a fake-ID operation in their apartment in Cicero. Police believe that the immigrants received the IDs to duplicate from a janitor or former janitor at the Mexican consulate.

The three men from Mexico were charged with manufacturing identification cards and driver's licenses, and felony possession of fraudulent identification cards and driver's licenses.

Police found computer scanners, color printers, templates for more than a dozen different fake state Ids and 136 blank Social Security cards.

Manufacturing and possession of fraudulent identification cards is a felony. If convicted, the men could face up to three years in prison.

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Two changes in Immigration law are anticipated to affect the immigration of religious professionals and other religious workers.

First, if the September 30, 2003 bill passes, only ordained ministers may obtain permanent residence without obtaining Labor Certification. All other religious workers must first obtain Labor Certification.

Second, the BCIS recently decided to grant only petitions for a religious worker when the petitioner is a church. Religious workers petitioned for by religious relief organizations, mission organizations, interdenominational organizations, religious colleges and secondary schools are now being denied by the BSIC because they are not churches.

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Conservative Senator Orrin Hatch of Utah introduced and backed the "Equal Opportunity to Govern" amendment to the Senate last Thursday. This amendment could allow foreign-born citizens to become president or vice-president of the United States.

Currently, only native-born Americans can hold the country's two highest offices.

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The House Judiciary Committee is currently involved in drafting legislation for U.S. Free Trade Agreements with Chile and Singapore.

During hearings, the committee adopted an initiative that could split the H-1B visa category into the H-1B(I) and H-1B(II) categories. The H-1B(I) category would be similar to the current H-1B category.

The H-1B(II) category, on the other hand, would allocate 1,400 visas to Chile and 5,400 to Singapore taken away from the H-1B visa cap. Consequently, 6,800 visas would be taken away from the general cap of 195,000. This new visa category will be renewable annually, with attestations required each third year.

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Posts that have developed or anticipate developing waiting periods for NIV interviews should now give priority to students and exchange visitors in the professor, student, and research scholar categories this summer when scheduling interviews.

Any questions or comments about priority appointment systems may be forwarded to CA/VO/F/P.

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## 8. International Roundup

Taiwan's Ministry of Foreign Affairs was angered this week by China's decision to require foreign passport holders born in Taiwan or Hong Kong to put "China" as their birthplace when applying for Chinese visas.

Emotions ran high after a report by the Central News Agency (CNA) earlier in the week stated that China had already initiated the action. The report said China considers people who cite their birthplace as "Taipei, Taiwan, or Hong Kong" are implying that Taiwan and Hong Kong are sovereign states, which would violate its "one China" principle.

The Ministry called for Beijing to end this action because it might affect overseas Taiwanese traveling on foreign passports. The Ministry views the action as a way to try to downgrade the status of Taiwan to a province of China.

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Sean O'Muireagain, a Northern Ireland man, was allowed to return home to Belfast after being held in Israel for questioning about his alleged bomb making. While the journalist said he had never been in the IRA or part of the republican movement, he was arrested last Saturday by Israeli security forces reportedly acting on information from UK security services.

O'Muireagain, who went to the West Bank to promote a cultural exchange project, said he was strip searched in the street after Israeli police stopped him outside Ramallah. He was then handcuffed and taken to a concrete cell where police kept the light on 24 hours a day. The Editor of an Irish language newspaper underwent a lie detector test and was asked about his Palestinian links through the Ireland-Palestine Solidarity group. He believes that the interrogators gained personal information about him through UK intelligence services.

The security officials may have been trying to detain the other John Morgan, a name that O'Muireagain is often called.

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Liberian president Charles Taylor addressed thousands of Liberian refugees huddled last week in a rundown sports stadium to say that he would remain in office until international troops arrive. The indicted war criminal also told the crowd, many of whom are seeking shelter from the latest round of fighting, that he will no longer fight.

U.N. Secretary-General Kofi Annan said he expects Taylor to step down and accept asylum in Nigeria. He said that all parties have agreed that West Africa will send up to 1,500 troops to Liberia within two weeks. After their arrival, Taylor will leave and American and other reinforcements would join the West Africans, with a U.N. peacekeeping force taking over in the long term.

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Uganda will deport a South Africa man who stowed away on a chartered plane for reporters covering U.S. President George Bush's trip to Africa. Police will question him when he returns to South Africa to determine if he can be charged with any crimes. The man, Patrick Fello Litheko, claimed he was covering AIDS stories for an organization called the Gauteng Youth Development Project. He was detained after a White House aide notified Secret Service that he joined reporters traveling with Bush.

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## 9. Legislative Update

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

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## 10. DHS Announces Legal Immigration Figures For FY 2002

The Department of Homeland Security Department recently announced the legal immigration figures for the 2002 fiscal year.

The BCIS stated that fewer foreign immigrants came to the United States with visas issued abroad in 2002 than in 2001.

During the October 1, 2001 to September 30, 2002 fiscal year, a total of 1,063,732 people legally immigrated to the United States. Approximately 384,427 received immigrant visas from the Department of State abroad, and the remaining 679,305 received adjustment of status by the BCIS.

Sixty five percent of the one million immigrants settled into six states: California, New York, Florida, Texas, New Jersey, and Illinois.

Forty percent of the immigrants came from five countries: Mexico, India, The People's Republic of China, Philippines, and Vietnam.

The number of legal immigrants to the United States dropped in 2002, as the Department of State issued 26,632 fewer immigrant visas than in 2001. The number of immigrants who became permanent residents increased, however, by 26,046.

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## 11. Guest Article: How To Win A Motion To Reopen, By Karen Weinstock

*Karen Weinstock is a partner in Siskind Susser's Atlanta office. She can be contacted at [kweinstock@visalaw.com](mailto:kweinstock@visalaw.com)*

Winning a motion to reopen and reconsider is a great accomplishment for immigration attorneys. It is almost like a white elephant myth. Since the same BCIS officer that denied the petition in the first place adjudicates the motion, attorneys face low success rates in these motions. The review process is the reason why many

immigration practitioners are hesitant to file a motion to reopen, instead choosing to file an appeal or do nothing. Filing an appeal usually means a long wait, typically between six months and a year. Trying to find another visa category under which the client may be admitted is another available option. However, sometimes there are no other options, and the immigration attorney concludes that the petition should not have been denied.

In one recent case, we filed an H-1B visa petition for a manager of a small professional services firm. We used the premium processing service because the company needed its employee to start working as soon as possible. The BCIS issued a Request for Additional Evidence (RFE), which is not uncommon these days, questioning whether the position was a specialty occupation. The requested evidence was submitted to the service. However, the BCIS denied the petition arguing the specialty occupation part of the petition was not proven since the firm was small and relatively new. This reasoning was offered despite the fact that this is a top managerial position and the company is financially stable, as ability to pay the wage was never an issue.

However, the service itself admitted in its denial letter that the "proposed duties appear to be the duties normally required of a ... [specialty occupation position]", and that "this service is not convinced that the beneficiary will be performing the specific duties described above. As you are a small, relatively new company ..." We felt that the service made an error in denying the case, especially when the denial admitted the position was a specialty occupation. We were also concerned about discrimination against small businesses especially by an administration that has claimed to be the friend of the small business owner (which happens to be the majority of business owners in the country). Therefore, we decided to file a motion to reopen and reconsider.

As mentioned earlier, immigration attorneys often overlook filing a motion to reopen due to low overall success rates. However, we should keep in mind all the available possibilities to correct an error of law, an error of interpretation, or simply a wrong decision by a BCIS officer, instead of a lengthy and expensive appeal that may not be the best option for the client.

The great advantage to a motion to reopen is that it is usually adjudicated within 30-60 days, and sometimes faster in premium processing units. Also, if an officer denies a motion to reopen, a supervisor must approve his/her denial. An approval of such motion is not supervised. The motion must be filed within 33 days of receipt of the decision on the case (or 30 days if the decision was received by fax), along with the \$110 filing fee. There is no specific form to file so the motion can be printed in many formats.

We have included the following documentation in the typical motion to reopen. These documents increase the likelihood of success in such circumstances:

- **Brief Excerpt of the written decision and why you disagree with it.** The attorney must not be lengthy in his/her excerpt but on-point with the key issue of disagreement. In the above case, we have outlined the fact that the service itself admitted that the position was a specialty occupation and the decision to deny seemed arbitrary.

- **Brief excerpt of the laws and regulations relating to the case.** In this case we have stated the laws as well as legal arguments.
- **For H-1B cases, Dictionary of Occupational Title, OES Wage JobZone, and SVP levels in cases of specialty occupation challenges** (note that we have submitted that evidence also in response to the RFE). In this case the SVP level was 8.0, a high indicative of a specialty occupation.
- **New evidence.** This may be the most important aspect of the motion to reopen as new evidence that was not submitted before may give the officer a reason to change his/her mind. In this case we used industry-wide standards as well as other materials to demonstrate the industry standards to the officer.

As you can all guess from the title of this article, the service reversed its own decision, granted the motion to reopen and reconsider, and sent an approval notice for my client, which we received with great surprise. Since our expectations were low, we were very happy indeed to receive that approval notice. It reminded us all not to assume a defeat in advance but to try our best to win, even if the odds are against us.

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## 12. House Introduces Two L-1 Visa Bills

Members of the House of Representatives have introduced two pieces of legislation that seek to tighten L-1 visa rules. The following is a summary of the major provisions in each of the bills:

### The Mica Bill

- H.R. 2154
- The bill seeks to amend the Immigration and Nationality Act to restrict an L-1 sponsoring employer from placing an employee with another employer
- Employers would be required to file an attestation with the Department of Labor stating that it is not placing employees with other employer

### The DeLauro Bill

- H.R. 2702
- Entitled "The L-1 Nonimmigrant Reform Act"
- Contains new prevailing wage requirement similar to H-1B rules except wages must be a level 2 wage
- Similar work conditions attestations as H-1B Labor Condition Application
- The employer must attest that it has not displaced workers within 180 days before filing or 180 days after filing the L-1
- The employer may not outsource, lease or contract for the placement of the worker at any outside firm
- Employers violating the attestation rules, like H-1B employers, subject to one year debarment on L-1 filings
- Employers cannot make employees pay a financial penalty for leaving a contract early

- No benching permitted
- Limit of 35,000 L-1s per year
- Worker retraining fee from H-1B program extended to L-1 visas as well
- L-1 blanket petitions would no longer be permitted
- specialized knowledge L-1B workers would need bachelors degrees
- employment must have taken place in the two years prior to admission

The Mica bill is certainly the one of the two bills that would change the program the least. There is no evidence that using L-1s as contract workers has been widespread in any case. The DeLauro bill would basically turn the L-1 visa into a visa category that mirrors the H-1B program. It would dramatically shrink the L-1 program by setting a 35,000 cap which is about half the number of L-1s issued this past year and impose new large fees. The bill will no doubt be considered one of the more extreme immigration bills coming up this year in Congress.

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### 13. Temporary Protected Status For El Salvador Extended

After examining the conditions in El Salvador following its devastating earthquake, the United States government determined that the country is not yet ready to handle a large influx of nationals returning home. Therefore, the government extended the Temporary Protected Status (TPS) for those residing in the U.S. from El Salvador. The TPS extension for Salvadorans is effective for 18 months, from September 9, 2003 through March 9, 2005.

An alien who is a national of El Salvador (or in the case of an alien having no nationality, a person who last habitually in El Salvador) may re-register for the 18-month extension of TPS and an extension of employment authorization. Only those who registered during the initial TPS registration period that ended on September 9, 2002, or who registered after that date under the late initial registration provision, and who timely re-registered during the previous extension may re-register. Many individuals with criminal backgrounds are not eligible to register. It is also important to note that before traveling abroad, those with TPS status must receive advance permission to return to the United States.

However, those who haven't registered may still be eligible to register. In order to file late initial registration, an applicant must submit a complete application package, including supporting documentation and applicable fees, a \$50 fee with Form I-821 and, if 14 years of age or older, a \$50 fingerprint fee. Those available for late initial registration include: a national of El Salvador (or an alien who has no nationality and who last habitually resided in El Salvador); has been continuously physically present in the United States since March 9, 2001; resided in the U.S. on or before February 13, 2001 and has continuously resided in the U.S. until the present; is admissible as an immigrant, except as provided under 8 CFR 244.3; AND is not ineligible for TPS under 8 CFR 244.4 (criminal and security-related bars). To be eligible for TPS, a person from El Salvador must have resided in the United States since February 13, 2001. Those arriving after that date do not have the opportunity to apply for this status.

In addition to these showings, a late initial registrant must demonstrate that he or she: was a nonimmigrant or had been granted voluntary departure status or any relief from removal; had an application for change of status, adjustment of status,

asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal; was a parolee or had a pending request for reparole; OR a spouse or child of an alien currently eligible for TPS under this program may apply for late initial registration at any time if he or she is otherwise eligible and was so at the time of the initial registration period. An applicant for late initial registration must register no later than 60 days after the expiration or termination of the conditions described above.

Those previously granted TPS through the El Salvador TPS Program, which will expire on September 9, 2003, may re-register during the 60-day re-registration period beginning on July 16, 2003, and ending on September 15, 2003. The applications must contain a postmark dated on or prior to September 15, 2003. These individuals must submit the following: an application for Temporary Protected Status, Form I-821; an application for Employment Authorization, Form I-765; and two identification photographs (1 ½" x 1 ½"). Applications submitted without the required fee, if applicable, and/or photos will be returned. However, applicants will not need to submit new fingerprints or the fingerprint fee. An applicant who requests employment authorization must submit a \$120 fee with Form I-765.

For more information, contact the BCIS National Customer Service Center at 1-800-375-5283 or visit the BCIS on the web at [www.bcis.gov](http://www.bcis.gov).