

Siskind's Immigration Bulletin
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Canada and the People's Republic of China. To schedule a telephone or in-person
consultation with the firm, go to <http://www.visalaw.com/intake.html>. Editor: Greg
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1. OPENERS

Dear Readers:

Many of you have used the INS' Premium Processing Program. This week we report on a new government report which confirms what most immigration lawyers and many regular users of nonimmigrant visas already know - since the premium processing program came online, regular processing times have slowed considerably. That was not supposed to happen. The INS was supposed to use the millions of dollars in extra fees to improve service overall. But that has not happened, despite a drop in H-1B applications and despite a massive infusion of premium processing money. Coincidentally, this week we had the first case filed by our law firm under the premium processing program that was not completed in the allotted 15 days. After 20 days (and my contacting the INS three times), a case for a medical doctor was approved. We're going to ask for a refund of the premium fee, and I'll let you know how difficult that process is. In our issue this week, we report on the new Justice Department report on processing as well as include a guest article by Gary Endelman on the topic.

We also are pleased to let you know that the proposed bill to limit visitor visas to 30 days instead of six months was officially dropped by the government. The rule could have thrown the already deeply hurt tourism industry in this country into a downward spiral.

We include many of our regular features as well this week.

In firm news, this week I'll be speaking the Tennessee Association of International Educators as well as the University of Alabama-Birmingham Medical Center. I look forward to seeing newsletter readers at both events.

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

Regards,

Greg Siskind

2. THE ABC'S OF IMMIGRATION – IMMIGRATION OPTIONS FOR NANNIES, AU PAIRS, AND CHILD CARE WORKERS

While families all over America have foreign-born nannies, the options for hiring them legally are very limited. A high portion of the families hiring such individuals is likely not complying with the nation's immigration laws.

There are some available strategies, however. They each have limitations and may require patience and money. But if you want to follow the law, you will need to consider these possibilities.

J-1 Visas for Au Pairs

[Excerpted from *The J Visa Guidebook* by Greg Siskind, William Stock and Steve Yale-Loehr published by Lexis Nexis
(http://bookstore.lexis.com/bookstore/catalog?action=product&prod_id=12991&cat_id=T&pcat_id=31&pub_id=)

The au pair program has been controversial since its inception in 1985. When the first two pilot programs ended, the U.S. Information Agency (USIA), which administered the au pair program at the time, wanted to terminate their designation because it claimed that it lacked statutory authority to regulate the programs. In 1988 and 1990, Congress passed legislation authorizing and obliging the USIA to administer and regulate the au pair program. The program was supposed to end in 1995, but it was extended until 1997. In 1997 Congress extended the au pair program permanently.

Au pair programs allow foreign nationals to enter the United States, live with a U.S. family and experience American family life while providing limited child care and attending a U.S. post-secondary educational institution. Au pair participants may elect to participate in the "EduCare" program, a subset of the au pair program, which allows the au pair to reduce the number of hours per week spent on child care and to pursue academic studies more vigorously. Originally, the program was only available to individuals from Western Europe. In 1995, however, Congress expanded the program to admit students from around the world except those countries with which the United States has no diplomatic relations. All au pairs must be proficient in English, high school graduates and between the ages of 18 and 26.

Applicants to an au pair program must submit to an in-person interview in English, provide three non-family references, successfully pass a criminal background check, and satisfactorily complete a physical examination. Further, an applicant must have a personality profile done that is based on a psychometric test that measures the differences between the characteristics among applicants and those characteristics considered most important to successfully participate in the au pair program. The sponsor is responsible for providing a host family with the prospective au pair's complete application, including references, so the family may determine whether the applicant would be compatible with them.

Host families must be fluent in English and must pass a background check. In addition, they must either be U.S. citizens or legal permanent residents. All adult family members living in the home must submit to an interview conducted by the program sponsor. In addition, the family must have the financial resources to pay the au pair a weekly stipend of at least the minimum wage and up to \$500 for academic expenses. Au pairs who participate in the EduCare program are paid 75% of the weekly rate paid to non-EduCare participants, and up to \$1000 for the au pair's academic work

Au pairs may not be placed in any one of the following five situations:

- . The family has not specifically agreed that a parent or other responsible adult will remain in the home for the first three days following the au pair's arrival to provide a transition period and to ensure that the au pair is comfortable in his or her new home, community, responsibilities and surroundings;

- . The family has a child less than three months old, unless a parent or other responsible adult is present in the home;

- . The family has children under two years old, unless the au pair has at least 200 hours of documented infant childcare experience;

- . The family and the au pair have not executed a written agreement outlining the au pair's obligation to provide no more than 45 hours of child care services per week (EduCare participants may provide no more than 10 hours per day or 30 hours of child care services each week); or

- . The family cannot provide the au pair with a suitable private bedroom.

Just days after the USIA merged into the State Department, the State Department issued new rules on the selection and orientation of both host family and au pair participants. The State Department indicated that the purpose of the rule is to provide greater consistency in the au pair program (and presumably in response to the highly publicized recent au pair murder trial in New England involving a British J-1 visa holder). The new rules break down into four general categories: placement of the au pair, requirements for selection as a host family, orientation to the program, and reporting requirements.

The following are new requirements related to the placement of au pairs:

- . A parent or other responsible adult must remain in the home for the first three days the au pair is there.

- . An au pair is not to be placed with a family with a child under three unless a parent or responsible adult is in the home.

- . An au pair is not to be placed in a family with a child under two unless the au pair has at least 200 hours of documented infant care experience.

- . An au pair is not to be placed in a family with a special needs child unless the au pair has documented prior experience and the family has reviewed it.

- . A written agreement between the au pair and the host family is required, and must spell out that the au pair will provide no more than 45 hours of child care per week. EduCare participants may provide no more than 10 hours per day or 30 hours of child care services each week.

- . The au pair must be provided with a private bedroom.

- . There must be a telephone interview between the au pair and the host family before the au pair leaves home to come to the United States.

The new requirements for a host family are as follows:

- . The host parents must be U.S. citizens or permanent residents.
- . The host parents must be fluent in spoken English.
- . All adults living in the host family must be interviewed by the program sponsor.
- . All adults living in the host family must pass a background investigation, including employment and personal character references.
- . The host family must have financial resources commensurate with its obligations as host.
- . The host family must be provided with a copy of the au pair's application, including all references.

The au pair must be provided with copies of all rules and regulations that govern his or her participation in the au pair program, as well as a detailed profile of the family and community where he or she will be placed and any schools in the area, including costs of attendance. The host family must attend a host family conference, and must be provided with copies of regulations governing the au pair program.

The new regulation also requires the program sponsor to file an annual report with the State Department. The report must include the following information:

- . The results of surveys of host families and au pairs regarding their satisfaction with the program;
- . Lists of complaints about the program, including actions taken in response;
- . Copies of all promotional literature; and
- . A report by a certified public accountant affirming that the program is complying with the procedures and reporting requirements of these regulations.

In addition to the new requirements, sponsors have a number of other responsibilities in administering the au pair program:

- . Au pairs should provide no more than 45 hours per week or 10 hours per day of child care. EduCare participants may provide no more than 10 hours per day or 30 hours of child care services each week. Au pairs must be given one and one-half days off per week, one full weekend off per month and two weeks of paid vacation per year;
- . Au pairs must enroll in an accredited post-secondary educational institution for at least six semester credit hours or its equivalent, or 12 semester hours for EduCare participants;
- . Au pairs may not participate in the program for more than one year; and
- . Each host family must attend at least one "family day conference" to be given by the sponsor during the placement year.

In addition, sponsors must inform au pairs of their child care duties and what is considered unacceptable behavior. The sponsor must also provide the au pair with a summary of his or her travel arrangements and a detailed description of the host family, the community in which the au pair will live and the educational institutions in that area including the tuition costs. Program sponsors must ensure that the au pair's compensation is at least the minimum wage set forth by the Department of Labor, with appropriate deductions for room and board. Participants in the EduCare program are to be paid 75% of the weekly rate paid to non-EduCare participants.

Program sponsors are also responsible for providing child care training for au pairs. Au pair program participants must receive at least eight hours of child safety instruction, of which four must be specifically infant-related. In addition, they must receive at least 24 hours of child development instruction, of which no fewer than four hours must be instruction in the care of children under two years old. This child development instruction should include topics such as stress management and Shaken Baby Syndrome. Such training may be provided in the au pair's home country.

The State Department has approved the following au pair program sponsors:

EDUCATIONAL FOUNDATION FOR
FOREIGN STUDY (*EF Au Pair*)
EF Center Boston
One Memorial Drive
Cambridge, MA 02142
Responsible Officer (R.O.): Mr. Steven Meyer
Tel.: (617) 619-1000
Tel.: (800) 333-6056
Fax: (617) 619-1100
Internet: <http://www.efaupair.org/APNetscape/index.html>

AMERICAN INSTITUTE FOR FOREIGN
STUDY (*Au Pair in America*)
River Plaza
Nine West Broad Street
Stamford, Connecticut 06902
R.O.: Ms. Ruth Frizell Ferry
Tel.: (203) 399-5000
Tel.: (800) 727-2437
Fax: (203) 399-5592
Internet: <http://www.aifs.org/>

EURAUPAIR INTERCULTURAL
CHILD CARE PROGRAMS
250 North Coast Highway
Laguna Beach, CA 92651
R.O.: Mr. William Gustafson
Tel.: (914) 494-5500
Tel.: (800) 333-3804
Fax: (914) 497-6235
Internet: <http://www.euraupair.com/>

AYUSA INTERNATIONAL

(Au Pair Care)

2226 Bush Street
San Francisco, California 94115
R.O.: Mr. John Wilhelm
Tel.: (415) 434-8788
Tel.: (800) 428-7247
Fax: (415) 616-0585
Internet: <http://www.aupaircare.com/>

INTEREXCHANGE AU PAIR
161 Sixth Avenue - 13th Floor
New York, NY 10013
R.O.: Ms. Uta Christianson
Tel.: (212) 924-0446
Tel.: (800) 287-2477
Fax: (212) 924-0575
Internet: <http://www.interexchange.org/>

EXPLORING CULTURAL AND
LEARNING/AU PAIR REGISTRY
(Au Pair Program USA)
6955 Union Park Center
Suite 100
Salt Lake City, UT 84047
R.O.: Mr. D. Gary Christian
Tel.: (801) 255-7722
Tel.: (800) 574-8889
Fax: (801) 255-7782
Internet: <http://www.goaupair.com/>

The DOS list of approved au pair programs is also on the Internet at
http://exchanges.state.gov/education/jexchanges/private/AuPair_Sponsors.pdf

Other visa possibilities

While the J-1 visa is by far the most common visa category for au pairs, other child care workers occasionally come in using other visa categories.

If a nanny would like to come to the US to work with a family coming to the US on a work visa, the nanny may be able to work on a B-1 visa. Under Section 41.31 of the Foreign Affairs manual, personal or domestic servants who accompany or follow to join employers entering the US in B, E, F, H, I, J, L or M nonimmigrants may enter the US if

1. The employee has a residence abroad which he or she has no intention of abandoning (notwithstanding the fact that the employer may be in a non immigrant status which does not require such a showing);
2. The employee can demonstrate at least one year's experience as a personal or domestic servant, and
3. The employee has been employed abroad by the employer as a personal or domestic servant, for at least one year prior to the date of the employer's admission to the United States; or

4. If the employee-employer relationship existed immediately prior to the time of visa application, the employer can demonstrate that he or she has regularly employed (either year-round or seasonally) personal or domestic servants over a period of several years preceding the domestic servant's visa application for a nonimmigrant B-1 visa.

5. The employer and the employee have signed an employment contract which contains statements that the employer guarantees the employee the minimum or prevailing wages, whichever is greater, and free room and board and will be the only provider of employment to the servant.

H-2B visas are sometimes used by child monitors. H-2B nonimmigrant work visa provides a method for US employers and agents to obtain the services of foreign nationals to fill temporary needs for additional workers. The annual cap on this type of visa is 66,000. Until recently, the limits and requirements of the category caused usage of the visa to be marginal. For example, in 1995, only 2,398 H-2B visas were issued. However, the visa has become very popular in recent years, particularly in the hospitality industry. The limit has been much closer to being reached recently. H-2B visas require employers to go through a process of advertising for a position to show no Americans are available to fill the position and are immediately available.

The length of the stay on an H-2B visa is limited by the duration of the employer's temporary need for additional workers. The maximum authorized period of stay is one year, and the visa may be extended for a total of three years. However, extension applications are closely scrutinized. Either skilled or unskilled workers may be employed on an H-2B visa. Several unpublished decisions provide what little guidance is available on this subject. What does seem to be key is proving the need for the worker is temporary. If an employer does not explain why the need for the child monitor will end or hinting that the position is permanent will hurt the petition. An employer, for example, might want to specify that the need for the child monitor will end when a child registers in school.

Finally, child care workers are potentially eligible for permanent residency visas by going through a labor certification process. Like the H-2B visa, this is a process where an employer shows that after attempting to recruit for a position, no American workers with the minimum qualifications for the job are immediately available. Unlike an H-2B visa, an employer must show the position is permanent in nature and not temporary. The process can take several years and it is very difficult to maintain a legal nonimmigrant status in the US while waiting for the green card to come through.

3. ASK VISALAW.COM

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

Q - I have a couple of quick questions regarding filing for naturalization.

I have 3 children (13,11,and 7),all of whom have been on my petitions since k-1, AOS, I-751,etc and all have green cards.

1. When filing for naturalization for us all, do I pay the fee for just me or do I pay it 4 times?
2. Do they need to be fingerprinted or just me and what is the age that fingerprints become a necessity?
3. Do they need to attend the interview.
4. If i decided not to naturalize, at what age could they do it themselves?

A - Your children automatically become citizens with you and do not process under separate fees or applications. They will not be fingerprinted and they will not attend the interview. After you naturalize, you will file N-600 forms for them to get their proof of citizenship. I'm not sure about how you would opt out of naturalizing. I'm copying a colleague who might know the answer.

Q - I would like your opinion on the following issue. I am in the US on a H-1B visa. I got laid off about four weeks ago, and my former employer has already notified the INS about my termination. Last week I got an offer for a new position. The problem is that the new employer (educational institution) is reluctant to apply for the transfer of my H-1B because it has been more than 10 days since my lay off. Are their concerns justified? Is there something that could be done so that I can take this job without leaving the US?

A - You should probably file for premium processing and leave and then reenter with the new approval notice. The whole process would take just a few weeks. You are out of status so it is likely you'll have to leave. You can ask the INS to exercise discretion and excuse the problem. But the INS is not very tolerant these days for such problems.

Q - I am currently under F1 Visa status and am thinking of buying a US business. I understand I would need to convert my Visa to an E2. I also have my two daughters with me whom are under F2 status. Our nationality in British. The business is \$240,000 and I would be putting \$30,000 to \$40,000 down. It is a well established (since 1993) retail store in California.

A - There may be a problem putting only 1/8 or 1/6 down and also a problem with the size of the investment. First, we usually recommend an investment of at least \$50,000 to be taken seriously. Even that number is low, but we have gotten cases approved at that level. But more is definitely better. Second, the INS and State Department sometimes use a sliding scale that they are allowed to reference in determining whether an investment is "substantial."

1. If the value of the business or the cost to start it is less than \$500,000, a minimum 75% investment is required.
2. If the value of the business or the cost to start it is between \$500,000 and \$ 3 million, a minimum 50% investment is required.
3. If the value of the business or the cost to start it is over \$3 million, a minimum 30% investment is required.

Q - I am currently working on a H1B visa with company x for the last 6 months, it is my second H1B as I got lay off my previous job. My current company x is very small and on the verge of bankruptcy, if I do find another employer to sponsor me do you think the INS will approve a third H1B for the same person? Are there any rules how many H1B one person can have?

A - I don't see a problem switching again as long as the next position qualifies. There are no limits on switching employers.

Q - I have a question regarding 'Work permit for H4 visa'. Heard from friends that there is a new law wherein a H4 visa holder can apply for work permit and work in the U.S. Is this true?

A - There is no truth to this. Spouses of E and L visa holders can now work, but this is not true for spouses of H-1B visa holders.

Q - Is a citizen of El Salvador who failed to file I-765/I-821 within required time frame (11/12/2002) able to reapply? Has an extension been granted to people from El Sal to apply until 03/09/2003?

A - According to the BCIS, Completed re-registration applications for TPS must have been mailed to the appropriate Service Center and postmarked on or before November 12, 2002. Re-registration is necessary even though INS published a notice in the *Federal Register* on July 11, 2002 extending the TPS Employment Authorization Document (EAD) validity period from September 9, 2002 to March 9, 2003. The automatic EAD extension is designed only to prevent gaps in employment authorization while re-registration applications are processed, but it does not relieve TPS beneficiaries of the responsibility to timely re-register for TPS benefits. So it sounds like you are not eligible.

Q - Hi there, my friend has a multiple entry visa for five years. She was in the United States for 14 months. In that period, she applied for asylum but she was denied. She was told to depart from the United States. Therefore she went home on her own. While she was in the United States she applied for extension of stay and she was granted six more months. However, when she left the United States she only overstayed 60 days. She applied for asylum while she was in good status. Now she

wants to come back to the United States as a visitor on the same passport with the multiple entry visa. Will she be allowed to enter the United States?

A - Both the overstay and the asylum application will be problems. The asylum tends to show that your friend does not wish to return to her home country. And the overstay shows that she may not comply with immigration rules. I probably would look for other options to enter the US such as through a work visa because I think entering in visitor status again is risky.

Q - Do I legally need a "green card" if I am an American Indian born in Canada?

A - There are special provisions that allow certain American Indians born in Canada to get a green card. Basically, any American Indian born in Canada who is at least 50% American Indian is entitled to file for permanent residency and you would need the green card to show you are legally entitled to remain in the US. You would file form I-181 with the Bureau of Citizenship and Immigration Services to get a green card.

4. BORDER NEWS

Border News will return next week.

5. NEWS FROM THE COURTS

North Jersey Media Group v. Ashcroft
Appeal to the Supreme court from 3rd District Court of Appeals.

In this case, the Third Circuit Court of Appeals ruled in favor of the federal government allowing immigration proceedings to be held in secret for certain individuals whose cases are classified as being of "special interest." The rationale for secret hearings is that the individuals may have links to terrorism that threaten national security. News organizations sued the federal government arguing that closing the proceedings violated their First Amendment rights to access the hearings.

Shortly after the September 11th attacks, Chief Immigration Judge Michael Creppy issued a directive ordering immigration judges to close to the public some immigration hearings. INS officials began targeting and arresting Middle Easterners who had overstayed their visas. Some of their cases were classified as of "special interest" and their hearings were closed to the public, including the media. The District Court ruled in favor of the media organizations and issued a nationwide order enjoining the Attorney General from denying access.

The court used a test of experience and logic test to determine whether there is a First Amendment right of access. The judges noted that there is a history of openness throughout deportation proceedings and that such openness generally

benefits the public. The Circuit Court of Appeals found that deportation hearings do not pass the experience and logic test because deportation proceedings do not present the type of unbroken, uncontradicted history that the test requires to establish a First Amendment right of access. Holding that there is no First Amendment right of access, the court did not decide on the broadness of the injunction or whether the Creppy directive's closures would pass a strict scrutiny analysis.

The Third Circuit's decision runs counter to an opinion issued by the Sixth Circuit Court of Appeals last August. In *Detroit Free Press v. Ashcroft*, the Sixth Circuit that the government could not close immigration hearings to the public. The federal government did not appeal the decision of the Sixth Circuit. North Jersey Media Group and The New Jersey Law Journal have filed a petition requesting that the United States Supreme Court review the decision. The conflict between the two courts increases the likelihood that the Supreme Court will hear the case.

Natawadee Steinhouse v. John Ashcroft
United States District Court for the District of Connecticut

In 1998, Natawadee Steinhouse pled guilty to count one of an indictment charging her with racketeering, a violation of 18 U.S.C. § 1962, and another charging her with selling drug samples, a violation of 21 U.S.C. §§ 353(c)(1) and 333(b)(1)(B). Though sentencing guidelines called for between 11 and 14 years, she was sentenced to three years in prison because of diminished mental capacity.

The INS initiated removal proceeding because Steinhouse had committed an aggravated felony. In 2000, an Immigration Judge ordered her removed to Thailand. She applied for withholding under INA section 241(b)(3) on the grounds that she would face religious persecution in Thailand because she is Jewish. However, the INA section does not apply if the Attorney General decides that the alien, having been convicted by a final judgment of a particular serious crime, is a danger to the community of the United States. The IJ precluded her from seeking withholding of removal. The Board of Immigration Appeals agreed with the IJ that the crime was particularly serious, and therefore concluded that Steinhouse was removable because she committed an aggravated felony.

The BIA did not determine whether Steinhouse was a danger to the community, the factor that the District Court found to be most important. The court ruled that determining whether a crime is particularly serious depends upon an examination of the nature of the conviction, the type of sentence imposed, the circumstances and underlying facts of the conviction, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Matter of Frentescu*, 1982, I&N Dec. 244, 247 (BIA 1982). The case was remanded to the BIA to determine whether Steinhouse's crime was particularly serious, applying the correct set of *Frentescu* factors in totality.

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

Nebraska Service Center Processing Time Report March 1, 2003	
Form	We are Processing cases with receipt notice dates on or before:
I-90 to replace lost, damaged or destroyed I-551	4/9/2002
I-90 to renew expiring I-551	4/11/2002
I-102 for replacement/initial nonimmigrant arrival/departure form	2/1/2002
I-129 for H1B classification	1/8/2003
I-129 for H2A classification	2/15/2003
I-129 for H2B classification	1/24/2003
I-129 for H3 classification	12/26/2002
I-129 for L classification	1/28/2003
I-129 for Blanket L petition	1/27/2003
I-129 for O classification	1/9/2003
I-129 for P classification	1/20/2003
I-129 for Q or R classification	12/23/2002
I-129 for TN classification	1/24/2003
I-129F (fiancée)	9/27/2002
I-130 for spouse, parent or child (under 21) of a United States citizen	5/21/2002
I-130 for son or daughter (over 21) of a United States citizen	4/17/2001
I-130 for brother or sister of a United States citizen	4/17/2001
I-130 for spouse of a lawful permanent resident	4/12/2001
I-130 for unmarried child under 21 of a lawful permanent resident	4/17/2001
I-130 for unmarried son or daughter over 21 of lawful permanent resident	4/17/2001
I-131 for Advance Parole	1/9/2003
I-131 for Advance Parole for HRIFA principal applicant	4/17/2002
I-131 for Reentry Permit	5/21/2002
I-131 for Refugee Travel Document	1/30/2003
I-140 A (extraordinary ability)	10/2/2002
I-140 B (outstanding professor or researcher)	10/2/2002
I-140 C (multinational executive or	1/3/2003

manager)	
I-140 D (professional holding adv. degree/alien of exceptional ability)	11/27/2002
I-140 E (skilled worker or professional)	11/19/2002
I-140 I (National Interest Waiver)	10/24/2002
I-140 G (other worker)	11/23/2002
I-212 permission to reapply for admission after deportation/removal	9/12/2002
I-360 petition for Amerasian, widow(er), or Special Immigrant	10/30/2002
I-485 Asylum-based	2/1/1999
I-485 Refugee-based	8/1/2001
I-485 Employment-based	8/1/2001
I-485 Haitian Refugee Immigration Fairness Act (HRIFA)-based	12/27/1999
I-526 Immigrant Petition by Alien Entrepreneur	not processed at the NSC
I-539 for extension of stay for F or M non-immigrant	2/15/2003
I-539 for extension of stay for J non-immigrant	1/10/2003
I-539 for extension of stay for L or H non-immigrant	12/30/2002
I-539 for extension of stay for other non-immigrant	10/29/2002
I-539 to change nonimmigrant classification to F or M	11/18/2002
I-539 to change nonimmigrant classification to J	1/23/2003
I-539 to change nonimmigrant classification to L or H	1/2/2003
I-539 to change to other nonimmigrant classification	9/4/2002
I-612 waiver of foreign residence requirement	9/23/2002
I-730 Refugee/Asylee Relative Petition	7/26/2002
I-751 Petition to Remove Conditions on Residence	5/27/2002
I-765 for initial asylee or asylum applicant authorization	1/20/2003
I-765 for employment authorization associated with Hurricane Mitch TPS	
I-765 for employment authorization associated with El Salvador TPS	8/27/2002
I-765 for employment authorization while I-485 is pending	12/15/2002
I-765 for all other employment authorization	12/13/2002

I-817 Application for Family Unity Benefits	10/18/2002
I-821 for El Salvador	8/27/2002
I-821 for Hurricane Mitch countries	12/23/2002
I-824 Application for Action on an Approved Application or Petition	4/17/2002
I-829 Petition by Entrepreneur to Remove Conditions	not processed at the NSC
I-914 Application for T Non-Immigrant	not processed at the NSC
I-131 HRIFA BLOCK F	1/10/2000
I-485 INDOCHINA	2/15/2003

Texas Service Center Processing Time Report March 1, 2003		
Form	We are Processing cases with these receipt notice dates:	
I-90 to replace lost, damaged or destroyed I-551	4/10/2002	
I-90 to renew expiring I-551	n/a	
I-102 for replacement/initial nonimmigrant arrival/departure form	8/6/2002	
I-129 for H1B classification	9/3/2002	
I-129 for H2A classification	current	
I-129 for H2B classification	12/11/2002	
I-129 for H3 classification	1/7/2003	
I-129 for L classification	1/7/2003	
I-129 for Blanket L petition	1/7/2003	
I-129 for O classification	12/5/2002	
I-129 for P classification	1/13/2003	
I-129 for Q or R classification Q	Q Current - R 9/04/2002	
I-129 for TN classification	n/a	
I-129F (fiancée)	10/11/2002	
I-129 For E classification	9/3/2002	
I-130 for Spouse, Parent or Child of US Citizen	6/8/2001	
I-130 for Spouse of Lawful Permanent Resident	4/3/1998	
I-130 for Other Relative	4/3/1998	
I-131 for Advance Parole	10/15/2002	
I-131 for Advance Parole for HRIFA principal applicant	n/a	
I-131 for Reentry Permit	n/a	

I-131 for Refugee Travel Document	n/a	
I-140 A (extraordinary ability) IST PREF	5/20/2002	
I-140 B (outstanding professor or researcher) IST PREF	5/20/2002	
I-140 C (multinational executive or manager) IST PREF	5/20/2002	
I-140 D (professional holding adv. degree/alien of exceptional ability) 2ND PREF	8/29/2002	
I-140 E (skilled worker or professional) 3RD PREF	9/13/2002	
I-140 I (National Interest Waiver)	6/26/2002	
I-140 G (other worker) 3RD PREF	9/13/2002	
I-212 permission to reapply for admission after deportation/removal	n/a	
I-360 petition for Amerasian, widow(er), or Special Immigrant	8/1/2001	
I-485 Asylum-based	n/a	
I-485 Refugee-based	n/a	
I-485 Employment-based	11/1/2000	
I-485 Haitian Refugee Immigration Fairness Act (HRIFA)-based	n/a	
I-526 Immigrant Petition by Alien Entrepreneur	11/15/2002	
I-539 for extension of stay for F or M non-immigrant	12/16/2002	
I-539 for extension of stay for J non-immigrant	n/a	
I-539 for extension of stay for L or H non-immigrant	12/16/2002	
I-539 for extension of stay for other non-immigrant	12/16/2002	These cases are worked concurrently with the 129 if so filed.
I-539 to change nonimmigrant classification to F or M	12/16/2002	
I-539 to change nonimmigrant classification to J	12/16/2002	
I-539 to change nonimmigrant classification to L or H	12/16/2002	
I-539 to change to other nonimmigrant classification	12/16/2002	
I-612 waiver of foreign residence requirement	9/17/2002	
I-730 Refugee/Asylee Relative Petition	n/a	
I-751 Petition to Remove Conditions on Residence	9/13/2002	
I-765 for initial asylee or asylum applicant authorization C-8	11/22/2002	
I-765 for employment authorization associated with Hurricane Mitch TPS	7/8/2002	

I-765 for employment authorization associated with El Salvador TPS	8/1/2002	
I-765 for employment authorization while I-485 is pending C-9	10/21/2002	
I-765 for all other employment authorization	10/21/2002	
I-817 Application for Family Unity Benefits	12/29/1998	
I-821 for El Salvador	4/13/2001	
I-821 for Hurricane Mitch countries	8/17/1999	
I-824 Application for Action on an Approved Application or Petition	8/8/2002	
I-829 Petition by Entrepreneur to Remove Conditions	3/22/1999	
I-914 Application for T Non-Immigrant	n/a	

7. NEWS BYTES

The US Consulate in Tel Aviv, Israel is warning visa applicants to expect significant delays in visa processing. The consulate has also withdrawn all appointments for green card interviews for applicants currently living in the US.

The BCIS Texas Service Center has transferred nearly 5,000 I-130 cases to the Missouri Processing Center in order to help reduce the TSC's backlog.

The Department of State has announced that a new DS-156 Nonimmigrant Visa Application should be used by all people applying for nonimmigrant visas. The new form includes additional questions. It can be downloaded on the State Department's web site at <http://www.state.gov/m/a/dir/c4455.htm>

The BCIS has announced that only N-400 forms dated May 31, 2001 or later are acceptable for people applying for citizenship. Applications with earlier dates will be rejected and returned to applicants.

The State Department is reporting that they now expect all employment-based immigrant visa categories to remain current through the end of Fiscal Year 2004 (September 30, 2004). Recent legislative changes have freed up visa numbers to allow for more employment based applicants and demand for visas has been weaker than anticipated. State Department officials previously warned that the employment-based categories would likely backlog in FY 2004.

* * * *

On his last day as an employee of the Immigration and Naturalization Service, Deputy Executive Associate Commissioner Bill Yates issued a field memorandum reminding INS adjudicators to deny adjustment of status applications where a concurrently filed underlying family or employment-based petition is denied. Applications for employment authorization and advance parole should also be denied. But if the underlying petition is denied, the adjustment application will not be considered improperly filed.

* * * *

The US Labor Department has fined a teacher placement firm \$120,000 for various H-1B violations. Teachers Placement Group, Inc. of Plainview, NY was penalized for their treatment of 15 teachers they sponsored for H-1B visas. The teachers, all from India, were hired to fill math and science teachers in Newark, New Jersey public schools. The company was charged with not paying proper wages as well as other immigration law violations. They are also ordered to pay \$187,546 in back wages to the teachers.

"Abuse of the foreign labor certification program undermines the integrity of the program," according to Irv Miljoner of the Labor Department's Wage and Hour Division. Miljoner also told of the company's threatening teachers with deportation.

* * * *

The US government has extended the enrollment period for SENTRI (the Secure Electronic Network for Travelers Rapid Inspection) participants from one to to years. "This is a milestone for the SENTRI program," said Acting INS Commissioner Michael Garcia. "Extending the enrollment period will mean greater convenience, fewer processing delays, and cost savings for SENTRI applicants. It is also an important step forward in our effort to refine and expand the SENTRI program."

SENTRI is an automated system that enables enrolled motorists at selected land border ports to complete the inspections process and enter the United States more expediently using dedicated commuter lanes. As part of the enrollment process, SENTRI participants undergo an extensive screening that includes law enforcement and criminal background checks. By encouraging low-risk travelers to participate in programs like SENTRI, authorities can focus more attention and resources on unknown or higher-risk travelers.

Currently, there are more than 42,000 travelers participating in the SENTRI program along the U.S.-Mexico border. Commuters also will only need to pay the program fee once every two years instead of annually.

* * * *

The Washington Times newspaper is reporting that US consulates have cut by more than half the number of visas issued to nationals of states that sponsor terrorism. From June 1, 2002 to February 23, 2003, approximately 20,000 visas were issued to

people from Iraq, Iran, Syria, Libya, Sudan, North Korea and Cuba. During the same period in the previous year, more than 46,000 visas were issued.

8. INTERNATIONAL ROUNDUP

Co-worker Protest Helps Prevent Refugee's Deportation

An asylum seeker just hours from being deported has won the right to stay in Britain permanently, thanks to the success of a protest staged by his co-workers.

Luli Zefaj, 25, a Kosovo Albanian, fled his home country five years ago after being shot for refusing to fight in his country's civil war. He applied for asylum in Britain and started a new life there, taking English classes and working.

Last year, during a routine visit to the immigration office in Dover to sort out his paperwork, officials said their documentation showed that he had absconded and was in the country illegally. Zefaj was placed in a detention center and was told he would be deported to Albania within 48 hours.

With little time to spare, his coworkers organized a high-profile campaign, writing letters and assembling at Gatwick airport. Shortly before he was to be flown out, officials released Zefaj into the care of his colleagues at Digital Dream, a digital camera supplier based in Dover.

Zefaj's asylum bid was rejected, but an appeals panel ruled that he should be allowed to remain in Britain permanently because he had built a settled life for himself.

26 Nigerians Drown Off Moroccan Coast

Twenty-six Nigerians drowned in the Atlantic Ocean off the Moroccan coast earlier this year while attempting to enter Europe illegally, Nigerian Ambassador to Morocco Ladan Shuni said Wednesday. The incident was another in a series of fatal crossings from northern Africa; hundreds of Nigerians die annually attempting to cross the Sahara desert and the Mediterranean Sea in hopes of reaching Europe and America. Among those who perished in this most recent tragedy was an entire family of four.

South Korea: Dramatic Increase In Number Of Illegal Immigrants

Last week South Korea's Ministry of Justice reported that the number of illegal immigrants in the country has risen 530 percent since 1991, when the government first began to compile statistics. Ten years ago, there were 41,900 illegal aliens in the nation, compared to 289,100 last November. The ministry also said that nearly 25% of the population, or 13.6 million, traveled overseas last year.

Church Group Calls For Release Of Australia's Detained Asylum Seekers

The National Council of Churches of Australia (NCCA) has added its voice to a drive orchestrated by refugee advocates asking the parliament to set free 1,000 asylum seekers now being held in detention centers. The detainees have already taken health, identity and security checks. The NCCA also calls for 8,000 Temporary Protection Visa (TPV) holders to be granted permanent residency.

"It is well documented that 70 percent to 80 percent of refugees have suffered trauma or torture," said NCCA national refugee advocacy officer James Thomson. "Detention compounds that and then when they are released on TPV, it prevents them from settling in the community and getting on with a normal life."

9. DUKE CASE RAISES QUESTIONS ABOUT TRANSPLANTS FOR IMMIGRANTS

Immigrant organ transplants in the United States have become a hot topic since the news of the botched heart-lung transplant surgery of Jesica Santillan, a young girl from Mexico died. Doctors at Duke University Medical Center in North Carolina performed the surgery. The controversy concerning organ transplants and foreigners initially surfaced in the 1980's, and involves a mixture of politics, nationality and medicine that has the transplants networks like the United Network for Organ Sharing (UNOS), and groups who favor restricting immigration, like North Carolina Listens. Immigration advocates argue that U. S. citizens are more likely to benefit from organs donated by noncitizens than the reverse. In 2001, U.S. citizens received 96.2 percent of the transplants in the country while 94.8 percent of the organ donors were citizens. This has been the constant trend for more than a decade according to the UNOS.

UNOS, the non-profit group that coordinates the nation's transplant system linking organ donors with recipients nationwide, has a policy that imposes a limit on the number of organs that can be transplanted to foreigners in a given year. A center may not transplant more than 5 percent of organs to immigrants, but there is no limit to the number of organs a noncitizen may donate. Hospitals have the discretion to put foreign citizens, including illegal immigrants, on the national waiting list for transplants. From 1998 to 2001, organ donations from foreign residents increased from 0.1 to 2.8. This progress in organ donations is likely a result of outreach efforts to encourage donations, particularly in the Hispanic community.

At Duke University Medical Center, 2,541 people have received organ transplants at Duke from 1998 to 2002, there were no nonresident noncitizens recorded. But with more than 80,000 people on a national waiting list and more than 5,500 people dying each year before they can receive transplants, the question still lingers about whether foreigners should have the same access to the nation's limited pool of donated organs. Ron Woodard, the president of North Carolina Listens, while commenting on the sadness of the Santillan situation, said that if he was on the waiting list his thought would be, "Why were organs given to someone who was here illegally?" Joel Newman, UNOS spokesman says, "Part of the rationale is that it may be hypocritical to accept donors who are not U.S. citizens, but not allow them to be transplant recipients."

There are groups that believe that US citizens should be given priority in receiving transplants. But immigrant advocates point out that national data for 2001 shows 2 percent of the total donors were foreigners who died in the United States while just 1 percent of transplants went to foreign recipients. Immigration restrictionist groups also argue that the medical expenses of transplants and related care for illegal immigrants with no health insurance and who cannot pay are a burden to hospitals, U.S. taxpayers and insured patients. Jessica Santiallan, however, received no government funds, had 80 percent of her medical expenses paid by the her mother's employer's insurance plan and the balance was covered by the foundation established by the family's benefactor. The government has long stopped reimbursing hospitals for transplants for illegal immigrants.

10. URUGUAY ELIMINATED FROM VISA WAIVER PROGRAM; NEW RULES FOR BELGIANS

The US government announced in the Federal Register this week that Uruguayans will no longer be able to participate in the Visa Waiver Pilot Program. According to the announcement by the Immigration and Naturalization Service (the regulation states the agency as the former INS even though the new Department of Homeland Security's Bureau of Citizenship and Immigration Services took over responsibility for the program last week), the rule is a response to the high intercept and overstay rates for Uruguayans.

Nationals of Uruguay who intend to travel to the US AFTER April 15, 2003 must have a valid visa stamped in their passports. Travelers who enter before that date can still participate in the Visa Waiver Program and will still be authorized to stay for 90 days.

Uruguay's economy has been rocked by the turmoil in its much larger neighbor Argentina for much of the last few years. Argentina was removed from the Visa Waiver Program last spring.

The Visa Waiver Program permits nationals of designated countries to enter the US for ninety days or less as nonimmigrant visitors for business or pleasure without first obtaining a visa from a US consulate. A country is included if the US government determines that nationals of the particular country are at a low risk for violating the Visa Waiver Program's rules.

The INS noted that visits from Uruguay increased 15% between 1998 and 2001 but that US port-of-entry intercepts increased by 320%. In 2002, Uruguayan nationals were two to three times more likely than all nonimmigrants on average to have been denied admission at the border. Furthermore, the INS noted that 1,194 Uruguayans had overstayed in fiscal year 2001 out of the 72,915 visits to the US by Uruguayans. Nearly 1 in 3 Uruguayans arriving by air are overstaying, according to the INS.

Other countries received warnings. Belgium was warned about the integrity of its nonmachine readable passports and the inadequate reporting of lost or stolen passports by the Belgian government. After May 15, 2003, Belgian citizens seeking to enter the US must present a machine-readable passport in order to be admitted under the Visa Waiver Program. Portugal was warned as well about the timeliness of reporting of lost or stolen passports.

11. GUEST ARTICLE – UNITED STATES TAXATION OF RESIDENT AND
NONRESIDENT ALIENS – PART II: INCOME TAXATION OF NONRESIDENT
ALIENS, 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/>.

Last month we began our review of the U.S. income tax laws with an analysis of the various tests used to determine whether an individual is considered a resident alien or nonresident alien of the U.S. The distinction between a resident alien and nonresident alien is important, as the latter are subject to U.S. income tax on their worldwide income, and the former are generally only subject to U.S. income taxes on income earned from U.S. sources.

To summarize last month's conclusions, aliens holding a green card are treated as residents of the U.S. (unless treaty benefits are claimed). Additionally, those physically present in the U.S. for at least 183 days over the current and prior two tax years (with at least 31 days of presence occurring during the current year) are also treated as residents unless one of several exceptions apply. The first exception applies for those individuals with a "closer connection" to another country. Other exceptions allow certain "exempt individuals" to exclude certain days of presence from determining whether the 183 day test is satisfied, or to exclude certain days of presence due to medical conditions, commuting between Canada or Mexico and employment within the U.S., or days in transit between points outside the U.S. Lastly, an alien otherwise treated as a nonresident may elect to be treated as a resident provided certain conditions are satisfied.

This month our attention will shift from determining who is a resident alien, to the taxation of nonresident aliens.

Nonresident aliens may find themselves subject to two separate U.S. income tax regimes. The first regime applies to certain limited types of U.S. source income that are not effectively connected with a trade or business operated within the U.S. The second regime applies to income that is effectively connected with the conduct of a U.S. trade or business. The rules regarding the taxation of nonresidents are often confusing, complex and subject to many exceptions. Therefore, we will only review the general rules and most significant exceptions to those rules.

Nonbusiness Income from U.S. Sources

Income of a nonresident alien that is not effectively connected with the conduct of a U.S. trade or business is generally exempt from U.S. income tax unless it is from sources within the U.S. and falls within the definition of "fixed or determinable annual or periodical gains, profits, and income" (otherwise known as "FDAP"). FDAP includes wages and compensation, interest, dividends, rents and royalties received from U.S. sources, but does not include capital gains and other income realized from the sale of property. The tax on FDAP is applied at a flat rate of 30 percent and is usually collected by the payor of income who withholds this tax from the nonresident alien and remits the tax to the Internal Revenue Service ("IRS"). The tax is applied

against the gross amount of income, meaning that no deductions are allowed in arriving at the taxable amount. The withholding tax reflects the difficulty of collecting taxes from nonresident aliens who are often neither physically present in the U.S. nor tied to this country by residence or business operations.

By disallowing the deduction of expenses the withholding tax is often confiscatory. For example, the disallowance of a depreciation expense often causes the 30 percent withholding tax on gross rental receipts to exceed 30 percent of net income. In certain instances the withholding tax may even apply despite the fact that the nonresident alien recognizes no *net* income at all!

The U.S. has enacted a number of exceptions to the above rules. For instance, exemptions for certain types of interest income exist, and nonresident aliens may, in limited circumstances, pay a flat 30 percent tax on U.S. source capital gains, despite the general rule that such gains are generally exempt from the withholding tax.

Taxation of FDAP – Salaries, Wages, and Compensation

Salaries, wages and compensation from U.S. sources are included in FDAP and payments of such to nonresident aliens are subject to either (1) the 30 percent withholding tax, or (2) wage withholding on the same basis as U.S. citizens and residents. Wages, salaries and compensation are U.S. source if such payments relate to services performed in the U.S. If compensation paid to a nonresident does not exceed \$3,000 for a tax year such income is treated as foreign source, and not subject to withholding, if (1) the nonresident is temporarily present in the U.S.; (2) the nonresident is not present in the U.S. for more than 90 days during the tax year; and (3) the employer is either a foreign person not engaged in business in the U.S., or is a foreign office of a U.S. employer. Note, that because the performance of services in the U.S. generally gives rise to the existence of a U.S. trade or business, payments for such services are often not subject to the withholding tax and are instead taxed under the effectively connected income rules (see below).

Taxation of FDAP – Scholarships and Grants to Foreign Students and Researchers

Taxable scholarships and grants received by nonresident aliens temporarily present in the U.S. under nonimmigrant F, J, M or Q visas are subject to the withholding tax; however, the rate of tax is reduced to 14 percent. Generally, scholarships and grants are nontaxable to the extent used for qualified expenses, including tuition and fees, but amounts used for living expenses are taxable.

Taxation of FDAP – Interest Income

The taxation of interest income is perhaps the most confusing area of FDAP. Generally, the 30% withholding tax applies to the gross amount of interest income received by a nonresident alien. However, the U.S. is in fact a “tax haven” when it comes to interest income. The general rules concerning the taxation of interest income do not apply to several types of interest that the U.S. Congress has chosen to exempt from taxation, including: (1) portfolio interest and (2) interest on U.S. bank deposits. These exemptions allow nonresidents to lend massive amounts of capital to U.S. persons without paying any U.S. taxes on the resulting interest income.

Portfolio Interest Exemption

The portfolio interest exemption was originally enacted to permit U.S. corporations to participate directly in the Eurobond market. If not for this exemption, U.S. corporations would find it difficult to trade U.S. obligations in international markets, since international holders of these obligations want assurances that they will not be subject to U.S. income or withholding taxes.

If the obligation on which interest is paid is in registered form, the portfolio interest exemption only applies if a statement is given declaring that the beneficial owner of the instrument is not a U.S. resident. The statement (often given as IRS Form W-8) must be filed with the person who would otherwise be required to withhold tax from the interest. If the instrument is not in registered form, no statement to the withholding agent is required, but the exemption is denied unless the instrument was issued under guidelines designed to prevent the obligation from coming into the hands of U.S. persons. Compliance with the portfolio interest exemption rules insures that a U.S. resident is not able to avoiding the regular income tax on interest income. To determine if an obligation is in registered form consult your investment advisor.

The portfolio interest exemption is also not available for interest received by a 10 percent shareholder or 10 percent partner. Thus, a major owner of an entity cannot receive tax-free income under the portfolio interest exemption.

Interest on Bank Deposits

Interest on U.S. bank deposits is generally exempt from the withholding tax. The purpose of this exemption is to encourage foreign persons to deposit funds in the U.S. The exemption may also be applied with respect to deposits with domestic savings and loan associations, and amounts held by insurance companies under agreements to pay interest thereon.

Taxation of FDAP – Dividend Income

The 30 percent withholding rate also applies to the payment of U.S. source dividends, regardless of whether dividends are paid in cash or property. Generally, dividends are from U.S. sources if they are paid by a U.S. corporation. Dividends are foreign source if paid by foreign corporations. A dividend from a U.S. corporation may be partially or wholly exempt from withholding taxes if at least 80 percent of the corporation's gross income from all sources was derived from the active conduct of a trade or business in a foreign country or U.S. possession. In determining whether the 80 percent test is met, the three years preceding the tax year in which the dividend is paid are considered.

Dividends received from a foreign corporation are treated as U.S. source and subject to withholding taxes if 25 percent or more of the foreign corporation's gross income during the preceding three years was effectively connected with the active conduct of a U.S. trade or business.

Taxation of FDAP – Rental Income

Rents are from U.S. sources and subject to withholding taxes whenever paid for the use of property that is located in the U.S. However, the withholding tax on rents is seldom paid. Often, the activities of managing leased property rises to the level of

conducting a U.S. trade or business (see below), thus exempting such income from the FDAP regime. Additionally, a foreign investor may elect to treat real property income from U.S. sources as effectively connected with a trade or business. The election is advantageous because it allows foreign investors otherwise subject to the FDAP withholding tax regime the ability to deduct expenses associated with the management of such real property.

Taxation of FDAP – Royalties

U.S. source royalties are also subject to the withholding tax. Contrary to the phrase “annual or periodical,” royalties are taxable whether received in installments over time or in a lump sum. Gains on the sale of intellectual property are also subject to withholding taxes if they are recognized from the receipt of payments that are contingent on the productivity, use or subsequent disposition of the property.

Other Types of FDAP

The following is a brief list of other types of U.S. source income that are considered FDAP and subject to U.S. withholding taxes:

1. Alimony
2. Certain gambling winnings
3. Social security benefits

Effect of Tax Treaties

Tax treaties between the U.S. and the country in which the recipient of FDAP resides often reduce or eliminate the withholding rates applicable to many of the types of income discussed above.

For example, treaties often offer generous exemptions from U.S. taxation for compensation and wages received by nonresidents located in the U.S. for short periods of time. Employee compensation is usually exempt from U.S. taxes if (1) the nonresident is present in the U.S. for not more than 183 days during the tax year; (2) the employer is not a resident of the U.S.; and (3) the compensation is not borne by a fixed place of business of the foreign employer in the U.S.

Gains from the Disposition of Property

As stated above, capital gains (gains from the sale of property) are generally exempt from FDAP; however, some exceptions exist.

One such exception concerns net capital gains from U.S. sources realized by nonresident aliens present in the U.S. for 183 days or more. At first glance this rule seems obvious since noncitizens present in the U.S. for 183 days or more are generally treated as resident aliens and thus, subject to U.S. taxation on their worldwide income. The 183-day test under the FDAP rules generally only has significance where an alien's days of presence in the U.S. do not count for purposes of determining whether the alien is a resident or nonresident (see last month's article). For example, days in the U.S. because of a medical condition may count as FDAP days of presence, but are exempt days for purposes of establishing resident or nonresident status.

Withholding Occurs at the Source

The 30 percent withholding tax is almost entirely enforced by the withholding of tax at the source of payment. The tax must be withheld and remitted to the IRS by any payor (the "withholding agent") including a lessee, mortgagee, employer, or fiduciary having control over the payment of the income. Withholding agents are personally liable for the amount required to be withheld.

Because partnerships are not taxpaying entities under U.S. tax laws the withholding tax is imposed on a foreign partner's share of FDAP. In the case of a U.S. partnership, the partnership must withhold tax from payments to the foreign partner. In the case of a foreign partnership the payor of income must withhold tax on payments made to a foreign partnership.

Often a withholding agent may not be able to determine whether a payment is one of the above described types of FDAP, because the item's characterization as income may depend on the payee's individual circumstances. For instance, the payor of a scholarship may not know if those funds are being used for qualified expenses. Treasury regulations generally require that tax be withheld on the entire payment, leaving it to the payee to straighten matters out by applying for a tax refund.

In certain instances a withholding agent is exempt from withholding any tax. For example, the withholding agent may rely on the payee's statement that the payee is a U.S. citizen, resident, or a domestic corporation or partnership.

Income Effectively Connected With A U.S. Trade or Business

Income of a nonresident alien that is effectively connected with the conduct of a U.S. trade or business (otherwise known as "effectively connected income" or "ECI") is subject to taxation on a "net basis," meaning that the nonresident may take into consideration certain allowable deductions when computing taxable income. Additionally, tax is payable following the close of the tax year at normal, graduated tax rates, as opposed to having it withheld at the time of payment at a flat 30 percent rate.

A U.S. trade or business exists if profit oriented activities are carried on directly or through agents, on a regular, substantial and continuous basis in the U.S. The performance of personal services in the U.S. at any time during a tax year is a U.S. trade or business. This concept has been applied to a single performance by a visiting entertainer or athlete. A limited exception identical to that under the FDAP rules above, applies for nonresident aliens in the U.S. for short periods of time that provide limited services (\$3,000 or less).

Determining whether income is ECI can be a complicated process. Items ordinarily included in FDAP are treated as ECI if one of two tests are satisfied. The first test is satisfied if the FDAP type income arises from assets used or held in the conduct of the U.S. business. The second test is satisfied if the activities of the U.S. trade or business were a material factor in producing such income. Items not ordinarily included in FDAP, such as gains from the sale of physical inventory, are connected with a U.S. trade or business if such income arises from sources within the U.S. (regardless of whether or not such income is actually connected with the U.S. trade or business). For example, a foreign corporation maintains a U.S. business through which it sells office furniture, and a foreign office through which it sells computer

equipment. The sale of computer equipment to customers in the U.S. is considered ECI.

Effect of Tax Treaties

Under most U.S. tax treaties, business profits of a resident of the other country may be taxed in the U.S. only if the nonresident has a "permanent establishment" in the U.S. and the profits are attributable to such permanent establishment. A permanent establishment ("PE") is a fixed place of business through which the activities of the enterprise are wholly or partially carried on. Examples of PEs are offices and places of management. Certain facilities are exempt from the definition of a PE, thereby exempting profits attributable from such facilities from U.S. income taxation.

12. DEPARTMENT OF HOMELAND SECURITY BUREAUS TO DEAL WITH IMMIGRATION ISSUES

On March 1, 2003, the Bush Administration transformed the various functions of the former Immigration and Naturalization Service into the Department of Homeland Security to implement the Border and Transportation Security mission of the DHS. The reorganization is consistent with the President's long-standing position to separate immigration services from immigration law enforcement. There are three components: the Bureau of Citizenship and Immigration Services (BCIS); the Bureau of Immigration and Customs Enforcement (BICE); and the Bureau of Customs and Border Protection.

The Bureau of Citizenship and Immigration Services, which takes over nonimmigrant, immigrant and naturalization application processing, has named its new leaders. They are as follows:

Interim BCIS Regional Directors

Eastern Region	Louis D. Crocetti
Central Region	Ken Pasquarell
Western Region	Carolyn Muzika

Interim BCIS Directors

Eastern Region Locations:

Atlanta	Rosemary Melville
Baltimore	Richard Caterisano
Boston	Dennis Riordan
Buffalo	Frances Holmes
Cleveland	Mark Hansen
Detroit	Carol Jenifer
Miami	Jack Bulger
New Orleans	Jack Bennett
New York City	Mary Ann Gantner
Newark	Andrea Quarantillo
Philadelphia	Angela Klapakis
Portland, Maine	Rodolfo Lara
San Juan, Puerto Rico	Robert Bowles

Washington District Phyllis Howard

Central Region Locations:

Chicago	Donald Monica
Dallas	Angela Barrows
Denver	Michael Comfort
El Paso	Raymond Adams
Harlingen	Michael Trominski
Helena	James Cole
Houston	Hipolito Acosta
Kansas City	Michelle Perry
Omaha	Gerald Heinauer
San Antonio	Sharon Hudson
St. Paul	Curtis Aljets

Western Region Locations:

Anchorage	Bernadette Doody
Honolulu	David Gulick
Los Angeles	Jane Arellano
Phoenix	Stephen Fickett
Portland, Oregon	Jerry Garcia
San Diego	Debbie Rogers
San Francisco	David Still
Seattle	Robert Okin

The Bureau of Immigration and Customs Enforcement, under the leadership of Michael Garcia, has approximately 14,000 employees and will have the responsibility for enforcing customs and immigration laws in the United States and protecting federal buildings against terrorist and other threats. The employees comprises of the Customs Service and INS Special Agents, INS Detention and Deportation Officers, INS' Immigration Litigation Section, and Federal Protective Service (FPS) employees. Customs air and marine interdiction functions, as well as the Intelligence components of Customs and INS, and FPS will also be part of BICE. The Bureau will have three Regional Directors with interim directors already named. The Eastern Region has 14 regional city offices under Director Paula Corrigan. Under the direction of Robert A. Wallis, the Central Region will have 11 regional city offices. Western Region Director Anthony Esposito will administrate 8 offices. The BICE will have Special Agents located in 20 cities across the United States.

The BICE leadership is as follows:

Interim BICE Regional Directors

Eastern Region, Paula Corrigan
Central Region, Robert A. Wallis
Western Region, Anthony Esposito

Interim BICE Directors

Eastern Region Locations:

Atlanta, William Fred Alexander
Baltimore, Calvin McCormick
Boston, Steve Farquharson

Buffalo, Mike McLaughlin
Cleveland, Linda Rabbett
Detroit, Phillip Wrona
Miami, James Goldman
New Orleans, James "Mike" Johnston
New York City, Edward McElroy
Newark, Demetrios Georgakopoulos
Philadelphia, Bill Riley
Portland, Maine, Maria Hurley
San Juan, Puerto Rico, Myrna Pere
Washington District, Warren Lewis
Central Region Locations:
Chicago, Cynthia O'Connell
Dallas, Anne Estrada
Denver, Scott Weber
El Paso, Troy Henley
Harlingen, Phillip Tutak
Helena, Tom Homan (detail from Dallas)
Houston, Mike McMahon
Kansas City, Robert Smith
Omaha, Alonzo Martinez, Jr.
San Antonio, Frank Chavarria
St. Paul, Mark Cangemi
Western Region Locations:
Anchorage, Robert Eddy
Honolulu, Don Radcliffe
Los Angeles, Ron Smith (detail from Portland)
Phoenix, Pat Schmidt
Portland, Oregon, Phil Crawford
San Diego, Wayne Wills (detail from Honolulu)
San Francisco, Mark Riordan
Seattle, Aaron Wilson

Commissioner Robert C. Bonner will led the Bureau of Customs and Border Protection which have twin goals of creating a single face of government at the border to make America safer and improving the cross-border process. The BCBP will enforce customs and immigration laws at and between the 307 ports of entry. Approximately, 30,000 inspectors from the Customs Service, INS and the Plant Protection and Quarantine (PPQ) bureau Agriculture will now work together under the new bureau. The former INS' Border Patrol will join BCBP to protect the country between the ports of entry. The 20 interim directors of the Customs Management Centers and the 307 ports of entry interim directors have been named and that information is available by contacting the local public affairs officers for the city or town of interest.

The BCBP leadership is as follows:
Interim Directors of Field Operations
Bureau of Customs and Border Protection
Atlanta, Georgia, Robert Gomez
Baltimore, Maryland, Steven Knox
Boston, Massachusetts, Phillip Spayd
Buffalo, New York, Michael D'Ambrosio

Chicago, Illinois, Anne Lombardi
Detroit, Michigan, Kevin Weeks
El Paso, Texas, Luis Garcia
Houston, Texas, Robert Trotter
Laredo, Texas, Gurdit Dhillon
Los Angeles, California, John Heinrich
Miami, Florida, Thomas Winkowski
New Orleans, Louisiana, James Hynes
New York, New York, Susan Mitchell
Portland, Oregon, James Tong
San Diego, California, Adele Fasano
San Francisco, California, Thomas O'Brien
San Juan, Puerto Rico, Marcelino Borges
Seattle, Washington, Thomas Hardy
Tampa, Florida, Denise Crawford
Tucson, Arizona, Donna De La Torre
Directors of all of the ports of entry have also been named.

13. PROPOSED VISITOR VISA RULE WITHDRAWN

The Department of Justice has withdrawn the controversial regulation on the admission of individuals under B-1 and B-2 visitor visas. The proposed regulation tightened the rules that allowed an unlimited number of foreign visitors to travel and stay for six-months in the United States on business or tourist visas. The proposed rule would have required foreign visitors to prove that they needed to stay longer than 30 days. It also lowered the maximum stay under a B status visa from one year to six months. This proposed rule is part of the immigration crackdown launched after the September 11, 2001 terrorist attacks. Under the regulation, millions would travel to the U.S. with itineraries, but not knowing how long they will be allowed to stay.

The housing and tourism industries fought the proposal. Tour brokers and operators believe that they will have difficulties selling U.S. destinations for foreign clients fearing that they would not be able to complete their itineraries. Governor Jeb Bush, one of the key critics of the proposal, believes that it would hurt South Florida's economy. He explained that Florida is among the world's most popular visitor destinations welcoming nearly 8 million international travelers a year with a substantial number who stay for months. This contributes more than \$3 billion in spending for the Florida economy and nearly \$200 million in state sales tax revenue. Sales in the Florida luxury condominium market slowed last year. Many believe the proposed rule could have caused the market to be flooded by existing seasonal owners selling their homes.

The DOJ pulled the proposed new rule hours before the Department of Homeland Security became the agency to enforce the immigration laws. The opponents are not claiming a victory yet since it not clear whether the DHS will seek to revive the rule.

The DOJ believed that the rule would have empowered immigration inspectors to use their judgment in granting a length of stay to foreigners. They purport that giving a foreigner an open-ended visa makes it easier to thwart the immigration laws such as by looking for and accepting illegal work. Foreign visitors are routinely granted visa

for much longer trips than they need according to the supports of the former INS proposal.

An applicant for a B status visa must initially show proof of a residence abroad and an intention to return home after the visit is over. The B status visa is separated into two categories. B-1 visitor status is for business travel to U.S. and can be used for a variety of purposes including, but not limited, attending seminars, making investments, buying goods, and performing temporary work for a non-U.S. employer. B-2 visitor visa status is for pleasure travel. Governor Bush encouraged the federal government to make reasonable efforts to ensure that U.S. citizens are protected from terrorist activities, but not to place unreasonable restrictions on millions of international travelers who come to this country only to enjoy the nation's natural beauty, exciting destinations, and the hospitality of its people.

14. PAKISTAN PRESIDENT'S NEPHEW RELEASED BY IMMIGRATION AUTHORITIES IN MEMPHIS

Aamir Javed Musharraf, the nephew of Pakistani President Prevez Musharraf, was placed into the custody of immigration officials in Memphis after he reported to the INS for special registration under the NSEERS program. The National Security Exit-Entry Act required all nationals from 25 mostly Arab countries who are long-term visitors to be photographed and fingerprinted.

Musarraf was detained in connection with overstaying a six-month visitor visa issued in 1994. Immigration authorities released him on Friday. The National Security Exit-Entry Act required all nationals from 25 mostly Arab countries who are long-term visitors to be photographed and fingerprinted. Musharraf, a Pakistani national, was detained while registering under the new immigration regulations because in 1997 he had been ordered deported. An immigration judge in New York City stayed the order last week giving Musharraf the opportunity to file a petition Tuesday to reopen his deportation case.

When he lived in Nashville, he was a licensed affiliate real estate broker and worked for American Heritage Inc. A Pakistani embassy official said that it remains unclear why he chose to surrender to immigrations officials in Memphis. Real estate agents who worked with him said that they had a pretty good idea who he was though they did not discuss religion or politics with him. "We talked mostly real estate," one agent told Memphis' Commercial Appeal newspaper.

President Musharraf's brother is Aamir's father. The Pakistani president has been President Bush's close ally in the war on terrorism, helping to track down suspected terrorists. The Pakistani government was instrumental in the arrest last week of Khalid Shaikh Mohammad, the accused terrorist who is believed to have masterminded the September 11th attack and other al-Qaida terrorist activities. Musharraf became president in October 1999 after a bloodless coup d'etat.

The time and place of Aamir Musharraf's deportation hearing has not been released.

15. GOVERNMENT REPORT CRITICIZES PREMIUM PROCESSING PROGRAM

The US Department of Justice's Office of Inspector General has released an audit of the BCIS's Premium Processing Program ("PPP") that finds that it has adversely affected processing times in regularly filed cases. Published processing times from the four INS service centers back up this conclusion. Processing times have gone from one to two months to six months or more for I-129 nonimmigrant classification applications. This is despite the fact that the program has generated a \$136 million in extra funds.

The Premium Processing Program, established in June 2001, allows applicants to pay a \$1000 additional fee in certain employment-based nonimmigrant applications for a guaranteed 15 calendar day turnaround time on an application.

The INS regulation that established the Premium Processing program requires the agency to use the money generated by the PPP to hire additional adjudicators, contract representatives and support personal to provide service to all its customers and to improve the infrastructure so as to reduce backlogs of all types of petitions and applications.

The report made several major findings:

1. The PPP has adversely affected the time to adjudicate routine applications and petitions. The backlogs for regularly filed cases have steadily increased since the PPP came online. There are now 3.2 million cases in the backlog.
2. The INS Service Centers have not conducted IBIS security checks in a timely manner. 11,830 Premium Processing petitions were adjudicated without IBIS checks between January 28, 2002 and March 18, 2002.
3. The INS lacks reliable data about the Premium Processing workload and the resources it requires.

16. OUR FAUSTIAN BARGAIN: THE UNINTENDED CONSEQUENCES OF PREMIUM PROCESSING BY [GARY ENDELMAN](#)

DISCLAIMER:

Gary Endelman practices immigration law at BP Amoco Corporation. The opinions expressed in this column are purely personal and do not represent the views or beliefs of BP Amoco Corporation in any way. This article is copyrighted by ILW.COM and is reprinted with permission. You can read other articles by Mr. Endelman and subscribe to future articles at www.ilw.com

As we approach the return of the H1B quota to 65,000 on October 1, those who use this work visa might consider this. Take a glance at the most recent processing report of the Texas Service Center (2/15/03), and you will note with astonishment that they are now working on H petitions submitted on or before September 5, 2002 -- a delay of over 5 months. Processing times in California are equally dreary. This confirms the anecdotal reality that most immigration practitioners know all too well, namely that an H case filed without premium processing is doomed to gather dust on the Service Center shelves.

Most large employers understand that the need to make such "facilitation payments" to the INS is simply the cost of doing business, accustomed as they are to the vagaries of international commerce. It is the emerging company that wants to hire US workers who lacks the cash to pay the \$1000 expedite fee with any regularity. As some observers noted when the INS first introduced the concept of premium processing to the hosannas of the immigration bar, the very acceptance and existence of premium processing is a disincentive to efficiency. Why, after all, should the INS improve service when they can make a boatload of money by taking longer? Indeed, if things get bad enough, desperate employers will be willing to pay more than \$1000. If a 5 month backlog can earn a \$1000 fee, how much will a 10 month backlog bring in? When everyone expedites, what relevance does premium processing retain? Right now, employers have no choice. They are at this future place where expediting is the norm. Since DOL regulations do not allow for the filing of a labor condition application more than six months in advance, and the Texas Service Center is taking over 5 months to decide a normal H case, and the H quota is going south in a few months, can anyone afford not to expedite?

The real losers in this are not only the aliens and the companies that want to hire them, but everyone who works in the American economy and depends on it. The INS is stifling growth, killing off jobs, and making sure that the Intels of the future never become what they could be and what we all need them to be in these uncertain economic times. Small companies just getting started, the ones who are the engine of job creation in an economy where the big boys are constantly trying to get lean and mean, are precisely the ones least able to afford the added \$1000 surcharge. President Bush calls for a tax cut on dividends to stimulate the economy but allows the INS to operate our immigration system in a way that ensures economic revival will never happen. THAT is why all Americans, even, perhaps especially those, who have never heard of the H1B visa, need to be concerned.

It has now reached the point where even the Office of Inspector General in the Department of Justice admits that processing backlogs for non-expedited cases are, in part, aggravated by the growing use of premium processing by desperate employers who will pay anything for results, if they can afford it. An Audit Report of the INS Premium Processing Program issued by the OIG last month told us what we already knew:

The Premium Processing program has adversely affected the time required to adjudicate routine applications and petitions. Consequently, more applicants are paying the \$1,000 Premium Processing fee to assure adjudication within 15 calendar days. The mandate to adjudicate premium applications within 15 days has contributed in part to the increased backlog of routine petitions at the service centers. The backlog has steadily increased since the second quarter of fiscal year (FY) 2002, reaching 3.2 million in September 2002. Thus, a program whose purpose was ultimately to reduce or eliminate adjudications backlogs may be having the unintended consequences of increasing at least some of those backlogs...The increase in premium cases further prolongs processing times for routine cases because staffing and resources must be pulled from the general adjudication areas to meet the demands of Premium Processing (emphasis added).

The INS cannot do what we pay it to do, even at fees which have risen steadily as service goes down and waiting times soar. There is little reason to think that the newly-born Bureau of Citizenship and Immigration Services (BCIS) will fare any better and every reason to fear that even the promise of a 15 day turnaround will fade in an agency culture increasingly dominated by enforcement and a desire not to be the one who approves a case for the next Mohammed Atta. The system is ailing and we all know it. For a while, perhaps a long while, the magic medicine of the \$1000 premium processing fee will make the patient feel better. Yet, once the initial effect wears off, the fundamental illness remains and, then, even \$1000 will not be enough. Remember the \$500 H1B add on fee that is now \$1000-the price we paid to get a 3 year hike in numbers? It is not hard to imagine how the BCIS will pitch their argument to Congress for a rise in the Premium Processing Tax: " We cannot decide cases in 15 days! We need more money!" Suddenly, \$1000 becomes \$2000 and who knows where it ends? Either the BCIS will treat the 15 days as advisory, much as the INS did with the mandate to decide L1 cases in 30 days, or the fee will soar. There is no stopping point once we start down this slippery slope. Down this path lies only the discouragement of innovation, the forestalling of the need to do things differently, and the subsidizing of duplication and needless complexity that is nothing so much as a full employment program for bureaucrats and lawyers.

Addicted lawyers, and I am one, need the jolt of a quick fix. Get that case through now! Our clients do not care about the long run and, consequently, neither do we. Not only does this not solve the problem, but it actually makes things much worse. It distracts our attention by giving the false appearance of progress. It erodes our interest in, and ability to, contribute to a fundamental reordering of immigration priorities that the nation so obviously needs. The gulf between large employers who can pay the \$1000 fee and the small ones who cannot must disappear. The continued existence of such a divide has enabled the INS to practice the politics of divide and conquer with skill and efficacy. Yet, this has been a pyrrhic victory for, in the end, even the INS could not charge enough to hide the rot eating away at its insides.

There is a better way. Congress, not the BCIS, must run the show and decide what our immigration priorities should be. Only the elected representatives of the American people can say what kind of an immigration system we are willing to pay for. Simplify things. Do what any family would do. Decide what America cares most about and find out what it takes to get it done. Lawyers will get more business and make more money. They need not fear simplicity. In fact, it is their fast friend since complexity shuts out the vast majority of emerging employers and aliens from using their services. Only by weaning America from the hidden narcotic of user fees can Congress make it possible for the patient to enjoy true recovery.

About The Author

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

17. LEGISLATIVE UPDATE

The following bill was introduced this week in the Congress:

S. 539, sponsored by Pete Domenici (R-NM), this bill authorizes appropriations for border and transportation security personnel and technology, and for other purposes. Senator John McCain (R-AZ) supported the bill stating that we must do all we can to improve the ports of entry along the borders with both Mexico and Canada. He added that beyond the need for improving technology for infrastructure, the need for a guest worker program must be addressed. McCain stated that as long as there are jobs to be had on this side of the border, people will continue to attempt crossing illegally.

* * *

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