

Siskind's Immigration Bulletin
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SSHD serves immigration clients throughout the world from its offices in the US,
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1. Openers
 2. The ABC's Of Immigration – Tax Obligations For Foreign Students
 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. Guest Article: J-1 Summer Camp Staff FAQs, By Jim Buck
 11. Adjustment Cases Soon To Be Filed Nationally
 12. Canadian Corner
 13. Two Department Of State Employees Charged With Visa Fraud
 14. DOS Provides Special Immigrant Status For Certain Victims Of September
- 11

1. Openers

Dear Readers:

I wanted to alert you all to a potentially serious development at the BCIS that could
cause a drastic deterioration in the level of customer service at the agency. As many
of you know, with the exception of the Missouri Service Center, information officers

are available by telephone at the BCIS regional service centers in Texas, California, Nebraska and Vermont. It can sometimes take dozens of attempts and waits of several hours, but there is no choice but to speak to an information officer to resolve a problem with a case.

Now the BCIS is even planning on taking that most basic level of service away. Customers of the agency will now have to call a central 800 number and speak with officers who have no information on cases pending at the service centers. The person who fields that call will then forward the information to the service center handling the case and the customer will have to wait for a written response. Any seasoned immigration lawyer reading this is probably already bristling at this prospect. We're frequently told to fax inquiries to the service centers and we pretty much take for granted that we will NEVER get a response - in writing, by phone, or in any way. Let it be noted for the record that I predict that for most people, inquiries will seemingly go into a black hole. And for those lucky enough to get a response, they can expect to hear back in months and not days.

I know that there are many Congressional liaisons that receive this newsletter. You are about to be inundated on a permanent basis with calls from people who need help and are no longer able to resolve matters on their own. You might want to give a heads up to the members of Congress who employ you to warn them about what is coming. We hope you will urge them to let the BCIS know that changes like this that make the agency less accountable and less service-oriented are NOT acceptable.

Over the last several weeks we have run a series of articles on employment rules for F-1 students in the US. We are asked very frequently questions about student employment and so we decided that we would use our ABCs of Immigration feature to cover the subject at some length. A natural question that arises in connection with student work authorization is how to handle the tax obligations that come from working in the US. Not being tax experts ourselves, we asked our friend and frequent newsletter contributor Steven Weiser to help out. Steven is a gifted tax attorney/CPA and he has written this week's ABC's article on this topic. We hope you find his in depth treatment of the subject helpful.

We also write this week on our regular features as well as the week's news. Included is a guest article by Jim Buck of BUNAC, the well-known work/travel exchange program regarding the hiring of J-1 visa holders as summer camp employees.

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 – Tax Obligations For Foreign Students

[This week we are pleased to present a guest ABC's article by international tax guru Steven Weister. This article on tax issues for students complements nicely the recent

series of articles we've been running on work options for F-1 students. Note that questions on the topic should be directed directly to Steven at the email address below rather than to us.]

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/>.

Among those of us who never pursued an overseas education it is difficult to imagine the concerns and anxieties foreign nationals face when pursuing a higher education in the United States. Taxes are probably the last thing such students are concerned about, but when that first paycheck, scholarship check or loan disbursement check is received and taxes are withheld the student is left wondering where all his or her money went. Unfortunately, taxes are a fact of life and all students will eventually have to deal with them either during or after school. Having a basic understanding of the impact U.S. tax laws may have on a foreign student can help to alleviate some of the anxieties, concerns or questions that might surface later on.

When considering the impact U.S. income taxes may have on such a student, the analysis should always begin with determining whether the student is a "resident alien" or "non-resident alien" for U.S. tax purposes. The analysis is important primarily because the U.S. employs different methods for taxing resident and nonresident aliens.

Resident Alien vs. Nonresident Alien

An individual who is not a U.S. citizen is classified as a resident alien if he or she meets (i) the *lawful permanent resident test*, (ii) the *substantial presence test* or (iii) such alien elects to be treated as a resident. The lawful residence test is fairly straightforward in its application. Generally, this test is satisfied if the person has obtained a green card (hence, the lawful permanent resident test is also known as the "green card test").

The substantial presence test is a bit more complicated in application. Under this test an individual is treated as a resident alien if such individual is present in the U.S. (i) for at least 31 days during the current year, and (ii) for a total of 183 "adjusted" days during the current and two preceding calendar years. For purposes of applying the 183-day test, a day of presence in the U.S. during the current year counts as a full day; a day of presence in the preceding year counts as 1/3rd of a day; and, a day of presence in the second preceding year counts as 1/6th of a day. This can best be summarized through the following example:

X, an alien individual, is present in the U.S. for 122 days during 2000, 122 days during 2001, and 122 days during 2002. X was not a permanent lawful resident of the U.S. during any of those years and was not present in the U.S. in any year prior to 2000.

X is not a resident for 2000 because X is present on only 122 days during that year and the preceding two years. X is not a resident for 2001 because the total period of residence for 2000 and 2001 is 162 2/3 days (122 days in 2001, and 40 2/3 days in 2000). X *is a resident* for 2002 because she was present in the U.S. for at least 31 days in 2002, and was in the U.S. for 183 days during 2002 and the preceding

two years (122 full days in 2002, 40 2/3 days in 2001, and 20 1/3 days in 2000).

Since most school years begin in August or September, it is likely that most foreign students will *not* meet the substantial presence test during the first tax year they are in school. Physical presence in the U.S. from August 1 through December 31 only totals 153 days.

Nor will many of these students every meet the substantial presence test due to special exceptions to the substantial presence test, including one that allows "exempt individuals" to exclude certain days of presence from the above calculation. Exempt individuals include certain teachers, trainees or students. To verify exempt individual status Form 8843 should be filed with the Internal Revenue Service (Philadelphia Service Center).

An exempt teacher, trainee or student is an individual temporarily admitted to the U.S. as a nonimmigrant under specified provisions of the Immigration and Naturalization Act, more particularly, "F," "J" and "M" visa holders and their immediate family members. The individual must substantially comply with the terms of such visas. Failure to comply with the terms of these visas, or engaging in activities considered prohibited by the Immigration and Naturalization Act can result in the loss of exempt individual status. Furthermore, the Internal Revenue Service has been granted the power to make an independent assessment as to whether an individual has complied with the terms of the individual's visa. Unauthorized employment or not being engaged in a course of full-time study may be treated as a failure to comply with the individual's visa requirements even if the Immigration and Naturalization Service has not sought to revoke the individual's visa.

An individual may not exclude days of presence as an exempt teacher or trainee if the individual has been exempt as a teacher, trainee or student for any part of two of the prior six calendar years. In the case of a temporary F or J visa holder whose compensation is paid by a foreign employer, the preceding sentence is modified by providing that the individual may not exclude days of presence if the individual has been exempt as a teacher, trainee or student for any part of four of the prior six calendar years.

Y is temporarily present in the U.S. during the calendar year as a teacher. Y holds a "J" visa, and has not received compensation from a foreign employer. Y was treated as an exempt student for two of the prior six calendar years. Even if this is the first year that Y seeks exempt individual status as a teacher, Y will not be an exempt individual because Y was exempt as a student for at least two of the prior six years.

An individual cannot exclude days of presence as an exempt student if the individual has been exempt as a teacher, trainee or student for any part of more than five calendar years, unless the approval of the Internal Revenue Service ("IRS") is obtained. Generally, the IRS wants to insure that the individual does not intend to reside permanently in the U.S. Factors important to the IRS in making this determination include whether a student has maintained a closer connection with another country and whether the individual has taken steps to secure a green card.

Finally, if an individual fails both the "green card" and substantial presence tests, the individual can make an election to be treated as a resident. To qualify for the election the individual must not have been a resident during the prior calendar year and *must* be a resident under the substantial presence test for the following calendar year. The individual must also meet several minimum presence tests during the year of election as well. Most foreign students should not attempt to make this election, as it will ordinarily have adverse tax consequences. Students often prefer nonresident alien status on account of the associated exemption from employment taxes (see below).

If residency status changes during a year the individual effectively has two tax years, one as a nonresident and one as a resident. If an individual acquires a green card during a year (but does not meet the substantial presence test) resident status begins on the first day of U.S. presence as a lawful permanent resident. Similarly, if the substantial presence test is met, residency generally begins on the first day of U.S. presence. In the case of an individual making the election to be treated as a resident, the residency starting date is the first day of the calendar year of which the individual is treated as a resident.

Okay, So I Know That I Am A Resident or Nonresident Alien, But What Does That Really Mean?

Foreign students who are treated as resident aliens are taxed on their worldwide incomes in a manner identical to that of U.S. citizens. Annual income tax returns must be completed and income tax should be paid to the U.S. government.

On the other hand, the process of taxation is entirely different for individuals treated as nonresident aliens. Two separate U.S. income tax regimes apply to nonresident aliens. 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. It should be noted from the outset, that the terms of most student visas prohibit students from engaging in work for wages or salaries, or from engaging in business while in the U.S. Nevertheless, for tax purposes nonresident alien students admitted to the U.S. under F, J or M visas are always considered engaged in a U.S. trade or business. Although on first glance this hardly seems logical, the rule is actually designed to work for the benefit of such students by placing them in a position that is more tax advantageous.

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.

Salaries, wages and compensation from U.S. sources are included in FDAP and payments of such to nonresident aliens are subject to either (i) the 30 percent

withholding tax, or (ii) 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. However, if such compensation does not exceed \$3,000 for a tax year the 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. Most students will fail to qualify for this exemption. Still, because the performance of services in the U.S. generally gives rise to the existence of a U.S. trade or business (and because nonresident student aliens holding F, J or M visas are always considered engaged in 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).

Many students are surprised to learn that their scholarships and grants may be includable in FDAP income. Taxable scholarships and grants received by nonresident aliens are subject to the withholding tax if the payor of the scholarship or grant resides in the U.S.; however, the rate of tax is reduced to 14 percent. Generally, scholarships and grants are taxable to the extent *not* used for qualified expenses, which include tuition and fees required to enroll in school. Therefore, amounts used for living expenses are generally taxable. To the extent a scholarship or grant is provided by your educational institution, the school may actually withhold tax from that portion of the scholarship or grant payable towards expenses such as room and board.

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.

Ordinarily, 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. 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). The ECI analysis can be very complex and a qualified tax professional should always be consulted when dealing with these rules.

Items ordinarily included in FDAP are instead treated as ECI if one of two tests is 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. Ordinarily, nonresident students admitted to the U.S. under F, J or M visas that receive income from wages, tips, scholarships and grants are subject to tax as if such income is ECI.

Employment Taxes

Many students find it necessary if the terms of their visas allow, to finance their education, at least in part, with a paying job. Generally, services performed as a nonresident alien admitted into the U.S. under a F, J, or M visa are not covered under the U.S. social security program if the services are performed in accordance with the terms of the visa. These individuals are exempt from social security and Medicare withholding taxes, a point often missed by many employers and employees (especially off-campus employers). Employment taxes are always withheld in cases in which services performed are *not* for the purpose for which the student was admitted to the U.S.

All students treated as resident aliens are, however, covered under the social security and Medicare programs and subject to withholding and employment taxes, unless a tax treaty between the U.S. and student's home country provides an exception.

What Tax Forms To Complete and When

Resident and nonresident aliens file different types of income tax returns. Resident aliens complete Forms 1040, 1040A or 1040EZ, the same forms completed by U.S. citizens. The due date for filing such returns is April 15 of the year following the year in which income was earned (e.g., April 15, 2004 for the tax year ending December 31, 2003). Automatic extensions to June 15 are granted to a resident alien residing outside the U.S. on April 15. Additional extensions to August 15 can be obtained by filing Form 4868 with the IRS.

Nonresident aliens needing to file tax returns should use Forms 1040NR or 1040NREZ. Returns should be filed if a nonresident alien was considered engaged in a U.S. trade or business; therefore, students admitted to the U.S. under F, J or M visas should always file a tax return. Nonresident aliens that were employees and subject to U.S. income tax withholding should file their returns by April 15. Nonresident aliens that were not employees receiving income subject to income tax withholding should file a return by June 15.

In all cases, failing to file a tax return by the due date, may result in the denial of allowable deductions and tax credits, thereby potentially increasing the amount of any tax liability.

Students departing the U.S. permanently should generally file a special Form 1040-C.

Residents and nonresident aliens should always let their employers know of their status. Resident aliens should file IRS Form W-9 with their employers. Nonresident aliens should provide their employers with Form W-8233 or Form W-8BEN to establish that they are foreign persons. All employees should provide their employers with a Form W-4 (click here to view Form W-4 in pdf format: <http://www.visalaw.com/03may2/w4.pdf>). In the case of nonresident aliens, the W-4 will establish that taxes should be withheld at the same graduated rates as resident aliens and U.S. citizens. Special rules apply to nonresidents filing out Forms W-4. All nonresident aliens should (i) claim single status on Form W-4 (regardless of actual marital status), (ii) claim only one allowance on line 5 (except residents of Canada, Mexico, Japan or South Korea), (iii) request that the employer withhold an additional \$7.60/week on line 6, and (iv) do not claim "Exempt" on line 7.

All tax forms can be obtained from the IRS website (<http://www.irs.gov/>).

The Effect of Tax Treaties

The U.S. has income tax treaties in effect with many countries. If you are a resident or citizen of such a country you may qualify for certain benefits that reduce or eliminate the need to withhold income or employment taxes. For example, the tax treaty between the U.S. and the People's Republic of China provides the following:

A student, business apprentice or trainee who is or was immediately before visiting [the U.S.], a resident of the [P.R.C.] and who is present in the [U.S.] solely for the purpose of his education, training or obtaining special technical experience shall be exempt from tax in the [U.S.] with respect to:

(a) payments received from abroad for the purpose of his maintenance, education, study, research or training;

(b) grants or awards from a government, scientific, educational or other tax-exempt organization; and

(c) income from personal services performed in [the U.S.] in an amount not in excess of 5,000 United States dollars or its equivalent in Chinese yuan for any taxable year.

The benefits provided under this Article shall extend only for such period of time as is reasonably necessary to complete the education or training.

Treaty provisions are not limited to simply determining whether income is taxable in one country or not. They may also provide special rules for determining whether the individual is considered a resident alien or not. Also, treaty provisions often reduce the rate at which taxes are withheld upon the payment of certain types of income.

Students wishing to take advantage of treaty benefits should file Form 8233 with their employers to reduce or eliminate the withholding of income taxes. Students must also attach a statement to Form 8233. Examples of these statements can be obtained from IRS Publication 519 (available through the IRS website). The same documentation should be use for students receiving otherwise taxable scholarships and grants.

In Summary

Alien students with U.S. source income should always consider consulting with a qualified tax professional as the tax rules affecting these students is unfortunately very complex. Generally, in the case of nonresident students admitted to the U.S. under F, J or M visas, income taxes on wages, salaries and even scholarships are often due and annual tax returns should be filed. Students may be exempt from the payment and withholding of employment taxes. Always consider and determine if a tax treaty exists between the U.S. and a student's home country, as such treaty may provide additional tax benefits.

Lastly, the IRS has made available Publication 519, a U.S. tax guide for resident and nonresident aliens. This publication is highly informative and should be reviewed by all students prior to entry into the U.S. Publication 519 is available through the IRS website.

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 would likely to know what are fees for visa stamping. I am H1B holder. I am sending documents for visa revalidation

A - You can find information on visa revalidation at <http://travel.state.gov/revals.html>.

The base fee for these applications is \$100. You need to look up your country in the visa reciprocity tables to determine if you also must pay a reciprocal fee on top of the regular fee.

Q - My wife has a pending I-485 adjustment of status and her EAD card expired last month. We applied for a renewal in early February, but have yet to receive the new card. Now her employer will not let her continue to work because her EAD has expired. We showed them a copy of the renewal application, but they won't listen. Is this legal? Can't my wife continue to work for up to 240 days on her existing card until she receives her renewed EAD card?

A - Unfortunately, your employer has acted properly. He cannot employ you merely because you have applied for an EAD extension. You need to have the new card. By law, the INS must adjudicate the EAD within 90 days or they are required to issue an interim card, however. So you should check with the INS on this. As for the 240 day rule, that applies for extensions of non-immigrant work visas.

Q - After six years as an H1-B holder and one year as a TN visa holder, is it possible to reapply for an H1-B visa again? How long it will take to go back to H1-B?

A - You can only get additional H-1B time if you have been outside the US for a year or are eligible for one year H-1B extensions as a result of having a qualifying permanent residency or labor certification petition pending.

Q - Are Canadian Citizens supposed to have visitor visas and can they attend school part time?

A - Canadian citizens do not need visitor or student visas but they still need to be admitted in visitor or student status after being inspected at a port of entry. Students need to be admitted to a school, get an I-20 form, have evidence of their intentions to comply with the rules for student status and apply for visitor status at a port of entry. Visitors also simply need to show up at a port of entry to be admitted to the US. For most Canadians, a passport or other form of official identification may be all that is needed.

Q - I came to the US from India with my wife in Aug 1998 on F1 & F2 visas which expired on May 2000. I had applied for Optional Practical Training before my visa expired. I received OPT approval in June 2000. I started working on OPT from June 2000 and applied for H1. I received H1 approval a few months later, before my OPT ran out. I still have not gone to India to stamp the H1 visa. My first question is: Have I been out of status?

I changed jobs in the beginning of 2002. I applied for transfer of H1 and I came to know that the previous company's lawyer had not filed for an H4 visa for my wife. My new company's lawyer applied for it and we received the approval for both of us. Will there be any problem if she goes to India for stamping her visa (Mine is still not stamped)?

A - As long as you have had valid I-94s and have been complying with the terms of your H-1B approval, the fact that you have had a visa that is in a different category than your current status does not matter. As for your wife, her status should now be clean since the BCIS has issued a new I-94 for her. Since her F-2 status was presumably duration of status, she is not subject to a reentry bar. A consulate is likely to be fairly forgiving for what is actually a fairly common immigration problem. That assumes they even pick up on the fact that there was a status violation on your wife's part.

Q - My sister's had EAD from V2 visa. She is going to be 21 on May 8th. Her EAD expires on May 8th. Her priority date is current and we filed I-485 with I-765 today. Can she work after May 8th even her EAD will be expired?

A - Unfortunately, the EAD does not automatically extended merely because you re-filed a new I-765 application. Your sister will not be able to legally work until she gets a new EAD or other work visa.

4. Border News

Last week Homeland Security Secretary Tom Ridge said the government would speed up the deployment of biometric security measures at the nation's borders, expected to be in place by the end of the year. The Enhanced Border Security Act, enacted last year, requires passports, visas and other travel documents to include biometric

information and equipment to read them at port of entry by 2005. In a recent story by the Baltimore Sun, some experts warned that biometric systems are not capable of handling the large scale of activity at the nation's borders. James L. Wayman, a math and biometrics professor at San Jose State University, said he doubts such systems could process the workload at all points of entry. He noted that there are roughly 1 billion border crossings, requiring six times the number of annual searches conducted by the FBI's current fingerprint system, which is the nation's largest existing biometric database. Biometric technology being considered includes iris scanners, facial recognition devices, and even motion analysis and odor sensors. A report by the Government Accounting Office estimates the cost of implementing such technologies at \$1.2 billion.

Under Secretary for Border and Transportation Security Asa Hutchinson testified before a Senate subcommittee this week that the Department Of Homeland Security will need a 33% budget increase for the department's Bureau of Customs and Border Protection (BCBP). Hutchinson told the Senate Homeland Security Appropriations Subcommittee that such programs as the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative (CSI) required funding that would raise the bureau's budget to \$6.7 billion in fiscal year 2004.

Hutchinson said the funds will "provide a greater accountability through an integrated border and transportation security organization, create smart borders that are more secure and increase the security of international shipping containers."

In addition to the BCBP, Hutchinson heads the Bureau of Immigration and Customs Enforcement (BICE) and the Transportation Security Administration (TSA). These three bureaus are set to receive a total of \$18.1 billion in the next fiscal year.

The families of 14 migrants who died crossing the into the Arizona desert have filed a \$42 million lawsuit against the U.S. Department of the Interior. The suit claims federal policy forced the immigrants to enter through a treacherous area known to have little water, and that Humane Borders was refused permission to place a water station "in the exact area" where the crossers died. According to The Arizona Daily Star, the Cabeza Prieta National Wildlife Refuge and Wilderness Area placed seven Humane Borders flags marking wildlife water stations migrants could use, the day after the bodies were found. Robin Hoover, president of Human Borders, said a request to set up a water station in the area was initially rejected because of concerns for the endangered Sonoran pronghorn antelope. In a letter to Human Borders, Cabeza Prieta National Wildlife Refuge Manager Donald Tiller said the water station "has been determined to be non-compatible with the goals, objectives and purposes of the refuge."

Border authorities say they have found a safe and effective solution to stopping "kamikaze smugglers," cars packed with illegal immigrants and drugs that speed across the U.S.-Mexican border. Next week, testing will begin on a new device called the Vehicle Stopping System (VSS), which snares smugglers in high-tech nets. The device is said to stop vehicles so smoothly that the occupant of a car traveling at 50

mph isn't pitched forward. The net also prevents suspects from fleeing because it wraps around the doors of the vehicle, trapping them inside. Officials found that road spikes were not a good solution because they caused vehicles to lose control, injuring innocent people, and because smugglers learned how to drive over the spikes by filling their tires with silicon.

5. News From The Courts

Andrzej Markowski v. John Ashcroft
United States Court of Appeals for the Third Circuit

Andrzej Markowski, a Polish citizen, appealed a Board of Immigration Appeals' decision denying his application for adjustment of status under the Diversity Visa program, and ordering him removed from the United States. Markowski argues that the removal proceedings should be equitably estopped based on affirmative misconduct by Immigration and Naturalization Service (INS) officials. The court denied the petition for review.

In 1996, the INS failed to process Markowski's initial adjustment of status application in a timely fashion and failed to notify him of his eligibility for adjustment of status despite having his correct address on file throughout the matter. In 1997, Markowski filed a second adjustment of status application that was filed prior to the expiration of DV-97, but the INS did not schedule an interview with Markowski until the available visa numbers had expired. Markowski was no longer eligible to adjust his status by receiving a visa. In 1999, INS served Markowski with a Notice to Appear, charging him with being removable from the United States.

The Immigration Judge rejected Markowski's argument that the INS's denial of his adjustment of status was the result of malfeasance. The IJ ruled that because there were no longer visa numbers available she could not grant Markowski's application for adjustment of status. The BIA determined that it had no authority to apply the doctrine of equitable estoppel to order the INS to adjust his status. The BIA dismissed Markowski's appeal.

Estoppel is an equitable doctrine applied in order to avoid injustice. Fredericks v. Commissioner of Internal Revenue, 126 F.3d 433, 438 (3d Cir. 1997). A party seeking estoppel against the government bears the burden of showing that a government official engaged in affirmative misconduct. Id. The court held that while Markowski had certainly demonstrated that INS officials were negligent in their handling of his applications, he has not provided evidence of affirmative misconduct.

The court further held that even if the court were to apply equitable estoppel in this matter, the problem of fashioning an appropriate remedy would remain. The visas under DV-95 and Illegal Immigration Reform and Immigrant Responsibility Act § 637 are no longer available and the court has no authority to order the INS to grant a nonexistent visa. See e.g., Iddir v. INS, 301 F.3d 492, 501 (7th Cir. 2002). The court explained that the INS's failure to process the visa application did not extend the "statutorily-limited period of eligibility for diversity visa." Nyaga v. Ashcroft, 323 F.3d 906, 914 (11th Cir. 2003).

* * *

In re: _____
Decision of the Board of Immigration Appeals

The Respondent appealed the decision denying his application for relief from removal. The Respondent claimed that the Immigration Judge made several errors when issuing his decision. The Board held that on remand the IJ should address Respondent's claim both as to his eligibility for asylum and withholding of removal.

The Board found that the IJ failed to specifically address the respondent's claim pertaining to his treatment as an orphan; based on a theory of his membership in a particular social group. The Board instructed the IJ to specifically consider whether this past treatment amounted to torture as defined in the Convention Against Torture (CAT). The IJ's analysis of the Respondent's religion-based-claim was deficient.

The Board further held that the IJ's adverse credibility finding was not based on any material inconsistencies in the record. See Matter of S-A-, 22 I & N Dec. 1328. The Board reasoned that the IJ found, without any particular basis, that the Respondent's explanation for his failure to timely file his application for asylum was not plausible and rendered an adverse credibility finding despite the consistency and plausibility of the main basis of his claim.

6. Government Processing Times

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 May 1, 2003	
Form	We are Processing cases with receipt notice dates on or before:
I-90 to replace lost, damaged or destroyed I-551	4/12/2002
I-90 to renew expiring I-551	4/19/2002
I-102 for replacement/initial nonimmigrant arrival/departure form	2/1/2003
I-129 for H1B classification	2/27/2003
I-129 for H2A classification	4/17/2003
I-129 for H2B classification	3/20/2003
I-129 for H3 classification	3/17/2003
I-129 for L classification	3/14/2003
I-129 for Blanket L petition	3/6/2003
I-129 for O classification	2/24/2003
I-129 for P classification	4/3/2003
I-129 for Q or R classification	2/13/2002
I-129 for TN classification	2/25/2003

I-129F (fiancée)	12/2/2002
I-130 for spouse, parent or child (under 21) of a United States citizen	5/28/2002
I-130 for son or daughter (over 21) of a United States citizen	5/25/2001
I-130 for brother or sister of a United States citizen	5/25/2001
I-130 for spouse of a lawful permanent resident	5/17/2001
I-130 for unmarried child under 21 of a lawful permanent resident	5/25/2001
I-130 for unmarried son or daughter over 21 of lawful permanent resident	5/25/2001
I-131 for Advance Parole	2/19/2003
I-131 for Advance Parole for HRIFA principal applicant	1/25/2003
I-131 for Reentry Permit	5/27/2002
I-131 for Refugee Travel Document	3/7/2003
I-140 A (extraordinary ability)	1/9/2003
I-140 B (outstanding professor or researcher)	11/27/2002
I-140 C (multinational executive or manager)	1/24/2003
I-140 D (professional holding adv. degree/alien of exceptional ability)	2/6/2003
I-140 E (skilled worker or professional)	1/2/2003
I-140 I (National Interest Waiver)	11/8/2002
I-140 G (other worker)	12/20/2002
I-212 permission to reapply for admission after deportation/removal	11/4/2002
I-360 petition for Amerasian, widow(er), or Special Immigrant	2/11/2003
I-485 Asylum-based	2/1/1999
I-485 Refugee-based	8/22/2001
I-485 Employment-based	8/22/2001
I-485 Haitian Refugee Immigration Fairness Act (HRIFA)-based	1/11/2000
I-526 Immigrant Petition by Alien Entrepreneur	not processed at the NSC
I-539 for extension of stay for F or M non-immigrant	4/7/2003
I-539 for extension of stay for J non-immigrant	3/31/2003
I-539 for extension of stay for L or H non-immigrant	2/10/2003
I-539 for extension of stay for other non-immigrant	11/11/2002

I-539 to change nonimmigrant classification to F or M	12/9/2002
I-539 to change nonimmigrant classification to J	3/19/2003
I-539 to change nonimmigrant classification to L or H	2/17/2003
I-539 to change to other nonimmigrant classification	9/18/2002
I-612 waiver of foreign residence requirement	10/14/2002
I-730 Refugee/Asylee Relative Petition	8/5/2002
I-751 Petition to Remove Conditions on Residence	6/5/2002
I-765 for initial asylee or asylum applicant authorization	3/10/2003
I-765 for employment authorization associated with Hurricane Mitch TPS	4/17/2003
I-765 for employment authorization associated with El Salvador TPS	4/17/2003
I-765 for employment authorization while I-485 is pending	2/19/2003
I-765 for all other employment authorization	1/24/2003
I-817 Application for Family Unity Benefits	12/3/2002
I-821 for El Salvador	4/17/2003
I-821 for Hurricane Mitch countries	4/17/2003
I-824 Application for Action on an Approved Application or Petition	7/19/2002
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	not yet adjudicated

California Service Center Processing Time Report 5/1/03		
Form		We are now processing cases with these receipt dates:
I-90	To replace lost, damaged or destroyed I-551	6/25/2002
I-90	To renew expiring I-551	6/25/2002
I-102	For replacement/initial nonimmigrant arrival/departure form	4/22/2003

I-129	For H-1B classification COS	11/14/2002
I-129	For H-1B classification EOS	10/17/2002
I-129	For H-2A classification	5/4/2003
I-129	For H-2B classification	5/1/2003
I-129	For H-3 classification	3/5/2003
I-129	For E classification	10/2/2002
I-129	For L classification	3/20/2003
I-129	For Blanket L petition	5/5/2003
I-129	O classification	1/16/2003
I-129	P classification	1/16/2003
I-129	Q classification	1/16/2003
I-129	R classification	9/18/2002
I-129	TN classification	
I-129F	(Fiancée)	2/13/2003
I-130	For spouse, parent, or child (under 21) of a United States citizen	12/16/2002
I-130	For Unmarried son/daughter (over 21) of a United States citizen	4/5/2001
I-130	For Spouse/Child of a lawful permanent resident	4/6/1998
I-130	For Unmarried son/daughter (over 21) of a lawful permanent resident	4/6/1998
I-130	For Married Son/daughter of a United States citizen	4/5/2001
I-130	For Brother/Sister of United States citizen	4/6/1998
I-131	For Advance Parole	3/20/2003
I-131	For Advance Parole for HRIFA principal applicant	
I-131	For Reentry Permit	
I-131	For Refugee Travel Document	
I-140A	(extraordinary ability)	10/25/2002
I-140B	(outstanding professor or researcher)	11/14/2002
I-140C	(multinational executive or manager)	12/19/2002
I-140D	(professional holding adv. degree/alien of exceptional ability)	4/1/2003
I-140E	Skilled worker or professional	1/21/2002

I-140I	(National Interest Waiver)	1/16/2003
I-140G	(other worker)	12/3/2002
I-212	Permission to reapply for admission after deportation/removal	4/19/2001
I-360	Petition for Amerasian, widow(er), or Special Immigrant	9/18/2002
I-485	Asylum-based	
I-485	Refugee-based	
I-485	Employment-based	11/16/2001
I-485	Haitian Refugee Immigration Fairness Act (HRIFA)-based	
I-539	For extension of stay for F or M non-immigrant	4/21/2003
I-539	For extension of stay for J non-immigrant	
I-539	For extension of stay for L or H non-immigrant	4/16/2003
I-539	For extension of stay for other non-immigrant	4/16/2003
I-539	To change nonimmigrant classification to F or M	4/21/2003
I-539	To change nonimmigrant classification to J	
I-539	To change nonimmigrant classification to L or H	4/16/2003
I-539	To change to other nonimmigrant classification	4/16/2003
I-612	Waiver of foreign residence requirement	4/15/2003
I-730	Refugee/Asylee Relative Petition	
I-751	Petition to Remove Conditions on Residence	8/20/2002
I-765	For initial asylee or asylum applicant authorization	Current
I-765	For employment authorization associated with Hurricane Mitch TPS	Current
I-765	For employment authorization associated with El Salvador TPS	Current
I-765	For employment authorization while I-485 is pending	9/9/2002
I-765	For all other employment authorization	8/14/2002
I-817	Application for Family Unity Benefits	6/14/2002
I-821	For El Salvador	4/17/2002
I-821	For Hurricane Mitch countries	12/20/2002
I-824	Application for Action on an Approved Application or Petition	3/28/2002
I-829	Petition by Entrepreneur to Remove	10/23/2000

	Conditions	
I-914	Application for T Non-immigrant	

Vermont Service Center Processing Time Report 5/1/03		
Form		We are now processing cases with these receipt dates:
I-90	To replace lost, damaged or destroyed I-551	6/7/2002
I-102	For replacement/initial nonimmigrant arrival/departure form	3/20/2003
I-129	Petition for Nonimmigrant Worker H-1B Cap	2/24/2003
I-129	Petition for Nonimmigrant Worker H-1B Ext	2/24/2003
I-129	Petition for Nonimmigrant Worker H-2A	Current
I-129	Petition for Nonimmigrant Worker Other (H-2B, H3, O, P, Q, R)	3/13/2003
I-129	Nonimmigrant Worker L (not based on a blanket petition)	4/4/2003
I-129	Nonimmigrant Blanket L	4/4/2003
I-129F	(Fiancée)	4/28/2003
I-212, I-601, I-612	Waivers	Current
I-130	Immediate Relatives Classes	8/21/2002
I-130	Preference Classes	2/8/1999
I-131	Application for Travel Document	2/27/2003
I-140	Immigrant Petitioner for Alien Worker E11	5/1/2002
I-140	Immigrant Petitioner for Alien Worker E12	5/1/2002
I-140	Immigrant Petitioner for Alien Worker E13	7/1/2002
I-140	Immigrant Petitioner for Alien Worker E21 (National Interest Waivers: 5/18/2002)	5/31/2002
I-140	Immigrant Petitioner for Alien Worker E31, E32, EW3 (Nurses: 4/18/2003)	8/12/2002

I-360	Petition Widowed/Special Immigration	12/23/2002
I-360	VAWA	10/5/2002
I-485	Application to Register Permanent Residence or to Adjust Status	12/3/2001
I-539	Application to Extend/Change Nonimmigrant Status	4/14/2003
I-687		N/A
I-751	Petition to Remove Conditions on Residence	12/1/2001
I-765	Employment Authorization (C) (8)	3/20/2003
I-765	Employment Authorization (C) (9)	3/6/2003
I-765	Employment Authorization Other	3/13/2003
I-817	Application for Family Unity Benefits	N/A
I-821	Application for Temporary Protected Status – El Sal	4/4/2001
I-821	Application for Temporary Protected Status – Nicaragua/Honduras	Current
I-824	Application for Action on an Approved Application or Petition	2/11/2002
I-914	Application for T Non-Immigrant Status	1/31/2003
N-470, N-565, N-643		9/13/2002
N-600		9/13/2002

7. News Bytes

South Korea President Roh Moo-hyun is expected press President Bush to ease obstacles facing nationals of his country who seek visas to enter the US when the leaders meet next week in Washington. Korean business leaders are particularly concerned with a proposal to eliminate the personal appearance waiver program around the world. Right now, nearly 2/3 of Koreans have their interviews waived for visitor visas to the US. Koreans worry that if the personal appearance waiver is eliminated the consulate will be overwhelmed and long waits for visas - possibly months-long - will result. Business leaders would instead like to see South Koreans granted Visa Waiver Program status so that they can enter the US without having to get a visa.

Korea's entry into the Visa Waiver program is unlikely, however, according to the US Ambassador to that country. Ambassador Thomas Hubbard told the Korean Times this week "There are somewhere close to two million Koreans and Korean-Americans in the US and it is a draw for Koreans wanting to go there and stay with family and work there. For that reason, it continues to be that the refusal rate will probably make Korea's entry into the visa waiver program difficult."

The US Embassy in Ireland is warning Irish nationals that they are anticipating a serious shortfall in meeting the demand for processing Summer Work/Travel applicants for this year. The Embassy is blaming the problem on sponsors submitting applications late, additional US government visa processing requirements legislated in the wake of the 9/11 attacks and early flight departures to the US. The Embassy says these factors will result in a high percentage of an estimated 10,000 students hoping to travel to the US this summer not getting visas in a timely manner.

According to a message posted on the Embassy's web site, "The J-1 Summer Work/Travel program continues to be of great mutual interest and benefit to the U.S. and Ireland and we regret the inconvenience and disappointment that this projected shortfall will cause. Our best advice to students is to submit their applications to their program sponsors as quickly as possible and to ensure that their photos and supporting documentation are correct and their visa application forms are complete."

Employers who rely on Irish summer workers, particularly those at vacation resorts around the US, are expressing deep concern about the expected absence of the students. Senator Edward Kennedy has contacted the Department of State to try to ensure the Embassy has adequate staff to handle the demand. Kennedy told the Boston Globe this week, "I'm hopeful that we can rectify the processing problems in the program this year, so that it can continue to be a positive example of a well-run, efficient program."

A Utah company may move its operation to Mexico following a raid by immigration agents that resulted in the deportation of 70% of its workforce. Jose Silva, an attorney for Champion Safe, said the company is financially devastated because it is having a hard time finding a work force.

"It's been quite a difficult task, just because of the lack of good workers in the area," Silva said.

Nina Pruneda-Muniz, a BICE spokeswoman, said the employer "knowingly violated immigration law by hiring these people." Officials question the company's motives and intentions, asking if Americans really are unwilling to fill the jobs or if the employers are simply unwilling to pay a good wage.

According to Silva, Champion Safe had documents for all of its workers and, by law, had no obligation to verify those documents.

In a memo by the Executive Associate Commissioner of the Office of Field Operations at the INS, Johnny Williams wrote to regional directors that a waiver of the photograph requirements for I-90 applicants could not be issued only on the basis of religious faith in the absence of other special circumstances. Previous regulations permitted a waiver only in cases of confinement due to advanced age or physical infirmity, but the Alien Documentation, Identification and Telecommunication System (ADIT) manual states that "religious/ethnic reasons" as well as "physical disfigurement" may be acceptable reasons to waive the requirement. The memo states that, although waivers have been granted for religious grounds on occasion as included in the ADIT manual, waivers should no longer be issued except where specifically provided by the regulations, "in light of national security concerns arising from the events of September 11."

The Department of Defense announced Friday that it had released 13 detainees from Guantanamo Bay, Cuba, after determining that they "no longer posed a threat to U.S. security."

A DOD news release stated that "transfer or release of detainees can be based on many factors, including law enforcement, intelligence, medical considerations, as well as whether the individual would pose a threat to the United States. At the time of their detention, these enemy combatants posed a threat to U.S. security."

Citing "security considerations" officials said no further details could be released.

An Associated Press story published earlier this week suggested that the release could have been the result of a complaint by Secretary of State Colin Powell, who pressed the Pentagon to move faster in determining the fate of the prisoners, some of whom have been held a year and a half without charges and without access to lawyers. Senior Defense Department officials denied the theory.

The Guardian reported that 11 of the freed prisoners arrived in Afghanistan on Thursday, but 30 more Afghan detainees had been flown into the camp, bringing the current total of inmates to 680. Last month human rights groups called for the release of teenagers being held in Guantanamo. The Guardian quoted US officials as saying some or all of the teenagers would be freed.

The Bush administration has re-initiated Clinton-era efforts to hunt and deport foreign human-rights abusers living in the United States.

According to a report in the Wall Street Journal, administration officials say they have decided to form a special unit dedicated to the hunt, and they are also drafting legislation to make a broader array of crimes deportable and to strengthen the government's hand in related immigration-court proceedings.

The legislation, which is almost identical to a bill proposed by the Clinton administration in 2000, would expand the list of deportable offenses to include homicide, rape, torture, kidnapping, mutilation, prolonged or arbitrary detention, enslavement, forced pregnancy, forced sterilization and recruitment of youths for

armed conflict. It also would make it easier for the government to invoke all grounds on the deportable-offense list in immigration court.

Under the existing Immigration and Nationality Act, only those who lie to get into the U.S., or are found guilty of genocide, severe violations of religious freedom or Nazi persecutions, are subject to criminal prosecution and deportation.

Illinois is poised to join four other states in extending in-state tuition rates to illegal immigrants attending state colleges and universities. This week the State Senate passed the legislation on a 56-1 vote. The bill has already passed the House, and Governor Rod Blagojevich has said he would sign it. Only New York, California, Utah and Texas have similar laws, but 14 other states are considering the issue.

Senior Bush Administration officials say immigration and customs agents at the nation's airports have been authorized to detain arriving passengers who show symptoms of the SARS disease. The Department of Homeland Security has also provided masks and gloves to thousands of its airport inspectors as part of the effort to prevent the spread of SARS, or severe acute respiratory syndrome. Inspectors have been told in training sessions that they should give attention to the health of passengers arriving from 51 Asian cities, where the SARS outbreak has been most severe.

The University of California Berkeley has barred foreign students living in SARS-affected regions in Asia from attending summer sessions at the campus. The restriction applies to students from China, Hong Kong, Taiwan and Singapore, UC Berkeley Chancellor Robert Berdahl said. More than 400 students will be prevented from taking classes this summer.

Berkeley's health officer, Poki Namkung, was quoted by the San Francisco Chronicle as saying, "it's a terrible thing to deny a student an opportunity for an education, yet given the situation in China, which is out of control, we felt our primary responsibility was to protect the community."

8. International Roundup

An officer in the Iraqi Republican Guard has fled to Britain and applied for asylum. The soldier, whose name has not been disclosed, is also a senior member of the Ba'ath Party and fought against British and American forces before escaping to Syria shortly after the war began in March. He said he left Iraq when he realized Saddam Hussein's regime had no hope of victory and that his life would be in danger if he returned to a post-Hussein Iraq. Officials said the man had undergone an initial screening interview and that they were checking to see if he was on any international wanted list. A Home Office spokesman said the asylum-seeker had changed some details of his story during the interview and that officials were trying to establish his precise rank.

Britain gave asylum to several former Taliban members, including an army commander and a government minister. A spokesman said it was possible that Ba'ath Party members could be granted asylum but that it wouldn't be automatic.

An article in the Washington Times this week claimed the French government secretly supplied fleeing Iraqi officials with passports in Syria that allowed them to escape to Europe. U.S. intelligence officials told the newspaper that an unknown number of officials in Saddam Hussein's government were issued French passports, which are regarded as documents of the European Union, and have helped them avoid capture. Nathalie Loiseau, a spokeswoman for the French Embassy, said authorities have not issued any visas to officials of the former Iraqi regime since the beginning of the war in Iraq.

A group of immigration lawyers in Australia has formed an organization called the Immigration Lawyers Association of Australasia (ILAA). Founders Glenn Ferguson and Anne O'Donoghue (a regular contributor to this newsletter) said immigration law was moving toward more rigorous professional standards, greater specialization and stronger oversight, and said they hope that the establishment of the ILAA will "add to the opportunities that immigration lawyers have for professional development within their field, whilst also encouraging a new area of practice for young lawyers."

The first EU asylum seeker processing center to be opened outside EU territory could be operating by the end of the year, according to British Immigration Minister Beverley Hughes. Plans to establish the centers, possibly in Africa, would allow asylum seekers wanting to settle in EU countries to stay while their applications are determined.

Immigration to Israel has dropped by 45 percent in the first quarter over the same period last year. A senior official blamed the decline on slashed immigrant benefits, an economic downturn and the war in Iraq. According to the Jewish Agency, fewer than 6,000 people immigrated to Israel in the first four months of 2003, compared to over 10,000 in 2002.

A bill to allow dual citizenship to persons of Indian origin was slated to be introduced during the budget session of India's Parliament this week, but officials said debate and passage would not be taken up until the "monsoon session" that normally begins towards the end of July. Parliamentary Affairs Minister Sushma Swaraj said dual citizenship would be offered during the first phase to citizens of Indian origin living in seven countries, which also offer dual citizenship - the United States, United Kingdom, Canada, Australia, New Zealand, Hong Kong and Singapore.

9. Legislative Update

The following bills were recently introduced in the Congress:

- H.R. 1930, sponsored by Rep. Patrick Kennedy [RI-1] (introduced 5.1.2003), to adjust the immigration status of certain Liberian nationals who were provided refuge in the United States.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1930ih.txt.pdf

- H.R. 1953, sponsored by Rep. Doc Hastings [WA-4] (introduced 5.6.2003), to revise the provisions of the Immigration and Nationality Act relating to naturalization through service in the Armed Forces, and for other purposes.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1953ih.txt.pdf

- H.R. 1954, sponsored by Rep. James Sensenbrenner [WI-5] (introduced 5.6.2003), to revise the provisions of the Immigration and Nationality Act relating to naturalization through service in the Armed Forces, and for other purposes.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1954ih.txt.pdf

- H.R. 1958, sponsored by Rep. Robert Andrews [NJ-1] (introduced 5.6.2003), to require the Secretary of the Treasury to mint coins in commemoration of the 100th anniversary of the beginning of Korean immigration into the United States.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1958ih.txt.pdf

- H.R. 1983, sponsored by Rep. Juanita Millender-McDonald [CA-37] (introduced 5.6.2003), to amend the Immigration and Nationality Act to facilitate the immigration to the United States of certain aliens born in the Philippines or Japan who were fathered by United States citizens.

The text of this bill was not yet available at the time of publication.

- S. 950, sponsored by Sen. Michael Enzi [WY] (introduced 4.30.2003), to allow travel between the United States and Cuba.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s950is.txt.pdf

- S. 986, sponsored by Sen. Harry Reid [NV] (introduced 5.5.2003), to designate Colombia under section 244 of the Immigration and Nationality Act in order to make nationals of Colombia eligible for temporary protected status under such section.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s986is.txt.pdf

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

10. Guest Article: J-1 Summer Camp Staff FAQs, by Jim Buck

Jim Buck is Executive Director of BUNAC, which operates work/exchange programs to and from the USA and other countries for college students and young people. He welcomes comments at jbuck@bunacusa.org.

Can I Hire A Foreign Worker On These J-1 Programs?

Yes. Each participant is a "work eligible individual" who is expressly authorized to accept paid employment. You can see this in the program description *Camp Counselor* or *Summer Work/Travel* in q4 on the bar-coded DS-2019 form. Each participant also has a *Dear Employer* letter for you. This contains an explicit authorization from the program sponsor enabling the participant to work at your camp.

What Paperwork Do I Need To Fill In?

Exactly the same as for a US employee, the I-9 Employment Eligibility Verification form and W-4 form.

- A I-9: Each participant has a sample I-9 showing you how to complete it for a J-1 student. Please note – J-1 students do NOT need to have a Social Security Number in order for you to hire them. The Social Security card is an optional piece of eligibility evidence for the I-9 (see Column C); all J-1 students are covered under Column A and so do not need to provide any documents from Columns B or C. Moreover, it is explicitly illegal for any employer to refuse to hire someone either because they do not possess a SS card/number or because they are from overseas or because their work authorization is for four months.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

INS Form I-9.

B W-4: Again, all our participants have a sample W-4 showing in detail how to complete it.

I Hear There Are Problems With Social Security. What's The Story?

INS and SSA have put in place new procedures to ensure that SSNs are only issued to eligible foreign nationals. The process for this relies on the speed with which INS and two separate levels of INS subcontractors enter the applicant's arrival details into an INS database. Currently, this takes 10-15 work days. It also depends on how frequently the local Social Security office checks the database once the documents are entered; this varies widely.

When the applicant applies for a card at the local SS office, it is this INS database that is checked to verify eligibility so that Social Security can start to process an application. However, the SS office will always give a Receipt to the applicant. Sometimes this receipt is marked "*No certification of documents*" which is unfortunately highly misleading. It is INS's delay that prevents certification, not anything the applicant has done or failed to do. It categorically does NOT mean that any documents are invalid.

The key point is that once applicants have a receipt, you can put them on your payroll immediately.

If the employee shows the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the employee, the employer shall enter in his records with respect to such employee the name and address of the employee exactly as shown on the receipt, and the address of the issuing office. The receipt shall be retained by the employee.

Code of Federal Regulations, Title 26, Volume 14 [Revised as of April 1, 2002], Chapter I, Part 31, Subpart G, Sec. 31.6011(b)-2, (c) (2)(iii)

The changes to the way Social Security assigns numbers and issues cards may cause a delay in receiving the number. ... Note that the employee may work while the Social Security number is being processed.

SSA Publication *Employer Responsibilities When Hiring Foreign Workers*.

www.ssa.gov/employer/Foreign%20Workers.doc

Even if an applicant has NOT yet applied for a card when they report for work, you can put them on the payroll without waiting - they and you have seven days for that application to be made.

Though not required as a condition of employment, each new employee hired should show his or her Social Security card to you so that:

- You can check the SSN for accuracy.
- You can accurately transcribe the name and SSN to the employee's payroll records.

Social Security Administration Publication 16-004 (Employer's Guide To Filing Timely And Accurate W-2 Wage Reports, p9)

So How Do I Deal With A "Blank" Social Security Number?

If you need to file a W-2 for a student before his/her number is available, IRS Publication 15 (*Circular E, Employer's Tax Guide*) instructs you to write "Applied For" on the W-2. When the number arrives, you file Form W-2C to update the original W-2.

But My Payroll Company/Software Can't Handle This....

Unfortunately, when INS and SSA added these new requirements, they did not take such 'real world' problems into account. However, this is a 'real-world' problem – not a legal issue. As stated above and confirmed by law, INS and IRS regulation, you cannot refuse to hire someone or pay him/her simply because a Social Security Number is not yet available.

The use of 000-00-000 or 999-99-999 on a temporary basis is the traditional way to handle this. However, we hear from some employers that their software or payroll company doesn't like this simple approach. If your payroll is handled internally, you need to set aside a series of dummy numbers just for this purpose. Alternatively, several employers have agreed with their payroll company to use a predetermined sequence for such employees.

Remember, this is only a temporary measure until the number is available. In most cases, you have already seen the Social Security receipt to prove the number has been validly applied for.

This Is A Real Pain!

We couldn't agree more. Since these changes were first proposed, we have lobbied with INS, IRS and SSA to have this system improved. Please contact your local Senators and Congressmen to express your support for a simpler and faster system.

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11. Adjustment Cases Soon To Be Filed Nationally

We recently informed readers that the Missouri Service Center is about to be re-designated the National Benefits Center and will be handling preliminary data entry for many types of cases. We're now getting more information on this major development in immigration processing.

Apparently the change is imminent. The BCIS already has the Federal Register notice ready to publish and is waiting on some final approvals in Congress before releasing the announcement. Once the announcement is made, the program will begin 60 days later. It will be phased in starting in the west (Hawaii, Alaska, Washington, Montana, Oregon, Idaho, Utah, Wyoming and Colorado). Every 60 days new states will be phased in and the order will be determined on a clockwise basis (presumably with the Midwestern states, then the East Coast, then the South and then the Southwest).

The program will start with I-485 family-based, battered spouse-based and green card lottery-based adjustment of status filings. N-400s will be phased in later.

According to reports from a meeting between the American Immigration Lawyers Association and the BCIS, how quickly N-400s are phased in will be determined by how well I-485 processing goes. Right now, N-400s are filed at the service center level and the change here merely means that a different service center will eventually be handling the filings. But for adjustment filings, the new system represents a major change.

Cases handled by the new NBC will actually be sent to a Chicago processing center where the fee will be processed and documents scanned for electronic transfer to the NBC. The Chicago office will also generate a receipt notice directing applicants to an Application Support Center (ASC) for photos and fingerprinting. The applications will then be sent to Missouri for further processing. Once the case is received in Missouri, examiners will review the cases to make sure that basic requirements are met, run the IBIS security screening and adjudicate the I-131 and I-765 travel and work document applications. BCIS will be able to use the fingerprint provided at the ASC for generating the employment authorization document. LOCAL BCIS OFFICES WILL NO LONGER ISSUE EAD CARDS UNDER THE PLAN. After the EAD card is issued and the FBI background check is completed, the file will be forwarded to a local district office for further processing.

One benefit of the new system will be the ability to check on the status of cases using the BCIS' online status inquiry system. But this will be coupled with the removal of any access to information officers to determine what is happening on a case (see our Openers section of this newsletter for more on this issue).

The MSC is beefing up its staffing for the new workload though they are telling AILA that they can handle the workload with existing staff.

12. Canadian Corner

Quebec Immigrant Investor Program

We have been advised that the Quebec Government reopened its Damascus office on May 4, 2003.

Files that have been sent submitted to the United de Soutien in Montreal have been sent back to Damascus.

Regulations of Canadian Immigration Consultants

The Advisory Committee on regulating Canadian immigration consultants has just submitted its report to Citizenship & Immigration Minister. Among the recommendations, the implementation of an official license for the consultants, whereby they would have to meet minimum requirements on education and experience. In case of unethical behavior, the license could be revoked and the consultant could be charged and or fined.

We anticipate that the Minister will move quick to implement the recommendations.

If you have any questions about Canadian Immigration laws please contact Leonard Pearl at our Canadian office (lpearlvisalaw@sprint.ca or 905-764-8767).

13. Two Department Of State Employees Charged With Visa Fraud

The Department of Justice announced last week that a federal grand jury in Sacramento has returned an 18-count indictment charging nine persons, including two former employees of the State Department, in connection with a scheme to sell entry visas into the United States. Eight of the nine defendants were arrested at locations in three states. The State Department employees charged are Long N. Lee, 51, and Acey R. Johnson, 32, and the two are married.

According to the 130-page complaint, the visa scheme involved the payment of hundreds of thousands of dollars to the State Department employees in exchange for the issuing of visas to various foreign nationals, primarily from Vietnam and India.

All nine defendants are charged with conspiring to defraud the United States and to bribe public officials and to commit visa fraud.

In addition to conspiracy, Johnson and Lee are also charged with ten counts of wire fraud, one count of mail fraud, and one count of bribery. Vinesh Prasad, 33, is also charged with one count of visa fraud, one count of wire fraud, one count of encouraging illegal entry of aliens for financial gain, and two counts of money laundering. The other defendants are Minesh Prasad, 28; Phuong-Hien Lam Trinh, 35; Rajwant S. Virk, 46; Davinder Singh Bhullar, 44; and Rachhpal Singh, 32.

Bhullar remains at large and is believed to be in India. He is currently a fugitive in an unrelated criminal case also pending in U.S. District Court in Sacramento.

Each of the charges in the indictment is considered a felony. The maximum sentence for the conspiracy charge, and for each wire fraud, mail fraud and money laundering charge is five years in prison, and each count also carries a penalty of up to three years of supervised release and a \$250,000 fine.

14. DOS Provides Special Immigrant Status For Certain Victims Of September 11

The Department of State is amending its regulations clarifying entitlement to special immigrant status under the USA Patriot Act. Section 421 of the US Patriot Act provides special immigrant status for certain victims of the terrorist attack of September 11, 2001 who file petitions for classification under the Immigration and Nationality Act (INA) section 203(b)(4). By adding a new fourth preference classification, paragraph (9), to 22 CFR 42.32(d), the Department will clarify entitlement to special immigrant status under the Patriot Act.

The new regulation authorizes consular officers to accord fourth preference employment-based special immigrant classification to those who qualify as a special immigrant. As with other classes of fourth preference employment-based immigrants, the alien must be a beneficiary of an approved petition.

Under the regulation, applicants entitled to special immigrant classification include the following:

1. principal alien who is

- (a) the beneficiary of a petition, filed on or before September 11, 2001, for classification as an immigrant under INA § 203(a) or (b) or as a nonimmigrant under INA § 101(a)(15)(K), or
- (b) the beneficiary of a labor certification application filed on or before September 11, 2001

whose application was revoked, terminated or rendered null, either before or after its approval, due directly to the attack of September 11, 2001, that resulted in the death or disability of the petitioner, beneficiary, or applicant; or caused the loss of employment due to physical damage to, or destruction of, the business of the petitioner or the applicant.

2. the spouse or child of a principal alien who accompanied the principal alien or following to join the principal alien no later than September 11, 2003. In the case of a deceased principal alien, the requirement for accompanying or following to join is disregarded.

3. the grandparent of orphan, as a direct result of a September 11, 2001 terrorist attack, if either of the orphan's parent was a U.S. citizen, a U.S. national, or a lawful U.S. permanent resident on September 10, 2001. The grandparent must demonstrate that he or she is coming to the United States to assume legal custody of the child.

To qualify for classification as a special immigrant, the alien must demonstrate to the Secretary of Homeland Security that he or she is a "victim of a specified terrorist activity," defined in the Patriot Act as any terrorist activity conducted against the Government or people of the United States on September 11, 2001. Foreigners in the special category are subject to all the grounds of ineligibility except INA § 212(a)(4).

A priority date will be given at the time the fourth preference petition is filed.