

Siskind's Immigration Bulletin
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SSHD serves immigration clients throughout the world from its offices in the US,
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:

Call me a technogeek if you like. But I was one of the people enthusiastically waiting
to use the BCIS' new electronic filing system when it went live yesterday morning.
Actually, I was hoping to file at 12:01 am yesterday morning so I actually stayed up

late with a client's employment authorization application in hand. But at the stroke of midnight nothing happened.

And after waiting another hour and seeing no change on the BCIS web page, I gave up and went to sleep. In the morning, the BCIS' web site was down. "Aha!" I said to myself. They must have taken the site down temporarily to load the new e-filing system. A few minutes later it was up and there it was. I quickly went to the application page (hey, instructions are for the weak!) and started typing away. I should find out soon if I filed the very first ever e-filing application - woo hoo!

The good news is that at least for an immigration lawyer everything seemed to be straightforward. I was a little disappointed by certain aspects of the system. For example, you still have to call the national customer service number to book an appointment at an Application Service Center for fingerprints, photographs and signatures. Why can't the appointment be booked online like the State Department does in the NVARs system for appointments in Mexico and Canada? Why can't supporting documents be submitted electronically as well? Court systems around the country accept electronic filings with supporting documents scanned and sent in Adobe Acrobat format. And why won't the BCIS take credit cards. Even the Internal Revenue Service accepts credit cards.

Still, I should not complain too loudly. Who can complain about getting an instant filing receipt? And who can complain about being able to ensure that the data that makes it onto an immigration document is exactly what was typed in by you rather than a poorly paid data entry clerk. And it electronic filing allows the BCIS to shift resources from data entry to actually working cases, what more could you want?

This week we include in our ABCs of Immigration article an overview of e-filing. I even took screen shots of the various e-filing pages so readers can get a better feel for the process.

Last week my Openers criticized a CNN report on the H-1B cap debate. I came down on CNN for what I felt was an imbalanced report. I received some nice letters from readers agreeing with me. But I was a bit surprised when I started receiving several letters basically informing me that I am in cahoots with the devil and I should pack up and ship out. Apparently, one of the anti-H-1B visa web sites complained about me and readers from that site wandered over to mine to see who this Siskind/Satan fellow was. Anyhow, I actually received an interesting letter from the publisher of the site laying out his position on the H-1B issue and inviting me to respond. And I will. Next week, I'll let you know what I had to say and also present the other side of the argument in this advocate's own words. Which is exactly what I asked CNN to do - present both sides of the issue. Readers of this newsletter know that while I don't hide my pro-immigration beliefs, I cover ALL immigration news even when it tends to show immigrants and immigration in a poor light.

In firm news, this week I was quoted by the San Francisco Chronicle in a story on abuse of the L-1 visa category. You can find the story linked on our web site at www.visalaw.com/news.

We also say goodbye this week to law clerk Shadrick King. Shadrick is a recent law school graduate who is going on to obtain a master's degree in law. He wrote many articles for this newsletter particularly those covering court cases. Good luck Shadrick! You will be missed.

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 – E-filing At The BCIS

This week history was made as the Bureau of Citizenship and Immigration Services began accepting electronically certain immigration-related applications. The agency kicked off the new program by accepting I-765 employment authorization applications and I-90 green card replacement requests.

Siskind Susser Haas & Devine filed one of the first applications under the new system, and we can report that it went smoothly and was relatively easy to navigate. There are some aspects to the system we don't like, including the following:

- no acceptance of credit cards (just electronic transfers from checking and savings accounts)
- no integration with case management software
- no online scheduling of appointments for fingerprints and photographs
- no electronic filing of supporting documents (they are submitted by mail after getting an e-filing receipt)

We captured the screens for each of the steps in the system and they are linked below:

[Page 1](#), [Page 2](#), [Page 3](#), [Page 4](#), [Page 5](#), [Page 6](#), [Page 7](#)

What do I need to e-file?

To file immigration applications electronically, you need to have an Internet connection, a web browser (at least Netscape 4.7 or Internet Explore 5.0), and Adobe Acrobat reader software. You will also need a checking or savings account in a US bank and a printer.

Can I file electronically if I live outside the US?

No. Only people residing in the US may file electronically.

What applications can be filed electronically?

Right now the BCIS will accept I-765 employment authorization document applications and I-90 green card replacement applications. According to the BCIS, these two forms were selected for starters because they account for 30% of all BCIS applications and because they usually are not accompanied by very many supporting documents.

Note that not all I-765 applications may be submitted electronically. Applicants who fall under the following categories are not able to file electronically:

Category 274a.12(a)

- (1) Lawful Permanent Resident
- (2) Legalization Temporary Resident
- (9) K-3 Nonimmigrant Spouse of U.S. Citizen or K-4 Dependent
- (12) Temporary Protected Status (TPS) - Angola, Burundi, El Salvador, Liberia, Montserrat, Sierra Leone, Somalia, Sudan
- (14) LIFE Legalization
- (15) V-1, 2 or 3 Nonimmigrants

Category 274a.12(c)

- (1) Dependent of A-1 or A-2 Foreign Government Officials
- (4) Dependent of G-1, G-3 or G-4 Nonimmigrants
- (7) NATO Dependent
- (10) NACARA Section 203 Applicants who are eligible to apply for NACARA relief with INS
- (13) Not in use.
- (14) Deferred Action
- (15) Not in use.
- (19) Temporary Treatment Benefits - Angola, Burundi, El Salvador, Liberia, Montserrat, Sierra Leone, Somalia, Sudan
- (21) S Nonimmigrant
- (23) Irish Peace Process
- (24) LIFE Legalization

How will supporting documents be submitted?

Supporting documents will be submitted the old-fashioned way - by mail. One day they too may be submitted electronically, but for now, you will be prompted to check a box stating whether there are or are not supporting documents. When a receipt is generated at the end of the application process, you will take the receipt, place it on top of the supporting documents and mail them to the address on the receipt. The process will work in a similar fashion to responses to Requests for Evidence.

How will application fees be accepted?

For now, you must pay using a savings or checking account in an American bank. You must have the bank's routing number and the account number handy as well as the bank's address and the account holder's information. Credit card and debit card payments are not being accepted.

How will I submit fingerprints, photographs and signatures?

Well, despite claims to have gone totally electronic, here again old fashioned systems still play a role. After a receipt is generated, an applicant will be instructed to call the BCIS' national customer service telephone number to schedule an appointment at an Application Support Center. The applicant will then go to the ASC and provide fingerprints, a photograph and sign the application documents. That information will be electronically transmitted to the BCIS and then the entire application package will be sent to the BCIS office issuing the document.

Applicants who filed Form I-90 should bring two copies of their application and their Confirmation Receipt notice to their appointment. The ASC will keep the copy of the application.

Applicants who filed Form I-765 need only bring a copy of their Confirmation Receipt notice.

At the ASC, the BCIS will confirm the applicant's identity and electronically capture a photograph, fingerprints, and a signature. The BCIS will use these biometrics to produce the Employment Authorization Document or Permanent Resident Card, if the application is approved.

Also note that a handful of ASCs will not work with e-filing applicants. Charleston applicants should go to Charlotte. Jackson, MS applicants should go to Memphis. New Orleans should go to Houston. St. Croix, Virgin Islands applicants should go to St. Thomas. And Yakima, Washington applicants should go to Seattle.

While e-filing work with my immigration case management software system?

No. For now, it is necessary to enter the data a second time in the e-form. The BCIS has indicated that in the future they plan to make it possible to file from a case management system.

Will e-filing speed up processing on my case?

No (well not directly). The American Immigration Lawyers Association is reporting that BCIS offices plan on considering e-filed cases along with paper-filed cases in the order received. On the other hand, the BCIS believes that if many people use the system, overall processing times will improve since workloads will decrease.

Will I get a receipt right away?

Yes. A receipt is generated immediately upon filing. This is an obvious benefit of the new program and that alone will make it worthwhile since the BCIS has a terrible history of losing applications in the mail room (or shredding initial applications as was the case recently in the California Service Center). Once the electronic receipt is issued, a paper I-797 with the same receipt number will be mailed to the applicant.

Where can I find the form to e-file?

You can get to the form from the e-file information page at <http://www.immigration.gov/graphics/formsfee/forms/eFiling.htm>.

What are the next forms to be added to e-filing? When will they be added?

The BCIS is already working on six other forms that should be ready for e-filing in the future.

- ✓ Form I-129, Petition for Nonimmigrant Worker;
- ✓ Form I-131, Application for Travel Document;
- ✓ Form I-140, Immigrant Petition for Alien Worker;
- ✓ Form I-539, Application to Extend/Change Nonimmigrant Status;
- ✓ Form I-821, Application for Temporary Protected Status;
- ✓ Form I-907, Request for Premium Processing

The BCIS believes that these forms will be ready for e-filing sometime this autumn or at least by the end of the year.

3. Ask Visalaw.com

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

Q - I am a physician on H-1B1 visa(no visa stamp on the passport yet). If I or my dependents decided to visit my home country, should my petitioner need to file I-824(Application for action on an approved application or petition) on my behalf before leaving USA.

A - No that would not be necessary. You would just need to take your approval information and documentation that you are continuing to be employed on the terms of the H-1B approval including recent paystubs and a letter from your employer.

Q - My mother has immigrated to US. and my immigration has also been filed. But it will probably take another 6 years to come thru. In these circumstances, I wanted to know that if I apply for an Australian or Canadian immigration and get it processed in next one year or so , will that affect my US immigration application in any way? Will i be denied the US immigration?

A - Your pursuit of Canadian or Australian immigration will have no affect on your green card processing in the United States. Note, however, that once you acquire

permanent residency in the US, you will need to plan on spending most of your time in the US. And that may negatively impact your immigration status in the other country or countries.

Q - Hi! I am currently a H1 B holder whose green card application is in process. My question is once I get my EAD am I restricted to working with my current employer or do I have the option to change jobs before I get my Green Card?

A - The law allows someone who has had an adjustment application pending for more than 180 days to switch employers if the new job is in the same or a very similar occupation. That sounds straightforward, but there are no BCIS guidelines here so you will want to be VERY cautious lest you get a BCIS examiner who takes a very narrow view of the law.

Q - I am a medical resident on H1B visa. My wife is a physician also and was accepted this year for a position at my institution but on a J1 visa. Soon I will start a job and I will be sponsored for a green card. What will happen for my wife after her residency? will she still have to leave or is there any way to waive this requirement? and can I include her in my application for green card?. P.S.: I have a son who is a citizen of the United states.' Thank you.

A - Your wife will have to get a waiver, unfortunately. As for the basis for a waiver, that really depends. But if it is based on working in an underserved area, should could very well have to work three years on the H-1B visa before she could get a green card through you.

4. Border News

Six French journalists were deported earlier this month after being searched, handcuffed and detained for 26 hours at the Los Angeles Airport. Immigration officials said they lacked visas, which are required for certain French professionals traveling on business.

"If you are a reporter and come to the US as a journalist you need an "I" visa," Bureau of Citizenship and Immigration Services spokesman Francisco Arcaute said. "These gentlemen did not have proper documentation. Consequently, they were held and put on a flight back to Europe."

The reporters arrived on May 10 and 11 and were sent to cover the Electronic Entertainment Expo, a videogame trade show. French group Reporters Without Borders sent an irate letter to the US ambassador to France, demanding an investigation of the journalists' "arbitrary if not discriminatory" treatment by US immigration officials.

Responding to a question during a daily press briefing, Department of State spokesman Richard Boucher said the journalists did not have the appropriate visa status when they entered.

"The information on that is readily available through our Embassy and the websites. But ultimately the determination on entry is made by the Department of Homeland Security, formerly the Immigration and Naturalization Service," Boucher said.

The New York Daily News published an article this week about Farouk Abdel-Muhti, whom the newspaper says may be one of the last illegal immigrants detained in anti-terrorism sweeps that has not been deported, released, charged with a crime or classified as a material witness. Supporters say Abdel-Muhti has been held because of his outspoken views against Israel, but officials say he is a con man who has thwarted the immigration authorities efforts to deport him by claiming numerous aliases and birthplaces. Since entering the US in 1963, Abdel-Muhti has lied to judges, immigration agents and law enforcement about his name, date of birth, country of birth, marital status, number of children and criminal record, according to records obtained by the Daily News. In a statement to supporters, Abdel-Muhti called on the Bush administration to end the detention of "thousands in prison with no reason other than immigration matters."

Customs and Border Protection Commissioner Robert C. Bonner plans to announce new measures designed to make the Tucson sector's border with Mexico safer. On Tuesday, Bonner will join with Mexican Under Secretary of Population, Migration and Religious Affairs, Dr. Javier Moctezuma, to reveal plans to increase surveillance of high risk areas along the border and steps the two governments will take to prevent border-related accidents and combat smuggling operations.

5. News From The Courts

Harpal Singh; Rajwinder Kaur v. Immigration and Naturalization Service United States Court of Appeals for the Ninth Circuit

Harpal Singh and Rajwinder Kaur, citizens of India, appeal from a decision denying their request for asylum. An Immigration Judge denied their request for asylum, claiming that the couple engaged in terrorist activities related to their effort to establish a separate Sikh state, Khalistan, in India. In making her decision, the Immigration Judge stated that she "has employed reasonable factual inferences from the classified evidence." This court ordered the government to reveal the classified information to the court.

The IJ stated that she gives "appropriate weight" to the classified evidence. The IJ, three times in her unclassified decision, refers to her classified decision for analysis of the credibility of one or other of the petitioners. The judge also determined that Singh and Kaur should not be deported to India because they are likely to face torture and persecution. The Board of Immigration Appeals stated that its decision "is based solely on the non-classified evidence of record."

This court ruled that it is the court's statutory duty to review petitions from decisions of the Board. The court explained that when the court is denied access to the data

informing the IJ's factual findings, which the Board has made its own, the court is unable to perform our statutory duty. The court ordered the government to produce the 30 pages of classified documents that it used to deny Singh and Kaur's asylum claim.

Singh is being detained in a county jail in California based on the classified evidence and has not been charged with any crimes. Kaur was bonded out after brief detention. They challenge the allegations that they were terrorist in India.

Wang He v. John Ashcroft

United States Court of Appeals for the Ninth Circuit

Wang He, a Chinese citizen, appealed the denial of asylum by the Immigration Court and an explicit finding by the Board of Immigration Appeals (BIA) that Mr. He's testimony in support of his asylum application was not credible. Mr. He claimed that the Chinese government based on their opposition to China's population control policies had persecuted him and his wife. Specifically, he claimed that, following the birth of their second child, his wife had been involuntarily sterilized. This court held that the BIA's adverse credibility finding was not supported by substantial evidence.

The court held that none of three reasons for doubting Mr. He's testimony are supported by substantial evidence in the record: 1) the implausibility of his story that ten people came to his house to forcibly take his wife to be sterilized; This court noted that Mr. He explained that ten people might have been thought necessary to subdue him and his wife and to prevent them from running away. 2) the fact that United States embassy officials were aware of certificates issued after voluntary abortions but not after involuntary sterilization; This court found that Mr. He's attorney pointed out to the IJ that the Embassy statement referred to abortions rather than sterilizations. 3) and the fact that Mr. He mentioned a second fine late in his testimony, only when he was questioned about why he and his wife never formally registered their marriage. This court explained that Mr. He mentioned the second fine when it became relevant to his story and the questions he was asked on cross-examination.

This court concluded the BIA finding that Mr. He was not credible and refusing to believe that his wife had been involuntarily sterilized, was not supported by "reasonable, substantial, and probative evidence." INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). The BIA relied on the IJ's three reasons and added one of its own – the implausibility of Mr. He's wife being forcibly taken from her house and sterilized during the time period between 7:00 and shortly after 7:30 am. The court noted that this reconstruction of the timing of the events is based on a strained and unjustified reading of a single phrase in Mr. He's doubly translated testimony, "a little while." This court held that it is impossible to glean a precise meaning from a statement that appears in the record as "a little while." The court reasoned from the transcribed testimony, we cannot tell whether Mr. He claimed to have waited at the hospital for several minutes or several hours.

Documentary evidence was introduced at the hearing to support Mr. He's testimony. This court noted that some of the evidentiary problems in the case appeared to stem from interpreting difficulties. The interpreter spoke Mandarin but did not speak Mr. He's Foo Ching dialect. Mr. He did not argue, and the court did not hold, that the

inadequate translation services he received constituted a denial of due process. This court explained that even where there is no due process violation, faulty or unreliable translation can undermine the evidence on which an adverse credibility determination is based. See Balasubramaniam v. INS, 143 F.3d 157, 162-64 (3d Cir. 1998).

The court believed that this case presents the sort of special circumstance where a remand for additional investigation regarding eligibility would be inappropriate. INS v. Ventura, 123 S. Ct. 353, 355 (2002).

6. Government Processing Times

Texas Service Center Processing Times

Jurisdiction: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee and Texas.

Texas Service Center Processing Time Report May 15, 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	11/19/2002
I-129 for H2A classification	current
I-129 for H2B classification	3/14/2003
I-129 for H3 classification	3/14/2003
I-129 for L classification	4/1/2003
I-129 for Blanket L petition	4/1/2003
I-129 for O classification	2/24/2003
I-129 for P classification	2/19/2003
I-129 for Q or R classification Q	Q Current - R 2/03/2003
I-129 for TN classification	n/a
I-129F (fiancée)	12/15/2002
I-129 For E classification	1/17/2003
I-130 for Spouse, Parent or Child of US Citizen	6/13/2001
I-130 for Spouse of Lawful Permanent Resident	4/3/1998
I-130 for Other Relative	4/3/1998
I-131 for Advance Parole	12/4/2002

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	6/4/2002
I-140 B (outstanding professor or researcher) IST PREF	6/4/2002
I-140 C (multinational executive or manager) IST PREF	6/4/2002
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	9/30/2002
I-140 I (National Interest Waiver)	7/9/2002
I-140 G (other worker) 3RD PREF	9/30/2002
I-212 permission to reapply for admission after deportation/removal	n/a
I-360 petition for Amerasian, widow(er), or Special Immigrant	4/8/2003
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	3/3/2003
I-539 for extension of stay for F or M non-immigrant	2/10/2003
I-539 for extension of stay for J non-immigrant	n/a
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	2/10/2003
I-539 to change nonimmigrant classification to F or M	2/10/2003
I-539 to change nonimmigrant classification to J	2/10/2003
I-539 to change nonimmigrant classification to L or H	2/10/2003
I-539 to change to other nonimmigrant classification	2/10/2003
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	10/31/2002
I-765 for initial asylee or asylum applicant authorization C-8	2/18/2003
I-765 for employment authorization associated with Hurricane Mitch TPS	11/1/2002
I-765 for employment authorization associated with EI Salvador TPS	8/1/2002
I-765 for employment authorization while I-485 is pending C-9	4/11/2003
I-765 for all other employment authorization	1/16/2003
I-817 Application for Family Unity Benefits	12/17/2002

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 Executive Office for Immigration Review, part of the Department of Justice, has launched a webpage that links reports tracking the legal representation rates at EOIR Immigration Courts throughout the country. The reports are listed by city and include information regarding the custody status, nationalities, languages, and forms of relief requested by individuals in removal proceedings. The page was created for non-profit legal agencies and pro bono attorneys and can be found at <http://www.usdoj.gov/eoir/reports/icrepsummary.htm>

The Government has released its semiannual regulatory agenda, which presents the various departments' Unified Regulatory Agenda for forthcoming proposed, interim and final regulations. The Department of Homeland Security, the Department of Justice, the Department of State and the Department of Labor have each issued regulations dealing with immigration, and these can be found in the Tuesday, May 27, 2003 publication of the Federal Register Volume, 68, No. 01., online at http://www.access.gpo.gov/su_docs/fedreg/a030527c.html

The American Immigration Lawyers Association (AILA) issued a press release Tuesday calling for an Independent Immigration Court that would offer a "meaningful appellate review in immigration cases." Reacting to a Federal Court ruling of May 21, which denied a challenge to the Attorney General's decision to restructure the Board of Immigration Appeals (BIA), AILA said that the immigration appellate process had been gutted of any meaningful review.

Together with the Capital Area Immigrants' Rights Coalition, AILA challenged the BIA reform regulations, bringing action under the federal Administrative Procedures Act (APA) that governs agency rulemaking. AILA argued that the government violated APA "because it had not engaged in reasoned decision-making prior to promulgating the final rule." The court disagreed.

The AG's BIA reforms went into effect on September 25, 2002. According to AILA, the new regulations increase the use of single BIA member decisions, reduce the number of BIA members to 11 from 23, and establish a six-month transition period for eliminating the case backlogs, which run into the tens of thousands.

"Given the life and death consequences of asylum cases, it is crucial that the BIA engage in a careful, individualized review of each case," AILA President Jack Pinnix said. "It is vitally important that immigration courts be independent, impartial and include meaningful checks and balances. Accordingly, AILA urges the creation of an independent immigration court system that can assure that each person has his or her day in court and review before an impartial administrative body."

The American Immigration Lawyers Association (AILA) recently discussed with the Immigration Services Division (ISD) problems concerning receipt notices that indicate a processing time of "969 to 999 days" on filings that should take considerably less time. The ISD stated that each service center individually controls the number of days. The service center can correct the issue if the problem is the use of a default in processing time. The ISD also assured AILA that Quality Control is presently investigating the issue.

The Bureau of Citizenship and Immigration Services (BCIS) is conducting a survey to determine the success of the new call system. As the agency continues to move more of its calls to a central 800 National Customer Service Center. The BCIS wants information from those who have used the new system in order to find out how the Center is handling inquiries and resolving problems. Access to the survey is available online to AILA members through the AILA Infonet <http://www.aila.org/infonet/>

Amnesty International criticized the United States' conduct in the organization's human rights report for 2002, pointing to Washington's actions in the war on terror as in defiance of international humanitarian law and mistreatment of imprisoned foreign nationals.

Amnesty stated that the United States is using legislation enacted after Sept. 11 in order to excuse detainment of terror suspects without a trial at Guantanamo Bay in Cuba. While more than 1200 foreign nationals, mostly Muslim men of Arab or South Asian origin, were taken into custody following the Sept. 11 attacks and the war in Afghanistan, around 600 still remain in detention without being charged or access to legal assistance.

Amnesty also expressed concern for the situation in Iraq following the war, saying the lack of security poses a threat to human rights and development. The organization also discussed fear that Iraq would fall by the wayside, much like Afghanistan, if no genuine effort were made. More than 18 months after the war in Afghanistan, Amnesty states millions of Afghans are facing uncertain and insecure futures.

Amnesty's secretary general, Irene Kahn, accused the United States of undermining international law by seeking bilateral agreements to exempt its citizens from charges of human rights abuses by the International Criminal Court.

The organization also pointed to the "hidden" crises in the Congo, Chechnya, and other areas around the globe.

Washington dismissed the report as "without merit."

The General Accounting Office has issued a report titled "Protecting Refugee Women and Girls Remains A Significant Challenge." The GAO said it commissioned the study in order to assess efforts by the UN High Commission for Refugees (UNHCR) to protect refugees and to determine what steps the UN and other organizations must take to prevent the sexual exploitation of refugee women by humanitarian workers. The report says the GAO found weaknesses in UNHCR's staffing process that limit the effectiveness of measures it has developed to protect refugees, and that UNHCR lacks a formal plan for providing practical training for most staff.

During a recent State Department press briefing, DOS spokesman Richard Boucher responded to a question about possible plans to close embassies and consulates in the face of increased terrorism. Boucher said posts could close for a day or two while security checks are processed, or while additional security measures are installed. "That will continue to happen from time to time," he said, "but because those decisions are made fairly rapidly on the ground by the embassies themselves, I can't predict in advance."

The Texas Service Center has established a new P.O. Box just for applicant and attorney address changes (below). AILA members should provide the applicants name, A# (if applicable), application type and SRC#, in addition to the old and new addresses.

Alien Address and Attorney Changes
US BCIS/TSC
PO Box 850891
Mesquite, TX 75185-0891

Senator John McCain was recently quoted as saying he supports immigration reforms such as amnesty and a guest-worker program, ideas put on hold since 9-11, and that they must be made a priority when Congress reconvenes.

"I believe we can pursue the security programs and at the same time set up a system where people can come here and work on a temporary basis. I think we can set up a program where amnesty is extended to a certain number of people who are eligible and at the same time make sure that we have some control over people who come in and out of this country," he said.

McCain said amnesty would be vital to any immigration bill that includes a guest-worker program.

"How can we have a temporary worker program if we're not allowing people who have been here for 30 years to hold jobs here?"

In a White House press briefing this week, Spokesman Ari Fleischer said the President would continue to push for 245(i).

"There continue to be ongoing conversations through the State Department. And we continue to press Congress to make advancements on issues such as 245(i), and of course, the Mexico trucking issue, if you remember, is something that the President worked to make progress on," Fleischer said.

The National Lawyers Guild's Immigration Law Project has posted an international student advisory containing tips on processing F-1 visas at US consulates. The link is <http://www.nationalimmigrationproject.org/sept11/IntlStudentTravelAdvisory.pdf>.

8. International Roundup

The US Committee For Refugees has released the 45th annual edition of its World Refugee Survey, which documents internationally the state of refugee protection and human rights. According to the survey, 13 million refugees were caught in "no man's land" during 2002, unable to travel freely or return home. The survey includes articles by UN High Commissioner For Refugees Ruud Lubbers and US Senator Sam Brownback, chair of the Senate Subcommittee on East Asian and Pacific Affairs, contributing with a piece titled "Mercy in Short Supply - The Plight of North Korean Refugees in China." The survey can be accessed online at <http://www.refugees.org>.

An Iranian man who sewed up his lips, eyes and ears to protest Britain's treatment of asylum seekers has been granted refugee status and was allowed to stay in the country, government spokesmen said. Abbas Amini, a poet, stitched his mouth shut and went on an eight-day hunger strike. Amini, who lives in a rented house he shares with other asylum seekers, said the government owed an apology to all asylum seekers for the way they have been treated. The Home Office was prepared to appeal a decision granting his asylum, but found Wednesday that it had no grounds for an appeal. "That means he gets to stay," a Home Office spokesman said.

Iranian Foreign Minister Kamal Kharazmi denied US accusations that his country was harboring al Qaeda operatives, suspected of playing a role in the May 12 suicide blasts in Riyadh. Kharazmi said the suspects were in Iranian custody at the time and could not have directed the attack. US Secretary of Defense Don Rumsfeld said it was "a fact" that senior al Qaeda members were being harbored in Iran. US State Department officials said Iran need to "meet their international responsibilities" and hand over the terrorist suspects. Officials did not identify the suspect's countries of origin.

The government of Thailand said it was planning to launch a nationwide crackdown against employers hiring illegal aliens. Deputy Prime Minister Korn Dabbaransi, who chairs the alien labor policy committee, said the government would bring charges against entrepreneurs using illegal workers under the anti-money laundering law.

"From now on, there should be no need for us to catch illegal alien labor, but we will take serious action against employers," he said.

Dabbaransi said the government planned to reduce the number of occupations open to aliens, and that only Thai citizens would be permitted to work as karaoke bar staff, waiters and beauty assistants.

According to an immigration report released by Japan's Justice Ministry, the country deported 41,935 illegal aliens last year, up 2.9 percent from the previous year, with nearly 80 percent of them found to be working illegally. Those removed were subject to deportation for violations to the Immigration Control and Refugee Recognition Act.

Tokyo had the largest number of illegal workers at 10,962. South Koreans topped the list of foreigners who were forced to leave, at 9,656, followed by China, the Philippines, Thailand and Brazil.

9. Legislative Update

The following bills were recently introduced in Congress:

- HR 2220, sponsored by Rep Michael Burgess [TX-26] (introduced 5/22/2003), to amend the Transportation Equity Act for the 21st Century with respect to NAFTA corridor planning and development and coordinated border infrastructure and safety.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h2220ih.txt.pdf

- HR 2235, sponsored by Rep Sam Graves [MO-6] (introduced 5/22/2003), to suspend certain nonessential visas, in order to provide temporary workload relief critical to the successful reorganization of the immigration and naturalization functions of the Department of Homeland Security, to ensure that the screening and monitoring of arriving immigrants and nonimmigrants, and the deterrence of entry and settlement by illegal or unauthorized aliens, is sufficient to maintain the integrity of the sovereign borders of the United States, 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:h2235ih.txt.pdf

- S. 1099, sponsored by Sen. Kay Bailey Hutchison, Kay Bailey [TX] (introduced 5/21/2003), to amend the Transportation Equity Act for the 21st

Century with respect to national corridor planning and development and coordinated border infrastructure and safety.

http://thomas.loc.gov/cgi-bin/t2GPO/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s1099is.txt.pdf

- S. 1129, sponsored by Sen Dianne Feinstein [CA] (introduced 5/22/2003), to provide for the protection of unaccompanied alien children, 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:s1129is.txt.pdf

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

10. Guest Article – The Taxation Of Non-Immigrant Estates: Think It Won't Affect You? Think Again, 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/>.

Let's start with the following example:

T, admitted into the U.S. under a non-immigrant visa, purchases investment real estate in the U.S. for \$5 million, paying \$1 million down and financing the rest with a \$4 million note. T dies before making any principal repayments. The remainder of T's estate consists of assets located outside the U.S. worth \$5 million. T's estate has \$10,000 of funeral and estate administration expenses. For U.S. purposes, T's taxable estate is almost \$3 million and the resulting U.S. estate tax liability is \$1,255,350. More than T's equity in the U.S. property!

The example illustrates the effect that U.S. estate tax may have on a nonresident alien owning property in the U.S. With marginal U.S. estate tax rates rising as high as 49-percent in 2003, the U.S. estate tax is quite burdensome. Couple that with the lack of deductions and tax credits otherwise available to U.S. citizens and resident aliens, and you have a disaster waiting to happen. In the above example, selling the U.S. real estate won't even generate enough cash to pay the estate tax liability. Also not considered is the amount of estate or inheritance taxes imposed on the same property by T's home country. Now let's look at a similar, but more common scenario.

H, admitted into the U.S. under a non-immigrant visa, purchases a home in the U.S. for \$200,000, financing it with a \$180,000 mortgage loan and \$20,000 down payment of his own funds. H dies before making any principal repayments. Immediately prior to his death, H owned a residence in his home country worth \$200,000 (net of any foreign mortgage) that he rented out while living the U.S. H's estate has \$10,000 of funeral and estate administration expenses. For U.S.

purposes, T's taxable estate is \$105,000 and the resulting U.S. estate tax liability is \$12,300. More than half of the equity in the home is effectively lost to pay the U.S. estate tax liability.

Fortunately, in almost all instances the U.S. estate tax can be eliminated or reduced for non-immigrants owning U.S. property, real or personal. It simply takes careful planning and an understanding of the law.

The U.S. estate tax is generally imposed upon the value of all property comprising a decedent's (deceased person's) estate. In the case of a nonresident alien the taxable portion of the estate only includes property situated in the U.S. at the time of death. Before considering the impact the estate tax may have on a nonimmigrant alien, our analysis, as with all tax matters concerning foreign nationals, must begin with a determination of whether a decedent is a resident or nonresident alien for U.S. tax purposes. This analysis differs substantially from the resident/nonresident analysis we have considered in earlier income tax related articles.

Resident or Nonresident Status

For U.S. estate tax purposes, a resident alien is an individual, who at the time of death, is *domiciled* in the United States. *Domicile* refers to the place in which a person resides or intends to reside permanently, with no present intention of later moving therefrom. For example, a French national may be living in the United States at present, but it may be that person's intent to someday return to France, her permanent home.

Obviously, while physical presence is easy to determine, an individual's present intent is not. Some factors that indicate where a person is domiciled include: (1) the duration of stay in the U.S. and other countries, and frequency of travel between countries; (2) the nature of dwellings maintained and where those dwellings are located; (3) the location of personal possessions; (4) the location of family and close friends; (5) the places where church and club memberships are maintained; (6) the location of business interests; (7) residence declarations on visa applications, wills, or other legal documents; and (8) place where voter registration and driver's licenses are maintained.

You might think that the existence of a non-immigrant visa necessarily indicates that the visa holder is not domiciled in the U.S. since the terms of the visa prohibit the individual from residing in the U.S. on a permanent basis. The Court of Federal Claims recently rejected this argument in a case concerning the estate of a Canadian veterinarian. In that case, the IRS was granted the opportunity to show that a Canadian doctor, admitted into the U.S. under a temporary professional visa, was domiciled in the U.S. at the time of death. The decedent veterinarian was first admitted into the U.S. in 1993 for a period of one-year and continually renewed his temporary professional visa until his death in 1996. (For a complete analysis of this case click [here](#).)

If an alien decedent is determined to be a resident of the U.S., the estate tax applies in the same manner that it is imposed on U.S. citizens. However, if the alien decedent is a nonresident at death, special rules apply.

Estate Taxation of Nonresident Aliens

For nonresident aliens, the U.S. estate tax is imposed against those assets of the estate situated in the U.S. at the time of death. Different rules apply in determining where specific types of property are situated. For example, the situs of real property is always determined by its physical location. Situs of tangible personal property is determined by its physical location at the time of death, although exceptions to this rule exist (e.g., jewelry brought into the U.S. on a vacation). Stock in a domestic corporation is always deemed situated in the U.S. regardless of the location of stock certificates.

Once the total value of the estate's assets situated in the U.S. is known, the estate is entitled to deduct certain expenses, indebtedness and losses in arriving at the total taxable estate. Unfortunately, in this area the benefits available to nonresident decedents are not nearly as favorable as those available to U.S. citizens and resident aliens.

In the case of property subject to a recourse (other assets of the debtor may be used to satisfy the loan in the event of a default) mortgage, the full fair market value of the property must be included in the estate, but only a fraction of the debt is deductible equal to the ratio of U.S.-situs assets to worldwide assets. Therefore, in the first example above, T's estate is only entitled to a deduction of \$2 million for a \$4 million mortgage. By contrast, if the mortgage is nonrecourse (the lender can only look to the secured property for satisfaction of the loan in the event of default) the full amount of the mortgage is deductible. **The planning point to remember in the case of nonresident aliens choosing to own U.S. real property outright (rather than through a partnership or corporation), is to mortgage the property to the greatest extent possible and get the lender to accept a nonrecourse note.**

Estates of nonresident decedents are also entitled to deductions for funeral and administrative expenses. However, these expenses are also limited by the proportion of U.S.-situs assets to worldwide assets.

A very significant deduction and planning tool available to estates of citizens and resident aliens is the so-called "unlimited marital deduction." The unlimited marital deduction allows the estate a deduction equal to the value of all property passing to a surviving spouse. Therefore, if all estate assets pass to a surviving spouse no estate tax is due (although the assets may be subject to estate tax upon the later death of the surviving spouse). The estate of a nonresident decedent is entitled to the unlimited marital deduction only if the surviving spouse is a U.S. citizen.

If the surviving spouse is not a U.S. citizen, transfers qualify for the marital deduction only in two limited circumstances: (1) the surviving spouse becomes a U.S. citizen before the U.S. estate tax return is filed, and was domiciled in the U.S. between the date of the decedent's death and the surviving spouse's naturalization; or (2) the property passes to a qualified domestic trust (QDOT) or similar contractual arrangement for the benefit of the surviving spouse.

A QDOT is a trust meeting several statutory requirements and should only be drafted by qualified legal counsel. The statutory requirements generally necessitate that the trustee be a U.S. citizen or corporation, and that the trustee distribute nothing other than income from the trust, or that the trustee has the right to withhold tax imposed on such distribution. Other requirements exist that are beyond the scope of this article. It should be noted, however, that it is possible in the event property is

transferred outright to a non-citizen surviving spouse, that the surviving spouse make an election to immediately transfer the property to a QDOT. In other words, although it is highly recommended, it is not necessary that the QDOT be created prior to the first spouse's death.

The QDOT actually serves to defer the decedent's estate tax due until a later triggering event. The actual taxation of the QDOT occurs at estate tax rates otherwise available to the decedent, thereby allowing the decedent's estate to take advantage of the lower marginal rates. So in some respects the QDOT actually provides benefits not otherwise available to transfers to U.S. citizen surviving spouses. Triggering events resulting in taxation include the death of the surviving spouse, the termination of the trust as a QDOT, or any distribution from the QDOT during the surviving spouse's life, except mandatory distributions required to qualify as a QDOT and distributions of trust principal "on account of hardship."

The total taxable estate of a nonresident alien is subject to the same marginal estate tax rates applicable to U.S. citizens and resident aliens. However, a nonresident alien's estate is entitled to an estate tax credit of \$13,000. This credit effectively eliminates tax on the first \$60,000 of assets included in the estate. This credit pales in comparison to the credit available to U.S. citizens and resident aliens that effectively exempts the first \$1 million of assets from estate tax.

Effect of Tax Treaties

The U.S. has several estate, gift and inheritance tax treaties in effect with other countries. These treaties should always be consulted as they are designed to eliminate the double taxation of assets by the U.S. and the treaty partner country. Treaties often provide specific rules concerning the determination of domicile, situs of property or the marital deduction. Furthermore, treaties may increase the amount of allowable credit against the U.S. estate tax.

A Note on U.S. Probate

In order to effectively dispose of and transfer assets contained in a nonresident alien's estate, it is often desirable to execute a will specifically covering the disposition of property located within the U.S. Often, an alien will have two wills, one concerning the disposition of assets located in her home country, and one concerning the disposition of assets located in the U.S. In the absence of a U.S. will, a foreign-executed will may be admitted into probate in the U.S., but state courts are generally not compelled to admit these wills into probate.

Conclusion

Estate planning for nonresident aliens is often an overlooked area, but should be considered particularly if the alien intends on acquiring or investing in U.S. property. Estate taxes and probate can often be avoided through the use of foreign entities that hold property, but doing so is not always practical, especially if the property has already been acquired by the nonresident alien.

During the estate planning process it is advisable for an alien to execute an Affidavit of Domicile, which serves as a statement of the alien's intent to reside permanently within or without the U.S.

A well drafted will should include provisions designed to eliminate or minimize potential U.S. estate taxes. Wills should include credit shelter trust or QDOT provisions where appropriate.

11. In Class Action Lawsuit, Lawful Permanent Residents Claim DHS Refuses To Accept Their Legal Status

Padilla et al. v. Ridge et al.

United States District Court for the Southern District of Texas

In this case, lawful permanent residents are claiming that the Department of Homeland Security violated their rights as they are being refused proof of their lawful status. Without proof of their legal status, the immigrants are prevented from working, going to school, or traveling abroad. The Texas Lawyers Committee and the Mexican American Legal and Educational Fund filed the class action suit. The lawsuit is seeking relief for all persons who were or will be granted legal permanent resident status in the Harlingsen, Houston and San Antonio immigration districts.

The lawful permanent residents have made several requests to DHS to provide documentation of their lawful status. The immigrants fear not being able to show that they have legal status in circumstances where they come in contact with state and federal officials. "The DHS must give legal permanent residents proof of their lawful status so that they can take care of their families and contribute to society," said, Joe Berra, staff attorney for MALDEF. "Without their 'papers', their hard won freedoms are meaningless."

DHS has informed the parties that they would be notified by mail of a return date to complete processing. The delays have lasted from months to years. The immigrants in this case are expecting the DHS policies to be declared unlawful, prohibit DHS from denying documentation of LPR to the plaintiffs, and order the agency to immediately issue temporary documentation to the plaintiffs. Javier N. Maldonado, Executive Director of the Texas Lawyers' Committee explained, "the law is clear: the moment an Immigration Court grants lawful permanent resident status, an individual acquires the right to work, go to school and travel abroad."

12. Supreme Court Decision Leaves Secret Deportation Hearing Policy Unclear

By deciding against review of a New Jersey case that allowed secret deportation hearings at the government's discretion, the Supreme Court leaves the government without a clear national policy. The highest Court effectively allowed secret hearings in 46 states and at the same time restricted the government's power in the four states belonging to the 6th Circuit – Tennessee, Michigan, Ohio and Kentucky.

In the 46 states outside the 6th Circuit, the Department of Justice can close immigration hearings to the public and media in cases it determines to be important for national security.

On Sept. 21, 2001, Chief Immigration Judge Michael Creppy, under the direction of Attorney General John Ashcroft, issued an order that deportation hearings should be closed in any case deemed of "special interest" in the investigation of the attacks. The 6th Circuit Court of Appeals ruled that this directive violated the First Amendment rights of the public and the media in a Michigan case concerning a detainee. Then, in the present New Jersey case, the 3rd Circuit Court of Appeals upheld the government directive by a 2-1 vote.

After the decision by the Supreme Court to pass on the issue, the Detroit Free Press attorneys who filed the lawsuit in the 6th Circuit case stated that they will not appeal the decision. The government can still ask the Supreme Court to review the decision from that case. However, the Department of Justice said in a legal brief that it would not appeal the 6th Circuit's decision if the Supreme Court chose not to review the 3rd Circuit's decision.

While immigration hearings are typically open, this directive has placed a limit on the access to individuals facing possible deportation because of ties to terrorist networks. The government took the majority of the so-called "special interest" detainees into custody from New York and New Jersey following Sept. 11. Of the 766 "special interest" detainees, the government has deported 505 individuals.

The government alone has the right to determine if a detainee or case is of special interest to the war on terrorism. The Bush administration defended the policy as a security precaution.

The attorneys for the New Jersey newspapers that filed the lawsuit against the government said they believe that this ruling gives too much discretion to the federal agencies.

"An individual's liberty is at stake in a deportation hearing," the newspapers' lawyers wrote. "Yet the government nonetheless claims the power to hold these proceedings beyond public scrutiny, without providing any particularized showing that secrecy is necessary."

The Bush administration's top Supreme Court lawyer urged the Court to stay out of the 3rd Circuit case.

"There is no First Amendment right of public access to executive branch proceedings in general or to removal proceedings involving special interest aliens in particular," Solicitor General Theodore Olson argued in a court filing.

The government said its policies are "currently under review" in a brief filed with the Supreme Court in the New Jersey case. Spokesmen for the American Civil Liberties Union stated that the ACLU would continue to monitor the government to determine if any policy changes occur.