

Siskind's Immigration Bulletin  
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Siskind Susser serves immigration clients throughout the world from its offices in the  
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1. Openers

Dear Readers:

Our firm represents its fair share of computer programmers and other high tech workers. The high tech industry has suffered greatly in the current recession and, even though H-1B petitions for tech workers have dropped dramatically and employers have pointed out that the workers being recruited typically have skills that are still hard to find, politicians, members of the media and others are trying to portray foreign technology workers as a threat to the country.

Congress is finally starting to wake up to the fact that, after October 1st, the H-1B program reverts to its old 1990 Act quota numbers. Those numbers were barely adequate for our economy 13 years ago and, even in recession, they are not enough even to take us through a few months a year. Plus, as you'll see if you read our article this week on new H-1B data, the types of workers using the H-1B visa represent many fields, including several that are clearly facing shortages. They include doctors, schoolteachers, nurses and many others.

Special kudos go to Steve Yale-Loehr, my friend and J-1 Visa Guidebook co-author who testified recently in front of Congress regarding the benefits of the H-1B program. He has done this country a service and is owed our thanks.

In addition to our coverage of the H-1B debate this week, we have two in-depth articles on topics not usually covered on immigration sites in much depth. First, in our ABCs article, we focus on the Hague Convention and intercountry adoptions. And then regular guest columnist Steven Weiser writes on estate tax issues for non-citizen spouses.

In firm news, this week I attended and spoke at the International Bar Association's annual meeting in San Francisco. I was on a panel with lawyers from Germany, Holland, England and Canada. What was very interesting was learning about how different our systems are. But a common theme was the continued tightening of immigration rules in all five countries. The program covered entertainers and athletes. At the end of the program, it became clear that the US had the toughest rules.

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

Regards,

Greg Siskind

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2. The ABC's Of Immigration – Intercountry Adoption

**Hague Convention on Intercountry Adoption and The Intercountry Adoption Act of 2000**

The Hague Adoption Convention, also known as the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, is a multinational treaty. The treaty was adopted at The Hague, in Holland, on May 29, 1993. The Convention created certain rules and procedures which would be observed by all

countries that became signatories to it. The goal of the Convention is to protect the children, birth parents, as well as adoptive parents, who are involved in intercountry adoptions.

The United States has been an active and important participant in the negotiation of the Convention. The U.S. delegation to the negotiations, which included adoptive parents, law professors, adoption service providers, public welfare representatives and government officials, sought to ensure that, in addition to setting meaningful norms and procedures, the Convention would remain sufficiently flexible so that only minimal changes to current practice would be necessary for U.S. implementation.

On March 31, 1994, the United States signed the Convention and thereafter began efforts to ratify the convention. In 1998 the Convention was sent to the U.S. Senate for advice and consent to ratification. In June of 1998 the draft of the legislation, entitled "Intercountry Adoption Act," was sent to both houses of Congress. The Convention and implementing legislation was then forwarded to the Congress for further consideration, study, and Congressional action. On September 15, 2003 the proposed rule was published in the Federal Register.

The most important provisions of the Convention can be summarized as follows:

- All signatory countries become parties to the Convention and the Convention will apply to all adoptions between the signatory countries.
- An adoption may take place only if:
  1. The country of origin has established that a child is adoptable
  2. That an intercountry adoption is in the child's best interests
  3. That after counseling, the necessary consents to the adoption have been given freely
  4. The receiving country has determined that the prospective adoptive parents are eligible and suited to adopt
  5. That the child they wish to adopt will be authorized to enter and reside in that country
- Every signatory country to the Convention must establish a national government-level central authority to carry out certain non-delegable functions, which include cooperating with other central authorities, overseeing the implementation of the Convention in its country, and providing information on the laws of its country.
- Other functions under the Convention are delegable to public authorities and, in many cases, to adoption agencies and other international adoption service providers.
- Services provided by persons/entities other than adoption agencies are permitted if both the country of origin and the receiving country permit them.
- Persons wishing to adopt a child resident in another member country must apply to a designated authority in their own country.
- The Convention provides that, with limited exceptions, there can be no contact between the prospective adoptive parents and any person who cares for the child until certain requirements are met.
- All adoption service providers must be accredited/approved to provide services

under the Convention.

There are major benefits and advantages to the Convention which will be enjoyed by all the signatory countries. Implementation of the Convention would mean that:

- For the first time there will be a formal international and intergovernmental approval of the process of intercountry adoption
- The Convention encourages intercountry adoption, as regulated by the Convention, as a means of offering the advantage of a permanent family to a child for whom a suitable family cannot be found in the child's country of origin.
- A minimum set of uniform standards governing international adoptions are established. Every country that is a party to the Convention is able to promulgate or maintain further conditions and restrictions beyond those specified in the Convention.
- The Convention establishes a central authority in each country to ensure that one authoritative source of information and point of contact exists in that country. In the U.S., authorities of other party countries and members of the American public will be able to look to the U.S. central authority for reliable information and assistance.
- The Convention establishes reasonable certainty that adoptions decreed pursuant to the Convention will be recognized and given effect in all other party countries.
- The Convention facilitates the adoption by U.S. adoptive parents of children from another party country by providing a justification for establishing a new category for children for immigration purposes. The Immigration and Nationality Act (INA) will be amended by the implementing legislation to establish a category of children adopted pursuant to the Convention, thereby streamlining U.S. visa procedures.

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3. Ask Visalaw.com

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

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Q - I am currently living outside USA since 1 year working on a French work Permit. My old H1B expires in November 2004. Since I plan to come back to USA soon, can I get come back to US and claim another 6 years on my old H1B or should I re-enter the country on a new H1B to claim another 6 years. And also since I do not have latest pay stubs, would that be a problem? while transferring the visa?

A - You can come back in on the old H-1B visa if it is unexpired and if you are resuming the position approved in the H-1B petition. Also, I'm assuming the

conditions of your employment remain the same. You also are entitled to extend your H-1B visa for up to six more years since you have been absent from the US for a year. You don't need to apply for a new H-1B visa to claim that additional six years until your current visa expires. You'll want to show your paystubs abroad, tax returns, rent receipts, passport stamps and, perhaps, a letter from your employer in France to prove your one year abroad.

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Q - When it is time for a student to renew their student visa, can they renew their visas in the United States without returning to their home countries? If so, would they renew at the countries embassies or at some other location? Please inform me of this situation.

A - Unfortunately F-1 visas may not be renewed in the US. Students will have to travel abroad and apply for an F-1 visa at a US Consulate. Before September 11, some US consulates abroad permitted students to send their passports in for the renewal of their visas, but with increased security this is not an option any longer. Typically students can apply for visas in their home countries and Canada and Mexico. In some cases, other consulates may also have jurisdiction.

Keep in mind that an expired visa has no adverse effects when the student is already in the US. What controls how long the student may remain in the US is the student's I-94 card, not the visa. The visa must only be valid when the student is seeking entry to the US.

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Q - I am an international student, and I have been out of status for one year. Then I got a transfer to a community college in City A, but now I living in City B with some relatives because there was no way I could afford living by myself. I want to transfer to the community college here San Jose but I do not have a visa nor an I-94 card because I lost them in Mexico last year. I did not attend the community college in City A as I had just applied in June and got accepted then I came here to City B. They want me to go back home and get a visa then come back and attend the college, or try to get reinstated which is just as hard. I do not want to ruin my chance of studying in a good college and get my higher education. what should I do? Please Help.

A - Your school is correct, you should either apply for reinstatement (which will be hard because you've been out of status for more than 6 months) or you should apply for a new visa at a US consulate abroad. Because you were an F-1 admitted for the duration of his status, and because immigration did not issue a formal decision declaring you out-of-status, section 222(g) of the immigration act that requires out-of-status aliens to obtain their visas from their home countries will not apply to you, and therefore you will be able to apply for a visa in Canada or Mexico as well (unless, depending on your home-country, it is not possible for you to obtain an appointment in Canada or Mexico). You should apply for a visa with a new SEVIS Form I-20 marked "initial attendance."

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Q - I am a F-1 holder since August 2001. My I-20 is valid until May 2007. One of my children is a high school junior. I am aware that she will apply for change of status (F-2 to F-1) when she becomes a college student. The other one is already in college, but she considers transferring to a public university next academic year. Will my children be treated as international students and pay out-of-state tuition in public colleges after being in USA for more than 3 years as non-resident aliens?

A - The rules for residency for tuition purposes is defined at the state, school system, and the individual university level. Therefore, you should check this with the schools that they will be attending. As a general rule, F-1 students, because they are on a temporary visa and therefore cannot establish domicile, are treated as out-of-state students, however, in certain cases (for instance for undergraduate students, if the parents are working full-time in the state) they may be classified as out-of-state, but may still be charged in-state tuition. Therefore it is best to check with the school.

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Q - Hi! I'm a second preference (2A) family sponsored petitioner. My priority date is Nov 99. When I got my application approved I was 18. Now I'm 22. I'm I still eligible for the automatic conversion to 1A preference? My father (sponsor) is getting citizenship in a few months. Thanks!

A - You automatically converted to the 2B family preference category when you turned 21. Once your father becomes a citizen, you'll automatically convert to the 1st preference category. The good news is you don't need to file for a conversion. And you'll retain your November 1999 priority date.

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#### 4. Border News

The Bush administration revealed plans last week to launch a master database of "known and suspected terrorists" that would be used in background checks worldwide. The FBI and the Department of Homeland Security will create a Terrorist Screening Center (TSC) and pull information from a dozen existing watch lists in order to avoid a communication breakdown like the one surrounding the 9-11 attacks. The TSC will provide 24/7 support to all officials authorized to use the central watch list. The new database is scheduled to be operational by December 1.

The President's directive can be viewed online at:

<http://www.whitehouse.gov/news/releases/2003/09/20030916-5.html>.

More information on the TSC is available online at:

<http://www.dhs.gov/dhspublic/display?content=1596>

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Mexican officials say the arrests of six people last week in connection with a 1,000-foot tunnel crossing from Mexico into Arizona delivered a "serious blow" to a powerful drug cartel. The six men arrested are alleged members of Joaquin Guzman Loera's drug cartel. Loera is a drug kingpin who escaped from a maximum-security prison in Guadalajara in 2001. U.S. Drug Enforcement Administration officials connected Loera to a similar drug-smuggling tunnel discovered in 1990.

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According to an article in the Canadian Press, "Washington wants all Canadians traveling to the U.S. to carry a passport that will eventually include biometric markers such as iris scans as well as digital photos." Homeland Security Director Tom Ridge will meet with Canadian Deputy Prime Minister John Manley next month in order to discuss a proposal calling for passports to be issued after next year to be quickly scanned by border authorities and would include biometric data, officials said. The Bush administration has refused Canada's requests for an exemption from new legislation that requires tracking of every tourist, student and business traveler entering the U.S.

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Federal agents detained two prominent Muslim religious leaders after they arrived at Fort Lauderdale-Hollywood International Airport last Thursday. They were released the next day and returned to Canada. The men, Sheikh Ahmed Kutty and Sheikh Abdul Hamid, were traveling to Orlando.

"I feel so sorry for America. It has lost everything that sustained it as a nation. America has turned into a police state," Kutty told reporters.

Officials said the two men were found inadmissible under the Immigration and Nationality Act but that no further details could be given due to privacy reasons. Bureau of Customs and Border Protection spokeswoman Barbara Gonzalez said the two religious leaders voluntarily withdrew their applications for admission and they are not barred from reentering the United States at another time.

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## 5. News From The Courts

### U.S.A v. Belles

In this case from the Ninth Circuit, the appellant, Robert Dale Belles, was convicted of illegally possessing a firearm, in violation of a federal statute that makes possession of a firearm illegal for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence." Mr. Belles challenged his federal conviction on the grounds that his prior misdemeanor conviction is not within the firearm statute's definition of a crime of domestic violence, and that the misdemeanor conviction was invalid for the purposes of the federal statute because he pleaded guilty without the benefit of counsel and was not properly advised of his rights before he entered his plea.

Mr. Belles's prior crime arose from a citation for violation of a Wyoming Statute that stated that he committed "assault and battery by assaulting Kristen Belles – grabbing her chest/neck area and pushing her against her car in an angry manner." Kristen Belles was married to Mr. Belles when he committed battery against her.

The Ninth Circuit held that simple battery does not qualify as a domestic violence offense unless the record of conviction shows that the battery involved more than

mere offensive touching. The government has asked for extra time to file a petition for rehearing and reconsideration.

If this decision stands, it may mean that in the Ninth Circuit simple assault or battery, or even a domestic violence offense involving simple assault or battery, will not be a basis for deportability under the domestic violence ground unless the government establishes that the official record of conviction (charging papers, plea or judgment, and sentence) shows that the conduct went beyond mere offensive touching.

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Zhou v. Ashcroft

In this case from the Ninth Circuit, the court addressed the very important issue of credibility of the applicant for asylum.

Zhe Xiao Zhou, a native and citizen of china, petitioned for review of the decision of the Board of Immigration Appeals affirming the immigration judge's ("IJ") order denying the application for asylum and withholding of removal. The Ninth Circuit reviewed the IJ's adverse credibility finding for substantial evidence.

The Ninth Circuit found that the IJ erroneously concluded that Zhe Xiao Zhou was not credible because he testified to certain details regarding his alleged persecution by local communist officials that were not included in his asylum application. The Court held that "it is well settled that an applicant's testimony is not per se lacking in credibility simply because it includes details that are not set forth in the asylum application.

Moreover, the IJ failed to provide an adequate reason for rejecting Zhe Xiao Zhou's explanation for the omissions. Under the *Garrovillas v. INS* (9<sup>th</sup> Cir. 1998) "inconsistencies of less than substantial importance for which a plausible explanation is offered" are improper bases for adverse credibility finding. Therefore the decision of the Board of Immigration Appeals was vacated and the case was remanded to the Immigration Court.

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6. Government Processing Times

Texas Service Center Processing Time Report September 15, 2003	
Jurisdiction: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee and Texas.	
Form	We are Processing cases with these receipt notice dates:
I-90 to replace lost, damaged or destroyed I-551	9/20/2002

I-90 to renew expiring I-551	n/a
I-102 for replacement/initial nonimmigrant arrival/departure form	10/31/2002
I-129 for H1B classification	4/11/2003
I-129 for H2A classification	9/1/2003
I-129 for H2B classification	7/11/2003
I-129 for H3 classification	6/19/2003
I-129 for L classification	8/15/2003
I-129 for Blanket L petition	8/15/2003
I-129 for O classification	6/19/2003
I-129 for P classification	6/5/2003
I-129 for Q or R classification Q	Q 8/11/2003 - R 4/23/2003
I-129 for TN classification	n/a
I-129F (fiancée)	4/11/2003
I-129 For E classification	4/16/2003
I-130 for Spouse, Parent or Child of US Citizen	6/15/2001
I-130 for Spouse of Lawful Permanent Resident	4/3/1998
I-130 for Other Relative	4/3/1998
I-131 for Advance Parole	3/20/2003
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	10/1/2002
I-140 B (outstanding professor or researcher) IST PREF	10/1/2002
I-140 C (multinational executive or manager) IST PREF	10/1/2002
I-140 D (professional holding adv. degree/alien of exceptional ability) 2ND PREF	1/9/2003
I-140 E (skilled worker or professional) 3RD PREF	1/9/2003
I-140 G (other worker) 3RD PREF	1/9/2003
I-140 I (National Interest Waiver)	9/24/2002
I-212 permission to reapply for admission after deportation/removal	n/a
I-360 petition for Amerasian, widow(er), or Special Immigrant	7/29/2003
I-485 Asylum-based	n/a
I-485 Refugee-based	n/a
I-485 Employment-based	1/2/2001
I-485 Haitian Refugee Immigration Fairness Act (HRIFA)-based	n/a
I-526 Immigrant Petition by Alien Entrepreneur	9/1/2003

I-539 for extension of stay for F or M non-immigrant	6/12/2003
I-539 for extension of stay for J non-immigrant	n/a
I-539 for extension of stay for L or H non-immigrant	6/12/2003
I-539 for extension of stay for other non-immigrant	6/12/2003
I-539 to change nonimmigrant classification to F or M	9/6/2003
I-539 to change nonimmigrant classification to J	9/6/2003
I-539 to change nonimmigrant classification to L or H	9/6/2003
I-539 to change to other nonimmigrant classification	9/6/2003
I-612 waiver of foreign residence requirement	5/5/2003
I-730 Refugee/Asylee Relative Petition	n/a
I-751 Petition to Remove Conditions on Residence	11/7/2002
I-765 for initial asylee or asylum applicant authorization C-8	8/18/2003
I-765 for employment authorization associated with Hurricane Mitch TPS	6/7/2003
I-765 for employment authorization associated with El Salvador TPS	6/12/2002
I-765 for employment authorization while I-485 is pending C-9	7/31/2003
I-765 for all other employment authorization	7/7/2003
I-817 Application for Family Unity Benefits	12/17/2002
I-821 for El Salvador	5/12/2001
I-821 for Hurricane Mitch countries	1/2/2000
I-824 Application for Action on an Approved Application or Petition	9/26/2002
I-829 Petition by Entrepreneur to Remove Conditions	8/24/1999
I-914 Application for T Non-Immigrant	n/a

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

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## 7. News Bytes

The Times of India reported on a private reception attended by President Bush last week, where he is said to have expressed emphatic opposition to a bill in congress that would eliminate the H-1B visa. Immigration attorney Paresh Shah was present at the meeting, a reception in honor of Mississippi Republican gubernatorial candidate Haley Barbour, and asked Bush specifically about Rep Tom Tancredo's bill terminating the H-1B visa program (HR 2688).

According to the article, "Bush spread his hands as wide apart as possible and stated unequivocally: 'Tancredo and I are at opposite ends of the pole. I fully do not support Congressman Tancredo's bill against H-1Bs.' Shah said."

"From his immediate grasp of the H-1B issue, and his strong support for continuing the program, he understands also that these foreign specialty workers are basically a much needed element of our economy," Shah said.

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Last week Eduardo Aguirre, Director of U.S. Citizenship and Immigration Services (CIS) announced the new Office of Citizenship and that Alfonso Aguilar has been appointed as the office's first chief. The new office will "promote instruction and training on citizenship responsibilities to both immigrants and U.S. citizens," according to a CIS news release.

"It is our duty to ensure that the process of becoming an American is meaningful to the candidate and beneficial for the country," Aguirre said.

Aguilar most recently worked as the Press Secretary for Latin America and the Caribbean at the U.S. Agency for International Development. Before that, he held similar posts at the U.S. Department of Energy and the Commonwealth of Puerto Rico. He is a graduate of the University of Puerto Rico School of Law and the University of Notre Dame.

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A Canadian married gay couple were not allowed to enter the United States last week when they insisted on filling out a single customs clearance form declaring themselves a family, the New York Times reported. The two were on their way to attend a human rights conference in Georgia when a customs agent would not accept their joint declaration. A U.S. official in Canada said the refusal was lawful under the 1996 Defense of Marriage Act, which defined marriage as "only a legal union between one man and one woman as husband and wife." Same-sex marriage was made legal in Ontario this summer when the top appeals court in that province ruled that current federal marriage law was discriminatory.

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New York Mayor Michael Bloomberg revised his immigration policy last week to make it harder for city agencies to report illegal immigrants to federal authorities. Seeking to comply with a 1999 federal court ruling that struck down the city's policy of prohibiting city employees from passing on immigration information, Bloomberg had replaced the "don't tell" policy with a "don't ask" policy that restricted city employees from asking about a person's immigration status. Hoping to quiet a growing number of critics, especially those in the Hispanic community, the mayor signed a new executive order establishes a broad new privacy policy that prohibits city workers in most cases from spreading information about a person's immigration status, sexual orientation, income tax records and welfare assistance. The order applies to law enforcement officers, except in cases involving criminal activity and terrorism.

"It remains to be seen whether the new order adequately protects immigrants and others, and whether the federal government will challenge the new city order," said Stephen Yale-Loehr, an immigration lawyer who teaches at Cornell Law School.

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The White House issued a news release last week to inform the public of a new executive directive on "Integration and Use of Screening Information to Protect Against Terrorism." Available online at: <http://www.whitehouse.gov/news/releases/2003/09/20030916-5.html>, the directive authorizes the Attorney General to establish an organization to consolidate the Government's terrorist screening process, and calls for increased information sharing between other executive officials, including the Secretary of Homeland Security, the Secretary of State, the Director of Central Intelligence, and the heads of other executive departments.

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#### 8. International Roundup

The Washington Post reported this week that China has moved military police units into positions along its 870-mile frontier with North Korea and ordered them to take over border patrol duties from military police units. The Foreign Ministry said the Army took charge of defending the border in early September. Analysts said the change could be intended to put pressure on North Korea to abandon its nuclear weapons program.

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Bangladesh Foreign Minister Morshed Khan urged South Korea to legalize the status of 17,000 Bangladeshis working there without permission, during a meeting this week with South Korean Vice Minister for Foreign Affairs and Trade Kim Jae-sup.

"I urged the Korean foreign minister to take steps to reduce the trade imbalance by providing more Bangladeshi people with employment in South Korea," Khan told reporters.

South Korean law allows amnesty to those who have stayed for less than four years, but those who have stayed without permission more than four years will be deported, Kim said.

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Ireland has established a new unit in the Department of Justice to process 11,000 residency claims from the immigrant parents of Irish-born children. A Supreme Court ruled last January that non-national parents of Irish-born children did not have an automatic right to remain in the country, resulting in a backlog of such cases. In July, the Government said the outstanding applications would be subject to "individual consideration." Around 150 workers will be transferred from other departments in order to process the cases.

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Charting a new approach to immigration last week, the European Union considered implementing national quotas for legal immigrants during a meeting of EU interior ministers. The 15 EU countries have never before pooled together resources for immigration, and the subject remains a controversial one in Europe, where quotas have long been considered taboo.

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## 9. Legislative Update

This week Rep. Lamar Smith of Texas, a member of the Select Committee on Homeland Security, introduced the Removal of Terrorist Criminal Aliens Act of 2003 (H.R. 3106), which expands the criminal offenses that trigger expedited deportation of terrorists. The new offenses include possession of controlled substances, firearms offenses, espionage, sabotage, treason, threats against the President, violations of the Trading With the Enemy Act, draft evasion, and certain alien smuggling crimes. The Act also expands the list of destinations where an alien can be deported, currently limited to the country of origin or the country of citizenship. According to a news release on the legislation, the Act also "authorizes the Secretary of Homeland Security and the Attorney General to remove from the United States those individuals they have reason to believe pose a danger to national security."

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The following bills were recently introduced in Congress:

H.R. 3106: To strengthen the law enabling the United States to expeditiously remove terrorist criminals, to add flexibility with respect to the places to which aliens may be removed, to give sufficient authority to the Secretary of Homeland Security and the Attorney General to remove aliens who pose a danger to national security, and for other purposes.

Sponsor: Rep Smith, Lamar [TX-21] (introduced 9/17/2003)

Committees: House Judiciary

Latest Major Action: 9/17/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R. 3110: To specify locations where certain citizens and nationals of Mexico may be removed from the United States into Mexico.

Sponsor: Rep Bonilla, Henry [TX-23] (introduced 9/17/2003)

Committees: House Judiciary

Latest Major Action: 9/17/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R. 3115: To prevent a State or unit of local government from using Federal funds to assist prosecutors unless the State or unit provides information to the Department of Homeland Security on individuals convicted of crimes for use by the Department in identifying immigration violations by such individuals, and for other purposes.

Sponsor: Rep Fossella, Vito [NY-13] (introduced 9/17/2003)

Committees: House Judiciary

Latest Major Action: 9/17/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R. 3123: To amend the Immigration and Nationality Act to exempt certain elderly persons from demonstrating an understanding of the English language and the history, principles, and form of government of the United States as a requirement for naturalization, and to permit certain other elderly persons to take the history and government examination in a language of their choice.

Sponsor: Rep Nadler, Jerrold [NY-8] (introduced 9/17/2003)

Committees: House Judiciary

Latest Major Action: 9/17/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R. 3136: To amend the Immigration and Nationality Act to reduce the annual income level at which a person petitioning for a family-sponsored immigrant's admission must agree to provide support in a case where a United States employer has agreed to employ the immigrant for a period of not less than one year after admission or where the sponsored alien is under the age of 18.

Sponsor: Rep Weiner, Anthony D. [NY-9] (introduced 9/17/2003)

Committees: House Judiciary

Latest Major Action: 9/17/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

S. 1635: A bill to amend the Immigration and Nationality Act to ensure the integrity of the L-1 visa for intracompany transferees.

Sponsor: Sen Chambliss, Saxby [GA] (introduced 9/17/2003)

Committees: Senate Judiciary

Latest Major Action: 9/17/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

S. 1628: A bill to prescribe the oath of renunciation and allegiance for purposes of the Immigration and Nationality Act.

Sponsor: Sen Alexander, Lamar [TN] (introduced 9/17/2003)

Committees: Senate Judiciary

Latest Major Action: 9/17/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

For a review of all the immigration bills introduced this year, visit our legislative chart at [www.visalaw.com/advocacy.html](http://www.visalaw.com/advocacy.html).

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10. State Department Visa Bulletin – October 2003

#### **A. STATUTORY NUMBERS**

This bulletin summarizes the availability of immigrant numbers during **October**. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by September **8th** in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date **earlier than** the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

#### **FAMILY-SPONSORED PREFERENCES**

**First:** Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

**Second:** Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:  
A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;  
B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

**Third:** Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

**Fourth:** Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

#### **EMPLOYMENT-BASED PREFERENCES**

**First:** Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

**Second:** Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

**Third:** Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers."

**Fourth:** Certain Special Immigrants: 7.1% of the worldwide level.

**Fifth:** Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating

provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: MEXICO, INDIA and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

<b>Priority Dates for Family Based Immigrant Visas</b>				
	<b>All Chargeability Areas Except Those Listed</b>	<b>INDIA</b>	<b>MEXICO</b>	<b>PHILIPPINES</b>
<b>Family</b>				
<b>1<sup>st</sup></b>	<b>15MAY00</b>	<b>15MAY00</b>	<b>01OCT94</b>	<b>22JUL89</b>
<b>2A*</b>	<b>15SEP98</b>	<b>15SEP98</b>	<b>01MAR96</b>	<b>15SEP98</b>
<b>2B</b>	<b>01MAY95</b>	<b>01MAY95</b>	<b>01DEC91</b>	<b>01MAY95</b>
<b>3<sup>rd</sup></b>	<b>01JUL97</b>	<b>01JUL97</b>	<b>08OCT94</b>	<b>08FEB88</b>
<b>4<sup>th</sup></b>	<b>15DEC91</b>	<b>22JUL90</b>	<b>15DEC91</b>	<b>22SEP81</b>

\*NOTE: For October, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01MAR96. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01MAR96 and earlier than 15SEP98. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

<b>Priority Dates for Employment-Based Immigrant Visas</b>				
	<b>All Chargeability Areas Except Those Listed</b>	<b>INDIA</b>	<b>MEXICO</b>	<b>PHILIPPINES</b>
<b>Employment-Based</b>				
<b>1<sup>st</sup></b>	<b>C</b>	<b>C</b>	<b>C</b>	<b>C</b>
<b>2<sup>nd</sup></b>	<b>C</b>	<b>C</b>	<b>C</b>	<b>C</b>

3 <sup>rd</sup>	C	C	C	C
Other Workers	C	C	C	C
4 <sup>th</sup>	C	C	C	C
Certain Religious Workers	C	C	C	C
5 <sup>th</sup>	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

#### **B. DIVERSITY IMMIGRANT (DV) CATEGORY**

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NCARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NCARA program. **This reduction has resulted in the DV-2004 annual limit being reduced to 50,000.** DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For **October**, immigrant numbers in the DV category are available to qualified DV-2004 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **BELOW** the specified allocation cut-off number:

#### **All DV Chargeability Areas Except Those Listed Separately**

##### ***Region***

AFRICA: AF 9,300 Except: Ethiopia 6,000

ASIA: AS 5,000

EUROPE: EU 8,000

NORTH AMERICA (BAHAMAS): 2

OCEANIA: OC 100

SOUTH AMERICA, and the CARIBBEAN: 300

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2004 program ends as of September 30, 2004. DV visas may not be issued to DV-2004 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2004 principals are only entitled to derivative DV status until September 30, 2004. DV visa availability through the very end of FY-2004 cannot be taken for granted. Numbers could be exhausted prior to September 30. **Once all numbers provided by law for the DV-2004 program have been used, no further issuances will be possible.**

#### **C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN OCTOBER**

For **November**, immigrant numbers in the DV category are available to qualified DV-2004 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **BELOW** the specified allocation cut-off number:

#### **All DV Chargeability Areas Except Those Listed Separately**

##### **Region**

AFRICA: AF 11,700 Except: Ethiopia 9,000

ASIA: AS 5,600 Except: Bangladesh 2,800

EUROPE: EU 10,100

NORTH AMERICA (BAHAMAS): 3

OCEANIA: OC 400

SOUTH AMERICA, and the CARIBBEAN: SA 500

#### **D. SPECIAL IMMIGRANT CATEGORY FOR CERTAIN RELIGIOUS WORKERS**

The provisions in Section 101(a)(27)(C)(ii)(II) and (III) of the Immigration and Nationality Act for visa issuance to Certain Religious Workers (SR) expire as of September 30, 2003. Applicants who qualify for SR status must either adjust status or immigrate on or before September 30, 2003. This includes any accompanying spouses and children of such religious workers. On or after October 1, 2003, qualifying religious workers cannot immigrate under the current provision. (The special immigrant classification for Ministers of Religion is permanent, however, and will not be affected by the expiration of the provisions for other religious workers.) Congress is considering an extension of the "SR" visa category is possible, but there is no certainty when legislative action may occur. If this proposed legislation becomes law, readers will be notified in an upcoming *Visa Bulletin*.

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11. Guest Article: Estate Planning With A Non-Citizen Spouse, 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/>.*

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As if estate and gift tax planning for U.S. citizens wasn't already complicated enough, here comes the Internal Revenue Code once again to make an already difficult

situation even worse. In the May 31, 2003 Bulletin, we addressed estate-planning considerations for *nonresident alien individuals*. In this article we focus on estate and gift tax planning for *U.S. citizens* that have non-citizen spouses.

In general, an individual may make unlimited lifetime or post-death transfers of property to a spouse free of estate and gift taxes- *unless the recipient spouse is a non-citizen*. For example, H and W are a married couple. H is a U.S. citizen. H provides in his will that all property he owns at his death is left to W. If W is a U.S. citizen H's estate is not liable for *any* estate taxes. However, if W is a non-citizen, to the extent the value of H's estate exceeds the estate tax exemption amount, H's estate is liable for estate taxes imposed on the value of property passing to W.

Let's look at another example. H and W are a married couple and jointly hold title to their primary residence. In an effort to protect his assets from creditors, H decides to title the home solely in W's name. If both H and W are U.S. citizens no adverse tax consequences result. However, if one spouse is a non-citizen a taxable gift may very well occur simply by altering title to the home.

Prior to 1988, the above described transfers ordinarily escaped taxation because U.S. citizens and resident aliens were allowed to transfer unlimited amounts of property to their spouse's free of any U.S. estate and gift tax. This was, and still is, known as the unlimited marital deduction (because the amount transferred to the spouse was deducted from the gross taxable gift or estate). In 1988, Congress determined that the unlimited marital deduction could be abused where one spouse is a non-citizen. Assets could be transferred to the non-citizen spouse who would return to her home country, relinquish U.S. residency and escape U.S. taxation on all property other than those assets situated in the U.S. In order to remedy this perceived abuse, Congress enacted a series of laws that place substantial burdens and restrictions on transfers to non-citizen spouses. Understanding these laws and planning accordingly will insure that you maximize the amount of wealth you transfer to your non-citizen spouse and family, while minimizing or eliminating Uncle Sam's share.

#### In General

Congress has altered the rules applicable to non-citizen spouses in the following ways (all discussed in more detail below):

The unlimited *estate tax* marital deduction for transfers to non-citizen surviving spouses is disallowed, unless such property is placed in a qualified domestic trust (QDOT);

The unlimited *gift tax* marital deduction for transfers to non-citizen spouses is disallowed, but the annual exclusion from the federal gift tax is increased; The full value of jointly held property is includible in the estate of the U.S. citizen spouse; and

In certain situations taxing the creation or termination of a joint tenancy where one spouse is a non-citizen.

#### Estate Tax Marital Deduction

The federal estate tax is imposed on the value of all property owned by an individual at the time of death. Items ordinarily including in the taxable estate include bank

accounts, investments, personal property, residences, and even life insurance proceeds payable to the surviving spouse. Ordinarily, when calculating the amount of the taxable estate, a deduction is allowed for the value of all property passing to a surviving spouse (the marital deduction) thereby insuring that such property is not taxed. However, if the surviving spouse is a non-citizen, no marital deduction is allowed unless the property passes to the spouse through a QDOT and the personal representative of the deceased spouse's estate makes a timely QDOT tax election.

Here's how it works: H dies, leaving a non-citizen spouse, W, and two children with the following assets:

Bank Account	\$ 10,000
Investments and retirement	250,000
Residence (net of mortgage)	350,000
Life Insurance Proceeds	<u>700,000</u>
Total Assets	<u>\$1,310,000</u>

H's will provides that all property passes to W. Ordinarily, H's estate would owe no estate taxes since all property passes to his spouse. However, since W is a non-citizen no marital deduction is allowed. H may still use his unified credit equivalent to exempt \$1 million from estate taxation, but the remaining \$310,000 results in a tax liability of \$91,200 in 2003. However, if H's will had provided that all property passes to a QDOT for the benefit of his wife and children, estate taxes would have been avoided.

A QDOT actually serves to defer payment of any estate tax liability on the deceased spouse's estate so it is not a perfect answer to the lost unlimited marital deduction. QDOT taxes are due only upon the occurrence of certain events such as the death of the surviving non-citizen spouse, distributions of trust principal to the spouse, or the termination of a trust as a QDOT. The QDOT tax is determined using the same estate tax rates otherwise imposed against the estate of the decedent spouse. The amounts subject to tax are equal to the amount of distributed money or value of distributed property. Distributions of QDOT income, as opposed to distributions of trust principal, are not subject to QDOT tax.

The spousal and familial support provisions of QDOTs are usually very similar to ordinary marital trusts. All income must be paid to the surviving spouse no less frequently than quarterly (limited exceptions to this rule exist). Generally, the trustee of the QDOT is allowed to make additional discretionary distributions to the surviving spouse, provided such distributions meet certain ascertainable standards (e.g., surviving spouse and children's health, education maintenance and support). Often, the trustee is granted the right to terminate the trust if doing so will not result in an additional estate tax liability. This right may be useful where the surviving spouse later becomes a U.S. citizen. Upon the surviving spouse's death, trust principal may be distributed outright to surviving family members, friends, charities, etc., or may remain in trust for the benefit of such persons.

QDOTs are subject to numerous statutory requirements, which are most easily met with a properly drafted last will and testament, revocable trust or similar estate planning document. Occasionally, if an outright property transfer to the non-citizen surviving spouse has been made, the marital deduction is available if the surviving spouse subsequently transfers the property to a similar QDOT prior to the date on

which the estate tax return must be filed.<sup>1</sup> Because of the complexities involved, a QDOT should only be drafted by a qualified estate planning attorney.

At least one trustee of a QDOT must be a U.S. citizen or domestic corporation. If an individual, the trustee must have a regular place of business or abode in the U.S. The QDOT document must also provide that the U.S. trustee has the right to withhold any QDOT tax on any distributions of trust principal. Trust records must be kept in any state or the District of Columbia. As a practical matter, records are usually maintained at the location of the trustee.

QDOTs are divided into two classes: those with assets in excess of \$2 million (Large QDOTs), and those with assets of \$2 million or less (Small QDOTs). Large QDOTs must have a trustee that is a U.S. bank, furnish a bond in favor of the IRS equal to 65% of the value of the trust assets, or furnish an irrevocable letter of credit equal to 65% of the value of trust assets. Small QDOTs need to comply with these provisions only if the amount of real property located outside the U.S. accounts for more than 35% of all trusts assets.

#### Gift Tax Marital Deduction

There is no federal gift tax marital deduction for lifetime transfers to a non-citizen spouse. Instead, an individual may transfer up to \$100,000 annually to a non-citizen spouse without gift taxes being imposed, provided the gift would otherwise qualify for the marital deduction (for example, a gift of a future interest in property would not qualify).

As an example, assume on January 1, 2004 H transfers title to his family residence worth \$250,000 to his wife, W, a non-citizen of the U.S. Also assume on January 1, 2005 W becomes a U.S. citizen. The transfer to W in 2004 is a taxable gift. No marital deduction is available, but H can exclude \$100,000 of the value of the residence from the taxable amount, but the remaining \$150,000 is a taxable gift. The fact that W becomes a U.S. citizen in 2005 makes no difference because she was a non-citizen at the time of transfer.

#### Effect of Joint Tenancies

Generally, the Internal Revenue Code provides that upon the death of a spouse, one-half of the value of property held jointly with the surviving spouse is included in the deceased spouse's taxable estate. For example, H and W hold joint title to their primary residence. H dies when the home is valued at \$200,000. Only \$100,000 is included in H's taxable estate.

However, where the surviving spouse is a non-citizen, this rule is completely eliminated. In the above example, if W is a non-citizen spouse, H's estate may be subject to estate taxes on the full \$200,000 value of the residence. Upon W's death, she could claim a credit for estate taxes previously paid, but only if her estate is subject to U.S. estate taxes.

Generally, the creation of a joint tenancy in real property (real estate) between a husband and wife has no tax consequences, regardless of which spouse actually

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<sup>1</sup> A rarely used exception to these rules allows certain transfers of nonassignable annuities or other arrangements to qualify for the marital deduction, provided other requirements are met.

furnishes consideration for the purchase price of the joint property. However, upon the termination of a joint tenancy in real property, other than by reason of death, a spouse may be considered to have made a gift to the other spouse. The amount of the gift to the donee spouse is dependent upon the value of the interest in property received, multiplied by the percentage of consideration the donee spouse provided towards the original purchase of the property. For instance, H, a U.S. citizen, and W, a non-citizen, purchased a residence. H provided all of the consideration paid for the purchase of the home, which was titled jointly in both spouses' names. For liability protection purposes, the home is later transferred into the sole name of W. A taxable gift occurs. Since W is a non-citizen the unlimited marital deduction is not available, and to the extent the amount of the gift exceeds \$100,000, federal gift tax is due.

The creation of a joint tenancy in personal property is ordinarily treated as a gift. However, special rules exist for certain types of personal property. For example, the creation of a joint bank account does not result in a taxable gift. The taxation of terminations of joint tenancies in personal property is less clear. It appears that an equal separation of personal property or proceeds from the disposition of such property does not result in a taxable gift, regardless of which spouse furnished consideration for the original purchase of the property.

### Summary

Many estate and financial planning professionals often overlook special considerations that should be made where one spouse is a U.S. citizen and the other is not. Care needs to be taken, not only in planning for a spouse's well-being following the death of the first spouse, but also in structuring acquisitions of wealth, disposition of property, or asset protection matters. You should always consult with a professional with experience in international tax and estate planning matters to insure that you avoid unnecessary taxes, and that your spouse and family are adequately provided for in the event of your untimely death.

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## 12. USCIS Advises on Coming Changes to H-1B Program

On September 15, 2003, the Department of Homeland Security's Bureau of Citizenship and Immigration Services (now the USCIS) issued a memorandum to all service centers in the country. The subject of the memorandum was the "Sunset of Additional \$1,000 Filing Fee Imposed by American Competitiveness and Workforce Improvement Act (ACWIA) and Return to 65,000 Annual Limit on H-1B Petition Approvals." The purpose of this memorandum, as the title suggests, was to inform the service centers that H-1B petitioners who file petitions after October 1, 2003, will no longer be required to submit the additional filing fee of \$1,000. Also, the annual cap on H-1B petition approvals will fall back from 195,000 to 65,000 beginning in fiscal year 2004.

For those who are filing their H-1B petition on or after October 1, 2003, it should be noted that if the \$1,000 additional filing fee and the base fee of \$130 are made in a single remittance, the petition will be rejected as improperly filed. If the fees are in separate remittances, then the \$1,000 ACWIA fee may be rejected and the petition and filing fee accepted. Also, the I-129W, H-1B Data Collection and Filing Fee Exemption must still be filed in conjunction with the I-129 form for an H-1B nonimmigrant worker petition. The filing fee information in Part B can be omitted.

The form I-129W would also help ensure USCIS' adherence to the H-1B numerical limitations imposed by law.

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### 13. New Report Challenges Assumptions Regarding H-1B Workers

According to a report compiled by the National Research Council, employers reportedly hire H-1B workers because of difficulties recruiting qualified U.S. workers and because of the substantial lags in obtaining a green card for foreign workers.

H-1B workers are concentrated in information technology (IT) fields. In 2001, almost 58 percent of H-1B visas were issued to workers in computer-related occupations. Computer systems design and related services accounted for 47 percent of total H-1B visas issued by the INS. H-1B workers make up about 10 percent of the IT labor force, and it has been estimated that new H-1B visa workers contributed about one-fourth of annual growth in the core IT workforce between 1995 and 2000. In 1999 alone, H-1B workers made up 54 to 60 percent of IT labor force growth.

During the 1998-2001 period, the number of IT workers increased by 20 percent. A substantial fraction of these IT workers were foreign born and worked in the U.S. with temporary nonimmigrant visas issued under the H-1B program. It was the H-1B program that allowed employers to temporarily employ a foreign worker in the United States on a nonimmigrant basis in a specialty occupation. H-1B workers are generally professionals and the visa requires at least a bachelor's degree or the equivalent in the specific specialty. An H-1B visa is issued for an initial period of up to three years and can be renewed once, making employment for up to six years possible.

Using various data, mainly compiled from the labor condition applications, the authors of the report determined that there is little support for claims that the program has a negative impact on wages. However, some results do suggest a positive relationship between the number of LCAs and the unemployment rate a year later.

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### 14. Congress Hears Testimony on H-1Bs

#### Examining the Importance of the H-1B Visa to U.S. Economy

On September 16, 2003, Elizabeth C. Dickson, the director of immigration services for Ingersoll-Rand Company, testified before the Senate Judiciary Committee on behalf of the U.S. Chamber of Commerce. The testimony concerned the subject of the importance of the H-1B visa to the American economy. Ms. Dickson reiterated the importance of hi-tech companies to find vitally needed workers.

The H-1B visas allocated for any given fiscal year will go from 195,000 in the year 2003 to 65,000 visas beginning October 1, 2003. Ms. Dickson stated: "It is unclear what, if any rationale, was used in developing this cap." It was noted that this new regulatory measure would cause great economic hardship to U.S. employers. Ms. Dickson added: "We cannot afford to let arbitrary caps dictate U.S. business immigration policy. Immigration policies and procedures must be rationally based

and include consideration for economic security and competitiveness. We must be able to tap the talent we need both domestically and abroad.”

Ms. Dickson then provided details of how the cutback on the H-1B visas would adversely affect U.S. employers’ efforts to recruit severely needed specialty workers. Professions such as meteorologists, metallurgical engineers, and plastic engineers, to name but a few, are specialties that are in short supply in the United States. And almost all the students enrolled in such programs are foreign nationals. Ms. Dickson testified: “Human Resource Managers advise me that they simply cannot find Americans to fill such positions.” Thus, according to Ms. Dickson, it is easy to see that businesses may not be able to find a U.S. candidate who would meet their requirements, and therefore they turn to qualified applicants who enter the U.S. on H-1B visas. This is despite the fact that all these companies try to train U.S. workers and invest in the domestic workforce, Ms. Dickson testified.

Ms. Dickson also reminded Congress that whenever a company decides to hire an H-1B worker, the Human Resources personnel spend dozens of hours, compiling the necessary documentation for submission, and overseeing the process of application. In addition to the paperwork for an H-1B petition, application fees and legal costs, there is an ongoing support to facilitate visa revalidation international travel. The cost of an international relocation and the international salary administration, benefit payments and temporary housing allowances, all have to be borne by the sponsoring company. A company would not invest money in these individuals unless there was a sound business need for their skills and services in the United States, according to Ms. Dickson

Ms. Dickson concluded, “America cannot maintain its global advantage without an adequate supply of top-quality specialty workers, including immigrants. Immigrants build wealth and create jobs for native-born Americans...a recent report from the Immigration Policy Center of the American Immigration Law Foundation, foreign born individuals are 28 percent of all Ph.D.s in the U.S. who are engaged in research and development in science and engineering...If the government refuses to recognize market needs and demands, the only alternative for American companies will be to move more of their operations offshore...In the near-term, we simply must have access to foreign nationals. Many of them have been educated in the United States. By sending them home, we are at best sending them to our own foreign plant sites, and at worst to our competitors. The U.S. needs to maintain its global competitiveness and not let other countries lure away the talented professionals that generate ideas, innovation and prosperity. In the future, we will still want to hire the best and the brightest, whatever their nationality.”

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## 15. Schwarzenegger May Have Violated Terms Of Non-Immigrant Visa

Republican Arnold Schwarzenegger is facing heat over his immigration records and work history. The issue has surfaced during his campaign to become the next Governor of California.

Schwarzenegger entered the United States in 1968 on a B-1 visa, which allows a select group of visitors, such as training athletes, to come into the United States for brief periods of business. Under this rule, “a non-immigrant in B-1 status may not receive a salary from a U.S. source for services rendered in connection with his or

her activities in the United States." However, the rules do allow immigrants to receive "actual reasonable expenses," such as money for food and hotel rooms.

In his 1977 autobiography, Schwarzenegger stated that he worked out an agreement with Joe Weider to come to America. Under this agreement, Schwarzenegger provided Weider information about how he trained, while Weider provided Schwarzenegger with an apartment, a car, and payment of a weekly salary.

Weider stated earlier this month that the weekly salary was \$200. Last week, a spokesman for Schwarzenegger said that he was only paid \$65 per week. At the end of last week, Weider stated that he could not remember the details of the business deal.

After questioning about half-dozen immigration attorneys on whether this payment would have been allowable, the Mercury News reported that his visa would likely have been barred under these circumstances. However, some attorneys noted the more rigorous application procedures that are now present for the immigration process. In the 1960s, the procedures were much more lax than they are now.

Schwarzenegger attorney Tom Hiltachk said Schwarzenegger received an H-2 visa, which allowed him to work in this country, in November 1969 – after more than a year in the United States. He became a permanent resident in 1974 and a citizen in 1983.

In addition, Schwarzenegger's new ad campaign on a Spanish-language radio station announces his humble beginnings in America as a bricklayer. Several immigration attorneys also believe that he violated the terms of his H-2 work visa by launching this bricklaying business in 1971. According to further reports by the Mercury News, immigration attorneys across the country said Schwarzenegger would have been barred by visa restrictions from starting his own business. Moreover, there is no record that Schwarzenegger and the Italian bodybuilder that he paired up with ever received a required state contractor's license.

In addition, following this latest immigration issue, Hiltachk said it is unclear what type of visa Schwarzenegger had when he started the bricklaying business. But whether Schwarzenegger had an H-2 or another temporary visa, immigration attorneys said, the bodybuilder would have been barred from doing any work as a bricklayer or handyman.

"If they come into the United States to pick tomatoes, they can't go out and work at McDonald's," said Nancy Alby, an assistant center director at the U.S. Bureau of Citizenship and Naturalization Services, who spoke in general about H-2 visas and did not comment specifically on Schwarzenegger's case. "They have to do exactly what they were let into the United States to do."

The immigration issue fires up a debate over Schwarzenegger's support for Proposition 187, a 1994 ballot measure that sought to keep illegal immigrants from receiving some state educational and social services. He also vows to fight a new law that allows illegal immigrants to get driver's licenses. Schwarzenegger has said that immigrants must follow the rules like he did.

The federal government and the Bureau of Immigration and Citizenship Services declined to discuss Schwarzenegger's immigration file or release his full file. Only a

one-page article was released to the Mercury News when they requested the information.

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## 16. Immigrant Worker Freedom Rides

Taking a note from the Civil Rights Movement, immigrant workers and their supporters are setting out on the Immigrant Workers Freedom Ride, departing from nine major U.S. cities to cross the country in buses in late September. The group plans to make a stop in Washington D.C. to meet with members of Congress around the first of October, then to travel to New Jersey, ending with a mass rally in New York on October 4.

The group hopes to raise awareness and make changes in the current immigration system. Specifically, the group wants legalization for the estimated 10 million undocumented immigrants living in the United States, stronger rights for workers, and the right for their families to move here.

Twenty buses carrying approximately 800 people will be departing from cities around the country. The nine major starting points for the rides are Seattle and Portland, San Francisco, Los Angeles, Las Vegas, Houston, Minneapolis, Chicago, Miami, and Boston. Each one of these routes makes stops in close to 100 cities through different parts of the country, with a focus on central and southern portions of the country where illegal immigrant populations are high.

Included in the numerous groups who are supporting this trek include representatives from civil rights organizations, immigrant organizations, labor unions, elected officials, religious organizations, and the American Immigration Lawyers Association (AILA).

In addition, a group made up of students, professors, and professionals from around the country plan to deliver the "Petition for Academic Visa Reform" to the members of Congress during the Immigrant Workers Freedom Rides in Washington and at the Freedom Rides rally in New York. The petition came from the International Student Committee of the Graduate Employees and Student Organization (GESO). The group hopes to show Congress what changes they would like to see in the visa process for students, removing some of the restrictions that have been implemented since September 11. The number of student visas issued by the State Department decreased from 226,465 in October 1999 through August 2000, to 174,479 in October 2002 through August 2003, according to the department.

Also among those who are supporting the Freedom Rides is the AFL-CIO, a federation of 60 labor unions. The group believes that the rides and the rallies will bring more awareness to the public about immigrants' contributions and their concerns.

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## 17. Canadian Corner: Immigration Canada Lowers The Qualification Requirements

On September 18, 2003 the Minister of Citizenship & Immigration Canada announced an adjustment to the pass mark for federal skilled worker applicants. Effective

immediately, all new skilled worker applicants and those currently in the system who have not received a selection decision will be assessed with a pass mark of 67. Since the implementation of the new immigration laws (known as IPRA), the pass mark was 75.

Additionally, the Minister is proposing to amend the IRPA transition regulations to allow for all skilled workers and business applicants who applied before January 1, 2002 to be assessed under the selection criteria of the former Immigration Act.

The changes are a result of various court challenges. Leonard Pearl of Siskind Susser was one of the lawyers that successfully challenged Immigration Canada's IRPA implementations. Leonard Pearl is currently advising his clients to immediately file their Canadian immigration applications, as he is not confident that the dramatic decrease in the points pass mark will be kept for an lengthy period of time.

If you have any further questions please do not hesitate to contact Leonard Pearl, at [lpearlvisalaw@sprint.ca](mailto:lpearlvisalaw@sprint.ca) or (905) 764-8767.