

Siskind's Immigration Bulletin
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Siskind Susser serves immigration clients throughout the world from its offices in the US, Canada, Mexico, Argentina 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>.

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1. Openers

Dear Readers:

Our family's trip up the California coast is over and I'm back in the office and glad to be back working on the newsletter and handling immigration matters. I want to thank my team – in particular Arda Beskardes who filled in as editor for the last two issues. Arda did a great job and I'm glad to call him a colleague.

Many of you are watching the Olympics this week and the American team is, as always, a great example of how proud this country can be of its immigrants. Immigrants are well represented on the US team including swimming great Lenny Krayzelburg, tennis legend Martina Navratilova, gymnast Annia Hatch and soccer phenomenon Freddy Adu. Good luck to all the athletes!

In firm news, I'm profiled this week in the *Memphis Business Journal*. You can read the story on our web site at www.visalaw.com/news/.

Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. 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: P-2 Visas for Artists and Entertainers in Reciprocal Exchange Programs and P-3 Visas for Artists and Entertainers Participating in Culturally Unique Programs

What is a P-2 visa?

The P-2 nonimmigrant category is reserved for those who are coming to the US through an exchange program in which US based and a foreign-based organizations exchange artists and entertainers. The visas are available to both individuals and groups. There are few requirements for these exchange programs so long as the people involved are of equal caliber, will be employed in similar conditions and for similar periods of time, and there are similar numbers of people being exchanged. The P-2 category also includes support personnel.

What documents should I include in my P-2 application?

Among the specific documents required in the P-2 application are the following:

- A copy of the agreement between the US and foreign organizations about the exchange program,
- A letter from the US organization describing the exchange program,
- Evidence that a US labor union or similar organization was involved in negotiating the exchange, and

- Evidence that the foreign artists and entertainers in the US will be employed in conditions similar to those under which US artists and entertainers will be employed abroad.

Is there anything I should do before applying for a P-2 visa?

If you are considering applying for a P-2 visa, check with the organization that represents artists in your field. For example, the American Federation of Musicians has a P-2 program allowing for the exchange of American and Canadian musicians.

What is a P-3 visa?

P-3 visas are granted to artists and entertainers who come to the US to participate in a “program that is culturally unique.” The statute does not make clear whether the performance that will be given must be culturally unique, or whether the performance must also be given in a setting that is culturally unique. While the USCIS initially took the position that the program must be culturally unique, it has since relaxed the standards to allow issuance of P-3 visas so long as the performance that will be given is culturally unique. P-3 essential support personnel are also given P-3 visas.

What documents should I include in my P-3 application?

The following evidence must be submitted with a P-3 application:

- Affidavits or letters from experts regarding the authentic cultural uniqueness of the performance, or
- Other documentation that the performance is culturally unique, such as material published in newspapers and trade journals, and
- Evidence that each performance will be culturally unique.

The application must include an I-129 Form as well as a P Supplement and the O. It must be submitted to the USCIS Service Center having jurisdiction over the petitioner’s location.

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 on H-1B visa in US. I have a baby girl born in the US with heart disease. So, it is necessary for her to stay here to get a high level of medical treatment. My employer has filed a labor certificate.

However, if I need to leave the US, is there any law providing some provision for us to return for my daughter to get medical treatment?

A - Before your H-1B status ends, you'll need to apply to switch to B-2 visitor status or, if you have already left the US, you'll need to apply for a visitor visa at a consulate (or enter on the Visa Waiver Program if you are from a Visa Waiver country). Coming to the US for medical treatment or accompanying a minor child needing treatment is a legitimate use of a B-2 visa and it is not unusual for people to come to the US in this category. Children needing treatment and their parents are usually given a lot of flexibility here as long as you present solid medical documentation (primarily a letter from her primary physicians explaining what is happening and why it makes sense to get treatment in the US rather than at home). You should also present financial documentation to show that you can afford medical treatment. I wish your daughter the best of luck.

Q - I have a question about I-485 adjustment of status applications. If I am changing an employer after 180 days of filing I-485 do I need to find a SIMILAR POSITION only or can I go for Higher Position? For example if I am working for Company A as "Programmer Analyst" and if I change Employer Company B can I join as "Senior Programmer Analyst" or else "Systems Analyst"? Do I have to go for "Programmer Analyst" only? Also can I join company B for higher pay?

A - You are speaking about the law which allows someone who is applying for adjustment of status based on an employment green card category to change employers if the adjustment application has been pending 180 days and the worker is switching a job that is the same or very similar to the job approved in the I-140. There is no definition of "similar" so it is impossible to answer your question with certainty. However, my sense is that changing from "programmer analyst" to "senior programmer analyst" would likely be okay if you can document that each job requires the same basic set of skills and knowledge and the job duties are often overlapping. Higher pay should not be a major problem unless the pay is so disparate that it would indicate the jobs are in completely different fields. That's about the best I'm going to be able to do absent US Citizenship and Immigration Services issuing guidance on this point.

Q - I am a U.S Permanent resident and have a green card and had applied for citizenship. My fingerprints have been taken and I am scheduled for interview in the second week of October. I reside in New York city and am a married student. My husband is an U.S citizen. I have been in U.S for about 4 and half years. My parents reside in India and I wish to apply for them, so as to immigrate them to U.S. When could i apply for them at the earliest?

A - You can only apply for your parents once you have been sworn in as a US citizen. Immediately after you are sworn in, you should probably be able to go forward and submit the paperwork.

As for when you will take the oath, unfortunately, you can sometimes spend quite a bit of time waiting for the oath after the interview - sometimes months depending on your local area's backlog. You should be able to find out at the interview. I doubt you'll learn much more before that.

Q - I was looking for some information on the working hours limitation during F-1 Optional Practical . I wanted to know, if there is any limit on the number of working hours during OPT? Is it limited to 40 hours per week?

A - There is no limit on the hours you can work per week while in your post-graduation practical training period.

Q - I was denied for immigrant visa in F4 family-based immigrant category because I turned 21 too early. Now I want to know if one of my parents will apply for me in family based immigration category than can I get any advantage in the newly filed immigration category because I have been denied already.

A - If your parents have a green card now, they can sponsor you. But you will get a new place in line based on the date they file for you. The previous denial will not be a problem, but you will also not get any advantage either.

4. Border and Enforcement News

According to the *Los Angeles Times*, the Department of Homeland Security has proposed a new policy regarding arrests of undocumented immigrants in response to controversial unauthorized inland Border Patrol sweeps in June. Border Patrol agents will focus on arresting undocumented immigrants at the border and as they travel inland from transportation centers and highway checkpoints. Immigration and Customs Enforcement (ICE) will cover the interior areas and lead all immigration investigations. The boundary between the border and inland areas has not yet been clearly defined, however.

Border Patrol agents oppose the proposal, arguing that ICE lacks the resources to enforce immigration law. ICE agents already investigate immigrant and drug smuggling rings, terrorism, child pornography, copyright infringement, and customs violations. Recent cutbacks in agents and investigations are expected to continue into the next fiscal year, but ICE has not commented on its capacity to handle the additional proposed duties. The agency has also not disclosed whether it would conduct sweeps like those precipitated by the Border Patrol.

5. News From The Courts

United States of America v. Dominguez-Hernandez
U.S. Court of Appeals for the Fifth Circuit
2004 U.S. App. LEXIS 10676

Petitioner Israel Dominguez-Hernandez ("Dominguez"), a Mexican citizen, appeals the retroactive application of the 2002 U.S. Sentencing Guidelines that increased his 2001 offense from level eight to twenty-four. In 1987, Dominguez was convicted of involuntary manslaughter in Texas and received a six-year prison sentence. In 1990, he was deported to Mexico. In 2001, an immigration official found Dominguez in the U.S. while he was

serving a yearlong sentence for possession of cocaine. Dominguez pled guilty to the offense of being illegally present in the U.S. subsequent to deportation.

The probation officer handling Dominguez' case applied the 2002 Sentencing Guidelines and recommended a sixteen-level enhancement because of Dominguez' involuntary manslaughter conviction. Dominguez objected to the adjustment and argued that the 2000 Guidelines effective at the time of his 2001 offense should apply. The district court overruled Dominguez' objection, holding that the increase applied under both sets of the Guidelines and sentenced Dominguez to 80 months imprisonment.

The Court of Appeals for the Fifth Circuit distinguished the two sets of Guidelines. The 2002 Guidelines specifically categorize manslaughter as a "crime of violence," triggering the sixteen-level enhancement. In contrast, the 2000 Guidelines provide for a four-level adjustment unless the underlying crime is an "aggravated felony," (also defined as a "crime of violence"), in which case the sixteen-level enhancement applies. The Court rejected the government's argument that Dominguez failed to preserve his objection on appeal by not specifically referring to the ex post facto clause. The ex post facto clause of the U.S. Constitution prohibits the retroactive application of a law if it would result in a more severe penalty than the law in effect when the offense was committed. The Court found that the basis of Dominguez' objection was evident and valid and that the 2000 Guidelines should apply to Dominguez' case.

The Fifth Circuit held that under Texas law, involuntary manslaughter does not constitute a "crime of violence," inherently involving the *intentional* use, attempted or threatened use, or the substantial risk of physical force against another's person or property. Texas defines involuntary manslaughter as *recklessly* causing another's death. Because Dominguez' offense was not a "crime of violence," the sixteen-level enhancement was inappropriate. The Court vacated the district court's opinion and remanded for resentencing.

6. Government Processing Times

There are no new processing times to report.

7. News Bytes

The Department of State's spokesperson announced at a press briefing last week that Bangladesh has been designated as a Tier 3 country on the Trafficking in Persons report. Sanctions could be imposed if the government of Bangladesh does not take significant steps to address trafficking issues. While no decision has been made on whether sanctions would be appropriate in this case, the President has until September 30, 2004, to make a decision on whether to impose or waive sanctions.

According to the Federal Register, the Department of State has redesignated the Communist Party of the Philippines, also known as the New People's Army, as a Foreign Terrorist Organization. This designation was effective August 9, 2004.

According to statements at a State Department Press Briefing, the U.S. Embassy will be temporarily closed in Colombo, Sri Lanka, after a discovery of an envelope with white powder on the premises. Professional testing of the material is underway, and when there is more information, it will be released to the public.

8. International Roundup

The *Guardian* reports that Britain's recent vigilant effort to weed out fraudulent visa applications from China is precluding legitimate students from attending UK universities this fall. Professor Les Ebdon at Luton University estimates that the crackdown could effect up to 10,000 Chinese students and deprive universities of 77 million pounds. According to Professor Ebdon, the increased scrutiny is believed to be a response to the tragedy in Morecambe Bay where 21 Chinese laborers drowned in February, despite the lack of evidence that those individuals entered on student visas.

Professor Steven Lei of Middlesex University asserts that Chinese students have difficulty proving to immigration officials that they can afford university tuition. The British embassy cannot always verify that a student has sufficient funds because parents sometimes do not receive pay slips, or an entire community contributes to send a student abroad. Chinese citizens comprise the largest group of international students in Britain. Because universities may set their own rates for international students (unlike their UK and EU peers), schools stand to lose a significant source of funding from the crackdown. Despite earlier initiatives by Prime Minister Tony Blair and the Department for Education and Skills to recruit more international students, the department expressed deference to the decisions of UK visas, the inter-government agency that processes applications.

According to *The Guardian*, deployment of the Inmate Management System (IMS) is being expanded after development at two prisons and an immigration detention centre. The procedure, which the Home Office prefers to call a "visitor recognition system," saves records of visitors' fingerprints and their photographs on local computers. Five additional prisons will be equipped with a new biometric security system to scan the fingerprints of a multitude of visitors and prisoners. MIS, devised by a London firm, Unilink Systems and Software, is intended to speed up the processing of visitors and ensure inmates do not escape by swapping places with visitors. Further, banned visitors can be more easily excluded and suspicious patterns of visits tracked.

This technology has proved successful. However, fingerprint scanners can be fooled. A Japanese professor used gelatin to transfer a copy of someone else's prints on to his finger. However, the resources for such techniques are unlikely to be available in prison.

9. Legislative Update

For a review of all the immigration bills that have been recently introduced, visit our legislative chart at www.visalaw.com/advocacy.html.

10. Campaign 2004

According to the *Washington Times*, the debate over immigration policy within the Republican Party poses one of the greatest challenges for platform writers seeking to paint an image of party unity at the Republican national convention, which begins August 30 in New York. Several Republicans involved in platform-committee activities have voiced efforts to temper some of the extremist views on immigration and avoid language that immigrants might perceive as "unwelcoming." Colorado Representative Tom Tancredo, who opposes President Bush's "guest worker" proposal, prepares to persuade the platform committee to adopt a stricter stance regarding enforcement of immigration laws. Tancredo may encounter opposition from the three chairpersons of the committee who more closely support the President's immigration views: Senate Majority Leader Bill Frist of Tennessee, Colorado Governor Bill Owens, and Pennsylvania Representative Melissa A. Hart.

According to the *The Arizona Daily Star*, Congressman Kolbe will be facing opposition as he runs for his 11th term this year in the House of Representatives. His long career as a Republican has made him the senior member of Arizona's eight-man delegation in the House. His opposition comes from Randy Graf, also a Republican with four years experience as a lawmaker. Although the two disagree on various domestic policies, including abortion rights and health care, the main motivation for Graf to run is immigration.

Graf is opposed to a guest-worker proposal Kolbe introduced last year with two fellow Arizona Republicans, Sen. John McCain and Rep. Jeff Flake. He has said that he considers the proposal an amnesty plan for "lawbreakers" and is calling for stricter border security measures. Undeterred by the long victorious record of Kolbe, Graf has said that he believes Kolbe's stance on immigration is why he needs to be voted out of office.

According to *The Washington Times*, Democratic presidential nominee John Kerry recently stated during a tour at the Grand Canyon, that he will not get involved in the fight on the Protect Arizona Now initiative. Kerry stated that he believes states should be allowed to make such decisions. Though last year, he called the initiative, "both heartless and divisive."

If implemented, this initiative will deny state and local services to illegal immigrants and also require proof of U.S. citizenship before voting. Polls show this initiative carries the support of three quarters of Arizona voters. However, Kerry is currently working on securing votes in Northern Arizona and New Mexico, specifically amongst Hispanics and Native Americans who tend to vote Democratic.

11. DHS Extends Border Patrol's Expedited Removal Power

According to the *New York Times*, the Department of Homeland Security (DHS) has empowered border patrol agents to deport undocumented aliens perfunctorily without hearings. Legislation authorizing such expedited removal has been in place since 1996, but until now, DHS has only permitted officials at airports and seaports to exercise this authority. Concerns about tightening the country's borders to prevent terrorism have

prompted the agency's extension of this power to undocumented aliens apprehended within 100 miles of the Mexican or Canadian borders who have spent 14 days or less in the U.S. Border agents will target primarily citizens of countries other than Mexico and Canada, beginning August 24 in Tucson and Laredo, Texas.

Previously, undocumented aliens had the opportunity to plead their cases before immigration judges, who decided whether the immigrants would stay or be deported. This process often lasted over a year, overburdening detention centers and depleting resources. By contrast, expedited removal will enable deportation within eight days of apprehension—unless an immigrant displays a credible fear of persecution in his or her home country. Such asylum applicants will continue to receive hearings before an immigration judge.

Immigrant advocates denounce the new policy, fearing that legitimate asylum-seekers and American citizens or other travelers lacking proper documents will be improperly deported. Because DHS has not disclosed much information about training border patrol agents to exercise their new discretion, advocates worry that agents will make mistakes.

In the same press release declaring the expanded use of expedited removal, DHS announced that Mexicans with border crossing cards will be able to stay longer in the U.S., beginning December 31. The new rules increase these temporary visits from 72 hours to 30 days within the border zone. This includes the area within 25 miles of the border in Texas, New Mexico, and California and within 75 miles of the Arizona border.

12. President Bush Signs Bill to Extend Requirement Deadline for Biometrics in Passports

Last week President Bush signed H.R. 4417, which will extend by one year, to October 26, 2005, the requirement for Visa Waiver Program countries to include biometrics in passports. According to a State Department press release, the extension was necessary in order to avoid impending interruption of international travel and provide more time for improving the biometric passport. The Enhanced Border Security and Visa Entry Reform Act of 2002, the original legislation that mandated the requirement for Visa Waiver travelers to have biometrics included in passports, required that Visa Waiver Program country passports issued on or after October 26, 2004, be biometrically enabled for use in Visa Waiver travel.

The Department of Homeland Security will begin enrolling Visa Waiver Program travelers through the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program at all airports and seaports on or about September 30, 2004. Enrollment in US-VISIT is an effort by the United States to enhance border security while facilitating international travel. The US-VISIT system requires two digital index finger scans and a digital photograph from a traveler to verify his or her identity.

There is a requirement for Visa Waiver Program travel that will still come into effect on October 26, 2004. On and after that date, all passports used for travel in the Visa Waiver Program must be machine-readable. A postponement was granted from October 1, 2003, until October 26, 2004, as the date by which Visa Waiver Program travelers from 22 countries must present a machine-readable passport to be admitted to the United States without a visa. According to the release, all domestically produced U.S. passports will be biometric passports by the end of 2005.

13. USCIS Provides Clarification on Extension of Stay for Foreign Students

Since the Federal Register notice regarding the extension of the duration of status of certain F-1 and J-1 non-immigrants unable to change status to that of an H-1B nonimmigrant because of the fiscal year 2004 statutory cap of 65,000, a memorandum has been issued from U.S. Citizenship and Immigration Services (USCIS) to address related questions and provide guidance regarding the procedures for handling these petitions and concurrent change of status requests.

The memorandum states that if the F-1 or J-1 nonimmigrant alien is still within their 60- or 30- day grace period at the time of filing the request for change of status (COS) to H-1B nonimmigrant effective October 1, 2004, the request for change of status is considered timely filed. As long as the alien was in status on the date that the COS application was originally filed, he/she may benefit from the Federal Register notice.

Any COS request denied by USCIS prior to July 23, 2004, based upon unavailability of H-1B status due to the annual cap is a correct decision, according to the memorandum. However, applicants may file a motion to reopen/reconsider the change of status denial with USCIS. These motions must be received by USCIS no later than August 23, 2004.

Questions regarding the memorandum or the Federal Register notice should be directed to USCIS Headquarters.

14. Immigration Attorney Suspended for Threatening Client

A Connecticut immigration attorney, Sherri B. Paige, has been suspended for one year for threatening to expose his client to the FBI as a terrorist sympathizer after the client hired a different lawyer. According to Law.com, Paige told the client he needed to get life insurance and recommended her husband without informing the client of their relationship. At her presentment hearing, Paige told the court that she was never hired by the client, and presented forged documents. However, she filed immigration papers that stated she was, in fact, his attorney. At the hearing, the judge said that if she is not his attorney, then she committed fraud on the United States Citizenship and Immigration Services.

The client first brought complaints against the immigration attorney in May 2002, after USCIS rejected his application because it contained the wrong paperwork. The client hired another attorney after Paige refused to refund the \$1,750 retainer.

The new attorney, Judith Sporn, got his file returned from USCIS. According to the judge in the presentment hearing, Paige contacted congressmen and immigration officials to report "outrageous" behavior of her former client. When he told Paige he would file a grievance complaint against her, Paige told Sporn that following through with this intention would gain the attention of the Federal Bureau of Investigation and facilitate identifying the client as a terrorist sympathizer.

Paige must apply for reinstatement and achieve a passing score on the Multistate Professional Responsibility Exam to get her law license back.

15. Immigration Official Convicted of Corruption and Violating Civil Rights

According to a Department of Justice press release, a federal jury in Los Angeles convicted an Immigration and Naturalization Service asylum officer on corruption and civil rights charges. Thomas A. Powell was convicted of using his power as an asylum officer to victimize two women in 2000.

In one incident, he touched a female immigrant inappropriately and demanded sexual favors in exchange for recommending approval of her asylum application. Her asylum was denied when she rejected his advances. In a second incident, Powell solicited and received a \$2,000 bribe from another immigrant seeking political asylum. In exchange, Powell recommended approval of the application.

Powell faces a maximum of 31 years in federal prison. Sentencing is scheduled to occur on November 22, 2004.
