

Siskind's Immigration Bulletin
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1. Openers

Dear Readers:

Immigration was in the news in a big way this week – two items we expected and one we did not. The bigger headline was the surprise withdrawal of Bernard Kerik from consideration as Secretary of Homeland Security. This is the Cabinet Department that oversees the country's three immigration agencies. Why did Kerik pull out of the process? An old familiar reason was offered – the employment of an illegal nanny in the Kerik household. Like Linda Chavez who withdrew from consideration as Labor Secretary four years ago, the White House felt that it could not defend his nomination when the position came with the responsibility of enforcing the country's immigration laws.

The Kerik withdrawal once again illustrates just how seriously flawed our immigration system is. The Kerik family is no different than thousands – perhaps hundreds of thousands – of families around the US who depend on foreign undocumented workers who help in their households. The anti-immigrants in our country will say that if these jobs just paid better, plenty of Americans would line up for them. That's just ignoring reality. First, there are an estimated 14,000,000 undocumented workers in this country and only 8,000,000 unemployed Americans. Even if you could magically force every undocumented worker to leave and gave Americans the opportunity to fill all these jobs, there would still be millions of vacancies. Second, ask your average unemployed stockbroker or middle manager whether they're interested in laundering soiled patient garments in a nursing home or cleaning dishes at the local diner and you'll likely get a "forget it" in response. These ARE jobs Americans simply aren't available to do.

And it turns law enforcement heroes like Bernard Kerik, admired jurists like Supreme Court Justice Stephen Breyer, popular commentators like Pat Buchanan and countless others into lawbreakers. The self-righteous will say "Hey, employers should just do it the legal way instead of hiring people illegally. Well folks, there is no legal way. We don't have a guest worker program in this country and getting a visa for a nanny and many other types of skilled and unskilled workers is usually out of the question. President Bush's immigration plan would be an important step in the right direction. Hopefully, the one positive result of the Kerik mess is that it will help the President make the case that immigration reform is needed.

The shocking news of the week for many, however, was the retrogression of the EB-3 employment green card category for skilled and unskilled workers. We new this was likely to come in early 2005 and we have been warning readers of the possibility. For the first time in several years, cutoff dates have been published in this category. For now, Filipino, Chinese and Indians are affected. But the remaining green card categories will likely start to roll back in the coming months. In this issue, we explain what the EB-3 cap means and how to deal with it.

Another important development is that President Bush signed the H-1B and L-1 reform bill we described in our special newsletter issue a few weeks ago. At the time the bill passed, we were unsure how the USCIS would determine which of the two new fees went into affect right away. The USCIS has now said that the \$1500/\$750 worker retraining fee applies right away while the \$500 fraud protection fund will not start until March 5, 2005. Note also that USCIS will not begin taking cases under the new quota until March either. We'll report more on the new law as we learn of developments.

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: Understanding the State Department Visa Bulletin

With the establishment of cutoff dates in the EB-3 green card category for the first time in several years, the State Department Visa Bulletin is in the news. This summary will help you understand how to read the bulletin and what different parts of it mean.

What is the State Department Visa Bulletin and where can I find it?

The United States Department of State, through the Bureau of Consular Affairs, publishes the monthly "Visa Bulletin." The Visa Bulletin lists the availability of "immigrant numbers" during the month of publication, and is intended as a guide for consular officials, attorneys and others who would like to know if visas are immediately available for individuals in particular categories. We make the Visa Bulletin on our website as soon as we have the information, and include it in the next issue of our newsletter. It is also available from several other sources, include the State Department's website.

Why is the State Department Visa Bulletin necessary?

Section 201 of the Immigration and Nationality Act establishes limits on family and employment based immigration. There is no limit on the number of spouses and minor children of US citizens, but there is an annual limit on the other categories of family based immigrants of just under 500,000. The limit for employment-based immigration is 140,000. Section 202 of the Immigration and Nationality Act states that the total number of visas that may be issued ("charged") to specific countries may not exceed seven percent of the total number of family or employment based immigration on a worldwide basis. It is this limit on the number of visas that may be received by a country's nationals that creates the backlogs for some countries.

Under the AC21 Act, if the total number of visas available in the five employment-based green card categories is more than the number of applications submitted, then requirements that prevent countries from having more than 7% of the allotment of employment-based green cards will not apply. That way, immigrant visas will not go unused if there are applications pending that would otherwise be subject to the per country limit.

The Visa Bulletin indicates the availability of visas for family and employment-based preference categories, and separately lists countries that may have exceeded their allocation of visas. Countries that have exceeded their allocation of visas are "oversubscribed" and individuals from those countries must wait before a visa can be issued.

What does it mean if a category is "current"?

If a Category is "Current" then visas are immediately available for issuance by the consulate, and tables on the Visa Bulletin indicate this fact with a "C" under the appropriate chargeability area. If a category is oversubscribed, tables on the Visa Bulletin indicate this fact with a date, such as 15MAR94 under the appropriate chargeability area. When a category is oversubscribed, only individuals with a "priority date" earlier than the one listed on the Visa Bulletin may be issued visas. The priority date is the date on which the USCIS received the application, either an I-130 application for an alien relative or an I-140 application for an immigrant worker.

What does a priority date mean?

A priority date is assigned when an individual, who is qualified for the category of immigration they request, files a complete application. Individuals whose priority date is after the one listed in the tables must wait until their priority date is included in a table published in the monthly Visa Bulletin. Contrary to what one might believe, priority dates do not necessarily advance one month at a time, and depend upon the number of applications filed around the time of an individual's application. A surge in applications for a particular chargeability area at the time of filing could lead to priority dates advancing only one week per month. Similarly, a sharp drop in applications for a particular chargeability area when the application was filed might result in priority dates that advance two months at a time.

What is the difference between all the family-based categories on the State Department Visa Bulletin?

Family based immigration is divided into four preference categories and "immediate relatives" of United States citizens. Immediate relatives of United States citizens are parents, children under 21 and spouses. This category is not subject to any limits, and visas are always immediately available to those within it. The first family preference is for unmarried (whether single, widowed, or divorced) children over 21 of United States citizens and is presently backlogged more than 18 months for all countries. Backlogs for Mexico and the Philippines are particularly long (just over 6 years and just over 12 years). The family 2A preference is for spouses and unmarried children under 21 of permanent residents, and presently has a backlog of about four years. The family 2B preference is for unmarried children over 21 of permanent residents, and presently has about a seven-year backlog. The third family preference is for married children (any age) of United States citizens and currently faces about a four-year backlog for most countries, again with longer backlogs for Mexico and the Philippines. The fourth and final family preference is for brothers and sisters of United States citizens (over 21), and currently has about an eleven-year backlog for all countries, except the Philippines, which faces a wait of over 21 years.

What is the difference between all the employment-based categories on the State Department Visa Bulletin?

Employment based immigration is divided into five preference categories. The first preference category is for "priority workers" such as outstanding professors and researchers, aliens of extraordinary ability and multinational executives and managers. This category is presently current for all countries. The second preference category is for members of the professions holding advanced (post graduate) degrees, aliens of exceptional ability, and others whose immigration is in the "national interest." This category is presently current for all countries except China and India (China is backlogged about 18 months and India about nine months). The third preference covers skilled workers,

professionals and other workers. Within this category, skilled workers and professionals are presently current for most countries, except China and India (two and one-half years and three and one-half years respectively). However, the category of "other workers" faces a backlog of about five years for all countries. The fourth preference is for "special immigrants" and includes certain US Government employees, religious workers, foreign medical graduates, employees of international organizations, juveniles, members of the U.S. Armed Forces, and limited number of other individuals. This category is presently current for all countries. The fifth and final preference category is for "entrepreneurs," commonly known as immigrant investor visas. The investment typically required is \$1,000,000, and requires the creation of at least ten new full-time jobs in the U.S. for individuals other than the investor's spouse or children. This category is presently current for all countries.

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 - My mom is getting her green card next month. Her application is also on the process for landed immigration to Canada. Just wondering if her green card can affect her application process in Canada or not?

A - The US won't care if you have landed immigrant status in status as long as you maintain substantial ties to the US. The USCIS will look at the person's specific ties to the US in evaluating whether the green card holder has abandoned status in the US. For more information on this subject, please look at the article on our web site at <http://www.visalaw.com/01jan4/12jan401.html>.

Q - A relative of mine has multiple entry visa to visit. Does visitor need fresh Affidavit of support I-134 from sponsor for each trip.

A - No, that's only needed at the initial application at the consulate.

Q - I had extended my stay for 6 months came in as a B-1, B-2 visa holder can i be given a grace period after the expiry of my I-94? if so how long is it and who should i contact?

A - There's no grace period after an I-94 expires, but you do remain in status during the period when an extension application is pending as long as you filed the extension application before the I-94 expired.

Q - Is there an I-94 Entry & Departure form I can download? I have an employee that found out that their valuables were stolen and they need another one.

A - You need to download the I-102 at immigration.gov. That's the form you file to replace a lost I-94.

4. Border and Enforcement News

According to *Stuff* (a publication from New Zealand), as many as 10,000 Mexican children have risked their lives this year traveling alone to the northern border and trying to cross into the United States. According to Desarrollo Integral de la Familia (DIF), a Mexican philanthropic organization, there were 9,100 unaccompanied children picked up attempting to cross the border from January to November of this year, and the figure could top 10,000 for the year.

5. News From The Courts

Mirmehdi v. Ashcroft
United States Court of Appeals for the Ninth Circuit
No. 03-56271, No. 03-56272, No. 03-56273, No. 03-56274
2004 U.S. App. LEXIS 20924

Mirmehdi v. Ashcroft is a case concerning the four Mirmehdi brothers from Iran who all applied for asylum in California. Mohammad-Rez Mirmehdi, Mohsen Mirmehdi, Mostafa Mirmehdi and Mojtaba Mirmehdi all appeared before an immigration judge who denied all their applications for asylum as well as denied their ineligibility for withholding of removal. Upon this decision all four brothers appealed the decision regarding their withholding of removal to the Board of Immigration Appeals (BIA). Furthermore, only two of the brothers, Mohammad-Rez and Mohsen, also appealed to the BIA for the denial of their asylum application. On August 20, 2004 the BIA ruled to uphold the asylum application decision of the IJ, but to grant withholding of removal to all of the Mirmehdis.

At this point, all four brothers have gone further to appeal their denial of bond revocation, which was affirmed upon evidence of the brothers' terrorist activity involvement, to the United States Court of Appeals for the Ninth Circuit. Upon review the case the court found that because Mohammad-Rez and Mohsen went forth in appealing their applications for asylum, unlike their other two brothers, their appeals for denial of bond revocation were not moot, leaving Mostafa and Mojtaba unable to appeal that particular decision. The court also found that because agencies have a duty to make decisions that are consistent with their

previous findings or to state why when decisions are not consistent, they did not find the BIA decision satisfactory. The Court of Appeals stated that because the BIA made contradictory decision when deciding on the Mirmehdis' cases, the cases of Mohammad-Rez and Mohsen have been remanded for further review by the district since the BIA later found that the brothers had no connection to terrorist activities.

6. Government Processing Times

Processing times are available this week for the following service centers:

Vermont (12/06/04): <http://www.visalaw.com/vermont.html>

Missouri (12/06/04): <http://www.visalaw.com/missouri.html>

California (12/06/04): <http://www.visalaw.com/california.html>

7. News Bytes

President Bush, on December 3, signed legislation that extends and modifies the "Conrad 30" J waiver program for foreign-born physicians. Under the program, aliens who participate in medical residencies in the United States on exchange program (J) visas are exempted from the two-year foreign residence requirement if they agree to practice medicine for three years in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals. A detailed description of the bill is available on our web site at <http://www.visalaw.com/04nov4/2nov404.html>.

The United States Citizenship and Immigration Service (USCIS) made an incorrect announcement on November 23, 2004 concerning the address at which certain applications should be filed.

The USCIS incorrectly stated that beginning December 1, 2004 those applicants who usually file with the Nebraska Service Center (NSC) should begin sending applications to a lockbox in Chicago for all I-485, I-765 and I-131 applications.

The correction to this Federal Register Notice went on to say that this change of filing centers does not affect those applying for the above mentioned applications. Therefore, all these applications should continue to be sent to the Nebraska Service Center.

8. International Roundup

The *Japan Economic Newswire* reported on December 7 that after a summit among Asian leaders in Laos last month, leaders in the Philippines and Japan have decided make a free trade agreement very similar to one currently existing between the Philippines and South Korea.

The trade agreement was mainly focused on allowing Filipino nurses and caregivers access to work in Japan, given the shortage of employees in the medical profession Japan is experiencing and the increased population of elderly Japanese. However, a government agency under the Labor Department, The Technical Education and Skills Development Authority, is first developing a program whereby potential caregivers wishing to work in Japan will be educated in the Japanese language and culture.

The government program is very similar to another trade agreement, made with South Korea, through which the Philippines as already sent 3,000 workers to South Korea who are skilled in factory and computer technology, machine operations and medical caregiving. This similar program also initiated a language pre-employment training, hoping to make sure all Filipinos working in South Korea became properly adapted.

In the private sector, similar employment trade agreements have also emerged. One such private organization is The STI group which has also contracted with a Japanese medical agency in order to send Filipinos for employment. One top of their courses in information technology and nursing, STI has begun offering classes in Japanese.

However, in order to prevent a shortage of health care providers within its own country, the Philippines has set a limit on the number of employees that may enter this trade agreement and limit on the time they may send in the neighboring country.

On December 6, 2004 the Mid Day reported that the Mumbai Chhatrapati Shivaji International Airport has begun consulting architects about structural changes to the airports terminals due to a new design aimed at easing congestion at the immigration counters.

The plan looks to centralizing the immigration counter, which are currently located in two different terminals and adding eight new immigration counters to the centralized location.

Airport official stated that the current immigration counters' set up causes not only confusion but chaos, even with only two plane load moving through immigration. However, they claim that the planned changes should work to meet future increased numbers of passengers and allow immigration official to easily move from counter to counter.

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. State Department Visa Bulletin

IMMIGRANT NUMBERS FOR JANUARY 2005

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during January. 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 December 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: CHINA-mainland born, INDIA, MEXICO, 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.)

	All Chargeability Areas Except Those Listed	CHINA - mainland born	INDIA	MEXICO	PHILIPPINES
Family					
1 st	22DEC00	22DEC00	22DEC00	15OCT94	15OCT90
2A*	15AUG00	15AUG00	15AUG00	15OCT94	15AUG90
2B	01AUG00	01AUG00	01AUG95	15FEB92	01AUG95
3 rd	22DEC97	22DEC97	22DEC97	22JAN95	01JUN90
4 th	22NOV92	22NOV92	08APR92	22NOV92	22SEP82

*NOTE: For January, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15OCT97. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15OCT97 and earlier than 15AUG00. (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.)

	All Chargeability	CHINA - mainland	INDIA	MEXICO	PHILIPPINES
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	Areas Except Those Listed	born			
Employment-Based					
1 st	C	C	C	C	C
2 nd	C	C	C	C	C
3 rd	C	01JAN02	C	01JAN02	01JAN02
3 rd	C		C	C	C
Other Workers	C		C	C	C
4 th	C		C	C	C
Certain Religious Workers	C		C	C	C
5 th	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: (area code 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 (NACARA) 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 NACARA program. **This reduction has resulted in the DV-2005 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 January, immigrant numbers in the DV category are available to qualified DV-2005 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:

Region	All DV Chargeability Areas Except Those Regions Listed Separately		
AFRICA	AF	17,400	Except: Nigeria 14,600
ASIA	AS	5,100	Except Bangladesh 4,300
EUROPE	EU	14,900	
NORTH AMERICA (BAHAMAS)	NA	11	
OCEANIA	OC	460	

SOUTH AMERICA, AND THE CARIBBEAN	SA	875	
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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-2005 program ends as of September 30, 2005. DV visas may not be issued to DV-2005 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2005 principals are only entitled to derivative DV status until September 30, 2005. DV visa availability through the very end of FY-2005 cannot be taken for granted. Numbers could be exhausted prior to September 30. **Once all numbers provided by law for the DV-2005 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 FEBRUARY

For February, immigrant numbers in the DV category are available to qualified DV-2005 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:

Region	All DV Chargeability Areas Except Those Region Listed Separately		
Africa	AF	20,225	Except: Nigeria 17,600
ASIA	AS	5,700	Except: Bangladesh 4,700
EUROPE	EU	16,600	
NORTH AMERICA (BAHAMAS)	NA	13	
OCEANIA	OC	535	
SOUTH AMERICA, AND THE CARIBBEAN	SA	11,25	

D. OVERSUBSCRIPTION OF THE EMPLOYMENT-BASED THIRD PREFERENCE CATEGORY FOR CHINA-MAINLAND BORN, INDIA, AND THE PHILPPINES

In recent years, all Employment-based categories have been "Current" for all countries, primarily as a result of two factors:

1. The American Competitiveness in the Twenty-First Century Act (Title I of Pub. L. 106 - 313 enacted on October 17, 2000) contained several provisions intended to increase the availability of Employment-based numbers. Pub. L. 106-313 recaptured those Employment-based numbers that were available but not used in Fiscal Years 1999 and 2000, creating a "pool" of 130,107 numbers which could be allocated to applicants in the Employment First, Second, and Third preference categories once the annual Employment-based numerical limit has been reached. Approximately 101,000 of these "pool" numbers remain available for use during FY-2005. Pub. L. 106-313 also removed the per-country limit in any calendar quarter in which overall applicant demand for Employment-based visa numbers is less than the total of such numbers available.

2. Changes in CIS processing procedures during the past two years created a significant backlog of cases and a consequent reduction in demand for numbers. During the time that the Employment-based categories have remained "Current" many tens of thousands of applicants have become eligible to file for adjustment of status. Last summer, CIS notified Congress of its intent to eliminate its current backlogs by the end of FY-2006. As a result of the CIS backlog reduction effort, we are now experiencing very heavy visa demand as CIS has begun to process cases to conclusion. Section 201(a)(2) of the Immigration and Nationality Act states that not more than 27 percent of the Employment-based annual limit may be used in each of the first three quarters of a fiscal year. Based on the current rate of demand, the 27 percent level for the first quarter of FY-2005 will be exceeded by the end of December.

It has therefore become necessary to impose an Employment-based Third preference cut-off date for January in order to limit number use during the second quarter. Many of the cases have priority dates that are several years old, and the cut-off date represents the first priority date that cannot be accommodated for final processing. The cut-off date will apply only to the following chargeability areas: China-mainland born, India, and Philippines. Cut-off date movement during the remainder of FY-2005 depends on the extent of future visa demand. No specific predictions are possible at this time.

11. Commentary – What do the EB-3 Green Card Cutoff Dates Published Mean?

As we have warned previously, the EB-3 green card category for skilled and professional workers is going to retrogress in January. We now know how far back they will roll back. Beginning next month, nationals of the Philippines, China and India will not be able to receive immigrant visas unless they have a priority date that is earlier than January 1, 2002. Generally, the priority date is the date the I-140 application was filed for the applicant. Nationals of other countries are not affected - YET. We expect the priority dates to retrogress for all nationalities in a few months.

Why is this happening? Well, there is considerable pent up demand for EB-3 green cards due to the 245i surge in applications file in 2001. A lot of these cases recently have moved to the point of being able to process them. Also, the "banking" of extra slots from 1999 and 2000 provided for by Congress in AC21 is now not enough to meet the current demand.

So what to do? First, for applicants in the US, it is crucial that adjustment applications be filed before the end of the month. For applicants abroad, those who can be interviewed and processed this month will be safe. So definitely don't seek postponements of any interviews if possible.

There are still non-immigrant visa possibilities available to many and for H-1B visa holders, extensions should be possible until a current EB-3 priority date is available. Of course, for applicants like nurses who do not have a non-immigrant option readily available, this news is particularly bad and could lead to delays in processing for several years.

Otherwise, the best solution will be to get this problem fixed legislatively. That means getting Congress to pass a bill that will allow unused green card numbers in other categories to be used by EB-3 applicants. A law that passed four years ago allowed unused slots from 1999 and 2000 to be used by EB-3 applicants and that is one of the reasons why the EB-3 numbers have been current for the last several years. We need Congress to extend that law to allow unused numbers since 2000 to continue to be used.

12. DOL Addresses Issue of Shipping Unprocessed Cases to Backlog Processing Centers

On September 29, 2004, the Employment and Training Administration (ETA) informed the State Workforce Agency of their intentions to open additional Backlog Processing Centers in Philadelphia and Dallas.

All currently unopened and unprocessed permanent labor certification cases were to be sent to the centers in order to assist in clearing the huge backlog the agencies have been experiencing. The plan was set to use a first-in, first-out system so that the oldest cases that were still unprocessed would be processed first.

In the memorandum sent to the State Workforce Agency on December 3, 2004 by Chief of the Division of Foreign Labor Certification William Carlson, details to the shipping of these unprocessed cases were laid out. Because the agencies were working on the first-in, first-out system, shipping is scheduled in two shipments.

The first of these shipments is to consist of those backlogged cases whose dates register before 2003 and are unopened and un-processed. These cases must be sent to the appropriate new backlog centers before Dec. 31, 2004.

The Second shipment is to include all other cases that have not been opened or processed to this date and must be sent to the appropriate center by SWA before March 31 of 2005.

The memorandum also included technical information concerning which new backlog center, Philadelphia or Dallas, State Workforce Agencies in each state should send their cases to as well as detailed instructions on how to organize the backlogged cases, label the boxes, ship the boxes and notify Team Exceed, the agency's contractor, of shipment.

13. USCIS Reminds Eligible Hondurans and Nicaraguans to Re-register for TPS

U.S. Citizenship and Immigration Services last week issued a press release reminding those eligible Hondurans and Nicaraguans to re-register for the 18-month extension of Temporary Protected Status (TPS) by January 3, 2005. The TPS extension will extend benefits until July 5, 2006. Under this extension, those who have already been granted TPS are eligible to live and work in the United States for an additional 18-months and continue to maintain their status. There are approximately 81,875 nationals of Honduras and 4,309 nationals of Nicaragua (or aliens having no nationality who last habitually resided in Honduras and Nicaragua) who are eligible for re-registration.

To re-register for TPS under the extension, a TPS applicant must submit Form I-821 with revisions date 7/30/2004 or 11/05/2004 (Application for Temporary Protected Status) without the filing fee, Form I-765 (Application for Employment Authorization), and a \$70 biometrics services fee for each applicant age 14 and older. Unlike previous extension procedures, TPS re-registrants need not submit photographs with the TPS application because photographs will be taken when the applicant appears at an Application Support Center (ASC) for collection of biometrics. In addition, any applicant under age 14 who seeks an EAD must submit the \$70 biometrics fee. Both the Form I-765 and I-821 must be submitted for re-registration. USCIS has published a revised Form I-821, and will only accept Form I-821 with a revision date of 7/30/2004 or 11/05/2004. If the applicant is only seeking to re-register for TPS and not seeking an EAD, there is no filing fee for the Form I-765. However, all applicants seeking an EAD valid until July 5, 2005 must submit a \$175 filing fee with Form I-765. Applicants may request a fee waiver in accordance with the regulations. The biometric fees, however, cannot be waived. Failure to submit the correct forms and filing fees will result in the rejection of the re-registration application.

Application materials are to be submitted to the USCIS Lockbox in Chicago, Illinois, at the following address:

USCIS
PO Box 87583
Chicago, IL 60680-0583

Or for non-United States Postal Service deliveries:

USCIS
427 S. LaSalle-3rd Floor
Chicago, IL 60605.

The revised form I-821, Application for Temporary Protected Status and Form I-765 are available on the USCIS web site at www.uscis.gov.

14. Omnibus Appropriations Act for FY 2005 Yields New Fees for H-1B Visas

U.S. Citizenship and Immigration Services announced last week that President Bush has signed the Omnibus Appropriations Act for FY 2005, which contains provisions affecting the H-1B and L nonimmigrant visa categories. Both the H-1B and L programs allow U.S. employers to sponsor temporary foreign workers.

Before October 1, 2003, employers who used the H-1B program were required to pay an additional \$1,000 fee imposed by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In part, that \$1,000 fee paid for U.S. citizens, lawful permanent residents and other U.S. workers to attend job training and receive low-income scholarships or grants for mathematics, engineering or science enrichment courses administered by the National Science Foundation and the Department of Labor. The ACWIA fee requirements sunset on October 1, 2003.

The H-1B provisions of the Omnibus Appropriations Act reinstates the ACWIA fee and raises it to \$1,500. Petitioners who employ no more than 25 full-time equivalent employees, including any affiliate or subsidiary, may submit a reduced fee of \$750. Certain types of petitions, that were previously exempt from the \$1,000 fee, are still exempt from

the new \$1,500 and \$750 fee. The new \$1,500 and \$750 fee applies to any non-exempt petitions filed with USCIS after December 8, 2004.

In addition, the Act creates a new Fraud Prevention and Detection Fee of \$500, which must be paid by petitioners seeking a beneficiary's employer within those classifications. Other than petitions to amend or extend stay filed by an existing H-1B or L nonimmigrant classification, there are no exemptions from the \$500 fee. The new \$500 fee applies to petitions filed with USCIS on or after March 8, 2005.

Each of the fees is in addition to the base-processing fee of \$185 to file a Petition for a Nonimmigrant Worker (Form I-129) and any premium processing fees, if applicable.