

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:

For the last year, one of the most common questions we've received at our firm is "when are we getting PERM?" PERM is the new electronic labor certification filing system that was proposed by the US Department of Labor a few years ago. PERM promised decisions on cases in as little as 21 days, something that is immensely appealing given the multi-year

waits common in several states. The program does away with local processing for all but the wage determination part of the process and seeks to standardize how all labor certification cases are handled.

Sound great, right? But when the proposed PERM rules came out they contained much more than just the electronic filing system. They contained a smorgasbord of controversial new policies that the Department of Labor had been seeking for many years and which immigration practitioners have fought as being anti-business and impractical. Many, many comments were received criticizing these provisions and many believe that the negative reaction has been the source of much of the delay in getting the rules into final form.

Now we know that we're close to the publication of the final rules. The Department of Labor has been waiting for months for the final clearance of the new rules from the Office of Management and Budget. That has now happened and the rules will be published any day now in the Federal Register. Once that happens, a 60 day implementation clock will begin ticking and the new process will start right after that.

When a major law or regulation has been published over the last ten years, Visalaw.com has always rushed to produce a detailed summary for our readers. We will do so again this year and will likely publish a special issue explaining what is changing. So keep an eye out for this special newsletter issue.

Of course, with the retrogression of EB-3 numbers for nationals of the Philippines, China and India coming next month, taking advantage of the faster process will be an exercise of "hurry up and wait" for many. The retrogression to January 1, 2002 for people in this category is going to be extremely bad news, particularly in industries like nursing where non-immigrant visas are not available to get people into the US working while they wait on a number. Look for a major lobbying effort to begin in the new year to address this issue. We'll be providing news on this as it develops.

Every congressional and presidential election brings change even when incumbents get reelected. That is especially true this year. Despite the fact that the most recent Congress' chairs of the two committees that oversee immigration - the Judiciary Committee and the Immigration Subcommittee - remain in the Senate, neither will return to those posts in the new Congress that will be sworn in next month. Senator Arlen Specter will take over the Judiciary Committee. Specter, a moderate Republican, is seen as pro-immigration, though the outgoing chair, Senator Orrin Hatch, also had a similar reputation. Hatch was the sponsor of last session's failed DREAM Act. Senator Saxby Chambliss will leave his post as chair of the Immigration Subcommittee. But the replacement has not been named yet. It will be one of the following Senators:

Hatch
Grassley
Kyl
Dewine
Sessions
Graham
Cornyn
Brownback
Coburn

Some are betting on Senator Kyl from Arizona. Kyl is seen as a hardliner on immigration enforcement though a moderate on legal immigration measures. Senator Brownback rejoins the Judiciary Committee.

Another major legislative change that recently took place is the passage of a new H-1B law that increases slot availability for US-educated workers as well as imposing new fees for employers. This week, we're updating our ABCs of Immigration article on H-1B processing to include the new changes.

In firm news, Jack Richbourg, an attorney in our Memphis office had his recent circuit court asylum win written up in the Memphis Commercial Appeal newspaper this morning. You can see the article on our web site at www.visalaw.com/news/.

This is our last issue before the end of the year (except for a special PERM issue if the regulations come out before then). Many of the folks in our office who contribute to the newsletter will be taking traditional end of the year holidays and so we'll resume publication after the new year.

In the mean time, to all of our readers, have a safe and happy holiday season and best wishes for a wonderful 2005!

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: The H-1B Visa

For thousands of American employers, the H-1B visa program is the primary method for bringing in professional level foreign employees. The visa has been the subject of considerable media attention in recent years because Congress has set limits on the numbers of workers allowed in on H-1B visas.

What is an H-1B visa?

The H-1B is a nonimmigrant classification used by an alien who will be employed temporarily in a specialty occupation or as a fashion model of distinguished merit and ability.

What is a specialty occupation?

A specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are specialty occupations.

Is there a limit on the number of H-1B aliens?

Yes. Under current law, there is an annual limit of 65,000 aliens who may be issued a visa or otherwise provided H-1B status. Under the "L-1 Visa and H-1B Visa Reform Act of 2004", beginning March 8, 2005, up to 20,000 additional H-1B slots are available to graduates of US masters degree (or higher) programs. There are some types of jobs that are exempt from the H-1B cap and these are discussed below.

The number of H-1B visas for FY2004 was reached on the very first day of the fiscal year. Petitions for positions starting on or after October 1, 2005 may be submitted up to 180 days ahead of the requested start date. In other words, applications for the next quota of H-1B visas (excluding the new 20,000 slots for graduates of US educational programs) will be accepted beginning in April 2005.

Who is actually subject to the cap?

Not every H-1B applicant is subject to the cap. Visas will still be available for applicants filing for amendments, extensions, and transfers. The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Physicians taking jobs under State 30 or federal government agency waivers based on serving underserved communities are exempt from the H-1B cap.

What are the advantages to applying for an H-1B?

One of the things that makes this visa so desirable is that, unlike many other nonimmigrant visa categories, it is a "dual intent" visa. This means that a visa will not be denied simply because an individual has intentions to become a permanent resident. The assumption is that if for some reason the permanent residency petition is denied, the person would still have the intention to return home. Thus, assuming the applicant meets all of the statutory requirements for the H-1B visa, the main reason it would be denied is if the consular officer feels there is good reason to believe the applicant will not comply with the terms of the visa (such as having a history of failing to comply with the terms of a visa).

Another advantage to the H-1B category is that the employer does not need to demonstrate that there is a shortage of qualified US workers and, consequently, a labor certification process can be avoided. Aside from documenting that the position offered is in a specialty occupation and that the employee has the appropriate credentials for the job, the employer need only verify that the H-1B worker is being paid the prevailing wage for the work being performed and that employment of a foreign worker is not harming conditions for US workers.

How does one apply?

In an H-1B visa application, the US employer is called the petitioner and the foreign worker is called the beneficiary. After an offer of employment is made, the petition process begins. The first step is for the petitioner to ensure that the worker will be paid at least 95% of the prevailing wage paid to similarly employed workers in the geographic area where the beneficiary will be employed. The employer must also be sure that it is not paying less than the actual wage paid to its other employees with similar qualifications. The prevailing wage can be determined through a private wage survey or through a state Employment Security Agency. The benefit of relying on a state wage determination is that it cannot be challenged later by the US Department of Labor. On the other hand, state determinations are frequently not a close match to the job performed and are slow in being issued.

Once the wage information has been obtained, a Form ETA 9035 Labor Condition Application (LCA) must be submitted to the US Department of Labor. On this form, the employer must submit the wage to be paid, the prevailing wage, and must make certain attestations. The form is submitted by the web or by fax and the Department of Labor only reviews the form to make sure it is properly completed. It does not look to see whether the information is accurate and instead investigates a small percentage of cases where violations of the regulations appear to be occurring.

(For more information, see the Department of Labor's Foreign Labor Certification web page at <http://workforcesecurity.doleta.gov/foreign/>.)

The certified LCA petition is submitted to USCIS as part of the H-1B petition package. Other information that should be included in USCIS petition includes documentation of the beneficiary's qualifications, the petitioner's type of business, and the type of work the beneficiary will be performing. Each of these will be further detailed below.

Additionally, the employer must send an accompanying fee of \$130. (Prior to FY2004, employers were required to submit an additional \$1,000 fee to sponsor the H-1B worker, unless specifically exempt. This requirement sunset on October 1, 2003, but there is a possibility that the fee may be reinstated in the future.) Based on USCIS petition approval, the alien may apply for the H-1B visa, admission, or a change of nonimmigrant status.

For more information on the application process, see our H-1B flow chart at <http://www.visalaw.com/O2dec1/H1B.pdf>.

What is the purpose of the LCA?

The LCA serves two related purposes: (1) ensuring that US wages are not depressed by the hiring of foreign labor and (2) that foreign workers are not exploited. On this document, the employer makes specific representations regarding the conditions under which the foreign worker was hired and will be employed. These attestations are as follows:

- The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position
- The employment of H-1B workers will not adversely effect the working conditions of US workers
- When the LCA was filed, there was no strike, lockout or other work stoppage because of a labor dispute
- The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted in a conspicuous place notice that an LCA was filed.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, including its source, whether the state or a private survey is used, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

In addition, the employer must keep other information that need not be made available to the public. This includes payroll data for all employees in the same occupations as the H-1B worker, a calculation of the actual wage paid the H-1B worker, the raw data behind the prevailing wage determination, documentation of any fringe benefits provided workers, and evidence that the H-1B worker has been given a copy of the LCA. Once approved, an LCA is valid for three years.

(Beginning in 1998, some new requirements were added to the LCA process. However, these requirements apply only to "H-1B dependent" employers, a concept also created in 1998. These requirements sunset on October 1, 2003, were restored in late 2004. Whether an employer is H-1B dependent depends on the following guidelines:

- If the employer has over 50 employees, the employer is H-1B dependent if at least 15% of the workforce is comprised of H-1B visa holders
- If the employer has 26-50 employees, the employer is H-1B dependent if it employs more than 12 H-1B workers
- If the employer has 25 or fewer employees, the employer is H-1B dependent if it employs more than seven H-1B workers

While in most cases the new requirements apply only to H-1B dependent employers, they also apply to employers who have been found to have committed a willful failure or misrepresentation with regard to any attestation made on the LCA. If the employer is H-1B dependent, it must comply with these requirements:

- The employer must attest (swear under oath) that it has not and will not "displace" a US worker during the period from 90 days before the H-1B petition is filed until 90 days after it has been filed.
- The employer must attest that it has taken "good faith steps" to recruit US workers for the job, and that they have offered it to any US worker who applied that was at least as qualified as the H-1B nonimmigrant.)

What is the next action after filing the LCA?

Obtaining an LCA is only the first step in the H-1B process. The application for an H-1B visa must present evidence that will convince USCIS of three basic truths:

- The employer has a legitimate need for a "specialty occupation worker"
- The position offered is in a "specialty occupation"
- The prospective employee is qualified for the position.

1. The employer's need

This is often the easiest aspect of an H-1B petition to demonstrate. As a general rule large and well-known businesses do not have much difficulty in showing they have a need for an H-1B worker. Problems can be encountered if the employer is small, or if the business was recently started. In such cases USCIS has requested evidence relating to the stability of the

business, such as tax returns and payroll records. Court decisions have, in the past, said USCIS is not supposed to examine the financial background of a company. However, USCIS routinely asks for such documentation even for many large employers.

2. The nature of the position

Demonstrating that a position is in a specialty occupation is quite easy with some jobs, such as lawyers, accountants, engineers and professors. With many positions, however, it is not so simple. In these situations, the application must carefully define and describe the job. Two volumes published by the Department of Labor are helpful in this area. They are the Dictionary of Occupational Titles and the Occupational Outlook Handbook. The Dictionary of Occupational Titles contains a list of job titles and lists job duties that are associated with each. The Occupational Outlook Handbook lists general educational requirements for entry into certain areas of employment, but often it deals with such broad fields that it is of limited usefulness. While the books are helpful in documenting a case, neither is binding on USCIS and the use of the publication should always be used with caution. Also, the O*Net database provided by the Department of Labor provides helpful information in documenting a position is a specialty occupation.

In cases where the specialty nature of the position is not evident, many types of evidence may be used. Trade and association publications may be presented. Petitioners may also procure affidavits from authorities in the field. Such an affidavit would be especially useful if written by someone who has personally observed the workplace and the position's role in it. One of the best types of evidence is the employer's own hiring practice in hiring for the position. Evidence of the minimum qualifications required for positions below that for which an H-1B worker is sought can also be helpful, especially if such people are required to have a university degree.

If the occupation is little known or is relatively new, extensive documentation will be required to convince USCIS of the need for an H-1B worker. In these cases appropriate evidence would include affidavits from other employers in the field and professional organizations in the field.

3. The alien's qualifications

To qualify as a specialty occupation, the position must require at least a bachelor's degree or its equivalent. Therefore, one of the most important parts of an H-1B case is documenting the alien's education and/or experience. A diploma may be submitted if it indicates the alien's field of study and that field is relevant to the position sought. If this is not the case, transcripts should also be submitted. If the relevance of the subjects studied is not apparent, course descriptions from the school catalog may be included. If the alien did not attend school in the US, their degree must be evaluated by a credentials evaluation service to ensure it is at least equal to a US bachelor's degree. Note that if the alien attended college abroad, and then obtained an advanced degree in the US, no evaluation of their undergraduate degree is required because it is presumed that the US graduate institution would not have admitted the student without at least possessing the equivalent of a bachelor's degree.

While possession of a degree is the most common way of establishing a person's ability to work in a specialty occupation, a degree is not required to obtain an H-1B visa. The applicant can demonstrate through work experience or a combination of education and experience that they have the equivalent of a bachelor's degree. If work experience will be used, USCIS requires affidavits from former employers outlining the alien's responsibilities

and skills learned while there. Under USCIS rules, three years of work experience is equal to one year in college.

If there are any additional requirements that the alien must meet to take the position offered, documentation that these requirements are met must be submitted. An example would be when a license is required by the state in which the alien will be working.

How long can an alien be in H-1B status?

Under current law, an alien can be in H-1B status for a maximum period of six years at a time. After this time, an alien must remain outside the United States for one year before another H-1B petition can be approved. Certain aliens working on Defense Department projects may remain in H-1B status for 10 years. Additionally, certain aliens may extend their status beyond the 6-year period in one year increments if:

- 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
- 365 days or more have passed since the filing of an EB immigrant petition.

For whom can an H-1B non-immigrant work?

H-1B aliens may only work for the petitioning US employer and only in the H-1B activities described in the petition. The petitioning US employer may place the H-1B worker on the worksite of another employer if all applicable rules (such as the Department of Labor rules) are followed. H-1B aliens may work for more than one US employer, but must have a Form I-129 petition approved by each employer.

H-1B employees may apply for a change of status from one employer to another. The application process is fairly similar to applying for a brand new H-1B except that the process can be completed in the US without a trip abroad to a US consulate.

How does an H-1B non-immigrant change or add an employer?

One of the easiest ways for an H-1B visa holder to run into trouble with his or her visa status is to fail to comply with immigration regulations when switching employers or changing the terms of his or her employment.

The most difficult problems are often created when someone changes jobs without taking care of immigration issues. In fields like computer programming or physical therapy, it is not unusual for an individual to move frequently from employer to employer. But for an H-1B visa holder, each change can present challenges.

The first basic rule to note is that an H-1B is employer specific. In other words, it is only valid for the petitioning employer and only entitles the recipient to work for the employer approved by USCIS. That means that each time a worker moves to a new employer, a new H-1B approval is required. It is possible to apply for a change of status to switch employers from the US without having to leave and get a new visa stamp, however. But it is important to remember that the process involved will be pretty similar to getting an H-1B visa from scratch.

At one time, it was thought that changing H-1B employers meant that a new visa stamp would be needed the next time someone leaves and reenters after a change of status in the

US. USCIS and the State Department now make it clear that as long as the visa remains unexpired the applicant remains in H-1B classification. Note that someone who changed from another visa to H-1B status in the US (such as from F-1 to H-1B) and never has had a visa stamp will still need to get an H-1B visa at a consulate.

What is 'H-1B Portability'?

In October 2000, former President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC21). One of the most sought after provisions in AC21 is the "portability" provision, which eases the process of changing jobs. Under it, H-1B workers can begin working for a new employer as soon as the new employer files an H-1B petition for the worker. In the past, the worker had to wait for the petition to be approved before he could begin working for the new employer. Because this provision applies to petitions for new employment filed before or after the enactment of AC21, workers for whom a new petition was filed can begin work for the new employer immediately.

The primary limitation on this portability provision is that the new employer must have filed a "non-frivolous" petition, which is one with some basis in law and fact. To take advantage of the portability provision, the worker must be in the US pursuant to a lawful admission, and must not have engaged in unauthorized employment since that admission.

The portability provision has created concern among employers about how they will comply with I-9 requirements, which obligate employers to ensure that all employees are legally authorized to work in the US. While the worker who begins working for a new employer after the filing of a new petition is work authorized, the I-9 form contains no provision for such a situation. Employers in this situation should follow current documentation procedures, as well as keeping a copy of the worker's I-94 and a copy of the receipt notice for the new H-1B petition.

How does the H-1B cap affect an immigrant who requests a change in employers?

USCIS has stated that the limit on the number of H-1B visas does not apply in this situation. However, if one leaves an employer and waits more than 30 days to apply for a new H-1B visa, the cap would apply again. Also, if one works for a cap-exempt employer and then switches to an employer that is not exempt from the cap, the cap will apply.

In the case of a concurrent filing of an H-1B application where a person is working for an exempt employer and then seeks additional employment with a non-exempt employer, the cap will not apply to the second position.

What if you change employers and then decide to go back to the first employer?

The news here is good. The H-1B petition continues to remain valid until it expires or until the employer has it revoked. USCIS takes the position that if neither of the above has occurred, one can resume work for the first employer without filing a new petition or an amendment.

What if several employers file H-1Bs for the same worker?

Let's say that two employers successfully file an H-1B and the worker enters to work for Company 1. After coming here, the worker decides to go work for Company 2 instead. Even if the worker never worked before for Company 2, the worker can switch to Company 2 without the need for a new petition. As noted above, a revocation of the petition by

Company 2 or the expiration of the visa approval period for Company 2 would mean a new petition is required.

What about the case where an employee accepts a job with a second employer without giving up the first position?

There is no legal reason why this cannot take place. An H-1B worker can work for several employers simultaneously if desired. However, each employer must have a separate approval for the worker to work there. Also, USCIS does not recognize "co-employer" arrangements, so if this is the case either one employer must designate itself as the petitioner, or each employer must file a separate petition.

There are many times when a change in the nature of one's employment will trigger the need to file either an amendment to an H-1B petition or a completely new petition. USCIS position is that if the change in employment is "material" then an amendment must be filed. So, for example, if there is a significant change in job duties, then a new petition will probably be necessary. Also, being transferred to a different legal entity within the same corporation would trigger an amendment. Also, in certain cases, changing job locations could require an amendment.

Mere changes in job titles without a serious change in job duties will probably not require an amendment. The same holds true for raises in salary unless the change is so great that USCIS presumes that the position is really a new one.

Note that changes in the corporate structure of a company could mean that a new H-1B petition must be filed. The general rule is that if a new legal entity is created, a new petition is required. This would be the case, for example, if a company is sold and the new company dissolves the old company without assuming its liabilities. A merger that results in the creation of a new company might also mean that new petitions should be filed. If the new company is what in corporate law is called a "successor in interest" then a new petition is normally not necessary. Changes in a company's name will not trigger the need for an amendment or to refile, but an amendment is useful in order to avoid confusion when the worker reenters the country later on.

Must an H-1B alien be working at all times?

As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full or part-time employment and remain in status. An H-1B alien may also be on vacation, sick/maternity/paternity leave, on strike, or otherwise inactive without affecting his or her status.

Can an H-1B alien travel outside the US?

Yes. An immigrant with H-1B status may reenter the US during the validity period of the visa and approved petition.

What are the filing fees associated with an H-1B visa?

There are four government filing fees that come up in H-1B cases. First, the base filing fee for an H-1B case is applicable in every case. As of publication of this article, that fee is \$185.

In late 2004, Congress passed legislation restoring a worker retraining fee. The previously applicable worker retraining fee was reinstated and increased from \$1000 to \$1500. Employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries pay \$750. Previously exempt employers will continue to be exempt from the fee.

The following categories of employers and employees are exempt from the H-1B retraining fee:

- The employer is an *institution of higher education* as defined in the Higher Education Act of 1965; or
- The employer is a *nonprofit organization or entity related to, or affiliated with an institution of higher education.*; or
- The employer is a *nonprofit research organization or governmental research organization*, that is primarily engaged in basic research and/or applied research; or
- This petition is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the \$1,000 filing fee was paid on the initial petition or the first extension of stay; This petition is an amended petition that does not contain any requests for extension of stay filed by the employer; or
- This petition is to correct an Immigration and Naturalization Service error; or
- The employer is a primary or secondary education institute; or
- The employer is a nonprofit entity which engages in an established curriculum-related clinical training or students register at the institution.

Applicants seeking faster processing can pay a \$1000 premium processing fee to be guaranteed an answer within 15 days.

Finally, on March 8, 2005, a new \$500 fraud prevention and detection fee will come into force.

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 - Hello...I am filing a I-751 form Petition to remove conditions. My 2 year card expires on March 26th 2005, so that means it must be sent in on Dec 26 2004.

I called INS and they sent me the form. I have to file through Texas. They sent me (from what I can tell an expired form (Rev. 02/18/04) Y. The stated fee is \$145. I got looking at their internet downloadable form and it is Rev. 04/30/04. with a \$200 fee. What form do I

submit, the one they sent me or the newer form off the internet or both. Also can I mail this package out on Dec 23 2004. I'm going on Holidays.

A - It can be sent in no EARLIER than 90 days ahead of time so any time after December 26th is fine. It does not have to go in exactly on that date. You can download the latest form on the USCIS web site at www.immigration.gov. The site also lists the current fee. Use the form off the Internet. You're fine mailing earlier as long as it does not get there earlier than 90 days.

Q - I am currently under H1-B status, and have received a visa stamp at the embassy in my home country. I am ready to leave to another company for a similar position. The new company will file my H1-B transfer. My question is: Once the transfer of my visa is complete and I travel overseas, do I have to get a new stamp in my passport with my new company's name on it? My stamp will not expire for two more years.

A - No, you can use the same visa stamp to reenter as long as you have documentation of your approval for the new position and proof of your employment. Check with your immigration lawyer before you leave to make sure you take the correct paperwork.

Q - One of my U.S. Marines, Not a U.S. Citizen, born in Mexico, is deploying to Iraq with our protective services detail in February. My Marine has lived in the U.S. for 22 years. He is not able to get a required Official U.S. Government Passport or security clearance until he gets his citizenship. Is there an express citizenship process for urgent military war time needs?

A - There is, in fact, a new Executive Order signed by President Bush calls for expediting naturalizations for people like the Marine you mention. You can get information at <http://uscis.gov/graphics/services/natz/MilitaryBrochurev7.pdf>. There is information there on the streamlined process for active duty military personnel.

Q - My H1B status will expire in two weeks. My company wants to request a renewal, and we know that the renewal process will take 120-180 days before we can receive a final answer. My question is: Can I keep working and earning a salary during those 120 days while the INS studies my case? Or should I wait until the case is over and I get my new status?

A - You are permitted to work for up to 240 days while you wait on the answer on an H-1B extension.

Q - I will be a US Citizen next year, I am planning on marrying a lady who entered the US legally, however, she overstayed her visa after the extension and has been living with kids for the past 5 years. Will I have any problems doing so?

A - If you are a US citizen and your fiancé entered legally, then she should be eligible to adjust to a green card under Section 245(a) of the Immigration and Nationality Act. I'm assuming, of course, the marriage is genuine and she's not otherwise inadmissible (crimes, health, etc.).

4. Border and Enforcement News

Homeland Security Secretary Tom Ridge said on a visit with *The San Diego Union-Tribune* editorial board that he sees a need for a third border crossing in the San Diego region to accommodate record amounts of traffic and commerce at the San Ysidro and Otay Mesa ports of entry. Ridge said he is concerned that terrorists may try to join forces with existing drug cartels or smuggling operations to sneak into the United States from Mexico, although authorities have no specific intelligence indicating that such a connection has been attempted. The San Ysidro and Otay Mesa ports of entry have registered record numbers of crossers.

Central American nations are allowing free movement of people and goods between nations. Countries that participated in talks last week on this topic were Mexico, Belize, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama and the Dominican Republic. The goal of the talks is to remove customs and other border restrictions, allowing people and goods to move quickly and easily between nations. Guatemala and El Salvador were the first countries to implement the plan, pulling out customs and border control buildings on both sides of the border and leaving one common checkpoint that reviews the passports of those crossing. Costa Rica, Belize and Mexico have declined to participate, in part because all three countries are already struggling with an influx of illegal Central American migrants who come to either look for work or, in the case of Mexico, pass through to the United States.

5. News From The Courts

Gjyzi v. Ashcroft
United States Court of Appeals for the Sixth Circuit
Case Number 03-3054
2004 U.S. App. LEXIS 21275

Gjyzi v. Ashcroft concerns Vikto Gjyzi, a native of Albania, who fled Albania in 2000 and eventually filed for asylum under the Convention Against Torture. Gjyzi based his appeal on

the claim that he was persecuted for his political beliefs and activities. Gjyzi was an active member of the Democratic Party in Albania and claimed that his activism caused him to be persecuted by the Albanian Socialist Party that was supported by the state police.

Gjyzi claimed that over a series of years from 1986 to 2000, he was harassed and harmed by the supporters and protectors of the Socialist Party. In 1986, his father was killed for his activities with the Democratic Party. Over the years, Gjyzi served as a member of the electoral commission, chairman of the electoral commission, observed many democratic elections and spoke before large crowds in behalf of the party. Consequently he was harassed, beaten and threatened on many accounts and told to abandon his support for democracy. In 1997, he was stopped by police for writing a report investigating the Socialist Party and beaten to the point of hospitalization for three days. He was later threatened with death or imprisoned if his activities did not cease. Finally, when the windows of his home were shot out and letter arrived saying this was his last warning he fled to the United States.

Upon appearing before the IJ, it was ruled that Gjyzi's application for asylum and withholding of removal were to be denied on the grounds that Gjyzi was not credible due to a discrepancy on the date he arrived in the United States (December 5 2000 versus November 5 2000). Because Gjyzi was not credible, his withholding from removal petition was also denied and the IJ called his application for asylum "untimely" even though it was filed within the year time-limit after entering the US.

When Gjyzi appealed to the BIA, the IJ's decision to deem Gjyzi lacking credibility was removed. However, the BIA still upheld the IJ's decision to deny his asylum claim and withholding of removal petition even though they were on the grounds of his lack of credibility.

The United States Court of Appeals for the Sixth Circuit did not able agree with the logic of the BIA in removing Gjyzi's credibility status, but still upheld the IJ decision, vacated the order of the BIA and remanded the case back to the BIA.

6. Government Processing Times

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

Nebraska (12/15/2004): <http://www.visalaw.com/nebraska.html>

California (12/17/2004): <http://www.visalaw.com/california.html>

Texas (12/17/2004): <http://www.visalaw.com/texas.html>

Missouri (12/17/2004): <http://www.visalaw.com/missouri.html>

Vermont (12/21/2004): <http://www.visalaw.com/vermont.html>

7. News Bytes

US-VISIT will begin testing biometric entry procedures at the secondary screening areas of three land border ports of entry on November 15. Following the tests, US-VISIT will begin deploying entry procedures at the secondary screening areas of the remaining 50 busiest land ports. Deployment began December 6, 2004 and will be completed by December 31, 2004. At secondary inspection areas of US land ports of entry, the US-VISIT procedures will

involve the collection of biometrics - two index finger scans and a digital photograph - for visitors who are required to obtain an arrival/departure Form I-94 and who carry a foreign passport or visa.

On December 10, 2004, President Bush signed legislation to amend and extend the Irish Peace Process Cultural and Training Program Act of 1998. The program allows young adults from disadvantaged areas of Northern Ireland and designated border counties to enter the US to develop job skills and conflict resolution abilities.

8. International Roundup

Last week, Slovakian police broke up a group of 15 people-traffickers for the seventeenth such instance this year. According to the head of the transport police, the traffickers snuck immigrants from Austria into the country. They charged between 200 and 600 dollars a head to smuggle at least 115 immigrants.

Iceland has approved a residency permit for Bobby Fischer, but the former chess champion faces hurdles in traveling there because he remains in Japanese custody and lacks a valid passport. Fischer is wanted in the United States on charges of violating international sanctions against Yugoslavia, and has been detained since July 13 in Tokyo where he has been fighting a deportation order to the United States. It was not immediately clear if he would be able to travel to Iceland.

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. FY 2005 H-2B Processing Begins

U.S. Citizenship and Immigration Services (USCIS) announced last week that it has received H-2B petitions for 61,747 beneficiaries counting against the statutory visa cap for fiscal year 2005 (October 1, 2004 through September 30, 2005). The fiscal year 2005 statutory visa cap is 66,000.

Based on past experience, USCIS needs to approve approximately 100,000 beneficiaries to fully utilize the 66,000 H-2B visa cap during a fiscal year. As the 100,000 beneficiaries target is approached, USCIS will use more exacting counts to determine if it needs stop accepting H-2B petitions during fiscal year 2005.

On March 9, 2004, USCIS stopped accepting H-2B petitions that counted against the fiscal year 2004 statutory cap. USCIS continued to process petitions for current H-2B workers that did not count against the cap throughout fiscal year 2004. Those petitions were filed to:

- Extend the stay of a current H-2B worker in the United States.
- Change the terms of employment for current H-2B workers.
- Allow current H-2B workers to change or add employers.

USCIS anticipates imposing a similar cut-off with similar exceptions during fiscal year 2005.

H-2B visas allow U.S. employers in industries with peak load, seasonal or intermittent needs to augment the existing labor force with temporary workers. Typically, H-2B workers fill labor needs in occupational areas such as education, construction, health care landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.

11. EOIR Notifies Aliens Eligible for Full Asylum Benefits

The Executive Office for Immigration Review (EOIR) last week announced that notices have been sent to those individuals in the United States with conditional grants of asylum based on resistance to a coercive population control program (CPC) who now are fully eligible for all asylum benefits. The spouses and children of these individuals also are eligible for all asylum benefits if they were properly included in the application for asylum (Form I-589) as dependents and if they reside in the United States.

The law specifically limits the number of individuals who can be granted asylum on grounds related to CPC to 1,000 per fiscal year. Asylum is granted to such individuals on a conditional basis by Immigration Judges and by the Board of Immigration Appeals in EOIR, or by Asylum Officers in the U.S. Citizenship and Immigration Services of the Department of Homeland Security. Because the number of individuals who annually establish eligibility for asylum based on CPC has been greater than 1,000, these individuals are placed on a waiting list and remain in conditional grant status until one of the 1,000 final approval authorization numbers becomes available. More than 9,000 asylum applicants currently are on the waiting list. Consequently, for those who were granted conditional asylum during FY 2004, the waiting period for full asylum benefits is approximately 9 years.

Persons who were granted conditional asylum on or before September 15, 2000, but who have not received a notice regarding final asylum approval, should check on the status of their final asylum approval, if they have not already done so, by sending a letter to the appropriate address specified below. The letter should include

- Full name of the person who filed the asylum application and has been granted conditional asylum,
- His or her date of birth,
- His or her alien number,
- His or her current address, and
- A copy of the order for letter granting conditional asylum.

If an Immigration Judge issued the conditional grant of asylum, status inquiries must be sent to:

Office of the Chief Immigration Judge
Attn: CPC Status Inquiry
5107 Leesburg Pike, Suite 2500
Falls Church, VA 22041

If the Board of Immigration Appeals issued the conditional grant of asylum, status inquiries must be sent to:

Board of Immigration Appeals
Clerk's Office
Attn: CPC Status Inquiry
Post Office Box 8530
Falls Church, VA 22041

If a USCIS Asylum Officer issued the conditional grant of asylum, status inquiries must be sent to the USCIS Asylum Office that has jurisdiction over the conditional grantee's residence. The USCIS Web site at <http://uscis.gov/graphics/fieldoffices/alphaa.htm> provides the jurisdiction and addresses of the eight USCIS Asylum Offices.

Persons who remain in conditional asylum status must comply with any requests to appear for fingerprinting and biometrics or other background clearance procedures. They also must provide any changes of address promptly in the following manner:

If an Immigration Judge issued the conditional grant of asylum, individuals must submit to the Immigration Court that last had jurisdiction over their case a completed Form EOIR-33/IJ, "Change of Address Form," within 5 days of any change of address. Addresses for the Immigration Courts can be found on the EOIR web site at <http://www.usdoj.gov/eoir/sibpages/lcadr.htm>. They also must submit a completed Form AR-11, "Alien's Change of Address Card," within 10 days of any change of address to the Department of Homeland Security at the address indicated in the form instructions.

If the Board of Immigration Appeals issued the conditional grant of asylum, individuals must submit a completed Form EOIR-33/BIA, "Change of Address Form," within five days of any change of address to the above mentioned Board of Immigration Appeals Clerk's Office. They also must submit a completed Form AR-11, "Alien's Change of Address Card," within 10 days of any change of address to the Department of Homeland Security at the address indicated in the form instructions.

If a USCIS Asylum officer issued the conditional grant of asylum, individuals must submit to the Department of Homeland Security at the address indicated in the form instructions a completed Form AR-11, to the USCIS Asylum Office that has jurisdiction over their residence.

Additional information about CPC ad asylum is available on the USICS Web site at <http://uscis.gov/graphics/services/asylum/cpc.htm>.

12. US Arrival Added to US-Visit

"US Arrival" is a new component to the US-VISIT system that was added on December 9, 2004, at the border Ports of Entry. Under US Arrival, nonimmigrants will not be filling out white paper I-94s at border Ports of Entry anymore. CBP officers will instead fill in the information for the I-94s and print them from US Arrival. Individuals with the new I-94s who leave the US will be subject to US-VISIT every 6 or 8 months. The I-94 card remains valid for the duration of status for the NIV category while the person remains in the United States. However, the following two dates will appear on the bottom:

- A date showing the last time the person entered through US-VISIT, and
- A date after which the person will have to go through US-VISIT again.

Regarding the second date, if the person enters the United States before that date, s/he does not have to be re-registered in US-VISIT. However, if s/he enters 6-8 months later after that date, s/he does need to go through US-VISIT again to re-verify eligibility. This includes individuals in status valid for 3 years, such as L-1A and H-1B. New I-94s are not issued for people entering under the Visa Waiver Program since these people must fill out the green I-94W with an additional ten questions on the back.