

Siskind's Immigration Bulletin
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1. Openers

Dear Readers:

As many of you know, the H-1B cap is set to be hit any day now. This news will be greeted with a collective groan by employers around the country and with glee by the anti-immigrant groups out there who have been trying to bind the H-1B to the populist arguments condemning outsourcing of jobs by American companies. Our position has always been clear. H-1B visa holders SAVE jobs for American workers, not the opposite. When employers do not have ready access to needed workers – either through a lack of qualified American workers or lack of access to needed foreign workers - they don't just sit back and let their global competitors take advantage of the situation. They simply move their operations to the places where they can find the people they need. And when they move their operations, Americans lose jobs.

Our long term job retention policy in this country needs to combine two notions – developing a domestic work force that is better trained to compete in the world and making up the gaps by recruiting the world's best workers for the high end jobs for which there are not enough available Americans and hardworking willing workers for the low end jobs that Americans don't want.

H-1B visas are part of the answer on the immigration side. So is a guest worker program like the one President Bush has proposed. The other side is tougher. Improving our education system is usually the subject of political rhetoric, but agreeing on the best methods to achieve results – much less ACTUALLY achieving results – is a challenge, which is difficult to meet. I don't pretend to be an expert on education policy in this country. I just simply remind folks that H-1B workers are brought to this country not to replace American workers, but to work in jobs where there are not enough qualified Americans. Get more qualified Americans and H-1B usage declines. That has now been empirically demonstrated. When job losses piled up in this country starting two years ago, the number of H-1B applications plummeted dramatically. Count on H-1B demand to go up as the economy recovers. This is perfectly natural.

What is not natural is Congress' efforts to second-guess employers on how many H-1B visas are needed. We're now locked into an arbitrary number that was selected out of thin air during bill drafting 15 years ago. What is not natural is how so-called conservative Republicans who are normally horrified when Congress seeks to impose more regulations on business have no qualms dictating to employers who they can and cannot hire to perform a specific job.

Perhaps there is room for compromise that will satisfy both sides of the debate. I throw out an idea for your consideration:

The H-1B numbers should be meted out according to the following principles:

1. When the overall unemployment rate falls below a certain number – let's say around 5% for the sake of argument – there should be no cap on H-1B visas.
2. When the number goes higher, there should be another priority system that kicks in:
 - a. A set number of H-1B visas should be allowed under a general cap – let's say we stick to 65,000, but that number might be higher. We need

this flexibility just because there are many jobs that are hard to fill even in tough economic times.

- b. The US Department of Labor should annually list occupations where there are extraordinary shortages (e.g. today we would be talking about teachers, nurses, physicians, and perhaps other occupations). Any occupations on the list would be exempt from the H-1B cap.
- c. Certain institutions that we want to encourage to hire the best qualified people and not just those with minimum qualifications – universities, research institutions, etc. – should be exempt from the cap as they are today.
- d. For the rest, employers should be able to have a fast track system for documenting that they have tested the labor market and should be able to hire H-1B workers over the cap (something along the lines of the web-based recruiting system President Bush announced in his recent immigration plan).

Of course, the existing prevailing wage and posting requirements would remain in place in order to assure Americans that American workers are not being bypassed in order to hire cheaper foreign workers.

A compromise like the one above represents a middle ground. H-1B numbers will remain available and during a booming economy, employers would have the flexibility to hire as needed. During a down economy, American workers can be assured that H-1Bs will be targeted carefully based on where there are demonstrated needs.

The other reason we need a proposal like this is because it takes away the need to go back to Congress to raise or lower the cap every time the economy changes. Congress has a consistent track record here for acting too slowly. In the past, the cap was raised at the end of an economic boom and the extra numbers became available when the demand was no longer there. This time around, the cap is dropping by two thirds just as we are moving into an economic recovery period. Count on Congress to move to slowly to raise the cap the next time around. The better solution would be to have a long term, flexible solution that does not depend on Congress to stay on top of things.

As the H-1B visa is on people's minds, we've decided to update and re-run our ABCs of Immigration article on H-1B visas. We've also re-drafted it in the question and answer format that many of you have said you prefer.

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

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 for FY2004. (The numerical limitation was temporarily raised to 195,000 in FY2001, FY2002 and FY2003.) 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 is expected to be reached by the time this article is published or within days of publication. Petitions for positions starting on or after October 1, 2004 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 will be accepted beginning in April 2004.

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 waivers may be subject to the cap, but the language in the statute is not clear and further interpretation is probably needed.

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/02dec1/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 also sunset on October 1, 2003, but could very well return. So the following is provided in case that happens. 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.

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.

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 - Where can I file a complaint about an immigration lawyer?

A - You would file it with the board of professional responsibility in the state where the lawyer practices. Go to www.legalethics.com for contact information. I remind readers that you can avoid a lot of problems by spending some time choosing the right immigration lawyer. The article on our web site at www.visalaw.com/hal.html may help you become a more informed consumer.

Q - I was approved for permanent residency and had my passport stamped for proof of permanent residency last year. Due to the fact that the stamp is expiring on March 2 and I have not received the green card on the mail, I decided to go to the local BCIS office to have my passport stamped for an extension and inquire why I have not received my card for almost a year. I was told that the local office has a new policy that it cannot confirm my legal status and I have to wait for my green card. The reason I have not received the card they said was the fact the fingerprints I submitted have not cleared. They also told me in order to travel outside the country, I have to file for advance parole travel document. I have no criminal record and the judge noted this when I was granted permanent residency.

My question to you is: why has it taken too long for them to clear the criminal background? This problem it seems is not limited to me but also some few people I have contacted. How am I supposed to support my family when I cannot prove my legal status? Why do I have to file for advance parole in order to travel?

A - This is definitely not right. If they had previously given you the I-551 stamp, they cannot refuse now without going through the proper procedures to revoke your

residence. I would contact a local immigration lawyer and have them contact your CIS office and straighten out the problem.

Q - My problem is few years ago I was injured at work and got out of job, but I did not get any benefit. I used my insurance and saving for the treatment. Now my saving is at the end point but I still need medical treatment and therapy. I am planning to apply for Medicaid. At the same time I have applied for Naturalization. I have two US citizen children. My question is if I receive Medicaid will this affect me in getting naturalized?

A - That would only be a problem in a green card application case, not in a naturalization case. Naturalization does not depend on your personal financial situation.

Q - Currently, I have a student visa and I know that I need to have 12 credits each semester to keep my visa. However, I would like to know if I could withdraw from 1 class so I won't get F.

A - The answer, unfortunately, is no. There are very limited instances where an F-1 student may drop his courses below a full-course of study and the risk of failing that class is not one of them. You may fit under other academic exceptions like improper course placement, initial difficulties with American teaching methods, etc., and you must talk to your international student advisor to see if any of them will be applicable. You must NOT drop your course before getting permission from your international student advisor.

Q - I am a student advisor and this concerns one of my students. The student was initially in F2 status. She changed to F1 here in the states. Her latest I-20 was stamped F1 and it stated that the next time she left the country, she needed to renew her visa and get the F1 stamp.

Last May, she returned from China and used her F2 visa...and was given an I-94 card with the F2 stamp. She did not follow the procedure in terms of getting a new visa.

She had questioned me about this back in May...and mind you at the time, OPT nor any other employment benefit was brought up by the student. She simply asked me if it was ok that her I-94 stated F2. The way she described it was that it was incorrectly stamped F2...she did not tell me she didn't get the F1 visa...so based upon that information, I told her that everything was ok...since her I-20 was stamped as F1. And when she left the country and returned she would receive a new I-94 card...(and of course she would have to have her visa stamped F1)

Well now she wants to apply for OPT and does not have an I-94 card that indicates she is F1.

Do you have any recommendations as to what she can do? She technically has been in student status since 2002. Does she have to apply for a change of status again?

A - Unfortunately, your student is in serious trouble:

1. What status a person has in the US is controlled by that person's I-94 form. When she reentered the US with her F-2 visa, she was admitted as an F-2 and the fact that she obtained a change of status in the past and that she had an I-20 that said "F-1" has no relevance. She abandoned her F-1 status when she left the country.
2. I am assuming that she has been carrying a full-course load. As you know, studying full-time in a degree program is a violation of the F-2 status. Therefore, she is also out-of-status.
3. If she had an on-campus job, assistantship, etc., it is even worse, because she also worked illegally. That is something that will get both her and you as the employer in trouble.

A "change of status" is what it literally means - a change of "status". As you know, status and visa are not the same thing. When a person changes their status, it only means that they obtained a new I-94 from the immigration and as you know, the I-94, or the status, is abandoned when a person leaves the country. When they return (unless they fit under very narrow exceptions) they need to present a visa and then are readmitted and given a status that is usually the same as the type of visa that they presented. That is why the change of status approval notice and the stamp on the I-20 says, "this is not a visa and cannot be used in place of a visa". Your student should have known that and should have been advised of it.

When she returned with the F-2 visa, the CBP officer did the right thing and admitted her as an F-2. At that time she had two options:

1. Stop going to school and apply for another change of status; or
2. Immediately leave the country, obtain an F-1 visa in Canada, Mexico, or China and then return to the US.

She did neither.

Even though she is out of status, she is not really subject to the reentry bars and 222g (I suggest you read this chapter in the NAFSA manual before advising her, so that she is clear on the consequences of her actions). Therefore, she can still leave the country, apply for an F-1 visa, and if the visa is granted, return in the F-1 status. But that creates interesting SEVIS questions and questions on OPT eligibility. You may have to create an initial record in SEVIS for her and then register her when (if) she returns. After her return, if she was a full-time student for an academic year, she may be able to apply for OPT.

Again, your student is in serious trouble, and I suggest that you document everything that you advise her and all the history very carefully. You may also want to refer her to a competent immigration attorney.

According to the Office of Budget Management (OMB), the US Border Patrol will receive a budget cut next year of 7%. The OMB assessment found "a need for improving outcome and cost-effectiveness based measures."

The US-Mexico border is being used as an entry point used by international gangs to smuggle Arabs into the US. Last November, the Mexican consul to Lebanon, Imelda Ortiz Abdala, was arrested on charges that she helped a smuggling ring illegally bring Arabs from Mexico to the US. A Lebanese café owner in Tijuana, Mexico, Salim Boughader Mucharraille, was also arrested in connection to the smuggling operation. US officials suspect Boughader of smuggling 300 Arabs into the US from 1999 to 2002. Boughader has been previously arrested for smuggling.

Boughader would hand over his clients to Mexican smugglers, who did not ask about the background or motives of the people they were bringing into the US. This greatly alarms US security officials, who know that the smugglers do not care whether their clients are terrorists or not, they just want to make money.

Mexico's former security advisor, Adolfo Aguilar Zinser, warned both countries in 2001 that Spanish and Islamic terrorist organizations were using Mexico as a refuge before crossing into the US.

Several Cuban musicians who received Grammy nominations were unable to attend the event held on February 8, 2004, due to visa denials. Singer Ibrahim Ferrer, a multiple Grammy winner in the past, who won best traditional tropical album, was absent because his visa application was rejected. Veteran guitarist Manuel Galvan, who won the award for best pop instrumental album for "Mambo Sinuendo", was also not able to accept his award in person. Other nominees were percussionist Amadito Valdes and singer Barbarito Torres.

The four artists received letters from the US Interests Section in Havana, which cited Section 212(f) of the Immigration and Nationality Act, which states that the President can deny entry to foreigners when their coming to the country is deemed "detrimental to the interests of the United States." The Bush administration uses this policy in order to prevent the flow of American dollars through compensation received by the artists, considered to be government employees, from reaching Cuba's coffers.

Cuban artists have been absent from the awards ceremony since 2001, when rules for those seeking entry into the United States were toughened after the September 11 attacks. 45 Cuban musicians planned on attending this year's Grammys, and all were denied visas.

5. News From The Courts

Jahed v. INS
US Court of Appeals for the Ninth Circuit
No. 02-70487

The Ninth Circuit granted the petition of the Jahed family to review the Board of Immigration Appeals' decision to deny their motion to remand and appeal of the Immigration Judge's decision denying their asylum petitions.

The members of the Jahed family are citizens of Iran. Mr. Jahed claimed that he had faced persecution in the past and feared future persecution by soldiers of the Iranian Revolutionary Guard. He stated that this persecution stems from his involvement with the Mojahedin, an Iranian political group that was displaced by the current Iranian government. Mr. Jahed stated that the current Iranian regime has banned the Mojahedin and has ordered all members of the group to be killed.

In his asylum petition, Mr. Jahed recounted an incident where a soldier of the Iranian Revolutionary Guard threatened to kill him and his family unless Mr. Jahed paid him a large sum of money. Knowing that he would be killed whether or not he paid the money, Mr. Jahed fled the country with his family.

The Immigration Judge (IJ) denied Mr. Jahed's petition, concluding that Mr. Jahed had established that he had been the victim of attempted extortion, but not persecution for his political beliefs. He further noted that Mr. Jahed's act of fleeing Iran "was not motivated by his political opinion or lack thereof, but rather by his inability to pay [the money]."

Mr. Jahed filed a motion to reconsider the IJ's decision due to ineffective counsel incompetent translation by the interpreter. He also appealed the decision to the Board of Immigration appeals (BIA). Mr. Jahed filed another motion with the BIA to consider the motion to reopen as a motion to remand. He later filed a supplemental petition to the BIA requesting relief under the UN Convention Against Torture (CAT).

The BIA accepted the IJ's decision, dismissed Mr. Jahed's appeal, and denied the motion to remand. The BIA did not address Mr. Jahed's petition for relief under CAT.

The Ninth Circuit concluded, "Petitioner's evidence viewed in its totality clearly establishes a causal connection between the persecution, the fear of future persecution, and Petitioner's political opinion." The court further noted that the IJ and BIA did not view the soldier who committed the attempted extortion "was part of the totalitarian government to which the Petitioner had been opposed when he was active in the Mojahedin...although the soldier himself did not personally threaten harm, he represented that it would be done by the government by which he was employed."

The court granted the Jahed's petition: because Mr. Jahed did face persecution in the past and did have a well-founded fear of persecution in the future, he and his family are eligible for asylum due to Mr. Jahed's political opinion.

Mayo v. Ashcroft
US Court of Appeals for the Eighth Circuit
317 F.3d 867; 2003 U.S. App. LEXIS 1227

Petitioner, a native of the Philippines, entered the United States in 1987 as an unmarried daughter of a lawful permanent resident. Approximately one year later, she was detained for 22 months following the INS' finding of documentation that indicated that she was married in the Philippines. She claimed that the documents

were only evidence of a proposal of marriage, but spoke little English and had no representation. The case eventually reached the Eighth Circuit Court of Appeals and was remanded for an evidentiary finding and to provide Petitioner with an interpreter and an attorney. On remand, the immigration judge found that she should not be deported, but the BIA reversed his decision.

The 8th Circuit Court of Appeals did not believe that the BIA sufficiently justified their decision with regard to Petitioner's credibility. The BIA relied exclusively upon the first immigration judge's decision and the previous appeals, which had been reversed and remanded due to many procedural defects. The Court also found that the IJ properly exercised his discretion in granting Petitioner a Section 212(k) waiver, even though the BIA did not even address this issue in their opinion.

With regard to the validity of the marriage, the man who signed Petitioner's marriage license testified that the marriage was valid. Because of inconsistencies in his statements, the IJ did find his testimony credible. The BIA stated that his inconsistent statements did not provide it with adequate reasons to discredit his entire testimony. The Court of Appeals did not find the BIA explanation sufficient. The Court believed that the BIA did not offer the IJ the deference that it should have and failed to provide an adequate justification for its ruling. The Court agreed with the IJ that there was ample evidence to find that the signature on the marriage license was forged and not a valid signature. Due to this finding, the marriage was void because it was not performed prior to the time that a valid marriage license was signed.

The Court acknowledged that the case should typically be remanded for further hearings, but in this case, the Court determined that rare enough circumstances were involved as to allow the IJ's order to be carried out. Due to the fact that the Petitioner had been in immigration limbo for 12 years and the IJ's order thoroughly examined the issue, the case was remanded to the BIA with directions that the IJ's order be carried out and that the Petitioner be granted a waiver of inadmissibility under Section 212(k).

* * * * *

Kourski v. Ashcroft
US Court of Appeals for the Seventh Circuit
2004 U.S. App. LEXIS 915

Vassili Kourski, a citizen and native of Russia, petitioned for review of the order of the Board of Immigration Appeals affirming the IJ's denial of his application for asylum.

The Petitioner applied for asylum before his tourist visa expired, claiming to have been persecuted in Russia as a result of being Jewish by anti-Semites.

The Petitioner's presented as evidence a copy of his Russian birth certificate that listed his nationality as being Jewish. The Petitioner testified that his mother sent him the birth certificate and he did not know whether it was a forgery. The IJ determined to the birth certificate to be a forgery, and declared him not to be credible.

The Seventh Circuit Court of Appeals granted the petition and held that because the IJ did not find that the Petitioner knew or suspected that the birth certificate was a forgery, he did not have any basis for its adverse credibility finding.

6. Government Processing Times

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

California (02/06/2004): <http://www.visalaw.com/california.html>

Missouri (02/06/2004): <http://www.visalaw.com/missouri.html>

Vermont (02/06/2004): <http://www.visalaw.com/vermont.html>

7. News Bytes

Viisage, a leading developer of identity solutions, has been hired by the State Department to create a facial recognition system for visa applicants for the Diversity Lottery Program. The new face recognition technology will help to reduce the number of fraudulent applications and duplicate submissions.

When President Bush took office, he vowed to have every immigration application processed within six months of the date of submission. Even though the government has spent millions of dollars to reduce immigration backlogs, the processing times for many applications have grown. Government officials attribute the increase to the security checks imposed after September 11, 2001, but critics blame poor management.

Each new application is checked twice through a database of lawbreakers, alleged terrorists and other potential threats. About 7% of applications last year required further investigation, and 2.3% were confirmed to be listed on the database.

8. International Roundup

Louis Gabriel Sanchez, head of the Chiapas legislature's Ecological Commission in Mexico wants to deport dozens of foreign Zapatista supporters who live in Montes Azules and provide support to the rebel group. The lawmaker said that by providing assistance to the guerillas, the foreigners were violating their tourist visas, which prohibit visitors to Mexico from participating in any kind of political activity.

Prime Minister Adrian Nastase of Romania has promised to ban all international adoptions, without exception, after the European Union threatened to cut off its chances of joining the organization.

Three years ago, Romania suspended foreign adoptions because the EU was concerned that the system in Romania was corrupt and that Romanian children were being sold to foreigners. The US and some EU countries pressured Romania to lift the suspension.

EU officials have accused Romania of backing out of its promise to reform the adoption system. The EU Commissioner for Enlargement, Guenter Verheugen, said that Romania was close to failing to meet EU requirements for entry into the organization.

Last year, 133 illegal immigrants attempted to enter Singapore by sea. Senior Minister of State for Home Affairs, Ho Peng Kee, said traffickers help bring illegal immigrants in vehicles or boats or provide forged passports. The increase methods of illegal immigration required enforcement agencies to be always on alert at the checkpoints and during coastal patrols.

The SmartGate Australian system is the first in the world to use facial recognition for border control. The new technology will allow frequent flyers to bypass customs and have their identity checked by face-scanning machines, thereby speeding up passenger processing without reducing security.

Passengers will step into a kiosk and place their passport photograph face down on a scanner. Five simultaneous photos are taken of the person and compared to the photo in the passport.

Of the 4,000 Qantas crew registered to use the new system, 98% said they preferred the machine to a check by a customs officer.

9. Legislative Update

California State Assemblywoman Sally Lieber (D-San Jose) introduced a resolution urging Congress and President Bush to adopt a federal bill, the Permanent Partners Immigration Act (PPIA), which would allow US citizens and permanent residents to sponsor their same-sex partners for immigration.

Department of Homeland Security Secretary Tom Ridge has announced that he is receptive to the idea to use state and local police to help enforce US immigration laws. At a Senate hearing on the Department's budget, several senators brought up the issue of additional resources for immigration enforcement in order to implement President Bush's temporary guest worker proposal.

Senator Larry Craig (R-ID) suggested that using state and local law enforcement to support immigration officials would be more cost effective than hiring additional immigration officers.

The CLEAR Act in the House and the Homeland Security Enhancement Act in the Senate propose to give state and local law enforcement the power to investigate, apprehend and remove non-citizens who are illegally in the US. The CLEAR Act, with 115 sponsors, is currently before a judiciary subcommittee. The Homeland Security Enhancement Act, with 3 sponsors, is awaiting a hearing by the Senate Judiciary Committee.

On February 12, USCIS Director Eduardo Aguirre testified before the Senate Judiciary Subcommittee on Immigration, Border Security and Citizenship on the proposed temporary worker programs. Aguirre presented five points for congressional consideration that complement the President's proposal.

An immigration proposal must emphasize enforcement, American workers must come first, incentives for registration and return to the home country are required, the program should not be at the expense of legal immigrants and the program should be able to be effectively administered.

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

At a Republican retreat in Philadelphia, Republican lawmakers presented their constituents' concerns to President Bush's political strategist. The legislators stressed that voters in their constituencies were not happy with the President's immigration proposal, and that they themselves would not vote for the bill. They also expressed the opinion that President Bush proposed the immigration bill in order to attract more Hispanic voters.

A Bush spokesman stated that the President defended his proposal: "He said he didn't do it for politics [but] because that's what he believes is good for the country."

California Senator Rico Oller issued a four-page mailer last week, attacking his opponent Attorney General Dan Lungren for supporting amnesty for illegal immigrants while he served as attorney general in 1990.

The mailer states "Dan Lungren voted to give illegal aliens US citizenship. Lungren broke with the Republican majority and supported keeping amnesty for millions who broke US immigration laws."

In an interview last week, Lungren stated the mailer referred to legislation he had helped to create that became law in 1986. The bill included a provision granting legal status to foreign farm workers. The Congressional Quarterly reported at the time that although Lungren originally backed the bill, he opposed it once the amnesty clause was inserted. At the time, he was the ranking Republican on the immigration subcommittee in the House of Representatives.

According to Republican California US Senate candidate Rosario Marin, the US must pressure Mexico to improve its economic conditions in order to discourage illegal

immigration. Marin, an immigrant from Mexico, said the determination of the cause of the large immigration numbers from Mexico to the US has been avoided and instead the government has decided to focus on solutions to the immigration problem.

Marin is the only one of the four Republican candidates running for a seat representing California in the US Senate that supports the guest worker proposal presented by President Bush. A major part of her platform includes her opinion that Mexico should be held more responsible for illegal immigration than the United States. Although she knows that Congress has no authority over Mexico's domestic policies, pressure could be applied through economic aid and treaties.

Marin is also proposing in her campaign that illegal immigrants convicted of crimes should be returned to Mexico to serve their sentences. Marin, however, refuses to address the issue of whether or not illegal immigrants should have the privilege of obtaining a driver's license and is being criticized for her silence on the issue.

A Palestinian-American, Maad Abu-Ghazalah, is running for Congress in San Francisco on a platform emphasizing foreign policy improvements. His main opponent is Rep. Tom Lantos (D-CA), a Holocaust survivor and a loyal supporter of Israel who has held the office since 1981. A recent trend of Muslim citizens has been to attempt to affect and change US federal policy by becoming part of the government.

With President Bush's announcement of a guest worker program in time for the presidential election, immigration is becoming a major issue for all the candidates. Bush called for a new, humane and rational approach to the immigration situation, prompting all presidential candidates to release statements of their own on the topic.

Senator John Kerry supports legalizing undocumented workers who have been working in the US for more than five years and who do not have a criminal record, as well as legalizing the status of the children of undocumented workers who have been raised in the United States. While serving in the US Senate, he has voted against both raising the number of skilled workers' visas and curtailing benefits to immigrants.

Senator John Edwards has stated that he would back an earned legalization program to legalize the status of illegal workers. Former Vermont Governor Howard Dean says that he would legalize the status of undocumented workers who have been upstanding citizens, similar to Clark's position. Dean, however, has expressed concern over the possibility of many Hispanics joining the military to get citizenship.

Representative Dennis Kucinich contends that Bush's proposal is a form of indentured servitude and has announced that he supports amnesty for undocumented workers. Similarly to Kuchinich's stance on illegal immigrants, the Reverend Al Sharpton equates an illegal immigrant to something very close to a slave. He favors a more lenient policy that would treat the people coming in to the US from Mexico more like those who come in from Canada.

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during **March**. 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 February **6th** in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date **earlier than** the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

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

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

FAMILY-SPONSORED PREFERENCES

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

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

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

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

EMPLOYMENT-BASED PREFERENCES

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

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

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

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

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

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: MEXICO, INDIA and PHILIPPINES.

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

Priority Dates for Family Based Immigrant Visas				
	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Family				
1 st	01OCT00	01OCT00	15OCT94	15JUN90
2A*	19MAY99	15MAY99	01NOV96	15MAY99
2B	08MAY95	08MAY95	15DEC91	08MAY95
3 rd	01OCT97	01OCT97	22JAN95	01FEB90
4 th	08MAY92	22JAN91	08MAY92	22FEB82

*NOTE: For March, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01NOV96. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01NOV96 and earlier than 15MAY99. (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.)

Priority Dates for Employment-Based Immigrant Visas				
	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Employment-Based				
1 st	C	C	C	C
2 nd	C	C	C	C
3 rd	C	C	C	C
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 (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-2004 annual limit being reduced to 50,000.** DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

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

All DV Chargeability Areas Except Those Listed Separately

Region

AFRICA: AF 23,200 Except: Ethiopia 21,900, Nigeria 16,475

ASIA: AS 10,500 Except: Bangladesh 6,940

EUROPE: EU 17,800

NORTH AMERICA (BAHAMAS): 13
OCEANIA: OC 685
SOUTH AMERICA, and the CARIBBEAN: 1,400

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

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

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

All DV Chargeability Areas Except Those Listed Separately

Region

AFRICA: AF 24,800 Except: Ethiopia 24,100, Nigeria 16,475
ASIA: AS 10,700 Except: Bangladesh 7,850
EUROPE: EU 19,000
NORTH AMERICA (BAHAMAS): 13
OCEANIA: OC 750
SOUTH AMERICA, and the CARIBBEAN: SA 1,450

D. VISA AVAILABILITY IN THE MEXICO FAMILY FOURTH PREFERENCE CATEGORY

Cut-off date movement in the Mexico Family Fourth preference has been very rapid during the past year. Therefore, it is expected that demand for immigrant numbers in the months ahead will be very heavy. As a result, there will be limited, if any, movement in the Mexico Family Fourth preference cut-off date for the remainder of fiscal year 2004.

12. Guest Article: Staying Close To Home: Off-Shoring, Immigration and A High-Tech H Visa, By Gary Endelman

Gary Endelman practices immigration law at BP America Inc. The opinions expressed in this column are purely personal and do not represent the views or beliefs of BP America Inc. or Visalaw in any way.

The looming specter of a jobless recovery casts a pall over every new report of economic good news. Mounting unease over white-collar unemployment has given enhanced credibility to political assaults on free trade. As America prepares to elect a President, who is going to defend substituting low-wage workers abroad for high-wage white collars at home? Lots of new jobs are being created, critics argue, but are they here in the United States? Politicians who have long wanted to change sides on the free trade issue now have the intellectual respectability to switch over and loudly champion the virtues of protectionism. The fact that America's unemployment level is still the lowest of any industrialized economy, that most workers displaced by technology and trade move on to new jobs, is quietly and conveniently ignored. Clive Cook writing in the December 17, 2004 issue of *The National Journal* puts the anxious headlines of the moment into perspective:

Much of the concern about America's jobless recovery is overdone--and to anybody living outside the United States difficult to comprehend. So far, the economy has weathered the slowdown that inevitably followed the boom of the late 1990's extraordinarily well. It is true that, by American standards, job creation is subdued. But to talk of jobs lost since the peak of the business cycle as a possible long-term trend is ridiculous. Much bigger losses might have been expected as the cycle wound down. The longer-term employment trend is fine.

Need some reassurance? How about a stiff dose of hard facts to stiffen your spine? Turn to a recent paper by Catherine J. Mann of the Institute for International Economics called "*Globalization of IT Services and White Collar Jobs: The Next Wave of Productivity Growth*" that can be downloaded from www.iie.com. Having served at the Federal Reserve Board of Governors, the President's Council of Economic Advisers and the World Bank, maybe she knows a thing or two about economic policy. She predicts that a "deeper transformation and wider diffusion of IT throughout the US economy will bring about a second wave of productivity growth." While the productivity gains of the late 1990's are undeniable, there remain large chunks of the US economy that have yet to integrate IT into their core business operations. This is particularly true in those sectors where one might logically look for a rebound in hiring- health services, construction, retail trades and small business. Folks, that is about to change. We are now at a point where lower prices for IT software and services on a global basis will trigger both higher productivity and revived business investment. Projections that trumpet the coming loss of IT jobs in blaring headlines ignore the surge in job demand that is bound to come when the second phase of globalization reduces the cost and widens the acceptance of IT software and services in these key areas. Catherine Mann reminds us why all is not lost:

Frequently cited projections indicate that millions of jobs will be lost to offshore workers. What these projections ignore is that the globalization of software and IT services, in conjunction with diffusion of IT to new sectors and businesses, will yield even stronger job demand in the United States for IT-proficient workers.

It may disappoint the critics of free trade to know that IT employment in the US remains surprisingly robust. The 2002 Annual Occupational Employment Survey compiled by the Bureau of Labor Statistics should calm fears of a wholesale IT offshoring exodus. Employment in computer and mathematical occupations in October 2003 is 6% higher than in 1999 while business and financial jobs rose 9% over this same period; architecture and engineering remained stable. America's trade surplus in "other private services" such as financial services, business, professional and technical

services, the very areas that one might suspect as being most likely to be shipped abroad, actually showed positive net balances. Our trade surplus in OPS increased from \$42 billion in 1997, at the very cusp of the boom, to roughly \$50 billion in the first quarter of 2003, in the early stages of recovery. Reports of the death of IT demand in the United States, to paraphrase Mark Twain, have been greatly exaggerated it seems. The Bureau of Labor Statistics Occupation Outlook Handbook forecasts that 3 of the 10 "hot occupations" in the first decade of the 21st century will be computer-related (computer support specialists; computer software application engineers and computer system software engineers). The BLS projects that 13% of the total jobs created in the economy by 2010 will be IT-related; an estimated 43% surge in jobs that were supposed to all be in India!

So what does any or all of this have to do with immigration? Is there a link with off-shoring? Until now, advocates of more immigration have not made one. This has, by default, left the field to the immigrant bashers who claim that L-1 and H-1B visas accelerate the exodus of American jobs. Such a perspective, regardless of its merit, focuses almost entirely on those jobs that already exist, reflecting a static view of the economy that fails to anticipate the second phase of IT diffusion or its global impact. What do we who believe that immigration strengthens America have to say? So long as we remain mute, without any suggestion as to how immigration will keep good paying jobs close to home, we cannot expect, nor should we receive, the support of those Americans who feel themselves at risk. Going forward, immigration advocates must realize that, more than anything else, immigration is something that happens to Americans, not just immigrants. It is a tool that can and must be wielded to promote the nation and strengthen its competitive posture against those who seek to challenge its dominance.

Restrictions on free trade weaken the American economy by depriving it of the flexibility that remains the irreplaceable engine of job creation. The American economy in January created only 112,000 jobs despite a continued drop in unemployment. As it was, even these relatively modest gains were disproportionately concentrated in retailing and construction. Economists told *The New York Times* that sustained economic growth of the kind recently experienced normally generated much more robust hiring.

"The labor market is like wet wood in a bonfire," said Edward McKelvy, senior economist at the Wall Street investment house of Goldman Sachs & Company. "It's working, but it's not working very well. "The unimpeded flow of investment, both in human and capital terms, is essential if the American economic system is to remain nimble and transparent."

That is why the critics who want to shut down the H-1B program are dead wrong. Truth is that this visa can provide the talent vital to keep good paying IT jobs close to home. Just as it does not make sense to quantify white collar IT job loss from the peak of the economic boom, or to ignore the drag of an overvalued dollar on the export of US high tech services, H-1B detractors only serve their own narrow partisan interests, and not those of the nation, by choking off talent, innovation and creativity.

The one thing that can put this emerging economic renaissance at risk is the severing of the American economy from its talent pipeline. "The point is not that no jobs will be done abroad," Catherine Mann explains, "but rather that higher-paid jobs demanding IT skills are projected to grow very quickly in the United States." America does not need to, and should not try, to preserve low-wage, low-skill IT jobs. We do need to

fashion a coordinated national strategy to keep good paying IT jobs close to home. One way to do that is to create a new IT H-1B visa category that will not be subject to any numerical restrictions. This would enjoy a six year validity thus giving both employers and workers a sense of predictability that will facilitate, not frustrate, long-range planning. It would be open to visa applicants who earn at least \$60,000 annually, though adjustments must be made to reflect regional cost of living differences, or hold a Master's or Ph.D. level degree. These are precisely the same criteria now accepted by the USDOL in deciding who should be exempt from calculations to determine H-1B dependent employer status.

There would be two restrictions worth noting: First, the IT H-1B could not be extended since the shelf life of the technologies on which they work should not be longer than that. Second, a demonstrated inability to recruit equally qualified American workers should be a mandatory condition precedent to H-1B petition approval. Because the IT H-1B must move at the speed of business, no new advertisement or recruitment would be required. Sponsoring employers would be able to use the same ads and interview data that their managers looked at when deciding to extend the offer of employment in the first place. When filing the H-1B petition, the sponsoring employer would provide government adjudicators with evidence of such prior activity. This would go directly to US Citizenship and Immigration Service; USDOL would not be involved.

When the next waver of productivity hits, Uncle Sam better be ready. A new high-tech H-1B can help.

13. Guest Article: How Korean Passport Law Affects Korean LPRs Temporarily Residing In Korea, by Young H. Noh

Young H. Noh is an expat US attorney working and residing in Korea. He is co-author of the Chapter on American Embassy in Seoul in Visa Processing Guide published annually by AILA. Young Noh represents Korean clients with their immigration and visa cases and also works with Korean-licensed attorneys to represent non-Korean clients with business and litigation cases involving Korean law. Mr. Noh can be reached at: webattorney@yahoo.com.

There are many LPRs of Korean nationality temporarily living and working in Korea. As US immigration practitioners are aware, many of them apply and obtain reentry permits and stay in Korea for prolonged periods of time. However, in certain situations, various aspects of Korean laws do have significant effect on the LPRs and complicate things.

One such Korean law governs the validity of Korean passports, which state that immigrant passports of US permanent residents automatically expire IF the Korean national passport holder physically stays in Korea continuously for more than two years. The relevant statute appears below:

Article 6 -Period of Validity of Korean Passport

1. Korean Passport shall be issued for the maximum of 5 years (revised 05/06/1998)

2. The period of validity of Korean passport granted under the 1st clause can be extended unlimited times unless otherwise provided by Ministry of Foreign Affairs and Trade; except, the same passport cannot be extended after having been in existence for over 10 years. (Revised 03/25/1983, 05/06/1998)
3. In case where the individual is in possession of Korean passport designated as "PR", if his/her stay in Korea exceeds 2 years, unless provided by Ministry of Foreign Affairs and Trade, the Passport shall be deemed to have expired on the day his/her stay reaches 2 years or on the expiration date showing on the passport, whichever comes first; except in case of the individual who has the duty of military service under Military Service Act but has been exempted from military service or has been permitted to travel overseas, if such individual stays in Korea over 1 year with his PR passport, the passport will be deemed to have expired on the day his/her stay reaches 1 year (new 08/01/1981, 09/18/1995, 05/06/1998)."

Let's take one example to demonstrate the complexities that can arise. Let's say a Korean family (Husband, Wife, Daughter and Son) who obtained green cards need to return to Korea because the Husband has been offered a good job with Samsung Electronics in Korea as a marketing manager. They applied for reentry permits before they left the US on January 10, 2002 and all of them obtained reentry permits for two-year periods. Their reentry permits are due to expire in April 10, 2004. They stayed in Korea continuously from January 10, 2002 up to the present, which is over two years.

Under Korean law, because they stayed in Korea continuously for over two-year periods, their Korean passports are deemed to have become voided, even though their reentry permits are still valid. Because their Korean passports are deemed to be voided, they will not be able to board the airplane at a Korean airport and must first obtain a one-time Travel Permit (which looks like a Korean passport) from the Korean Passport Office and then use the Travel Permit to first enter the United States and then obtain another Korean passport from the Korean Consulate in the United States. They are able to at least obtain Travel Permits because their reentry permits are still valid.

However, if they were to stay in Korea beyond April 10, 2004 - the valid date of their reentry permits - then they could not even obtain Travel Permits and as a result, they will not be able to board the flight. In this situation, their only option is to apply for Returning Visas from the American Embassy in Korea, and use the Returning Visas issued by the American Embassy to obtain Travel Permits from the Korean Passport Agency and then enter the US.

Prudent US immigration practitioners should advise Korean LPRs considering coming to Korea to temporarily work and live in Korea that they should try to avoid staying in Korea continuously for over two years, and inform them to check with someone knowledgeable about Korean law and US immigration law regarding their situations.

14. Conservatives Emphasize Support for Bush Plan

The Wall Street Journal recently published an article titled the "Conservative Statement of Principles on Immigration" in support of President Bush's immigration reform proposal.

The article begins with the declaration that America is a "nation of immigrants." It emphasizes the US need to have an open door immigration policy in able to help US prosperity, culture, military strength, role in the world affairs and historic tradition as the land of freedom and opportunity.

"Conservatives believe in legal immigration. We believe that America grows stronger by welcoming those who seek to better their families, work in our industries, and find liberty and refuge from oppression."

The authors continue by saying that they oppose illegal immigration and current immigration law needs to be changed in order to "reflect reality and common sense, be fiscally responsible, and avoid the loss of innocent life."

President Bush's proposal is viewed as a solution to the illegal immigration problem, and the plan is praised.

"We applaud the president and believe his approach holds great promise to reduce illegal immigration and establish a humane, orderly, and economically sensible approach to migration that will aid homeland security and free up border-security assets to focus on genuine threats."

The fifteen politicians, businessmen and intellectuals who signed the letter are Stuart Anderson, Jeff Bell, Linda Chavez, Larry Cirignano, Cesar V. Conda, Francis Fukuyama, Richard Gilder, Newt Gingrich, Ed Goetas, Tamar Jacoby, Jack Kemp, Steve Moore, Grover Norquist, Richard W. Rahn and Malcolm Wallop.

15. Extension Proposed for Looming SSI Deadline

With thousands of refugees and asylees facing a critical loss of benefits within the year, President George W. Bush has proposed an extension to the upcoming deadline.

A 1997 welfare law required all asylees and refugees who entered the US after 1996 to become citizens in seven years or lose their monthly Supplemental Security Income (SSI) checks. In the President's proposed budget plan, he says that people who legally have been in the country seven years should have an additional year before they lose their benefits.

However, since the \$93 million budget item would not even become law until October, the extension will be too late for thousands of elderly and disabled immigrants. Also, even if the extension helped to curb the immediate crisis, the problem would resurface next year. Immigration advocates believe that there should not be such a restriction on asylees and refugees because they are in the country legally and are facing lengthy delays to become a citizen.

The time period to become a citizen is short considering that federal law only allows 10,000 asylees to become permanent citizens each year. That limitation is not even factoring in problems with backlogs in immigration applications. Some asylum seekers are now waiting 16 years to apply for citizenship.

In Florida, a state with a large number of those affected, the numbers are astounding. In the Miami federal asylum office, 6,000 applicants from 1995 are waiting for an

interview. Once approved, they must wait 10 years in order to become a permanent resident.

Four thousand people have lost their SSI benefits since September, with 8,000 more expected to lose their benefits this year. With the loss of eligibility for the SSI benefits comes the loss of eligibility for Medicare.

Administration officials say that the extension, even if implemented, will not be retroactive.

16. Judge Condemns Treatment of Asylees

In a court decision, a federal judge condemned the former Immigration and Naturalization Service for its many violations of law. The case, *Ngwanyia v. Ashcroft*, was a class action suite filed on behalf of over 150,000 asylees by the American Immigration Law Foundation (AILF).

The immigrants in the case were granted asylum in the US, but were waiting to obtain their permanent resident status. The plaintiffs successfully argued that over the past ten years, INS and now USCIS unlawfully failed to adjust the status of 22,000 asylees due to mismanagement. This increased the asylees wait times to become US citizens and extended the waiting list for all asylees by more than two years.

Judge Richard H. Kyle of the District Court of Minnesota ordered the federal government to adjust the status of the 22,000 waiting asylees. The Judge also criticized INS' procedures for asylees to obtain work permits. Federal law requires the government to grant an asylee a work permit automatically and to keep it valid for as long as the asylee remains an asylee. INS had illegally required the asylees to reapply for work permits each year at a cost of \$120 per permit.

The court's decision is online at http://www.ailf.org/lac/ngwanyia_021204.pdf.

17. Soldier Becomes US Citizen

Fifteen years ago, Juan Escalante illegally entered the US when he was 4 years old. After graduating from high school, at age 18, he enlisted in the US military by using a fake green card he bought for \$50. He signed up for a four-year tour of duty. Private Escalante was then shipped off to Iraq.

Illegal immigrants are not eligible to be US soldiers. An illegal immigrant who is caught fraudulently serving in the US army is normally discharged. The military discovered Escalante's illegal status while he was deployed in Iraq, and decided that he would better serve America as a US citizen than as a deported immigrant.

There are currently 37,000 non-citizens in the US military. About 3,000 of these servicemen are green card holders who have served in Iraq. Many illegal immigrants go unrecognized in the US military, and immigrations officials say they have naturalized others in the military who have illegally entered the country.

An executive order signed by President Bush on July 3, 2003 allows for expedited naturalization for immigrants in active duty during the war in Afghanistan. Over 13,000 military personnel have submitted citizenship applications under the order.

Private Escalante successfully passed his citizenship exam and was naturalized on February 11. He serves with the First Brigade of the army's Third Infantry Division and expects to head to Korea next month and then to return to Iraq.