

Siskind's Immigration Bulletin  
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Published by Greg Siskind, partner at the Immigration Law Offices of Siskind Susser, Attorneys at Law; telephone: 800-748-3819, 901-737-3194 or 615-345-0225; facsimile: 800-684-1267, email: [gsiskind@visalaw.com](mailto:gsiskind@visalaw.com), WWW home page: <http://www.visalaw.com>.

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Editor: Greg Siskind. Associate Editor: Esther Schachter. Contributors: Penny Egel, Paola Palazzolo, Maryam Tanhaee and Megan Turngren.

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1. Openers

Dear Readers:

We are pleased to report this week on the hopeful beginning of the end of a year of problems processing non-immigrant and immigrant visas for religious workers. Over the past year, in an effort to crack down on fraud, the USCIS started becoming extremely tough in processing religious worker cases, frequently issuing decisions that seemed to introduce new requirements not envisioned by Congress and sometimes ignoring the law all together. For example, USCIS examiners rejected many applications by parochial schools around the country because the schools, while clearly religious in nature, were not churches, synagogues, mosques or temples. The problem is that the law actually allows for institutions like this to qualify anyway as long as the institution could show that it would qualify as a religious organization under the federal tax rules. Many religious schools can qualify under either the educational organization tax exemption or the religious organization tax exemption. Choosing either makes no difference from a tax point of view so a school's accountant will often pick the educational category. USCIS decisions have punished schools that did this even though the law clearly provided otherwise.

For an Administration that claims to be for strengthening and promoting the role of religious organizations in their community work, the USCIS approach of the last year seemed to be a major contradiction. Many of the religious workers denied entry were precisely the people working on the faith-based initiatives that President Bush has promoted.

So how could this particular Administration be the one in charge of a USCIS that suddenly became anti-religion almost to an extreme? We suspect that this happened without the knowledge of the White House. It might surprise readers to learn that it is really not unusual for career USCIS, State Department and Labor Department officials to make policy decisions that contradict the philosophy of the President they are serving.

Another example of this is the recent change in the HHS J-1 physician waiver program. The folks running that program recently introduced changes to the program that effectively end waivers for the agency. To be perfectly blunt, the officials at HHS who instituted the policy change double-crossed the White House and members of Congress. The White House only learned of these changes recently and HHS' actions certainly should embarrass the Administration.

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

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2. The ABC'S Of Immigration - J-1 Waiver Flowchart #7: J-1 Physician Conrad State 30 Flowchart

This is the seventh in a series of flowcharts for J-1 visa holders with a two-year home residency requirement. The flowchart linked below shows how J-1 physicians

can determine if they are eligible to apply for a waiver through the Conrad State 30 Program.

J-1 Conrad State 30 Flowchart:

<http://www.visalaw.com/04jan3/conrad30.pdf>

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3. Ask Visalaw.com

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

Q - Can an H1B holder own and operate a business outside of his H1B job? If not, how can this be done?

A - The only way to do this is to get a separate, concurrent H-1B approval for the second job. There is no bar on having an ownership interest in an H-1B sponsoring employer as long as the employer can demonstrate an ability to pay the prevailing wage and that the employer has a genuine need for the worker.

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Q - My H1B 6 year term expired in August 2003 so I had to leave the country. I know that I have to stay outside of USA for 1 year. When can I apply for the new H1B visa (taking in account that processing takes some time)? Do I get under the H1B visa cap?

A - You can apply up to six months before you are eligible for H-1B status again as long as the start date on the petition is no earlier than you are eligible to come back.

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Q - I heard rumors that there is a time restriction on how long a visitor can stay. My mum is coming to visit the USA. She is over 70 yrs. old. She already has a US tourist visa. Can she stay for about 2 months with me? I am a permanent resident here.

A - Immigration inspectors typically authorize stays of six months per trip. Extensions are possible on any given trip. What is always key in these cases is whether a visitor can show that they have strong ties abroad and will go home when their authorized stay in the US is over.

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Q - An individual who entered the US with a V-visa sent an application for adjustment of status to that of Permanent Resident. And then later applied for a Citizenship via N-600. Both applications are pending. A Receipt Notice for the Permanent Resident application has been received. These two applications are based on her father who is a recent Citizen of the US. The child is under 18 years of age.

The individual with V -visa applied to college and requested for Financial Aid. The college required proof that she is an eligible Non-Immigrant Alien. Is she considered an eligible Non-Immigrant Alien for the purpose of Financial Aid ( Pell Grant etc.)?

A - The US Department of Education requires proof of lawful permanent residency (I-551 stamp or greencard) for financial aid purposes. DOE has a very good publication about non-citizen financial aid eligibility that I used very often when I was a DSO. You can download it at the following web address:

<http://www.ifap.ed.gov/sfahandbooks/attachments/sech2-citizenship.pdf>

Under that list, she will not be considered an eligible non-immigrant. This document is from 2001 and at that time the V visa was not in existence. Nevertheless, their FAQs from 2003-04 instructions I think confirm this statement:

[http://studentaid.ed.gov/students/publications/completing\\_fafsa/2003\\_2004/ques2.html](http://studentaid.ed.gov/students/publications/completing_fafsa/2003_2004/ques2.html)

13. Citizenship status. You can receive federal student financial aid only if you are a U.S. citizen or an eligible noncitizen. If you have changed from a noncitizen to a citizen and have not informed the SSA, contact the SSA to update your status. Otherwise, the SSA may report that you are not a citizen, and you will have to provide citizenship documentation before receiving aid.

For financial aid purposes, an eligible noncitizen is one of the following:

- A U.S. permanent resident who has an Alien Registration Receipt Card (I-551 or I-151)
- A conditional permanent resident (I-551C)
- A noncitizen with a Departure record (I-94) from the U.S. Immigration and Naturalization Service (INS) showing any one of the following designations: "Refugee," "Asylum Granted," "Indefinite Parole," "Humanitarian Parole," or "Cuban-Haitian Entrant"

You are neither a citizen nor an eligible noncitizen, nor are you eligible for federal student aid, if you are in the U.S. on one of the following:

- An F-1, F-2, or M-1 student visa
- A J-1 or J-2 exchange visitor visa
- A B-1 or B-2 visitor visa
- A G series visa (pertaining to international organizations)
- An H series or L series visa (allowing temporary employment in the U.S.)
- A "Notice of Approval to Apply for Permanent Residence" (I-171 or I-464)
- An I-94 stamped "Temporary Protected Status"
- However, you may be eligible for state or institutional aid and may therefore wish to complete the FAFSA to apply for that aid. If you are completing a paper FAFSA, fill in oval C. On FAFSA on the Web, indicate that you are not a citizen by using the drop down menu.

Despite the strict intentions for the US-VISIT program that is being rolled out, a high-level memorandum from Homeland Security Secretary Tom Ridge's office ordered customs agents to stop fingerprinting as many travelers as needed to reduce wait times caused by the new program. Customs agents are to cease collecting the biometrics on foreign passengers if processing wait times exceed one hour.

DHS spokespeople have said that the one-hour deadline should not be a problem thanks to advance passenger data from airlines. DHS intends for the new program to only add 15 seconds to the entry process once agents become proficient at fingerprinting and photographing passengers. Many agents are surprised that Washington is setting the deadline despite the high threat alert.

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Immigration advocates are concerned that inaccurate information will cause problems for people entering the country because of efforts the Department of Homeland Security is taking to integrate more than two dozen criminal and terrorist databanks as part of a new immigration tracking system. To make the US-VISIT program work, DHS plans to combine 27 different biographical databases and one biometric database this year. The information from visitors is scrutinized against databases from other agencies, e.g. CIA, FBI, DHS and Defense Department.

Advocates of immigration fear that existing databases contain inaccuracies that will cause some visitors to be unfairly targeted. Concern stems from the fact that FBI records do not have to comply with accuracy regulations under the 1974 Privacy Act. US-VISIT's deputy director Robert Mochy acknowledged to GovExec.com that existing databases have inaccurate information, such as misspelled names and incorrect biometrical information. He expects the integrated database of biometrical information, such as fingerprint scans, will reduce the number of false identifications and increase positive identifications.

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US Border Patrol highway checkpoints have a new emphasis of slowing traffic to look for terrorists and see if drivers and passengers in vehicles are legally in the United States. The check points are part of a nationwide program for the southern and northern border areas that was ordered by the Department of Homeland Security because of the increase in the threat level to orange. The new emphasis of preventing terrorists and terrorist weapons from entering the country joins the US Border Patrol's main focus of ensuring that illegal immigrants and drugs are not brought into the US.

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The majority of the 27 Visa Waiver Program countries whose citizens do not need visas to visit the United States probably will not meet the October 26 deadline for including biometric features such as digital photographs or fingerprints in all new passports, according to Department of Homeland Security officials. If the extra security data is not included on passports, these countries could lose their privileges of traveling in and out of the US freely.

Britain, Japan and a number of other countries have told DHS they were likely to miss the deadline. Citizens of countries that fail to meet the cut-off date would be required to apply for US visas ahead of their travel. This would cause logistical problems and frustrate potential visitors. It could also cost the US economy billions of dollars in missed travel.

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## 5. News From The Courts

Niam v. Ashcroft  
2004 U.S. App. LEXIS 117  
Decided January 7, 2004

The Petitioners, Nourain Niam, Peter Blagoev, Iordanka Kissiova, and Iana Kissiova petitioned for review of the orders of the Board of Immigration Appeals (BIA), which denied their claims for withholding of removal and asylum. The Sixth Circuit Court of Appeals consolidated their petitions.

The Sixth Circuit held that the fact that there had been a regime change in the applicants' native countries of Sudan and Bulgaria, did not establish that they did not have a future fear of persecution when they returned. The Court also held that the BIA's determination that the curriculum vitae of the expert witness produced by Blagoev and Kissiova did not show on its face that she was unqualified to give an expert opinion on the political conditions in Bulgaria.

The Court of Appeals reversed and remanded the case back to the Immigration Judge.

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## 6. Government Processing Times

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

California (01/07/2004): <http://www.visalaw.com/california.html>  
Missouri (01/07/2004): <http://www.visalaw.com/missouri.html>  
Texas (12/15-31/2003): <http://www.visalaw.com/texas.html>  
Vermont (01/07/2004): <http://www.visalaw.com/vermont.html>

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## 7. News Bytes

The American Immigration Lawyers Association reports the following from meetings with senior Department of Homeland Security officials:

- The H-1B cap is likely not to be hit until mid-March
- The USCIS is working on a memo to address the re-adjudication of established facts as well as unreasonably abusive requests for evidence in employment-based non-immigrant and immigrant visa petitions

- CBP and CIS are working on establishing a procedure to correct I-94s with errors (AILA members have been reporting that neither agency wants to assume responsibility for correcting them)
- USCIS is taking the position that in adjustment portability cases involving concurrently filed I-140/I-485s, the I-485 must be pending for 180 days AND the I-140 must be approved.

AILA is also reporting the following based on meetings with senior Labor Department officials:

- The PERM program regulations are finished at DOL and are awaiting final clearance from the Office of Management and Budget. The program will not likely debut until later this summer.
- DOL is setting up new backlog reduction centers, but they have not yet budgeted funds to support the effort.

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The DHS sent a reminder to schools approved in SEVIS under the preliminary enrollment regulation that the deadline for completing the SEVIS enrollment process, including payment of the required fee and having a site visit, is May 14, 2004. In addition to explaining the process that preliminary enrollment schools must use to pay their SEVIS enrollment fees and have a site visit scheduled, the memo encourages those schools complete the necessary procedures by February 1. To view the DHS memo, go to <http://www.nafsa.org/sevp>.

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USCIS Associate Director of Operations William Yates issued a memo on January 8, 2004 extending the validity of civil surgeon endorsements on Form I-693, Medical Examination of Alien Seeking Adjustment of Status. This policy will be in effect until January 1, 2005.

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The Office of Administrative Law Judges of the Department of Labor found that an employer's failure to make displacement inquiries of secondary employers was a violation of 8 U.S.C. § 1182(n)(1)(F).

The statute provides that:

"The employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where-- (i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and (ii) there are indicia of an employment relationship between the nonimmigrant and such other employer; unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer."

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President Bush has signed Presidential Proclamation 7750, To Suspend Entry as Immigrants or Nonimmigrants of Persons Engaged in or Benefiting from Corruption. The proclamation restricts immigrants and nonimmigrants “who have committed, participated in, or are beneficiaries of corruption” from entering the US in order to protect the international activity of US businesses, US foreign assistance goals, US security and the stability of democratic institutions and nations.

There are four categories of individuals who are restricted from entering the US under the proclamation. The first is public officials or former public officials who have accepted an “article of monetary value or other benefit” in return for not carrying out their public functions, or has caused serious negative effects for US national interests.

The second includes individuals who provide or offer to provide an “article of monetary value or other benefit” to the public officials in exchange for not carrying out their public duties or negatively affecting US national interests. The individuals in these two categories are designated by the Secretary of State.

The third category includes public officials or former public officials who misappropriate public funds or interfere with public processes, such as the judicial or electoral processes, or have negatively affected US national interests. And the fourth category includes spouses, children and other dependents of those in the first three categories, who benefit from the “articles of monetary value or other benefits” received by those individuals.

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The North Carolina Court of Appeals has ruled that the state must expand Medicaid to cover illegal immigrants to allow for longer treatment for serious health problems. This ruling can expand the number of medical treatments that illegal immigrants in North Carolina are able to receive and may allow hospitals that already treat illegal immigrants to receive more Medicaid reimbursements.

The panel of appellate judges found that the state’s Department of Health and Human Services had misapplied Medicaid rules in the treatment of an undocumented worker from Mexico, Benito Luna. Luna was admitted to Moses Cone Hospital in Greensboro, North Carolina in December 1999, where doctors discovered that he had cancer of the spine. Two days after being admitted, doctors operated on Luna and gave him chemotherapy for the next month. State and county Medicaid officials paid the hospital for the surgery but not the chemotherapy.

Medicaid does not fully cover illegal immigrants, but federal and state regulations require that the program must cover treatment for emergency medical services given to the poor. State officials had denied the chemotherapy claim because they felt that the surgery had stabilized Luna’s condition. The court found that the state and a lower court had not considered that Luna’s health could have seriously deteriorated without the chemotherapy treatments.

The appellate decision can be found online at <http://www.aoc.state.nc.us/www/public/coa/opinions/2004/020557-1.htm>

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Four workers at Mohawk Industries Inc. filed a lawsuit Tuesday accusing the carpet-making company of suppressing wages by hiring illegal immigrants. The workers allege that Mohawk recruits and hires illegal immigrants and knowingly accepts fraudulent identity documents, violating the federal Racketeer Influenced and Corrupt Organizations statute.

Mohawk contends that they obey the law, but workers say that the company hires illegal immigrants because it can pay them less than US citizens and legal immigrants and because illegal immigrants are unlikely to pursue worker's compensation claims if they are hurt on the job.

Howard Foster, a Chicago attorney who specializes in class action racketeering lawsuits, initialized the suit and based his argument on the racketeering law, which allows private lawsuits against people or organizations with a pattern of violating certain federal statutes, including immigration laws.

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Thomas C. Wright, Jr., of the Virginia House of Delegates, is drafting a bill that would prohibit illegal immigrants from carrying a gun. The bill is intended to give police new authority when trying to crack down on terrorism and drug trafficking.

Federal law already makes it illegal for an illegal alien to carry a gun, but it's difficult to convict anyone of the offense in a timely manner. A state law like the one Wright is proposing would help police act quickly against offenders.

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## 8. International Roundup

A Brazilian judge issued a ruling in late December requiring immigration officials throughout Brazil to subject Americans traveling in or through Brazil to the same procedures that Brazilians face in the United States. Beginning January 1, immigration authorities began photographing and fingerprinting Americans entering Brazil.

However, the poorly equipped and understaffed immigration services could not keep up with the number of travelers and caused great delays. Some Americans waited up to nine hours to enter the country and many missed their connecting flights. According to the Ministry of Tourism, the country's international tourism business, which was just beginning to climb out of recession, is now declining due to the judge's decision.

The Rio de Janeiro city government has asked a federal appeals court to overturn the judge's ruling, but no date has been set to hear the appeal.

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In response to the US-VISIT program, Foreign Secretary Delia Albert of the Philippines said in a written statement that although the government understands the reason behind the new measures and they find them generally reasonable, it will

closely monitor the treatment of Filipino travelers to ensure that their rights and dignity are respected.

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On December 12, 2003 the Canadian government announced the creation of the new Canada Border Services Agency (CBSA) as part of a newly formed Department of Public Safety and Emergency Preparedness. The new agency will apply a risk-management approach to expediting the flow of low-risk goods and travelers across the US-Canada border. The purpose of the new agency is to improve emergency preparedness and responses to natural disaster and security emergencies, and to improve connections to domestic emergency preparedness networks.

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## 9. Legislative Update

Senator Chuck Hagel (R-NE) and Minority Leader Tom Daschle (D-SD) have been working for months on a new immigration bill that some believe could serve as the realization of or an alternative to President Bush's guest worker proposal. The exact details of the bill are unknown as of now, but the bill is likely to include protections for US workers. Hagel's spokesmen have said that Hagel is supportive of the President's proposal and that the new proposal is not meant to be an alternative. Hagel and Daschle began working on the bill in late summer, before President Bush made his announcement. It is expected that the bill will be introduced by next week.

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US Representative Rosa DeLauro of Connecticut sponsored a bill that provides tougher restriction on L-1 work visas. The bill requires employers to provide comparable wages and prohibits layoffs of U.S. workers for 100 days before and after the L-1 employee is hired. The bill also provides for a cap on the number of L-1 visas issued each year.

Proponents of the bill favor similar legislation that would decrease the cap on H-1B visas. The H-1B cap currently stands at 195,000 visas per year.

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

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## 10. Reader Commentary: It's the Labor Certification, Stupid, By John Ryskamp

*John Ryskamp currently serves as the Immigration Manager for Los Gatos Community Hospital, SACC, Inc., Allcare, Inc., and other health care facilities and computer consulting companies.*

For those familiar with the debate over illegal immigration, but unfamiliar with immigration procedures, here is a summary of them. As usual, the devil is in the details. Among other things, these procedures show where and why the

Administration is having such a difficult time getting a handle on this issue, even though President Bush has stated an apparently simple goal for immigration law: connecting a willing worker with a willing employer. It also shows a way out of the problem, which does not involve any new legislation.

Although the debate seems to revolve around the concept of labor shortages, actually there is never a shortage of US citizens to perform any job; the word "shortage" is a term of art. However, under current conditions some jobs in this country pay so little money for the work involved, that US citizens will not perform them. We have to assume that illegal workers are going to continue to work in this country, and then see where the law stands in the way of their gaining legal status.

### The Seemingly Insoluble Problem

A US company must sponsor the foreign national who seeks a Green Card, in a process called Labor Certification. Note that no US company is ever required to sponsor a foreign national for a Green Card--it is entirely voluntary on the part of the company. The company can simply employ the foreign national on a temporary basis as long as the United States will permit it, and when the permissible period has ended, the foreign national must go home. For example, in case of H1B workers, they are granted six years, then they must return for a year, then they can come back for six years.

If the company does decide to go ahead and sponsor a foreign national for a Green Card, the first step it must take is to convince the US Department of Labor that there is a shortage of US workers for the position. If the company can do that, the Department will certify that there is a shortage of US workers for the position (hence the term Labor Certification). The company makes the application on ETA Form 750. (The form, and the details of labor certification, can be found at [www.dol.gov](http://www.dol.gov).) The application involves the company submitting evidence that it has advertised for the position, considered applicants, and found that not even ONE US worker meets the minimum requirements for the position (that's the standard for approving or denying a Labor Certification application). It's an onerous, expensive process in which there is no guarantee of a successful result.

The process is utterly inapplicable to the situation of illegal workers, and it is this disconnect that is causing all the problems. The fact is that illegal aliens are performing work in this country, have always done so and will always do so. Historically, in order to keep their illegal workers performing the work, US companies AVOID any process that might reveal the availability of US workers. As it is, most US employers, even of legal workers, refuse to go to the expense of the Labor Certification process (and many of those who did so, have stopped, as a cost saving measure during the recession). There is no evidence to suggest that they would do so for the workers currently illegally employed by them, even if those workers were granted legal status through a temporary work visa. Also, many illegal workers do not remain with a company long enough for the Labor Certification process (and the subsequent immigrant visa process) to come to an end. It takes at least 3 years in California today, and the moment the worker stops working for the sponsoring employer, the employer can withdraw the application.

Similar considerations doom the temporary work visa plan itself. First, it's easy not to participate in the plan: sanctions for non-compliance are hardly ever enforced even for the temporary work visa programs we have today and the Administration is

not considering significant enhancement of enforcement. Second, filing does cost money, and the reason these companies hire illegal workers in the first place is to save money. Certainly, companies that do not file for the temporary visa are not going to file for Labor Certification.

From the perspective of the Administration, it does not want to request new immigrant visas even if the temporary work visa and Labor Certification hurdles are overcome, because that looks like an amnesty, which is anathema to the conservative wing of the Republican Party. From the perspective of the illegal aliens and their employers, they do not want to risk putting names and addresses into any database which might be used to deport illegal workers. Ironically, although the plan is touted as beneficial to illegal workers, it will be the workers themselves who will pressure the US companies NOT to apply for the temporary work visa. Result? US companies will continue to employ workers illegally, and illegal aliens will continue to take those jobs. Nothing will have changed.

What about the highly unlikely situation in which, the US company applies for Labor Certification and is granted it? The company then attaches the approved Form ETA750 to the Immigrant Petition for Alien Worker and files both with the Bureau of Citizenship and Immigration Services (formerly the INS). The petition is Form I-140 (this form can be found at [www.uscis.gov](http://www.uscis.gov)). In Part 2 of the Form I-140, you will see that the Government asks the US company what sort of worker is being sponsored. President Bush, in his proposal, is talking about two of the kinds of workers listed on this form:

1. A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a US bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)

Or

2. Any other worker (requiring less than two years of training or experience).

In the past, the worker had to wait until this petition was approved before taking the absolutely crucial step: filing the Form I-485 application to adjust status to permanent resident, the Form I-765 (which is renewable yearly and grants the worker permission to work for any US employer while waiting for approval of adjustment), and the Form I-131 (also renewable yearly and granting the worker permission to travel abroad while waiting for approval of adjustment). These forms can also be viewed at [www.uscis.gov](http://www.uscis.gov). If you can get to the stage of filing the Adjustment application, then, barring evidence of some very serious illegal conduct, which would bar you from permanent residency, you are guaranteed a Green Card. So filing that little form is actually the heart of this big debate.

Today, all four documents can be filed together, and then, once a permanent resident visa becomes available, the worker is called down to the local B.C.I.S. to have the Green Card stamp put in the passport. This indicates that the worker is a permanent resident of the US. It is what every illegal alien wants.

Note the following: illegal aliens will not participate in any government immigration scheme which does not guarantee that, sooner or later, they will get the Green Card. This is non-negotiable, and it is where the new immigration proposal either succeeds or founders.

## The Foolproof Solution

### 1. Get US companies out of the process

US companies will love to hear this, and they will jump on the bandwagon if there is any proposal to relieve them of the Labor Certification burden. In the final analysis, permanent residency is about what kind of people the United States Government wants here. Obviously, it wants illegal workers here--that is, workers whose jobs require little or no training or experience. Either there is nothing the Government can do about them and so has conceded their permanent residence here, or the Government realizes that, apart from being here illegally, they obey all laws, pay taxes and spend money and so deserve to stay.

And it wants other foreign nationals here as well. Who are they? They are people with sufficient training and experience to insure that they will always have a job, that they will not become public charges, and that they will obey all laws and pay their taxes (and spend money).

How do we know the Government wants both types of people to stay? Well, it specifies them on Form I-140 e. and g. What you read above is a direct quote from the Form.

In these two categories, the issue is really between the Department of Homeland Security (B.C.I.S. is a part of this Department) and the foreign national. The US company is not the issue; the foreign national is the issue. Thus, a foreign national currently in the US--whether legally or illegally--should be able to present his or her case directly to B.C.I.S. at once, TODAY. As a matter of fact, the Form I--140 can already be submitted directly by a foreign national who feels qualified under one of the other categories (for example, a Nobel Prize winner wanting a Green Card doesn't have to be sponsored, or petitioned for, by anyone). There is a Part B to Form ETA750, on which the foreign national lists his or her education and work experience in order to demonstrate that he or she qualifies for a Green Card under either category. It should be required that that form be submitted along with the Form I-140, the I-485, the I-765 and the I-131.

### 2. Temporarily suspend Labor Certification for categories e and g

And what about Labor Certification? Given the institutional loyalty to the notion that US workers should be preferred for US jobs, Congress is not going to abolish Labor Certification. However, it is also not interested in creating scofflaws by enacting a new scheme which is ignored by both US companies and illegal aliens, and the Administration is willing to experiment with temporary changes. The solution is to temporarily suspend the Labor Certification requirement for those foreign nationals in the United States who qualify under categories e and g. Since the current proposal for the temporary work visa for illegal aliens is six years, it makes sense to suspend the requirement for six years. Let's see how it works out (it will work out just fine).

### 3. No current increase in immigrant visas--and no new laws

As everyone knows, MANY foreign nationals would like to become permanent residents of the US. There must be a limit to the number of immigrant visas granted

each year. Furthermore, amnesty is a third rail issue. Anything that looks like amnesty will doom the legislation.

However, the immigration system is very familiar with a system in which there are not sufficient immigrant visas for all who qualify. It deals with this issue in a very successful way. A foreign national in the US who qualifies under one of the categories, can simply file an Adjustment of Status application along with the Form I-140 immigrant petition and then wait for a visa to become available. Anyone who is permitted to file an Adjustment of Status application is automatically in legal status until a visa becomes available and the application is approved.

These changes eliminate the need for the new work visa in order to confer legal status on illegal aliens (no new bureaucracy, please!). In addition, as stated above, a foreign national can, along with filing the Adjustment application, get work and travel authorization, which will be valid until an immigrant visa becomes available. This in turn eliminates the need to confer work authorization on illegal aliens by creating a new work visa category for them (again, no need for new kinds of paperwork). Once a visa becomes available, the foreign national simply goes down to the local B.C.I.S. office and gets a passport stamp indicating permanent residence, which confers permanent work and travel authorization. The individual is, finally, out of the system--and that's what EVERYONE wants. You can see that the Administration's proposal--start with a temporary work visa conferring legal status and end with adjustment of status--gets it exactly backwards and will create new scofflaws.

Congress periodically increases the number of immigrant visas and clears out the backlog of adjustment applications. A gradual increase will defuse the amnesty issue, which would be raised by the proposal for a huge number of new immigrant visas. The plan will convert the firestorm over "rewarding" illegal aliens, to an orderly and non-controversial incorporation of them in the legal system, which is where we want them to be. Result? Workers formerly here in illegal status will simply become permanent residents in the order in which their applications were received. That's exactly the way it is done now.

The plan provides the guarantee illegal aliens need in order to induce them to participate in the system and obey the law: 1) they can remain legally, work and travel abroad; 2) at some point, they WILL be granted permanent residency. US companies can directly—and immediately—exit the entire process.

How to make it work? President Bush faces a dilemma: he wants aliens to be brought within the legal system, but he does not want to grant them amnesty and they do not want to participate in any system which does not provide for permanent residency. And yet a middle way is open to him: the Executive order, which requires no legislation and could be issued pursuant to the pardon power. It would be far less than a pardon. He can order aliens present in the US, and qualifying under e or g, to file the immigration petition and adjustment application; he can further grant temporary legal status to those who do so. They will have that status pending approval of the petition and application. Finally, he can suspend labor certification in these two categories for six years in order to allow them to proceed with these filings. Such an order would withstand judicial scrutiny, assuming anyone had standing to litigate it. It would also change the legal status of more people in this country than any Executive order since the Emancipation Proclamation.

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## 11. Congress Responds to Bush's Guest Worker Proposal

The aftermath of President Bush's proposal for a guest worker program has motivated many lawmakers to take official positions against or in support of the plan. Political affiliation is not, in this case, dictating how an individual member of Congress feels about Bush's plan. However, it seems that many members of Congress have strong feelings one way or the other about the proposal.

There have been a number of positive remarks from lawmakers from both parties. A handful of key congressional leaders have voiced their full support for the Bush administration's plan. House Speaker Dennis Hastert (R-IL) has publicly said he will work to get this proposal passed and Senate Majority Leader Bill Frist (R-TN) is also very supportive of Bush's efforts. Only a handful of conservative pundits immediately approved Bush's proposal, including David Horowitz, Andrew Sullivan and John Podhoretz.

Democratic presidential candidates were quick to refer to similar plans of their own. Representative Dick Gephardt (D-MO) referred to his own three-year-old plan for "earned legalization," which would legalize those illegal immigrants who have been good citizens while they have been in the country. Senate Minority Leader Tom Daschle (D-SD) and Senator Chuck Hagel (R-NE) had planned to introduce legislation later this month designed to grant legal status to illegal immigrants who can show that they have been taxpaying US workers for several years, and also to set up a guest worker program for those who do not qualify for earned legalization. The senators still plan to unveil their bill soon.

Other lawmakers who support allowing undocumented immigrants to earn legal status criticized Bush's proposal as insufficient. Senator Ted Kennedy (D-MA) expressed his disappointment in the Bush administration's delayed re-involvement in the immigration debate and said that it falls short of what needs to be done to fix the problem. Gephardt has said that Bush's announcement was more of a political move than a solution, agreeing with other Democrats. Another presidential hopeful, Senator Joseph Lieberman (D-CT) released a statement saying that Bush's proposal coincides too closely with the election year and is three years too late.

Presidential candidate Howard Dean and Minority Leader Daschle support the earned legalization plan along with the goal of legalizing undocumented workers. Daschle, however, has expressed concern that wages paid to guest workers might pull down the wages of American workers and that it is critical to offer minimum wage limits to all these workers.

Representative Ciro D. Rodriguez (D-TX), chairman of the Congressional Hispanic Caucus, told the press that he thinks Bush's proposals are an election-year ploy to court Hispanic voters and may damage US relations with Mexico. He also said that Bush's plan would create a population of second-class citizens with no hope of ever achieving the American dream.

Conservative lawmakers are also expressing their apprehension in regard to Bush's plan. Although Representative Dana Rohrabacher (D-CA) spoke admiringly of Bush's idealism, he expressed concerns that the long-term impact on the American people would be very negative.

Spokesmen for Representative Tom Tancredo (R-CO), who heads the Congressional Immigration Reform Caucus that strives for tighter controls on immigration, stated that Tancredo feels Bush's plan is extremely dangerous and is too close to de facto open borders. Although Tancredo is from one of the state's major GOP strongholds, he appeared on nearly 25 news programs in the past several days criticizing Bush's plan for rewarding illegal behavior. He has repeatedly called the measure an "amnesty" program and said that Bush's administration obviously cares more about cheap labor and political points over national security. Tancredo's press secretary said that he supports putting the military on the Mexican border to solve the problem of immigrants illegally entering the United States.

House majority leader Tom Delay (R-TX) told CNN that he applauds the President for delving into such a difficult and important issue, but that his plan seems to reward illegal behavior.

Despite the vocal criticism from both conservative and liberal lawmakers on Capitol Hill, congressional leadership aides predict that the President might be able to pass his immigration reform proposals this year if he pushes hard for support from moderate lawmakers in both parties.

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## 12. Urban Institute Releases Data on Undocumented Immigrants

The Urban Institute Immigration Studies Program released a data sheet this week with a description of the basic characteristics of the present undocumented immigrant population in the United States. According to the data, approximately 9.3 million undocumented immigrants are presently living in the United States. This population makes up 26 percent of the total foreign-born population.

Approximately 5.3 million, or 57 percent, of these immigrants are from Mexico. Latin American immigrants from other countries make up about another 2.2 million, with only 10 percent from Asia and five percent from Europe and Canada. In this growing population, almost two-third live in six states. California and Texas have the largest numbers, with 27 percent and 13 percent, respectively. New York, Florida, Illinois, and New Jersey account for the other states with the largest population. However, the data indicates that the most rapid growth within this population has occurred in other states.

In 10 states, the undocumented immigrants make up over 40 percent of the foreign-born population. The Rocky Mountains, the Midwest, and the Southeast have all seen an increase in the population since the mid-1990s. The population in Arizona, Georgia, and North Carolina may already surpass that of New Jersey.

Of the estimated 9.3 million, approximately 6 million of these undocumented immigrants are working. They account for 5 percent of the labor force in America. Those individuals who are working are earning less than US citizens, with two-thirds of undocumented workers receiving less than twice the minimum wage.

Among the undocumented men, 96 percent are in the work force. The numbers exceed those of legal immigrants or US citizens, since the undocumented workers are less likely to be disabled, retired, or in school. Women make up approximately

41 percent of this undocumented population. Undocumented women are less likely to participate in the labor force because they are more likely than US citizens to have children and remain in the home.

About 1.6 million children under 18 are undocumented immigrants, with another 3 million children who are US citizens with undocumented parents because the children were born in the United States.

The full report can be found online at <http://www.urban.org/url.cfm?ID=1000587>.

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### 13. USCIS Releases Memo Regarding Religious Worker Petitions

William Yates, Associate Director of Operations for US Citizenship and Immigration Services (USCIS), has issued a memo regarding the extension of the Special Immigrant Religious Worker Program and the tax-exempt status requirements for religious organizations.

The Special Immigrants Worker Program, which allows for the admission of "special immigrants" who are professional or other religious workers in a religious vocation or occupation, was scheduled to end on September 30, 2003. This date did not apply to those who enter the US to work as ministers of a religious denomination. In October 2003, the program was extended until September 30, 2008. On July 18, 2003, CIS issued a memo on July 18, 2003 instructing that Special Immigrant Worker Petitions that were subject to the September 30 sunset date should be processed quickly. The Yates memo instructed that since the deadline has been extended, these petitions do not need expedited processing.

The second part of the Yates memo deals with the tax-exempt status of religious organizations. This issue has been of particular concern to religious organizations around the country due to the USCIS' recent extremely restrictive interpretation of the rules for religious organizations. 8 CFR 204.5(m)(2) defines a bona fide religious organization as one that is "closely associated with the religious denomination and which is tax exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code (IRC)." This is repeated in 8 CFR 204.5(m)(3)(i), which adds that evidence showing that the employing religious institution qualifies as a nonprofit organization must be included in a petition for a religious worker.

IRC section 501(c)(3) has several classes of tax-exempt organizations. Religious organizations that qualify for this status are listed in IRC section 170(b)(1)(A), such as churches. Other organizations may be eligible if they can establish that the religious classification is due to religious factors, that they are organized for religious purposes and operate under the principles of a religious faith. Evidence of the tax exempt status can be a signed letter from the IRS stating that the organization has tax exempt status as a religious organization in accordance with section 501(c)(3), or documentation that is required by the IRS to establish eligibility and documentation that establishes the religious nature of the organization, such as a completed IRS Form 1023, a copy of the organization's charter or constitution that contains the dissolution clause required by the IRS and states the purpose of the organization, brochures and other literature describing the religious purpose and activities of the organization.

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#### 14. GAO Issues Report on USCIS Application Fees

The fees received by US Citizenship and Immigration Services (USCIS) are not sufficient to fully fund its operations, according to a GAO report released this week. However, the report was unable to determine the exact amount of the shortfall due to insufficient data. This was due to the USCIS being unable to put a cost on each step in the processing of an application.

From 2001 through 2003, USCIS exceeded its available funds for operating costs by almost \$460 million, which created the need for appropriated funds. In addition, the number of pending applications increased by more than 2.3 million to about 6.2 million between Fiscal Year 2001 and 2003. The increase continued even with an additional \$80 million annually in appropriations in FY 2002 to address the backlog.

The GAO report stated that USCIS would continue to need appropriated funds to prevent a greater number of applications from entering the backlog. The funds would have to be provided if certain other actions were unable to be met, including increased fees, reduced processing times, and improvement of the timeliness and completeness of fee schedule updates. However, analysis of the cost to process income and pending applications, as well as administrative and overhead costs, must be done before the full cost of USCIS's operations can be determined.

The GAO recommended that the Director of USCIS conduct an analysis of the current processing functions to determine steps needed to reduce the processing time to an average of six months or less, to fall within the goals of the 6-month average goal established by the President's backlog initiative. In order to determine the cost of processing new and pending applications, the GAO recommended that the USCIS Director perform a comprehensive fee study to determine the costs to process new immigration applications and determine the costs to eliminate the backlog of pending applications.

In addition, the GAO recommended that the DHS Deputy Secretary identify which support services and functions, such as shared services, modernizing and supporting shared databases, shared infrastructure, and other forms of support, and the cost of those functions should be transferred or allocated to USCIS. As for fee schedule updates, the USCIS Director should determine ways to improve the agency's timeliness in implementing fee updates.