Siskind's Immigration Bulletin
March 8, 2004

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1. Openers

Dear Readers:

Last week I mentioned that I was off to Washington to visit my Congressmen and Senators as part of the American Immigration Lawyers Association annual Lobby Day. This is the one day a year immigration lawyers from around the country visit their Congressional representatives to give them a "macro" picture of what is happening in their states and districts on the immigration front and to advocate for proposals consistent with our belief that immigration is good for America.

I'm from Tennessee, a state that is not known as a melting pot. That's one of the reasons why I've focused on building a national immigration practice in the ten years since founding this law firm. But Tennessee has changed a lot over the last decade and it really is a good case study for how immigration is helping America and how the major immigration issues facing the country are relevant in our state as well. More than 25% of the private, for-profit hospitals in the country are owned or managed by Tennessee companies. Every hospital in the country, including the ones in my state, are feeling the effects of the worst health care professional shortage ever. Immigration is one of the tools that can be used to help deal with this crisis. The need for more immigrant nurses, doctors, technologists, etc. resonates with Tennessee legislators not just because Tennesseans need access to health care, but because so many people in my state work for companies that can't grow and prosper as well as they could because of the professionals' shortages.

Tennessee has hundreds of thousands of undocumented workers. These individuals are basically keeping several industries in our state afloat. While many Tennessee legislators would be very hesitant to support efforts to legalize this large population, they are more receptive to the notion that there needs to be reform in our immigration laws that will make it easier for employers to legally hire foreign workers when they can demonstrate that there are not American workers to available. The fact is that there are many more undocumented individuals working in this country – 14 million by one estimate – than there are unemployed Americans (8 million is the approximate number of unemployed). And within the ranks of the unemployed, there are a large number of workers who no matter what would not accept the kinds of backbreaking, low-paying jobs immigrants fill – agricultural pickers, chicken and meat processors, hotel maids, restaurant dishwashers, landscapers, etc.).

Tennessee is home to some of the country's major international companies – both American based companies and foreign-owned companies with substantial operations. Federal Express is based in Memphis and has helped make the Memphis International Airport the world's busiest cargo airport. More planes take off and land in Memphis every day than in any airport in the world thanks to the fact that just about every Federal Express package delivered in the US passes through the airport on its way to its eventual destination. Japanese-owned Nissan Motors builds a number of its car models in its successful Smyrna plant. Automobile parts retailer Autozone calls Memphis home. HCA, the world's largest hospital company, is headquartered in Nashville. Japanese owned tire company Bridgestone/Firestone is based in Nashville. And there are many other examples. All of these companies rely

on H-1B visas, E-2 visas, L-1 visas and other visa categories to ensure that they can bring over top managers and executives as well as the world's leading talent. The fact that these companies can have access to visas for these needed company leaders and workers means thousands of other Tennesseans can find high paying good jobs. Companies that can't operate with the needed freedom to hire who they want eventually will look at moving operations outside the US.

Several of the Representatives and aides we spoke to said the same thing to us – the pro-immigration side needs to make itself heard. Anti-immigrant groups are extremely well-organized and effective. They regularly bombard Congressional offices with calls, letters and emails to argue against pro-immigration bills and in favor of restrictionist legislation. But the silent majority that believes immigration is good for this country does not speak up. This despite the fact that the immigration is probably the number one reason that the United States economy is the most successful in the history of the world.

Nothing is really new here. In almost every generation, there have been organized efforts – even the organization of political parties – designed to thwart immigration. And in NEARLY every generation, the urge to slam the door has been avoided. In the few times where the restrictionists have succeeded in shutting the door, we've come to regret it. In the last century, the most tragic example was the passage of the Immigration Act of 1924, which was deliberately designed to cut down on the immigration of Jews, Italians and Poles. Those groups, like the Mexicans of today, were despised by the majority population of the day. They argued that the immigration of these folks would take jobs away from worthy Americans, that they were a drain on the economy and that the cultural identity of the country was at risk. These arguments are now being used by the descendents of these immigrants to keep out new immigrants. Of course, we know that thousands of people died as a direct result of those rules just 15 years later during the Nazi Holocaust and World War II.

The message "Immigration Works" – AILA's catchphrase to succinctly justify its positions – is one that resonates still, even with many in Congress who are seemingly against immigration. The problem is that people who agree with this sentiment are not making their voices heard. And that now needs to be the priority. Easy to say, of course, but everything we believe in depends on making the effort.

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. ABC'S Of Immigration: Temporary Protected Status

What is Temporary Protected Status?

Temporary Protected Status (TPS) is a temporary immigration status granted to eligible nationals of designated countries who cannot return home because of a crisis in the home country. It's the relief the US offers foreign nationals when civil wars break out, hurricanes strike, volcanoes erupt, and the like. Unfortunately, these terrible crises come too often and the US has to examine the TPS option on a regular basis.

TPS beneficiaries are not required to leave the United States and may obtain work authorization for the initial TPS period and for any extensions of the designation. TPS does not lead to permanent resident status, however, and should be seen as a temporary solution for the applicant. When the Attorney General terminates a TPS designation, beneficiaries will return to the same immigration status they had before TPS (unless that status has expired or has been terminated) or to any other status they may have been granted while in TPS.

The Attorney General (the "AG") may designate a country for TPS when the AG determines, after consulting with appropriate government agencies, that:

- There is an ongoing armed conflict within the state and, due to that conflict, return of nationals to that state would pose a serious threat to their personal safety;
- The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or
- There exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless the Attorney General finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

A TPS designation will be effective for a minimum of 6 months and a maximum of 18 months. Before the end of the TPS designation period, the Attorney General will review the conditions in the designated state and determine whether the conditions that led to the TPS designation continue to be met. Unless a determination is made that those conditions are no longer met, the TPS designation will be extended for 6, 12, or 18 months. If the conditions that led to the TPS designation are no longer met, the Attorney General will terminate the TPS designation. Designations, extensions, terminations and other information regarding TPS are published in the Federal Register.

Who is eligible to apply for TPS?

If you are a national of a country designated by the Attorney General for temporary protected status, or if you are a person who has no nationality but last habitually resided in a designated country, you may be eligible to apply for temporary protected status if:

- You apply for TPS during the specified registration period. The registration period is stated in Federal Register notices of designation and is also generally noted in USCIS press releases (Siskind's Immigration Bulletin will normally report on TPS designations so be sure to monitor our site).

- You have been continuously physically present in the United States since the temporary protected status designation began, or since the effective date of the most recent re-designation.
- You have continuously resided in the United States since a date specified by the Attorney General. (Note: This date is listed in the Federal Register notice of designation and may be different than the date temporary protected status became effective.)
- You are not subject to several criminal and security-related bars.

An applicant is NOT eligible if the applicant

- Has been convicted of any felony or two or more misdemeanors committed in the United States;
- Is a persecutor, terrorist or otherwise subject to one of several security-related bars to asylum; or
- Is subject to one of several criminal-related grounds of inadmissibility for which a waiver is not available.

For more specific information relating to eligibility, see Immigration and Nationality Act Section 244(c)(2) and Title 8, Section 244.1 - 244.4 of the Code of Federal Regulations.

Which countries are designated under the program?

The following countries are currently designated under the TPS program: Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia and Sudan.

How do I apply for TPS?

If you are applying for TPS for the first time, you must complete USCIS Form I-821, Application for Temporary Protected Status, submit supporting evidence of identity and nationality, proof of residence, two identical color photos, and, if you are age 14 or older, a fee for fingerprinting.

If you are between the ages of 14 and 65 and want employment authorization, you should also complete and submit USCIS Form I-765, Application for Employment Authorization with the appropriate fee. Applicants who already have or do not wish to receive employment authorization still must submit a completed USCIS Form I-765, but without the accompanying fee. If you are over the age of 14, you will be called by the USCIS for fingerprinting after you send in your application.

If you are granted TPS, you must re-register with the USCIS for each period that your TPS benefits are extended. To re-register, submit a completed USCIS Form I-821 and USCIS Form I-765 during the period stated in the Federal Register notice of extension of the TPS designation. You do not have to send in another fee for USCIS Form I-821, but you must submit a fee for USCIS Form I-765 if you are between the ages of 14 and 65 and are requesting employment authorization. *If you do not re-register each period, your temporary protected status will be withdrawn.*

What are the fees for applying for TPS?

There is a $50 fingerprinting fee and a $120 fee for employment authorization.

Will I get a work permit?

If your TPS application is approved, you will receive work authorization if it was requested at the time you applied for temporary protected status.

May I travel outside the United States?

An individual granted TPS must remain continuously physically present in the United States. The grant of TPS status does not mean that you have permission to travel abroad, though permission to travel may be granted by the district director according to the Service's advance parole provisions. There is no appeal to a denial of advance parole. Failure to obtain advance parole prior to traveling abroad may result in the withdrawal of your TPS and/or the institution or re-calendaring of removal proceedings.

How can I check the status of my application?

You should contact the USCIS office that received your application and be prepared to provide the USCIS staff with specific information about your application.

May I appeal a decision based on my TPS case?

If your application for temporary protected status is denied, you will receive instructions telling you whether or not you are allowed to appeal the decision. Instructions on how to appeal will be included in the notice of denial.

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3. Ask Visalaw.com

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

Q- I'm an H-1B visa holder. Am I allowed to open businesses in the United States? Particularly LLC?

A - H-1B visa holders can go through the process of creating a company and the form of the company does not matter. But as soon as that company begins operations, the H-1B visa holder needs to either switch to simply an investor role as opposed to actively managing the enterprise OR get a concurrent H-1B visa to work in the business. Note that it is often tough to get an H-1B visa for an employer of a new business because it is necessary to show the new business has the ability to pay the worker the prevailing wage.

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Q - I wonder if I can change employers after I file an EB1 or EB-2 green card application? I am a research scientist at a university.

A - It depends. In an EB-1 extraordinary ability case, moving institutions is probably not a big deal since you can self-petition and the focus is on your background. In an EB-1 outstanding researcher case, it is employer-sponsored so moving could create problems. In an EB-2 national interest case, you can move but the question is whether you are doing the same kind of work at the new institution. In an EB-2 labor certification case, you have the same problem as the outstanding researcher. You should consult with your immigration lawyer before moving employers.

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Q - My father was born in Taiwan and subsequently became a naturalized Canadian Citizen. He now is a green card holder living in the US eligible for US citizenship. Would he have to give up his Canadian citizenship if he decides to pursue his US citizenship?

A - No, both the US and Canada recognize dual citizenship.

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Q - I have been hired by a company with only 4 employees. 2 are US Citizens and one is going to be an H1B visa holder. Can the company sponsor me and this person or does the company need to be a bigger one with more employees?

A - There is no minimum size for a US company to hire someone in H-1B status. The key is that the company be a real enterprise and that it demonstrate that it meets the normal requirements for the H-1B (it needs you, the job is professional, it intends to pay the prevailing wage, etc.). Small businesses tend to get hung up on the prevailing wage issue. The USCIS will often challenge smaller businesses on the question of whether they have the ability to pay the offered salary. So your immigration lawyer will need to focus on providing good documentation to address this question.

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Q – I am a green card holder petitioning for a green card for my spouse who is not in US. Info on BCIS web indicates that form I-485 can not be filed before a visa number is assigned. Will my spouse be given a visa after passing her Consular interview or visa will be issued after the I-485 process is completed?

A - I think you are confused about how the process works. If you are a permanent resident sponsoring a spouse in the Family Second category, you can only file an I-130 at the regional service center of the USCIS. All this does, in essence, is a claim a place in the queue for your spouse since there is a limit on the number of family-based green cards available. The F2 green card category is backlogged several years. So until your spouse moves to the front of the queue, there will be nothing happening in your case. The I-485 you mention is for people who are in the US and who have a visa number available. That would include spouses of permanent residents who had waited the several years for the green card to become current. More often, it includes spouses of people who become US citizens (there is no queue for this group; they can apply for an I-485 immediately). Note that filing the I-130 does not give your spouse the right to remain in the US. To be in the US, your spouse would need a non-immigrant visa of some sort - work visa, student visa, etc. If your spouse cannot get in the US in a non-immigrant category while waiting

through the green card queue, she would need to wait outside the US and then eventually interview at a consulate when she is at the front of the queue.

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4. Border and Enforcement News

Carols Garcia de Alba will become Mexico's new consul general on March 8, 2004. Garcia de Alba plans to significantly upgrade the Dallas consulate to accommodate the increase of immigrants to North Texas. According to new Mexican statistics, the Dallas area has the nation's third highest concentration of first and second generation Mexican immigrants.

Garcia de Alba will be faced with increasing Mexican businesses in the Dallas area and advocating recognition of Mexico's consular identification card. He is the sixth consul general in Dallas since 1994, replacing Ezequiel Padilla Couttolenic.

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A new DHS program, the Immigration Security Initiative, proposes stationing American inspectors at foreign airports to screen passengers in an effort to detect terrorists before they board an airplane headed towards the US. DHS officials are seeking voluntary participation with seven international airports in the United Kingdom, Paris, Japan, Mexico, Amsterdam and Germany.

The DHS proposal is not a new idea. US Customs inspectors have been stationed in Canadian airports for years and a previous US program posted US Customs officials around the world to assist passengers with questions about what goods they were allowed to bring into the US.

However, post-September 11, Canada denied a request to allow US customs and immigration officials carry firearms while on duty at Pearson International Airport in Toronto. Canada and other countries are opposed to the plan.

Many European governments openly disagree with the US requirement to have armed sky marshals on US-bound flights. European officials are wary of the new DHS initiative. Some have said that if the inspectors were limited to assisting airport security officials by providing intelligence or access to US data, they would be open to the idea.

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Border patrol officers fear that if passed, President Bush's guest worker proposal will spawn fake employment papers. One agent commented that as many immigrants have counterfeit passports and drivers licenses, this will be one more document to falsify.

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Three suspects are waiting to be sentenced for the murder of a US Border Patrol agent in Mexico, while one is still at large. Three of the suspects beat Jorge Salomon Martinez and then killed him after taking one other suspect's advise. All three

arrested for the murder have pleaded guilty and could be sentenced by summer. Each could each face 15 to 50 years in prison.

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5. News From The Courts

Halaim v. INS
No. 02-72311, 02-72312
Ninth Circuit Court of Appeals

The Petitioners, members of the Pentecostal Christian faith from the Ukraine, claimed that since their asylum claim would be covered by the Lautenberg Amendment if they were physically outside the United States, they should be entitled to a presumption that they established past persecution based on a pattern or practice of persecution and were entitled to a lower burden for proving a well-founded fear of future persecution.

The Lautenberg Amendment lowers the burden of proving refugee status for certain categories of individuals, including those from the former Soviet Union who are Jews or Evangelical Christians. Section 207(b)(1)(A) states: "…Evangelical Christians shall be deemed a category of alien established under paragraph (1)(A)." Therefore, the petitioners would be included in the groups protected under the Act.

The Court ruled that individuals applying for asylum within the United States might not invoke the Lautenberg Amendment even though they could invoke it if they were applying for refugee status from outside the United States. The Court rejected the petitioners' claims because the Amendment limits its application to refugee applicants under INA § 207 and does not include asylum applicants under INA § 208. The equal protection claim was found inapplicable because the Amendment was rationally related to Congress' desire to respond to the INS' failure to properly adjudicate refugee applications overseas.

In addition, refugee applicants were still required to demonstrate a well-founded fear of persecution under the Amendment. A lower standard of proof is not the same as a conclusive presumption. The Court determined that the Amendment is not a declaration by Congress that all Ukrainian Pentecostals have been persecuted. Therefore, the applicants must still meet the necessary burden of proof, which was not met in this case.

The petitioners were denied asylum because the IJ's denial of their claim of past persecution or a well-founded of future persecution was supported by substantial evidence.

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The People v. Saeid Kangarlou
2004 Cal. App. Unpub. LEXIS 962

The Appellant Saeid Kangarlou appealed from an order denying his petition for writ of error coram nobis. The Appellant, a citizen of Iran, plead no contest to unlawfully taking or driving a vehicle in February 1999. As a result, he was detained and ordered deported by the Immigration and Naturalization Service.

The Appellant brought two petitions for write of error coram nobis in the superior court, alleging that when he plead no contest, he reasonably believed that he was a United States citizen. The trial court denied the petitions, and the Court of Appeal of California reversed the denial and remanded the case for a new hearing.

A petition for writ of error coram nobis is a motion to vacate the judgment. In order for the court to grant the motion, the petitioner must establish that some fact existed which, without his fault or negligence was not represented to the court at the trial and would have prevented the adverse judgment; the new evidence does not go to the merits of the any issue of fact determined at trial; and the petitioner did not know and could not have reasonably known or discovered the facts before the time he petitioned for the writ.

In this case, the trial judge did not appoint counsel when Kangarlou could not afford an attorney. The Court of Appeal found that Kangarlou had the right to counsel, and that counsel should have been appointed for him. On these grounds, the court remanded the case to back to the Immigration Judge to appoint counsel for the Petitioner and rehear the petition.

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6. Government Processing Times

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

Nebraska (03/01/2004): http://www.visalaw.com/nebraska.html
Texas (02/16-29/2004): http://www.visalaw.com/texas.html

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7. News Bytes

USCIS announced on March 3, 2004 that it had completed processing the renewal Employment Authorization Documents (EADs) for the over 238,000 Salvadorans who re-registered for Temporary Protected Status (TPS). Those who applied for their TPS extension by the September 15 deadline should receive their renewal EAD cards by March 9, 2004. These renewal cards will be valid until the current extension for TPS for Salvadorans expires on March 5, 2005.

Salvadorans who timely filed their TPS re-registration but do not receive a renewal EAD by March 9, 2004 should contact the National Customer Service Center at 800-375-5283.

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The Bush administration announced that the Department of Homeland Security is considering changing the Oath of Allegiance, said by new citizens at naturalization ceremonies, to include disavowing loyalty to terrorist organizations. The current oath require all new Americans to renounce “all allegiance and fidelity to any foreign prince, potentate, state or sovereignty” of whom or which they have been subjects or citizens.

A DHS spokesman said that the new proposed oath would not specifically mention 'terrorist groups', but would include a broad term such as 'all foreign powers'. DHS officials currently believe that the Oath of Allegiance is outdated for the post-September 11 world.

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USCIS officials indicate that the 66,000 H-2B cap is nearly exhausted, and that cut-off for these filings may occur in the very near future. While earlier speculation was that the cap would be reached in April, it now appears that it may be reached in early March.

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Federal authorities are testing alternatives to jail for those facing deportation in Seattle, Portland and Northwest Alaska. About eight immigrants arrested for being in the US illegally are wearing ankle bracelet tracking devices at home rather than being locked up. Those considered for participation will have strong employment and community ties, possibly have a US citizen spouse and be considered low flight risks. Criminal suspects will not qualify for the electronic-monitoring program.

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On February 25, 2004, the Department of State submitted to Congress the 2003 Country Reports for Human Rights Practices, which provide detailed analyses of human rights practices in 196 countries, and are frequently cited in hardship, asylum, withholding of removal, and Convention Against Torture cases.

The reports and remarks by Secretary of State Colin Powell are available online at http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm

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As over 40 percent of Los Angeles residents are foreign-born, the city has created an Office of Immigrant Affairs to help new immigrants adjust to life in the US. The office will have two employees who will help immigrants contact existing community service and support organizations. Federal grants totaling $125,000 will cover the costs of running the office for the next two years.

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The Department of State has issued a cable advising that all immigrant, K-1 and K-3 visa petitions that are returned with a recommendation to USCIS for revocation should be forwarded to the National Visa Center. The cable states that there are two reasons for this new procedure. The first is that many petitions that were returned to USCIS with recommendation for revocation have been lost. The other reason is that the National Visa Center Fraud Protection Unit will use data obtained from revocations to track trends for future intelligence dissemination.

Under the new procedure, all revocation cases will be forwarded to the National Visa Center, who will track all the cases returned to USCIS and then forward them to the appropriate USCIS office.

The cable can be seen in full at http://travel.state.gov/state041682.html.

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Pennsylvania is planning to transfer all Foreign Labor Certification (FLC) activity from the Philadelphia Processing Unit to the Harrisburg Processing Unit. The transition date is expected to be April 15, 2004. H-1B Prevailing Wage Determination Request Forms and Applications for Alien Labor Certification should continue to be filed in the Philadelphia office until this date.

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March 1, 2004 was the one-year anniversary of the Department of Homeland Security's assumption of INS functions. AILA, the American Immigration Lawyers Association, reviewed the DHS's performance. AILA found that DHS has inadequate coordination between the enforcement and adjudications branches of the agency, USCIS has inadequate funding to be able to do its job and there are continuous delays in processing.

AILA stated "it is both unfair and inaccurate to point fingers at DHS alone. Congress and the [Bush] Administration need to step up to the plate and take responsibility for how DHS has functioned."

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In a USCIS memorandum, Associate Director of Operations for USCIS William R. Yates provided guidance to immigration officials with regard to free trade-related changes. The first change is the removal of the cap on Mexican NAFTA nonimmigrant professionals seeking TN status, and the elimination of the requirement that a TN petition and associated labor condition application (LCA) be filed. The second change relates to the implementation of two new Free Trade Agreements with Chile and Singapore, which creates a new H-1B nonimmigrant classification for professionals and the extends of E-1/E-2 treaty trader/investor privileges for the two countries.

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8. International Roundup

In a change of policy that affects all Cuban-born people living abroad, the Cuban government confirmed that most Cuban-born people living outside the island can visit without a visa beginning on June 1, 2004 if they have a valid Cuban passport. Cubans will be excluded from the new measures if it is damaging to the country's interests.

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On February 19, 2004, the Taiwanese Ministry of Foreign Affairs formally launched a scholarship aimed at encouraging foreign students to study in Taiwan. The island hopes to project its culture overseas, improve its ties with foreign governments, schools and cultural and educational institutions by attracting more foreign students to study in the country.

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Canadians and Americans traveling to Barbados will now need a passport to get into the country. Until now, photo identification and proof of citizenship have been the only requirements. Cruise ship passengers with trips beginning and ending in Barbados are also required to have a passport.

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In May 2003, Israel launched a new program called "At Home-Together," to help new immigrants adapt to the country. The program matches participants from around the country according to language, educational background and profession to help new immigrants integrate smoothly into Israeli society. The program is sponsored by the Jewish Agency, the Ministry of Absorption and the Union of Local Authorities.

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9. Legislative Update

H.R.3867: To require the Secretary of Homeland Security to designate Haiti under section 244(b) of the Immigration and Nationality Act so that nationals of Haiti present in the United States may be granted temporary protected status.
Sponsor: Rep Deutsch, Peter [FL-20] (introduced 3/1/2004)
Latest Major Action: 3/1/2004 Referred to House committee.
Status: Referred to the House Committee on the Judiciary.

H.RES.542: Expressing the sense of the House of Representatives that the Secretary of Homeland Security should designate Haiti under section 244 of the Immigration and Nationality Act in order to make nationals of Haiti eligible for temporary protected status under such section.
Sponsor: Rep Meek, Kendrick B. [FL-17] (introduced 2/26/2004)
Latest Major Action: 2/26/2004 Referred to House committee.
Status: Referred to the House Committee on the Judiciary.

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

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10. Campaign 2004

Former US treasurer, Rosario Marin, recently began a campaign to challenge the incumbent Senator Barbara Boxer in California. Marin has been criticized for failing to openly oppose Proposition 187, a 1994 measure that would have denied public services to illegal immigrants, while she was a spokeswoman for the Wilson administration, a supporter of the Proposition. Marin is currently the only candidate that supports President Bush's immigrant guest-worker plan.

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Teresa Heinz Kerry, wife of Presidential candidate John F. Kerry, spoke to a group of 75 people at the United Farm Workers headquarters in Kern County, California. The

crowd consisted of mostly Latinos, and Heinz Kerry spoke of immigration, healthcare, and education.

The Los Angeles Times reported on February 25 that UFW President Arturo Rodriguez noted that Kerry's election would make her "the first immigrant in the White House." Heinz Kerry grew up in Mozambique to Portuguese parents.

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The National Council of La Raza recently held its annual "State of Hispanic America" report. The report urged Democratic and Republican candidates to move beyond the immigration issue and address other concerns of the Hispanic community. The report outlined recommendations for improving education, access to health care, and raising the rate of Hispanic homeownership.

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Garden Grove, California, Councilman Van Tran won in the 68th Assembly District primary. If Tran wins as he is predicted to in November, he will be the first Vietnamese American elected to a state office.

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Senators John Kerry and John Edwards answered questions pertaining to US immigration issues at the Democratic presidential debate sponsored by the Los Angeles Times and CNN last week.

Kerry contended that the US needs immigration reform that doesn't exploit workers in America, like he says President Bush's plan will. Kerry said he wants to have a full immigration reform plan that involves earned legalization, advanced technology and support along the border, cooperation with Mexico's President Vicente Fox in order to have a functional guest-worker program and crackdowns on people hiring illegal immigrants.

Edwards said that the only right thing to do for immigrants who are hard working and responsible is to let them earn their citizenship.

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Immigration is on the forefront of some candidates' minds of the democrats running in Maryland's 6th District congressional primary. Candidate James Daniel Benson has voiced his concerns about the number of illegal aliens in the country, saying they have driven down wages for US workers and contributed to the threat of terrorism. Candidate Ty Unglebower has said that if elected he would see that more emergency workers in the 6th District received homeland security funds.

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The Illinois Coalition for Immigration and Refugee Rights is accusing Republican US Senate candidate Jim Oberweis of Aurora, Illinois, of using undocumented immigrants as a scapegoat in his scare-tactics filled campaign based on his anti-immigration views. Oberweis has run two TV ads against illegal immigration that are angering immigrant advocacy groups. He focuses both ads around the 10,000 illegal

immigrants a day he says are entering the United States. Oberweis' campaign recently faxed out a *New York Times* story in which Oberweis discusses his anti-immigration views.

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11. Guest Commentary: Capped Out - Where Do We Go From Here? 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. in any way.

Announcing the obvious with an air of discovery, the US Citizenship and Immigration Services (USCIS) told the world on February 17,2004 that it had received enough H-1B petitions to meet FY 2004's cap of 65,000 new workers. USCIS will turn back any new H-1B petitions for first-time employment that come in after February 17th. Employers will have to wait until April 1 before filing a petition requesting new FY 2005 H-1B approval with an October 1st validity date. That is what we know right now. Capped out, where do we go from here?

No visa was more closely linked with the high tech boom of the late 90's than the H-1B and none has come under shaper challenge or closer scrutiny since the bubble burst. As the economy remains sluggish, with the specter of a jobless recovery casting a pall over Wall Street's revival, the H-1B has become a lightning rod for critics. The charge that unscrupulous employers import cheap labor to displace Americans is not a new one; indeed, it pre-dates the H-1B and is as old as immigration itself. Hard times have breathed new life into these old accusations, making them more threatening and believable. Even the companion L-1 intracompany transferee visa that, until now, has managed to fly quietly under the radar is threatened by the general turbulence. What is most striking about recent Congressional hearings on the L-1 is the extent to which critics seem most upset over alleged H-1B abuse. Indeed, the most damning charge flung at the L is that employers are turning to it precisely to avoid H-1B restrictions. That is why restrictionists want to reconfigure the L in the image of the H. Those who seek to drive out foreign workers do not distinguish between the H and L visas. Their rejection of the H leads them to disavow the entire body of immigration law whose purpose is to arm the US to engage in a global competition for talent and people.

How Congress deals with the H-1B will shape the future of business immigration for years to come. If we cannot articulate a rational policy here that serves the nation well, we will not be able to do it anywhere else. The ongoing H-1B debate is really about the direction that the American economy will take in the digital age. Members of Congress worried about re-election now clearly think that a lowered H-1B ceiling will stem the flow of good paying jobs out of their districts. The law may distinguish between dependent and non-dependent H-1B employers, but most legislators do not. They will tell anyone who asks that the H-1B is to be used as a visa of last resort only when there is a demonstrated shortage of US workers with needed skills. The fact that most H-1B employers have to make no such showing would come as a rude and most unwelcome surprise on Capital Hill.

Business and immigrant advocates have already begun lobbying Congress for a higher H-1B cap. If there is a rationale for the 65,000 number, it remains America's

best-kept secret. The problem with these fluctuations in the H-1B cap is not primarily one of numbers, but of uncertainty. In this kind of institutional indecision, where the rules of the game change every few years without rhyme or reason, it is impossible for American employers of H-1B workers to engage in intelligent planning that seeks to maximize the benefit of their presence. Restrictions on where they can work, how often they can travel, what kinds of jobs they can perform-all these inject rigidity and artificiality into the economy that serves no purpose other than to empower those who police such activity. This kind of micromanagement does not create wealth, produce jobs, or make employers more competitive. Beyond all of this, it is sheer fallacy to look at the H-1B quota in isolation from the need to create a rational and simplified labor market control system. Failing to do so ignores the basic truth that employers do not recruit for 3 or 6 years; they are looking for employee who will be around for the long haul. It makes no sense to expand the H-1B quota without doing something to enable these same employers to retain the very H-1B beneficiaries they have trained after their authorized stay is up. If we do nothing about labor certification, any improvements made in the H-1B arena will be wasted. Frustrated employers will respond by taking the logical step of decreasing H-1B sponsorship and sending the jobs overseas. Only low-wage, English-speaking havens, like India, will benefit.

The inherent difficulty of settling upon any cap number suggests that perhaps the focus of the debate belongs elsewhere. All H-1Bs are not created equal. What is important is not how many H1B workers come, but what kind of H-1Bs come. If the economy needs certain skills in certain jobs, then it is these types of H-1Bs that should be favored without any limit. Correspondingly, if the economy has a surplus of expertise in a designated discipline, then, until a shortage develops, no H-1Bs of this type should be allowed. Whatever the end result, any cap on H-1B admissions should not be a political but an economic decision arising out of what the economy needs. The amount of red tape and dollars that are now required to sponsor an H-1B worker is insane but not particularly surprising given who makes the rules. This is what happens when Congress senses there is a problem, but cannot really figure out how to correct it without any help from either the regulators or the regulated. Legitimate users of the H-1B program must acknowledge its underlying flaws and try to be a part of the solution, rather than never yielding an inch. Honest opponents must recognize that the H-1B is essential for American companies to be diverse, seamless and productive in a global economy where wage pressures operate in a transnational context.

Any new H-1B cap must be the product of negotiation and consultation. It should be set on a country-by-country basis that varies as the facts and circumstances of America's bilateral economic relationships vary. Only when we have a cap that puts the economic interests of America first will any such restriction serve a useful purpose. The number of H-1Bs from Venezuela need not be the same as the H-1B influx from Canada, nor should it be since America's commercial links with each are fundamentally dissimilar. To argue, as some immigration advocates do, that this would result in some favored nations getting a disproportionate percentage of the overall H-1B visa allotment reflects an alien-centered view of the H-1B that cannot be reconciled with vigilant protection of the American national interest. To counter this, why not allow unused H-1B visa numbers from one nation to be used by H-1B applicants from an oversubscribed country, much as Congress did to wipe away chronic immigrant visa backlogs for China and India? Beyond that, there is no entitlement to the H-1B and access to this program should be earned through the extension of reciprocal benefits and trade concessions offered to the United States by

those countries whose citizens and economies benefit from, indeed depend upon, its continued existence.

The recent Free Trade Agreements signed with Chile and Singapore, which have the effects of taking away 6,800 H-1B visas, more than 10% of the total, and count against the cap in the 1st and 7th years, make H-1B admissions from these countries dependent on how many Americans in these same occupations are allowed to work there. Here is an interesting model that transforms the H -1B visa into a tool for American penetration of emerging foreign markets. Washington did not set the cap on H-1Bs from Singapore and Chile alone, but all concerned trading partners in concert who decided how much global mobility they would allow. What works for Chile and Singapore should work for other nations should work for other nations with whom we do business on a regular basis. Allowing an H-1B worker from India or China the freedom to work in the United States in H-1B status should be a conscious decision to share the fruits of our national sovereignty and prosperity with allies whose citizens have the talent to help us; in turn, they should be prepared to level the playing field by opening their markets to American capital. The extent of H -1B admissions from any particular country would, as with Chile and Singapore, be the subject of bilateral conversations that treat the controlled movement of people as an asset to be maximized, not a problem to be controlled.

Does the economy have the same need for all H-1B occupations? The question answers itself. Without the need for Congress to do anything, USCIS can use the authority it already has under the Negotiated Rulemaking Act to convene experts from business, labor, academia, professional societies, ethnic groups and the immigration bar to prepare a list of occupations worthy of H-1B pre-approval. This is precisely what USDOL has long since done with labor certification in the form of its "Schedule A". The creation of such a list for H purposes will keep jobs at home, protect American workers, and benefit emp loyers who can afford to increase domestic hiring. Annual revision of the list will keep it current. What about those occupations that do not make it onto such a list? Do they lose out entirely? No, but their H-1B visa would be valid for only one year, not three. They would not be exempt from the presumption of entering the US as an intending immigrant. Section 214(b) of the Immigration and Nationality Act would apply. Only those occupations pre-approved for H visa treatment would continue to benefit from the doctrine of dual intent under which H visa holders can come temporarily to the US while exploring green card options after arrival. There is nothing particularly radical in such notions. This is precisely how the Singapore and Chile Free Trade Agreements deal with the issue.

The ultimate protection for any worker, regardless of where they come from, is the job mobility that comes from having a genuine stake in society not dependent on any particular employer. In the American Competitiveness in the 21st Century Act, Congress endorsed the concept of H-1B portability, but the law still takes only a few baby steps down this road. How about taking some giant ones? Why not allow the H-1B alien to file the petition in his/her own name, much as they can now self-petition under the national interest and extraordinary ability immigrant visa categories? The resulting H-1B approval would then truly belong t the alien visa holder rather than to the employer who immediately loses any leverage that the market would not otherwise provide. Armed with such a weapon against unreasonable employer demands, the H-1B alien has no further need for protection by USDOL. The entire forest of protective regulations inspired by the American Competitiveness Workforce Improvement Act instantly becomes irrelevant. Honest employers with well paying

jobs will still get the workers they need. Give H-1B workers ownership of the visa so that they can vote with their feet to look for greener pastures when they perceive themselves to be the victims of mistreatment. When this happens, once the H-1B becomes truly mobile and imbued with spirit of capitalism, no further justification for keeping the labor condition application can possibly present itself. It will then be a failed experiment whose time has come and gone.

The benefit for different kinds of H-1Bs should not blind us to the transparent need to change their method of delivery. That is why we need a Blanket H-1B program much as we have a Blanket L intracompany transferee program. Once USCIS approves a Blanket H petition, the USDOL would be asked to certify a labor condition application and the alien beneficiary could then apply for the visa at the US consulate in their home country. This is precisely how the Singapore and Chile H-1Bs work since neither case requires prior USCIS petition approval. Once USDOL approves the employer's attestation, the US Consular authorities need only decide whether the prospective US job is a professional occupation requiring the relevant university degree that the alien has earned. Eligibility for this Blanket H-1B should depend on the number of H-1B petitions that USCIS has approved for the US employer in the past year, the percentage of full-time equivalent H workers in their employ, and a demonstrated ability to pay the prevailing wage No H-1B dependent employer, nor any company found guilty of a willful or material labor condition application violation, could participate in the Blanket H-1B program.

To do most, or even part of this, we will all have to take a huge leap of faith and start talking not just to ourselves but reach across the aisle to adversaries who do not agree or even like us. Unwilling to do that, not much will happen. Now that the H cap has been reached, where we go from here depends on our ability to come to terms with the central reality that an immigration system that most Americans do not understand as being in their best interest will never prosper or long endure. It is not a matter of H-1B numbers or more dollars. Neither a higher H cap, nor more dollars, nor an unlimited cadre of USCIS adjudicators can make an H visa regime work that does not place serving the national interest and the US economy as its first, last and only priorities. The choices are ours. What happens next depends on us.

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12. Guest Commentary: Opposition to Proposed USCIS Fee Increase, By Paul Parsons

The following letter was written by the State Bar of Texas Committee on Laws Relating to Immigration and Nationality in response to the proposed fee increase for USCIS applications. The comment period for this proposal has since passed.

March 8, 2004

Director
Regulations and Forms Services Division
Department of Homeland Security
US Citizenship and Immigration Services
425 I Street NW, Room 4034
Washington, DC 20536

Re: CIS No. 2233-02
Comments on Proposed Fee Increase

Dear Madam or Sir:

I am writing this letter on behalf of the State Bar of Texas Committee on Laws Relating to Immigration and Nationality to share our concerns about the recent proposed fee increases for the processing of immigration applications and petitions as reported in the Federal Register. The Committee on Laws Relating to Immigration and Nationality is comprised of lawyers, social service providers, and community members concerned with issues relating to immigration. The Committee studies current and proposed laws pertaining to immigration and nationality, and the impact upon the public arising from these laws. We make recommendations for improvements to our country's immigration laws.

In January of 2004, the United States Citizenship and Immigration Services proposed raising the application fees. We write to express our strong opposition to the proposed fee increases recently reported in the Federal Register. Almost a year ago Eduardo Aguirre, Jr., Director of Citizenship and Immigration Services, told Congress that his agency would reduce the application backlogs to six months or less by 2006. A recent report from the General Accounting Office states that 6.2 million applications were pending at the end of September 2003, a fifty nine percent increase from the 3.9 million awaiting action two years earlier. This delay occurred despite a $160 million dollar allocation by the Congress to reduce these backlogs.

We are familiar with the tremendous backlogs that characterize the US Citizenship and Immigration Services ("USCIS"), and oppose any further fee increases without a serious effort to first ease the backlogs and competently adjudicate applications currently pending before this agency. United States citizens and permanent residents who have paid for the adjudications of immigration petitions and applications filed for their parents, spouses, and children are not receiving decisions for several years on mostly routine applications. United States employers are forced to wait between six months to several years on applications filed to seek temporary or permanent status for key foreign personnel. In addition, voluntary agencies that provide assistance to indigent immigrants are tremendously concerned about the impact of these fee increases on lower-income indigent immigrants who find it very difficult to adjust their status or naturalize due to such high costs. A large number of immigrants served by these non-profit community based organizations will be discouraged from filing applications.

In the past, the predecessor INS agency, raised fees several times while promising to deal with substantial backlogs, but the increased fees have done nothing to alleviate these problems. According to the Federal Register, the amount of the fee increases are extremely high, increasing by over 25% for most applications, without a resulting enhancement in services. While the US CIS states that such an increase is necessary to meet the requisite cost of completing new and pending applications, a study by the General Accounting Office states that the US Citizenship and Immigration Services did not know the cost of completing new or pending applications or its own future administrative costs.

While our Committee welcomes Director Aguirre's pledge to substantially reduce backlogs and provide improved customer service, we have not observed any

improved US CIS efforts. The backlogs grew longer during this past year. The CIS seeks further cost of living adjustments in the future. Without demonstration of the ability to reduce backlogs and provide appropriate customer service, such future fee increases without Congressional oversight seem irresponsible.

While our Committee shares your concerns regarding the quality of service and reduction of backlogs, it is unclear how the proposed fee increases will address that issue. Our Committee is further concerned with a differential and disparate impact of these fees on indigent immigrants. We recommend that the Service refrain from implementing any new fee increases until a specific plan is underway to appreciably reduce the tremendous backlogs now in place.

Respectfully submitted,

Paul Parsons
Chairman

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13. Haitians Repatriated Despite Continuing Violence

Over 900 Haitians have been repatriated since February 21, 2004 despite the political chaos and violence in Haiti. The Bush administration has defended its repatriation policy by saying that it is a necessary course of action to deter an exodus of Haitian refugees. Immigration advocates criticized the President for his lack of concern for Haitians.

Executive Director of the Florida Immigrant Advocacy Center stated that President Bush's "message to Haitians is clear: 'Haitian, your lives don't count.' At the same time that we are urging US citizens to immediately leave Haiti and we are sending in Marines to protect the embassy, we are repatriating Haitians without due process to a country with no rule of law."

Lawmakers have proposed helping Haitians who arrive in the US. Senator Bob Graham (D-FL) said that any Haitians intercepted at sea should be given the chance to apply for refugee status. On March 1, 2004, Representative Peter Deutsch (D-FL) introduced legislation to allow Haitians to be granted temporary protected status.

Haitian-Americans have stated that President Bush has lost their support for his reelection campaign for not helping the fleeing Haitians and for not doing enough to help Haitian President Jean-Bertrand Aristide.

While the US is refusing to allow most of these Haitians claim refugee status, other countries are refusing to return the Haitians to their home country. Over 100 Haitians fled to Jamaica, whose government refuses to return them to Haiti due to "the present environment of upheaval and mayhem," according to a spokesman from Jamaica's Ministry of National Security.

During the month of February, the US Coast Guard picked up 704 Haitians at sea, compared with 157 in February 2003. As a result, the Coast Guard has formed a blockade of ships to keep Haitians from fleeing violence in their country. The blockade has infuriated human rights groups who say the blockade is discriminatory

and illegal. Human Rights Watch and other activist groups said sending Haitians back while fighting continues violates international protocols barring the return of refugees to a place where their lives or freedom are in danger.

This week, the Coast Guard intercepted and returned to Haiti 11 people in a sailboat off the Florida coast, and returned three Haitians picked up earlier who had been interviewed but found to have no credible fear of danger in their homeland.

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14. USCIS Receives Failing Grade

A coalition of immigrant rights groups, including the New York Immigration Coalition, the Florida Immigrant Advocacy Center, the Illinois Coalition for Immigrant and Refugee Rights and the Coalition for Human Immigrant Rights of Los Angeles, issued a report card for the Bush administration's immigration policies. While the administration received an 'A' for its position on immigration, it also received an 'F' for failing to reduce the massive backlogs for the processing of citizenship applications and for proposing to increase processing fees.

Backlogs and processing delays for those seeking citizenship or legal permanent residency have continued to increase. There are currently 6.2 million petitions awaiting adjudication and the wait time for naturalization is close to three years.

The Bush administration has proposed a nearly $100 million cut in USCIS funding in an effort to reduce the backlog. The cutback would be recovered in part by increasing processing fees.

USCIS was also given a grade of 'incomplete' for its efforts to change the citizenship test to gauge more accurately an immigrant's command of English and of American culture and government. The coalition stated that if the test is changed, ten percent of those who take it will probably fail.

The coalition also said that the division of the INS into three parts - one for investigations within the US (ICE), one for the border (CPB), and one for the adjudication of immigration applications (USCIS) - has allowed for a lack of communication between the new agencies, which has led to the harassment of immigrants by investigators. Cases have been reported where immigrants are picked up by investigators and charged with being in the country illegally, when they are actually waiting for adjudication of a petition for citizenship or permanent residence.

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15. GAO Finds Visa Mantis is Delaying Visa Processing for Science Students and Scholars

The General Accounting Office (GAO) released its report studying visa applications by science students and scholars. Each year, thousands of international science students and scholars apply to enter the US on student and exchange programs. These students bring diversity and intellectual knowledge to the US, as well as benefit the US economy, according to the GAO. At a hearing held by the House Committee on Science on March 26, 2003, witnesses expressed their concerns about

the length of time it takes for science students to obtain a visa. Because of delays in the visa process, the US may be losing the top international students to other countries.

The GAO study, titled "Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars," found that because the State Department has not established specific criteria or a time frame for visa processing, the time it takes to adjudicate a visa depends on whether the visa applicant needs to undergo a security check, known as Visa Mantis, which was designed to protect against sensitive technology transfers.

By randomly sampling Visa Mantic cases from April to June 2003, the GAO found that it took an average of 67 days for the security check to be processed and for the State Department to notify the consular post. GAO visits to posts in China, India and Russia in September 2003 found that many Visa Mantis cases had been pending for 60 days or more. Consular officers said that they lacked clear guidelines on when to apply Visa Mantis checks and did not receive feedback on whether they were supplying enough information in their Visa Mantis requests.

The GAO concluded that delays were caused by the way in which Visa Mantis information was disseminated, insufficient instruction and feedback to Consular Officers and that the FBI's systems are not interoperable with DOS's systems.

The full report is available online at http://www.gao.gov/new.items/d04371.pdf.

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16. Uncontrolled Immigration Yields Heath Care's Critical Financial State, According to Study by Anti-Immigration Group

The Federation for American Immigration Reform (FAIR) recently released a report entitled "The Sinking Lifeboat: Uncontrolled Immigration and the US Health Care System," that stated how immigration policy is a key factor in a growing increase in the uninsured and the financial troubles encumbering public health care systems nationwide.

The report detailed how one out of every four uninsured people in the United States is an immigrant, how almost half of immigrants either have no insurance or have it provided to them at taxpayers' expense; and how in some hospitals, two-thirds of total operating costs are for uncompensated care for illegal immigrants.

According to the report, as states are cutting their health care budgets, high rates of immigration are straining the health care system. It said that hospitals near the US-Mexican border reported losses of close to $190 million in uncompensated costs for treating illegal aliens in 2000. These costs have caused some hospitals to reduce staff, increase rates, cut back services and close maternity wards and trauma centers.

FAIR officials contend that the number of legal and illegal aliens who arrived in the US from 1994 to 1998 and their offspring accounted for 59 percent of the growth in the size of the uninsured population in the past 10 years. They also maintain the position the US politicians need to consider immigration policies and other fundamental causes for the health care crisis in the United States.

The following is a link to the report:
www.fairus.org/news/NewsPrint.cfm?ID=2379&c=55.

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17. Orphaned Immigrant Receives Recognition and Support of US Legislators

Malik Jarno, a 19-year-old orphaned immigrant from Guinea, West Africa, who was recently removed from York County Prison and placed in York's International Friendship House impressed some of the nation's legislators during his visit last week to Washington, D.C. Jarno spoke to the directors of the Women's Commission for Refugee Women and Children about his situation and got quite an emotional response, according to statements his pro-bono attorney, Christopher Nugent, made to the press.

The Board of Immigration Appeals agreed to reopen his case on Monday, December 22, in part based on new evidence from experts in Guinea who confirmed that Jarno would be in real danger if deported to Guinea where he would be a homeless orphan subject to abuse on the streets of his home country.

After holding a half-hour conversation in French with Norway's ambassador, Jarno asked Nugent to ask the ambassador to accept him if he's deported. Nugent told the press that Jarno is extremely worried about his future. United States legislators that have promised to support Jarno's effort include US Representative Todd Platts, R-York County, US Senator Rick Santorum, R-PA, and US Senator Ted Kennedy, D-MA.

On February 20, the Board of Immigration Appeals agreed to reopen his case based on new evidence. Jarno is currently awaiting a new hearing before an immigration judge, although no date has been set.

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18. Rare Win Comes for Asylee in Atlanta

Bahman Sigari and his family were facing deportation in Atlanta following Bahman's detention. Bahman, his wife, and two children were all nationals of Iran. The couple's two other children were American citizens.

The case came before the immigration court in Atlanta. Atlanta is considered to be the hardest place in America to win an asylum case. Of the 73,000 asylum cases handled by the nation's immigration courts in 2000, immigration judges in Atlanta heard 734.

Bahman faced one of the toughest Atlanta immigration judges, William Cassidy, for his asylum hearing. In the past four years, Cassidy has granted only 34 asylum requests out of a total of 593. While the national average for the 220 immigration judges is to deny roughly two asylum cases for every one grant, Cassidy rejects more than 10 asylum applications for every approval. He is also known for his quick docket, deciding approximately 800 cases more than his closest competitor in the nation a few years ago.

A report four years ago found that most immigration judges previously worked for the government. However, those judges who came from private practice were 50

percent more likely to grant asylum than those who had worked for the government. In Atlanta, all three judges come from a government background.

Concern about the possibility that an asylee is lying causes IJ's to increase the burden of proof, despite a Supreme Court decision 17 years ago that appeared in fact to lower the burden of proof for asylees. The decisions become an issue of weighing the possibility of lying with the possibility that the asylee will face persecution upon return to his or her home country.

For Bahman and his family, concern centered on his wife's conversion and baptism to Christianity the day after his arrest by INS officials. However, Cassidy found her testimony, as well as that of her daughter who had also converted, to be true. Following a fingerprint check, the Signari family will be allowed to remain in the United States.