

Siskind's Immigration Bulletin
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Siskind Susser serves immigration clients throughout the world from its offices in the US, Canada, Mexico, Argentina and the People's Republic of China. To schedule a telephone or in-person consultation with the firm, go to <http://www.visalaw.com/intake.html>.

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1. Openers

Dear Readers:

I'm back in the office after going to Capitol Hill to lobby on S. 2130, the legislation that will extend the Conrad 30 waiver program for foreign physicians. Certainly that bill is important and as it makes progress, we'll report on its movement. But the one thing that becomes more and more apparent to me each time I go to Washington to advocate on an issue is how important such visits are in influencing the political process.

I've heard one person on the Hill say that one personal visit is worth a thousand letters on an issue. That might be a slight exaggeration. But the point is still valid. One who bothers to take time out of their schedule and pay for a trip to the Capitol is presumably much more concerned about an issue than someone who writes a letter or phones (or does nothing at all). And it is far easier to explain a complicated issue in person than to depend on a Congressional aide to figure it out from a letter.

That certainly was the case on this trip. I visited with two physicians representing hospitals that are deeply affected by the physician shortage in the US. We had the opportunity to visit with three Senators' offices and three members of the House of Representatives. In each case, we first had to spend a few minutes introducing the Congressmen and their aides to the complicated topic of J-1 home residency requirements. But once we were able to get that out of the way, we were able to explain what some of the current problems are and how legislation could be helpful. We also were able to ask for the Senators and Representatives to sign on to the bills as co-sponsors and to call their colleagues to urge support.

You will find it helpful, of course, to advocate for positions that can draw bipartisan support and which a member of Congress can endorse knowing that they're not going to get into trouble. But even if your position is one that a member of Congress philosophically opposes, it still helps to provide an alternate view. For example, a member of Congress may feel more constrained about vocally speaking out against immigrants when he or she knows that people in his state or district really feel opposed to such views. They may be less likely to join an anti-immigration caucus and co-sponsor anti-immigration legislation even if they won't change their votes.

I still encourage everyone to write letters and make phone calls. These forms of communication still make a difference. But every once in a while when there is a big issue, consider getting on a plane and going to Washington. It can make a huge difference.

Speaking of Capitol Hill, the Democrats introduced their major immigration reform package, five months after the President. Of course, there are serious doubts about either proposal moving anywhere this year. But the plans set the tone of the debate and will no doubt be major topics of discussion after the elections. So they should not be ignored.

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,

2. The ABC'S Of Immigration: R-1 Religious Worker Visas

Religious workers seeking to temporarily enter the US to pursue work in their field are likely to enter using the R nonimmigrant visa.

Who qualifies for an R visa?

To qualify for an R visa, the applicant must be

- A minister,
- A person working in a professional capacity in a religious occupation or vocation, or
- A person who works for a religious organization or an affiliate in a religious occupation who has been a member of the religious group for at least the two years immediately preceding the application.

What is a "Religious Denomination"?

A religious denomination is defined as a religious group that have some form of ecclesiastical government, a common belief or statement of faith, some form of worship, a set of religious guidelines, religious services and ceremonies, established places for worship, religious congregations or comparable evidence of a bona fide religious organization.

What are examples of "Religious Occupations"?

A religious occupation is an activity relating to "traditional religious functions." Examples of religious occupations include liturgical workers, religious instructors, religious counselors, cantors, workers in religious hospitals or religious health care facilities, missionaries, religious translators or religious broadcasters. Maintenance workers, clerks and fundraisers who work for religious institutions are not eligible under this category.

What is a "Religious Vocation"?

A religious vocation is defined as "a calling to religious life". This calling must be shown through the demonstration of commitment to the religious denominations, such as taking vows. Examples of this include nuns, monks, religious brothers and sisters.

How do I apply for an R visa?

This is an unusual category. If an applicant is outside the US, he or she can apply for an R-1 visa without prior USCIS approval. The applicant can go to the appropriate consulate and present the required evidence and be issued the visa on the spot.

If a person is in the US and wishes to change from one nonimmigrant category to R-1 status, an application must be made with the USCIS. This is done by submitting Form I-129, the R Supplement and a number of supporting documents showing eligibility for the category. Also, extensions of stay in R-1 status are made on this form.

What evidence needs to accompany an R visa application?

Among the most important evidence that must be presented by the applicant is documentation of the sponsoring religious group's tax exempt status or eligibility to receive tax exempt status in the US.

Under the Immigration and Naturalization Act (INA) § 101(a)(15)(R) and 8 CFR § 214.2(r), religious entities applying on behalf of religious workers must be "exempt from taxation as organizations described in IRC § 501(c)(3) as it relates to religious organizations." The regulations require these organizations show they either are exempt under 501(c)(3) as a religious organization, such as a church, or have the documentation required by the Internal Revenue Service to be eligible for exemption as a religious organization under 501(c)(3). The regulations include these two separate options because according to IRS Tax Publication #1828, titled "Tax Guide for Churches and Religious Organizations", churches are considered automatically exempt from taxation and are therefore not required to obtain a formal 501(c)(3) determination letter. Note that this requirement has been the source of many problems recently regarding religious workers. The Department of Homeland Security believes that there is considerable fraud occurring in the religious worker category and has taken very restrictive views on which institutions are eligible to apply for such visas.

The sponsoring organization also needs to submit a letter on behalf of the R-1 visa holder. This letter should outline the applicant's two-year minimum membership, including where that membership occurred, in or out of the US. It should also include a statement that the foreign-based religious group and the US based religious group for which the applicant will work belong to the same denomination. It must state the name and location of the organization in the US for which the applicant will work. Finally, it should outline the applicant's qualifications and salary.

How long can I have R status?

The maximum stay in R-1 status is 5 years. A person can obtain R-1 status again after remaining outside the US for one year before making another application.

What visa status would the spouse and children of an R-1 nonimmigrant receive?

Spouses and children of R-1 nonimmigrants are classified as R-2. They are not permitted to work unless they have their own work visas.

Are there any differences between the special immigrant religious worker category for green card applicants and R-1 non-immigrant visas?

The most important difference between the two religious worker categories is that the R-1 visa is temporary and the special immigrant religious worker visa is permanent. An applicant for a green card as a special immigrant religious worker must have been working for the religious group for at least two years prior to making the application. This work may be done either in or out of the US. In most cases where the work is done in the US, the person has been in the US on an R-1 visa. Another difference between the two is the forms involved. A special immigrant religious worker applies using Form I-360 in place of the I-129 and R supplement.

The evidence that should accompany the special immigrant religious worker petition and the role of the beneficiary within the religious organization are the same as for the R-1 applicant.

RECENT DEVELOPMENTS

As noted above, the R-1 visa category has been the source of considerable tension recently. Immigration adjudicators have been interpreting immigration regulations to require that a religious organization must be classified as a church under IRC § 170(b)(1)(A)(i). This trend was first seen in Administrative Appeals Office (AAO) decisions in 2000, as reported by American Immigration Lawyers Association (AILA) members. Similar problems then began to show up at USCIS service centers. If a religious organization could not demonstrate that it was a church, the petition was denied.

In response to complaints regarding the 'church' classification issue, the White House held a meeting on December 9, 2003 with several religious organizations. White House representatives and the CIS General Counsel's office agreed that immigration regulations were being misinterpreted by adjudicators. On December 17, 2003, USCIS Associate Director William R. Yates issued a memorandum that made an attempt to rectify the situation. The memo states that a religious organization classified as a church under the IRC is only one method of demonstrating that the petitioner is a qualifying religious organization. The memo further states that organizations other than churches can be considered qualifying organizations if it can be demonstrated that their tax exemption is due to religious factors and that the organizations are "organized for religious purposes and operate under the principles of a particular faith, rather than solely for education, charitable, scientific and other 501(c)(3) qualifying factors."

An additional development is an Administrative Appeals Office (AAO) decision dated April 20, 2004 that reversed a Nebraska Service Center (NSC) decision denying a special immigrant religious worker petition (I-360). While the decision affected a religious immigrant worker, the decision may positively affect decisions for religious nonimmigrant workers (R-1) workers. In its decision, the AAO pointed out that the NSC was incorrect in its decision to deny the petition because of a lack of evidence establishing that the organization was a "bona fide religious organization as recognized by the IRS" as the petitioner had submitted a second IRS letter that explicitly stated that the petitioner was a religious organization. The AAO also drew attention to portions of the IRS Publication 1828 that were submitted by the petitioner on appeal that pointed out that the IRS does recognize religious organizations that are not churches that may be tax-exempt under 501(c)(3). The AAO stated, "Therefore, the petitioner has overcome the finding of the [NSC] director that the petitioner is not a bona fide nonprofit religious organization." The AAO concluded that the NSC's determination that "only churches qualify as religious organizations is overly broad and is, therefore, withdrawn."

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 am here on H1 visa. I came on B1/B2 and had it changed to H-1B. I want to apply for green card. My H-1B is still single entry. I have been told that all the experience and qualifications I gained with the present employer cannot be used if I want to get my green

card from the same person and that will create a difficulty for my green card. What can i do?

A - You are correct that experience gained with the employer sponsoring a labor certification cannot generally be used. You'll want to advertise the position to require no more than what you had when you started the job. There are some exceptions if you can show that the job you are in is truly different than the job were you gained the experience. The alternative is to get a different employer to sponsor you. In that case, all prior experience, including experience gained with your current employer, can be used.

Q - I've been in the USA for 18 months under a tourist visa. I got inside of the country March 2002 and got a permission for 6 months. I renew my permission twice what gave me the legal right to stay for 18 months. I left USA before my last I-94 expired in September 17 2003. I'm planning go back to USA in Middle of June. I'd like to know if I might have a problem to get inside of the country under a tourist visa again.

A - The length of time outside the US will help. You'll be pressed to show that you have the finances to stay in the US for a while and that you still have strong ties to your home country. But having complied with your visa the last time and remaining away from the US for many months is going to make things somewhat easier.

Q - Can the applicant send the passport update renewal information to the service center while the I-539 application for extension of stay is pending? Will the update info be accepted at the time of adjudication or the service center only accepts the evidence sent initially?

A - Getting a case updated is very tough after the initial filing. Once electronic filing of I-539s starts later this month, this might be easier, but we'll have to wait and see. You should still notify the USCIS of the change and keep documentation of this notification so if you have problems later on, you can at least say you used your best efforts to keep the USCIS informed.

Q - I am a "waived" J-1 teacher with a J-2 dependant, EAD working spouse. Our visa expires this summer. I have an offer to be a J-1 research scholar next year. If I get my new visa while on vacation at my home country, does my wife have to start over with the process of obtaining an EAD again?

A - This is a grey area, but note that the EAD is valid for the duration on the card OR the validity of the J-2 status. If that status terminates, she needs a new EAD. So the issue will be whether your J-1 terminates. Sounds like your status as a J-1 will continue so I would think you would be okay. But I'm copying a colleague who may have some other thoughts.

Q - I am a tax attorney/CPA. I have a client who has a green card and has been living abroad. He is now applying for citizenship and has stated that he must live 6 months and 1 day a year in the US. Is this correct? For how many years must he do this? I have referred him to your office to assist him. I have in the past Prepared his tax returns as a full time resident of Mexico where he lived.

A - The rule is not that simple. Basically, there are a couple of residency rules that need to be met.

1. The applicant must have been physically in the US for at least 2.5 years out the five years prior to applying to naturalize
2. The applicant must have no absences of more than six months straight unless they have very good reasons for that and no absences of more than a year straight (good excuse or not).
3. The applicant must reside for 90 days in the district where they will be applying.

Q - Can illegal immigrants apply for a SS # ? If they do, are there any ramifications to be concerned with?

A - No. An applicant must be authorized to work in the US in order to qualify for a Social Security Number. Even many people are legally in the US on visas have difficulty getting Social Security Numbers.

4. Border and Enforcement News

At a speech last week in Washington, Customs and Border Protection Commissioner Robert Bonner announced an immigration security initiative that will send inspectors to airports abroad to screen visitors coming to the United States by plane. This pilot program will begin within the month of May in Warsaw International Airport. The mission of the initiative, according to Bonner, will be detecting security risks and immigration fraud.

Customs and Border Protection will measure the success of the initiative in six months and plans to extend it to other airports. Bonner said countries and airports are voluntarily obliging and Warsaw International was the first to ask to participate.

U.S. officials told Reuters last week that the U.S. is planning on giving the world police body Interpol information on about 400,000 lost or stolen U.S. passports to increase security. The passports involved were each issued to someone who later reported them lost or stolen, rather than blank U.S. passports, which U.S. officials say seldom go missing.

Interpol officials told Reuters that Interpol's database contains serial numbers of 1.1 million stolen travel documents of which 188,609 were black papers in which individuals can insert photographs, descriptions and aliases, therefore posing a special risk. A new system will enable police and immigration officials to check whether a travel document is stolen by simply typing its number into a computer.

5. News From The Courts

Matter of Jose Castaneda-Gonzalez Board of Immigration Appeals

Jose Castaneda-Gonzalez appealed the decision of an Immigration Judge that found him removable to the Board of Immigration Appeals (BIA). The BIA sustained the appeal and terminated removal proceedings.

On April 29, 1999, Castaneda-Gonzalez pleaded guilty in a Colorado court to a class 3 misdemeanor of harassment and was sentenced to probation.

The Department of Homeland Security charged Castaneda-Gonzalez with begin subject to removal because he had been convicted of a crime of violence as defined by the INA. The Immigration Judge assigned to the case relied upon police records submitted by the DHS.

In reviewing the Colorado Statute, the BIA found that the statute is divisible between "acts of physical violence (strikes, shoves, kicks) and lesser offensive touchings (touches a person or subjects him to physical contact)." The BIA has held that when a statute is divisible, it may look beyond the statute to consider the facts that appear in the record of conviction (Matter of Pichardo, 21 I&N Dec. 330, 334 (BIA 1996)).

The Board found that the police reports submitted were not part of the conviction and does not fall within the categories of evidence that can be used to establish a conviction under the INA. Also, Castaneda-Gonzalez did not plead guilty in the police report.

Therefore, the BIA found that the DHS failed to establish "by clear and convincing evidence" that Castaneda-Gonzalez was convicted of a crime under section 240(c)(3)(A) of the INA. Castaneda-Gonzalez's appeal was sustained.

6. Government Processing Times

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

Texas (04/30/2004): <http://www.visalaw.com/texas.html>
Nebraska (05/01/2004): <http://www.visalaw.com/nebraska.html>
California (05/01/2004): <http://www.visalaw.com/california.html>

7. News Bytes

USCIS stated at the AILA/Service Center Operations teleconference last week that it would hold any filings postmarked before April 30 that use the new filing fee rather than return them. It will return premium-processing cases postmarked before April 30 that use the new fee.

In a memorandum, the USCIS instructed that District Offices have to provide a new, corrected I-94 for cases in which the USCIS is responsible for issuing an I-94 with erroneous information. The USCIS will not correct I-94s issued by Customs and Border Patrol (CBP), but will direct individuals with erroneous CBP-issued I-94s to go to CBP for corrections. The memorandum is located at <http://www.aila.org/infonet/fileViewer.aspx?docID=12938>.

An immigration employee in Detroit was indicted by a federal grand jury on charges that he assisted immigrants become U.S. citizens in exchange for jewelry. When Robert Walton was employed in the Detroit district office of the former Immigration and Naturalization Service it was found that he engaged in illegal activity involving conspiracy to defraud the United States, bribery and aiding foreign nationals to unlawfully obtain citizenship. If convicted on all counts, he could be sentenced to up to 39 years in prison and fined \$1.25 million.

USCIS has announced that a new phone system is in the final stages of development that will allow customers direct access to information officers at the service centers for questions regarding pending cases and to facilitate problem resolution. Calls will be directed to service centers based upon a caller's responses to prompts in the Interactive Voice Response (IVR) system. The IVR menus are being restructured to facilitate the direct transfer of calls and to incorporate a considerable amount of enhancements that are being added. The rollout date for the new system is not yet set, but its implementation is projected for later this year.

The Republic of the Philippines and the United States have established a joint plan addressing the residential issues concerning certain Vietnamese nationals living in the Philippines since 1989. The two countries decided there needs to be a comprehensive humanitarian solution for members of this group, which is made up of approximately 1,855 Vietnamese asylum seekers living in the Philippines. The United States has agreed to conduct resettlement interviews for the majority of the group and will apply a generous refugee-screening standard during this interview. For those the US cannot interview or approve, the Philippines will make best efforts to offer residency consistent with its law.

On April 30, 2004, the new USCIS fee adjustment took effect. By law, USCIS must ensure that the fees cover the costs of providing immigration services and benefits. A recent cost analysis discovered that the fees did not cover the costs processing under the new post-September 11 guidelines.

The new USCIS fee schedule can be found at <http://uscis.gov/graphics/publicaffairs/newsrels/USCISFeeStructure.pdf>.

8. International Roundup

The Netherlands and Germany will be the top two choices as an estimated 5.5 million Polish people travel to other EU Countries in search of work over the next two years. According to research conducted for a Dutch television program, two million Poles will be traveling to other EU members to look for work, now that Poland joined the community, effective May 1. The Netherlands expect the biggest influx of workers from the 10 new member states to come from Poland.

The Hungarian cabinet decided last week to allow Swedish citizens free access to the Hungarian labor market. Sweden is the only current EU member state that will give immigrants from new member states unconditional access to its job market and welfare benefits.

The Board of Audit and Inspection (BAI) acknowledged that local governments and two overseas missions, including the South Korean embassy in Japan have issued between a total of 154,191 passports with erroneous identification codes between October 2000 and July 2002. In some cases the holders, of the passports were denied entry when traveling overseas. The BAI ordered the Foreign Affairs and Trade Ministry to recall all the passports and reissue new ones.

Saudi Arabia banned small companies from recruiting foreign staff in a bid to create jobs for Saudis and scale down the country's unemployed rate, since competition from foreigners made it difficult for qualified Saudis to find jobs according to labor officials. Officials are making an effort to emphasize the need to rationalize recruitment of foreign workers to balance the labor market.

9. Legislative Update

[H.R.4262](#): To provide for earned adjustment to reward work, reunify families, establish a temporary worker program that protects United States and foreign workers and strengthen national security under the immigration laws of the United States.

Sponsor: Rep Gutierrez, Luis V. [IL-4] (introduced 5/4/2004)

Committees: House Judiciary

Latest Major Action: 5/4/2004 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.4274](#) : Private Bill; For the relief of Rona Ramon, Asaf Ramon, Tal Ramon, Yiftach Ramon, and Noah Ramon.

Sponsor: Rep Carter, John R. [TX-31] (introduced 5/4/2004)

Committees: House Judiciary

Latest Major Action: 5/4/2004 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.4306](#) : To amend section 274A of the Immigration and Nationality Act to improve the process for verifying an individual's eligibility for employment.

Sponsor: Rep Cannon, Chris [UT-3] (introduced 5/6/2004)

Committees: House Judiciary

Latest Major Action: 5/6/2004 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[S.2381](#) : A bill to provide for earned adjustment to reward work, reunify families, establish a temporary worker program that protects United States and foreign workers and strengthen national security under the immigration laws of the United States.

Sponsor: Sen Kennedy, Edward M. [MA] (introduced 5/4/2004)

Committees: Senate Judiciary

Latest Major Action: 5/4/2004 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.2391](#) : Private Bill; A bill for the relief of Pongsakorn Kaewkornmuang.

Sponsor: Sen Hollings, Ernest F. [SC] (introduced 5/6/2004)

Committees: Senate Judiciary

Latest Major Action: 5/6/2004 Referred to Senate committee.

Status: Read twice and referred to the 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.

10. Campaign 2004

Matt Throckmorton, a Republican candidate for the third district of Utah, has been receiving a lot of publicity for his anti-immigration views. Throckmorton has been criticized for using the election to further his immigration agenda.

Throckmorton's agenda includes lobbying to overturn a pro-immigration policy that he once supported - a state law that allows undocumented workers to gain a Utah driver license using a Mexican consulate card as legal identification.

11. Democrats Roll Out Immigration Reform Plan

On May 4, 2004, Senator Edward Kennedy (D-MA) and Representatives Robert Menendez (D-NJ) and Luis Gutierrez (D-IL), introduced the "Safe, Orderly Legal Visas and Enforcement (SOLVE) Act of 2004" (S. 2381/H.R. 4262). According to the bill's sponsors, this comprehensive immigration reform legislation is intended to legalize workers, reunite close

family members in a timely fashion, regulate the flow of legal immigration by reforming the temporary worker system, strengthen worker protections and enhance national security.

When presenting the bill in the Senate, Senator Kennedy stated: "The bill we are introducing today will achieve the full reforms we need. A good first step would be to enact two bills that are already pending - the AgJOBS bill to reform the immigration laws for migrant workers, and the DREAM Act, to enable undocumented high school students to qualify for legal status so they can attend college...Let's at least get these bills done now. We cannot afford any more delays. I look forward to working with my colleagues to reform our immigration laws. It's time to make these long-overdue reforms happen."

Through the new bill, immigrants who are already present in the US, pay taxes and learn English could earn legal status. The Department of Labor estimates that the need for foreign labor will continue to increase in the coming years. The bill's sponsors argue that legalizing foreign workers already in the US would provide employers with a more stable workforce, improve wages and working conditions for all workers and protect immigrant workers for being exploited by their employers because they fear deportation.

The proposal would also provide for the timely reunification of immediate family members. Currently, the wait times for close family members to be reunited are long. A US citizen parent petitioning for Mexican children must wait approximately ten years and a US parent must wait 14 years to be reunited with their Filipino children. Legal permanent residents have even longer wait times. The bill's proponents believe that these long wait times have led to illegal immigration to the US as families are forced to be separated for long periods of time. If passed, the SOLVE Act would broaden the definition of "Immediate Relative" to include the spouses and children of legal permanent residents and stop the subtraction of Immediate Relatives from the annual cap on family immigration.

The SOLVE Act is also intended to protect immigrants by regulating the flow of immigration and by safeguarding workers' rights. The bill's sponsors believe that the current US immigration system encourages illegal immigration, fosters the growth of immigrant smuggling operations and leads to immigration fraud. The Act would create a temporary worker program as well as provide an opportunity for earned legalization. Through the temporary worker program, workers would receive the same protections afforded to US workers and ensure employer accountability.

The bill's sponsors are also touting the immigration proposal as a vehicle for enhancing national security. The plan's authors believe it will help by reducing illegal immigration and improving enforcement capacity by allowing enforcement agencies to focus on terrorists and criminals. Immigration documents issued under the program would include machine-readable, tamper-resistant biometric identifiers, which would also reduce crime by preventing the falsification of documents.

HIAS, the Hebrew Immigrant Aid Society, welcomed the introduction of the new bill. HIAS President and CEO Leonard Glickman informed the media that the organization "look[s] forward to working with the sponsors of the new bill, the administration, as well as Congress and community leaders committed to reform, to make our country safer and more humane through Comprehensive Immigration Reform." In 2003 HIAS endorsed Comprehensive Immigration Reform as an important organizational priority because American values and American security interests can be served by taking bold steps to solve the problem of undocumented migration.

12. 72-Hour Rule Gets Deported Immigrant Returned to the United States

Mei Ying Fong was ordered returned to the United States last week after Southern District Judge Alvin K. Hellerstien said immigration officials illegally deported her in September. The Chinese immigrant had been removed from the United States even though a contrary order was made.

Hellerstien determined Fong was denied due process because she was told to appear for a hearing on her removal but was then arrested, taken to an airport and deported to China. Hellerstein said in court that this action violated a federal regulation that states an undocumented individual taken into custody will not be deported less than 72 hours afterward without the consent of that person.

Fong arrived in the U.S. in 1995 and three months later sought asylum based on her claim that Chinese officials would retaliate against her for assisting a woman who was about to have a forced abortion under the country's government's one-child policy. Over six year period, the Bureau of Immigration and Customs Enforcement tried to arrange to hear Fong's asylum application and to hold hearings on her removal.

In September 2003, the Bureau of Immigration and Customs Enforcement scheduled a hearing on the adjustment application. However, rather than having a hearing, Fong was taken into custody upon arrival. After receiving a writ of habeas corpus, Hellerstein ordered the temporary stay of Fong's removal.

The order was not adhered to, however, when Fong was not removed from her plane headed to China. Hellerstien argued in court last week that the new regulations, in the form of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) passed in 1996, did not offer a time limit by which an individual who had been taken into the government's custody could not be removed. Thus, Hellerstien determined the 72-hour requirement had been abandoned.

Hellerstien pointed out in court that the intentions of IIRIRA were only to merge separate provisions for deportable immigrants, and that a change to the 72-hour rule was never intended.

13. Tennessee Proposal Would Deny Licenses to Immigrants

A measure proposed by Tennessee Governor Phil Bredesen that would prohibit some legal immigrants and all undocumented immigrants from obtaining Tennessee driver's licenses is gaining bipartisan support. The bill is opposed by two legislative groups: -those who want even tighter restrictions for immigrants and those who want to preserve immigrants' right to have a driver's license.

The measure would allow legal nonimmigrants and undocumented immigrants obtain a certificate of driving. The certificate would be used only for driving and to obtain insurance.

The certificate would not be used as official government identification and would expire at the same time an immigrant's papers expired.

Legal immigrants permanently in the US would still be able to obtain a Tennessee driver's license.

Under Tennessee state law, anyone aged 16 and up who can prove Tennessee residency is eligible to receive a driver's license. This has resulted in 58,000 driver's licenses being issued to individuals without Social Security numbers, according to Tennessee Department of Safety estimates. Many of these individuals are assumed to be undocumented immigrants.

Critics of the bill worry that non-immigrants with driver's certificates will be assumed to be illegal by law enforcement authorities who do not understand that only some of those in possession of driver's certificates are actually out of status.

Senator Bill Ketron (R-Murfreesboro), who is introducing the governor's bill in the state Senate, says that the bill addresses national security concerns because virtually anyone can now obtain a Tennessee driver's license.

The bill's advocates point to a recent raid conducted by immigration officials that resulted in the arrests of 25 undocumented immigrants who told officials that they came to Tennessee solely to get driver's licenses.

Immigrant advocates respond by reminding public officials that current rules encourage undocumented immigrants to take responsibility for learning to drive safely and that lives are being saved as a result. Any measures that discourage people from seeking to be tested and licensed will only make the public less safe.

14. USCIS Issues Memorandum Directing Examiners NOT to Re-Judge Work Visa Extension Applications

In response to complaints that the examiners have been denying non-immigrant status extension applications based on facts previously found acceptable, William Yates, the USCIS' Associate Director for Operations, has issued a field memorandum directing officers to refrain from basic re-adjudications.

Many of the cases that prompted the issuance of the memorandum were O-1 visa extensions. O-1s are non-immigrant work visas approved for applicants with extraordinary ability in fields like the sciences, the arts and athletics. Applicants must prove their ability by presenting extensive documentation including support letters, awards, publications, patents, etc. Until recently, if O-1 status was approved by USCIS, extensions would routinely be granted. But in the last two years, USCIS examiners have frequently denied O-1 extension applications on the ground that the applicant failed to demonstrate they had extraordinary ability.

The policy memorandum from USCIS is intended specifically to address the situation where there are no material changes in the underlying facts of the case. The memorandum admits that examiners have been re-adjudicating O-1 cases "as a matter of routine". The new

memorandum directs examiners to give "deference" to prior decisions on eligibility for a visa category.

Examiners are permitted to re-adjudicate a petition only in three circumstances:

1. When there was a material error in the original adjudication;
2. A material change in the facts has occurred; and
3. There is new information that adversely impacts the applicant's eligibility.

The new changes should dramatically reduce the number of instances where an examiner can properly deny an extension application. In most cases, they would essentially have to accuse the first examiner of not doing their job properly, something USCIS examiners may be loathe to do. And in O-1 cases, applicants' credentials tend to improve as time goes on so showing that facts have changed and an applicant is no longer extraordinary will be tougher.

The memorandum does remind examiners, however, that applications may still be denied on normal admissibility grounds (such as the applicant's failure to maintain status in the US). In such cases, an applicant might be approved in a "split" decision where classification in a category is approved, but an applicant has to process a visa at a consulate rather than in the US via a change of status.

A Deputy Service Center Director must also now sign off on the denial of an extension application or even the issuance of a Request for Evidence. This will also likely dissuade an examiner from re-adjudicating the facts of a case.

15. USCIS Memorandum "Streamlining" Requests for Evidence Worries Immigrant Advocates

USCIS Associate Director of Operations William Yates has issued a memorandum making it much easier for case examiners to deny applications without first issuing a Request for Evidence. Currently, in most cases an examiner will issue such a request before denying a case.

According to the memo, "In certain instances adjudicators unnecessarily issue an RFE prior to making a final decision on a petition or application. It is unclear how this practice evolved and it has resulted in a process that significantly affects limited CIS resources, increases processing delays, and confuses petitioners and applicants. Further, the current regulations at 8 CFR 103.2(b)(8) do not require RFE issuance in every instance prior to adjudication of a petition or application.

The memorandum goes on to state that an RFE is not required for every case prior to adjudication and clarifies when an adjudicator may deny an application or petition without issuing an RFE.

According to the new memo, applicants may be denied when there is evidence of clear ineligibility. That might include a case where a naturalization applicant is not old enough, an I-130 case is filed by a relative or other person who does not qualify and other cases where the basic requirements for a benefit are not met.

If an application is submitted with enough evidence to render a decision, an examiner may deny a case based on the evidence submitted. The Yates memorandum offers the following illustration to explain this concept:

"An I-140 petitioner is required to file initial evidence establishing its ability to pay the beneficiary the proffered wage. 8 CFR 204.5. The required initial evidence as specified in the regulation is copies of annual reports, federal tax returns, or audited financial statements. The petitioner submits a single copy of one of these required documents. On review, the CIS adjudicator determines that these documents do not establish the petitioner's ability to pay. The CIS adjudicator may deny the petition since the applicant has not met his or her burden to establish eligibility for the requested benefit."

Immigration advocates are deeply worried about this memorandum. Immigration examiners requests for evidence often show an examiner either does not understand the law or has not adequately examined the record. For example, it is quite common for an examiner to ask for a document that was actually submitted in an initial application.

Under current procedures, an applicant has an opportunity to address these problems before a denial is issued. And in many cases, an applicant will remain in status while a request for evidence is considered. Under the new system, an applicant who receives a denial inappropriately will usually have just two options. The applicant can file a motion to reopen and reconsider. But such motions frequently take many months. The alternative is to appeal a case and this can take well over a year.

The problems could also be exacerbated by the fact that so many examiners have been hired in recent years and many examiners are inexperienced. The RFE process is seen as one mechanism to cut down on poor decision-making.