

Siskind's Immigration Bulletin  
January 17, 2005

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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:

Well, our break is over and we're ready to go for 2005. And there is much news to report. The key story to watch this year is whether President Bush can succeed in his ambitious

effort to reform the US immigration system and finally have a work visa system that allows us to meet the country's needs and compete with the rest of the world. The President gave an interview this week to the Washington Times where he indicated that immigration and Social Security reform were his two top domestic priorities this year.

Bush's efforts will be substantially enhanced by the appointment this week of Senator John Cornyn (R-TX) to head the Senate Immigration Subcommittee. Cornyn told the press upon his appoint

*"Serving as chairman of the immigration subcommittee when Congress is seriously considering true reforms is a welcome challenge. Reform is long overdue, and in a post 9/11 world, one of our most urgent responsibilities. We must address the need for better border security, and combat human smuggling and other exploitation, while acknowledging the important contributions that immigrants make to our economy."*

The House won't be so easy, however. The Immigration and Judiciary Committees are likely to be chaired by anti-immigration Representatives (though appointment of the chair of the Immigration Subcommittee has yet to be announced).

While the H-1B visa gets all the publicity, the H-2B visa quota was recently filled. This versatile seasonal and temporary worker program is used for everyone from minor league hockey players to casino employees to Alaskan fishery workers. Expect to see efforts to push an H-2B cap hike this year as well.

On January 1<sup>st</sup>, employment-based green card numbers in the EB-3 category rolled backwards by three years for nationals of the Philippines, India and China. This rollback will probably be noticed most immediately in the nursing profession when 1000s of Filipino and Indian nurses fail to report for work. The US is facing a critical shortage of nurses right now and the loss of this many nurses will translate into actual danger for patients in hospitals across the country. Recent studies have shown that the nursing shortage is taking its toll in US hospitals with patient death rates shown to be proportionate to staffing ratios. Congress will likely consider a proposal shortly that would allow unused green card numbers for the past four years to be used anyway as was done for the leftover numbers in 1999 and 2000.

Finally, the horrible tsunami disaster in the Indian Ocean is causing changes in US immigration policies for people from the affected countries. The US government has already announced measures to facilitate and expedite applications for people from the affected countries. And consideration is underway to grant Temporary Protected Status to people in the US from the countries most severely affected. Congresswoman Sheila Jackson-Lee introduced a bill in Congress that would grant such status if the US Attorney General chooses not to exercise his discretion.

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I had the opportunity to visit the annual Consumer Electronics Show in Las Vegas this week. This is the nation's largest trade show, attracting more than 130,000 visitors to see the latest technological gadgetry being marketed by the companies across the planet. I'm working on an a couple of articles for legal industry publications and so went with an eye on innovations of interest to lawyers.

While there, I heard an interview that surprised me. The head of the Consumer Electronics Association, which puts on CES, explained why CES would next year have a separate show

in China. The reason? Too many Chinese buyers and vendors have been unable to secure visas to come to the US for the show. The German competitor show has been establishing itself as the better alternative for many people who have become fed up with the arduous US visa process. CES has decided to take their show to their customers. That's fortunate for the would-be attendees of CES from China. But it is sad that Las Vegas (and cities across the US hosting international exhibitions) will lose out. And what about shows that cannot afford to run separate shows abroad? What about the small American company looking to sell to Chinese customers who were counting on the Chinese buyers to come to Las Vegas and who cannot afford to go abroad to display. American companies and American taxpayers pay a real price when our government pulls out the welcome mat for international visitors.

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In firm news, for the third year in a row, I've been named to the list of the Top 101 lawyers in Tennessee by Business Tennessee Magazine. My friend Linda Rose in Nashville was the other immigration lawyer on the list and I congratulate her on being recognized. You can see the full list of honorees at [www.businessstn.com](http://www.businessstn.com).

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Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. We would love to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

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## 2. The ABC's of Immigration: Citizenship Rules for People Born Outside the United States

All persons born in the United States are citizens of the United States (with the very minor exception of certain children of diplomatic personnel). This is perhaps the only simple rule of US citizenship. One of the most complicated areas of US citizenship law involves the passage of citizenship to children born outside the US to one or more US citizen parents. While naturalized US citizens are treated like natural born citizens, which includes those who are deemed citizens even when born outside the US, in almost every respect, there is one important office that only natural born citizens can hold – the presidency (though expect to see efforts in Congress to change this if Governor Arnold Schwarzenegger decides to run for President). Also, a person who is a citizen from birth cannot be denaturalized (though denaturalization rarely ever occurs).

The rules determining when such children are citizens are extremely detailed, and vary a great deal depending on when the child was born since the laws changed several times in the 20<sup>th</sup> century.

**What are the rules for people born before May 24, 1934?**

Persons born abroad before May 24, 1934 to a US citizen father who had resided in the US at any point before the birth are considered US citizens at birth. The status of the mother did not matter unless the child was born out of wedlock. There were numerous legal challenges to this rule, claiming that it violates equal protection by treating the children born to US citizen women different than those born to US citizen men. The issue was never fully resolved by the courts, but in 1994, Congress passed a law retroactively granting citizenship at birth to children born abroad to US citizen women.

In 1940, Congress passed a law making illegitimate children born abroad to US citizen women citizens if the mother had resided in the US. However, under this law, if the child was legitimated by the foreign national father before his or her eighteenth birthday, the child would not be considered a citizen. In 1998, the Supreme Court issued an opinion upholding the requirement that a child born out of wedlock to a US citizen woman be legitimated before his or her eighteenth birthday. The decision was reaffirmed in the 2001 US Supreme Court decision *Nguyen v. INS* which held that differing requirements for out-of-wedlock children of US citizen men versus US citizen women are constitutional.

The US citizen parent must have resided in the US prior to the birth. This residence can be in the US itself, or in certain US territories after certain dates. The residence can have been while the parent was a minor, and there is no length of time for which the parent must have resided in the US.

#### **What are the rules for people born between May 24, 1934 and January 13, 1941?**

In 1934, Congress passed a law allowing US citizen parents, regardless of their gender, to pass citizenship to their children born abroad. If both parents were citizens, only one was required to have resided in the US, and as with the previous law, there was no required length of time that the parent must have resided in the US.

However, if one parent was a US citizen and the other a foreign national, the child would lose their citizenship if they did not either reside in the US for the five years immediately prior to their eighteenth birthday or, within six months of turning 21, take an oath of allegiance to the US. These requirements were gradually relaxed between 1934 and 1940.

Illegitimate children born abroad between 1934 and 1941 became citizens under the general provision, and because the child was considered to have only one parent, no requirements were imposed that could result in the loss of citizenship.

#### **What are the rules for people born between January 14, 1941 and December 23, 1952?**

As before, children born abroad to two US citizens, with one parent having resided in the US, the child was a US citizen at birth. No further action was required to maintain citizenship.

When one parent was a citizen and the other a foreign national, however, the rules changed substantially. To pass citizenship, the citizen parent must have resided in the US for at least 10 years before the birth of the child, and at least five of those years had to be after the parent turned 16. Because this rule made it impossible for parents under 21 to pass citizenship, in 1946 the requirement was amended to create an exception for parents who had served in World War Two.

Originally, for children born during this period to retain US citizenship, they had to reside in

the US for five years between the age of 13 and 21. However, an exception was made for children of US citizens who were employed abroad by the US government or a US company.

Children born out of wedlock to a US citizen mother who met the residence requirements were automatically citizens, and they retained US citizenship even if legitimated by the foreign national father. For a child born out of wedlock to a US citizen father, to obtain US citizenship the child must have been legitimated before the age of 21.

### **What are the rules for people born between December 23, 1952 and November 13, 1986?**

Again, children born abroad to two US citizen parents were US citizens at birth, as long as one of the parents resided in the US at some point before the birth of the child.

When one parent was a US citizen and the other a foreign national, the US citizen parent must have resided in the US for a total of 10 years prior to the birth of the child, with five of the years after the age of 14. An exception for people serving in the military was created by considering time spent outside the US on military duty as time spent in the US.

While there were initially rules regarding what the child must do to retain citizenship, amendments since 1952 have eliminated these requirements.

Children born out of wedlock to a US citizen mother were US citizens if the mother was resident in the US for a period of one year prior to the birth of the child. Children born out of wedlock to a US citizen father acquired US citizenship only if legitimated before turning 21.

### **What are the rules for people born on or after November 14, 1986?**

Children born abroad to two US citizen parents, one of whom has resided in the US prior to the birth of the child, continue to be US citizens at birth, and need take no special actions to retain citizenship.

Children born to one citizen parent and one foreign national will obtain citizenship at birth if the citizen parent resided in the US for five years before the birth, with two of those years after the age of 14. The child does not need to take any special action to retain US citizenship.

Children born out of wedlock to a US citizen mother will be US citizens if the mother resided in the US for one year prior to the birth of the child. Children born out of wedlock to a US citizen father will acquire US citizenship if the following conditions are met:

- There is an established blood relationship between the father and the child,
- The father was a US citizen at the time of the birth,
- The father has agreed to financially support the child until it is 18, and
- Before the child is 18 it is legitimated, or the father acknowledges paternity in a document signed under oath

While these are general rules, Congress has continually amended and revised many laws relating to citizenship, particularly those dealing with the requirements for retention of citizenship. If a person believes that they have a claim to US citizenship, they should consult with an attorney for a full examination of that possibility.

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3. Ask Visalaw.com

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

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Q - I was an international student before I dropped out because of financial constraints. I am now married to a USA citizen and we have one kid together. I have a bad entry in my record. I was taken to court by my wife for a battery and ordered to attend anger management classes. I was also placed under probation for 1 year. We have since then reconciled. My wife wants to file for me papers so that I can become a permanent resident of USA. Do you think my misdemeanor record and being on probation may cause the USCIS to deny my application?

A - If the misdemeanor was committed when you were less than 18 and more than five years before you apply for permanent residency, it will not be a problem. If the maximum penalty that can be imposed was less than one year and you were not sentenced to a term of imprisonment of more than six months, it will not be a problem.

If neither of the above apply, you may qualify for a waiver if you can show that the crime was committed more than 15 years before your application for admission, you are not a threat to security of the US, and you have been rehabilitated. You may also get a waiver if you are the spouse, parent, or son or daughter of a US citizen or lawful permanent resident and your spouse, parent or child would suffer extreme hardship if you were not allowed to enter.

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Q - My wife is here on an H-1B Visa & I am also in H-1B status. Can we both apply Green Card through different employers?

A – Yes. In fact, this is quite common and a good backup in case one of the applications falters.

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Q - I'm on by my F-1 Optional Practical Training until July 2005. I've my bachelor's degree from United States. My H1-B Visa was rejected on October 1st due to the cap being reached. Can I apply for my H1-B visa again on March 7th or 8th 2005 when 20,000 new visas will be issued?

A - Unfortunately, the new 20,000 visa separate H-1B quota is for people who have graduate degrees (masters or higher) from a US university.

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Q - My sister, who is an American citizen, petitioned for me back in 1998. I now have found an employer that is willing to sponsor me and petition for me. My question is since my petition is pending with my sister, I am covered by the 245i, which means that I will not have to leave the country to adjust my status, but can that petition grandfather the new employment petition that the employer will submit? Will I still be covered by the 245i with the new petition?

A - Yes, if you find a new basis for permanent residency, 245i should cover you for the new petition (assuming 245i covers your case).

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Q - My conditional green card expired on November 20, 2004, I did file the I-751 application to remove conditions before Aug.20 and receive a letter from Nebraska center confirming they got my application and fee. Problem is that Nebraska center is backlog on I-751 until 07/15/2003, so if I want to travel outside the country, what should I do?

A - The I-797 receipt you received from Nebraska should have language on it stating that it is evidence of your continued legal residence for a one-year period. Take the I-797 with you when you travel and it will get you back into the US.

If you get to the end of the one year and you have not received approval yet, make an appointment with your local CIS office using Infopass and they will stamp your passport for an additional year.

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#### 4. Border and Enforcement News

According to the *Washington Times*, U.S. Border Patrol agents apprehended 1.15 million illegal aliens last year trying to enter the United States between the nation's land ports of entry. Apprehensions number more than 3,100 a day — a 24 percent increase over the year before. The agents, part of U.S. Customs and Border Protection (CBP), also made 8,577 drug seizures, confiscating 1.4 million pounds of illegal narcotics with an estimated street value of \$1.62 billion, according to the figures released by the Department of Homeland Security.

The Homeland Security figures also show that CBP inspectors and officers at the nation's 300 official land, air and sea ports of entry made 47,744 drug seizures worth an estimated \$1 billion; seized more than \$138 million in counterfeit goods, up from \$94 million in 2003; and identified and arrested more than 23,000 people with criminal records — including 84 murder suspects, 37 suspected kidnappers, 151 wanted on charges of sexual assault, 212 robbery suspects and 2,630 others implicated in drug-related charges. Those inspectors and officers also processed 428 million passengers and pedestrians, including 262 million aliens, denying entry to more than 643,000 aliens under U.S. law.

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#### 5. News From The Courts

Chavez Saucedo v. Morones

W.D. Wa. at Seattle  
No. CO4-2344-RMS-MAT  
Dec. 17, 2004

In December of 2004, a United States District Judge in the Western District of Washington issued an order granting a temporary restraining order against the Bureau of Immigration and Customs Enforcement ("BICE"), preventing the Bureau from detaining the Petitioner under the Immigration and Nationality Act's mandatory detention statute pending a hearing on whether the mandatory detention statute even applied.

The Petitioner is a native and citizen of Mexico and has lived in the United States since 1984. He became a legal resident of the United States in 1997. The Petitioner was convicted on May 1, 2003 for possession of a narcotic in violation of an Oregon statute, and was sentenced to eighteen months probation and ten days in confinement. He was released by the state on May 18, 2003.

On October 19, 2004, immigration officials took the Petitioner into custody for the May 2003 conviction. Simultaneously, the BICE issued a Notice to Appear, placing the Petitioner in removal proceedings. On November 15, 2004, the Immigration Judge determined that the Petitioner was not eligible for release and was subject to mandatory detention until his removal proceedings, as authorized under the Immigration and Nationality Act ("INA") §236(c). The Petitioner filed a Petition for a Writ of Habeas Corpus to challenge the legality of his detention by the BICE and asked for a temporary restraining order against the BICE, which would prevent the BICE from detaining him while waiting for the outcome of the habeas petition.

The Court stated that in order to grant the motion for the temporary restraining order, the Petitioner must demonstrate that (1) the Petitioner will probably succeed in the habeas petition on the merits and that the Petitioner will face irreparable injury if the injunction is not granted; or (2) that serious legal questions are raised by the Petitioner's case and that the balance of hardship tips sharply in the Petitioner's favor.

The Court found that the Petitioner's case raised serious legal questions, that being whether the Petitioner is subject to the mandatory detention under INA § 236(c) at all. That section states, in relevant part, that

The Attorney General shall take into custody any alien who ... is deportable by reason of having committed any offense covered in section 237 (a)(2) ***when the alien is released***, without regard to whether the alien may be arrested or imprisoned again for the same offense. INA § 236(c) (emphasis added).

The court considered the precedent of other district court cases concerning the mandatory detention statute, each of which interpreted the phrase "when the alien is released" to mean that the alien must be taken into immigration custody immediately after release from state custody and not after a substantial amount of time has passed since the release from state custody. In this case, the Petitioner was not taken into immigration custody until eighteen months after his release from state custody.

The Court found that serious legal questions were raised by the Petitioner's continued detainment under the mandatory detention statute despite the fact of the length of time between his state custody release and his immigration custody arrest. Additionally, the Court felt that the balance of hardship was tipped in the Petitioner's favor since he had been detained from his family and job since his immigration arrest and would be until the Board

of Immigration Appeals reviewed the Petitioner's appeal. As such, the District Judge issued the temporary restraining order, preventing the BICE from detaining the Petitioner until the habeas petition as to the legality of his detention could be determined.

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#### 6. Government Processing Times

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

Nebraska (01/01/2005): <http://www.visalaw.com/nebraska.html>

California (01/06/2005): <http://www.visalaw.com/california.html>

Texas (12/31/2004): <http://www.visalaw.com/texas.html>

Missouri (01/06/2005): <http://www.visalaw.com/missouri.html>

Vermont (01/06/2005): <http://www.visalaw.com/vermont.html>

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#### 7. News Bytes

U.S. Citizenship and Immigration Services recently issued a statement regarding the adoption of Tsunami orphans. Although USCIS recognizes the offers of Americans to adopt abandoned children in this area as commendable, the agency is not recommending adoption as a short-term solution. In a crisis, the international standard among adoption professionals is to keep children as close to their family and community as possible. It is only if and when these countries decide to make these orphans available for international adoption that American citizens will be able to begin adoption proceedings for those children who also qualify as orphans as defined in the Immigration and Naturalization Act. Additional information is located at <http://uscis.gov/graphics/services/index2.htm>.

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Beginning January 15, 2005, eligible Chinese nationals who wish to visit the United States temporarily for business (B-1) or tourism (B-2) will be issued visas that are valid for 12 months and multiple entries. The previous maximum validity for U.S. visas issued for these purposes was six months and for multiple entries. The Chinese Ministry of Foreign Affairs has also agreed to reciprocally issue to U.S. citizens visiting China on temporary business and tourism visas valid for 12 months and multiple entries. The U.S. Embassy in Beijing and the Chinese Ministry of Foreign Affairs exchanged diplomatic notes on this agreement in December 2004. While the United States and China will in principle issue maximum validity visas to each other's citizens, on a case-by-case basis, each side may limit the period of validity and number of entries as required by law and regulation.

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On January 6, 2005, USCIS officials inaugurated a new district facility in Fairfax, Virginia. This new USCIS Fairfax office is located across from the Dunn Loring station of Metro's Orange Line at 2675 Prosperity Lane.

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Effective January 1, 2005, the U.S. Consulate Nogales, Sonora Mexico will accept E visa applications only from individual residents in its consular district, the Northern half of the Mexican state of Sonora. All other E visa applicants are referred to their country of origin.

Consulate Nogales will still accept applications for those E visa applicants previously appointed in January 2005. After review of the completed E visa application, Consulate Nogales will contact the applicant or their attorney and confirm an interview appointment. Applicant's submitted cases will be reviewed in order of their receipt at this consulate. Applicants previously appointed will be contacted regarding a new appointment date after receipt of their E visa application. Applications other than those previously appointed cannot be accepted unless the applicant can show evidence of legal residence in Sonora Mexico.

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A U.S. Immigration Judge has denied the political asylum claim of a mentally retarded youth from West Africa whose plight has aroused worldwide attention and whose situation we have previously reported on. Judge Joan Churchill rejected the claim of Malik Jarno in a judgment posted late Wednesday after a 12-day hearing, believed to be the longest asylum case ever heard in the United States, according to Reuters.

The U.S. Government has been attempting to have Jarno deported ever since he arrived in the United States at Washington's Dulles Airport in January 1999. He spent three years in jail, where he was abused and is now living in a group home for refugees in York, Pennsylvania, attending high school. It is possible that Jarno could be jailed following the ruling. Jarno originally came to the United States seeking sanctuary from an ethnic conflict in which much of his family was killed.

70 members of Congress have appealed for Jarno to be allowed to stay. Amnesty International has sent out a worldwide alert about the case while Human Rights First, the American Bar Association and at least two groups advocating the rights of the mentally ill have also intervened.

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## 8. International Roundup

More than 700 German police officers raided dozens of mosques, apartments and small businesses across Germany on Wednesday in a bid to break up a loosely organized network of Islamic radicals, authorities said. Counterterrorism officials and prosecutors said 22 people were arrested, most on suspicion of raising money for extremist causes and forging passports and other official documents. Investigators said there was no evidence that the network was planning any attacks and gave few details about its ideological goals or motives.

The sweep was part of an aggressive anti-terrorism strategy recently initiated by the German government, which faced heavy internal and external criticism for moving slowly in response to threats from Islamic radicals after the Sept. 11, 2001, attacks in the United States. The leaders of the Sept. 11 plot were part of an al Qaeda cell in Hamburg that had attracted the attention of German investigators before the hijackings but managed to keep its intentions secret.

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The Internal Affairs and Communications Ministry urged the Japanese government last week to review its policy on foreign students because their academic performance has been declining. The ministry also called on law enforcement authorities to tighten immigration screening procedures for privately financed overseas students, some of whom sometimes overstay their visas to get illegal jobs.

In a report evaluating the policy, the ministry recommended that the Education, Culture, Sports, Science and Technology Ministry, the Justice Ministry, the Foreign Ministry, and the Health, Labor and Welfare Ministry review existing systems concerning foreign students. The number of foreign students studying in Japan totaled about 117,300 last year, topping the 100,000-mark target set by the government in 1983 when the number of overseas students totaled about 10,000.

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## 9. Legislative Update

### [HR 261](#)

Title: To expand the class of beneficiaries who may apply for adjustment of status under section 245(i) of the Immigration and Nationality Act by extending the deadline for classification petition and labor certification filings.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

### [H.R.105](#)

Title: To amend the Immigration and Nationality Act to exempt elementary and secondary schools from the fee imposed on employers filing petitions with respect to non-immigrant workers under the H-1B program.

Sponsor: Rep Green, Gene [TX-29] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

### [H.R.193](#)

Title: To amend the Immigration and Nationality Act to provide for compensation to States incarcerating undocumented aliens charged with a felony or two or more misdemeanors.

Sponsor: Rep Sanchez, Linda T. [CA-39] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

### [H.R.251](#)

Title: To assist aliens who were transplanted to the United States as children in continuing their education and otherwise integrating into American society.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

### [H.R.260](#)

Title: To amend the Immigration and Nationality Act to modify the requirements for a child born abroad and out of wedlock to acquire citizenship based on the citizenship of the child's father, and for other purposes.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

#### [H.R.291](#)

Title: For the relief of Sharif Kesbeh, Asmaa Sharif Kesbeh, Baol Kesbeh, Noor Sharif Kesbeh, Alaa Kesbeh, Sondos Kesbeh, Hadeel Kesbeh, and Mohammed Kesbeh.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Private bill

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.245](#)

Title: To amend the Immigration and Nationality Act with respect to the record of admission for permanent residence in the case of certain aliens.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

#### [H.R.100](#)

Title: To amend the Immigration and Nationality Act to modify provisions relating to judicial review of orders of removal.

Sponsor: Rep Dreier, David [CA-26] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.60](#)

Title: To designate Sri Lanka, India, Indonesia, Thailand, Somalia, Myanmar, Malaysia, Maldives, Tanzania, Seychelles, Bangladesh, and Kenya under section 244 of the Immigration and Nationality Act in order to render nationals of such foreign states eligible for temporary protected status under such section.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.253](#)

Title: To provide for the collection of data on traffic stops.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.98](#)

Title: To amend the Immigration and Nationality Act to enforce restrictions on employment in the United States of unauthorized aliens through the use of improved Social Security cards and an Employment Eligibility Database, and for other purposes.

Sponsor: Rep Dreier, David [CA-26] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the Committee on Ways and Means, and in addition to the Committees on the Judiciary, Homeland Security (Select), and Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

#### [H.R.209](#)

Title: To waive certain prohibitions with respect to nationals of Cuba coming to the United

States to play organized professional baseball.

Sponsor: Rep Serrano, Jose E. [NY-16] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the Committee on International Relations, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

#### [H.R.255](#)

Title: To prevent commercial alien smuggling, and for other purposes.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.139](#)

Title: To provide for the recapture of unused employment-based immigrant visa numbers in order to facilitate improved health care for all persons in the United States.

Sponsor: [Rep Lantos, Tom](#) [CA-12] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.247](#)

Title: To increase the numerical limitation on the number of asylees whose status may be adjusted to that of an alien lawfully admitted for permanent residence.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.19](#)

Title: To require employers to conduct employment eligibility verification.

Sponsor: Rep Calvert, Ken [CA-44] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the Committee on the Judiciary, and in addition to the Committee on Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

#### [H.R.248](#)

Title: To modify the requirements applicable to the admission into the United States of H-1C nonimmigrant registered nurses, and for other purposes.

Sponsor: Rep Jackson-Lee, Sheila [TX-18] (introduced 1/6/2005)

Latest Major Action: 1/6/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

#### [H.R.143](#)

Title: To provide job creation and assistance, and for other purposes.

Sponsor: Rep McHugh, John M. [NY-23] (introduced 1/4/2005)

Latest Major Action: 1/4/2005 Referred to House committee.

Status: Referred to the Committee on Education and the Workforce, and in addition to the Committees on Ways and Means, the Judiciary, and Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

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

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10. Guest Column - 10 Key Questions on PERM, 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 nor do they represent the views of Siskind Susser. This article is copyrighted by ILW.COM and is reprinted with permission. You can read other articles by Mr. Endelman, and subscribe to future articles at [www.ilw.com](http://www.ilw.com).*

Now that we have digested the PERM regulation to learn what it says, perhaps we can take a step back, draw a deep breath, and try to drill down to a deeper level of understanding. One way to start is to look at some key questions that a closer reading of PERM conjures up. No one will have all, or even most, of the answers now, not even the architects of PERM within DOL itself. Yet, by going through this exercise at such an early stage, the agenda for further examination and future inquiry by DOL, the bar and the business community may begin to take shape.

PERM is the last best hope for labor certification to avoid total collapse. DOL knows that and has staked the future of the program on PERM's success. Yet, many attorneys are confused right now and it is not hard to figure out why. Consider some of the following sources of concern:

1. PERM discourages re-filing
  2. Who in their right mind would withdraw a pending case?
  3. Can you have two bites at the apple?
  4. Does a SESA/SWA job order ALWAYS preclude PERM?
  5. Does PERM forget about the backlog?
  6. Does business necessity really survive under PERM?
  7. If you lose at PERM does the 7th H-1B year still survive?
  8. Labor Certification Revocation and AC 21 adjustment of status portability: Can't we all learn to get along?
  9. Are "occupations" and "job opportunities" the same thing?
  10. How much alternative experience should a fella get anyhow?
1. PERM DISCOURAGES RE-FILING

The refiling instructions set forth at 20 CFR 656.17(d) on page 77392 of the December 27th *Federal Register* discourage the refiling of existing cases. There is no way for an employer to know if the conversion request will be accepted. There is no way for a lawyer representing that employer or the alien beneficiary to be sure that the previously filed case was PERM compliant. They can only compare the PERM criteria with what was previously done, but they do not know that the original filing date can be retained. If they are wrong, not only will PERM be unavailable to them, but the original priority date is gone! How many employers are willing to take that gamble? Perhaps in a situation where the child of the beneficiary is aging out, given DOL's firm stand against expediting. Yet, in many cases, employers will be reluctant to risk all, not being able to predict with any degree of certainty what will happen.

DOL is understandably concerned over unscrupulous employers or aliens who filed bogus labor certifications from being able to take advantage of them. This concern is typified by

the hostility towards substitution of beneficiaries found in the preliminary comments. DOL knows that many of the 315,000 pending cases were filed before the April 30, 2001 deadline for 245(i) eligibility. Yet, is this a reason to impose a Hobson's choice on honest employers and deserving aliens who had no interest in 245(j)? Is this not an example of abuses connected with illegal immigration placing an undue burden on legal immigration?

The PERM regulation requires that most mandatory and alternative advertisement occur between 30 and 180 days before filing. This means that the recruitment in most, if not all, pending RIR cases will be stale and cannot be used! Forcing employers, especially smaller ones, to re-advertise and re-recruit requires an enormous expenditure of time and money when the outcome is far from assured. This is a disincentive for employers to refile under PERM and will contribute to a continuation of the backlog. Employers who wish to "convert," a word that the PERM regulators scrupulously avoid, should not be forced to start all over again. Why not allow them to take advantage of the advertisement and recruitment undertaken at the time of original RIR submission? Why impose additional legal fees as the price of PERM participation? Clearly, this would require a regulatory change and it is obvious that DOL wants to make a clean break with the past. Therefore, why not allow a limited transition period, perhaps six months, when this could be done? The 90 day advance notice of PERM implementation needs to be expanded so that employers are encouraged to jump into this brave new world, not frightened away.

## **2. Who in their right mind would withdraw a pending case?**

In a recent AILA teleconference on PERM, noted immigration attorney Ester Greenfield posed much this same question, though in a more thoughtful and dignified manner. After all, there is much to lose, and not a whole lot to gain, she rightly noted. What if an employer pulls a pending case, plunges into a new round of advertisement and recruitment, and this time finds a qualified worker so that no filing under PERM is possible? Now, that poor employer, who already went through this same exercise once before, has nothing! Even if the prior RIR case was done in good faith and uncovered no qualified applicants, he or she is out of luck. For this reason, and especially since filing under PERM is considered an abandonment of the prior case, no employer in touch with reality is going to withdraw first and then refile under PERM within 210 days. That being so, why do we have that option in the regulation? What purpose does it serve? Beats me.

## **3. Can you have two bites at the apple?**

Immigration maven George Newman wondered this aloud at the same AILA teleconference noted above. Past DOL policy and practice says NO! Clearly, PERM did not consider this possibility, but a close parsing of the plain language of 656.17(d)(ii) may lead an Article III judge to rule differently. Consider what the reg says, namely that filing under PERM is deemed to be a withdrawal of the original application *when the employer states his desire to use the original filing date (emphasis added)*. So, a literal reading would suggest that, if you file under PERM but do not ask to use the original filing date, then the original application should not be deemed to be withdrawn! Presto! Two bites at the apple. Doubtless, DOL is not going to want to be held to the awkward language of its own rule and may try to wish this away through administrative interpretation. However, this would almost assuredly trigger serious litigation.

## **4. Does a SESA/SWA job order ALWAYS preclude PERM?**

In 20 CFR 656.17(d) on page 77392 of the *Federal Register* PERM regulation, we learn that there can be no PERM upgrade if a job order was placed for a pending case before PERM

takes effect on March 28, 2005. On first glance, this would appear to throw out many RIR cases where the employer, either to show good faith, to demonstrate diverse recruitment or simply to comply with state procedures, places a job order with the SESA/SWA. Does this preclude PERM? Maybe not. Look at the comments on page 77342 that speak of such placement with reference to current 20 CFR 656.21(f). If you go to this regulation, you will see that the "local office" has to "prepare and process an Employment Service Job Order" using the information in Part A of ETA 750. The SESA/SWA, not the employer, must then place the job order "into the regular Employment Service recruitment system." So, in an RIR case, where the Employer acts, where there is no supervised recruitment of any kind, where the SESA/SWA is purely a passive bystander, there should be no ban on PERM. This needs to be clarified by DOL.

## **5. Does PERM forget about the backlog?**

It appears as if DOL has made a strategic decision to copy the model from USCIS and concentrate on speeding up future cases while whittling away at the backlog. This is the vision of Ombudsman Prakash Khatri and it is this vision that animates PERM. As noted above, few, if any, pending RIR cases will have recruitment that is not stale- that is to say, advertisements placed within 180 days of the March 28th effective date. Even if they were timely, cautious employers may be loath to risk the loss of an old priority date by seeking to refile under PERM when the job opportunity may not be deemed to be identical or when certification is subject to revocation at any time for basically any reason in the sole estimation of the PERM Certifying Officer. Moreover, as will be discussed at greater length below, if the old priority date is gone and PERM is withheld, what happens to the 7th year H-1B extension? Gone.

These RIR cases will largely be relegated to the tender mercies of backlog reduction, which is clearly meant to work in tandem with PERM, but quietly and out of the spotlight. The future belongs to PERM and the past to the backlog reduction centers. When taken in combination with DOL's refusal to expedite cases, this will mean that most of the backlog will remain stacked up for a long time to come. Children will age out before they can take advantage of the Child Status Protection Act since it is impossible to file an immigrant petition on Form I-140 for those categories not exempt from this requirement. The backlog reduction centers are designed by DOL to be funded for only two years. What then? We can only assume that the backlog will be certified or denied away. In either case, the principle of individualized adjudication and supervised recruitment for specific job opportunities, concepts that are at the core of the present labor certification system, even though neither was envisaged nor mandated by Congress in 1965 when it changed labor certification from a passive to an active system, are fatally compromised.

Adoption of the Khatri model will enable top DOL brass to come before Congress and parade statistical evidence that PERM is working. Hopefully, no one will notice the looming backlog in the background. This is all smoke and mirrors. The PERM centers in Chicago and Atlanta will rapidly backlog. By 2007, the PERM backlogs will be largely indistinguishable from today's with the only major difference being the elimination of regional variations, something the immigration bar has long advocated. The only discernable strategy at the Backlog Centers is to deny the backlog under the pretext of Center Receipt Notification Letters that ask even Fortune 100 corporations to prove they exist. It is not likely that the contractor staff without a deep background in, or knowledge of, labor certification will be able to process the backlog with anything that even remotely approaches the old Regional staff, something no veteran immigration practitioner ever thought of saying before! The use of CRNLs will ultimately backfire and provoke both employer resistance and complaint that will lead either to congressional intrusion, class litigation or both.

## **6. Does business necessity really survive under PERM?**

DOL's concern over fraud permeates PERM. They should be concerned. DOL does not have the capacity, the political will, or the money to audit most labor certifications. This leaves the PERM system dependent on the good will and honesty of those who use it, a necessary but uneasy state of affairs. This comes at a time when the political imperative to move lots of cases through the system at full throttle may well be irresistible.

The immigration bar rightly screamed bloody murder when the notice of proposed rulemaking eliminated the doctrine of business necessity. DOL listened, it seems. Business necessity is back as articulated by the BALCA in *Information Industries*. Do not celebrate so fast! Who is going to be honest or brave enough to use it, particularly in a web-based submission when back-up justification is not part of the form? Question No 12 on Section H of the ETA 9089 asks whether the job requirements are "normal" for the occupation. More on that later. Now, just consider that, if they are not, the employer must be prepared to justify them on grounds of business necessity. A blind man could see that anyone who checks the "yes" box to this question will be audited. So, the price of invoking business necessity will be a DOL audit, thereby dashing any hopes of a quick decision, and negating PERM's raison d'etre. While the audit procedures outlined in 20 CFR 656.20 require an employer response to the audit letter within 30 days, with one possible 30 day extension tacked on, there does not appear to be any time deadline by which the Certifying Officer must render a decision on the audit.

This puts honest lawyers and conscientious employers in a quandary. Do they admit that their job requirements are "abnormal" but necessary, knowing that an audit is coming, or do they abandon business necessity as interesting theory but impossible practice? The irony, of course, is that dishonest filers, be they lay or lawyers, will face no such moral dilemma. They will simply check "No" to Item No.12, secure in the knowledge that their odds of skating through without further complication run strongly in their favor. Chances are that DOL will look to the IRS system of random audit control and implement a sophisticated profiling database that may favor larger employers at the expense of their smaller brethren, who are the true engines of job creation. Even here, however, it would not be surprising if even corporate giants get audited since it is impossible to control the forces that PERM will unleash.

PERM does nothing to address the fundamental reason for fraud in the first place, namely employer control over the sponsorship process that ties a particular alien to a specific employer. DOL cannot act on its own and Congress shows little inclination to get involved. No votes or campaign cash to be mined there. Only adoption a point system which focuses on the permanent characteristics of the alien, as opposed to the temporary needs of a single employer, can liberate aliens from the position of subordination and dependency whose existence make fraud possible. Moreover, since the benefit gained allows for perpetual residence in the USA, why should the transitory requirements of any employer, as opposed to the alien's immutable talents, be the fulcrum on which the entire system rests? The notion of portability has found acceptance in the H1B and adjustment of status contexts. Why not extend it across the entire spectrum of the employment-based immigration system? It is a convenient halfway point on which all interested parties of good will can agree without having to go through the agony of a total system overhaul.

## **7. If you lose at PERM does the 7th H-1B year still survive?**

This is a tough one that will have to be settled in Washington DC. at the policy levels of

USCIS. Here is the problem, or at least why might be a problem. If anxious employers want to risk the loss of the old priority date, they can file under PERM. USCIS would just love not to have to decide if someone should get a 7th H1B year and PERM gives it the perfect out. After all, no one is forced to file under PERM, so it is hard to argue that they are being punished for doing so. If the PERM upgrade is accepted, the original filing date is retained. However, if disaster strikes and there is no PERM approval, there will be no pending labor certification on file for at least 365 days to adjudicate; hence, the rationale for allowing a 7th year in H1B status is gone. No need to allow for more time so DOL can decide a labor certification that has been withdrawn! Now, it is true that the American Competitiveness in the 21st Century Act does not require the labor certification to still be there, and the statute does not bar giving a 7th H1B year if the PERM upgrade fails but why would you? What is there to wait for? After an unsuccessful PERM upgrade, USCIS can easily argue that the 7th H1B year request has become moot since there is no longer any underlying labor certification to sustain it.

One other minor annoyance that could come back to bite you- after PERM, will you still be able to get proof of the labor certification filing to support this 7th H1B year? After all, as leading immigration expert Naomi Schorr points out, the [April 2003 memo](#) by William Yates asks for proof either from the SWA/SESA or from the Regional DOL office, neither of which will have any records or role to play after March 28th. For this reason, unless you already have it, obtaining proof of a prior labor certification filing may be difficult to get post-PERM. Perhaps, Mr. Yates can update his guidance to make it PERM compatible. This would, of course, require the elimination of his prior memo even if the new one is not accepted! Cautious employers may elect to lodge such requests for confirmation before March 28th either with their SESA/SWA or, if the files have been shipped out, with the backlog reduction center that has jurisdiction over the case.

## **8. Labor Certification Revocation and AC 21 adjustment of status portability: Can't we all learn to get along?**

Right now, once a Certifying Officer approves a case, they lose control over it. If they change their mind later, it is too late. There is nothing in the current labor certification regulations that allows a CO to revoke an approved labor certification. 20 CFR 656.30(d) and 656.31(d) do authorize a Consul, a Court or the INS to revoke an approved labor certification, but only after a finding of fraud or willful misrepresentation of a material fact. Compare that to PERM which allows for revocation by the Certifying Officer if the CO finds that approval was not "justified", which may or may not be a different, perhaps lesser, standard than in the Notice of Proposed Rulemaking where the CO had to conclude that the prior certification was "improvident". It is not certain if the CO can act unilaterally (preliminary comments say yes) or the regulation itself which calls for consultation with the Chief of the Division of Foreign Labor Certification. In either case, anything that would justify denial is now enough for revocation; no fraud or willful misrepresentation need be found. Truly, the times are a changin'.

There is a conflict between PERM and the USCIS policy governing adjustment of status portability under the American Competitiveness in the 21st Century Act. Under PERM, there is no time limit on revocation, while AC 21 says that, once an adjustment has been on file for 180+ days, assuming I-140 approval required by current USCIS interpretation, the old employer loses any control over the process that now belongs body and soul to the alien. Indeed, the labor certification itself survives should the alien port to the same or similar occupation with another employer. So, after 180 days, the old employer has no ability to affect the adjustment case. Indeed, USCIS has told us that even withdrawal of the approved I-140 after 180 days would not change anything. How does that square with PERM? Not

very well.

Angelo Paparelli, one of America's leading immigration lawyers, points out that, under PERM, it would be the old employer, now powerless, who gets notice of an intent to revoke the labor certification! Not the alien who owns the labor certification. Not the new employer for whom the alien intends to work upon becoming a permanent resident. What interest would such an old employer, now spurned by the alien who has moved on for greener pastures, an employer who may have withdrawn the I-140, have in fighting revocation? Very little. Indeed, some employers might actually welcome revocation as punishment for the ungrateful alien. As Angelo Paparelli wisely observes, clearly DOL did not take AC 21 adjustment portability into account when the revocation approach was set in stone. It is reasonable to assume that past revoked certifications will be one of the database elements used by DOL in deciding on whether future cases by an employer should be audited or subjected to supervised recruitment. So, even an antagonistic former employer might find it in their own narrow self-interest too contest revocation even when they do not want to have anything to do with that alien ever again. Now, is that not going to be fun for immigration counsel to explain that one to an irate client?

### **9. Are "occupations" and "job opportunities" the same thing?**

The concept of "occupation" figures prominently in the PERM regs. They speak of a "combination of occupations" as opposed to a combination of jobs. They ask whether requirements are normal for an occupation. Have US workers in an occupation been laid off in the past six months? Yet, nowhere is "occupation" defined. Is its meaning self-evident. In other instances, we are told to look to the O\*NET job zones for SVP, but there is no frame of reference, such as the Occupational Outlook Handbook, to define the term "occupation" or determine what would be normal for it.

The ETA 9089 form itself moves back and forth between jobs and occupations as if they were opposite ends on a seamless continuum. Question 12 in Section H is a perfect embodiment of this schizophrenic nomenclature: "Are the *job opportunity's* requirements normal for the *occupation?*" (emphasis added) Why not ask if they are normal for the job opportunity? Moreover, you look in vain for any definition of "normal" in the definitional section of the PERM regs at 20 CFR 656.3. What is "normal"? The DOL's valid concern has been and remains that the "job opportunity" not be restrictively defined. That being so, why not ask if the requirements are normal for that job for which certification is sought, rather than for the wider occupational category? Indeed, even *Information Industries, 88-INA-92*, (BALCA, February 9, 1989) recognizes that whether job requirements bear a reasonable relationship to an occupation must be defined "in the context of the employer's business" and whether such requirements are reasonably essential to perform the duties of that job. The point is that you cannot determine if requirements are normal for any occupational category unless "occupation" is defined in the context of, and with direct relation to, the specific job opportunity for which certification is sought. Question 12 on Section H of ETA 9089 simply does not do that.

### **10. How much alternative experience should a fella get anyhow?**

The lack of definition in PERM between jobs and occupations breeds similar confusion in the treatment of alternative experience. We learn from 20 CFR 656.17(h)(4)(ii) that, if the alien does not satisfy the primary job requirements, but must qualify on the basis of alternative experience, certification will not issue unless any combination of education, training or experience is acceptable. There are several problems here:

(1) There is no way for an employer to state on the ETA 9089 that *any* suitable combination is acceptable for the simple reason that this question is never asked. Question 10 in Section H only asks if experience in an alternate occupation is acceptable, while Question 10B asks for the job title of the acceptable alternate occupation. The employer who wanted to indicate that any alternative is acceptable has no way to say this.

(2) The language of the regulation and the form are not the same. Question 10B only speaks of a "job" title for an acceptable alternate "occupation." This assumes that "job title" and "occupation" are one and the same. Not so. Moreover, contrary to the wording of the regulation, the form never uses the word "combination" much less "suitable combination" and makes no mention of combining "education, training or experience."

(3) By its very wording, Question 10B assumes there is only *one* acceptable alternative occupation whereas the regulation mandates that *any* alternative is OK.

(4) The regulation speaks of a "suitable" combination while the form itself inquires as to an "acceptable" alternative. Are these two concepts identical in meaning? Who is to judge whether an alternative occupation is suitable? Is it the CO or the employer? If the CO and employer disagree, what then? Could the CO change his or her mind about suitability after certification and use this as a basis for revocation on the grounds that prior approval was not, in retrospect, "justified" to use the amorphous language of 20 CFR 656.32(a)?

This is a related but equally large point. 656.17(h)(4)(ii) speaks of the alien who is "already employed" by the employer. In what capacity? Does it have to be in the same job for which certification is sought or in a different job? What if the alien was employed in a job that was not "substantially comparable" so that more than 50% of the job duties were different than in the labor certification job? Would the employer still be under an obligation to accept any suitable combination? If so, this would seem to undermine acceptance of the use of such experience provided for in 656.17(i)(3) by imposing a higher burden on how alternative experience can be structured. If this interpretation is correct, it means that *Kellogg* trumps *Delitizer*, something that the BALCA has never admitted, and contrary to what DOL has consistently contended.

These questions are not meant to suggest that the PERM regulation, or PERM itself, will not work. They are asked to point out that, in several key places, PERM is technically imprecise and thematically incoherent. Whether these problems can be solved will go far to determine PERM's fate, and ours as well.

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## 11. DHS Announces Relief Measures for Countries Affected by Tsunami

The Department of Homeland Security (DHS) recently announced temporary relief measures that will be made available to nationals of countries affected by the Asian Tsunami who were unable to return to their home country or are currently traveling in the United States due to the destruction in Southeast Asia.

United States Citizenship and Immigration Services (USCIS) will expedite the processing of certain immigration applications, including requests for advance parole and relative petitions for minor children from the affected areas. For individuals who have already been paroled into the U.S., the period of parole may be extended. USCIS will also more readily approve applications from visitors from the tsunami-affected countries who are requesting a change or extension of their nonimmigrant status. Standard requirements for security checks will remain in place under expedited procedures.

Beginning January 7, 2005, individuals from either Sri Lanka or Maldives who are under a final order of removal will be granted a stay of removal for 90 days. This temporary

suspension is specific to these two counties due to the massive infrastructure damage. The stay is automatic, and no request or petition is necessary. Immigration and Customs Enforcement (ICE) will also consider stay of removal requests from non-criminal aliens from countries other than Sri Lanka and Maldives that were affected by the earthquake and tsunami, and temporarily suspend the deportation of any individual presently in the U.S. who would be returned to an area severely affected by the tsunami. Decisions will be made on a case-by-case basis and based on specific circumstances. Where appropriate and authorized by law, nonimmigrant visitors and aliens that receive a stay of removal may be eligible to apply for or receive employment.

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## 12. 18-Month Extension of TPS Announced for Nationals of El Salvador

In an effort to assist El Salvador recover from the earthquakes that affected the nation in 2001, the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) recently announced an 18-month extension of Temporary Protected Status (TPS) for nationals of El Salvador (or aliens having no nationality who last habitually resided in El Salvador) who are eligible for re-registration.

Nationals of El Salvador who have been granted TPS must re-register for the 18-month extension during the 60-day re-registration period, which began Friday, January 7, and will remain in effect for 60 days there after. The re-registration period will end Tuesday, March 8. Salvadorian TPS beneficiaries are strongly urged not to wait until the end of the re-registration period to file their application materials. DHS has granted an automatic six-month extension, until September 9, 2005, of the validity of EADs issued under this TPS extension for nationals of El Salvador.

To re-register for TPS under the extension, a TPS beneficiary must submit Form I-821 (Application for Temporary Protected Status) without the filing fee, Form I-765 (Application for Employment Authorization) with filing fee if seeking an employment authorization document, and a \$70 biometric services fee. All applicants seeking a new EAD, valid through September 9, 2006, must submit a \$175 filing fee with Form I-765. An applicant who only seeks to re-register for TPS and does not seek an EAD need not submit the \$175 filing fee for the Form I-765. Applicants may request a fee waiver in accordance with the regulations; however, the biometric services fee may not be waived. Failure to properly submit Forms I-821 and I-765 (completed in their entirety) with all applicable fees will delay processing of the applications or lead to the rejection of the re-registration application. Applicants are not required to submit a photograph with their re-registration material, as both photographs and fingerprints will be collected at the USCIS Application Support Center.

USCIS has published a revised Form I-821, Application for Temporary Protected Status. Only Form I-821 with Revision Date 11/5/04 will be accepted. Earlier versions of the form will be rejected. The newly revised form is available on the USCIS Forms line.

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## 13. USCIS Reaches H-2B Cap

U.S. Citizenship and Immigration Services (USCIS) announced recently that it has received enough H-2B petitions to meet this year's congressionally mandated cap of 66,000 new workers. After January 3, 2005, USCIS will not accept any new H-2B petitions subject to the FY 2005 annual cap.

USCIS will follow the procedures set forth in the notice published on March 16, 2004, in the *Federal Register* at 69 FR 12340 to address the cap reached during FY 2004. For the remainder of FY 2005, USCIS will use the following procedure:

- USCIS will process all petitions received by the end of business on January 3, 2005.
- USCIS will return all petitions subject to the annual cap (along with the filing fee and, if applicable, the premium processing fee) that were filed after the end of business on January 3, 2005.
- Petitioners may re-submit or file new petitions when they have received labor certification approval for work to start on or after October 1, 2005.

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#### 14. Enhancement of Expedited Traveler Program Announced for JFK Airport

U.S. Secretary of Homeland Security Tom Ridge announced recently that the United States would begin deploying enhanced technology to expedite security checks and immigration processing of pre-screened, international travelers through John F. Kennedy International Airport in New York City. Further, Secretary Ridge and Dutch Minister of Immigration and Integration Rita Verdonk announced that their agencies will work together to develop an international registered traveler program. The improvements at JFK will be deployed in the coming weeks, while U.S. and Dutch officials commence discussions to design and implement an international pilot.

U. S. citizens, U.S. legal permanent residents and foreign visitors who travel frequently to the United States will be eligible for the program, contingent upon admissibility to the United States and the completion of a background check. Participants will use dedicated kiosks when they arrive at JFK Airport. They will enter the United States without routine Customs and Border Protection (CBP) questioning, unless chosen for a selective or random secondary referral. They must present their machine-readable passport, submit their fingerprints for biometric verification, be photographed, and make a declaration at the kiosk. Once cleared at the kiosk, pilot participants will be allowed to claim their bags and exit the airport.

Travelers who voluntarily enroll in the program must go through a pre-screening clearance, which may include checks of various biometric and biographic watch lists, including a 10-fingerprint criminal history check, a face-to-face interview with a DHS officer, and a review of any other pertinent information. Travelers may not qualify if they: are inadmissible to the United States under applicable immigration laws; provide false or incomplete information on their application; have been convicted of a criminal offense in any country for which they have not received a pardon; have been found in violation of customs or immigration laws; or; fail to meet other requirements.

For more information, visit [www.dhs.gov](http://www.dhs.gov).

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#### 15. Fraudulent Immigration Consultants Punished in Texas

Texas Attorney General Greg Abbott recently applauded a Dallas County district court for taking decisive action against the owner of Grupo ECSA, a Dallas-based operation accused of providing unauthorized legal advice on immigration matters to unsuspecting consumers.

Attorney General Abbott filed a lawsuit in November 2004 against Fidelina Cuevas and Grupo ECSA under the Texas Deceptive Trade Practices Act. A temporary restraining order and a temporary injunction required Cuevas to take down a Web site promoting the business. When she failed to do so, State District Judge Jay Patterson imposed a \$13,000 fine in December. After investigators with the Office of the Attorney General showed the Web site was still active, Patterson on Thursday found Cuevas in contempt of court and ordered her jailed for 179 days or until she proves she has taken down the Web site.

The lawsuit accused Grupo ECSA and Cuevas of defrauding immigrants and their families by misrepresenting themselves as authorized to provide legal services to persons seeking immigration status and benefits such as work permits or permanent residency. The company promoted its services through its Web site, and Cuevas appeared on paid Spanish-language radio to recruit business outside of Texas.

Since the lawsuit was filed, dozens of victims have reported that Cuevas failed to provide agreed-upon services after collecting thousands of dollars from each family. The defendant admitted during one of the recent court hearings that between 1999 and 2004 she earned at least \$1.7 million as a result of the unauthorized activities. A January 21 hearing is scheduled on additional contempt motions filed by Attorney General Abbott against Cuevas for refusing to provide her former clients immediate access to their immigration petitions and other documents in her possession and for failing to account for the money she received from consumers. A trial in the lawsuit is scheduled for March.