

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:

This week we write about a couple of important developments in immigration law. First, USCIS and the Department of Labor have jointly proposed a rule to dramatically simplify the

application process for H-2B cases. The proposal mimics the PERM program recently unveiled for green card applications in that it no longer requires employers to go through the manual labor certification process prior to filing an H-2B application. Employers will need to recruit and make attestations regarding the lack of availability of American workers on the H-2B application. Heavy penalties will be imposed on employers who are not honest in their applications. No labor certification application would need to be submitted for most applications. This should dramatically ease and speed up processing for H-2B cases. Of course, that will be a moot point for many since the H-2B cap quickly filled up this year. Look for Congress to address this issue soon.

This week we review two US Supreme Court decisions that will have an important effect on the treatment of people in deportation proceedings. In one case, the Court ruled that people could be deported back to their home country even if the home country does not consent. The case specifically addressed a Somali man who argued that the lack of a government in that country meant he could avoid deportation. The Court ruled that DHS could still deport him to Somalia. The other case re-confirmed an earlier decision that requires the government to release undeportable people if they can prove after six months that they still cannot be removed. The case dealt with a Cuban man.

Apologies to folks who may have had difficulty reaching folks in our firm over the last week. We've been going through various upgrades to our computer system and some messages were inadvertently bounced back to senders.

In firm news, I'm participating in next Monday's pILW.com phone seminar covering major recent immigration-related developments in Congress. Several of the top immigration lawyers in the country will be participating. You can get a preview of the topics to be covered, biographies of the speakers and an online registration form by going to www.ilw.com.

My firm, Siskind Susser, is seeking an attorney with at least three years of business immigration experience to join our Memphis office. We're also looking for a business immigration paralegal in Memphis. A qualified candidate should have at least five years of relevant experience. If you're interested, please email your CV to me at gsiskind@visalaw.com.

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

2. The ABC's of Immigration: Immigration Under the Violence Against Women Act

In November 2000, the Violence Against Women Act II was passed into law. Among other things, this law made changes to previously existing immigration laws that had allowed abused immigrant women and children to seek legal residency in the US independently of their abusers.

What does the Violence Against Women Act II do?

The law allows women to petition for adjustment of status for themselves and exempts them from section 245(c) of the Immigration and Nationality Act, which prohibits immigrants who have engaged in unauthorized employment, those who have failed to maintain valid immigration status and a number of others from applying for adjustment of status. Under the revised VAWA, applicants no longer have to show that they would face extreme hardship and they are also allowed to apply for permanent residence from outside the US, if they can demonstrate that they were the victims of domestic violence in the US.

What are the eligibility requirements for the VAWA II?

To be eligible for adjustment of status under the VAWA II, the woman must show one of the following:

Their marriage was ended within the past two years for reasons connected to domestic violence;

The abuser lost his or her immigration status within the past two years for reasons related to domestic violence;

If a US citizen, the abuser died within the past two years; or

The abuser was or is a bigamist

What is the difference between VAWA applicants and other visa applicants?

While for most people in deportation proceedings, their period of continuous physical presence ends when the USCIS notifies them that they are being placed in deportation proceedings, this rule does not apply to VAWA applicants. In other words, they have more of a chance to obtain the seven years presence necessary to be eligible for cancellation of removal. Also, any absences from the US that were the result of domestic violence will not break the period of continuous physical presence. Furthermore, the grounds for inadmissibility relating to good moral character can be waived if they are connected to domestic violence.

Also, applicants under the VAWA are exempted from the public charge ground of inadmissibility insofar as they are entitled to public benefits. They may also obtain a waiver of the ground of inadmissibility relating to HIV positive status.

What is a U Visa and how can I be eligible?

The VAWA II also created a new category of nonimmigrant visa. To be eligible for this "U" visa, the applicant must have suffered "substantial physical or mental abuse" because of a variety of crimes, including domestic abuse and involuntary servitude. The applicant must have information relating to this crime that would be of assistance to law enforcement in investigating or prosecuting it. There is an annual limit of 10,000 U visas. U visa holders are work authorized, and are able to apply for adjustment of status after three years.

One of the eligibility requirements is that a self-petitioner must demonstrate that he/she is a person of good moral character. A VAWA-based self-petition will be denied or revoked if the record contains evidence to establish that the self-petitioner lacks good moral character. The inquiry into good moral character focuses on the three years immediately preceding the filing of the self-petition, but the adjudicating officer may investigate the self-petitioner's character beyond the three-year period when there is reason to believe that the self-petitioner may not have been a person of good moral character during that time. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis taking into account the provisions of section 101(f) of the Act and the standards of the average citizen in the community.

Other provisions in the VAWA II allow people who have adjusted status under it to apply for naturalization in three, rather than five years.

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.

4. Border and Enforcement News

32 Chinese nationals were found recently in two shipping containers at the Port of Los Angeles after a crane operator spotted several stowaways emerging from a hole in one of the containers. The incident marked the first case of container stowaways at the port in nearly a year. The apprehended individuals will have a chance to meet with a U.S. immigration services official and may ask for asylum. If asylum is denied or if they choose not to seek it, they could be returned to China.

The Minnesota office of U.S. Immigration and Customs Enforcement disclosed last week that 293 Somali refugees living in Minnesota or the Dakotas are under final orders of removal and therefore could be deported to their homeland. Another 143 are in the process of removal proceedings but have not been ruled deportable by an immigration judge. The fate of these refugees had been awaiting a Supreme Court decision on whether U.S. law permits deportations to a country that has no government able to receive deportees. In reacting to the Supreme Court decision, Somalis and their advocates have expressed a hope that the U.S. government will take into account the dangerous circumstances in Somalia and deport only those who represent a threat to U.S. security.

5. News From The Courts

News From the Courts will return next week.

6. Government Processing Times

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

Nebraska (01/15/2005): <http://www.visalaw.com/nebraska.html>

Texas (01/15/2005): <http://www.visalaw.com/texas.html>

Vermont (01/21/2005): <http://www.visalaw.com/vermont.html>

Missouri (01/21/2005): <http://www.visalaw.com/missouri.html>

California (01/21/2005): <http://www.visalaw.com/california.html>

7. News Bytes

A federal judge recently denied a motion by Wal-Mart Stores Inc. to dismiss the lawsuit against the company filed by undocumented immigrant employees, and approved the sending of court-approved notices to potential plaintiffs. The court found merit in the claim that undocumented immigrant workers have minimum wage and overtime pay rights under the federal Fair Labor Standards Act, according to the Associated Press. The lawsuit was originally filed by 17 Mexican and Eastern European janitors, many of who were among the 250 people arrested in an October 23 federal raid on 60 Wal-Mart stores in 21 states. Since the lawsuit was filed, lawyers have found more than 200 other former Wal-Mart contract janitors, many from Eastern Europe, who they say were also illegal immigrants.

U.S. Department of Homeland Security (DHS) announced last week that foreign visitors departing from Newark Liberty International Airport are required to adhere to check out procedures before departing on their flight. Visitors must provide their two index finger scans and hold for a photo as a part of a pilot program to test and evaluate an automatic biometric exit process. The exit procedures being piloted at Newark require foreign visitors to go through one of the following three processes:

Under one alternative, visitors departing the United States will check out of the country at exit stations located within the airport. As with the process the visitors encounter upon entry at airports, their travel documents are read, their two index fingers will be scanned at the exit station, their digital picture will be taken, and they will receive a printed receipt that verifies that they have checked out.

The second alternative still uses the exit station but includes an additional step - verifying - at the departure gate. Visitors will be required to present the receipt at their departure gate to confirm that they checked out at the exit station. The workstation attendant will scan the receipt and then ask the visitor to place an index finger on the scanning device. Once the person's identity is matched to the receipt, the workstation attendant will hand the visitor his or her receipt back, and the visitor will board the airplane.

Another alternative under the pilot program is a biometric check out process with a hand-held device used by a US-Visit workstation attendant at the visitors' departure gates. In this process, visitors' travel documents are read, their two index fingers will be scanned, their digital picture will be taken, and they will receive a printed receipt that verifies that they have checked out.

The exit pilot program has been operating for a number of months in Baltimore-Washington International Airport, Chicago O'Hare International Airport, Denver International Airport, and the Miami International Cruise Line Terminal. It began last week in Newark and San Juan, Puerto Rico. It begins January 25 in San Francisco and January 28 in Detroit.

8. International Roundup

According to Canadian officials, Ontario will spend \$5.8 million over the next three years to help internationally trained people find employment in the province. The money will fund 15 new training programs designed to help up to 1,400 foreign-trained people. The training will be available to health-care professionals such as optometrists, pharmacists, social workers and nurses, as well as foresters, university professors, teachers and French speaking professionals.

The Bureau of Immigration is ready to resume the registration of about 5,000 undocumented Indonesians staying in Mindanao this week after the Department of Foreign Affairs reduced its registration fee. The Indonesian Immigration Commissioner last week signed an order re-launching registration on January 26 after the DFA lowered the fee from the 1,010 pesos to 410 pesos per registrant. The program was initiated after a survey conducted by the bureau six years ago showed that there were more than 7,000 undocumented Indonesians staying in Mindanao, many of whom have been on the island two to three generations ago.

9. Legislative Update

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

10. Supreme Court Holds That Inadmissible Aliens Cannot Be Detained Indefinitely When They Cannot Be Removed

Clark v. Martinez, 2005 U.S. LEXIS 627.

On writ of certiorari to the United States Supreme Court, two cases from the Ninth and Eleventh Circuits came before the Court for review, both concerning the legality of the length of detainment following orders of removal. In both cases, Cuban nationals were found inadmissible under 8 U.S.C. § 1182 and were ordered removed, but were unable to be deported because Cuba was unwilling to receive them. Both were detained pursuant to the 90-day removal period allowed under 8 U.S.C. § 1231(a)(1)(A), and both were then held substantially beyond the 90-day period. Section 1231(a)(1)(A) states that if any alien is found inadmissible and is ordered removed, the Secretary of Homeland Security "shall remove the alien from the United States within a period of 90 days." Furthermore, the Secretary has the authority to detain an inadmissible alien subject to the removal order for the length of the 90-day removal period.

Both aliens filed habeas corpus petitions challenging the legality of their continued detentions beyond the 90-day period. In one case, the Ninth Circuit affirmed the Oregon

District Court in finding that removal was not reasonably foreseeable, and ordering that the alien be released under conditions that the INS felt were appropriate. In the other case, the Eleventh Circuit affirmed the decision of the Florida District Court, which also found that removal would not occur in the foreseeable future, but nonetheless denied the petition and allowed the detention to continue.

On review of these two contradictory findings, the Supreme Court considered 8 U.S.C. § 1231(a)(6), which provides in relevant part:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the [Secretary] to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

The Court stated that § 1231(a)(6) applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182; (2) those ordered removed and who are removable under §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4); and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk. The Court then applied the prior decision of Zadvydas v. Davis, 533 U.S. 678 (2001), where it was determined that § 1231(a)(6) authorized the Secretary to detain aliens in the second category, those ordered removed and who are removable §§ 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4), only for as long as “reasonably necessary” to remove them from the country.

The Supreme Court determined that the same interpretation from Zadvydas should also apply to aliens in the first category, that is, the interpretation would apply to inadmissible aliens as well as removable aliens. The Court then held that the Secretary may detain inadmissible aliens beyond the 90-day removal period, but only for so long as reasonably necessary to achieve removal. Additionally, the Court held that the presumptive period during which the alien’s detention is reasonably necessary to effectuate removal is six months, and the alien must be conditionally released after that time if the alien can demonstrate that there is no significant likelihood of removal in the reasonably foreseeable future.

Here, the two aliens were detained well beyond six months after their removal orders became final. The lower courts in both instances found that the Government brought forward nothing to indicate that a substantial likelihood of removal existed and that removal to Cuba was not reasonably foreseeable. As such, the Supreme Court reversed the Eleventh Circuit and affirmed the Ninth, holding that the Secretary may detain inadmissible aliens beyond the 90-day removal period, but only for so long as reasonably necessary to achieve removal. That period is presumptively six months, but the alien can obtain conditional release upon a showing that there is no significant likelihood of removal in the reasonably foreseeable future.

11. Supreme Court: Deportees to be Sent Home Without Consent From Home Country

Jama v. Immigration and Customs Enforcement, 2005 LEXIS 626.

The United States Supreme Court recently held that a Somalian refugee whose status was revoked for a criminal conviction could be removed to Somalia despite the fact that the country had no functioning government and could not consent in advance to his removal.

When an alien is found to be ineligible to remain in the United States, 8 U.S.C. § 1231(b)(2) states the process for determining the country to which the alien will be removed. The Court summarized the relevant portions of section 1231(b)(2), stating that the statute provides for four consecutive removal commands. First, an alien shall be removed to the country of his choice, unless one of the conditions eliminating that command is satisfied (subparagraphs (A) to (C)). Second, he shall otherwise be removed to the country of which he is a citizen, unless one of the conditions eliminating that command is satisfied (subparagraph (D)). Third, he shall otherwise be removed to one of the countries with which he has a lesser connection (clauses (i) to (vi) of subparagraph (E)). These include (i) the country from which the alien was admitted to the U.S., (ii) the country in which is located the foreign port from which the alien left for the U.S. or for a foreign country contiguous to the U.S., (iii) the country in which the alien resided before entering the U.S., (iv) the country in which the alien was born, (v) the country that had sovereignty over the alien's birthplace when the alien was born, and (vi) the country in which the alien's birthplace is located when the alien is ordered removed. And fourth, if the first through third commands are "impracticable, inadvisable, or impossible," the alien should be removed to "another country whose government will accept the alien into that country" (clause (vii) of subparagraph (E)).

In this case, the alien declined to designate a country of choice, thus making the first command inapplicable. The alien was a citizen of Somalia, but since the country had no functioning government and could not accept him, the second command also did not apply. The issue now before the Court arose when, under the third step, the Attorney General attempted to remove the alien under clause (iv) of subparagraph (E), which permits the Attorney General to remove the alien to the country in which the alien was born. The alien contested that because Somalia had not given consent, he should not be removable under clause (iv) to that country.

The Court found that the only acceptance requirement in subparagraph (E) was found in clause (vii), which can be invoked only if the clauses (i) through (vi) are "impracticable, inadvisable, or impossible." Each of the clauses (i) through (vi) do not contain a word about an acceptance requirement on the part of the destination country. The Court concluded that the acceptance requirement does not stretch back from clause (vii) to clauses (i) through (vi), and therefore clauses (i) through (vi) do not require the acceptance of the destination country.

The Court stated that an acceptance requirement is not manifested in § 1231(b)(2)'s structure; an existence of an acceptance requirement at the fourth command does not imply that such a requirement exists at the third. As a result, the Court held that it was permissible under § 1231(b)(2)(E)(iv) for the alien to be removed to Somalia, his country of birth, without the advance consent of that country's government.

12. DHS Conducted 2004 Year-End Review

The U.S. Department of Homeland Security (DHS) recently released its 2004 year-end review. DHS is made of many different divisions, including Customs and Border Protection

(CBP), Immigration and Customs Enforcement (ICE), United States Citizenship and Immigration Services (USCIS) and US-VISIT.

CBP processed 428 million passengers and pedestrians at land, air, and sea ports of entry. Of that number over 643,000 aliens were deemed inadmissible under U.S. law. Border Patrol agents arrested 1,158,800 undocumented immigrants between official ports of entry. Due to the Integrated Automated Fingerprint System (IAFIS), over 23,000 individuals with criminal records were identified and arrested. Together with ICE, CBP seized more than \$138 million worth of counterfeit goods in FY 2004.

ICE made 1,368 arrests and brought 895 indictments for money laundering and other financial crimes, exceeding arrests and indictments of the prior fiscal year. ICE also apprehended more than 4,600 child sex predators nationwide and deported over 2,100 child sex predators.

USCIS naturalized 500,000 new United States citizens, including 9,00 active duty military personnel naturalized through expedited processing. USCIS conducted 35 million background checks of persons petitioning for immigration benefits were conducted, and more than 20,000 children from around the world were adopted by U.S. families due to petitions processed by USCIS.

In January, US-VISIT was implemented at all 115 U.S. international airports and 14 seaports. Since then, over 370 people with records of criminal or immigration violations have been prevented from entering the US by CBP. On September 30, Visa Waiver Program (VWP) travelers were included in US-VISIT and the program has now processed more than 14 million travelers. US-VISIT is now operational at the nation's 50 busiest land border crossings.

13. USCIS Proposes Changes to H-2B Program

US Citizenship and Immigration Services (USCIS) announced this week in the *Federal Register* a proposed rule that would significantly change the H-2B program. The H-2B nonimmigrant work visa provides a method for US employers and agents to obtain the services of foreign nationals to fill temporary needs for additional workers. Among other things, the new rule would:

- Establish a one-step petition process for U.S. employers seeking H-2B temporary workers,
- Require electronic filing of the Petition for Nonimmigrant Worker (Form I-129) in most cases,
- With limited exceptions, eliminate the need for U.S. employers to obtain a labor certification from the Department of Labor, and
- Establish new management tactics.

Under the proposed one-step process most employers will no longer be required to file for a labor certification from the Labor Department before filing a petition with the Department of Homeland Security. In the future, most employers will file a petition directly with Homeland Security after conducting their recruitment for U.S. workers.

These regulations are only proposals for public consideration and comment. Existing H-2B regulations and policies remain in force until further notice. The issuance of these proposed

regulations does not change the statutory cap of 66,000 H-2B nonimmigrant visas, which are available each fiscal year. The cap for FY 2005 was met on January 3rd.

The public is invited to submit comments regarding these provisions until February 26, 2005. The entire proposed rule can be read on the *Federal Register* website at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1240.htm>, along with a companion regulation published by the Department of Labor at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/05-1222.htm>.