

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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Siskind Susser is seeking an experienced immigration case manager to work in our Memphis office. Emphasis will be on employment immigration matters with an emphasis on physician and nursing immigration. Interested applicants should reply to Greg Siskind at gsiskind@visalaw.com.

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1. Openers

Dear Readers:

A few weeks ago we published a section by section summary of the McCain Kennedy immigration bill. A second bill is being introduced by Senator John Cornyn (R-TX) and John Kyl (R-AZ) that is expected to be the more restrictive of the two bills. The legal immigration provisions of the bill have not been released, but we have obtained a summary of the enforcement provisions and are in the process of comparing the bill to McCain Kennedy.

I'm writing this Opener in New York City where I am attending the annual meeting of the Hebrew Immigrant Aid Society. HIAS is the nation's oldest refugee resettlement agency and will soon celebrate its 125th anniversary. HIAS resettled my family when they fled Czarist Russia more than 100 years ago. They resettled my wife's family when her father and grandparents, survivors of the Holocaust, were among the first beneficiary of our modern asylum laws. Today HIAS helps refugees from many countries and many faiths. You can learn more about HIAS on their web site at www.hias.org.

I've been a HIAS board member for several years and always try and make this particular board meeting because it coincides with the annual HIAS Scholarship ceremony. Each year, HIAS awards scholarships to young immigrants who are truly living the American dream. These young people came to the US as refugee and will no doubt rise to become leaders in their fields. Whenever people question whether the US has the room for one more refugee, they should attend programs like the HIAS Scholarship Ceremony.

Later this month, many of our readers will be attending the annual meeting of the American Immigration Lawyers Association that will be held in Salt Lake City, Utah. On Saturday morning at the conference, I invite anyone interested in physician immigration issues to attend a breakfast meeting of the FMG Taskforce that will be held at the Marriott. I'm the current chair of the Taskforce and if you're interested in attending the meeting, please email 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: Visa Options for Nurses, Part 3: Healthcare Worker Certificates

Why do health care workers require special certification?

In 2003, the Department of Homeland Security issued long-awaited final regulations governing health care workers on non-immigrant visas. The rule follows the October 2002 release of proposed regulations and represents the final implementation of health care worker provisions included in Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("The 1996 Act"). That law created a new ground of inadmissibility for health care workers unless the workers have a certificate from an approved organization verifying the worker's credentials.

Section 343 of the 1996 Act provided a new ground of inadmissibility for health care workers unless the worker could present a certificate from the Commission on Graduates of Foreign Nursing Schools or an equivalent credentialing organization approved by both USCIS and the Department of Health and Human Services. The credentialing must verify:

1. The alien's education, training, license, and experience meet all applicable requirements for admission into the US, are comparable with that required for a similar American health care worker, and the license is unencumbered.
2. The alien has the level of competence in oral and written English considered by HHS and the Department of Education to be appropriate for health care work of the kind in which the alien will be working.
3. If a majority of states licensing the profession recognize a test predicting an applicant's success on the profession's licensing or certification examination, the alien has passed such a test or examination.

For nurses, Section 212(r) of the Immigration and Nationality Act provides that CGFNS can alternatively certify a nurse who has a valid and unrestricted license in a US state where the nurse intends to be employed, the nurse has passed the National Council Licensure Examination (NCLEX) and the nurse meets the following requirements:

1. The course instruction was in English; and
2. The nursing program was located in a country which was designated by CGFNS as having nursing programs of sufficient quality and English instruction; and
3. The nursing program was in operation on or before November 12, 1999 or has been approved by CGFNS if it was later established.

CGFNS has designated the following countries for purposes of the alternate certification process: Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and the United States.

What will happen to the approvals for previously authorized certifying organizations?

The organizations previously authorized under the prior interim rules to certify health care workers (except CGFNS) shall be required to be re-certified. However, those organizations will retain interim authority to continue issuing certifications. These organizations will have until January 28, 2004 to submit an I-905 Application for Authorization to Issue Health Care Worker Certificates. CGFNS will still have to submit an application (without paying a fee) by that date as well and CGFNS will still have to be subject to ongoing review by USCIS.

Are Non-Immigrants Covered by the VisaScreen rules?

Yes. Beginning on July 25, 2004, non-immigrants became covered by the VisaScreen rules (see below for more information on this). However, spouses and dependants of immigrants or non-immigrants who are the primary applicants are not covered even if the spouse intends to work in health care. But all people applying for H, J and O visas are covered. Also, TN visa holders are covered despite protests that the NAFTA Treaty prohibits this. Non-immigrants coming in for training under F, H-3 and J visas are NOT covered either.

Which Kinds of Health Care Workers are Covered by the Certification Requirements?

As in the proposed rule and the interim rules, seven occupations are covered. They are

1. Registered Nurses
2. Physical therapists
3. Occupational therapists
4. Speech-language pathologists
5. Medical technologists (also known as clinical laboratory scientists)
6. Medical technicians (also known as clinical laboratory scientists) and
7. Physician Assistants

The USCIS considered and has chosen not to expand this list and has also decided not to define these health care occupations. Instead, they will continue with the practice of reviewing the duties of a worker on a case-by-case basis.

Are Health Care Workers Trained in the US covered?

The USCIS has retained the controversial requirement from the proposed rule that health care workers who possess state licenses or who were trained in the US must still be certified. According to USCIS, they are strictly interpreting the law and Congress expressed no intention to exempt these workers.

Also, the USCIS argues that the state screening processes alone would not demonstrate applicants' English skills and comparable training and unencumbered licensing.

The USCIS did, however, accept the suggestion of CGFNS in the final rule to allow for a more streamlined certification process for those nurses who trained in the US or who already are licensed here. Under the CGFNS proposal, a nurse who graduated from an entry-level program accredited by the National League for Nursing Accreditation Commission (NLNAC) or the Commission Collegiate Nursing Education (CCNE) would be exempt from the educational comparability review and English language proficiency testing. Also, nurses educated in the US in any other named discipline and who have graduated from a program accredited by the discipline would be evaluated under this same process. The USCIS believes that this will substantially shorten the certification process and ease the paperwork burdens on nurses.

The USCIS and the Department of Health and Human Services have also agreed to use the same kind of streamlining for the following groups:

1. For occupational therapists, graduation from a program accredited by the Accreditation Council for Occupational Therapy Education (ACOTE) or the American Occupational Therapy Association (AOTA).
2. For physical therapists, graduation from a program accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) of the American Physical Therapy Association (APTA); and
3. For speech language pathologists and audiologists, graduation from a program accredited by the Council on Academic Accreditation in Audiology and Speech Language Pathology (CAA) of the American Speech-Language-Hearing Association (ASHA).

For now, other health care workers not listed above need to go through a normal certification.

When and How will the Certification be Presented to the USCIS?

First, certifications will only be valid for a five-year period. So it is possible that some nurses may have to go through the process more than once if they are in the US for an extended period on a non-immigrant visa or they simply wait several years before applying for admission to the US.

In the *proposed* regulation, the USCIS said that it would NOT be necessary to present the credentialing certification each time a worker enters the US. The presentation of an I-94 or a fee receipt showing that the worker was processed for admission under NAFTA can be used as evidence that the worker previously presented a certificate. **NOTE, HOWEVER, that the USCIS has changed its mind.** It will now only accept a valid health care worker certificate or certified statement as evidence that the worker is admissible. According to the USCIS, the proposal would not work because I-94s are supposed to be surrendered for many travelers and I-94s don't always contain information on a worker's occupation. Green card holders, however, do not need to show the certificate to be admitted each time.

How Will Certificates Be Presented When Applying for a Change of Non-Immigrant Status in the US?

The new rule adds a section that outlines the procedure for submitting a certificate when a change of nonimmigrant status is requested in the US.

Due to concerns that requiring workers already in the US in nonimmigrant visas to immediately get certifications could disrupt the delivery of health care, the USCIS has decided that they will continue waiving the certification requirement for ONE year for health care workers already in the US. The USCIS believes this will allow plenty of time for workers to meet the requirements for certification and for the credentialing organizations to get ready for a much bigger workload.

Therefore, any nonimmigrant health care worker admitted on or before July 26, 2004 will have the certification requirement waived. Furthermore, any petition or application to extend a worker's authorized stay or change his or her status will be denied unless the alien obtains the required certification no later than one year after the date of the worker's admission.

How Will Certificates Be Presented When Applying for an Immigrant Status in the US?

Any applicant coming to the US as an immigrant or is applying for adjustment of status to perform labor in a health care occupation must submit a certification at the time of visa issuance or adjustment of status. So it should not be necessary to have VisaScreen completed at the time of filing the I-140.

How Will Organizations Qualify to Issue Health Care Worker Certificates?

CGFNS is the only organization that can - at least initially - certify workers in any of the seven covered professions. They will still be subject to oversight and could lose their accreditation if the USCIS finds problem with their credentialing process.

All organizations must submit an I-905 Application for Authorization Workers (though CGFNS does not need to pay the \$230 fee). All applications are going to be handled by the USCIS Nebraska Service Center.

The USCIS will notify the public of new organizations approved for certifying by publishing a public notice in the Federal Register and on its web site at www.immigration.gov. The list will also identify organizations whose authorization has been terminated.

More than one organization can be approved to issue certificates for the same occupation and such approvals shall be valid for five years at a time.

The USCIS has laid out in the final rule the specific standards that must be met in order to qualify to issue certificates.

There are four guiding principles to the standards:

1. The USCIS will not approve an organization unless the organization is independent and free of material conflicts of interest regarding whether an alien receives a visa.
2. The organization should demonstrate an ability to evaluate both the foreign credentials appropriate for the profession and the results of examinations for proficiency in the English language appropriate for the health care field in which the alien works.
3. The organization should also maintain comprehensive and current information on foreign educational institutions, ministries of health and foreign health care licensing jurisdictions.
4. If the health care field is one for which a majority of states require a predictor examination (such as nursing), the organization should demonstrate an ability to conduct the examination outside the US.

A change from the proposed regulations is the addition of language clarifying that a not-for-profit corporation that has a self-perpetuating board of directors may still demonstrate that it is independent and free of material conflicts of interest regarding whether the alien receives a visa.

Another addition to the proposed rules is that credentialing organizations will be required to request evidence of a worker's degree and transcript from the issuing educational and

licensing authorities rather than from the applicants. This new rule is designed to reduce fraud.

The regulations also have a number of specific requirements that must be met by certifying organizations including the following:

- the organization must be independent of any other group that functions as a representative of the occupation or profession or serves as or is related to a recruitment/placement organization
- the organization must be able to render impartial advice regarding an individual's qualifications regarding training, experience and licensure.
- the organization must be completely independent in all of its day-to-day activities.
- the organization should provide applicants with their results as quickly as possible and if an applicant fails, the applicant should be quickly provided with information on his or her areas of deficiency
- the organization should take steps to ensure applicants' information is kept confidential
- the certifying organization must have a formal policy for renewing the certification if an applicant's original certification has expired before the individual first seeks admission to the US or applies for adjustment of status
- the organization shall provide all qualified applicants with a certificate in a timely manner
- the organization shall examine, evaluate and validate the academic and clinical requirements applied to each country's accrediting bodies or the educational institution
- the organization should evaluate the licensing and credentialing systems of each country or licensing jurisdiction to see which systems are equivalent to that of the majority of licensing jurisdictions in the US
- the organization shall be prepared to submit information requested by USCIS for use in investigating allegations of non-compliance with standards
- the organization shall establish procedures to track the ability of certificate holders to pass US licensing or certification exams. Information on passage rates shall be supplied to HHS on an annual basis or the USCIS as part of the five-year reauthorization application.

What Kinds of Organizations Can Qualify to Be a Credentialing Organization?

According to the USCIS, any organization, including a state agency, can be found eligible for authorization to issue certificates as long as it meets the majority of the standards noted above.

How Will the USCIS Monitor Credentialing Organizations?

The USCIS has stated that it intends to develop a process to monitor credentialing organizations to ensure that the organization continues to follow the standards in the new rule. As part of this process, the USCIS will review and reauthorize programs every five years. If the USCIS makes adverse findings, it can initiate termination proceedings. It also may conduct additional reviews at any time in the five-year period. CGFNS sought to be exempt from this requirement, but were rebuffed by USCIS.

How Much Time Will Credentialing Organizations Have to Issue Certificates?

The USCIS considered requiring organizations to issue certificates in a specified period of time. But instead they decided to simply state in the regulations that organizations must issue certificates in a timely manner to as to minimize any delays that may affect a worker's ability to proceed with his or her application for an immigration benefit. It did, however, state in the regulation's preamble that it reserves the right to initiate termination proceedings against organizations that are unduly slow in issuing certificates. It also can waive the certification requirement in individual cases upon request.

How Much Can a Credentialing Organization Charge for a Certificate?

The USCIS does not specify how much an organization can charge, but the regulation does state that the fee charged should not unduly impair a worker's ability to seek an immigration benefit.

How Can a Certificate Be Revoked from a Worker?

A credentialing organization must develop policies and procedures for revoking certificates if it finds that a worker was not eligible to receive the certificate at the time it was issued. Also, for workers whose certificates are revoked, credentialing organizations are responsible for notifying the Nebraska Service Center, which may revoke the visa petition and initiate removal proceedings.

The USCIS has added a requirement since the proposed regulation that requires an organization issuing certificates include in its revocation process a mechanism to revoke a certificate when it learns that a holder is no longer eligible to hold a certificate.

What Does the Certificate Need to Include?

The certification needs to include the following information:

1. The name, designated point of contact to verify the validity of the certificate, address and telephone number of the certifying organization;
2. The date the certificate was issued?
3. The health care occupation for which the certificate was issued; and
4. The alien's name and date and place of birth.

What are the Testing Organizations and Scores Approved for the English Language Certification Requirement?

The tests and scores will be published periodically in the Federal Register and on the USCIS web site at www.immigration.gov.

Score requirements are currently as follows:

1. Physical and Occupational Therapists -

ETS: TOEFL: Paper-based 560, Computer-based 220; TWE: 4.5; TSE: 50;

2. Nurses and other health care workers requiring a bachelors degree -

ETS: TOEFL: Paper-based 540, Computer-based 207; TWE: 4.0; TSE: 50;
TOEIC Service International: TOEIC: 725; plus TWE: 4.0 and TSE: 50; or
IELTS: 6.5 overall with spoken band score of 7.0 (this would require the Academic module).

3. Occupations requiring less than a bachelor's degree -

ETS: TOEFL: Paper-based 530, Computer-based 197; TWE: 4.0; TSE: 50;
TOEIC Service International: TOEIC: 700; plus TWE: 4.0 and TSE: 50; or
IELTS: 6.0 overall with spoken band score of 7.0 (this would require the Academic or the General module).

Note that graduates of health profession programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom and the United States are deemed to have met the English language requirements.

3. Ask Visalaw.com

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

Q - I have a green card and went to England on Nov 30th 2004. I came back yesterday May 30th 2005. The immigration officer who checked my passport and green card said that I was out of the country for 7 months. I disagreed, but he insisted and put a stamp on my passport stating I had overstayed. Is there a way I can change this? I still have my air line tickets showing departure and arrival dates.

A - You are not likely to be able to get the stamp removed. But it likely would not matter. If your green card was not taken, the notation in the passport is basically a warning to the officer on the next entry that you may not be residing permanently in the US. I think you instead want to focus on taking steps to ensure that you can document that the US is your primary place of residence. I'd read the article on our site at <http://www.visalaw.com/01jan4/12jan401.html>.

Q - Can you tell me the results of the latest DV lottery

A - DV results are starting to be released, but the State Department usually takes two to three months to accomplish the task and then will send out a notice when they are done. That notice is usually released in June or July. You cannot verify that you have or have not been selected.

Q - I'd like to ask a quick question on how to adjust status from I-130's Category 2B (unmarried daughter of lawful permanent resident) to I-130's Category 1 (unmarried daughter of US citizen) in the scenario below:

1. I did apply I-130 for my daughter (22 yrs old) on Category 2B 4 yrs ago (2001) with priority date of 2003.
2. I can apply for citizenship in 2006. Assuming I can become US citizen, how can I adjust the status for my daughter's I130?
3. When adjusting the status, which priority date will USCIS use to calculate in the new category 1?

A - When you naturalize, your daughter's case automatically converts to the better category and she'll retain the priority date from the first filing. The State Department won't know, however, until you notify them and then they'll begin consular processing. If your daughter is adjusting here in the US, she will simply file for adjustment of status with documentation showing the conversion to the new category (that would be done simply by providing your certificate of naturalization).

Q - I am currently on an H-1B and have been approached about a job at a different company. If I apply for a new H-1 to a different company does that fall under the quota? I got my MBA about 2 years ago. Does that makes things different?

A - In most cases, you will not have a problem with the H-1B cap when you move to another employer. The key is whether you were counted against the cap in the prior job. If you only have H-1B sponsorship with an exempt employer (for example, a university), you may have to deal with the cap for a new job.

4. Border and Enforcement News

U.S. Department of Homeland Security (DHS) recently announced that foreign visitors departing from Seattle-Tacoma International Airport (Sea-Tac) are required to follow checkout procedures before departing on their flight. Visitors are asked to provide their two index fingerscans and hold for a digital photo as part of a pilot program to test and evaluate an automated biometric exit process.

To help the process run smoothly, U.S. Customs and Border Protection Officers will provide foreign visitors with a card explaining the exit process when they arrive in the United States at one of the airports participating in the pilot. Directional map cards will be distributed by the airlines and signs will be strategically located throughout the airport directing the visitors to the exit stations.

U.S. Immigration and Customs Enforcement and the Defense Criminal Investigative Service arrested eight United Kingdom citizens and one New Zealand citizen recently at the Smith-Reynolds Airport in Winston-Salem, North Carolina, who were employed by a company sub-contracted to refit Navy P-3 Orion aircraft.

The Lockheed P-3 Orion aircraft is the Navy's primary long-range anti-submarine patrol aircraft and is also used for electronic surveillance.

The aliens entered the country under the United States' visa waiver program, which allows citizens of certain countries to use their passport to enter for short business or pleasure stays. They entered the country through various international airports. Aliens are prohibited from accepting employment while here on a visa waiver.

All are presently in detention and have been placed into removal proceedings for violations of the visa waiver program (Section 217 of the Immigration and Nationality Act). ICE intends to revoke the visa waiver status of each alien and remove them from the country. The respective embassies have been notified.

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:

Missouri (05/18/2005): <http://www.visalaw.com/missouri.html>

Vermont (05/18/2005): <http://www.visalaw.com/vermont.html>

California (05/18/2005): <http://www.visalaw.com/california.html>

Nebraska (06/01/2005): <http://www.visalaw.com/nebraska.html>

Texas (05/31/2005): <http://www.visalaw.com/texas.html>

7. News Bytes

U.S Citizenship and Immigration Services (USCIS) announced recently that the filing deadline for applications for legalization under the terms of the CSS and LULAC (Newman) settlement agreements is extended from May 23, 2005 until December 31, 2005. This is not a new amnesty program. The CSS and LULAC (Newman) settlement agreements allow for those who meet certain requirements to apply or reapply for Temporary Resident status under the 1986 amnesty program of Section 245A of Immigration and Nationality Act.

Eligible individuals may apply by submitting a Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, and a CSS/ LULAC (Newman) Class Membership Worksheet. More information on the eligibility

requirements and the application process may be found at local USCIS offices or online at www.uscis.gov under "Legal Settlements."

U.S. Citizenship and Immigration Services (USCIS) announced recently that valid V-2 and V-3 status holders will no longer "age-out" of V-2 or V-3 status. USCIS will now approve extension of status applications for children of lawful permanent residents who are 21 years old or older with V-2 or V-3 status, as long as they meet the requirements for extension of status in every other way.

An alien, physically present in the United States, who was previously in V-2 or V-3 status and whose application for extension of status was denied solely because he/she was 21 years of age or more, may file an application for extension of status. An alien, physically present in the United States, who was previously in V-2 or V-3 status and who did not apply for extension of status solely because the alien was 21 years of age or more at the time of expiration of his/her V status, may file an application for extension of status. If approved, USCIS will grant a period of admission not to exceed two years. The alien can continue to extend V status until he/she becomes a permanent resident or until the law terminates V status. V-2 or V-3 status holders who are physically present in the United States can request an extension by filing an Application to Extend/Change Non-immigrant Status (Form I-539). Form I-539 is available on the USCIS website at www.uscis.gov, and at local District USCIS Offices.

The new guidance does not change the fact that in order to qualify for the initial V-2 or V-3 status, the applicant must meet the legal definition of "child." This definition states that "child" includes being unmarried and less than 21 years of age.

U.S. Citizenship and Immigration Services (USCIS) announced recently that it has received more than 6,393 H-1B petitions that will count against the Congressionally-mandated exemption cap for fiscal year 2005 (October 1, 2004 through September 30, 2005) established by the H-1B Visa Reform Act of 2004.

The new regulations, which took effect on May 5, 2005, changed the H-1B filing procedures for FY 2005 and for future fiscal years. The regulations make available 20,000 new H-1B visas, only for foreign workers with a minimum master's level degree from a U.S. academic institution, in addition to the Congressionally mandated annual cap of 65,000 H-1B visas.

U.S. Citizenship and Immigration Services (USCIS) forwarded to the *Federal Register* a notice announcing that starting May 31, 2005 aliens must mail applications to renew or replace Permanent Resident Cards, commonly known as "green cards," directly to the Los Angeles Lockbox. Beginning on May 31st, aliens filing a Form I-90, regardless of their state of residence, must mail those applications with an application fee of \$185 and a biometrics fee of \$70 to one of the following addresses:

For U.S. Postal Service (USPS) deliveries:

U.S. Citizenship and Immigration Services

P.O. Box 54870
Los Angeles, CA 90054-0870

Or for non-USPS deliveries (e.g. private couriers):

U.S. Citizenship and Immigration Services
Attention: I-90
16420 Valley View Avenue
La Mirada, CA 90638

Applicants should NOT include their initial evidence and supporting documentation when submitting the Form I-90 to the Los Angeles Lockbox. All applicants will receive a notice for a biometrics processing appointment at an ASC and will submit their initial evidence during that appointment. All applicants will receive their biometrics appointment notice in the mail.

8. International Roundup

According to Reuters, Australia is investigating 201 cases of possible wrongful detention and deportation, uncovered since a mentally ill Australian was mistakenly detained as an illegal immigrant and another held and mistakenly deported. The government had previously admitted that at least 33 Australians were wrongfully detained in the past two years and set up a closed inquiry into detention centers.

According to Expatica News, Spain's government has told undocumented immigrants who were not eligible for its unprecedented amnesty that they must leave the country. Some 700,000 illegal immigrants to Spain, mostly from Latin America and North Africa, applied for the amnesty over the three-month period that ended on 7 May. Just over 600,000 of them — those who could demonstrate they were in Spain for six months beginning last year and who have work contracts for at least six months — are expected to be granted documentation in the coming weeks.

9. Legislative Update

H.R.2743

Title: For the relief of Aida Abigail Trevino de Zamarron.

Sponsor: Rep Cuellar, Henry [TX-28] (introduced 5/26/2005)

Private bill

Latest Major Action: 5/26/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

H.R.98 - 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 (introduced 1/4/2005)

Bill Status: 3/9/2005: Referred to the Subcommittee on
Emergency Preparedness, Science, and Technology.
Committee: House Emergency Preparedness, Science, and Technology
(subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00098:/>

H.R.685 - To amend title 11 of the United States Code,
and for other purposes.

Sponsor: Rep Sensenbrenner, F. James, Jr. (introduced 2/9/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on
Commercial and Administrative Law.

Committee: House Commercial and Administrative Law (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00685:/>

H.R.688 - To amend the Immigration and Nationality Act
to bar the admission, and facilitate the removal, of alien
terrorists and their supporters and fundraisers, to secure
our borders against terrorists, drug traffickers, and other
illegal aliens, to facilitate the removal of illegal aliens
and aliens who are criminals or human rights abusers, to
reduce visa, document, and employment fraud, to temporarily
suspend processing of certain visas and immigration benefits,
to reform the legal immigration system, and for other purposes.

Sponsor: Rep Barrett, J. Gresham (introduced 2/9/2005)

Bill Status: 3/9/2005: Referred to the Subcommittee on
Economic Security, Infrastructure Protection, and Cybersecurity.

Bill Status: 4/4/2005: Referred to the Subcommittee on
Immigration, Border Security, and Claims.

Committee: House Economic Security, Infrastructure Protection,
and Cybersecurity (subcommittee)

Committee: House Immigration, Border Security, and Claims
(subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00688:/>

H.R.780 - To amend section 5202 of the Intelligence Reform
and Terrorism Prevention Act of 2004 to provide for assured
funding for more Border Patrol agents.

Sponsor: Rep Ruppertsberger, C. A. Dutch (introduced 2/10/2005)

Bill Status: 3/9/2005: Referred to the Subcommittee on
Economic Security, Infrastructure Protection, and Cybersecurity.

Committee: House Economic Security, Infrastructure Protection,
and Cybersecurity (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00780:/>

H.R.793 - To revise certain requirements for H-2B employers
and require submission of information regarding H-2B nonimmigrants,
and for other purposes.

Sponsor: Rep Gilchrest, Wayne T. (introduced 2/14/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on
Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims
(subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00793:/>

H.R.814 - To amend the Immigration and Nationality Act to provide for the automatic acquisition of citizenship by certain individuals born in Korea, Vietnam, Laos, Kampuchea, or Thailand.

Sponsor: Rep Evans, Lane (introduced 2/15/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00814:/>

H.R.820 - To amend the Immigration and Nationality Act to reauthorize the State Criminal Alien Assistance Program.

Sponsor: Rep King, Peter T. (introduced 2/15/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00820:/>

H.R.884 - To provide for the adjustment of status of certain foreign agricultural workers, to amend the Immigration and Nationality Act to reform the H-2A worker program under that Act, to provide a stable, legal agricultural workforce, to extend basic legal protections and better working conditions to more workers, and for other purposes.

Sponsor: Rep Cannon, Chris (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00884:/>

H.R.893 - To allow certain individuals of Japanese ancestry who were brought forcibly to the United States from countries in Latin America during World War II and were interned in the United States to be provided restitution under the Civil Liberties Act of 1988, and for other purposes.

Sponsor: Rep Becerra, Xavier (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00893:/>

H.R.900 - To amend the Immigration and Nationality Act to remove from an alien the initial burden of establishing that he or she is entitled to nonimmigrant status under section 101(a)(15)(B) of such Act, in the case of certain aliens seeking to enter the United States for a temporary stay occasioned by the serious illness or death of a United States citizen or an alien lawfully admitted for permanent

residence, and for other purposes.

Sponsor: Rep Case, Ed (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00900:/>

H.R.901 - To amend the Immigration and Nationality Act to give priority in the issuance of immigrant visas to the sons and daughters of Filipino World War II veterans who are or were naturalized citizens of the United States, and for other purposes.

Sponsor: Rep Case, Ed (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00901:/>

H.R.925 - To prohibit a Federal agency from accepting a form of individual identification issued by a foreign government, except a passport that is accepted on the date of enactment.

Sponsor: Rep Gallegly, Elton (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00925:/>

H.R.936 - To provide for immigration relief in the case of certain immigrants who are innocent victims of immigration fraud.

Sponsor: Rep Honda, Michael M. (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Bill Status: 4/4/2005: Referred to the Subcommittee on Crime, Terrorism, and Homeland Security.

Committee: House Immigration, Border Security, and Claims (subcommittee)

Committee: House Crime, Terrorism, and Homeland Security (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00936:/>

H.R.972 - To authorize appropriations for fiscal years 2006 and 2007 for the Trafficking Victims Protection Act of 2000, and for other purposes.

Sponsor: Rep Smith, Christopher H. (introduced 2/17/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Bill Status: 5/19/2005: Introductory remarks on measure. (E1026-1027)

Committee: House Immigration, Border Security, and Claims
(subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00972:/>

H.R.997 - To declare English as the official language of the United States, to establish a uniform English language rule for naturalization, and to avoid misconstructions of the English language texts of the laws of the United States, pursuant to Congress' powers to provide for the general welfare of the United States and to establish a uniform rule of naturalization under article I, section 8, of the Constitution.

Sponsor: Rep King, Steve (introduced 3/1/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on the Constitution.

Committee: House Constitution (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR00997:/>

H.R.1076 - To authorize the President to detain an enemy combatant who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda, to guarantee timely access to judicial review to challenge the basis for a detention, to permit the detainee access to counsel, and for other purposes.

Sponsor: Rep Schiff, Adam B. (introduced 3/3/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Crime, Terrorism, and Homeland Security.

Committee: House Crime, Terrorism, and Homeland Security (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01076:/>

H.R.1172 - To provide for the protection of unaccompanied alien children, and for other purposes.

Sponsor: Rep Lofgren, Zoe (introduced 3/8/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01172:/>

H.R.1196 - To improve the security clearance process along the United States-Mexico border, to increase the number of detention beds, and for other purposes.

Sponsor: Rep Ortiz, Solomon P. (introduced 3/9/2005)

Bill Status: 4/4/2005: Referred to the Subcommittee on Courts, the Internet, and Intellectual Property.

Bill Status: 5/10/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.

Committee: House Immigration, Border Security, and Claims (subcommittee)

Committee: House Courts, the Internet, and Intellectual Property (subcommittee)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01196:/>

H.R.1219 - To amend the Immigration and Nationality Act to eliminate the diversity immigrant program.
Sponsor: Rep Goodlatte, Bob (introduced 3/10/2005)
Bill Status: 5/10/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01219:/>

H.R.1233 - To amend titles XIX and XXI of the Social Security Act to permit States the option of coverage of legal immigrants under the Medicaid Program and the State children's health insurance program (SCHIP).
Sponsor: Rep Diaz-Balart, Lincoln (introduced 3/10/2005)
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01233:/>

H.R.1268 - An act making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, for the fiscal year ending September 30, 2005, and for other purposes.
Sponsor: Lewis, Jerry (introduced 3/11/2005)
CRS Product: RL32395 U.S. Treatment of Prisoners in Iraq: Selected Legal Issues
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01268:/>

H.R.1285 - To amend the Nursing Relief for Disadvantaged Areas Act of 1999 to remove the limitation for nonimmigrant classification for nurses in health professional shortage areas.
Sponsor: Rep Rush, Bobby L. (introduced 3/14/2005)
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01285:/>

H.R.1320 - To secure the borders of the United States, and for other purposes.
Sponsor: Rep Reyes, Silvestre (introduced 3/15/2005)
Bill Status: 3/29/2005: Referred to the Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity.
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Economic Security, Infrastructure Protection, and Cybersecurity (subcommittee)
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01320:/>

H.R.1324 - To require the Secretary of Homeland Security to establish a U.S. Immigration and Customs Enforcement Office of Investigations field office in Tulsa, Oklahoma.
Sponsor: Rep Sullivan, John (introduced 3/15/2005)
Bill Status: 3/29/2005: Referred to the Subcommittee on Management, Integration, and Oversight.
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Management, Integration, and Oversight (subcommittee)
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01324:/>

H.R.1325 - To amend the Immigration and Nationality Act to repeal authorities relating to H1-B visas for temporary workers.
Sponsor: Rep Tancredo, Thomas G. (introduced 3/15/2005)
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01325:/>

H.R.1374 - To amend the Immigration and Nationality Act to permit aliens who are independent living assistants to be accorded status as J nonimmigrants to provide in-home living and home support services to adults with disabilities.
Sponsor: Rep Cooper, Jim (introduced 3/17/2005)
Bill Status: 4/4/2005: Referred to the Subcommittee on Immigration, Border Security, and Claims.
Committee: House Immigration, Border Security, and Claims (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01374:/>

H.R.1415 - To improve the National Instant Criminal Background Check System, and for other purposes.
Sponsor: Rep McCarthy, Carolyn (introduced 3/17/2005)
Bill Status: 5/10/2005: Referred to the Subcommittee on Crime, Terrorism, and Homeland Security.
Committee: House Crime, Terrorism, and Homeland Security (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01415:/>

H.R.1509 - To create an inspection program that uses videophone systems at certain points of entry in Florida to satisfy customs and immigration reporting requirements.
Sponsor: Rep Foley, Mark (introduced 4/6/2005)
Bill Status: 5/19/2005: Subcommittee Hearings Held.
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01509:/>

H.R.1805 - To establish the position of Northern Border

Coordinator in the Department of Homeland Security.
Sponsor: Rep Slaughter, Louise McIntosh (introduced 4/21/2005)
Bill Status: 5/2/2005: Referred to the Subcommittee on
Management, Integration, and Oversight.
Committee: House Management, Integration, and Oversight
(subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR01805:/>

H.R.2092 - To amend the Immigration and Nationality Act
to comprehensively reform immigration law and to better
protect immigrant victims of violence, and for other purposes.
Sponsor: Rep Jackson-Lee, Sheila (introduced 5/4/2005)
Bill Status: 5/19/2005: Referred to the Subcommittee on
Economic Security, Infrastructure Protection, and Cybersecurity.
Committee: House Economic Security, Infrastructure Protection,
and Cybersecurity (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR02092:/>

H.R.2330 - To improve border security and immigration.
Sponsor: Rep Kolbe, Jim (introduced 5/12/2005)
Bill Status: 5/19/2005: Referred to the Subcommittee on
Economic Security, Infrastructure Protection, and Cybersecurity.
Committee: House Economic Security, Infrastructure Protection,
and Cybersecurity (subcommittee)
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR02330:/>

H.R.2360 - Making appropriations for the Department of
Homeland Security for the fiscal year ending September
30, 2006, and for other purposes.
Sponsor: Rogers, Harold (introduced 5/13/2005)
CRS Product: RS21302 Assistance to Firefighters Program
CRS Product: RS20071 United States Fire Administration:
An Overview
CRS Summary: Passed House, amended. Go to the Web page
to see the new summary.
CRS Summary: Reported to House, without amendment. Go to
the Web page to see the new summary.
<http://www.congress.gov/cgi-lis/bdquery/z?d109:HR02360:/>

10. State Department Visa Bulletin

Visa Bulletin for June 2005

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during June. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the

Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by May 10th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent

Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all

qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
Family					
1 st	08APR01	08APR01	22OCT94	22OCT94	15JAN91
2A*	22APR01	22APR01	22APR01	22APR98	22APR01
2B	08DEC95	08DEC95	08DEC95	15MAR92	08DEC95
3 rd	22JAN98	22JAN98	22JAN98	22APR95	01SEP90
4 th	01AUG93	01AUG93	15DEC92	01AUG93	22DEC82

*NOTE: For June, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 22APR98. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 22APR98 and earlier than 22APR01. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
Family					
1st	C	C	C	C	C
2nd	C	C	C	C	C
3rd	C	01JUN02	01JUN02	C	01JUN02
Other Workers	01JAN99	01JAN99	01JAN99	01JAN99	01JAN99

4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas / Regional Centers	C	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. This reduction has resulted in the DV-2005 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For June, immigrant numbers in the DV category are available to qualified DV-2005 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

	All DV Chargeability Areas Except Those Listed Separately				
Region					
AFRICA	AF	28,450	Except	Nigeria	21,400
ASIA	AS	7,900	Except	Bangladesh	5,975

EUROPE	EUR	20,500	Except	Poland	20,000
			Except	Ukraine	5,750
NORTH AMERICA (BAHAMAS)	NA	13			
OCEANIA	OC	1,000			
SOUTH AMERICA and the CARIBBEAN	SA	1,775			

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2005 program ends as of September 30, 2005. DV visas may not be issued to DV-2005 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2005 principals are only entitled to derivative DV status until September 30, 2005. DV visa availability through the very end of FY-2005 cannot be taken for granted. Numbers could be exhausted prior to September 30. Once all numbers provided by law for the DV-2005 program have been used, no further issuances will be possible.

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN JULY

For July, immigrant numbers in the DV category are available to qualified DV-2005 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

	All DV Chargeability Areas Except Those Listed Separately				
Region					
AFRICA	AF	32,800	Except	Ethiopia	29,400
			Except	Nigeria	23,300
ASIA	AS	9,200	Except	Bangladesh	6,700

EUROPE	EUR	20,500	Except	Ukraine	10,800
NORTH AMERICA (BAHAMAS)	NA	13			
OCEANIA	OC	1,180			
SOUTH AMERICA and the CARIBBEAN	SA	1,800			

D. RETROGRESSION OF THE EMPLOYMENT-BASED THIRD PREFERENCE "OTHER WORKER" CATEGORY FOR JUNE

As mentioned in the Visa Bulletin announcing the May cut-off dates, demand for visa numbers in the Employment Other Worker category has remained extremely high despite the imposition of a cut-off date. As a result, it has been necessary to retrogress the June cut-off date in an attempt to hold number use within the annual limit. It is likely that the limit will be reached sometime during June, and the category would immediately become "unavailable".

E. VISA AVAILABILITY DURING THE REMAINDER OF FY-2005

Employment-based: During the past month there has been a significant increase in the amount of numbers being used by Citizenship and Immigration Service (CIS) offices for adjustment of status applicants. This level of demand has significantly depleted the supply of Employment-based numbers available under the annual limit. Recent discussions with CIS have made it clear that their backlog reduction efforts will sustain or increase the current level of demand. Therefore, continued visa availability in the Employment-based categories cannot be guaranteed during the final quarter of FY-2005. If demand continues at the current rate, it will be necessary to oversubscribe many or all of the Employment categories on a Worldwide basis. Such oversubscription could result in the establishment of cut-off dates, retrogression of already established dates, or some categories becoming "unavailable".

Mexico: Heavy applicant demand in all of the Mexico Family-sponsored categories is causing the issuance level to approach the annual limit. It is likely that many of the Mexico cut-off dates will be retrogressed during the final months of FY-2005.

F. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is: <http://travel.state.gov>

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address: listserv@calist.state.gov and in the message body type:

Subscribe Visa-Bulletin First name/Last name
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address: listserv@calist.state.gov and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address: VISABULLETIN@STATE.GOV

(This address cannot be used to subscribe to the Visa Bulletin.)

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CA/VO:May 10, 2005

11. Guest Column: Not All Layoffs Are Created Equal: Layoffs In The PERM Looking Glass, 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.

Harry Truman used to say that a recession is when your neighbor is out of work, but a depression happens when you get the pink slip. The PERM rules on layoffs guard against both. As is so often the case with labor certification, DOL has acted from a good motive in trying to make sure that hiring foreign workers is the last option that employers turn to only after all qualified Americans who are looking for a job have been considered and found wanting. No one can object to this. Yet, as always, the devil is in the details and the manner in which DOL has elected to go about making sure that unemployed Americans have a shot will serve to frustrate employers without protecting those it is designed to serve. This is because DOL has imported into the PERM regulations concepts from traditional labor law

without taking with them the nuance and context that provide both meaning and balance. Torn loose from their moorings, such principles will be difficult to understand or enforce and are most likely to promote confusion to the detriment of all concerned. The goal, therefore, of any honest critique is not to attack DOL for trying to advocate for the jobless but, rather, to make such advocacy logical and effective. In many ways, the PERM treatment of layoffs goes way too far; in others, it does not go far enough. Making labor certification more difficult is not the best way to protect the legitimate interests of US workers whose cause deserves our attention and commands our support.

How does PERM define layoff? For that, we turn to 20 C.F.R. Section 656.17(k)(1) which says the following: "A layoff shall be considered any involuntary separation of one or more employees without cause or prejudice." [1] The employer must "document it has notified and considered all potentially qualified laid off (employee applicant) U.S. workers of the job opportunity." [2] Preliminary comments to such definition [3] clarify that the scope of a layoff "includes, but is not limited to, personnel actions characterized by an employer as reductions in force, restructuring or downsizing." [4]

There are several key qualifiers and unresolved issues that surround this definition:

- * Time- look to the six months before the labor certification is filed.
- * Focus on the area of intended employment- it is not a nationwide obligation.
- * Consider only the occupation in question or a related occupation. A "related occupation" is defined at 656.k(2) as " any occupation that requires workers to perform a majority of the essential duties involved in the occupation for which certification is sought." 69 Fed. Reg. at 77395. This is interesting for a number of reasons. First, it seems as if there is only one possible related occupation, rather than several that might bear sufficiently close resemblance to merit strict scrutiny. Second, occupations have duties, jobs do not. While a "related occupation" is defined, the very notion of an "occupation" is not. Third, what an "essential" duty is remains open to question, one that can only be answered with respect to what a specific employer needs at a particular point in time based on concrete circumstances that are constantly changing.
- * Don't worry about the other guy. Only layoffs by this employer count, not conditions in the industry as a whole. This represents a major change from pre-PERM standards that governed adjudication of reduction in recruitment requests.
- * The rule, the comments to the rule and the form do not say the same thing. First, let's look at the regulation itself. What do we learn? Only "potentially qualified" layoffs need be contacted. How can you tell who is "potentially" qualified? Is it fair for DOL to hold an employer to an undefined standard? Is the employer at liberty to decide in good faith what it means within the context of his or her own business ? The question lingers. Here's another: What if the employer thinks the laid off worker is not qualified? Is there still an obligation to contact them ? Well, maybe, and, for that, we look at the preliminary comments: [5] "The regulation does not state workers in a related occupation are qualified for the job opportunity, only the employer must notify those workers and consider whether they are qualified. " How does this square with the wording of Question No. 26-A on Section I (page 5) of the ETA 9089 which asks if the employer has contacted all laid off US workers? What happened to "qualified" or even "potentially qualified"? If the DOL cannot agree with itself as to which US workers have to be contacted , how is the poor employer supposed to know? Lacking reliable guidance from DOL, one can only assume that an employer acting in good faith must be given substantial deference in determining how to comply. This is especially so since there is no definition of what "potentially qualified" means. While the DOL has indicated in focus group discussions that the language of the regulation can be read into the ETA 9089 phrasing when it is not there explicitly, this is a thin reed on which a harried employer who seeks to find his way in this strange new world can rely.

* What if the laid off employee has moved away or left no forwarding address? What if they are otherwise unreachable? How then is the employer to "notify" anyone? Would good faith compliance be a first class letter mailed to the last known address or is something more called for? Is it possible for an employer to comply with the notification requirement under these circumstances, which, after all, are not all that uncommon? If it is not possible, what then? Can an employer be denied a labor certification for failing to do something which cannot be done and on which the rule is silent?

* What does "NA" mean when used by Question I-26A on ETA 9089. Once again, we do not know and we need to know. Does it mean "Not applicable" which seems odd since what then would be the purpose of the inquiry? Does it mean "Not Available" which suggests that the employer was unable to contact anyone? Why does this option appear?

* Layoffs are limited to employees; no accounting for contract workers need be made.

* Contrary to the old rock and roll song familiar to all aging baby boomers, it does not take two. One laid off employee is enough. This is quite different from what "layoff" usually means. Consider how Black's Law Dictionary has to say: "The termination...of a large number of employees in a short time." [6] Interestingly, this definition does not mention whether the layoff was for cause or not.

* What is an "involuntary" as opposed to a "voluntary" separation? What standard is used to judge this? Is it by a preponderance of the evidence or is there a higher burden of proof? Who has this burden? Is it the employer? the laid off worker? DOL? Is there a presumption of voluntariness or involuntariness? If such a presumption exists, is it rebuttable or irrebuttable? Will a hearing be required to determine whether a resignation, retirement or separation was involuntary? Would constructive discharge qualify as an involuntary separation? In other words, did the employer create working conditions so intolerable that the desperate employee was driven to resign? [7] Does an involuntary separation include an involuntary reduction in the total number of hours worked? This would be relevant if the IRS were considering supplemental unemployment benefit trust fund payments. [8] Whether it counts for PERM is anybody's guess. The PERM rule distinguishes between layoffs where the employer had cause and those that were involuntary. What if both conditions existed? What if the employer had cause and the employee felt that he or she had to resign precisely to avoid a termination for cause? Would this be a layoff under PERM? In traditional labor law, such a resignation would be deemed a voluntary act. [9] Would this be a voluntary separation under PERM? Hard to tell.

* The PERM layoff rule prominently features the word "cause". There is no definition of such a key term. How are we to determine if the employer had cause to sever the employer-employee relationship? What if they disagree? Is it not logical to suppose that "cause" can mean different things for different purposes in different contexts? Would it not, for example, be interesting to find out if the employer had reason for the layoff? Whether such proffered reason was valid or a mere pretext? Whether the employee was able to challenge the termination? As Justice Scalia reminds us of a "fundamental principle of statutory construction and, indeed, of language itself that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." [10] Is there a difference between a wrongful discharge and a separation for cause? There is in traditional labor law where a discharge for economic reasons, such as where the plant closes, is not a wrongful discharge. [11] What about PERM? Good question.

Now that we have our text, we know what DOL thinks a layoff is. We still are left wondering what it is not. It would seem that a retirement is not a layoff. What if the employee claims the retirement was coerced by the actions of the employer or that it was offered up only to avoid termination? It would seem that a voluntary resignation is not a layoff. Do things change if the employee now says she resigned under duress? After all, a retirement is generally deemed involuntary if obtained in response to an employer's duress or coercion. [12] Is there no statute of limitations to protect the employer against a false

change of heart? Who is to judge whether the resignation was voluntary? By what standard? Did the employer misinform or deceive the employee? [13] Did the employer threaten adverse action against the employee?[14] Did the circumstances leave the employee with no alternative but to accept the terms imposed by the employer? [15] Is there an appeal? What is to happen to the labor certification while this drama is being played out? Does it simply wither on the vine? PERM provides no mechanism to determine if a separation was involuntary or consensual. Compare that to the “involuntary separation” of a federal civil service employee. The phrase “involuntary separation” is defined for this purpose by the U.S. Civil Service Commission.[16] Under S-11-2: Meaning of Involuntary Separation, it says that “ the responsibility for determining whether a separation is involuntary for retirement purposes rests with the Commission.” [17] When shall we witness the appointment of a PERM commission to determine if a separation was involuntary?

In some ways, PERM does not go far enough. It would seem that a reduction in hours from full to part-time is not a layoff but, here again, does this not leave the employee vulnerable ? Do we have a layoff when the employer transfers the employee to another job, arguably even a lower paying one? There is no involuntary separation here but the legitimate interests of the US worker are clearly at stake. If the PERM layoff rule does not prevent an adverse impact on the wages and working conditions of US workers, the very purpose of Section 212(a)(5)(A) is undermined. It is hard to understand why such actions by the employer would not come within the spirit of the layoff rule. The same would be true if there was a reduction in benefits or salary. These also are not PERM layoffs. An employee on a leave of absence, with or without pay, has not been laid off for PERM purposes, nor would an employee on disability leave come under its sheltering arms. Seniority is no defense against a PERM layoff nor will the employer be helped by demonstrating the absence of bias against, or disparate impact upon, women, the disabled, older workers, or people of color. Similarly, while contract workers can be sent packing with seeming impunity, probationary workers, perhaps even interns or trainees, cannot. In the world of 21st century business, there will be fewer permanent employees and more contract workers who do not have to be paid benefits. By placing them outside PERM looking in, is the DOL creating an inducement that unscrupulous employers may find hard to resist? Not only are contract workers cheaper than employees, but they can be shed with impunity.

“Layoff” is a well- recognized doctrine in traditional labor law. The DOL has long been involved with understanding and applying it, as have numerous other federal agencies. What is most striking is that the PERM interpretation of “layoff” is vastly different in several key ways from virtually all other statutes and provides significantly less protection to affected US workers. It is possible that the distinctive nature and purpose of labor certification accounts for this contrast. It is also possible, however, that the DOL has imported a mainstream labor law concept into a culture for which it is ill-suited and is now attempting to apply it in a manner and for a purpose that simply does not fit. Let’s see what “layoff” means outside the PERM looking glass.

The most obvious candidate for comparison is the Worker Adjustment Retraining Notification Act of 1988 (WARN)[18], which, like PERM, seeks to protect American workers against the winds of change. How does it stack up side by side with PERM? The WARN Act coverage kicks in when the employer terminates at least 50 workers who constitute at least 33% of the total at a single plant.[19] PERM imposes no such minimum loss of employment; even a single layoff suffices. WARN requires a layoff of more than 6 months.[20] Not so in PERM where even a temporary job loss qualifies as a layoff. Interestingly, while PERM, as noted above, does not protect against a reduction in hours, however drastic, the WARN Act views a reduction in hours of more than 50% as tantamount to being fired. WARN recognizes that sometimes an employer has to act under the pressure of unforeseen business emergencies;

hence, WARN excludes a reduction in force resulting from an entire plant closing,[21] while PERM does not take into account such stark reality. How does PERM notice to laid - off workers compare with what the WARN Act demands? The WARN Act requires written notice to each affected employee at least 60 days before a plant closing[22], while PERM is silent on what kind of notice must be given, when it must be given, and whether oral notification will suffice. This can create problems, for example, in the case of a unionized plant where the collective bargaining agreement may require that the employer has to go through the union to contact laid off workers rather than dealing with them directly

Unlike traditional labor law, PERM does not consider the reasons for the layoff, how long it is likely to last, what the rest of the industry is doing, or how this particular employer is likely to act in the future. All of these criteria have been articulated by the National Labor Relations Board to determine if there is a layoff under WARN.[23] PERM makes no distinction between layoffs, which may be temporary, and terminations, which, by definition, are permanent. Ordinarily, these are separate actions with very different consequences. There is no temporal quality to a PERM layoff. Compare that to the definition of layoff presented in *Fishgold v. Sullivan Drydock & Repair Corp.*[24] where the Supreme Court told us what Congress mean when it used the word "discharge" in the Selective Training and Service Act of 1940, 50 U.S.C. 301 (repealed 1955). In distinguishing a "layoff" from a "discharge", the High Court characterized the former as a "period during which a workman is temporarily dismissed or allowed to leave work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an offseason." In the wide world beyond PERM, "layoff" generally means a temporary status without work for non-disciplinary reasons.[25] The Roberts definition also clarifies that laid-off workers "usually retain seniority rights and other protection under contract or company practice." [26] Not true in PERM where layoff equates to discharge. Roberts goes on to say that the layoff may, on occasion, be a disciplinary penalty for a particular misconduct and that " the employee is generally re-employed..."[27] Again, not so under PERM. Not only is there no element of temporariness under PERM, but there is no concept of a partial as opposed to a total lay off. Traditional labor law does make this distinction. When discussing employee benefits under the Redwood National Park Expansion Act of 1978, for example, Congress carefully made sure that partially laid-off employees could still collect some pay or benefits, up to 10% less, as opposed to being relegated to a no duty/no pay employment status. PERM, by contrast, focuses exclusively upon an irrevocable severing of the employment relationship. There is little concern wasted upon those who still have jobs, but only at the price of a deterioration in the terms and conditions of employment. PERM does not seem to care what happens before they go or whether they might come back.

One of the sharpest lines of demarcation between a PERM layoff and a layoff under traditional labor law is that PERM fails to consider whether those laid off are likely to return to work. This is a core concept in labor law. It is, for example, well-settled that laid off employees cannot vote in a union representation election unless they have a "reasonable expectation of recall in the foreseeable future." [28] In the PERM world, by contrast, DOL thinks that all US workers who have been sent home are entitled to come back, thus ignoring the realities of the global economy. In determining whether such a "reasonable expectation of recall" exists, traditional labor law examines 4 factors, none of which the PERM rule mentions: (1) employer's past experience; (b) employer's future plans; (3) the circumstances surrounding the layoff and (d) what the employer told the employees about the likelihood of recall.[29] No mention of any of these informs the PERM regulation. PERM also fails to consider whether the employer had a policy of giving laid off employees first crack at any vacancies in the event of recall.[30] Unlike traditional labor law, PERM does not ask if the employer, at the time of the layoff, advised those losing their jobs not to look for

new ones. If so, this creates in the mind of the employees, a reasonable expectation of return.[31] If DOL wanted to encourage the retention of American workers as a core element of the employer's work force, why does not the PERM rule ask and answer these and many other related questions that probe the reasons for the layoff and the circumstances surrounding it? PERM manages to make labor certification more difficult without protecting American jobs.

The PERM rule on layoffs is one of strict liability, something that traditional labor law has usually eschewed in favor of a deeper analysis. The PERM regulation, for example, does not seek to probe the motives behind the layoff that the employer might have entertained. Did the employer use the layoff to further a substantial and legitimate commercial objective? Did the employer display a bias against the laid off workers? PERM never asks. What criteria did the employer use in deciding who would be laid off? Was such criteria arbitrary or reasonable? Did the employer actually follow through in good faith? Silence. More questions present themselves for urgent resolution. Did the laid off employee receive specific written notice that the employer intended to let him go? Did he, at least, receive general notice of a reduction in force that would eliminate his job or otherwise make it redundant? Was she laid off after refusing relocation to another commuting area? Did the employer deceive the employee and provide misinformation to elicit the resignation, thereby vitiating its voluntariness?[32] Did the employer prompt the resignation after threatening to take disciplinary action despite knowing that the threat could not be carried out?[33]

These questions, and many others like them, may not arise from most PERM layoffs but the conspicuous failure of the PERM rule to raise virtually any of them suggests that the architects of PERM have adopted a strict liability rule where the circumstances surrounding the layoff simply do not matter. This is a dangerous notion that most employers and workers will find very hard to understand. Should not honest employers who act in good faith out of rational motives be treated differently than their unscrupulous competition? Should not DOL alter the PERM rule on layoffs to reward such conduct? Are all layoffs alike? By taking this viewpoint, is PERM nurturing American jobs or making them more vulnerable?

It would appear that a dismissal for "cause" is not a layoff. What if the two sides disagree on whether cause existed? Does "cause" mean different things for different industries? When the PERM rule uses the word "cause", does this include economic cause or is it limited to incompetence or insubordination? In other words, what if the employer did not act to rid himself of the services of a poor employee but out of other motives, no less rational or worthy of respect? Is that a PERM layoff? Once again, traditional labor law would not consider such a discharge to be wrongful or deserving of punishment. A termination of an otherwise competent employee due to adverse business circumstances, such as where the business is shutting down because it cannot survive, is not a wrongful discharge.[35] In Boynton[36], the Sixth Circuit held that a discharge for economic reasons was termination for cause. " To hold otherwise, " in words that we commend to our brethren at PERM Central, " would impose an unworkable burden upon employers to stay in business to the point of bankruptcy in order to satisfy employment contracts and related agreements terminable only for good or sufficient cause." [37]

The PERM layoff rule not only does not do much to help US workers who have lost their jobs, it can actually make their predicament worse. Here's how. Most major employers have severance plans under the Employment Retirement Income Security Act ("ERISA").[38] Though not obligated to do so, employers offer separation pay as part of their overall benefits package. It is attractive to new hires and it provides current workers with a safety net, which, from the employer's perspective, hopefully discourages them from accepting other employment when faced with rumors of a planned layoff or an economic downturn. As

part of such separation plans, severed employees typically sign a waiver of all claims against the employer, including the possibility of future employment. If an employee under an ERISA-qualified severance plan has waived the right to future employment as a condition of receiving separation pay earlier at the time of layoff, is such a waiver valid for PERM? Can the employee waive the right to notice and consideration with respect to a future job opportunity for which a labor certification is filed? It is far from certain that DOL will honor such a waiver. DOL might wonder if the employee understood what was being waived? Whether the employer advised the employee in writing to consult a lawyer before making a decision? Is it possible for the employee to revoke the waiver? Did the waiver specifically refer to any claims that might later arise under PERM? How long did the employee have to consider the waiver before signing? All these bear directly on whether any waiver of PERM rights was a knowing and intelligent one.

Traditionally, the DOL has been hostile to such waivers made as part of severance agreements. The plain language of 29 C.F.R. Sec. 825.220(d)(2004) makes any attempted waiver of rights under the Family Medical Leave Act of 1993 (FMLA)[39] unenforceable as a matter of law.[40] In general, waivers of federal remedial rights are not easily or lightly inferred.[41] Prospective waivers of ERISA claims are void as against public policy.[42] Is this not what the DOL response would be in PERM if the employer tried to rely upon a waiver executed within six months related to severance? Is it not highly likely that the DOL would argue, not within some justification, that any rights that might later arise under PERM were neither contemplated nor specifically encompassed by the language of the release?

The end result, however, of such a DOL response would be to hurt US workers by making employers more reluctant to grant severance, unless they determine in the best exercise of their business judgment that the other benefits of doing so outweigh this drawback. If not, and the jury is assuredly out on this one, a US employee who gets severance pay when laid off will be confronted with a Hobson's choice of giving back the money in order to be considered for a job under PERM, or keep it and, by so doing, becoming "unavailable". The employee cannot have it both ways. While a defective waiver can be set aside at the election of the employee,[43] once he learns that the release is voidable but keeps the money anyway, such acceptance is a ratification or reaffirmation of the original release.[44]

The proper constitutional objection to the PERM layoff rule is not "that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but...that no standard of conduct is specified at all." [45] For this reason, when you drill down through all of the arguments recited above, you arrive at a place where it is hard not to conclude that the PERM rule on layoffs "simply has no core." [46] As Justice Sutherland reminded us all long ago, a law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [47] It is certainly true that the PERM layoff regulation is not unconstitutionally vague simply because it is hard to understand.[48] It is also true that, when dealing with regulations that seek not to regulate First Amendment activity or impinge upon the rights of those accused, far more leeway is given by the courts. The regulation of business is not held to the same high standard under the void for vagueness doctrine.[49]

Having been properly forewarned, and knowing that we must tread lightly, people of good will must consider the possibility that the PERM layoff regulation is constitutionally infirm because it is so imprecise and so vague as to be no standard at all. It is hard to resist the conclusion that the PERM layoff rule is void for vagueness because it is "substantially incomprehensible" in a way that leaves even informed observers guessing as to how to comply, what compliance really means, and what the true meaning of the regulation is

meant to be.[50]

If the purpose of the PERM layoff rule is to frustrate employers, then the rule is a success. If the purpose is to make it more difficult to get cases approved, here too, the DOL has done what it set out to do. However, if the purpose is to preserve and protect top quality working conditions for US workers, little is accomplished. It is not possible to take a concept like "layoff" that was born and grew up as part of traditional labor law, rip it out of such a familiar context and apply it in an unfamiliar setting without any of the nuance that gave it meaning and effectiveness. The DOL certainly has the power to do that but little of substance is gained. Despite what the architects of PERM may think, not all layoffs are created equal. No layoff rule will do much at all unless and until it recognizes that. Why employers lay workers off and the circumstances surrounding such layoffs must be examined. Beyond that, the constitutional challenge that may be brought against PERM is ready for those who wish to pick it up.

The DOL has never liked the labor certification program, rightly viewing it as a diversion from its true and historic mission of making life better for American workers. PERM may simply reflect that long-held antipathy. The DOL may end up getting rid of the program after all since, if PERM goes down, the business community will compel Congress to step in and we are likely to see the Department of Homeland Security be saddled with this thankless task. We might even witness the adoption of an entirely new system of labor market controls, perhaps one based on a point system which has much to commend it. Yet, until the future arrives, we and DOL are stuck with PERM. DOL has made too much of an investment, in time, energy, money and institutional prestige, to abandon even a failed experiment. So, PERM is going to be with us for some time yet. That being so, trying to make it work, is worth the effort. It will not be easy. Perhaps, we can take some consolation in the knowledge that unearned suffering is redemptive. There should be plenty of that to go around in the months to come.

[1] 69 Fed. Reg. 77326, 77394 (Dec. 27, 2004)

[2] *Id.*

[3] at p. 77355(f) of the Federal Register version of the PERM rule

[4] 69 Fed. Reg. 77326, 77355 (Dec. 27,2004).

[5] 69 Fed. Reg. 77355

[6] Black's Law Dictionary 896 (7th Ed. 1999).

[7] *Braun v. Dep't. of Veterans Affairs*, 50 F. 3d 1005, 1007-08(Fed. Cir. 1995).

[8] See 26 C.F.R. 1.501©(17)(-1); Rev. Rul. 77-43, 1977-1 C.B.151; 1977 IRB Lexis 567(Jan.1977).

[9] *Pitt v. United States*, 190 Ct. Cl. 506, 513, 420 F.2d 1028, 1032(1970)(termination resulting from possible criminal prosecution); *Autera v. United States*, 182 Ct. Cl. 495, 389 F. 2d 815 (1968)(termination for incompetence).

[10] *Deal v. United States*, 508 U.S. 129, 131 (1993)(Scalia, J.).

[11] *Boynton v. TRW, Inc.*, 858 F.2d 1178, 1184(6th Cir. 1988)(en banc).

[12] *Schultz v. United States Navy*, 810 F. 2d 1133, 1136 (Fed. Cir. 1987). See also *Dumas v. Merit Sys. Protection Bd.*, 789 F. 2d 892, 894 (Fed. Cir. 1986).

[13] *Covington v. Dep't of Health and Human Services*, 750 F. 2d 937,942 (Fed. Cir. 1984).

[14] *Cruz v. Dep't of the Navy*, 934 F. 2d 1240, 1251-53 (Fed. Cir. 1991)(en banc).

[15] *Mc Gucken v. United States*, 187 Ct. Cl. 284, 289, 407 F.2d 1349, 1351, cert. denied, 396 U.S. 894 (1969).

[16] Subchapter S11 of the Federal Personal Manual Supplement 831-1 (issued on May 11, 1964)

[17] *Patterson v. United States*, 193 Ct.Cl. 750, 753 (Ct.Cl. 1971).

[18] 29 U.S.C. 2101 et. seq.

[19] 29 U.S.C. Section 2101(a)(3) (2005).

[20] 29 U.S.C. Section 2101(a)(6) (2005).

[21] 29 U.S.C. 2101(a)(3)(A)(2005).

[22] 29 U.S.C. 2101(a)(2005).

[23] *Damion v. Rob Fork Mining Corp.*, 945 F.2d 121,124(6th Cir. 1991).

[24] 328 U.S. 275, 287 n.11(1946).

[25] See, e.g., *Roberts' Dictionary of Industrial Relations* 377-78 (3d Ed. 1986).

[26] *Id.*

[27] *Id.*

[28] *S& G Concrete Co.* 274 N.L.R.B. 895,896 (1985).

[29] *Windsor Woodworking Inc. v. N.L.R.B.*, 647 F.2d 859,861 (8th Cir. 1981); *Sal-Jack Co.*, 286 N.L.R.B. 113 (1987).

[30] *Beloit Corp. Castings Div. V. N.L.R.B.*, 857 F.2d 1154, 1157 (7th Cir. 1988).

[31] *Windsor Woodworking supra* at 762.

[32] *Covington v. Department of Health & Human Servs.* 750 F.2d 937,942 (Fed. Cir. 1984).

[33] *Cosby v. United States*, 189 Ct. Cl. 528, 417 F. 2d 1345, 1355 (Ct.Cl. 1969); *Autera v. United States*, 182 Ct. Cl. 495, 389 F. 2d 815, 817 (Ct. Cl. 1968).

[34]

[35] *Boynton v. TRW, Inc.*, 858 F. 2d 1178, 1184 (6th Cir. 1988)(en banc). See also *Sahadi v. Reynolds Chemical*, 636 F. 2d 1116, 1118 (6th Cir. 1980); *F.S. Royster Guano Co. v. Hall*, 68 F. 2d 533, 535 (4th Cir. 1934).

[36] *Supra*.

[37] *Id* at 1183.

[38] 29 USC 1001 et. seq.

[39] 29 USC Section 2601 et. seq.

[40] *Bluitt v. Eval Co. of America, Inc.*, 3 F. Supp. 2d 761, 763 (S.D.Tex. 1988).

[41] *Watkins v. Scott Paper Co.*, 530 F. 2d 1159, 1172 (5th Cir.) , cert. denied, 429 U.S. 861 (1976).

[42] *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F. 2d 885, 896 n. 27 (3d. cir. 1975).

[43] *Wittorf v. Shell Oil Co.*, 37 F. 3d 1151, 1154 (5th Cir. 1994).

[44] *Grillet v. Sears, Roebuck & Co.*, 927 f. 2d 217, 220(5th Cir. 1991).

[45] *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971).

[46] *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

[47] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)(Sutherland, J).

[48] *United States v. Talbot*, 51 F. 3d 183, 188 (9th Cir. 1995).

[49] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

[50] *Jones v. Lubbock*, 727 f. 2d 364, 373 (5th Cir. 1984); *Exxon Corp. v. Georgia Ass'n of Petroleum Retailers*, 484 F. Supp. 1008, 1014 (N.D. Ga. 1979), affirmed sub nom. *Exxon Corp. v. Busbee*, 644 F. 2d 1030(5th Cir.), cert. denied, 454 U.S. 932(1981).

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12. DOS Releases New Rule for J-1 Professors and Research Scholars

To foster the exchange of ideas, culture, research and mutual enrichment between Americans and foreign nationals, the Department of State issued a final rule extending the duration of program participation for professors and research scholars from the current

three years to five years. The five-year period begins on the participant's program start date as documented by SEVIS and ends five calendar years from that date.

During the five years, the participant may depart and reenter the United States an unlimited number of times, as long as he or she is in good standing with the program sponsor. Those absences, however, will not toll the five-year period. The participant may not extend the five-year period, unless a Federally Funded National Research and Development Center or a U.S. Federal Laboratory directly sponsors him or her.

A participant in the program cannot repeat participation as professors or research scholars for a period of two years after the end of the five-year period. The scholar, however, may participate again at an early time if he or she completes an exchange program of less than five years, remains outside the United States for two years, and then applies. For example, if the participant finishes the first program in three years and leaves the country for the next two, the scholar may participate again in a five-year program starting at the date that essentially would be the end of the first five-year period.

The rule does contain several conditions to which the scholar or professor is subject. First, the participant cannot be eligible for a tenure track position. Second, the rule includes a "12-month bar" for any non-immigrant and accompanying spouse or dependent that held an F or J visa within the 1-year period immediately preceding the start of the program, unless the candidate transfers to the sponsor's program and was in the United States less than six months or was here pursuant to a short-term scholar exchange.

The site of the exchange must be the location of the exchange visitor program sponsor or the location of a third party facilitating the exchange that has the permission of the Responsible Officer. A scholar may participate or attend occasional lectures directly related to the exchange program if granted permission by his or her sponsor. The lectures or consultations cannot delay the completion of the scholar's program. Finally, all lectures must be documented in SEVIS. In order to obtain permission to participate in the short-term lecture or consultation, the participant visitor must present to the responsible officer: (1) a letter from offering employer stating terms and conditions of lecture or consult, and (2) a letter from visitor's supervisor recommending the activity.

13. Entry Without Inspection (EWI) Immediate Relative Adjustment of Status Possible Within Temporary Protected Status

CENTRO ROMERO has successfully argued two cases in which persons who entered without inspection (EWI) and are under current temporary protected status (TPS), were able to adjust status under INA 245(a), without the payment of a penalty.

Normally, any individual, who legally enters can apply for adjustment of status under INA 245(a) at any time, even after overstaying or falling out of status. The reasoning is that the individual was at some point "inspected and admitted or paroled." This differs with an EWI person because he or she was never inspected and admitted.

An EWI TPS grantee, however, has been given the equivalent to "nonimmigrant status" by Congress during the TPS period. Consequently, if the grantee files an I-485 before the

termination of the TPS status, an immigrant visa immediately becomes available to him or her by congressional fiat. The EWI is subsequently ignored.

Although a split of authority exists, the presence of these two new cases in the Chicago district strengthens the argument significantly.

Citation: (Ventura, Jose Manuel and Frank Melone, CENTRO ROMERO, Chicago, IL.)

14. House Further Defines Aggravated Felony

The House of Representatives recently passed the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279). This bill expands the definition of the federal "crime of violence" and the aggravated felony definition for immigration law purposes.

The author of the bill, Representative James Sensenbrenner (R-WI) added the definition provision to the bill in the manager's amendment. Current law defines a crime of violence as one that involves a risk that physical force will be used against a person or property. The provision seeks to expand the crime of violence definition to include nonviolent, negligent acts or omissions that place another person or property at risk of injury, even if no injury actually occurs.

The bill is now in the Senate, and Senators Dianne Feinstein (D-CA) and Orrin Hatch (R-UT) are backing a similar version of the bill (S. 155). The Senate version does not currently include the expanded definition. No timetable for Senate action of S. 155 is currently set.
