

Siskind's Immigration Bulletin -
June 16, 2005

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

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To subscribe to the free Siskind's Immigration Professional Newsletter, go to <http://www.visalaw.com/sip-intro.html>.

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:

Two major immigration stories broke today that could potentially affect millions of people and have major repercussions for the US economy. The one that will be covered by the mass media is today's announced decision to delay the October requirement that foreign visitors to the US have machine-readable passport.

The other news item will affect thousands of people planning on applying to adjust status to permanent residency over the next several months. Visas in the EB-3 employment-based green card category will become unavailable beginning July 1st and the category will not open up again until at least September 30th. This means that no new adjustment of status applications will be accepted during this period and pending adjustment of status applications will remain pending until numbers become available again.

Next Wednesday, the American Immigration Lawyers Association will have its annual meeting in Salt Lake City, Utah. Many of our readers will be there and I look forward to meeting you. I'll be moderating the technology panel on Thursday and my partner Lynn Susser will be on a panel on B-1 and B-2 visas just before my session.

I also want to invite people who work on physician cases to attend a breakfast meeting of Saturday morning for the FMG Taskforce, a coalition of law firms that handle physician immigration cases that I currently am chairing. The FMG Taskforce meets biweekly by teleconference to discuss physician immigration issues, meets with government officials to discuss physician issues and lobbies on doctor immigration matters. The top physician immigration lawyers in the country actively participate in the FMG Taskforce and if you're interested in joining, you are welcome to come to our meeting. It will be held at 7:30 am on Saturday in Room 150DE of the Salt Palace Convention Center.

And people interested in nursing issues should come to the FNT Taskforce, the nursing immigration counterpart to the FMG Taskforce. That meeting will take place in Salon I at the Salt Lake City Hilton on Friday afternoon from 4:30 to 6:00 pm.

Hearty congratulations to Esther Schachter, our immigration case manager extraordinaire who announced her engagement to be married. Good luck Esther!

Siskind Susser is seeking an additional immigration case manager to join our Memphis office. The position will focus on physician cases and experience with physician immigration is a plus. Interested applicants should send their CVs to me at gsiskind@visalaw.com.

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

Regards,

2. The ABC's of Immigration: Second Preference Employment Based Immigration - Aliens of Exceptional Ability and Advanced Degree Professionals

The second preference category of employment-based immigration includes aliens of exceptional ability and aliens holding advanced degrees in professional fields.

How many of these visas are available annually?

Each year the second preference category is allotted about 40,000 visas, including any not used in the first preference. Generally, this is a sufficient number of visas and there is no backlog. There is no distinction in the allocation of visas between the two-second preference subcategories. As a general rule, a labor certification is required, although in some cases a national interest waiver is available.

Who is considered to be an Alien of Exceptional Ability?

The key to demonstrating exceptional ability is to show that the applicant possesses a level of expertise above that which would normally be encountered in the field. Exceptional ability is limited to aliens in the fields of arts, science and business. After some debate, it now seems clear that for purposes of this category, athletics are to be considered an art.

What evidence must be included in an EB-2 application?

In making the application, the USCIS requires at least three of the following six types of evidence:

- For advance degree EB-2s, official record of a degree from a college, university or other learning institution related to the field in which the alien claims exceptional ability,
- For exceptional ability EB-2s, evidence of ten years of full time experience in the field in which employment is sought (typically in the form of letters from past employers);
- A license to practice or certification if required in the occupation;
- For exceptional ability cases, evidence of a high salary or other form of payment that indicates exceptional ability;
- For exceptional ability cases, evidence of membership in professional associations; and
- For exceptional ability cases, evidence of recognition by peers or professional associations for achievements and contributions to the field.
- Copy of an approved labor certification unless a national interest waiver is being sought.

Other comparable evidence may be submitted.

Who is considered an Advanced Degree Professional?

The USCIS defines a profession as an occupation in which a baccalaureate degree is the minimum requirement for entry. An advanced degree is any academic or professional degree above the level of a bachelor's degree. The Immigration and Nationality Act allows for the substitution of five years progressive experience in the field to substitute for the advanced degree.

What is a labor certification?

Labor certifications are documents that signify that the US Department of Labor has reviewed a position and determined that US workers with the minimum qualifications necessary to do the job are not immediately available. Employers need to go through an extensive recruiting process in order to get a labor certification and an EB-2 petition must include a copy of an approved labor certification. The labor certification process will be more fully addressed in a future article.

When will the labor certification requirement be waived?

A labor certification is not required if an applicant can demonstrate that granting the EB-2 petition is in the national interest. There are two kinds of national interest waiver applications available – the standard case and the physician NIW. Both are extremely complex topics and will be more fully discussed in a future article.

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 - After having been evaluated by FCCPT, how can I get visa to take physical therapist exam in US?

A - The appropriate visa to come to the US to take an examination is the B-1 business visitor visa. You can apply for this directly at a US consulate and will be required to demonstrate close ties to your home country and adequate finances to ensure a consular officer that you can afford the trip and will not need to resort to illegally working in the US. I usually recommend registering for the examination and then planning a very short trip to the US solely for the purpose of taking the test. Note that even if you put together an excellent application, in some countries there are very high denial rates for B-1 visas.

Q - My change of status from F1 to H1 was approved in November 2004. However, for some unknown reason my employer did not receive the I-797 and I-94. USCIS asked us to file I-824 to get a duplicate. My employer filed I-824 but made the mistake of interchanging my first name and middle name on the form. My I-824 has been approved and we got the I-797 and I-94 but with my first name and middle name interchanged. Can this be corrected by the USCIS? How should this be handled? Would this create problems for H1 stamping or H1 transfer or even H1 extension?

A - You should send the I-797 back to the Service Center with a copy of your passport and ask that it be corrected. If the original petition was correct, send a copy of that to show it was a Service Error. If you can't show it was Service Error, you can file an I-102 for a "corrected or replacement" I-94.

Q - I am currently adjusting my status from student to permanent resident (based on family petition) and I wanted to ask if I am eligible to be self-employed as an independent consultant/sales person through companies like Avon, Mary Kay Cosmetics, etc.?

A - Once you have an employment authorization card as part of your adjustment of status petition, you can be self-employed.

Q - My father is a green card holder since 1998 and he applying for US citizenship. He is a professor and medical consultant who has contributed significantly in his field. Unfortunately, he has a shoplifting charge in 1996 for theft which he paid a fine and completed probation. The court also expunged and sealed his record. In his N-400 form, he has stated this charge. My question to you is should this one charge pose a serious obstacle for him in securing his US citizenship.

A - You were correct to include the offense in the N-400 application.. Since the conviction was more than five years before the application, it is not a bar to naturalization, but any conviction or crime can be considered in deciding whether an applicant for naturalization has good moral character regardless of how long ago it was. Nevertheless, given the facts as you describe them I would not expect it to be a serious obstacle.

Q - I just switched from an L1-B to L1-A visa in May. I was a manager in India when I transferred to the US in 2005. Would you advice waiting to file for Green Card for some months or it is OK to file right now since I became in charge of a function only last month.

A - The regulations say that "the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity", That means to qualify for the multinational manager green card, you need to have been working abroad in managerial or executive status. That need not be the case for the L-1 and it's one of the few differences between the two categories. If you were a manager for a year abroad and the US entity is at least a year old, you may be eligible to process.

4. Border and Enforcement News

U.S. Immigration and Customs Enforcement (ICE) special agents arrested 22 U.S. citizens and Kenyans in Iowa recently who were subsequently arraigned in federal court for allegedly participating in marriage fraud schemes designed to evade U.S. immigration laws.

According to indictments filed in federal court, participants in the sham relationships married only so that the Kenyan nationals involved could obtain permanent resident status, commonly referred to as having a "green card." In return, the U.S. citizens were paid for entering into the fraudulent marriages.

In addition to the 22 currently in custody, 10 additional people have been indicted for conspiring to enter a marriage to evade immigration laws, marriage fraud, and making false statements, but have not yet been arrested.

More than 30 undocumented immigrants were sent to federal custody recently after being discovered in a mobile home in Berino, New Mexico. All the immigrants were reportedly in good health. There is no word on where the immigrants are from.

5. News From the Courts

Nanyange v. Gonzales

U.S. Court of Appeals for the 7th Circuit
2005 U.S. App. LEXIS 8925

Ms. Nanyange, who had applied for asylum and withholding of removal, was denied relief by the Immigration Judge because the IJ found that Ms. Nanyange's testimony was inconsistent and therefore not credible. The BIA affirmed the IJ's decision.

The 7th Circuit, however, vacated the IJ's decision and granted Nanyange's petition for review, because the IJ's credibility determination was not based on "cogent reasons." The court found that this adverse credibility decision was based solely on trivial and easily explained discrepancies that did not address the important or crucial issues in Ms. Nanyange's case, which was based on a claim of forced detainment and rape by government officials for her support of the opposition presidential candidate. The 7th Circuit further explained that the IJ's credibility decision is normally overturned only under "extraordinary circumstances," but the IJ's careful review is critical because an adverse credibility determination effectively ends an alien's asylum claim.

The court, subsequently, remanded the case for a new determination of Ms. Nanyange's eligibility for asylum.

6. Government Processing Times

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

Missouri (06/09/2005): <http://www.visalaw.com/missouri.html>
Vermont (06/09/2005): <http://www.visalaw.com/vermont.html>
California (06/09/2005): <http://www.visalaw.com/california.html>
Nebraska (06/15/2005): <http://www.visalaw.com/nebraska.html>

7. News Bytes

U.S. Citizenship and Immigration Services (USCIS) has announced 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."

The Transportation Security Administration is issuing a final rule that will exempt the Registered Traveler Operations Files (DHS/TSA 015) from several provisions of the Privacy Act of 1974 to prevent the unauthorized disclosure of classified and law enforcement information. This rule is effective July 8, 2005.

The USCIS posted to its website the revised form I-508, Waiver of Rights, Privileges, Exemptions and Immunities (Under Section 247(b) of the INA). Additionally, USCIS has revised and posted forms G-325A, I-526 and I-698. All of the revised forms are located at www.uscis.gov.

A program that collects biometric and biographic information from visa applicants and visitors to the United States has achieved 'unprecedented results' in identifying criminals and other potential security threats seeking to enter America, according to a recent press release from the Department of Homeland Security.

According to DHS, in the 17 months since US-VISIT was created, more than 7,000 visas have been denied -- more than a third of which were refused because the applicant was located on U.S. government law-enforcement and security lists.

A Texas immigration law firm employee pleaded guilty today to visa fraud and conspiring to file frivolous immigration petitions for Chinese nationals intending to enter the United States unlawfully, following an investigation by U.S. Immigration and Customs Enforcement (ICE). Norman Chapa, 52, a United States citizen, appeared before U.S. District Judge Keith P. Ellison Friday and admitted taking part in a large international visa scam from May 1999 to January 2004 while he was employed at the Law Firm of Kenneth L. Rothery in Houston.

Chapa described how he helped recruit Chinese national clients seeking immigration benefits that would allow them to work in the United States. Chapa, along with the owner of the firm and another employee, paid local businesses between \$10,000 to \$20,000 to control an interest in the company and then encourage the Chinese nationals to enter the U.S. as intra-company transferees, managers or executives.

All three defendants are charged with filing fictitious immigration petitions for Chinese nationals and for soliciting local businesses to sell actions or act as local petitioners to encourage these Chinese nationals to illegally enter the United States and seek employment.

8. International Roundup

Belarusian President Alyaksandr Lukashenka recently introduced visas for Georgians visiting Belarus, thus withdrawing Belarus from the CIS agreement of 1992 on visa-free travel, according to RFE/RL Newswire. Russia introduced visas for Georgians in 1999.

Japan plans to expand fingerprinting requirements for foreigners not only upon entry into the country but upon departure as well, as part of crime prevention measures, members of the Liberal Democratic Party announced recently. Those with special permanent residency, including Korean residents in Japan, will be exempt from the measure.

9. Legislative Update

Recently, the House took up authorization and appropriation bills for the Department of Homeland Security. During debate on the DHS Authorization bill, three amendments were considered. The first amendment introduced by Representatives Cox (R-CA) and Sensenbrenner (R-WI) authorized \$40 million in federal funding for state and local police agencies who enter into memorandums of understanding (MOUs) with ICE to enforce immigration laws. This amendment passed by a voice vote. The second amendment, introduced by Representative Norwood (R-GA) sought to declare that state and local law enforcement officers have inherent authority to enforce federal immigration laws, including the apprehension, detention, and removal of aliens in the United States. This provision (which was drawn from Representative Norwood's CLEAR Act) passed by a 242-185 margin.

A third amendment to the DHS Authorization bill was introduced by Representative Slaughter (D-NY). It would require DHS to create four remote enrollment centers for the FAST, SENTRI, and NEXUS programs.

An effort in California to allow undocumented immigrants to drive legally was revived in the state Senate. The new measure, approved by the Senate transportation committee on an 8-to-5 vote, represents a change from previous versions.

The revised bill from Sen. Gil Cedillo (D-Los Angeles) would create a 'driving-only license,' with a special design or color to differentiate it from regular licenses. The licenses would be free of the usual \$25 fee. The bill requires more than a majority vote because it would take effect immediately if signed into law, rather than be delayed until the start of 2006 like most new laws.

[H.R.2789](#): -- Private Bill; For the relief of Gabriella Dee.

Sponsor: Rep Dent, Charles W. [PA-15] (introduced 6/7/2005)

Committees: House Judiciary

Latest Major Action: 6/7/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.2827](#): -- Private Bill; For the relief of Malachy McAllister, Nicola McAllister, and Sean Ryan McAllister.

Sponsor: Rep Rothman, Steven R. [NJ-9] (introduced 6/8/2005)

Committees: House Judiciary

Latest Major Action: 6/8/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

10. Guest Column: Can Suzy Volunteer Until her Visa is Approved? "Volunteering" in the Crossroads of Immigration and Labor Law, an Interactive Discussion, by Helene Robertson and Murray Welsh

Helene Robertson is the Director of International Student and Scholar Services at The Catholic University of America. Murray Welsh is the Director of International Services at the Johns Hopkins Medical Institutions. Both are active in NAFSA and have spoken frequently about campus-based immigration issues.

Volunteering is a vital part of American society and many academic institutions are enormously indebted to the true volunteers that make many programs possible – the volunteers in our hospitals who read to the patients, candy strippers, alumni volunteers that organize events, interns seeking to observe and learn business practices ... The list is almost endless. These activities are wholeheartedly (and rightly) encouraged. Care should be taken to make sure that volunteerism is not abused and does not abuse the Fair Labor Standards Act. It is the balance between these two that we will examine today.

The Cast of Characters:

You, the International Student and Scholar Advisor, concerned with institutional compliance of immigration regulations, the needs of the institution and the well being of your international population.

Suzy H. Wannabee, whose F-1 OPT has just expired and whose H has not yet been approved by the U.S. Immigration and Naturalization Service.

Professor Reahl Chipuskayt, a well-funded tenured Professor and Suzy's boss. The Professor has a very important reporting deadline coming up and is also trying to submit three grant proposals in the next few weeks.

The drama:

Suzy telephones you informing you that her OPT is going to expire next week and that she needs to start work on her H-1B. She wonders if you can help her.

You immediately kick into crisis management mode and set about getting a rush H pulled together. You arrange for a conference call with both Suzy and her boss, Dr. Chipuskayt, and explain the H process, timelines and costs for processing (both regular and premium processing). You explain that Suzy must stop working once her EAD has expired and that she cannot work again until the H has been approved. You urge them to consider the expedited processing of premium processing and expect them to immediately jump at the chance. You are puzzled by the silence on the line.

Finally, the good Professor asks, "Well couldn't Suzy just volunteer until the H comes through and then we'll give her a bonus to make up the difference?"

Silence on your end as you quickly try to formulate your legal arguments....

**But what are they?
What would you do?**

Discussion Topics:

1. **Definitions**
 - Employer
 - Employee
 - Volunteer
 - Employment

2. **Risks**
 - Institution
 - Individual
 - You

3. **Risk Management Plan**

It is difficult to explain to both the faculty and to foreign national who are both happy (sort of) with the prospect of the employee "volunteering" their time that this arrangement may actually violate the law. Before you begin to offer your opinions, it is important to understand certain fundamental concepts in labor law.

In order for the Fair Labor Standards Act (FLSA) to apply to a given situation, three things must exist:

1. An employer,
2. An employee and
3. The conditions of employment.

To top it off, it is also important to understand exactly what a volunteer is.

As with all things legal, definitions exist and they will serve as a starting point for today's discussion:

THE EMPLOYER

Under the FLSA, an

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. [FLSA Sec. 3(d)]

THE EMPLOYEE

Section 3 (e) of the FLSA offers the following definition for determining who is an employee:

"(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer....

(2) In the case of an individual employed by a public agency, such term means –

- (A) any individual employed by the Government of the United States – (i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code), (ii) in any executive agency (as defined in section 105 of such title), (iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service, (iv) in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, or (v) in the Library of Congress;
- (B) any individual employed by the United States Postal Service or the Postal Rate Commission; and
- (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual – (i) who is not subject to the civil service laws of the State, political subdivision or agency which employs him; and (ii) who – (I) holds a public elective office of that State, political subdivision, or agency, (II) is selected by the holder of such an office to be a member of his personal staff, (III) is appointed by such an officeholder to serve on a policy making level, (IV) is an immediate adviser to such an officeholder with respect to the constitutional or

legal powers of his office, or (V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4) (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if – (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of service which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement."

THE VOLUNTEER

A volunteer is often viewed simply as someone who offers his or her services for free. Contained in the definition of "employee" above is also the FLSA guidance on volunteers, albeit in the context of employees of public agencies.

The regulations define a volunteer as:

(29 C.F.R. 553.101)

- (a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. Individuals performing hours of service for such a public agency will be considered volunteers for the time so spent and not subject to sections 6, 7, and 11 of the FLSA when such hours of service are performed in accord with sections 3(e)(4)(A) and (B) of the FLSA and the guidelines in this subpart.
- (b) Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to "volunteer" their services.

(c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

(d) An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.

EMPLOYMENT

The FLSA provides a fairly broad definition of employment:

"Employ" includes to suffer or permit to work. [Sec. 3 (g)]

Guidance from the FLSA

DOL looks to Section 3(e)(4) for guidance for determining what constitutes a volunteer, even though it addresses only volunteers in the context of public agencies. Essentially the following general guidelines apply:

- No expectation of compensation, and
- Services are not the same services for which the individual is employed by the employer
- If the services are the same for which the individual is normally employed, they can be provided only for a different employer/public agency.

Essentially, the following test, which is adapted from the publication *Negotiating the Legal Maze to Volunteer Service* by Anna Seidman of the Nonprofit Risk Management Center, may be helpful in determining volunteer status:

1. Are the services performed for civic, charitable or humanitarian purposes?
2. Are the services entirely voluntary, with no direct or indirect pressure by the employer, with no promise of advancement and no penalty for not volunteering?
3. Are the activities predominately for the individual's own benefit?
4. Does the individual impair the employment opportunities of others by performing work that would otherwise be performed by regular, paid employees? Does the "volunteer" provide services that are the same as services provided by a paid?
5. Is there no expectation of compensation either now or in the future for these services?
6. Do the activities take place during the individual's regular working hours or scheduled overtime hours?
7. Is the volunteer time insubstantial in relation to the individual's regular hours?

OTHER FACTORS THAT DOL MAY CONSIDER

The government and the employer should look at the economic reality of the arrangement.

- Does the individual depend on the employer for sustenance? Is a faculty or staff member providing the volunteer with "gifts" in the form of money or food?
- Does the employer gain a significant benefit from the "volunteer?" What is the nature of this benefit?

The Department of Labor does provide the following guidance for religious, charitable, and nonprofit organizations, schools, institutions, and volunteer workers in Section 10b3 of their Field Operations Handbook 10/20/93:

- (a) There is no special provision in the FLSA which precludes an employee-employer relationship between a religious, charitable or nonprofit organization and persons who perform work for such an organization. For example, a church or religious order may operate an establishment to print books, magazines, or other publications and employ a regular staff who do this work as a means of livelihood. IN such cases there is an employee-employer relationship for purposes of this Act.
- (b) Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees." However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.
- (c) In many cases the nature of religious, charitable and similar nonprofit organizations, and schools is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for services rendered. For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross; working with children with disabilities or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs. The fact that services are performed under such circumstances is not sufficient to create an employee-employer relationship.

(d) Although the volunteer services (as described in (c) above) are not considered to create an employment relationship, the organizations for which they are performed will generally also have employees performing compensated services whose employment is subject to the standards of the Act. Where such an employment relationship exists, the Act requires payment of not less than the statutory wages for all hours "worked" in the w/w/ [work week]. However, there are certain circumstances where such an employee may donate services as a volunteer, and the time so spent is not considered to be compensable "work." For example, an office employee of a hospital may volunteer to sit with a sick child or elderly person during off-duty hours as an act of charity. WH [Wage and Hour] will not consider that an employee-employer relationship exists with respect to such volunteer time between the establishment and the volunteer or between the volunteer and the person for whose benefit the service is performed. Another example is where an office employee of a church may volunteer to perform non-clerical services in the church, preschool during off duty time from his or her office work as an act of charity. Conversely a preschool employee may volunteer to perform work in some other facet of the church's operations without an employment relationship being formed with respect to such volunteer time. However, this does not mean that a regular office employee of a charitable organization can volunteer services on an uncompensated basis to handle correspondence in connection with a special fund drive or to handle other work arising from exigencies of the operations conducted by the employer.

THE IMMIGRATION AND NATURALIZATION SERVICE

The Immigration and Naturalization Service has a slightly different definition of an employee that should also be kept in mind:

An individual who provides services or labor for an employer for wages or other remuneration.

Remuneration can include such innocuous things as reimbursements, food (coffee, doughnuts, pizza, etc.)

PENALTIES

Employers who wrongly classify individuals as volunteers may be liable for:

- The payment of back wages
- Federal fines of \$10,000 for violating wage and hour laws
- State fines of up to \$10,000 for employing an individual without proper employment authorization
- Potential loss of federal research grants and contracts as a result of Executive Order #12989 and the inability to re-apply for federal grants/contract for 1 – 2 years.

Individuals found to have been working without appropriate employment authorization have violated the terms of their status and are subject to deportation. This could also negatively impact their plans to remain in the U.S.

“Managing” the Risk of “volunteers”

Institutions must have clearly defined guidelines that they follow regarding volunteers. These policies should establish the scope of any volunteer positions. It should state whether or not the volunteer is covered by workers compensation and what liability the institution carries with respect to its volunteers.

Campus players to have involved in formulating/formalizing a policy on volunteering:

- University Counsel
- International Services Office
- Provost/Academic Deans
- Human Resources
- Office of Institutional Risk

11. No More “Aging-Out” of V-2 or V-3 Status

U.S Citizenship and Immigration Services (USCIS) recently announced 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.

Established by the Legal Immigration Family Equity Act (LIFE Act) in December 2000, V status allows a spouse or child of a lawful permanent resident to enter or remain in the United States as long as his/her Form I-130 visa petition application or his/her application for permanent residency has been pending for three years or more and was filed on or before December 21, 2000. Previously, the child of an immigrant was only eligible to hold V-2 or V-3 status in the United States until he/she turned 21 years of age. After that point, the child had “aged-out” and could no longer retain or extend his/her V status.

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.

12. USCIS Strategic Plan Released

USCIS recently announced the release of *The USCIS Strategic Plan: Securing America's Promise*. The *Strategic Plan* provides a total departmental overview and incorporates the USCIS Vision and Mission with business objectives and goals. According to a USCIS press release, the twenty-page document provides the current organizational structure and sets a direction for USCIS into the future by providing an outline of upcoming initiatives and programs, such as the IT and business modernization plans, human capital strategy and management improvement plans.

The release stated the publication individual employees from office components across USCIS created the document, and that the *Strategic Plan* is organized cross-functionally, with equal treatment of all department initiatives, programs, and product lines. The document is intended to outline the role USCIS fulfills within the Department of Homeland Security by providing a full spectrum depiction of USCIS' current capabilities, and aligning the *Strategic Plan* with future priorities mandated within the Homeland Security Act.

The Strategic Plan document includes the following sections:

- USCIS Mission, Vision and Values
- Themes, Goals, Objectives and Strategies
- Context for Strategic Planning
- Framework of The USCIS Strategic Plan

The USCIS Strategic Plan: Securing America's Promise is currently available online at www.uscis.gov with print copies available for purchase through the Government Printing Office in July.

13. USCIS Releases Guide for New Immigrants

The Office of Citizenship, within U.S. Citizenship and Immigration Services, is announcing the release of *Welcome to the United States: A Guide for New Immigrants*. The USCIS calls the publication a "landmark" that represents the first time in recent history that the federal government has provided orientation materials for new permanent residents. Designed for permanent residents and the organizations that serve them, *Welcome to the United States* contains information to help immigrants settle into everyday day life in the United States, as well as basic civics information that will introduce new immigrants to the U.S. system of government. The guide also provides new immigrants with ideas on how to become involved in their new communities and how to meet their responsibilities and exercise their rights as permanent residents.

This guide includes information about:

- The rights and responsibilities of permanent residents
- Places to learn English
- How to find a place to live
- How to get a Social Security number
- Job placement resources
- How the U.S. school system works and how to enroll your child in school
- Ways to keep your home and family safe
- How the Federal Government works

The guide is available for free, and can be found online in English, Spanish, Chinese and Vietnamese at <http://uscis.gov/graphics/citizenship/>. Copies will soon be available online in Tagalog, Korean, Russian, Arabic, French, Portuguese, and Haitian Creole. Print copies of the English and Spanish guides are available for purchase through the U.S. Government Printing Office (GPO) by calling 1-866-512-1800 or by ordering through their website at <http://bookstore.gpo.gov>. Individual copies of the English and Spanish guides cost \$9.50. The guide in English is offered at a bulk purchase discount of \$171 for a box of 100. The guide in Spanish is offered in bulk at \$112 for a box of 50.

14. DHS Extends E-Passport Deadline Again

The Department of Homeland Security has retreated from the October 26, 2005 deadline for visitors to the US using the Visa Waiver program to present new high-tech secure passports at US ports of entry. The deadline was originally set for October 2003, was extended in 2004 and is now being extended again November. DHS Secretary Michael Chertoff has announced that affected countries will have until October 26, 2006 to get acceptable passports into the hands of their citizens. DHS' authority to require such changes stems from the Enhanced Border Security and Visa Entry Reform Act of 2002.

The July 26, 2005 deadline for visitors to present machine-readable passports to enter the US is NOT affected.

The US permits nationals of 27 countries (mostly European) to enter the US with only a passport and without the need for a visa. Many of the affected countries warned the US that they would not be able to meet that deadline. Technology is less of a problem than public policy debates in several countries over privacy concerns as well as the extensive costs that would be associated with replacing all passports. Approximately 15 million Europeans entered the US last year using the Visa Waiver program.

But DHS has not totally put off the question of more high-tech passports. VWP countries will be required to produce passports with digital photographs by October 26, 2005. Also, on that date, VWP countries are required to present an acceptable plan to begin issuing integrated circuit chips, called "e-passports" by DHS, within one year.

"The electronic passport is the path to secure and streamlined travel among Visa Waiver Program countries," said Secretary Chertoff. "These passport requirements will maintain and strengthen the integrity of the Visa Waiver Program in a manner consistent with congressional intent and international standards. We are pleased by the progress of many Visa Waiver countries in complying with these requirements and we look forward to working with participating countries toward their speedy and complete adoption."

DHS also announced the requirement that VWP countries commit to reporting all lost and stolen passports to INTERPOL and DHS, report all intercepted lost and stolen passports and increase information sharing between VWP countries and American authorities.

The 27 VWP countries are Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the UK.

