

Siskind's Immigration Bulletin
March 29, 2005

Published by Greg Siskind, partner at the Immigration Law Offices of Siskind Susser, Attorneys at Law; telephone: 800-748-3819, 901-737-3194 or 615-345-0225; facsimile: 800-684-1267 or 630-604-9306, e-mail: gsiskind@visalaw.com, WWW home page: <http://www.visalaw.com>.

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>.

Editor: Greg Siskind. Associate Editor: Penny Egel.

To receive a free e-mail subscription to Siskind's Immigration Bulletin, fill out the form at <http://www.visalaw.com/subscribe2.html>. To unsubscribe, send your request to visalaw-unsubscribe@topica.com.

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

Are you a jobseeker looking for an employer to sponsor your work visa?
Are you an employer or recruiter who can benefit from free online job postings?
Visit [Visajobs.com](http://www.visajobs.com), the online career network, and create your new account (<http://www.visajobs.com>).

1. Openers
2. The ABC's of Immigration: Military Service
3. Ask Visalaw.com
4. Border and Enforcement News
5. News From The Courts
6. Government Processing Times
7. News Bytes
8. International Roundup
9. Legislative Update
10. Anti-Immigrant Bill Attached to War Spending Bill
11. Mexico, Canada and US Announce Security and Prosperity Partnership
12. USCIS Announces Backlog Elimination Update

1. Openers

Dear Readers:

Another week has passed and still no word from USCIS on filing H-1Bs under the 20,000 bonus quota mandated by Congress for graduates of US graduate educational programs.

There is still little information available on what is behind the delay and when we'll final be able to file applications. But we did learn this week of another serious miscalculation on the part of USCIS that may be playing a role. According to a report in the *Washington Post*, the USCIS issued 10,000 too many visas under last year's quota of 65,000. According to the report, so many applications were filed at the last minute that they were unable to get the numbers figured out until it was too late.

This is not the first or even the second time something like this has happened. Certainly technology could be a solution. If the USCIS moved to a true electronic filing system, they would more easily be able to log cases against the quotas. The USCIS may argue that they are making rough calculations on how many cases to accept based on the knowledge that not all cases are approvable. But it would seem that an all electronic system would be a part of the solution. If all cases were filed electronically and the USCIS could see that the number of approved and filed cases combined added up to more than 65,000, they could then halt accepting applications and then open up the system as pipeline cases are denied, applications are withdrawn and approved cases are revoked by employers.

Instead of using e-filing to help deal with the H-1B cap, the USCIS shuts the system down as the cap is getting closer and during the period after the cap is reached until the new quota opens up (which, by the way, happens Friday of this week). That leads to an assortment of other problems in addition to the counting problem. For example, our firm has been trying to file a cap-exempt H-1B case this month that has been bounced twice because the USCIS has not been able to properly calculate the filing fee. The agency has been unable to get their hands around the issue that a case may be exempt from the H-1B cap, yet not eligible for the waiver of the \$1500/\$750 worker retraining fee. This has led to unnecessary delays and considerable additional labor on the part of USCIS (not to mention our firm). A well-designed e-filing system could easily have properly and instantaneously accepted the case.

The fear of people "rigging the system" and getting a case properly into system via a cap exemption that really should be rejected is presumably driving the USCIS decision to shut down the system for more than half the year for H-1B applications. Yet an examiner is ultimately going to review the case and if an application doesn't really meet the cap exemption test, it can be rejected anyway. Most employers are not going to be interested in filing cases that are ultimately going to be denied given the extremely high costs associated with filing H-1Bs – more than \$3000 in government filing fees alone for some employers before you even factor in the legal fees. The loss of the filing fees is a powerful deterrent against employers simply filing non-exempt applications to buy time. And presumably an employer that cannot at least make a good faith argument supporting the cap exemption are liable to be found guilty of visa fraud.

In any case, USCIS needs vision in order to revise its system to ensure it is meeting the intentions of Congress and providing reliable, predictable and expeditious service to the public, E-Filing should be seen as the centerpiece of such an overhaul rather than an inferior alternative to paper filing that is tolerated by the agency merely because customers demand it,

This coming week will be a critical one in Washington. Keep an eye on the atrocious REAL ID bill that was stuck on the House Iraq funding bill with no hearings or debate. REAL ID is known as the driver's license bill because it imposes standardization requirements on the states in order to ensure undocumented immigrants can't use licenses to get on planes,

apply for federal benefits, or otherwise use the license for anything with a nexus to the US government. One can argue plenty about whether this new unfunded mandate on the states does more harm to public safety than good. After all, terrorists can probably get access to phony documents, but the untold numbers of undocumented individuals who will avoid learning the rules of the road and becoming safe drivers who will drive anyway will lead to the deaths of many, many Americans.

But REAL ID also does much more and these under-publicized provisions are truly scary. The worst is in the area of asylum petitions. REAL ID would give an incredible amount of new discretion to immigration judges to deny asylum cases where an applicant has proven a credible fear of persecution but has any inconsistency – even a minor one – in the rest of their story. This is a major shift in asylum law that even the bill's supporters admit is more about making it harder to get asylum than it is about security.

The Senate takes up its version of the Iraq spending bill next week. This would be a great time to let your Senators know that REAL ID is a really bad idea. For more information, go to the web site of the American Immigration Lawyers Association at www.aila.org.

Our Memphis office is pleased to announce the addition of attorney Bryant Stevenson. Bryant is a recent graduate of the Cumberland School of Law in Birmingham, Alabama. He can be reached at bstevenson@visalaw2.com and we'll have his biography up on our web site soon. Welcome Bryant!

My favorite story this week involves Canadian uber-blogger Jeremy Wright who was stopped at the border coming to the US for a blogging conference. Wright was stripped searched and banned for several years from entering the US. Why? Because DHS officials believe it is impossible to earn a living from a blog. How backwards are our government officials that they were not aware of the most important phenomenon on the Internet in the last few years. Speaking as a person who owes the growth of a law firm from a solo immigration practice to one of the nation's largest almost entirely to the web, I can assure DHS that they need to revisit the issue. The case raises the serious problem at USCIS that government officials deciding cases everyday know nothing about the businesses, professions and industries they are judging.

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

The ABC's of Immigration: Military Service

Are immigrants required to be available for military service?

Since World War I, immigrants to the US have been required to be available for military service. Nonimmigrants, those people who are in the US for a temporary period of time, do not have this obligation, but permanent residents, refugees, parolees and even undocumented immigrants do. During times of peace, however, only citizens and permanent residents may volunteer for military service. As with all male citizens born after 1959, permanent residents must register with Selective Services. Failure to properly register could lead to criminal punishment, and can also lead to denial of future immigration or naturalization benefits.

Can I leave the US in order to avoid serving in the military?

Leaving the US to avoid military service, or desertion from the military, will make a person permanently ineligible for citizenship. In addition to this, being ineligible for citizenship is a basis upon which to deny a person admission to the US. Immigrants can obtain an exemption from the military service requirement on the ground that they are not citizens, but doing so will render them permanently ineligible for citizenship, unless the exemption was obtained under a treaty, and before seeking the exemption the immigrant had served in the military of their home country.

Can immigrants receive immigration benefits as a result of their military service?

Just as failure to abide by the Selective Service laws can result in a denial of future benefits, performing military service can produce benefits. People who have served for a total of three years in the US military and who, if no longer in the military, were honorably discharged, are exempted from standard residency requirements if the naturalization application is filed while still in the military or within six months of discharge.

Immigrants who served on active duty during World War I, World War II, the Korean War, the Vietnam War and other military conflicts are also exempt from the residency requirements, and may be naturalized regardless of their age. Permanent residents who died while serving in the US military are eligible for posthumous naturalization if the application is filed no more than two years after their death. Immigrants on active duty are not deportable under a special agreement between USCIS and the Department of Defense. Moreover, in many of these cases, the immigrant is given the opportunity to seek naturalization before USCIS initiates deportation proceedings.

Finally, at many times in the past, ceremonies have been held to naturalize permanent resident military personnel before they were sent overseas.

Can people who lack green cards join the military?

While all immigrants – legal or undocumented, are obligated to register with Selective Service, it is actually pretty difficult to join the military if you lack a green card or are not a citizen or asylees. The military is not supposed to accept undocumented individuals (though we are aware of a number of cases where undocumented immigrants made it into the military anyway) and none of the branches sponsor individuals for non-immigrant or immigrant status (with some minor exceptions).

Whether Congress and the military will relax its position in the wake of falling recruiting numbers remains to be seen.

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 - Both my parents are US citizen. My father is 80 years and mother is 70 years old. I am married child over 21. Can both of my parents submit petition for me? If so, can we submit them together? Do we need to pay fee twice?

A - Absolutely and it is something I encourage. Each parent should file an I-130 for you just in case something happens to either one of them. You would pay the fee twice.

Q - Could you please tell me if a priority date for a labor certification approved in the 1970s which resulted in the issuance of a green card can be currently used to grandfather an alien, who lost his permanent residence status and is currently illegally in the U.S., for 245 (i) purposes?

A - Once the labor certification is actually used to get the green card, the priority date is lost. Also, I believe CIS has specifically stated that in these situations, the beneficiary would not be grandfathered.

Q - I am a green card holder from NYC. I came to my country Bangladesh about 4 months ago. Is it true that i must return back to the United States within 6 months? I did not receive any permission to stay longer. if this is true what will happen if i stay longer then 6 months

A - There is no actual time limit, but extended absences from the US can lead to a green card being taken away due to abandonment. The article on our web site at <http://www.visalaw.com/01jan4/12jan401.html> may be helpful.

Q - I am presently working in an H-1-B status and my 6 years will be up in early 2006. My husband is presently an H-4, but has a chance to obtain J-1 status to complete his Doctorate Degree. My question is; If I change from an H-1 to a J-2 after my H-1 expires, will a year as a J-2 count as if I was outside the country? Could I then apply for an H-1-B after spending a year as a J-2?

A - No. You must be physically outside the US to get credit toward getting an additional six years of H-1B time.

4. Border and Enforcement News

U.S. Immigration and Customs Enforcement officers in New Orleans last week announced the removal of 17 criminal aliens and 107 non-criminal aliens during February. The enforcement operation is part of a 10-year strategic national initiative. Those deported were lawfully ordered to leave the United States by a federal immigration judge. The countries of origin of those deported include Mexico, Honduras, Haiti, Guatemala, India and Pakistan.

The offenses of the criminal aliens removed include criminal sexual abuse, theft, fraud, robbery, rape, murder, kidnapping, assault and battery and other crimes.

Eleven undocumented aliens stopped in the Pittsburgh area will be facing deportation proceedings. A van carrying the group of Mexican citizens was stopped for traffic violations and members of the group admitted to being in the country illegally. If no criminal activity is indicated in background and criminal checks, they will be released, according to DHS officials.

Immigration officials arrested nine janitorial workers who they said used fake IDs to get jobs with a national defense subcontractor in Tucson. A routine check of I-9 employment eligibility verification forms at a military contractor directed attention to a maintenance company in Tucson where special agents found the workers used phony Social Security numbers and counterfeit immigration residence cards to get jobs. None of the Mexican nationals arrested was found to have a criminal background or intent.

A Canadian blogger who tried to enter the US for a meeting with a media company was turned back at an immigration checkpoint in New York, apparently because DHS officials did not believe that someone could be earning a living by blogging. Jeremy Wright of Ensign.org was strip-searched and then banned from entering the US after he tried to visit New York last week. He had written about the ordeal on his blog, but took down the entry when friends advised him not to publish his immigration troubles.

5. News From The Courts

USCIS Administrative Appeals finds petitioner to have met burden of proving lawful source of funds through submission of evidence to establish pattern of income consistent with accumulation.

USCIS AAO Dec., #WAC 0025253507, December 30, 2004

The Administrative Appeals Office granted a motion to reopen on a case involving a petitioner seeking classification as an alien entrepreneur pursuant to I.N.A. § 203(b)(5). In the initial denial of the petition, the Director of the California Service Center determined that the petitioner had failed to demonstrate the lawful source of her invested funds, and stated that she had not demonstrated sufficient income to account for the accumulation of \$500,000.

Section 203(b)(5)(A) provides such classification to qualified immigrants seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise in which the alien has invested capital of an amount specified in paragraph (C), and which will benefit the U.S. economy and create full-time employment for not less than 10 U.S. citizens or permanent residents. Since the investment was to be in a business located in a target employment area for which the required amount of capital has been adjusted downward, petitioner was required to invest capital of at least \$500,000.

In addition to having the capital available, 8 C.F.R. § 204.6(j) requires that the petitioner show that the capital was obtained through lawful means, and must prove such through evidence such as foreign business registration documents and tax returns. The petitioner cannot establish the lawful source of funds by merely submitting bank letters or deposit statements. The actual path of the funds must be shown to prove that the funds are the petitioner's own.

The petitioner had submitted tax returns from 1994 through 1999, and evidence of savings in excess of \$500,000. While the tax returns proved how a portion of the capital was obtained, they did not account for the full \$500,000. On appeal, the petitioner submitted her 1993 tax return and an employment letter confirming her employment from 1973 to 1999 and her subsequent retirement income. The AAO found that while petitioner did not demonstrate a particularly large income, she demonstrated a pattern of steady income and that 26 years of professional employment is not inconsistent with the accumulation of \$500,000. The AAO held that the petitioner had met her burden and approved the petition.

6. Government Processing Times

There are no new processing times to report.

All processing times are online at www.visalaw.com/processing.html.

7. News Bytes

A new, more modern Tecate port of entry was recently opened in eastern San Diego County. The new facility has five times more space than the old and has technology tools such as license plate readers, radiation portal monitors and gamma ray inspections systems that will provide better border security. The improvements are the result of a continuing three-year, \$18.8 million construction project. The facility was originally built in 1993.

U.S. Customs and Border Protection (CBP) announced that beginning March 1, 2005, travelers to the United States will receive a newly designed admission stamp in their passport. The new stamp was designed with special security features that make it harder for counterfeiters to alter travel documents. The stamp will no longer indicate the admitting agency as U.S. Immigration and Naturalization Service (INS). Instead the new stamp states "Department of Homeland Security, U.S. Customs and Border Protection" signifying the merger of portions of the INS, Animal and Plant Health Inspection Service, Border Patrol and the U.S. Customs Service into one agency. In addition to the new stamp design, travelers will also notice the color of the ink has been changed from its former orange/rust color to that of Red and Blue. According to a press release, the two-color approach was also employed to thwart counterfeiting.

The new admission stamp and security ink was successfully tested at the JFK International Airport in New York beginning on January 1, 2005. Upon the completion of that trial period on February 28th, the remaining ports of entry began using the new stamp and ink.

A new I-864P became effective on March 22nd and the previous 2004 edition may be used only through 3/31/05. This form is used to determine the minimum income requirement needed to complete Form I-864, Affidavit of Support under Section 213A of the Immigration and Nationality Act. This form does not need to be filed. It is used only for assistance in completing Form I-864.

Last week the Office of Immigration Statistics revamped its website and has a new web address. It is <http://uscis.gov/graphics/shared/statistics/index.htm>.

The Administrative Appeals Office (AAO) concluded last week that an H-1B could be extended for the number of days the individual was shown to have been outside the country. This was a non-precedent decision and can be found on AILA's website, www.aila.org. The case is highly important as it will support applicants seeking to gain time beyond their six year limits based on the accumulation of days spent outside the US during the H-1B period.

According to a fact sheet recently released by the Centers for Disease Control and Prevention Tuberculosis rates rose in 17 states, and states with large numbers of recent immigrants, including New York, New Jersey, Florida and California, accounted for most new cases. Infection rates for Asians were 20 times as great as those of whites, and rates for blacks and Hispanics were 8 times as great as those of whites, according to the report.

A tuberculosis specialist, Dr. Kenneth Castro, told the New York Times that the high rates for Asians are a reflection of trends in the country of origin. China and India have the most cases in the world and there are relatively high rates in Vietnam and the Philippines. Comparatively, the higher rates for Hispanics and blacks reflect a combination of high rates in Mexico and the disproportionate rate of incarceration, homelessness and drug abuse among those populations, according to Castro.

The Centers for Disease Control and Prevention fact sheet is online at: <http://www.cdc.gov/od/oc/media/ressrel/fs050317.htm>.

In February, the U.S. House of Representatives approved the Real ID Act, a proposal endorsed by Bush that effectively denies undocumented immigrants the right to obtain driver's licenses. If the bill passes, it would also clear the way for construction of an expanded border wall near San Diego.

The 10-foot-tall primary fence made of welded steel was completed in 1993 along a 14-mile section of the border from the Pacific Ocean to the Otay border crossing. The final segment of fencing whose funding depends on the passage of REAL ID, along with a chain-link fence running parallel to new perimeter roads, is only 3.5 miles long and is the last segment of a 14-foot-tall secondary fence about 130 feet north of the existing fence. According to United Press International, some border state politicians have insisted that the United States continue with its fencing plans, claiming that the walled surveillance zones with motion sensors and bright lights like the one in San Diego are critical to the nation's effort to prevent terrorists, drug smugglers and undocumented immigrants from crossing on to the U.S. soil.

A recent study by the Pew Hispanic Center found that more than 6 million undocumented immigrant Mexicans now live in the United States, making up more than half of the nation's nearly 11 million undocumented immigrants. The report found that undocumented immigrants have dispersed far more widely than 15 years ago, with nearly 40 percent now living outside of the six states that traditionally have attracted the most immigrants. The states attracting the most immigrants are California, Texas, Florida, New York, Arizona, Illinois and New Jersey, in that order. The Pew Hispanic Center report is online at <http://pewhispanic.org/files/reports/44.pdf>.

8. International Roundup

More than 40 passports were stolen from an Immigration Service branch in New Zealand and remain missing, despite inquiries by private investigators and police. Although one former contractor was considered a suspect, there have been no arrests either and the service has closed the case. The passports were from China, South Korea, Hong Kong, South Africa, Cambodia, Russia, Malaysia and Britain.

An initial internal investigation report said that on February 27, several clients contacted the service asking about progress on their visa applications. There were no records of them having made applications. The report, dated March 11, found that the passports had most likely been stolen after they had been picked up from boxes where clients dropped off their applications. Weaknesses in systems and infrastructure allowed the potential for theft, it said.

Greek police last week freed 59 suspected undocumented immigrants from various Asian countries who had been detained in an Athens house by a trafficking gang demanding a ransom for their release. Eleven Iraqis, described by Greek radio as members of an international trafficking ring who smuggle people over the Turkish border into Greece and

then onto other European countries, were arrested in the operation. The 59 migrants had been crammed into a tiny living space, had not been given water for two days and had been tortured. The trafficking gang had allegedly demanded a ransom of 3,000 euro from the migrants' families.

9. Legislative Update

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

10. U.S. Issues More High-Tech Visas Than Allotted

According to the Associated Press, the Department of Homeland Security (DHS) approved 10,000 more applications for visas for high-tech and specialty workers than Congress permitted for this fiscal year.

The AP stated in an article last week that the mistake was made with H-1B visas, which are available to foreigners with a bachelor's degree or higher who want to fill US jobs in architecture, engineering, medicine, biotechnology and computer programming.

Although Congress let the department exempt from the limit 20,000 foreigners with graduate degrees from American universities, only 65,000 H-1B visas are supposed to be given out this fiscal year. According to the article, agency representatives told the press that a last minute surge in applications was responsible. The USCIS has not stated whether the over-issuance of visas has anything to do with the 22 day delinquency by the USCIS in accepting applications under the new 20,000 bonus quota. Congress mandated that the USCIS begin accepting those applications on March 8, 2005.

11. Mexico, Canada and US Announce Security and Prosperity Partnership

Last week, President Bush, Prime Minister Martin of Canada, and President Fox of Mexico announced the Security and Prosperity Partnership of North America (SPP) at Baylor University in Waco, Texas. A joint statement released after their formal meeting stated the initiative is aimed at strengthening continental security and promoting economic growth, competitiveness and improvements in the quality of life for the citizens of all three nations.

According to the joint statement, the security portion of the agreement is an effort to protect North America from external threats, prevent and respond to threats within North America, and streamline the movement of legitimate traffic across the nations' shared borders. The efforts are to include the following actions:

- Implement common border security and bioprotection strategies;
- Enhance critical infrastructure protection, and implement a common approach to emergency response;
- Implement improvements in aviation and maritime security, combat transnational threats, and enhance intelligence partnerships; and

- Implement a border facilitation strategy to build capacity and improve the legitimate flow of people and cargo at shared borders.

The three leaders called for the development of two working groups, one on security and the other on prosperity, made up of officials from all three nations, to develop concrete proposals and a schedule for future actions within 90 days.

In a related development, according to CNSNews.com, a letter dated March 21, 2005, and signed by House Democratic Leader Nancy Pelosi, Senate Democratic Leader Harry Reid, and leaders of the Congressional Hispanic caucus was sent to Presidents Bush and Fox demanding reasonable immigration reform. The letter offered a statement of principles for Presidents Bush and Fox to consider. Those principles include the following:

- family reunification;
- earned access to legalization;
- border safety and protection;
- an enhanced temporary worker program;
- respect for civil liberties and constitutional rights of immigrants and visitors;
- and support to legislative initiatives regarding immigrant student adjustment.

The Democrats in Congress are calling for President Bush to act on the immigration reform he has previously proposed. The plan's major opponents are members of the President's own Republican Party.

12. USCIS Announces Backlog Elimination Update

US Citizenship and Immigration Services (USCIS) announced last week in a press release that the continued reduction in the backlog in the processing of immigration benefits such as work authorization, permanent residency and naturalization. In the latest update issued to Congress, USCIS reported the backlog, which had reached a high of 3.8 million cases in January 2004, was reduced to 1.5 million cases as of September 30, 2004. According to USCIS, the agency has reduced the backlog by more than 2.3 million cases during fiscal year 2004.

In all, USCIS officers completed almost 2.2 million cases during the fourth quarter while receiving nearly 1.3 million new cases. According to the release, by completing 900,000 more cases than received, USCIS accomplished the most productive quarter in the Agency's history.

The latest report to Congress credits much of the backlog elimination progress to productivity increases and process refinements. USCIS stated in the release that it is prioritizing its pending workload to ensure that applications filed by eligible applicants for whom benefits are immediately available are handled first.

The report also noted a reduction in cycle times for a number of services and benefits. For example, the cycle time for the Replacement of a Green Card (I-90) is now 5.4 months. At the beginning of fiscal year 2004, the cycle time for this same service was 12.7 months.
