Siskind's Immigration Bulletin - SPECIAL EDITION
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1. Openers

Dear Readers:

This week we present another special issue covering major developments in immigration law. A few days ago, one of the most significant immigration bills in many years was introduced with strong bipartisan support. The Secure America and Orderly Immigration Act (SAOIA) is co-sponsored by power hitter Senators McCain (R-AZ), Graham (R-SC), Brownback (R-KS), Kennedy (D-MA) and Lieberman (D-CT). An identical bill has been introduced in the House also with bipartisan sponsorship. We are likely to see at least one or two competitor bills and the President has yet to signal whether he supports SAOIA, so this legislation has a long way to go. But the chances of serious immigration legislation happening this year are much better than in years past and the competitor bills are likely to overlap in many respects with SAOIA.

So what are some of the things SAOIA does? First, it provides substantial new tools to beef up and secure the borders of the US. The idea is that the country will finally secure the borders and create legal ways to ensure that those coming to the US can do so in a manner where we can verify that they do not pose a security threat. That means creating a genuine guest worker program - an H-5A visa - that is generous and meets the President's goal of matching up willing employers with willing workers and ensuring that Americans seeking employment are not overlooked. It also creates an H-5B visa that allows those out of legal status to get back into legal status. These workers will pay substantial fines for this privilege. The bill contains provisions that will allow H-5B workers to seek permanent residency and it is this issue that is likely to be an area of disagreement in the competing bills.

SAOIA also will substantially reduce family immigration backlogs by making more green cards available across the board and will also do the same on the employer side by doubling green card numbers, allowing borrowing of unused numbers from prior years and reallocating caps in the different categories to ensure that numbers are more efficiently distributed.

The bill also cracks down on "notarios" who are non-lawyers either holding themselves as lawyers able to assist immigrants with their legal work or those who claim to simply be assisting in filling out forms and not providing legal services. The bill makes it clear that filling out forms IS legal work. Violators may face private lawsuits and substantial fines under SAIOA.

We will track SAIOA as it moves throught Congress. In the mean time, in this special issue we include a detailed summary of the bill's provisions.

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We also include a summary of the just released AC21 memorandum that has been in the works for nearly five years. A number of the "grey areas" surrounding adjustment portability, H-1B portability and seventh year H-1B extensions are finally cleared up in the new memorandum. The memorandum was surprisingly worker friendly and has much good news.

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In firm news, the latest issue of AILA's Immigration Law Today contains a column I've written on technology. This month covers my favorite subject - cool gadgets for immigration lawyers (as well as other folks) that I discovered at the annual Consumer Electronics Show in Las Vegas. You can find the article linked on our site at www.visalaw.com/news/.

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

Regards,

Greg Siskind

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2. Analysis of the New AC21 USCIS Interpretive Memorandum

USCIS has released a May 12, 2005 memorandum interpreting a number of important provisions from AC21, the immigration law that created such concepts as the portability of H-1B visas and employment-based adjustment of status cases. The memorandum is from William Yates, the Associate Director of Operations at USCIS' headquarters in Washington and it is directed to the Directors of the USCIS Regional Service Centers.

The memorandum is designed to provide interim guidance until the release of regulations currently in development. The four subjects covered in the memorandum are

- The interplay between concurrent filing of I-140 and I-485 petitions and the I-140 portability provision in AC21;
- The processing of H-1B cases under the seventh year extension provision in AC21;
- The handling of seventh year extensions in cases where the applicable employment-based category is backlogged; and
- Processing H-1B cases in cases where the H-1B portability provision of AC21 comes into play.

Yates notes that prior AC21 guidance memoranda remain in effect and the new memorandum only provides supplemental assistance.

ADJUSTMENT PORTABILITY

UNADJUDICATED I-140S AND ADJUSTMENT PORTABILITY

The first issue addressed is how to handle adjustment portability when 180 days have passed since filing the I-140 and I-485, but the I-140 has not yet been approved. The key point is that portability can be permitted in this case.

The memorandum then provides guidance for examiners on how to handle such cases. If the underlying I-140 is approvable, the examiner is instructed simply to proceed with processing the I-485. If the I-140 is approvable but for an ability to pay issue or an issue arising after filing the I-140, the case should be approved on its merits and then the examiner should determine if the new job meets the portability test of being in the same or a very similar occupation. If additional evidence is needed to resolve a significant post-filing issue such as ability to pay, the examiner can issue a request for evidence to try to resolve the issue. If the examiner then finds the case approvable, it can then move to the adjustment application.

However, there is still a significant risk for an employee in a case like this. If an RFE is issued on the I-140 and the employer either fails to respond or indicates that the employee is no longer working for the employer, the examiner will deny the I-140 and also deny the adjustment application.

"SAME" AND "SUBSTANTIALLY SIMILAR OCCUPATIONS

One of the more difficult areas for immigration lawyers in the AC21 adjustment portability statute has been the question of whether a new job meets the "same" or "substantially similar" occupation test. The new memorandum provides some specific information on what these terms mean. Three factors will be used to determine if the test is met are

- A description of the job duties in the labor certification application or the initial I-140 and the job duties of the new job.
- The Dictionary of Occupational Titles code or the SOC code assigned to the initial I-140 employment in labor certification cases or the appropriate code for I-140 cases not requiring a labor certification filing compared to the DOT and/or SOC code appropriate for the new position.
- A comparison of the wages for the old and the new job. A minor difference would not matter, but a substantial change might be a factor in determining if the two jobs are the same.

A change in geographic location should NOT be considered by an examiner. And the offer of new employment needs to be in place at the time the adjustment application is adjudicated.

PORTABILITY FOR MULTINATIONAL EXECUTIVES AND MANAGERS

EB-1 multinational executives and managers CAN avail themselves of adjustment portability even when the new company is not related to the original sponsoring employer. But the new position must still meet the "same or substantially similar" test noted above.

REQUIREMENTS OF THE NEW EMPLOYER

A new employer is NOT required to demonstrate an ability to pay the worker. However, it is permissible to ask questions to see if the new employer is bona fide and an adjustment applicant still must document that he or she will not become a public charge.

A new employer is NOT required to file a new labor certification application and a beneficiary of a labor certification from an earlier employer can still benefit from that earlier filing.

SELF EMPLOYMENT AND ADJUSTMENT PORTABILITY

The new Yates memorandum makes it clear that it may be permissible for an applicant to port to a position of self employment. However, the basic "same or substantially similar" test needs to be met, the new employer needs to be legitimate, and the examiner can probe whether the initial job was really the position of intended employment at the time the application was filed.

WHAT IS THE 180 DAY CLOCK ACTUALLY COUNTING?

One of the more confusing aspects of portability is whether the 180 day clock means that an applicant needs to remain with the sponsoring employer for 180 days or if it is referring to the time that the adjustment application needs to be pending for portability to apply.

The new memorandum takes the more latter and more liberal interpretation. The basis for adjustment is not actual or current employment, but a prospective job. In fact, the I-140 need not be based at all on an applicant's current job. The only requirement is that the I-485 must be pending 180 days and, importantly, that the applicant truly intended to work for the initial I-140 sponsor upon approval of the adjustment. Examiners are not permitted to presume the absence of such intent.

WHEN IS THE I-140 SERVING AS THE BASIS FOR PORTABILITY NO LONGER VALID?

The I-140 will no longer be valid for portability purposes when it is withdrawn by the employer before the I-485 has been pending 180 days, where the I-140 is denied, or where the I-140 is revoked and the revocation did not take place before after the I-485 has been pending for 180 days.

WHAT HAPPENS TO ADJUSTMENT PORTABILITY WHEN EB PRIORITY DATES RETROGRESS AFTER THE ADJUSTMENT IS FILED?

Adjustment portability still is permitted in such cases and the 180 day clock continues even if a visa number is no longer immediately available.

WHAT HAPPENS TO AN APPLICANT'S PRIORITY DATE AS A RESULTING OF PORTING IN AN ADJUSTMENT CASE?

Nothing. The priority date remains the date of the filing of the initial labor certification or the date of the filing of the I-140 when an approved labor certification is not required.

H-1B SEVENTH YEAR EXTENSION ISSUES

TIMING OF AN H-1B SEVENTH YEAR EXTENSION REQUEST

The new memorandum addresses the question of whether an applicant must first get an approval to fulfill the balance of six years before then requesting an extension to go beyond six years under the seventh year extension request rules. This might be the case where someone had an approval to take them into the middle of six years, but not to the end of the sixth year and the person has a labor certification application already pending for a year. The USCIS takes the position that a seventh year extension request could be asked for at this point without having to get an approval first to reach the end of six years. The approval beyond the sixth year still could only be granted in a one year increment, however..

The applicant needs to have completed the one year labor certification or I-140 post-filing period before the requested start date on the seventh year extension period.

A final decision to deny a labor certification or I-140 that is the basis for a seventh year extension will result in any additional one year extensions being denied, though it will not affect the approval that was made before the denial. Until one's right to appeal an I-140 is exhausted or an actual I-140 appeal is denied, the decision is not considered "final."

Also, in the case of an extension based on a labor certification, the I-140 need not be filed before requesting the seventh year extension even if the labor certification has been approved.

LABOR CERTIFICATION SUBSTITUTIONS AND SEVENTH YEAR H-1B EXTENSIONS

In the case of a labor certification beneficiary substitution, only one party can apply for a seventh year extension based on that case. Only the "current" beneficiary – the one most recently substituted into the labor certification – is eligible for the extension.

EFFECT OF CHANGING EMPLOYERS ON SEVENTH YEAR EXTENSIONS

The labor certification or I-140 that serves as the basis for a seventh year extension need not have been filed by the same employer that is filing for the H-1B.

EFFECT OF CONSULAR PROCESSING ON SEVENTH YEAR EXTENSIONS

It also does not matter if an applicant intends to consular process his or her green card application rather than adjusting status.

SPOUSES, CHILDREN AND SEVENTH YEAR EXTENSIONS

H-4s are eligible for extensions just as H-1B principal applicants are. Spouses also on an H-1B are not entitled to the seventh year extension for their own H-1B case unless they independently meet the AC21 seventh year extension requirements.

H-1B EXTENSIONS BASED ON THE PER COUNTRY CEILING PROVISION OF AC21

Section 104(c) of AC 21 permits EB-1, EB-2 and EB-3 applicants to seek an extension of their non-immigrant status when their green card applications are being held up because the per country limitations on a particular green card category are backlogged. To qualify for an H-1B extension in this case, the I-140 needs to be approved. Extension applications under this provision may be granted in increments of up to three years. And despite the reference in AC21 to only granted a one time protection under this section, the new memo makes it clear that a qualifying alien may be granted more than one extension under the provision.

H-1B PORTABILITY RULES UNDER AC21

"PORTING" WHEN A PERSON IS NO LONGER HAS A VALID I-94 OR THE APPROVED PETITION HAS EXPIRED.

Porting is still permitted if the applicant remains in a "period of stay authorized by the Attorney General." A common example of this situation would be if one timely files for an extension of an H-1B with Employer A, the I-94 and original petition expire after filing the extension and then the applicant wants to switch to Employer B. The timely extension application ensures that the worker is in legal status so portability still is available.

SUCCESSIVE H-1B PORTABILITY PETITIONS

An applicant who takes advantage of portability for one employer and then decides to move to another can claim portability for the next job as long as the applicant can separately show that each of the two jobs met the requirements for H-1B classification and the applicant is otherwise eligible for extension of stay.

This strategy can be risky, however, since the USCIS states in the memorandum that if an applicant's H-1B status expires while the petitions are pending and one of the petitions is denied, the "bridge" will be undercut and portability will not be available anymore.

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3. Summary of the Secure America and Orderly Immigration Act

The McCain Kennedy immigration bill is 150 pages long and contains numerous small and large changes to US immigration law. This summary highlights several of the key changes.

Secure America and Orderly Immigration Act [SAOIA]

TITLE I – Border Security

SUBTITLE A—Border Security Strategic Planning

The bill requires the Department of Homeland Security to develop a National Strategy for Border Security that will include a security plan to enhance the Border Patrol.
The comprehensive plan must be submitted to Congress within a year of passage of the bill as well as annual updates.
The bill provides funding for five years for the program.
The Strategy replaces an earlier INS security plan and this new document will govern plans for federal security and enforcement efforts.

SUBTITLE B—Border Infrastructure, Technology Integration and Security Enhancement

The Department of Homeland Security will work with federal, state, local and tribal authorities to coordinate planning for law enforcement, emergency response and security responsibilities relating to the US' international borders. This Border Security Coordination Plan shall be submitted to Congress within a year of passage of the bill.
DHS may establish a Border Security Advisory Committee to advise DHS on border security and enforcement issues. The committee will be comprised of representatives from border states as well as local and tribal officials from border states.
Within 60 days of the bill passing, DHS must create a program to use aerial surveillance technologies to enhance border security. The bill outlines specific requirements for this program. A report on the program must be submitted to Congress within a year of the bill's passage.
The Secretary of Homeland Security shall develop a plan to improve coordination between the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection as well as state and local agencies to combat human smuggling. The plan shall consider more effectively using databases, using better training techniques, more effectively utilizing visas for victims of trafficking and implementing better investigative techniques, equipment and procedures. DHS is directed to work with the Department of State to coordinate with foreign governments to combat human smuggling. DHS is required

to submit a report to Congress within a year of passage of the bill describing legislative recommendations needed to combat human smuggling.
The provisions of this section are not intended to give state and local authorities any additional authority to enforce federal immigration law.

SUBTITLE C—International Border Enforcement

The Secretary of State shall enhance the mutual security and safety of the US, Canada and Mexico by providing a framework for better management, communication and coordination between the governments of North America.
DOS is authorized to negotiate an agreement with Mexico to cooperate in screening third-country nationals coming to the US from Mexico and to provide technical support for stronger immigration control at the US-Mexican border.
The Secretary of State shall coordinate with Canada and Mexico in establishing a program to review the needs of the countries of Central American in securing their borders and to use these findings to determine the financial and technical support needed to implement needed security measures. DHS will provide "robust" law enforcement assistance to these countries in dismantling human smuggling operations and enhancing border security.
DHS and DOS shall work together with officials of Guatemala, Belize and neighboring countries to set up a program to provided equipment, technical assistance and vehicles to manage the border of Mexico and its Central American neighbors.
DHS, DOS, the FBI, and government officials from Mexico and appropriate Central American countries shall work together to assess the impact of deporting violent criminal aliens; establish a program to track Central American gang activities, focusing on the identification of returning criminal deportees; devising an agreed-upon system for notification prior to deportation and for support for reintegration of these deported aliens;

TITLE II – State Criminal Alien Assistance

The State Criminal Alien Assistance Program is extended until 2011. The bill outlines specific funding for each year.
States will now be able to seek reimbursement for indirect costs relating to imprisonment of illegal aliens. Currently, only direct costs may be reimbursed. Indirect costs include court costs, detention costs, criminal procedure costs and indigent defense costs. States will get preference in their reimbursement based on whether they are a border state and if the state has an area with a large number of undocumented workers.

TITLE III – Essential Worker Visa Program

General H-5A Provisions

The bill creates a new H-5A temporary visa category for people coming to the US to initially perform labor or services not covered by the H-1B, H-2A, L, O, P, or R categories.
An H-5A applicant must maintain a residence in a foreign country which they have no intention of abandoning.
The worker can apply directly at a consulate and must demonstrate the ability to perform the services being requested in the H-5A application.

The worker is required to pass security and criminal checks, pay a $500 application fee, and undergo a medical examination.
The initial period of work will be up to three years and may be extended for an additional three year period.
If an alien is unemployed for more than 45 days, the alien must return to the home country or country of last residence. The unemployed alien can then use the same visa to reenter the US provided the worker meets the standards for the original entry to the US.
Aliens on H-5A visas may travel outside the US and be readmitted without having to obtain a new visa if the I-94 has not expired. But time spent outside the US will not extend the six years of allowed H-5B status.
H-5As will be portable. Aliens admitted to work for one employer will be permitted to change to other qualifying employers.
Renewal of an H-5A is barred if an alien is found to have willfully violated the terms of the H-5A. But waivers are available for technical violations, inadvertent errors, or violations for which the alien was not at fault.
H-5As are dual intent visas like their H-1B cousins

Employer and Foreign Labor Contractor Obligations

Employers are required to comply with all applicable Federal, State and Local labor and employment laws including laws covering migrant and seasonal workers.
H-5A workers may not be treated as independent contractors.
H-5A workers are entitled to the same labor law protections as their American counterparts.
Employers shall be responsible for the federal, state and local taxes of the H-5A worker.
H-5A workers are to be paid the prevailing wage for their work.
H-5A workers may not be used for strike replacement workers.
Employers are not permitted to threaten H-5A workers with withdrawing their visa petitions in retaliation for the alien exercising his or her rights under this law and employees are protected by a whistleblower provision for reporting employer violations of the Secure American and Orderly Immigration Act (SAOIA)
Foreign labor contractors must disclose to potential H-5A workers with the following: the place of employment, a description of employment activities, the period of employment, the pay and any other employee benefits (and any costs to be charged to the worker for such benefits), travel costs, the existence of a labor dispute at the place of employment, worker compensation benefits, any education or training to be required or provided (including the costs associated with such training or education), and a statement regarding the worker's rights under SAOIA. The disclosure must be provided in English as well as the language of the worker. The Department of Labor will assist in making disclosure information available in English, Spanish and other languages deeded appropriate.
Foreign labor contractors may not charge workers a fee for their services.
If travel costs are charged to the worker, they must be reasonable
Foreign labor contractors must register with the Labor Department every two years and employers can only file H-5A applications involving foreign labor contractors if the contractor is registered and certified by DOL. Applications will be submitted and approved electronically and certifications must be issued within 14 days of filing for registration. The DOL shall also set up a system to expeditiously update and renew registrations.
Certifications may be revoked for misrepresentations, if the registrant is really applying on behalf of someone who has been refused a certificate or the contractor has violated provisions of SAOIA.
Employers are required to notify DOL of any violations of SAOIA by a foreign labor contractor.
Foreign labor contractors may be required to post a bond depending on the contractor's ties to the US.

SAOIA has an enforcement system that includes back wage, civil and criminal penalties.

Market-Based Numerical Limits

In the first fiscal year after passage of SAOIA, up to 400,000 H-5A visas will be available.
If the 400,000 cap is hit within the first three months of the fiscal year, an additional 80,000 H-5As will be made available for the rest of the fiscal year. In that case, the cap for the next year will be 480,000.
If the 400,000 cap is hit in the second quarter of the fiscal year, an additional 60,000 H-5As will be available for the fiscal year and the number for the following fiscal year will be 460,000.
If the 400,000 cap is hit in the third quarter of the fiscal year, an additional 40,000 H-5As will be available for the remainder of the fiscal year and the number for the following fiscal year will be 440,000.
If the 400,000 visas are exhausted in the last quarter of the fiscal year, the cap will increase by 10% to 440,000 in the following fiscal year.
If the numerical limit is not reached in a given year after the first year of the program (outside of issues with processing backlogs), the cap shall decreased by 10% for the following fiscal year).
Visa caps in future years will continue to adjust upwards or downwards according to this formula.
50,000 H-5As will be reserved each fiscal year for "qualifying counties." These are counties in rural areas and counties that have experienced a 10% or more drop in population in the twenty years preceding enactment of SAOIA. If any of these 50,000 reserved H-5A slots are not used by June 30th of the fiscal year, anyone can claim the slot.
DOS is authorized in allocating visas to take "any additional measures necessary to deter illegal immigration."

Adjustment of Status to Permanent Residency for H-5As

Employers of H-5As may apply for their workers to adjust to permanent residency status for workers who have maintained four years of cumulative H-5A status.
H-5As may also self petition after four years in H-5A status.
H-5A workers seeking to adjust status must be physically present in the US and they must meet the naturalization English language and civics requirements or show they are enrolled in a course to meet these requirements.
Dual intent status for H-5As is noted in this section as well.
H-5As can continue extend their H-5A status if a labor certification application or I-140 petition is pending for the applicant. H-5As extended under this provision will be extended in one year increments until a final decision on permanent residency is granted.

Essential Worker Visa Program Task Force

SAOIA creates an Essential Worker Task Force to make policy recommendations to Congress regarding the H-5A.
The Task Force shall report its initial findings to Congress after two years and its final findings after four years.

Willing Worker-Willing Employer Job Registry

The Department of Labor shall modify America's Job Bank to work with the new H-5A visas. An employer must show that it has posted a job in America's Job Bank for at least 30 days.

TITLE IV – Enforcement

Within six months after enactment of the law, visas issued by DOS shall be machine-readable and tamper resistant and use biometric identifiers and meet document identifying standards set by the International Civic Aviation Organization.
The Commissioner of Social Security shall coordinate with DHS in the establishment of a system that will allow employers to make inquiries regarding the identity and employment authorization of an employee. This will be established as an eventual replacement to the I-9 system. The new system will use machine-readable documents that contain encrypted electronic information to verify employment eligibility. Verification will be provided within one day of the inquiry being made. For cases where a person is not identified, a secondary confirmation system shall be established and non-confirmed workers will have ten days to submit documentation for secondary confirmation. Individuals will be permitted to review their records and to seek correction of any flaws in the data.
The 1996 Immigration Act (IIRAIRA) would be amended to provide for the collection of biometric machine-readable information from an alien's visa or immigration-related document at the time the alien arrives in the US or departs from the US.
The Labor Department is granted the authority to investigate employers of H-5A workers who violate SAIOA. Among the factors that will trigger an investigation are whether an employer's submissions to the Employment Eligibility Confirmation System generate a high non-confirmation response relative to other employers, whether an employer rarely or never screens hired individuals, whether individuals employed by an employer rarely or never pursues a secondary verification process and any other indicators of illicit, inappropriate or discriminatory use of the H-5A system.
Individuals who file non-frivolous complaints under SAOIA and who are otherwise eligible to continue being employed in the US may be allowed to remain in the US and seek other employment for a period not to exceed the amount of time they would otherwise be allowed to remain.
The current fines on employers for violations of the Immigration and Nationality Act are doubled.

Title V – Promoting Circular Migration Patterns

The Secretary of State is authorized to enter into agreements with foreign governments to facilitate labor migration under the H-5A visa program. The State Department will place a priority on reaching agreements with countries that have a large number of nationals receiving H-5As. The agreements are to be reached within three months after enactment of the law or as soon as practicable. The program will be designed to provide H-5A workers with economic incentives to return to their home countries, help the foreign government to monitor the participation of their nationals in the H-5A program, help foreign governments run programs to reintegrate H-5A workers upon their return from the US and help the foreign governments facilitate travel to and from the US.
SAOIA includes a "sense of Congress" resolution encouraging the expansion of programs designed to promote economic development in Mexico and to ensure Mexican workers in the US have an adequate safety net.

TITLE VI – Family Unity and Backlog Reduction

Worldwide family immigration numbers may be increased from 480,000 per year by the number of family-based green cards unused in prior fiscal years (beginning with the 2001 fiscal year).
Immediate relative numbers are no longer counted against the 480,000 family immigration limit.
Employment-based green cards are increased from 140,000 to 290,000 per year and unused numbers roll over from year to year beginning with fiscal year 2001.
The per country limit is increased from no more than 7% for any country to no more than 10% and from 2% to 5% for dependent areas.
Family preference numbers are reallocated as follows:
- 1st preference (adult children of US citizens)– up to 10% of the worldwide numbers plus unused 4th preference numbers
- 2nd preference (spouses/minor children of permanent residents (2A) and adult unmarried children of permanent residents (2B)) – up to 50% of worldwide numbers plus unused first preference numbers (with 77% of 2nd preference numbers going to the 2A spouse/minor child of permanent resident category).
- 3rd preference (married child of US citizen) – up to 10% of worldwide numbers plus unused numbers from the 1st and 2nd preference categories.
- 4th preference (sibling of US citizen) – up to 30% of worldwide numbers plus unused numbers in the first three categories.
Employment preference numbers are reallocated as follows:
- EB-1 numbers are decreased from 28.6% to 20% of worldwide EB numbers
- EB-2 numbers are decreased from 28.6% to 20% of worldwide EB numbers
- EB-3 numbers are increased from 28.6% and 35% of worldwide EB numbers (this category now only includes skilled and professional workers)
- EB-4 (which now includes only immigrant investors (who were formerly in the EB-5 category)) is reduced from 7.1% to 5%.
- EB-5 (which now includes "other workers" formerly in the EB-3 category) is limited to 30% of worldwide numbers plus visas not used in the first four preference categories.
The former EB-4 category for special immigrants (including religious workers) is repealed. Note, however, that the categories of people in this category can still petition outside of the capped EB categories (i.e. petitions can be filed without a limit). The main users of EB-4s are religious workers who have generally used up less than 3,000 green cards a year, well under the 10,000 cap.
Allows minor children of spouses and parents of US citizens to be included in immediate relative family immigrant visa petitions.
Family and employment-based applications for adjustment of status by surviving immediate relative spouses, children and parents may continue as if the death had not occurred. This provision will be retroactive for up to two years prior to the date of enactment of SAOIA if an applicant files to reopen the previously denied case within a year of enactment of the law.
The affidavit of support requirement in immigrant visa petitions is modified to allow for sponsors to show that they earn at least 100% of the poverty level as opposed to the current 125% requirement.
Creates a new hardship exception for spouses, parents, sons and daughters with immigrant workers. A $2000 fee must be paid with the waiver application.
The exemption from the three and ten year reentry bars for children under 18 is changed to raise the age to 21. Aliens granted waivers of the three and ten year bars will now have to pay at $2000 penalty.

TITLE VII – H-5B Non-Immigrants

Title VII creates a new H-5B non-immigrant visa that is open to people in the US residing illegally in the US before the date SAOIA was introduced in May 2005. Applicants must have resided continuously since that time.
Spouses and children are eligible and certain ex-spouses are eligible in cases of domestic violence.
Grounds of inadmissibility tied to being out of status on the date SAOIA was introduced are waived, but not criminal and security inadmissibility grounds.
DHS may waive inadmissibility grounds for humanitarian, public interest or family unity reasons.
Applicants must show that they were employed in the US full time, part time, seasonally or were self-employed before the date SAOIA was introduced and have been in the US since that date. Evidence of employment can be made by presenting documentation from the Social Security Administration, IRS, or any other government agency. Also, documentation from employers, unions, work centers may be presented. Workers unable to show this evidence can present two other types of evidence including bank records, business records, affidavits, or remittance records. SAOIA directs DHS to interpret this section liberally given the difficulties encountered by aliens in obtaining evidence of employment due to the undocumented status of the alien. The requirement will be met if the alien has produced "sufficient evidence to demonstrate such employment as a matter of reasonable inference." The employment requirement does not apply to people under twenty-one and people attending school.
H-5B applicants must provide fingerprints and additional information in order to conduct a background check. Background checks are to be conducted expeditiously.
H-5Bs are authorized for up to six years of H-5B non-immigrant status. Changes of status to other non-immigrant classifications are not permitted until the six year period is over.
H-5Bs must pay a penalty fee of $1000 unless they are under the age of twenty-one.
H-5Bs, their spouse and children shall be granted employment authorization and the right to travel while the H-5B application is pending and may not be detained pending final adjudication of the petition unless there is a criminal history.
Applicants apprehended after SAOIA is enacted but before regulations are issued shall be permitted to file for an H-5B after regulations are promulgated. People in removal proceedings will also have an opportunity to apply for an H-5B unless a final administrative determination has been made. Applicants in the US who have been ordered removed or issued a voluntary departure order may still apply for an H-5B and need not file a motion to reopen, reconsider, or vacate the prior order. If the H-5B is not granted, the original order shall still be effective and enforceable as if the H-5B application had not been made.
USCIS will provide a single level of administrative appellate review authority for denied H-5B applicants. Federal courts will be allowed to review denials based on the administrative record established at the time of the review.
SAOIA guarantees the confidentiality of information provided in H-5B applications and limits disclosure of information to anyone other than the officers and employees of USCIS reviewing the application. Exceptions are provided for criminal or national security investigations. Privacy violations can be penalized by a fine of up to $10,000.
People who file or assist others in filing applications containing false or fraudulent statement or representations shall be subject to fines and/or imprisonment for up to five years as well as a lifetime bar on entry. However, anyone submitting an employment record that contains incorrect data used to verify prior employment shall not be considered to be in violation of this section of SAOIA.
H-5Bs can adjust to permanent residency if they meet the following requirements:
The applicant has been employed in the US during the required period.

A penalty of $1000 is paid (that is in addition to the $1000 paid to get the H-5B visa).
The applicant is not inadmissible under any ground that would cause the applicant to be ineligible for the original H-5B.
The applicant has taken a conforming medical examination.
The applicant has paid all takes during the requisite employment period.
The applicant can meet the naturalization civics and English test or is pursuing a course of study to achieve such an understanding of English and civics. Applicants who can show they can meet these naturalization requirements need not do so again later during the naturalization process.
The applicant passes a new criminal and security background check.
The applicant has complied with draft registration requirements.
Spouses and children are eligible to adjust with the principal applicant. An applicant no longer living with the principal applicant because of domestic violence may still be able to qualify.
The number of H-5Bs eligible to adjust to permanent residency is not capped.
Employers of H-5B applicants are protected from civil and criminal tax liability relating to the employment of the applicant prior to the applicant receiving employment authorization under the H-5B program. But employers are not insulated from liability relating to violating other labor or employment laws.
SAOIA provides for necessary funding to be appropriated to implement this program.

TITLE VIII – Protection Against Immigration Fraud

Only the following people can represent individuals in any immigration matter before a federal agency:
An attorney
A law student or graduate of an accredited law school not admitted to the bar if the student or graduate is under the direct supervision of a qualified attorney or faculty member, the matter is handled on a pro bono basis and the appearance is permitted by the judge or official before whom the law student or graduate wishes to appear.
Any "reputable" individual if the person is appearing on an individual case basis, the representative is not being paid directly or indirectly, the individual has a pre-existing relationship with the represented individual (such as a neighbor, relative, clergyman, business associate, or personal friend); the pre-existing relationship requirement may be waived in cases where adequate representation would otherwise be unavailable. Representatives in these cases must be approved by the official before whom the appearance is being made.
Permission to represent individuals will not be granted to anyone who regularly engages in immigration and naturalization practice or preparation, or holds himself or herself out to the public as qualified to do so.
Accredited representatives of recognized organizations approved by the Board of Immigration Appeals
An accredited official in the US of the alien's home country government.
A lawyer licensed in a foreign country who regularly practices in that country, the person normally only represents people outside the US and the official before whom representation is made permits such representation.
Former employees of the Justice Department, State Department, Labor Department or Department of Homeland Security may act as an authorized representative if such representation unless they otherwise comply with the law. Such prior employment must also be disclosed.
The Board of Immigration Appeals shall establish a procedure for approving accredited representatives of immigration advocacy organizations. The BIA can set rules for the types

of organizations that can qualify, set bond requirements and require reporting by the organization.
Only attorneys or individuals approved as accredited representatives are permitted to hold themselves out as being able to provide representation in immigration matters.
People applying for immigration benefits or who are in removal proceedings have the right to counsel as long as it shall not be at the expense of the government.
Representation by an individual not on the list above shall be a cause for the representative to be subject to civil or criminal penalties.
The following acts are prohibited by non-qualified representatives:
Directly or indirectly providing or offering representation regarding an immigration matter for pay.
Advertising or soliciting representation in an immigration matter.
Being paid for services regardless of whether any petition, application, or other document was filed with any government agency or entity regardless of whether a petition, application or other document was prepared or represented to have been prepared by such individual.
Representing oneself as an attorney or accredited representation when this is false.
Violating a state unauthorized practice of law statute
Any member of the public or a government official that has reason to believe that any person is being or has been injured by reason of a violation of this unauthorized practice statute may commence action in a court of competent jurisdiction. Prevailing plaintiffs are entitled to actual damages plus a punitive award of triple damages or $1000 per violation, whichever is greater. A court may also issue an injunction on the unlawful behavior as well as restitution. A prevailing plaintiff shall also be entitled to reasonable attorney's fees and costs, including expert witness fees. Private rights of action are not precluded by this statute.
Violators of this unauthorized practice statute may also be assessed a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations.
The remedies and penalties provided above are cumulative to each other and to remedies or penalties available under all other laws. The provisions of this section also do not supersede any state laws or regulations of this type of conduct.
An "attorney" under this section means one licensed in good standing in any state.
An "immigration matter" includes any "proceeding, filing, or action affecting the immigration status or citizenship status of any person, which arises under any immigration or nationality law..."
"Representation" includes
The appearance, either in person or through the preparing or filing of any document or petition on behalf of another person or client, before any Federal agency or officers; and
The study of facts or a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers [editor's note: this appears aimed at the numerous "notarios" who claim they are not practicing law when they engage in the practice of assisting immigrants in filling out forms.]
Victims of fraud by unauthorized representation may apply for U visas and the number of U visas available each year is accordingly increased to 15,000 from 10,000.

TITLE IX – Civics Integration

USCIS shall establish a United Stated Citizenship Foundation (USCF) which shall be charitable and educational in nature and which will support the functions of the Office of Citizenship.
The USCF shall be a grant making organization which will support activities including promoting civics and English learning and other activities designed to promote such learning.

TITLE X – Promoting Access to Health Care

Hospitals will continue to be reimbursed for emergency care of undocumented immigrants under the Medicare Prescription Drug Improvement and Modernization Act of 2003. The end date will be 2011 instead of 2008.
H-5A and H-5B workers are now included in the list of patients for whom hospitals can seek reimbursement.
Physician J-1 waiver programs cannot discriminate against hospitals in their criteria for determining eligible facilities [editor's note: this is presumably targeted at the largely non-functioning HHS J-1 waiver program which bars hospitals from applying]
HHS shall contract with the Institute of Medicine of the National Academies (the "Institute") to study binational public health infrastructure and health insurance efforts. Input shall be sought from border health experts and insurance companies. A report on this study shall be issued a year after entering into the contract with the Institute which shall include recommendations on ways to expand or improve binational public health infrastructure and insurance efforts.

TITLE XI – Miscellaneous

DHS and DOS are to provide regular reports to Congress on H-5A usage.
H-5A and H-5B fees will be paid into an account known as the "H-5 Nonimmigrant Petitioner Account." The money will be allocated as follows:
53% will go to DHS efforts related to the adjudication of H-5 visa programs and any other efforts needed to carry out the provisions of SAOIA.
10% shall remain available to DHS for border security efforts described in Title I of SAOIA.
Not more than 1% will go to programs to promote public awareness of the H-5 visa program, to protect migrants from fraud and to combat the unauthorized practice of law described in SAOIA.
Not more than 1% will go to the Office of Citizenship to promote civics integration activities.
2% will go to the Civics Integration Grant Program described in Title IX
15% will be available to the Department of Labor to enforce labor standards under the H-5A visa program.
15% shall remain available to the Commissioner of Social Security for the creation and maintenance of the Employment Eligibility Confirmation System described in Title IV of SAOIA.
15% shall remain available to DOS to carry out any necessary provisions of SAOIA.
2% shall remain available to HHS for the reimbursement of hospitals serving individuals working under programs established by SAOIA.
Establishes easier procedures for people facing persecution on account of their youth (who are unaccompanied minors) or their gender to be admitted to the US.
The number of authorized S visas for criminal informants is increased from 200 to 3,500 and now includes people with information on weapons of mass destruction and related delivery systems.
Clarifies that volunteer work at a religious organization is not unauthorized employment, notwithstanding the provision of room, board, travel and other basic living expenses.

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4. USCIS Public Notice: USCIS to Accept Additional H-2B Filings for FY 2005 and 2006

The following is a public notice from U.S. Citizenship and Immigration Services, released May 23, 2005:

Washington, DC – Beginning May 25, 2005, U.S. Citizenship and Immigration Services (USCIS) will begin to accept additional petitions for H-2B workers as required by the *Save Our Small and Seasonal Businesses Act of 2005.*

WORKERS WHO BENEFIT FROM THE ACT

The Act allows USCIS to accept filings beginning May 25, 2005 for two types of H-2B workers seeking work start dates as early as immediately:

1. For FY 2005: Approximately 35,000 workers, who are new H-2B workers or who are not certified as returning workers as set forth below, seeking work start dates before October 1, 2005.

2. For FY 2005 and 2006: All "returning workers," meaning workers who counted against the H-2B annual numerical limit of 66,000 during any one of the three fiscal years preceding the fiscal year of the requested start date. This means:

    - In a petition for a work start date before October 1, 2005 (FY 2005), the worker must have been previously approved for an H-2B work start date between October 1, 2001 and September 30, 2004.

    - In a petition for a work start date on or after October 1, 2005 (FY 2006), the worker must have been previously approved for an H-2B work start date between October 1, 2002 and September 30, 2005.

    - If a petition was approved only for "extension of stay" in H-2B status, or only for change or addition of employers or terms of employment, the worker was not counted against the numerical limit at that time and, therefore, that particular approval cannot in itself result in the worker being considered a "returning worker" in a new petition. Any worker not certified as a "returning worker" will be subject to the numerical limitation for the relevant fiscal year.

FILING REQUIREMENTS

Petition forms and processing will follow current rules, with these additional requirements for "returning workers:"

1. ***In the Petition:*** The petition must include a certification from the petitioner (employer) signed by the same person who signed the Form I-129 stating, "As a supplement to the certification made on the attached Form I-129, I further certify that the workers listed below have entered the United States in H-2B status or changed to H-2B status during one of the last three fiscal years." The list must set forth the full name of the worker. If the petition seeks change of status of the worker within the United States, it must include evidence of previous H-2B admissions, such as a visa or a copy of I-94 admission document.

2. ***Multiple Workers:*** A single petition may benefit more than one worker, including unnamed workers in "special filing situations" for business reasons. However, any returning workers must be listed in a certification as described above. For multiple

named workers, including returning workers, "Attachment 1" to Form I-129 must be included and completed.

3. ***After the Petition:*** A petition approval notice will list any returning workers, who must be prepared to show to the U.S. consulate (when requesting an H-2B visa) or CBP port inspector (if visa exempt) proof of the worker's previous H-2B admissions, such as a visa or a copy of I-94 admission document. The State Department will confirm prior visas through its electronic system, and that alone may be sufficient, but failure to show these documents may result in denial of visa or admission.

As usual, each petition must include a labor certification from the Department of Labor (DOL). The process for labor certification for H-2B is described on the DOL website at http://www.ows.doleta.gov/foreign/h-2b.asp. USCIS will accept a copy of the labor certification in those cases where the original labor certification has previously been accepted by USCIS.

Premium processing requests may be submitted by including a Form I-907 and the additional $1,000 fee.

In addition to the normal filing fee for petitions received by USCIS on or after May 25, 2005, and seeking work start dates beginning on or after October 1, 2005 (FY 2006), each petition must include a new additional fraud prevention and detection fee of $150. This fee is per petition, regardless of the number of workers benefiting from the petition.

NUMERICAL LIMIT CUT-OFFS

When any H-2B numerical limitation has been reached, USCIS will reject any additional H-2B petition filings that are subject to numerical limits (i.e., other than for "returning workers" and for extension of stay, change of employers or terms of employment). For FY 2006 filings, the Act provides that the numerical limit for the first 6 months of the fiscal year shall be no more than 33,000, with the remaining 33,000 H-2B numbers to be allocated on or after April 1, 2006.

The Act has allowed waiver of any requirement to issue regulations in order to implement expeditiously the provisions described above, and USCIS does not plan to supplement this Public Notice, which has been posted on the USCIS website, with any further notice in the *Federal Register*. USCIS may post other website notices, including to announce when particular numerical limits have been reached or filing procedures for the second half of FY 2006.

NEW SANCTIONS FOR MISREPRESENTATIONS

Employers should also note that the Act contains new sanctions provisions and civil monetary penalties (up to $10,000 per violation) for failure to meet any of the H-2B petition conditions and for willful misrepresentation of a material fact. These new sanctions provisions become effective October 1, 2005.