

Siskind's Immigration Bulletin –
February 17, 2006

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1. Openers

Dear Readers:

This week opened with a very disturbing proposed regulation being released by the US Department of Labor regarding labor certifications for green card cases. The rule is

ostensibly being released as a response to what the Labor Department says is an “emerging” black market in labor certifications. The rule would end the long standing policy of allowing employers to substitute workers on petitions, it would require employers to file I-140 petitions within 45 days of a labor certification being approved and it would actually bar employees and third parties from paying attorneys fees.

The Labor Department states over and over again that there is a serious problem with fraud and abuse, yet the preamble to the proposed rules only list a couple of cases and provide no statistics to back up the claims. The Labor Department has processed hundreds of thousands of cases over the last few years. If only a tiny percentage involved fraud, does it make sense to dramatically change the system? And every example of fraud cited by DOL is a crime punishable by prison (in fact, the one major case DOL cited several times did result in an attorney being imprisoned). Why is better enforcement of existing law not the solution here?

There are also serious questions raised about whether it is ever appropriate for a government agency to interfere with an individual’s ability to access legal counsel. The DOL simply states that because the employer is the petitioner in a labor certification case, the employer should be paying the fee. But it is the employee that bears the consequences when the labor certification process runs into trouble. For example, a properly pending labor certification allows a worker to continue remaining in H-1B status, access to 245i benefits, a priority date in queues that may be several years long, etc. An employer obviously has an interest in a case being successful, but the reality is that the employee’s life is more adversely affected when the case runs into problems.

Some employers are also not in the position to hire an attorney (especially non-profits charitable organization) and will be likely to go the do-it-yourself route. Is it fair to either those employers or their employees to not allow them to negotiate a deal that works for both? The DOL rules does not even mention a link between the prevailing wage and attorneys fees as they did in the H-1B regulations of a few years ago. So an employee making considerably over the prevailing wage still would not have the right to pay an attorney.

In many cases, particularly at universities, the employer has non-attorney staff handling labor certifications. But because of limited resources, cases don’t move quickly and employees grow frustrated. Some of these employers give employees the option of choosing to hire their own attorneys to manage the process as long as the employee pays. These types of very reasonable arrangements would be barred under the proposed rule.

For years I have encouraged arrangements where employers and employees each hire their own counsel to jointly work on a labor certification case. That way, when a conflict develops, each side would have their own representation and both employer and employee would be free to communicate with counsel and direct them to take actions that protect their interests. Those types of arrangements, routinely encouraged by ethics specialists, would be effectively barred by this regulation.

Presumably, many of our readers will be upset by this rule. Fortunately, this is only a PROPOSAL and there is time to make your voices heard. The Labor Department is required to review comments on the rule and those comments may be submitted during the 60 day period that began on February 13th.

The proposed rule can be found in the February 13th Federal Register. We’ve posted the regulation on our web site at www.visalaw.com/DOL.pdf and you can download it there. The

more comments DOL receives, the more likely they will be to modify or abandon the proposal. Our own law firm is working on a comment which I will publish when it is ready and I encourage many of the thousands of lawyers, employers and employees who read this newsletter to do the same.

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

Regards,

Greg Siskind

2. ABCs of Immigration: U Visas

In 2002, Congress passed the Victims of Trafficking and Violence Protection Act (VTVPA). The VTVPA created a special nonimmigrant classification designated as the U visa for victims of specific crimes. This article addresses the requirements and issues for potential U visa applicants.

Is the U visa currently available?

Although the VTVPA created the U visa five years ago, the actual visa will not be available until the Department of Homeland Security promulgates regulations for issuance for the U visa. In the meantime, "U visa interim relief" allows for deferred action and work authorization. This means that those persons who wish to apply may submit applications for the U visa to the USCIS Vermont Service Center (USCIS VSC). The USCIS should defer action on the alien's current presence in the United States subject to interim review by the USCIS.

Still, controversy over the five-year delay in issuing regulations has arisen in federal courts. A coalition of civil rights organizational plaintiffs and nine individual immigrant plaintiffs filed suit against the Department of Homeland Security (DHS) Secretary Michael Chertoff challenging the USCIS failure to adjudicate U visa applications and issue U visas to eligible immigrant applicants. Despite multiple written requests by the individual plaintiffs, who were victims of crimes listed in the VTVPA and who assisted law enforcement officials in the investigation and the prosecution of the offenders, the Defendants have not responded by providing the requested relief which includes providing the regulations and issuing the U visas. In addition to the relief stated in the suit and in the ignored requests, Plaintiffs' class counsel recommends that new applications should be accompanied by cover letters that state the applicant is *prima facie* eligible for a U visa and that the applicant requests prompt regulations for the issuance of the U visa with guidelines, the issuance of a U visa while requesting "deferred action" only if the USCIS refuses to issue the U visa.

In response to the lawsuit against Secretary Chertoff, Congresswoman Sheila Jackson Lee (D-TX), who recently proposed major immigration reform legislation to Congress, publicly expressed her shock that the DHS has failed to promulgate regulations for the U visa which

took only a couple of months for Congress to debate and implement. The U visa reflects public policy concerns upheld by Congress to provide humanitarian relief to victims of certain crimes and to bring dangerous criminals to justice.

For more information on this lawsuit, please visit the Center for Human Rights and Constitutional Law (CHRCL) website for immigrants' rights at <http://www.vocesunidas.org>

Who is eligible for the U Visa interim relief?

Currently, the interim relief U visa is available to those who meet all four basic requirements as follows:

1. Aliens who can show substantial suffering as the result of physical or mental abuse as a result of being the victim of certain criminal activity;
2. Aliens who possess information about that criminal activity;
3. Aliens who have been, or is being, or will be helpful or is likely to be helpful to Federal, State, or local authorities.
4. The criminal activity described violated the laws of the US and occurred in the US or in territories of the US. Criminal activity in violation of Federal, State, or local criminal law includes rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; being held hostage, female genital mutilation; sexual exploitation; prostitution; peonage; unlawful criminal restraint; abduction; kidnapping; slave trade; involuntary servitude; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice perjury and any attempt to commit any of these crimes.¹

What forms are required by the USCIS VSC for filing a U visa application?

Although no particular form is required for the U visa application, each application will require certain documentation depending on the nature of the case. Application cover letters should clearly state the applicant's basis for requesting the U visa and explain why each submitted document is relevant. The application should include a declaration by the applicant describing the abuse or criminal activity suffered by the applicant relevant to the U visa eligibility. The applicant must give all personal information such as personal identification, copies of passports, birth certificates (translated) and I-94 documents for all persons applying for both the U visa and the derivative U visa.

What forms of evidence are required by the USCIS VSC for determination of the U visa application?

The application must include law enforcement certification which can be obtained during the investigation or prosecution of the criminal activity. The certification must come from a Federal, State, or local law enforcement official, prosecutor, judge investigating or prosecuting the criminal activity. Since no official certification form exists, a letter or other form created by the applicant's representative will be sufficient, but must be signed by the

¹ The fact that the criminal activity occurred years prior to the current request, or that the case in which the applicant was victim is currently closed, are not determinative factors in determination at this stage. See "Centralization of Interim Relief for U Nonimmigrants Status Applicants" By William Yates, Associate Director of the USCIS dated October 8, 2003.

law enforcement official within the past six months and must include the following statements by the certifying official:

- The person was a victim of a crime as listed in the VTVPA (listed above).
- The crime must be identified.
- Verification that the person is useful or likely to be useful in the investigation or the prosecution of the criminal activity.

In cases involving substantial physical and/or mental abuse, the applicant include a personal declaration describing the abuse, photos documenting the abuse, medical reports, declarations by witnesses, law enforcement officials or medical officials, or any other evidence that documents the stated abuses suffered by the applicant.

Which USCIS field office accepts the U visa applications ?

Due to prior inconsistencies in the determination of the U Visa, the USCIS Vermont Service Center (USCIS VSC) is the designated "clearing house" for U visa applications. For more information on the USCIS VSC, please visit <http://uscis.gov/graphics/fieldoffices/stalbans/aboutus.htm#anchor1618781>.

Can aliens who have been granted the U visa apply for work authorization?

Even though the U visa is not an immigrant status, the alien who has received deferred action may apply for work authorization by filing Form I-765, Application for Employment Authorization. Such authorization is subject to yearly review.

What is the duration of interim relief U status once eligibility for deferred action is found?

VSC officers will conduct interim reviews of the deferred action cases to determine if there has been any change in the circumstances of the case. Upon these reviews, VSC officers will determine whether the interim relief U status should be continued or terminated.

What are the grounds for termination of the interim relief U status?

Interim relief U status can be terminated for changes of circumstances in the case so that it no longer warrants deferred action. Furthermore, interim relief U status can be terminated for conduct or a condition that was not disclosed prior to issuance of interim relief.

What happens if the interim relief U status is terminated?

Determinations of termination of the interim relief U Status cannot be appealed. Termination cancels the deferred action and revokes related work authorization.

Can aliens in removal proceedings and with final removal orders apply for the U visa?

The VSC does not have jurisdiction to assess deferred action for individuals who in removal proceedings or who have final orders of removal.

Who is eligible for the derivative classification of the U visa?

To avoid extreme hardship, the VTPA allows interim relief U status for applicants' spouses, children and parents of those U visa applicants under the age of 16. Applicants for the derivative status must provide certification from a government official that an investigation or prosecution would be harmed without the assistance of the derivative applicant. Those family members eligible for interim relief U status who are present in the United States must also demonstrate extreme hardship if removed.

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 - My elderly mother now has a green card. Will she need her tax returns at the naturalization interview for 5 years? In other words, does she need to file taxes even if she has no income, just to have these forms with her in 5 years? Thanks!

A - No, income is only an issue for the green card and not for naturalization.

Q - I have a question about physical-presence/residence requirements for naturalization. Since becoming an LPR (through employment) more than 4 years ago, I have had the same permanent job, owned a house, paid taxes, been physically present in the US for more than 2.5 years, but have also taken roughly 80 trips abroad totaling 550 days (all trips lasted less than 6 months, most took 2-5 days, and the longest one took 4 months). Most of those trips were by car to Canada, so dates I crossed the border were not recorded on my passport. However, I have kept a list of all departure/arrival dates and destinations. I have always returned to the US after each trip to continue my normal activities. May those trips cause problems during my naturalization application? Do I have to attach any other documentation or an explanation as to why I took those trips?

A - Residency requirements for naturalization are complex. There is a requirement to have spent half of the required five years of residency in the US. There is a requirement that residency be continuous. Absences of six months to a year are problematic unless the applicant can show that he or she did not mean to abandon residency. Absences over a year are fatal. And there is a requirement to reside for at least 90 days in the district where one is applying for citizenship. If there is any question about residency issues, I usually recommend consulting with an attorney because the issues can get complex. You also might find the article on my web site at <http://www.visalaw.com/01may2/12may201.html> and <http://www.visalaw.com/01may3/12may301.html> helpful.

Q - I was told that I am carrier of Hepatitis B year ago. And like most people I seems in good health except for this. But the problem arises when it comes to my life decision: I met an nice American guy. If in near future we plan to move together will I have problem to immigrate to USA?(I am outside USA).

A - There are likely to be issues relating to this and you need to get a waiver. I've written an article on the topic which can be found at <http://www.visalaw.com/03apr1/2apr103.html>.

Q - I got three receipts from USCIS. One was for an I-130, one for an I-485 and one for an I-765. But I was trying to check it on the computer and the first three letters on the receipt are "MSC." Do these applications go to the local office? Will I get a work permit in 90 days from the receipt date or notice date?

A - MSC is the Missouri Service Center and it handles initial data entry for family-based green card cases before the cases are returned to local offices for processing. The 90 day processing requirement for the employment authorization document is unchanged by the addition of the MSC to the process.

Q - How many Paychecks do we need for an H-1B transfer? I get paid monthly. I have 5 monthly paychecks on Optional Practical Training and **one H-1B monthly paycheck** from the same employer. So, given this situation, am I good to transfer my H1 visa to another company.? If my current employer cancels my H-1B visa, do they need to inform me beforehand and if YES, how many days in advance(legally) do they need to inform me of my h-1B cancellation effective date.

A - The key here is showing that you were maintaining H-1B status at the time you apply for the transfer. And that will require showing you continued to be employed. There is no clear rule on proving this, but you should be prepared to show that you received a paycheck for your last pay period whether that was a monthly paycheck or a weekly one. As for your current employer canceling your H-1B, they can do this with no notice. There only obligation to you is to pay for a return airline ticket for you. If you have filed for the transfer before they terminate you, you will generally not be considered out of status during the waiting period and under the concept of portability, you can usually start employment with the new employer while you wait on the approval. Definitely speak to a lawyer about this since the rules in this area are complicated.

4. Border and Enforcement News

A new program in Mexico, known as the System for Identifying Remains and Locating Individuals, links the Mexican government's Foreign Relations Department's 35 offices in Mexico and 45 consulates in the United States to an Internet database.

The offices will be able to feed the database with photos and information, including tattoos and birthmarks that might help officials find those missing or identify the dead, according to the Associated Press.

The database, started last June, has the capacity to store 2.5 million records, including information on those with passports or identification cards from Mexican consulates.

According to the Associated Press, The United States recently asked for the extradition of eight people arrested as part of a sting operation to dismantle a false-passport ring, although U.S. officials disputed Colombian suggestions the suspects were linked to Middle East terrorists.

According to an indictment unsealed Thursday in Miami, agents posing as leftist rebels obtained counterfeit Colombian and Spanish passports that would allow them to enter the United States illegally, purportedly to traffic drugs, launder money and buy weapons.

For their services, the ring charged more than \$20,000, the indictment alleged.

The eight foreign nationals - seven Colombians and one Palestinian native - were among 19 people arrested in 32 simultaneous raids across the country. Authorities said they seized what they believe were fraudulent passports from Hong Kong, Canada, Jordan and other countries.

As part of the undercover operation, coordinated with Colombian prosecutors and DAS secret police, operatives working for the U.S. Immigration and Customs Enforcement, or ICE, disguised themselves as members of the Revolutionary Armed Forces of Colombia, or FARC, and sought false passports to enter the United States.

The indictment also alleged the defendants offered to help the supposed FARC members buy and sell illegal drugs, as well to purchase guns and two helicopters.

According to the article, the eight arrested suspects are wanted on charges of providing material support to a foreign terrorist organization and alien smuggling. The U.S. government lists FARC as a terrorist organization.

According to the Associated Press, Homeland Security agents have said that they are going to speed up the removal of undocumented immigrants caught near the northern U.S. border, extending a program already in effect along the Mexican border.

The practice called 'expedited removal' speeds up the pace of deportations and makes it less likely that illegal immigrants will slip into the country because immigrant detention centers lack bunk space. Expedited removal has already cut the average length of detentions along the southern border from 90 days to 19 days, according to Immigration Customs Enforcement (ICE) officials.

The faster deportations apply to those immigrants who have been in the United States less than 14 days and are either found within 100 miles of the northern border or caught trying to enter the United States with phony documents. According to authorities, those seeking asylum will still be granted an interview with an asylum officer.

Advocates for refugees said the expedited removal program, including what they call major flaws in the southern border version, should not be expanded north.

On the Line, a report issued by the Defenders of Wildlife, is raising concerns over the toll both immigration and counter-immigration responses are taking on animal species along the Mexican border. With the dramatic increase in border patrol over the past ten years, cross-border immigration has seen a movement away from heavily populated areas such as San Diego, California to more remote and uninhabited regions. These regions, according to the report, are home to many protected and endangered species including the jaguar and Sonoran pronghorn—animals which are found nowhere else in the United States.

As immigration shifts, so, too, do the government countermeasures. The footpaths and waste left by immigrants moving into the US through national parks and other vital wildlife habitats are overshadowed by the attempts to combat this movement. The report claims that the degradation caused by the flow of immigrants “has only been compounded by Border Patrol enforcement actions, including road and wall construction, lighting projects and patrols by off-road vehicles and low-level helicopters.” Desires to protect these environmentally sensitive areas are facing major hurdles. Recent legislation passed in congress, coupled with decisions made by the Department of Homeland Security (DHS), have created loop holes in the National Environmental Policy Act (NEPA) which will make border agencies less accountable for their impact on the environment. Hoping to raise awareness about the growing problem, the report *On the Line* expresses a clear concern that the wilderness of Border States, and especially that of Arizona, is being overshadowed by the larger immigration issues that continually receive national attention.

5. News From the Courts

The News From the Courts column is written by Maria Bjornerud, an immigration attorney with an office in Southaven, MS. Originally from Russia, Ms. Bjornerud is licensed to practice law in Tennessee and Mississippi. She can be contacted via email at mbjorne@msn.com.

DerKEVORKIAN v. LIONBRIDGE TECHNOLOGIES, et al, Civ. No. 04-cv-01160-LTB-CBS, 2006 U.S. Dist. LEXIS 4191 (D. Colo. 2006) granted in part and denied in part a summary judgment in favor of the employer and held that Plaintiff adequately stated claims for breach of contract and promissory estoppel against her employer for failure to handle her adjustment of status application; held that non-economic damages related to breach of contract and promissory estoppel claims were non-recoverable; Plaintiff had failed to state a legally cognizable negligence claim against her employer; Plaintiff adequately asserted a cognizable claim for breach of fiduciary duty sufficient to survive summary judgment not subject to economic loss rule; granted summary judgment motion in favor of the employer’s legal counsel and held that legal malpractice claim against the employer’s legal counsel was precluded by statute of limitations; Plaintiff failed to meet her burden showing existence of an attorney-client relationship, and therefore could not prevail on her malpractice or breach of fiduciary duty claims.

JUDGE: BABCOCK:

Plaintiff, a citizen of France, was working for the defendant employer, as a Translator. In early 2000, Plaintiff was promoted to Project Manager and subsequently to the position of Translation Manager. Plaintiff's work visa was to expire in 2003. Plaintiff requested sponsorship by her employer pursuant to the employer's Permanent Resident Program. The employer approved its sponsorship of Plaintiff's green card application. In order to participate in the program, Plaintiff was required to continue her present employment for two years following receipt of her green card and Plaintiff could not move to another position within the organization until the application had been on file with the INS for 180 days. Additionally, Plaintiff agreed to allow the employer's legal counsel handle her application.

The employer retained the defendants, Ross and her law firm, to handle Plaintiff's green card application. At that point it became apparent that Plaintiff's work visa had not been properly amended to reflect her promotion to Translation Manager. Under the State of Colorado Department of Labor Certification, a corresponding prevailing wage for the position of Translation Manager significantly exceeded Plaintiff's actual salary.

The employer informed Plaintiff of the prevailing wage discrepancy, and indicated its unwillingness to pay her prevailing wage for the position of Translation Manager. The employer suggested that Plaintiff accept a demotion, without a decrease in pay, to the position of Translator. Plaintiff refused and the employer did not file an application with the INS for Plaintiff's green card. Plaintiff's work visa expired in 2003 and she was forced to resign her employment with the employer and leave the United States.

Plaintiff sued asserting breach of contract and promissory estoppel claims against the employer. The employer moved for summary judgment for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). Plaintiff also brought a legal malpractice claim against the attorney, Ross, and her law firm. Plaintiff asserted that Ross was negligent and breached a fiduciary duty of loyalty by representing parties with conflicting interests. The defendant attorneys also moved for a summary judgment.

The court found that Plaintiff's claims were not based on a termination from her employment and Plaintiff properly sought damages for the employer's alleged breach of a separate and distinct contract-the agreement to sponsor Plaintiff's green card application. Plaintiff claimed that the employer breached that contract by failing to assist and support Plaintiff in the process of applying for lawful permanent residence status; and that as a proximate result of that breach, Plaintiff had suffered damages. *See Wisehart v. Meganck*, 66 P.3d 124, 129 (Colo. App. 2002).

The court concluded that Plaintiff adequately stated a promissory estoppel claim for which relief could be granted. The employer's agreement to provide full sponsorship under its Permanent Resident Program constituted a promise to assist and support Plaintiff in the process of applying for LPR status, and that she reasonably relied on this promise to her detriment, and that such reliance has caused her damages. The court held that promises

ancillary to an otherwise at-will employment arrangement could support claim for promissory estoppel. *Pickell v. Arizona Components Co.*, 902 P.2d 392, 395 (Colo. App. 1994).

The court, nevertheless, held that Plaintiff was precluded from recovering non-economic damages for emotional distress due to her failure to specifically plead these special damages as required by Fed. R. Civ. P. 9(g). The court found no precedent in Colorado law that allowed for the recovery of non-economic damages on a promissory estoppel claim.

The court considered Plaintiff's negligence claim against the employer. The court declined to find a tort-based duty of care when the duty identified by Plaintiff was necessarily dependant on the employer's contractual agreement to accept her into the Permanent Resident Program, and therefore, purely contractual in nature. The court dismissed Plaintiff's negligence claim against the employer for failure to state a claim.

The court found that the allegations in Plaintiff's complaint that the employer completely took control over the application process were sufficient for finding of a fiduciary duty based either on an agency or a confidential relationship. *Dolton v. Capitol Federal Sav. & Loan Assoc.*, 642 P.2d 21 (Colo. App. 1981).

The court rejected the employer's argument that Plaintiff's tort claims were barred by the exclusivity provisions of the Colorado Workers' Compensation Act. The court explained that claims for injuries to economic interests and harm affecting a proprietary or financial interest were not "personal injuries" within the purview of the Workers' Compensation Act. *Serna v. Kingston Enterprises*, 72 P.3d 376, 379 (Colo. App. 2002).

The court determined that Plaintiff's claim against the defendants, Ross and her law firm, based in negligence was barred by Colorado two-year statute of limitations. C.R.S. § 13-80-102(1). Moreover, the evidence, even viewed in the light most favorable to Plaintiff, was insufficient to meet Plaintiff's burden of establishing an attorney-client relationship between herself and Ross. Plaintiff did not dispute that she neither sought nor received legal advice from Ross concerning the legal consequences of her actions, and was instructed by the law firm to seek any information about her case directly from the employer. The court declined to find the formation of an implied contractual relationship between Plaintiff and Ross. The court also rejected Plaintiff's argument that an attorney-client relationship was established by agency as having no precedent under Colorado law.

The court held that absent an attorney-client relationship Plaintiff could not prevail on her legal malpractice claim against Ross and her law firm based on either negligence or breach of fiduciary duty.

In Re ADAMIAK, 23 I&N Dec. 878 (BIA 2006) held that a conviction vacated pursuant to the Ohio Revised Code § 2943.031 for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes.

BEFORE: HOLMES, HURWITZ, and MILLER:

Appellant, an LPR, was charged with removability as an alien convicted of an aggravated felony based on his guilty plea to a drug trafficking offense in violation of Ohio Rev. Code § 2925.03. During the course of the immigration proceedings, the respondent filed a motion with the county court where he had been convicted and was granted a permission to withdraw his guilty plea due to the court's failure to advise him of potential immigration consequences of a guilty plea as required under Ohio law. The respondent's conviction was vacated and a new trial was scheduled. The IJ ruled that the Ohio court's order vacating the respondent's drug trafficking conviction had no effect for immigration purposes under the definition of a conviction under INA § 101(a)(48), 8 U.S.C. § 1101(a)(48)(2000), and ordered him removed.

The BIA held that the conviction based on respondent's guilty plea had been vacated as a result of a defect in the underlying proceedings and should no longer be considered a conviction for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). The BIA held that the Ohio court's vacation of the respondent's conviction should be recognized in immigration proceedings. The BIA declined to follow the Fifth Circuit decision in *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812-13 (5th Cir. 2002) (holding that a conviction remains valid for immigration purposes regardless of the reason it was vacated).

The BIA examined whether subsequent developments in the respondent's criminal case indicated that he nonetheless remained convicted of an aggravated felony drug offense and was therefore ineligible for cancellation of removal. Since the record of the respondent's subsequent conviction had not yet been examined, the BIA remanded to the IJ for a determination whether the respondent's subsequent conviction was for an aggravated felony within the meaning of INA § 101(a)(43)(B).

6. Government Processing Times

There are new processing times for the following service centers:

Vermont (2/8/2006): <http://www.visalaw.com/vermont.html>

California (2/8/2006): <http://www.visalaw.com/california.html>

Missouri (2/8/2006): <http://www.visalaw.com/missouri.html>

Nebraska (2/15/2006): <http://www.visalaw.com/nebraska.html>

Texas (2/15/2006): <http://www.visalaw.com/texas.html>

7. News Bytes

According to ConsumerAffairs.com, Texas Attorney General Greg Abbott received \$10 million in judgment against immigration consultant Yolanda Perez, who misrepresented her qualifications and authority to provide legal advice and immigration services.

The lawsuit showed that Perez was charging her clients to provide unauthorized legal advice and illegally prepare immigration documents for the past four years. She also told her clients that she was a former employee of the Immigration and Naturalization Service (INS), which was also false. Perez additionally misrepresented herself as an attorney. Clients and victims of Perez were removed from the U.S. because there were errors in the submission of their forms and they lost hundreds of dollars because of this.

According to *Congressional Desk*, Congressman Tom Tancredo (R-CO) voiced support for the first-ever lawsuit settlement for depressed wages against a company that hires illegal aliens. The \$1.3 million settlement, was the result of a lawsuit filed against top executives of Zirkle Fruit Company of Selah, Washington, using the RICO organized crime statutes.

According to documents filed in the Eastern District of Washington, the INS audited Zirkle's employee records in 1998 and criticized the company for widespread illegal hires. Court documents show that as late as 2004, more than 12,000 of Zirkle's employees-70 percent of its workforce-gave phony Social Security numbers on their employment applications.

Zirkle executives settled shortly before the case was to go to trial, and the settlement amounts to approximately \$2 per hour in lost wages per legal employee. However, Zirkle remains unwilling to scrub its workforce using DHS' Basic Pilot Program-the online program whereby employers can instantly check the legal status of their employees.

8. International Roundup

According to *The Daily Independent*, the Nigeria Immigration Service (NIS) last year rescued 60 people from human traffickers at the Seme border in Badagry, Lagos.

Statistics show that 166,761 people entered Nigeria through the border, while 165,409 emigrated. It also indicates that 77,680 Nigerians arrived the country through Seme border, while 76,015 travelled to countries in the sub-region, through the same route.

Also, 89,078 non-Nigerians entered the country through the border within the period, with 893,776 of the visitors from the Economic Community of West African States (ECOWAS) countries while 5,302 were Europeans, Asians, Americans, Africans from non-ECOWAS countries, and from the Middle East.

The Deputy Controller of Immigration, Mudrik Ogidan, said human trafficking had reduced considerably through the border.

According to the online news source *Telegraph*, France's interior minister Nicolas Sarkozy is creating a stir over recently proposed legislation aimed at changing current immigration procedures. Hoping to make immigration more effective and beneficial to France, Sarkozy's plan will match potential openings with desirable immigrants. Sarkozy intends to maximize the quality of individuals entering France by creating a ranking system in which all applicants will be placed. Besides controlling the flow of immigrants into the country, the

new laws would also make it easier for France to expel foreigners. The rationale behind this new legislation can be linked to the dramatic rise in riots in France over the past year and the upcoming presidential elections in which immigration is likely to be a key issue.

Macedonia and Spain have signed a deal on the readmission of undocumented migrants, according to EITB News. Spain's foreign minister, Miguel Angel Moratinos and Macedonia's Ilinka Mitreva signed the document in Skopje. Moratinos says that the agreement will help facilitate regular travel by Macedonian citizens. This deal is a prerequisite for Macedonia to begin easing its visa regime with the European regime. Macedonia is only one of five Western Balkan states that the EU has imposed rigid visa procedures. Skopje must sign agreements with all EU members to accept the return of all migrants who reach EU territory.

9. Legislative Update

According to *The Washington Post*, thirteen immigrant children were eliminated from the state's medical assistance program due to budget cuts. The administration cut seven million dollars from the state Medicaid program last year, which included medical care cuts for about four million children and pregnant women. Gov. Robert L. Ehrlich denied medical assistance to these legal immigrant children who have lived in the country less than five years. The children can appeal their medical assistance at a lower court. The Court of Special Appeals has agreed to set an expedited schedule for the children's suit which is set to come before the appellate court by early April. Montgomery County Circuit Court Judge Durke G. Thompson has granted a temporary junction to give the thirteen children access to health care while the case is pending.

According to the Associated Press, Maine's state senate voted without any debate to make requirements for issuing drivers' licenses and state identification cards stricter for the residents of the state who are not US citizens. The bill was voted to be enacted and then was sent to Governor John Baldacci. If the proposed law is signed off, it will prevent Maine from accepting expired visas that were granted by the US, as well as documents that is from another country. In addition to these types of documents, foreign passports showing expired dates are typically used for identification to get drivers' licenses or state identification cards will no longer work. This proposed legislation is not as strict as the federal requirements, but the law will make the Maine's existing rules stricter than before.

10. Decisions of the Administrative Appeals Office Adopted by the USCIS for Proceedings

The Administrative Appeals Office (AAO) has appellate jurisdiction over United States Citizen and Immigration Service (USCIS) regional centers and district offices. The decisions of the AAO provide legally sound holdings for disputes involving immigrant and nonimmigrant petitions and applications entered into the USCIS centers. AAO holdings serve as precedent for interpretation of immigration laws, regulations, and policy in the adjudication process of petitions and application by all involved parties including beneficiaries, applicants, attorneys

and government officials. In the past year, Robert C. Divine, Acting Deputy Director of the USCIS, issued the following AAO decisions with a memo stating that these decisions are binding policy guidance on all USCIS personnel.

Authorized admission for H-1B Status and L-1 Status Applies Only to Time Spent Lawfully in the US

In September 2005, the AAO sustained the appeal of a beneficiary who asked for a 30 day extension of H-1B status. The USCIS denied the petition on the grounds that the beneficiary had already been employed in the US for six years, the maximum time period allowed under the status classification. In addition, the USCIS found that the 30 day period the beneficiary spent out of the US while on business for the US employer just prior to the expiration of the six-year H-1B status did not interrupt the beneficiary's employment and did not entitle the beneficiary to an additional 30 days in H-1B status. The AAO looked at statutory language and determined that time spent outside of the US interrupts the accrual time in H-1B status thus entitling the beneficiary to an 30 day extension.

The AAO looked at statutory language and the pertinent regulations to determine whether or not the accrual of time spent in H-1B status is interrupted by brief trips out of the US. According to Section 101(a)(13)(A) of the Immigration & Nationality Act (INA), the term "admission" means time an alien is admitted in the US lawfully after inspection and authorization by an immigration officer. Under the relevant regulation, 8 C.F.R § 214.2(h)(13)(iii)(A), an alien in a specialty occupation with H-1B status who has spent six years in the United States may not seek to extend status. The USCIS director held this language to mean that to recapture time spent outside of the US, that time must be interruptive of the qualifying employment. The AAO disagreed with the USCIS director who denied the extension of status on the basis that the time spent out of the US did not interrupt the H-1B status qualifying employment. The AAO stated that in accordance with the statute and the regulations, only time spent inside the US after being lawfully admitted can be counted toward the maximum period of stay under H-1B status. Therefore, the beneficiary was not in status for US immigration purposes while outside of the US. This means that the H-1B status was interrupted when the beneficiary left the US and the H-1B status was renewed when the beneficiary reentered lawfully. The AAO added that this holding pertaining to "periods of authorized admission" also applies to L-1 status as found in the statute INA §214(c)(2)(D).

Additionally, the AAO noted that the beneficiary is in the best position to provide evidence of departures and reentries into the US. Thus, to recapture time spent out of the US for H-1B status and L-1 status, the beneficiary must provide supporting documentation such as I-94 forms and copies of visa entry and exit stamps from passports.

A Deniable Petition Cannot Serve As A Basis For Approval For An Adjustment of Status to Permanent Residence Under the Portability Provision of INA § 204(j)

In January 2005, the AAO determined whether or not the American Competitiveness Act in the Twenty-First Century Act (AC21), passed by Congress in 2000, amended the INA to allow the approval of adjustment of status to permanent residence applications merely because an application for adjustment of status pursuant to section 245 had been filed and remained unadjudicated for over 180 days. The AAO looked closely at the statutory scheme for adjustment of status both before and after enactment of AC21, as well as the statutory language and Congressional intent, and determined that a petition must be valid, and not deniable, for approval of the adjustment of status application even if the adjustment remained unadjudicated over 180 days. The AAO found the initial petition filed by the

applicant in the present matter was not valid for the purposes of AC21 and new job offer alone could not support the support the adjustment of status application even though the application remained adjudicated for over 180 days.

In the present matter, the petitioner filed an employment based immigrant petition on behalf of an alien who was not entitled to the classification, but claimed entitlement based a new job offer citing section 204(j) of the INA. The applicant in the matter sought to adjust status despite never having shown eligibility for the immigrant visa classification sought. The USCIS denied Form I-140 petitions filed by employers on behalf of the applicant on two separate occasions. The applicant, despite the USCIS director's denial of the visa petition filed by the applicant's actual employer, claimed he was entitled to adjustment of status based on a new employment offer under section 204 of the INA amended by AC21 section 106(c) which allows job flexibility for long delayed applicants if the new job is in the same or similar occupation classification for which the petition was filed.

To decide this issue, the AAO first looked at the regulations for applications for permanent residence based on employment at the time of enactment of AC21 and noted three procedural steps. First, the alien obtains approval for an employee-based immigrant petition. Secondly, the alien files an application to adjust status, and finally, if the adjustment application remains adjudicated after 180 days, the underlying visa petition remains valid even if the alien changed employers or positions so long as the new job was the same or similar to the occupational classification. AC21 works in tandem with section 245 of the INA which requires that the adjustment applicant to have an "approved" immigrant visa petition. The AAO pointed out that the problematic issues at hand result from the concurrent filing process implemented by the USCIS in 2002 for the convenience of aliens and their employers. The concurrent filing process allows the employer-petitioner and alien-beneficiary to file the I-140 immigrant petition and the I-485 adjustment of status application concurrently. However, at the time AC21 was enacted, only family based preference cases could be filed concurrently. Therefore, no alien under the employment based category could assert that a petition was valid through the passage of 180 days at that time because the process required that the immigrant petition be approved before filing the I-485 for adjustment. Thus, the AAO reasoned that the scheme implemented by Congress regulating the immigrant visas in threefold process cannot be undone simply because the scheme requires more than 180 days to effectuate.

The AAO then looked at the statutory language and committee reports to determine Congressional intent for passing AC21 and to decide if adjustment of status applications pending for over 180 days should be automatically approved. The operative language with respect to the issue in question can be found in section 106(c) of AC21 which states that a , "A petition...shall remain valid with respect to a new job if the individual changes jobs or employers..." Counsel for the applicant argued that Congress enacted AC21 to reduce backlogs of adjustment of status applications and to improve the affects that these backlogs have on applicants. Since the AAO found no legislative history that supported this argument, and discovered the committee reports specifically addressed immigrant visa petitions and not adjustment of status applications, the argument for the applicant was unpersuasive. Instead, the AAO put more weight on the ordinary meaning of the word "valid" which must be interpreted using its ordinary meaning and not by attempting to effect legislative intent. The ordinary meaning of "valid" is "well-grounded" or "legally sound or effective" and does not include denied or adjudicated petitions as applicant's Counsel suggested. Contrary to Counsel's argument, an application is not made "valid" simply through the act of filing and the passage of 180 days without adjudication.

As for the portability issues arising under section 204(j) of the INA which provides that a petition remains valid with respect to a new job if the individual's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must be valid to begin with if it is to be valid with respect to the a new job. In the instant case, the petition was not valid to begin with so the USCIS decision to deny the adjustment of status application was affirmed.

***A Publicly Held Corporation May Be Deemed American for Immigration Purposes
If the Corporation ss Incorporated in the US and Trades its Stock Exclusively on
US Stock Exchange Markets***

The AAO decided in January 2006 the *Matter of Chawathe* involving several issues related to the preservation of residence for naturalization purposes under section 316(b) of the INA providing that an absence from the US for a continuous period of one year or more shall break continuity or residence. The Applicant, an employee of ChevronTexaco Corporation with immigrant status as an alien of exceptional ability, filed an Application to Preserve Resident Status (Form N-470). The USCIS director determined that the applicant failed to establish that the employer was an American firm, that his temporary overseas assignment with a subsidiary of employer interrupted his residence and denied the application. The AAO overturned the USCIS decision and held that if the applicant can establish by the preponderance of the evidence that the employer is incorporated in the US and trades stock exclusively in US stock markets, then the employer is an American firm and that the reasoning for this standard can be applied in determining the nationality of a publicly traded foreign corporation where such a determination is required so long as it is not in conflict with existing laws and regulations for the classification sought. The AAO also discussed in this case burden of proof issues to remind parties of the distinction between burden of proof and standard of proof requirements when preparing for and adjudicating petitions and applications.

First, in regards to the nationality issues, the AAO looked at the principles of determining nationality of a corporation set forth in *Matter of Warrach*, 17 I & N Dec. 285, 286-87 (Reg. Comm. 1979) principles for nationality determination used by US Department of State (DOS). Under *Warrach* principles, incorporation in a US state does not establish nationality of a firm or corporation. Rather an applicant must also establish that the firm or corporation is more than 50% owned by persons who are US citizens. The AAO discussed that the *Warrach* principle does not take into account the difficulties of tracing ownership and nationality of the owners of the stock of a publicly-held corporation that has thousands of stock holders. Additionally, perhaps billions of stocks of a particular corporation are distributed and subject to sale on a daily basis. In deciding that the *Warrach* principles for determining nationality were impracticable for a publicly-held corporation, the AAO looked to the (DOS) definition of nationality for nonimmigrant treaty trader and investor purposes in Volume 9 of the Foreign Affairs Manual, 9 FAM 41.51 N3.2. According to the manual definition, nationality of a corporation is determined by the location of the exchange. The manual continues that in the case of corporations with stock trades in multiple locations, applicants must satisfy the consular officer by the best evidence that the corporation meets the nationality requirement. Under both *Warrach* and DOS principles, nationality is not satisfied by the incorporation location alone. Therefore, given the difficulty of tracing ownership of publicly held sticks, the AAO held that it is reasonable to presume that a publicly held corporation meets the definition of an "American firm" if incorporated in the US and whose stock is exclusively sold on US stock exchange markets.

The AAO looked at the evidence provided by the applicant to demonstrate the American nationality of the employer and to prove that the overseas employer is a subsidiary of the

US employer. The AAO distinguished the burden of proof from the standard of proof at issue. For administrative immigration proceedings, the applicant must show by the preponderance of the evidence that the applicant is eligible for the benefit sought. Thus, even if the USCIS has some doubt of the truth, where the applicant provides relevant, probative, and credible evidence that leads the USCIS director to believe the claim is "probably true" or more likely than not", the applicant has met the standard of proof. Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm. 1989). Where the USCIS director can articulate a material doubt, the officer may request additional evidence. If the doubt leads the officer to believe that the claim is probably not true, the USCIS may deny the application. In the instant case, the applicant met the burden of proof and demonstrated that the employer is an American corporation and sufficient evidence was provided by the evidence, meeting the standard of proof, thereby demonstrating that the overseas employer is a subsidiary. For these reasons, the AAO sustained the appeal to the denial of Application to Preserve Resident Status.

Conclusion

As previously mentioned, Deputy Director Divine issued these AAO decisions with orders to all USCIS personnel that these decisions are binding on the adjudication of applications and petitions involving the same issues. Therefore practitioners, applicants, petitioners, and certainly USCIS personnel must use these decisions for authority and guidance in the preparation of petitions and applications involving H-1B status authorized admission periods, issues for adjustment of status applications filed concurrently with immigrant petitions pending for over 180 days, and the determination of nationality of a publicly-held corporations for immigration purposes. Additionally, the *Chawathe* decision provides further assurance of the evidentiary requirements for such applications.

11. USCIS to Decouple Naturalization Applications

According to a public notice from the US Department of Homeland Security (DHS), USCIS will no longer group naturalization applications (a systems function known as Group Management) unless specifically requested by a family.

According to the notice, USCIS learned that the function is adversely affecting its ability to provide timely customer service. This adverse impact is primarily a result of the many system stages that a naturalization application must pass through before processing has been completed. The Group Management option requires that all applicants in a group successfully complete each processing stage before the group as a whole can move on to the next stage. For example, all members of a group must have their background checks completed before the group can proceed to the interview stage. If one individual in a group of 50 hasn't successfully completed this stage, the remaining 49 cases cannot proceed and their processing will unnecessarily stall.

USCIS has identified more than 10,000 naturalization cases currently affected by the Group Management function. Effective immediately, USCIS will decouple, or "ungroup," all currently established groups allowing individual cases to proceed through the process independently.

Upon request, group management will remain a customer service option for USCIS family applicants who desire group processing. This will allow applicants the option to schedule interviews for family members on the same day. Family applicants who wish to take advantage of Group Management should submit a written request for grouping when their naturalization application is mailed to the Service Center with jurisdiction.

12. DHS Announces Budget for FY 2007; Outlines USICS Progress

According to the DHS Service Budget Fact Sheet, the Department is requesting 47 million dollars in funding to support the multi-year program that will improve how USCIS receives, processes, and exchanges information. In the fact sheet, the US lists several items as accomplishments. Within the 2005 fiscal year alone, USCIS reduced the benefit application backlog from 3.8 million cases to less than 1.0 million. In the DHS summary of USCIS accomplishments, the agency noted that it performed over 35 million background/security checks on all benefit applicants. In addition, USCIS made it easier for applicants to understand and file petitions by means of developing an online informational fact sheet in Spanish, and developed the Benefit Fraud Assessment (BFA) Program to determine the fraud rate among immigration benefit applications.

Along with transforming its business processes, USCIS noted that it will reform its fee structure to ensure the recovery of operational costs in line with Federal fee guidelines. The Department is preparing to take on the President's Temporary Worker Program and a mandatory employment verification system, and plans to implement a long-term fee reform rulemaking process in 2008.

The Department is also requesting 134.99 million dollars for the purposes of operating the Systematic Alien Verification for Entitlements program (SAVE), which verifies immigration status in order to ensure only entitled non-citizens receive public benefits. The funding will also be allocated towards expanding the current Employment Eligibility Verification (EEV) program, which makes it easier for employers to confirm the eligibility of employees, improves the accuracy of wage and tax reporting, and protects jobs for authorized works.

13. Proposed Arizona Bill Would Make Renting to Undocumented Immigrants Illegal

In Phoenix, State legislators are considering proposals to prevent landlords from renting their properties to undocumented immigrants. According to Howard Fisher of the *Arizona Daily Star*, this new legislation would make it almost impossible for undocumented immigrants to find housing within the state of Arizona. Besides preventing undocumented immigrants from finding short term or temporary housing, the new law would make it more difficult for them to purchase homes. This proposed legislation would prevent anyone without a valid social security number from borrowing money from a bank.

The new proposals are receiving opposition from renters across the state who are concerned with the logistics of the potential legislation. According to the article, the proposed law does

not state which types of identification are acceptable. This would place the weight of discretion on the renters and make them subject to inadvertently breaking the law.

The loan portion of the proposed legislation is receiving mixed opinions. There is some argument over the Federal Government issued individual taxpayer identification numbers, which allow individuals without social security numbers to engage in legitimate financial business transactions, including banking. Legislators claim that these government issued identification numbers are meant for minor transactions and not for the purchase of houses. A penalty for individuals and businesses that offer housing or loans to undocumented immigrants is currently missing from the legislation and will be one topic of discussion when the committee reconvenes to review the proposal this Monday.

14. State Department Changes Rules for Admission and Visa Issuance Dates for F, M and J Visa Applicants

The Department of State has announced that it will now allow first time F-1, F-2, M-1 and M-2 visa applicants to be issued visas up to 120 days before the start date listed on their I-20s. Applicants can apply at any time, but consulates must not issue visas with an initial entry date before 120 days ahead of the beginning of the program. This is an extension of the previous 90 day limit.

Initially entering students are still not permitted to actually enter the US on their F and M visas until the 30 day period prior to the start date on the I-20 form. USCIS will be changing this date to 45 days, but until that happens the rule remains 30 days.

Persons already possessing F and M visas can apply for new visas at any time as long as they have been maintaining student status and their SEVIS records are current.

J-1 and J-2 visas can be issued to exchange visitors at any time before the beginnings of their programs. They are not permitted, however, to enter prior to 30 days ahead of their DS-2019 start date.

15. CRS Report on Legal Effect of INS Memorandums

The Congressional Research Service has issued a report on the continuing applicability of internal policy memoranda issued by the Immigration and Naturalization Service (INS) since the INS was transferred from the Department of Justice to the Department of Homeland Security and the agency was split into the USCIS, ICE and CPB. Section 553 of the Administrative Procedure Act (APA) sets out the procedures an agency must follow in regards to promulgating a legislative rule, yet does not encompass interpretive rules, general statements of policy, or rules of agency organization, procedures, or practice. In the areas which APA does not apply, publication and public access requirements under the Freedom of Information Act (FOIA) have the potential to fill the gaps.

After the Homeland Security Act of 2002 (HSA) reallocated administrative authority from the Department of Justice (DOJ) to the Department of Homeland Security, the Immigration and Nationality Act of 1952 (INA) was amended to accommodate the switch. The secretary of Department of Homeland Security took the place of the Attorney General in the

administration and enforcement of immigration laws. The Immigration and Nationalization Service was further split into two separate functioning bodies within the Department of Homeland Security.

According to the CRS, with the switch in ruling bodies, questions are raised whether or not former INS policy memoranda will be disregarded by the Department of Homeland Security. Rather than disregarding the policy memoranda because of their relation to the Department of Homeland Security after the switch, it is clarified that policy memoranda are not laws, but nonlegislative rules, which are in themselves nonbinding. Only if the policies in question were legislative rules, would they be legally binding to the department in question.

When a new department alters former rules and policies they are subject to the APA in determining how to promulgate these changes. However, they are not bound to promulgate those policies which are nonlegislative. The *Federal Register* made mention of the policies but did not explore them because they were seen as nonlegislative.

When a new policy is not promulgated under the APA due to its internal and nonlegislative nature, an agency is usually obligated to reveal the change in Freedom of Information Act (FOIA) request. The Freedom of Information Act does not encompass all policy and rule changes, however, including those policies that are (1) internal and trivial and (2) internal and sensitive to circumvention. In this way, the Department of Homeland Security is not bound to make all changes to internal policies available to the public.

16. President Bush Makes Three Immigration Leadership Appointments

After some controversy, President Bush has appointed three people to fill three immigration and refugee leadership positions. Julie Myers was named head of US Immigration and Customs Enforcement (ICE). Ellen Sauerbrey was named Assistant Secretary of State for Population, Refugees, and Migration, and Emilio Gonzalez was named the director of US Citizenship and Immigration Services (USCIS). When Congress was having its winter break, Bush suggested that Myers and Sauerbrey did not need approval from the Senate. Several Senators disapproved of Myers' nomination because she lacked experience relevant to the position. Myers was also accused of receiving the appointment due to family connections. She is the niece of an Air Force General Richard Myers, who retired as a chairman of the Joint Chiefs of Staff. She is also married to the chief of staff who of the Department of Homeland Security, Secretary Michael Chertoff. Even though she got partial votes from the Senate of Homeland Security and Governmental Affairs Committee, she never received a vote from the entire Senate.

In Sauerbrey's case, critics said that she lacked experience that was relevant to the position concerning refugee issues and touched on the fact that she was too outspoken in her opposition family planning and abortion while she represented the US internationally. She most recently served as the US Ambassador to the UN Commission on the Status of Women, she also was a Republican gubernatorial candidate in Maryland and represented President Bush and his campaign as the state chairman of his 2004 presidential campaign in that state.

At the request of Senator Barbara Boxer (D-CA), the Senate Foreign Relations Committee postponed their vote on Sauerbrey's nomination until after their winter break. The Senate

did confirm the nomination of Gonzales. His experiences consist of serving as a senior managing director of global and government affairs for Tew Cardenas and also as the director of Western Hemisphere affairs for the National Security Council. The recess appointments for Myers and Sauerbrey will last until January 2007 when the congressional session concludes, while Gonzalez has no limit on his appointment.

17. Department of Health and Human Services Updates Poverty Guidelines

Section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981(42 U.S.C. 9902 (2)) requires the Secretary of the Department of Health and Human Services to annually update the poverty guidelines, which are used as an eligibility requirement for the Community Services Block Grant program, as well as by a number of other Federal programs. The poverty guidelines are a simplified version of the poverty thresholds that the Census Bureau uses to prepare its estimates of the number individuals and families in poverty.

The 2006 guidelines reflect the 3.4 percent increase in the Consumer Price Index for All Urban Consumers (CPI-U) between calendar years 2004 and 2005. According to the 2006 poverty guidelines, the guidelines for the 48 contiguous states and the District of Columbia outline that a one-person family unit has a \$9,800 poverty guideline. With each additional person in the family unit, the dollar amount increases by an additional \$3, 400.

In Alaska, the guidelines are set at \$12,250 for a one-person family unit, with an additional \$4,250 per each additional family member. In Hawaii, the base guideline is set at \$11,270 with an additional \$3,910 per each additional person. Poverty Guidelines are not defined for Puerto Rico or other outlying jurisdictions. The Federal offices that administer programs in such jurisdictions are responsible for deciding whether to use the contiguous-states-and DC guidelines for that area or to follow some other procedure.

The poverty guidelines are annually administered by the Department of Health and Human Services, and have never been issued by OMB. Questions about how a particular program applies the poverty guidelines should be directed to the organization that is administering that program.

The poverty guidelines for 2006 follow:

2006 POVERTY GUIDELINES
FOR THE 48 CONTIGUOUS STATES AND
DISTRICT OF COLUMBIA

1	\$9,800
2	13,200
3	16,600
4	20,000
5	23,400
6	26,800
7	30,200
8	33,600

For family units with more than 8 persons,

add \$3,400 for each additional person.

2006 POVERTY GUIDELINES FOR
ALASKA

Persons in family unit Poverty
guideline

1	\$12,250
2	16,500
3	20,750
4	25,000
5	29,250
6	33,500
7	37,750
8	42,000

For family units with more than 8 persons,
add \$4,250 for each additional person.

2006 POVERTY GUIDELINES FOR
HAWAII

Persons in family unit Poverty
guideline

1	\$11,270
2	15,180
3	19,090
4	23,000
5	26,910
6	30,820
7	34,730
8	38,640

For family units with more than 8 persons, add
\$3,910 for each additional person.

18. Controversial Rule Would Limit Access to Attorneys in Labor Certification Cases

The US Department of Labor (DOL) has published proposed regulations that would dramatically affect labor certification processing. Labor certification is a requirement for certain types of employment based permanent residency petitions. An employer must demonstrate that it has attempted to recruit an American citizen or permanent resident with the minimum qualifications and who is immediately available to fill the position.

The rule has four major components:

1. The elimination of substitution of aliens in labor certification applications
2. The introduction of a requirement to file an I-140 immigrant visa application within 45 days of the approval of a labor certification
3. The rule would prohibit the sale, barter or purchase of permanent labor certifications as well as other related payments (**including the payment of legal fees by employees**).
4. Clarification of DOL procedures for responding to possible fraud and adding debarment procedures for participation in the permanent labor certification program.

Current DOL policy allows US employer to substitute an alien named on a pending or approved labor certification to substitute another prospective alien employee. Substitutions are not actually addressed in the Immigration and Nationality Act nor in DOL regulations, but are simply permitted as a matter of policy. This substitution can be made while the labor certification application is pending at DOL or while a Form I-140 petition is pending with US Citizenship and Immigration Services (USCIS). A labor certification remains valid indefinitely so a substitution, under current policies, can happen a long time after the labor certification process is begun.

The DOL notes in the proposed rule that the changes stem from concern that “various immigration practices, including substitution, are subject to a high degree of fraud and abuse.” DOL also mentions that the proposal is also rooted in recommendations from the Department of Justice and DOL Office of Inspector General as well as suggestions received from the public during the PERM 2002 comment period.

Substitution of Aliens

According to the DOL, the ability to substitute aliens has turned the labor certification into a commodity which can be sold by unscrupulous employers, attorneys and agents. The fact that labor certifications have an open ended validity also enhances this black market. In many of these cases, according to DOL, the job offer is fictitious.

The DOL describes this “black market” as one that is emerging. But while the DOL states that under the current rules, there is a strong incentive for the filing of fraudulent applications, it does not actually cite any statistics on the number of substitutions that occur each year and the number of cases that have been found to be fraudulent.

The DOL notes that aliens who are substituted in on labor certifications also get the benefit of the priority date on the earlier application and that they are able to jump ahead, sometimes several years ahead, of where they would be with a new application.

According to the DOL, the argument that originally justified substitutions was the long time it took to obtain a permanent labor certification. However, the agency now believes that the faster processing times available due to implementation of the PERM program removes this justification. The DOL fails to address, however, the issue of multiyear queues for employment-based visa numbers that can cause problems even more severe than lengthy labor certification processing times.

Under the proposed rule, only the alien named on the labor certification petition may be the beneficiary of an approved labor certification. Substitutions will be prohibited as of the effective date of the final rule, but substitutions approved prior to the final rule's effective date would not be affected.

Labor Certification Validity and Filing Period

According to DOL, the fact that labor certifications don't expire has contributed to the black market described above. The DOL noted its concerns that over time, the likelihood that a certified job opportunity still exists as it appeared on the original application becomes more doubtful and the labor market test and prevailing wage determination becomes less accurate or “stale.”

Under the proposed rule, an I-140 petition must be filed with USCIS within 45 calendar days of the date the Labor Department grants certification. For labor certifications approved before the rule's effective date, an I-140 must be submitted within 45 days of the effective date of the rule.

Prohibition on the Sale, Barter, or Purchase of Applications for Permanent Labor Certification and Prohibition on Related Payments

Under the proposed rule, employers are prohibited from seeking or receiving payment of any kind, from any source, for filing an ETA Form 750 or an ETA Form 9089 or for other actions in connection with the permanent labor certification process. Prohibited payments would include, but not be limited to

- Employer fees for hiring the alien beneficiary
- Receiving "kickbacks" of part of the alien beneficiary's pay whether through a payroll deduction or otherwise
- Paying the alien beneficiary less than the rate of pay stated on the application
- Goods and services or other wage or employment concessions
- Receiving payments from aliens, attorneys, or agents for allowing a permanent labor certification application to be filed on behalf of the employer

In what may be the most controversial section of the regulations, DOL is proposed to include in this prohibition a ban on alien payment, directly or indirectly, of the employer's attorney's fees and costs related to preparing, filing, and obtaining a permanent labor certification. According to DOL, employers, not aliens, file a permanent labor certification application and, therefore, these employer costs are not to be paid or reimbursed in any way by the alien beneficiary. The proposed rule would prohibit an employee or any third party from paying legal fees. And the fact that an employee would be paid substantially more than the prevailing wage even with the subtraction of legal fees is not considered.

The DOL fails to explain how this fits in to the long understood legal principle that immigration lawyers are dually representing employers and employees when they file labor certifications and that they owe fiduciary responsibilities to each. Attorneys would still owe ethical obligations to employees and can still be sued for legal malpractice despite the fact that employees are not allowed to pay legal fees.

Debarment

The proposed rule allows the DOL to suspend processing of any permanent labor certification application if an employer, attorney, or agent connected to that application is involved in either possible fraud or willful misrepresentation or is named in a criminal indictment related to the permanent residency program.

A new regulation permits the DOL in instances in which a pending application involves an attorney or agent who is the subject of a finding of fraud or willful misrepresentation, to notify employers associated with the applications.

19. USCIS Amends Policies on Postings in Nurse Cases

US Citizenship and Immigration Services has issued an important amendment to the Adjudicator's Field Manual governing how USCIS examiners are to decide cases. The February 14, 2006 guidance covers Schedule A posting and prevailing wage issues involving roaming employees. These cases are highly common in nursing since many sponsoring employers are contractors who send nurses to multiple hospitals.

The guidance directs employers that where a final work site is not known, the posting needs to be placed at all employer or employer client work sites where relevant workers are currently placed. The prevailing wage is determined based on the location of the employer's headquarters.

If the work site is unknown and the employer has no current clients or locations, the application will be denied because USCIS will consider there to be no bona fide job opportunity.

USCIS will allow employers with petitions pending or motion to reopen pending on March 20-2006 to repost to comply with posting location requirements.
