Siskind's Immigration Bulletin – July 8, 2006

Published by Greg Siskind, partner at the Immigration Law Offices of Siskind Susser, P.C., Attorneys at Law; telephone: 800-748-3819, 901-682-6455; facsimile: 800-684-1267 or 901-339-9604, e-mail: gsiskind@visalaw.com, WWW home page: http://www.visalaw.com.

Siskind Susser serves immigration clients throughout the world from its offices in the US and its affiliate offices across the world. To schedule a telephone or in-person consultation with the firm, go to http://www.visalaw.com/intake.html.

Editor: Greg Siskind. Associate Editor: Penny Egel. Contributors: Hadley Bajramovic, Maria Bjornerud.

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1. Openers

Dear Readers:

This is a very exciting week here at Siskind Susser. Last Friday we began our move to our new headquarters in Memphis. Last summer, we purchased a dilapidated not particularly attractive building that happens to be located in a great location in east Memphis and which was quite large – 12,000 square feet, in fact. Over the last 12 months, we have worked with our architect and transformed the building into a gorgeous, state of the art work space. The thirty-five year old building has a new façade and the entire inside was gutted and transformed into an ultra-modern law office. The opening of the new building was enough of an event that the city's business newspaper covered it. You can see that article at http://memphis.bizjournals.com/memphis/stories/2006/07/17/story4.html?jst=pn_pn_lk and you can see the before and after pictures of the building here and here. We appreciate the patience of our clients over the last several days.

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There is little progress to report right now on the big immigration bill in Congress. Each House in Congress is holding its own hearings and there still is no conference committee to work on a compromise measure. Representative Mike Pence (R-IN) is promoting the concept of a "trigger" approach where the legalization provisions of comprehensive immigration reform would be delayed until after the enforcement provisions go into force. How long of a wait? Probably one to two years based on current ideas being floated.

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In firm news, I was interviewed for an article at Forbes.com on the best occupations to get a visa to the US. You can see the article at http://www.forbes.com/leadership/2006/07/13/leadership-careers-immigration-cx_tw_0713jobsthatgetyouausvisa.html .

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I want to welcome Ken Bragdon to Siskind Susser and introduce him to readers. Ken will be a writer working on Siskind Susser's various publications and is serving as our interim editor.

We also want to wish Penny Egel well. Penny has served in that role for the last few years and has been an absolute

pleasure to have on our team. Penny is moving to Atlanta and will work in legal marketing in her new city. Thank you again Penny!

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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. ABCs of Immigration: Good Moral Character, English and Civics

Previously we discussed the residency and physical presence requirements that naturalization applicants must meet. This week we discuss the remaining requirements.

What are the English requirements for naturalization?

Naturalization applicants must be able to read, write and speak ordinary English. There is no specific test for this, and the applicant's ability with regard to English is determined in the course of the naturalization interview.

Are there any exemptions for the English requirement?

A few limited groups of applicants are exempt from this requirement. Those exempt are people who, because of a physical disability are unable to learn English, those with a mental handicap that makes it impossible to learn English, people over age fifty who have lived in the US as permanent residents for at least twenty years, and people over age fifty-five who have been permanent residents for at least fifteen years.

In the past few years, the USCIS has adopted definitions of physical and mental disabilities that are similar to the definitions used by federal agencies that run disability programs. The impairment must be "medically determinable," which means that it must be based on an anatomical, physiological or psychological condition that can be shown by accepted medical techniques to render the person unable to learn English. If reasonable steps could be taken to learn English, for example, a blind person using Braille, or a deaf person using sign language, the disability waiver is not

available. Even if the disability waiver is granted, most applicants must still demonstrate that they understand and agree with the oath of allegiance. Under a law passed late last year, however, a waiver of the oath is provided for people who cannot understand it because of a disability.

What must I know about the United States before I am naturalized?

Naturalization applicants must also demonstrate a knowledge and understanding of the history and government of the US. This is done by asking the applicant a number of questions from a standard list of 100 questions. Generally, people who are exempt from the English language requirement are not exempt from this requirement. They can use an interpreter during the examination. Those exempt from the civics requirement include those who are physically or mentally unable to comply. Also, applicants who are over age sixty-five and have been permanent residents for at least 20 years are given an easier test, having to answer only six questions correctly from a list of 25.

What additional requirements must I fulfill before being naturalized?

Naturalization applicants must also demonstrate good moral character. The five years immediately preceding the application are closely examined, and certain criminal offenses during this period will automatically preclude a finding of good moral character. The applicant's entire life can also be examined.

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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 appeal for removal of cancellation was denied by the Board of Immigration Appeals as well as my remand for asylum due to my female genital mutilation. I would like to know what the next step is and if I have any other chance to get my papers in the USA?

A - The next level of appeal would be to the Federal Circuit Court of Appeals. You have 30 days from the date of your BIA denial to file such an appeal. You could also request a reconsideration of the BIA decision but this will not stop the 30 days for the appeal from running.

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Q - My husband and I are both holding E-2 visas in the US. Our son was born in the US in 2005 and thus is an American citizen. Are we qualified for green card because of him? Could we apply before he is 18?

A - Your child cannot petition for you to get a green card by virtue of his being a US citizen until he is 21 years old. One of the most common myths in immigration law is that having a child in the US gives you the right to remain in the US.

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Q - I am working on a technical research project and have been searching for an expert to consult with. I finally found a suitable person who is a PhD grad student. He is enrolled at a US university under a student visa. According to the people he has talked to, he may not work more than 20 hours a week while school is enrolled. He currently has a summer job working 40 hours a week which seems to be allowed for summer work. I am trying to figure out if there is a way for him to consult for me and me be able to pay him without jeopardizing his visa status.

A - Students are eligible to work off campus using a program called curricular practical training if the work is related to their field. You might ask the student to speak with his or her foreign student advisor to see if this is an option. I'd also read the articles on work options for students on my web site at www.visalaw.com/abcs.html.

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Q - What happen if your wife you filed for a temporary visa K-3 leaves you have a few weeks

A - Unfortunately, the marriage must remain intact until the green card is granted. There are exceptions for abused wives and husbands, but that's about it.

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Q - I have been informed that I have received an approval notice (Aug 13,2005 - I haven't received it yet) for a relative petition application that was filed. What does the approval notice mean and what can I expect? I was told to fill out form I-824 to receive a duplicate of this approval notice that I never received.

A - The approval notice means that you have now been classified as eligible in a particular family immigration category. If you are in one of the preference categories, you'll still be subject to the quotas and whether you can proceed with your case or not will depend on where you are in the line (which is determined by when you filed the case).

You can file an I-824 to get a duplicate copy of the approval notice.

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Q - On the Green card process I have a question. I am on a concurrently filling process of both I-140 and I-485. I-140 has been approved, and also received my EAD. With EAD can I work at a 2nd job or start a business myself? For how long do I have to work at the current employer and when is it safe to switch employer?

A - With the EAD you can work on a second job or have your own position, but you would be wise to stay with your sponsoring employer as long as you can. The rule is that you can change employers after an adjustment of status application has been pending 180 days, but the new position must be in a same or very similar occupation. The USCIS has never specified exactly what this means so you need to be extremely careful about moving prior to the completion of the green card. For some occupations, this is not that big of a deal. But if the new job is not obviously the same as the last occupation, be cautious. It's always a good idea to review with your immigration lawyer first.

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4. Border and Enforcement News

According to the *Washington Post*, a Department of Homeland Security supervisor has been charged with falsifying immigration documents to help Asian immigrants obtain U.S. citizenship. Robert T. Schofield was arrested last week at his office, where he is a supervisor for U.S. Citizenship and Immigration Services, which processes immigration applications.

Over the past decade, the government investigated numerous allegations of bribery involving Schofield and Asian immigration applicants" when he worked at the former Immigration and Naturalization Service, according to court documents unsealed last week and reported on by the *Washington Post*. Schofield was demoted at one point for "conduct unbecoming a government employee," the documents say, and had an "inappropriate relationship" with a woman connected to an INS criminal probe.

When confronted about that relationship by INS officials, Schofield fled to East Asia, where he made $36,000 worth of unauthorized purchases on his government-issued credit card, according to court documents.

It was unclear when Schofield returned to the United States, how the previous investigations ended and how Schofield became a supervisor when the new Department of Homeland Security took over INS's functions in 2003.

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According to a news release from U.S. Immigration and Customs Enforcement (ICE), Detroit doctor Ali S. Makki, 46, was charged with over-billing Medicare more than $500,000 for unnecessary medical tests, falsifying medical records submitted in response to a Medicare audit, and providing false medical records to more than 500 "green card" applicants.

The 40-count indictment also charged Makki with immigration fraud for providing two immigrants who tested

positive for syphilis with "negative" test results, with helping aliens obtain citizenship by signing false medical waivers, and with illegally dispensing prescriptions for controlled substances without a medical purpose.

Makki was arrested early Friday afternoon by agents from: ICE, the FBI, Health and Human Services Office of Inspector General, and the Internal Revenue Service (IRS). His arrest took place at Detroit Metropolitan airport after he got off a flight from his native Lebanon by way of Paris. His arrest culminated a two-year investigation by those agencies.

The indictment alleges that Dr. Makki billed Medicare for the following: office visits when he was outside the state of Michigan, complicated surgical procedures he never performed, and for thousands of medical tests that were not medically necessary and were repeatedly ordered despite negative or normal tests. These three health care fraud counts carry a maximum punishment of 10 years in prison and a $250,000 fine. An indictment is only a charge and is not evidence of guilt. A defendant is entitled to a fair trial in which it will be the government's burden to prove guilt beyond a reasonable doubt.

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According to a news release from U.S. Immigration and Customs Enforcement (ICE), nine individuals from Mexico and Guatemala were charged last week with unlawfully entering the United States following their arrests by U.S. Immigration and Customs Enforcement (ICE) special agents. If convicted, the nine defendants face a maximum sentence of six months in prison, and a maximum fine of $5,000. All defendants appeared June 22 in federal court in Sioux City, IA and were held without bond. Trial in these cases is set for August 10, 2006.

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5. News From the Courts

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

AKHTAR, et al v. GONZALES, Nos. 04-60497& 04-60895 (5th Cir. 2006) held 8 C.F.R. § 245.1(c)(8), adjustment of status regulation rendering seven categories of aliens including “arriving aliens in removal proceedings” “ineligible” to apply for adjustment of status under § 1255(a), valid and reasonable means to expedite removal proceedings; found that it lacked jurisdiction to review discretionary determination by the IJ to deny application for cancellation of removal and the denial by INS to initiate conditional termination of removal proceedings to allow adjudication of alien’s application for adjustment of status.

Before: HIGGINBOTHAM, DAVIS, and STEWART:

Petitioners, citizens of Pakistan, are “paroled arriving aliens” in removal proceedings. Both entered the United States using fraudulent documents, married the US Citizens and have the U.S. born children. Both petitioners were put in removal proceedings. In response, one of the petitioners filed an application for cancellation of removal and an application for adjustment of status based on his marriage. He also asked the INS District Director, to temporarily terminate the removal proceedings because the IJ lacked jurisdiction to hear the application for adjustment of status

while the proceedings continued. The IJ confirmed the lack of jurisdiction. After the District Director refused to terminate removal proceedings, the IJ denied the petitioner's application for cancellation of removal, finding that he failed to establish that removal would cause "exceptional and extremely unusual hardship" to a qualifying family member, and issued a final order of removal. The BIA dismissed his appeal without opinion. The other petitioner was denied his motion for continuance to allow adjudication of an immigrant visa petition based on his marriage. The BIA affirmed, concluding that the IJ did not abuse her discretion in refusing to continue the proceedings because the petitioner, as an arriving alien in removal proceedings, was ineligible to adjust status under current regulations, rending a continuance pointless.

The court found that 8 U.S.C. § 1252(a)(2)(B), the provision precluding judicial review of discretionary orders, including orders granting or denying adjustment of status, did not preclude it from reviewing the petitioners' claim for pure legal questions.

The court agreed that 18 U.S.C. § 1255(a) allows all aliens "inspected and admitted or paroled" apply for immigrant status without leaving the country, even those in the country without a valid visa. The court explained that an alien, who is eligible for adjustment of status, shall apply to the director having jurisdiction over his or her place of residence. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application shall be made and considered only in those proceedings under 8 C.F.R. § 245.2(a)(1). An arriving alien, other than an alien in removal proceedings, who believes he or she meets the eligibility requirements, shall apply to the director having jurisdiction over his or her place of arrival. An alien on advance parole whose application was denied by the District Director may renew that application in removal proceedings. The court stressed that the IIRIRA of 1997 did not change § 1255(a) or otherwise change the adjustment of status process.

The court pointed out that it had not previously examined 8 C.F.R. § 245.1(c)(8) prescribing the categories ineligible for adjustment of status. The court disagreed with the First Circuit opinion in *Succar v. Ashcroft*, 394 F.3d 8, 12-19 (1st Cir. 2005), invalidating the regulation after concluding that it violated *Chevron* step one because discretion to adjudicate individual applications was not discretion to redefine eligibility, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The court agreed with the Eighth Circuit in *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005) rejecting *Succar* and upholding the regulation. The court agreed that *Chevron* step one did not control because § 1255(a) gave Respondent discretion to adjust status, and such discretion could be exercised case-by-case or by rule. Turning to *Chevron* step two, the court held § 245.1(c)(8) reasonable as a means to expedite removal proceedings.

The court explained that Congress did not speak expressly to the issue because it gave Respondent unreviewable discretion to adjudicate individual applications. And there was no reason why an agency given such discretion could not exercise it by rule. The court agreed with *Mouelle* that *INS v. Cardoza-Fonseca* did not create an artificial distinction between eligibility and case-by-case discretion. It merely held that the BIA's interpretation of the statute in that case failed because Congress did not intend the heightened mandatory-withholding showing to apply to discretionary asylum.

The court found that while Congress intended to define who was eligible to apply, it clearly intended to let Respondent deny many, some, or all applications. The court concluded that § 245.1(c)(8) was reasonable and valid under *Chevron*.

The court also rejected petitioners' remaining claims. The court noted that petitioner cited no authority for this request

to initiate conditional termination of removal proceedings to allow adjudication of his application for adjustment of status and dismissed the claim for lack of jurisdiction. The court also concluded that it lacked jurisdiction to review the discretionary determination by the IJ to deny application for cancellation of removal.

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6. Government Processing Times

There are new processing times for the following service centers:

Vermont (7/11/2006): http://www.visalaw.com/vermont.html

California (7/11/2006): http://www.visalaw.com/california.html

Missouri (7/11/2006): http://www.visalaw.com/missouri.html

Nebraska (7/14/2006): http://www.visalaw.com/nebraska.html

Texas (7/11/2006): http://www.visalaw.com/texas.html

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7. News Bytes

Department of Homeland Security Secretary Michael Chertoff appointed Robert A. Mocny to the position of acting director of the US-VISIT program. Mocny was previously deputy director of US-VISIT and was responsible for dat-to-day operations of the program, according to a press release from DHS. Mocny led the establishment of the Secure Electronic Network for Traveler's Rapid Inspection (SENTRI) at U.S. land border ports and initiated the policy of interagency project teams to meet U.S. government mandates. Mocny follows James A. Williams, who recently became the commissioner of the Federal Acquisition Service at the General Services Administration.

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Jonathan R. Scharfen has been appointed Deputy Director of U.S. Citizenship and Immigration Services (USCIS). According to a press release from USCIS, Sharfen retired from the US Marine Corp after 25 years of active duty and has served as Chief Counsel/Deputy Staff Director of the House International Relations Committee since April 2003.

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USCIS has updated its web page that keeps track of the H visa cap count. The latest numbers are as follows:

	Cap	Beneficiaries Approved	Beneficiaries Pending	Beneficiary Target [1]	Total	Date of Last Count
H-1B	58,200 [2]	------	------	------	Cap Reached	5/26/2006

H-1B Advanced Degree Exemption	20,000	3,740	8,178	21,000	11,918	6/23/2006[3]
H-1B (FY 06)	58,200	------	------	------	Cap Reached	8/10/2005
H-1B Advanced Degree Exemption (FY 06)	20,000	------	------	------	Cap Reached	1/17/2006

[1] Refers to the estimated numbers of beneficiary applications needed to reach the cap, with an allowance for denials and revocations. Each target is subject to revision later in the cap cycle as more petitions are processed.
[2] 6,800 visas are set aside during the fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool can be made available for H-1B use with start dates beginning on October 1, 2006, the start of FY 2007. USCIS has added the projected number of unused H-1B1 Chile/Singapore visas to the FY 2007 H-1B cap as announced in the H-1B Press Release, dated June 1, 2006.
[3] The numbers on the table for H-1B Advanced Degree Exemption include only receipted petitions. As of 6/23/06, an estimated 800 I-129 H-1B petitions seeking the Advanced Degree exemption had yet to be receipted.

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According to a press release from U.S. Citizenship and Immigration Services (USCIS), the agency published a notice in the Federal Register July 3, 2006 alerting the public that Employment Authorization Documents (EADs) issued under the designation of El Salvador for TPS and bearing an expiration date of either July 5, 2006 or September 9, 2006 are automatically extended untl March 9, 2007.

Individuals who currently have benefits through the designation of El Salvador for TPS are reminded that they still need to re-register according to the re-registration requirements set forth in the Federal Register at 71 F 34637 on June 15, 2006 to prevent experiation of their benefits on September 9, 2006. The June 15, 2006 Notice as well as the present Notice can be found on the U.S. Citzenship and Immigration Services website, www.uscis.gov.

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U.S. Citizenship and Immigration Services (USCIS) announced changes to the filing procedure for employment-based applications for lawful permanent resident status via a press release. Starting on July 24 2006, all applicants filing an Application to Adjust Status or Register Permanent Residence (Form I-485) based on a pending or an approved Immigrant Petition for Alien Worker (Form I-140), also referred to as a “standalone filing”, should mail that form directly to the Nebraska Service Center. Applicants should file accompanying forms (e.g., Form I-131 Application for Travel Document, and/or Form I-765, Application for Employment Authorization) at this same centralized location.

Starting on July 24, the Nebraska Service Center/Texas Service Center pairing will process all employment-based adjustment of status applications (and related applications). Although the Nebraska Service Center will serve as the centralized filing location, some petitioners/applicants will receive a filing receipt from the Texas Service Center, if the case is worked by that center. The center that generates the Form I-485 receipt notice will be the center that actually adjudicates the case.

The July 24 change establishing a new filing location for standalone, employment-based Forms I-485 (and related applications) does not affect other aspects of the form instructions. USCIS will continue honoring prior versions of Form I-485.

More information about this filing change is available by calling USCIS National Customer Service Center (NCSC) toll-free at 1-800-375-5283, or by visiting www.uscis.gov.

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According to the *Washington Post*, a Medicaid rule took effect July 1 that requires more than 50 million Americans to prove their citizenship or lose their medical benefits or long term care. Under the rule such proof as a passport or a birth certificate must be offered at the time a person applies for Medicaid benefits or during annual reenrollment in the state-federal program for the poor and disabled.

Critics fear that the provision will have the unintended consequence of harming several million U.S. citizens who, for a variety of reasons, will not be able to produce the necessary paperwork. They include mentally ill, mentally retarded and homeless people, as well as elderly men and women.

The new provision is part of last year's Deficit Reduction Act, which President Bush signed into law in February. Despite a federal inspector general's report concluding that there was little fraud by noncitizens, supporters said the measure would ensure that Medicaid dollars go only to citizens or eligible immigrants.

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8. International Roundup

Brussels police raided the church Our Sweet Lady of the Immaculate Conception in Anderlecht last week and cleared the building of 48 undocumented immigrants, according to *The Expatica News*. Police investigated the church sit-in protest after complaints from residents over disturbances of the peace, poor living conditions and a lack of hygiene. Among the protestors, police found two French nationals, who claimed they were staying in the church because hotel rooms in Brussels were too expensive. Both of them were immediately released.

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The Italian government has designed a proposal that would grant a quota for 1,000 Ghanaians to travel to Italy yearly to work legally. The proposal, which has yet to be presented to the Ghana government for, has been designed to curtail the activities of undocumented immigrants, who resorted to various unauthorized means to travel to that country, according to *The Angola Press*.

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9. Legislative Update

According to a press release from the American Immigration Lawyers Association, the organization commended the introduction of the "SKIL Bill" to reform both the H-1B visa and employment based green card processes. The release states that the introduction of the SKIL (Securing Knowledge Innovation and Leadership) Bill in the House is a positive sign that both Congress and the Bush administration are serious about correcting the growing competitiveness crisis for the United States and reform the visa system for highly educated foreign nationals.

Highlights of the SKIL Bill include the following:

- Exemptions for U.S. educated foreign workers with master's of higher degrees from the H-2B and EB green card quotas so their talent can be retained in the United States.
- Creation of a flexible, market-based H-1B cap so that U.S. employers are not locked out of hiring critical talent for over a year at a time.
- Extension of foreign students' post curricular optional practical training from 12 months to 24 months to allow them to transition more easily from student to green card.
- Exemptions for EB green card immigrant spouses and children from the annual cap, thus making more visas available for the innovative professionals we need.

H.R.5589 : To direct the Secretary of Homeland Security to transfer to United States Immigration and Customs Enforcement all functions of the Customs Patrol Officers unit operating on the Tohono O'odham Indian reservation.
Sponsor: Rep Souder, Mark E. [IN-3] (introduced 6/12/2006)
Committees: House Homeland Security
Latest Major Action: 6/15/2006 Referred to House subcommittee. Status: Referred to the Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity.

H.R.5621 : -- Private Bill; For the relief of Eqbal Shaikh.
Sponsor: Rep Davis, Danny K. [IL-7] (introduced 6/14/2006)
Committees: House Judiciary
Latest Major Action: 6/14/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R.5668 : -- Private Bill; For the relief of Amadou Heinz Ly.
Sponsor: Rep Rangel, Charles B. [NY-15] (introduced 6/21/2006)
Committees: House Judiciary
Latest Major Action: 6/21/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R.5672 : Making appropriations for Science, the Departments of State, Justice, and Commerce, and related agencies for the fiscal year ending September 30, 2007, and for other purposes.
Sponsor: Rep Wolf, Frank R. [VA-10] (introduced 6/22/2006)
Committees: House Appropriations; Senate Appropriations

Latest Major Action: 6/29/2006 Referred to Senate committee. Status: Received in the Senate and Read twice and referred to the Committee on Appropriations.

H.R.5730 : To designate Poland, Hungary, the Czech Republic, Estonia, Latvia, and Lithuania as program countries under the visa waiver program established under section 217 of the Immigration and Nationality Act.
Sponsor: Rep English, Phil [PA-3] (introduced 6/29/2006)
Committees: House Judiciary
Latest Major Action: 6/29/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R.5745 : -- Private Bill; For the relief of Irma Diaz, Luis Diaz, Jr., and Monica Diaz.
Sponsor: Rep Wu, David [OR-1] (introduced 6/29/2006)
Committees: House Judiciary
Latest Major Action: 6/29/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

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10. Notes from Visalaw.com Blog

Saturday, July 01, 2006

NSC INDICATES CHANGES TO OPT CAN BE MADE AFTER FILING

One of the more common questions we receive is whether F-1 students can change the dates on their optional practical training applications after they submit their papers. The traditional answer to this question has always been no, but a recent exchange between NAFSA (the association that includes foreign student advisors) and the USCIS' Nebraska Service Center indicates that such changes may be possible. In response to a question regarding what to do when a student has student wants to change the OPT date after an OPT petition already submitted, USCIS told NAFSA:

Yes, it is allowed if the case is still pending. Go into SEVIS and change the dates and also send an e-mail to NSC Schools requesting that we use the new dates. We will do our best to accommodate your request.

In response to a question of whether an OPT petition could be canceled prior to the OPT start date, the USC responded in the affirmative and gave the following directions:

If you return the card with a letter requesting that the application be withdrawn, we will prepare a Service motion to reopen and withdraw the case. Please note it must be received prior to the start date of the OPT. Please be sure to send copies of the letter and decision when reapplying for new OPT.

posted by Greg Siskind @ 9:43 PM

SKIL ACT INTRODUCED IN HOUSE

A key immigration bill has been introduced in the House. The bill would raise the H-1B cap, create new exemptions for the most highly educated immigrants, focus immigration benefits on severe shortage occupations like medical doctors and nurses and create green card exemptions for many of these workers. A similar bill has been introduced in the Senate and the provisions of the SKIL are largely incorporated into the Senate's comprehensive immigration

reform legislation.

The legislation is cosponsored by an all-Republican roster that includes John Campbell (R-CA), K. Michael Conaway (R-TX), John T. Doolittle (R-CA), Jeff Flake (R-AZ), Peter Hoekstra (R-MI), Michael McCaul (R-TX), Mike Pence (R-IN), John Shimkus (R-IL) and Todd Tiahrt (R-KS). Republican support is considered vital to passage of this legislation since Democrats are normally more inclined to support pro-immigration measures.

posted by Greg Siskind @ 7:42 PM

BECAUSE 500 ECONOMISTS TELL US IT IS SO

There's an old joke that goes "Economics is the only field in which two people can get a Nobel Prize for saying the opposite thing."

So when 500 economists agree on something, we should pay attention. That's why I was pleased to see the following letter sent to President Bush and members of Congress:

Dear President George W. Bush and All Members of Congress:

People from around the world are drawn to America for its promise of freedom and opportunity. That promise has been fulfilled for the tens of millions of immigrants who came here in the twentieth century.

Throughout our history as an immigrant nation, those who were already here have worried about the impact of newcomers. Yet, over time, immigrants have become part of a richer America, richer both economically and culturally. The current debate over immigration is a healthy part of a democratic society, but as economists and other social scientists we are concerned that some of the fundamental economics of immigration are too often obscured by misguided commentary.

Overall, immigration has been a net gain for American citizens, though a modest one in proportion to the size of our 13 trillion-dollar economy.

Immigrants do not take American jobs. The American economy can create as many jobs as there are workers willing to work so long as labor markets remain free, flexible and open to all workers on an equal basis.

In recent decades, immigration of low-skilled workers may have lowered the wages of domestic low-skilled workers, but the effect is likely to have been small, with estimates of wage reductions for high-school dropouts ranging from eight percent to as little as zero percent.

While a small percentage of native-born Americans may be harmed by immigration, vastly more Americans benefit from the contributions that immigrants make to our economy, including lower consumer prices. As with trade in goods and services, the gains from immigration outweigh the losses. The effect of all immigration on low-skilled workers is very likely positive as many immigrants bring skills, capital and entrepreneurship to the American economy.

Legitimate concerns about the impact of immigration on the poorest Americans should not be addressed by penalizing even poorer immigrants. Instead, we should promote policies, such as improving our education system, that enable Americans to be more productive with high-wage skills.

We must not forget that the gains to immigrants coming to the United States are immense. Immigration is the greatest anti-poverty program ever devised. The American dream is a reality for many immigrants who not only increase their own living standards but who also send billions of dollars of their money back to their families in their home

countries—a form of truly effective foreign aid.

America is a generous and open country and these qualities make America a beacon to the world. We should not let exaggerated fears dim that beacon.

The economists signing include many of the nation's most prominent economists. And there are five Nobel Prize winners in the group saying the same thing - immigrants are a boon to our economy.

posted by Greg Siskind @ 10:52 AM

Wednesday, June 28, 2006

CANNON VICTORY SIGNALS WEAKNESS IN ANTI-IMMIGRANT GOP WING

Just two weeks after anti-immigrant GOP members celebrated the by-election win of Brian Bilbray in a closely watched California US House race, they have been dealt a set back in another key race. Chris Cannon, the Utah Congressman who has one of the most pro-immigration records in Congress, was facing a serious primary challenge from an anti-immigrant opponent. Cannon's defeat would have sent shockwaves in Washington, but the Congressman handily defeated his opponent by a margin of 56 to 44. That victory plus the poll of Republican voters discussed earlier this week should give pause to Republicans who assumed immigration is a can't miss wedge issue in this year's congressional elections. Congratulations Congressman Cannon!

posted by Greg Siskind @ 4:18 PM

DETAILS ON HOUSE HEARINGS BECOMING AVAILABLE

The House and Senate are set to have dueling sets of hearings around the country on their competing immigration bills. *Roll Call* published the following details on the House hearings yesterday:

* On Thursday, a Homeland Security subcommittee will hold a hearing on the use of operational intelligence in border security.

* On July 5 and 7, an International Relations subcommittee is tentatively scheduled to hold field hearings in San Diego and Laredo, Texas, on "Border Vulnerabilities and International Terrorism."

* In mid-July, the Education and the Workforce Committee tentatively plans to hold two hearings on Capitol Hill, one on guest-worker programs and one on English as the official language.

* During the week of Aug. 14, the Government Reform Committee is tentatively scheduled to hold a hearing in Arizona focusing on the costs of illegal immigration to the local, state and federal governments.

posted by Greg Siskind @ 8:32 AM

Monday, June 26, 2006

REALITY CHECK

In the next 24 hours or so, look for anti-immigrant groups to begin citing a Congressional Budget Office report on

how many people would get visas under the Senate's immigration bill. The report was prepared for anti-immigration Senator Jeff Sessions (R-AL) and contains one fatal flaw that will presumably be ignored by those who seek to score political points by citing the dramatic 18,000,000 per year figure quoted as the estimate for usage in ten years.

What is the flaw? The report was prepared based on how the bill stood on May 16th. But it was after this date that several changes were made to the bill that would dramatically cut the numbers. For example, the guest worker program is now capped at 200,000 workers per year. The original version set it at 400,000 and allowed it to grow by up to 20% per year. By year 2016, the report is citing a figure of 4 million guest workers a year coming in to the country, more than 20 times the real number. And the number of employment-based green cards is now capped at 600,000 including family members. But the CBO report is stating 3.9 million as the estimate, an overstatement of more than 600%. Hopefully, the press will challenge those who cite the bad numbers. But I wouldn't count on it.

posted by Greg Siskind @ 5:18 PM

A NEW PUSH FOR IMMIGRATION REFORM?

Many accuse me of being too optimistic by nature, particularly when it comes to the immigration debate. But I've been telling anyone who asks that I still see immigration reform being very much alive. I've been right so far. The bill McCain bill was pronounced dead on arrival last year when it was introduced and again when the House passed the atrocious H.R. 4337 last December. The bill was supposedly set to die in the Senate Judiciary Committee. It was pronounced over when the Easter recess came and a deadline imposed by Senator Frist was missed. And it has been pronounced dead based on the recent by-election in California of anti-immigrant Republican Brian Bilbray.

But don't count out the bill. One of my pet theories is that moderates in both Houses of Congress find it easier to work behind the scenes when interested parties on both sides of the issue think the legislation is finished. The month of hearings that will happen in August gives much needed time for cranking out a real compromise.

And what sort of compromise might we see? My favorite idea was **discussed in this morning's Washington Post by columnist Fred Hiatt**.

posted by Greg Siskind @ 4:53 PM

Saturday, June 24, 2006

REPUBLICAN VOTERS SUPPORT SENATE BILL

The conservative Manhattan Institute has conducted a new poll of Republican voters and their findings should trouble Republicans who think pursuing an anti-immigrant policy is good politics. The **report** made four major findings:

1. Likely Republican voters want a solution to the problem of illegal immigration.
2. While likely Republican voters strongly support border enforcement, there is more support for a comprehensive immigration reform plan that provides current illegal immigrants with an opportunity for earned citizenship.
3. The charge of amnesty is not as powerful a weapon against immigration reform proposals as conventional wisdom suggests.
4. Support is much stronger among likely Republican voters for a comprehensive approach to immigration reform than an enforcement with guest workers only plan.

80% of Republican voters, according to the report, support an earned legalization program, a central idea of the Senate's immigration bill and the main reason the House is blocking movement on an immigration bill. 85% believe it would be impractical to deport the estimated eleven million undocumented immigrants in the US. And only 39%

believe that the Senate plan amounts to an amnesty, the key charge opponents of the bill continue to level.

posted by Greg Siskind @ 7:20 AM

Friday, June 23, 2006

CONSERVATIVE WALL STREET JOURNAL SLAMS HOUSE REPUBLICANS ON IMMIGRATION STALL TACTICS

Today's Wall Street Journal contains an editorial chiding the Republicans for failing to deal with immigration despite the fact that they are campaigning on the issue and despite the fact they control both Houses of Congress and the White House.

Most Congressional majorities campaign for re-election by touting their legislative achievements. Not this year. House Republicans have decided that the key to saving their majority is not to solve the immigration problem they've spent the last year building into a "crisis." Give them credit for novelty, if not for wisdom.

President Truman won his Presidential election campaigning against the "do nothing" Republican Congress of his day. The Journal echoes this as a possible election year issue for Democrats:

What might well cost all of them their seats is the growing perception that this Congress hasn't achieved much of anything. If Republicans want a precedent, they might recall what happened to Democrats who failed to pass a crime bill in the summer of 1994. Already in trouble on taxes at the time, Democrats looked feckless on crime and health care and went down to crashing defeat. Immigration could do the same for Republicans, who have been flogging the issue for months as a grave national problem. Doing nothing about it now risks alienating even those conservatives who merely want more border police.

posted by Greg Siskind @ 11:46 PM

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11. Guest Column: Farewell Izumi!: Robert Divine And The Return of Precedent, by Gary Endelman

Gary Endelman practices immigration law at BP America Inc. The opinions expressed in this column are purely personal and do not represent the views or beliefs of BP America Inc. in any way nor do they represent the views of Siskind Susser. This article is copyrighted by ILW.COM and is reprinted with permission. You can read other articles by Mr. Endelman, and subscribe to future articles at www.ilw.com.

The absence of precedent is the lawyer's worst nightmare. Without knowing how the game is played, the lawyer does not know when to advance or when to retreat. He or she is prone to putting in too much or not enough, placing undue emphasis on what is secondary and glossing over that which is truly essential. Some cases take an excessive amount

of time to prepare while others are filed prematurely. Law becomes a high stakes poker game, justice by ambush. The USCIS adjudicator also is at sea. Uncertain what standards to employ, frustrated by a nagging suspicion that overly clever attempts by an unscrupulous bar will win benefits for clients who do not deserve them, the line analyst looks in vain for guidance that does not come. The process becomes complex, complicated and expensive. Conflict replaces cooperation leading to litigation and micromanagement. There seems no exit. When nothing is sure, almost anything can happen.

In the not too distant past, opinions by the INS General Counsel served to provide the interpretive lubricant that made the process go. That ended on July 13, 1998, when the INS Administrative Appeals Office decided *Matter of Izumi* [1]. After that, for several years, we were on our own as Congress passed one new law after another while the INS went away and its successor agency, the United States Citizenship and Immigration Services, seemed unable or unwilling to use the regulatory process to tell its customers what it expected them to do. Finally, coming to Washington was a lawyer from the Heartland who served as the CIS General Counsel for one year and has been Acting Deputy Director for the past year. His name is Robert Divine and this is his story. Without intending to overthrow Matter of Izumi, he has done precisely that and, for the first time in a long time, the calm of precedent has made itself felt.

On its face, Izumi is a plain and rather tedious case with limited sex appeal, being concerned with the byzantine intricacies of what constitutes a qualifying investment for immigrant visa purposes. Looking a bit deeper, we find more and that is what excites us. The Izumi investors, it seems, had relied for justification of their actions on a December 19, 1997, legal opinion issued by the INS' Office of General Counsel. This did not, unfortunately for them, impress the AAO that was not overawed by the wisdom of such reliance: "OGC memoranda, as counsel himself stated after oral argument, [2] are merely opinions. OGC is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations. See 8 C.F.R. 103.1 (b) (1)." [3] When they switched over to the other side of the street and attempted to portray the General Counsel's memorandum as a substantive rule change that the legacy INS was retroactively applying in violation of the Administrative Procedure Act, the Izumi investors enjoyed the same lack of success:

As noted in the OGC opinion itself, the opinion in no way modifies existing law, but is intended merely to provide guidance to the Service in understanding many factual issues that have arisen over the years with respect to immigrant investor petitions. Providing this type of guidance is the very mission of the OGC, as specifically provided at 8 C.F.R. 100.2(a)(1) and 103.1 (b)(1). These regulations do not delegate any authority to OGC to establish binding legal principles or to exercise any other rulemaking power. Neither the AAU nor other Service adjudicators, therefore, are bound to follow the OGC opinion of December 19, 1997. [4]

The immigration bar was in shock. The verities of accepted wisdom had been shattered but what would take their place in this strange new world?

Stephen Yale-Loehr, head of AILA's Immigrant Investor Liaison Committee, and perhaps the foremost critic of the havoc that *Izumi* unleashed, gave voice to the emerging legal reality where borders and definition were a thing of the past:

If immigrants, attorneys and other INS officials cannot rely on official pronouncements by the INS, what can they rely on? Can the AAO or an INS adjudicator ignore a policy directive issued by the INS Commissioner? I doubt it. Then why not legal opinions issued by the INS General Counsel, most of which are usually thoroughly vetted within the agency for months before they are released? The AAO's statements on this issue undercut the ability of the public to rely on the many policy pronouncements that fill in gaps in the regulations and which are supposed to let us know how the agency will interpret its regulations. **Without such reliance, we have bedlam. (emphasis added).** [5]

Agile minds like Ron Klasko realized that, if the General Counsel's views did not bind the INS, they did not bind him either, while zealous litigators like Ira Kurtzban and Dale Schwartz sought in the courts the justice their clients could no longer expect from the INS. The only thing that was certain was the utter absence of certainty itself.

Enter Robert Divine, loyal Republican and legal scholar, fresh from his vibrant law practice in Tennessee to tell Bill

Yates and the USCIS how to stay smart and on the right side of the law. Divine was not on crusade against *Izumi*. There is no indication that he consciously set about to cast it aside or even that he thought about it very much. One doubts that *Izumi* disturbed the serenity of his nocturnal slumber. His was a less lofty but equally important and infinitely more practicable goal, to give USCIS adjudicators the guidance they needed to resolve thorny questions of interpretation and do a good job. Acting carefully, moving slowly, picking his spots with great precision, he restored the relevance of precedent without launching a frontal attack against *Izumi* that, in theory, retains the same validity that it has always had. Don't believe it for a second. We live in changed times. On three separate occasions, Mr. Divine has restored order to our universe. In each case, the precedent decision came from the Administrative Appeals Office. In each case, there were no binding regulations to decide the issue. In each case, what the CIS had to say was the final word. As Mr. Divine recently explained to the 2006 Spring Continuing Legal Education Conference of the American Immigration Lawyers Association held in Washington, D.C, he spoke out for a reason on issues " where CIS is the only decision maker that addresses that issue, it makes sense for us to designate decisions that we consider precedent , and that are policy of this agency, and so we've been doing that... and they all go up on the website." [6]

On October 18, 2005, Acting Deputy Director Divine designated *Matter of IT Ascent, EAC #0404753189* as binding precedent for all USCIS adjudicators. [7] No longer would overworked INS adjudicators have to waste time and energy trying to figure out if L-1 or H-1B absences from the United States were "meaningfully interruptive"; the alien now only had to show that he or she was not here. Makes sense, so much so that you wonder why someone did not think of it earlier. Well, they didn't and, even if they had, with *Izumi* having defanged the Office of General Counsel, how would anyone make it stick? That same day, Mr. Divine designated another decision out of the California Service Center, *Matter of ___________, WAC 02 282 54013, 2005 WL 1950775 (January 12, 2005)* [8] that, at long last, made it clear that, at least so far as the USCIS is concerned, *there can be no adjustment of status portability without an approved I-140 immigrant petition; by itself, keeping an adjustment case alive for 180 days is not enough. Whether we agree or disagree with this interpretation, Mr. Divine has finally and thankfully given us one. Now we have something to guide us.* Subsequently, on January 11, 2006, Mr. Divine again exercised his authority as USCIS Acting Deputy Director to designate the decision of the Administrative Appeals Office in *Matter of Chawathe* [9] so that lawyers and adjudicators would now be able to determine if an alien worked for an American firm or corporation for purposes of avoiding disruption of residence in the naturalization context. Divine sought results, correct decisions correctly arrived at. He was, as any skilled advocate must be, interested not in making law but solving problems. Until he acted, it was virtually impossible for aliens who worked for publicly-traded companies from proving the nationality of their employer. [10]

Precedent tells those who drive what the rules of the road are. That is Robert Divine's great achievement. Acting not to exalt the power of his office or create new theories, he has restored clarity and stability to important questions of law at a time when both qualities were sorely lacking. The fact that he has not been on a crusade to vanquish the ghost of *Izumi* makes the practical import of his having done precisely that no less telling. The immigration bar and the USCIS need each other; neither benefits over the long run if confrontation, not cooperation, rules the day. Those who work in the trenches of our Service Centers and decide these cases for a living have a right to know, particularly in the absence of regulation, what the legal position of the USCIS is on questions that come before them .The fact that Robert Divine has only acted with utmost care is less important than the mechanism he has established despite *I*zumi*,* a way around chaos that will be there for future USCIS policymakers to use with greater frequency as the needs of the moment and the interests of the Agency dictate.

This is not necessarily an ideal state of affairs. There is no opportunity for public notice and comment. Concerned interest groups will not feel a sense of ownership in a rule of law they received but did not help to create. Given the breakdown in the traditional regulatory process that has plagued the USCIS and the legacy INS , it would serve the national interests better if the USCIS leadership trusted the American public and the immigration bar, not to mention themselves and their own adjudicators, enough to invoke the Negotiated Rulemaking Act of 1990 [11]. Allowing all concerned factions to sit at the same table and work together to craft the rules by which they would then have to live would diminish the need for and number of public comments following the promulgation of a proposed rule. Other benefits must surely follow. Negotiated rulemaking would shorten the notice and comment period, limit the substantive changes necessary before the rule goes "live" and virtually eliminate the prospects for litigation that

sought to challenge the rule itself. [12] If Mr. Divine and his colleagues doubt that negotiated rulemaking would work, perhaps they would take time to examine the congressional findings that accompanied the Negotiated Rulemaking Act; there, they will soon find that "reg neg", as it is affectionally called by its growing army of devotees, offers an unparalleled opportunity for civic involvement and the amelioration of highly polarized issues that had proven stubbornly resistant to solution through traditional rulemaking. Yet, until that enlightened day of deliverance arrives, we have to muddle along as best we can using the tools at our disposal. Having restored the relevancy of precedent, Robert Divine has given us a great big one whose careful deployment deserves the hearty hosannas of good men and women everywhere.

Endnotes

[1]Matter of Izumi A 76 426 873 (Decided by Associate Commissioner, Examinations, July 13, 1998)

[2] While allowed in regulation, oral argument rarely plays a role in AAO decision making. That it did here is a sure sign that *Izumi* was a big deal.

[3] See Matter of Izumi, slip op. at 20.

[4] Id. *at 27.*

[5] Matter of Izumi: Why All Immigration Lawyers Should Be Worried (AILA InfoNet Doc. 98081840 posted on Aug. 18, 1998).

[6] See 83 Interpreter Releases 794-795(April 24, 2006). All precedent decisions can be found on the USCIS website at http://www.uscis.gov/graphics/lawsregs/decisions.htm.

[7] See Memorandum from Michael Aytes, Acting Assoc. Comm'r for Domestic Operations, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (Oct.21, 2005) reprinted in 10 Bender's Immigration Bulletin* 1810, 1811 (Appendix B, Dec. 4, 2005).

[8] See 82 Interpreter Releases 1795 (Nov. 7, 2005) and 7 Immigration Business News & Comment 245, 246-247(Dec. 1, 2005).

[9] Matter of Chawathe, A74 254 994 (AAO, January 11, 2006). Both the decision and Acting Deputy Director Divine's designation of it as precedential are reprinted at 11 Bender's Immigration Bulletin 191-201 (Appendix C, Feb. 15, 2006) and at 83 Interpreter Releases 225-232 (Jan. 30,2006)(Appendix II).

[10] Matter of Warrach, 17 I&N Dec. 285, 286-87 (Reg. Comm.1979) tried to solve the problem but it was as clear as mud. Under the *Warrach* test, the nationality of a company was determined by the nationality of those who owned 51% or more of its stock. However, since this changed every second of every hour of each trading day when Wall Street was open, nobody could figure this out. *Chawathe* gives us something that mere mortals can use, so that your client can file an N-470 to protect his naturalization case while working overseas if his or her company was both incorporated in the United State*s* and traded its stock exclusively on US markets. Only if this more flexible standard could not be met would it be necessary to crack the Da Vinci code and interpret *Matter of Warrach.*

[11] 5 U.S.C. Sec. 561-570. For an in-depth examination of negotiated rulemaking and its many virtues, *See* Gary Endelman, *Go As Far As You Can: How Negotiated Rulemaking in Immigration Benefits America,* 8 Bender's Immigration Bulletin 1110-1115 (July 1, 2003).

[12] So rare is it for a negotiated rule to be challenged in the courts that there is only one reported precedent . *U.S.*A. *Group Loan Services Inc. v. Riley,* 82 F.3d 708(7th Cir. 1996)(discussing student loan servicer's complaint that the Department of Education negotiated in bad faith).

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12. Ombudsman Khatri Delivers Annual Report

The Citizenship and Immigration Services Ombudsman, Mr. Prakash Khatri, addressed Congress on June 29, 2006 in his third Annual Report. Covering a one-year reporting period from June 1, 2005 through May 31, 2006 , the report highlights various problems that individuals and employers encountered when dealing with the USCIS, as well as suggestions for resolving those issues in the upcoming year.

The Ombudsman reports that one USCIS ongoing endeavor is the management of its limited fee-funded operating budget, which is affecting the agency's ability to respond in a timely fashion to customer needs. Recovering most of its operating costs by charging applicant fees for USCIS services, the agency struggles to make ends meet. The budget is further strained by the free services it provides, including the asylum, refugee, and military naturalization programs. As any other large-scale organization, USCIS is in need of major reorganization so that it can operate efficiently, and as it is required to do, clear its application backlogs. Specifically, USCIS must improve its approach to accepting and processing immigration benefit petitions and applications.

Besides budget constraints, another one of the current challenges facing USCIS are prolonged processing times and backlogs, which are caused by lengthy background security checks, archaic paper-based processing systems, and staffing/training shortages. The costly processing of interim benefits is another prevalent problem; these costs are passed along and made too expensive for legitimate applicants while somehow the interim benefits remain accessible to ineligible applicants. Finally, because USCIS is unable to quantify its employment-based green card application workload, a greater number of applicants have been allowed to file than the number of available green cards for the fiscal year.

The Annual Report also includes twenty-eight formal recommendations to ameliorate these above-mentioned dilemmas. For example, to reduce the excessive backlogs, the Ombudsman recommends up-front processing of immigration benefits first for family-based adjustment of status applications. His rationale for this suggested change is rooted in an enhancement of security, process integrity, customer service, and overall USCIS efficiency.

Furthermore, the Report covers the various benefits of the Dallas Office Rapid Adjustment (DORA) Green Card Program. Some of these benefits include: reduced processing time from two or more years to ninety days or less, fewer ineligible applicants, less costs and improved customer service. Also, for most applicants, DORA will completely eliminate the need for interim documents.

Also highlighted in the report is the expansion of services to individuals and employers that will lead to improved communications between them and USCIS. One way to accomplish this, according to the Ombudsman, is to educate the USCIS officers on the organization's mission and methodology for referring inquires. Also, more effective data collection processes and analysis systems are other solutions so that the transmission of case problem information will be more efficient.

As for the next reporting period, the Report identifies some of the Ombudsman's areas of focus. Major systematic issues that affect individuals and employers desiring USCIS services are an example. Other topics of interest for the following fiscal year are revenue and funding issues, which encompass identifying problems and solutions. The Ombudsman also hopes to explore the development of a "Virtual Ombudsman" system, enabling the public to directly communicate with him online. In addition to these initiatives, the Ombudsman will persist in assisting individuals and employers with problems they face when interacting with USCIS, as well as maintain security, customer service, and efficiency as priorities.