

Siskind's Immigration Bulletin –  
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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>.

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1. Openers

Dear Readers:

While there is not a lot of news on the legislative front to report this week, we have completed our summary of the 796 page comprehensive immigration reform bill that passed the Senate in late May. Go to the front page of our web site at [www.visalaw.com](http://www.visalaw.com) for a link to this special article. At this point, the House has yet to name its conferees to work on a deal with the Senate and members of both houses are fighting over procedural questions. But we will report on developments as they arise.

There were two key developments we report on this week, however. First, the H-1B cap was hit on June 1<sup>st</sup>. We reported this news on our blog just moments after the information was released. If you want to keep up to date with these kind of developments instead of waiting for the newsletter, go to [www.visalaw.com/blog.html](http://www.visalaw.com/blog.html). If you subscribe to an RSS reader, you can add our blog to your feed. The cap caught many by surprise since USCIS' count jumped by about 10,000 in just a day. How did this happen? Unfortunately, USCIS had applications piling up and they were under-reporting application receipts. Still, the cap was hit more than two months earlier than last year highlighting just how inadequate current numbers are for our economy. We provide a complete overview of what the cap means in a special bonus ABCs article on the H-1B cap.

The other important news of the last few days is the 9<sup>th</sup> Circuit Court of Appeals throwing out several physician National Interest Waiver regulations. The case was won by my friend Carl Shusterman's firm and to them I want to offer hearty congratulations. In our second ABCs article, you can find out about those changes.

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In firm news, next week we're off to the American Immigration Lawyers Association annual conference in San Antonio. Several of our attorneys will be on panels at the big meeting. David Jones will be on the technology panel this year. Lynn Susser will be on a basics panel on adjustment of status versus consular processing. I'm moderating a panel for Immigration Tracker on requests for proposals and we'll have in house counsel from places like Coca Cola, Nike and the Mayo Clinic telling how they work with outside counsel. I'm looking forward to seeing many of you at the big event.

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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: National Interest Waivers for Physicians

This week, the Ninth Circuit Court of Appeals ruled that several USCIS regulations governing physician national interest waivers were "ultra vires". In other words, they reached farther than what Congress intended. We thought that given the court's ruling, we would focus on that special green card category in this week's newsletter.

### **What is a National Interest Waiver?**

Aliens of exceptional ability and aliens holding advanced degrees in professional fields may apply for green cards through the second-preference employment category (EB-2). While a

labor certification is generally required for this category, this requirement is waived if an applicant can demonstrate that granting the EB-2 petition is in the national interest.

There are two kinds of national interest waiver (NIW) applications available: the standard case and the physician NIW. In standard NIW cases, rftf there is no formal rule defining what constitutes "national interest", court decisions have established a list of factors that show the permanent resident's admission would be in the national interest:

- The alien's admission will improve the U.S. economy;
- The alien's admission will improve wages and working conditions for U.S. workers;
- The alien's admission will improve educational and training programs for U.S. children and under-qualified workers;
- The alien's admission will improve health care;
- The alien's admission will provide more affordable housing for young, aged, or poor U.S. residents;
- The alien's admission will improve the U.S. environment and lead to more productive use of the national resources; or
- The alien's admission is requested by an interested U.S. government agency.

### **How is a physician NIW different from a standard NIW?**

On November 12, 1999, President Clinton approved enactment of the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, also known as the Nursing Relief Act. Section 5 of this act amends section 203(b)(2) of the Immigration and Nationality Act by adding a new subparagraph, which establishes special rules for requests for a national interest waiver that are filed by or on behalf of physicians. These regulations became effective October 6, 2000.

To be eligible for a physician NIW, the foreign physician must:

1. Agree to work full-time in a clinical practice for the period fixed by the statute. For most cases, the required period of service is 5 years; however, those who filed an immigrant visa petition before November 1, 1998 are required to perform only 3 years of service. The beginning of the five year period varies depending on whether the applicant previously secured a J waiver based on service in an underserved area or not.
2. Work in one of the following medical specialties: family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry.
3. Serve either in a Health Professional Shortage Area (HPSA), Mental Health Professional Area (MHPSA – for psychiatrists only), a Medically Underserved Area (MUA), or a Veterans Affairs facility.
4. Obtain a determination from a federal agency or a state department of health that has knowledge of the physician's qualifications, which states that the physician's work is in the public interest.

### **How does a physician apply for an NIW?**

There are several steps in the application process. Because the process of obtaining a letter from either a state department of health (if the physician will be working in a HPSA, MHPSA or MUA) or from the Department of Veterans Affairs demonstrating how the work is in the national interest can take time, applying for this letter is usually the first step.

A physician applying through the Department of Veterans Affairs should apply through the VA facility where he or she is or will be employed.

A physician who will be employed in a HPSA, MHPSA or MUA must contact the state department of health in the state where the practice site is located. Each state has its own procedures for applying for the letter, which can be viewed in the chart at <http://www.visalaw.com/IMG/NIW.html>.

The next step is to apply for the NIW with USCIS. The physician must submit the following evidence with Form I-140. For physicians who plan to serve at more than one practice site, the following evidence must be submitted for each site:

1. A full-time employment contract (issued and dated within 6 months prior to the date the petition is filed) for the required period of clinical medical practice (5 or 3 years, depending on the date the application is filed), or an employment commitment letter from a Veterans Affairs (VA) facility.
2. If the physician will establish his or her own practice, the physician must submit a sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.
3. Evidence that the physician will provide full-time clinical medical service:
  - a. In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or
  - b. In a facility under the jurisdiction of the Secretary of VA.
4. A letter (issued and dated within 6 months prior to the date on which the petition is filed) from the Department of Veterans Affairs or a state department of health attesting that the physician's work is or will be in the public interest.
5. Evidence that the physician has passed a U.S. medical licensing examination and is competent in oral and written English.
6. If the physician was a J-1 nonimmigrant who received medical training in the United States, he or she must also provide a copy of the USCIS approval notice of the J-1 visa waiver.

### **How long does the physician have to complete the NIW service requirement?**

Physicians must work for an aggregate of five years of full-time service. USCIS regulations require completion of the five year period within a 6-year period following approval of the petition and waiver (within 4 years of approval of the petition and waiver for cases filed

before November 1, 1998). However, the 9<sup>th</sup> Circuit Court of Appeals overturned this requirement in *Schneider v. Chertoff* (2006).

**When does USCIS begin counting the physician's 5 or 3-year service requirement?**

For J-1 waiver recipients, the 5-year or 3-year period of medical service begins when the physician starts working for the petitioner in a medically underserved area. USCIS regulations mandate that for those who did not receive a J-1 waiver (such as H-1Bs and O-1 visa holders, the 6-year or 4-year period during which the physician must provide the service begins on the date that USCIS approves the Form I-140 petition and national interest waiver. However, the 9<sup>th</sup> Circuit Court of Appeals overturned this requirement in *Schneider v. Chertoff* (2006).

**Does time spent by the physician in J-1 nonimmigrant visa status count toward the mandatory service requirement?**

No. Any time spent by the physician in J-1 nonimmigrant status does not count toward either the 5 or 3-year medical service requirement.

**Does time spent fulfilling a J-1 visa waiver service requirement count towards the NIW service requirement?**

For physicians who have received a J-1 visa waiver, USCIS will calculate the 5-year or 3-year period of services of the national interest waiver beginning on the date the physician changed from J-1 to H-1B status. That is, a physician who is subject to the foreign residence requirement will not be required to first serve for 3 years to obtain that waiver and then to serve an additional 5 years to obtain adjustment of status based on the national interest waiver. The 9<sup>th</sup> Circuit decision in *Schneider v. Chertoff* (2006) extends this rule to other applicants as well.

**Can a physician relocate to another underserved area during the 5 or 3-year service period?**

Yes, physicians will not be prohibited from relocating to other underserved areas. However, any physician who wants to transfer to a different underserved area must submit a new I-140 petition that documents the reasons for the proposed relocation.

USCIS will take into account the amount of time the physician is engaged in full-time practices in calculating the aggregate medical service time in the underserved areas. For example, if the physician completed 3 years of service before approval of the second petition, then only 2 more years of service would be needed to qualify for adjustment of status. However, even though the physician is allowed to transfer to a new area, he or she still has the original 6 years to complete the service requirement. Regardless of the number of times a physician transfers to a new underserved area, he or she is granted just one 6-year period to complete the required service time.

**Will USCIS require a physician to transfer to another underserved area if the original area loses its designation as an underserved area?**

A physician is not required to relocate to another underserved area if the area in which the physician is practicing loses its designation as an underserved area. The purpose of the NIW rules is to allow more physicians to practice in underserved areas and become integral parts of the community.

### **When can the physician apply to adjust status?**

A physician can simultaneously file for adjustment of status to that of lawful permanent resident when filing the I-140 petition unless green card numbers are not immediately available based on backlogs in the EB-2 green card category.

The physician can also apply for an Employment Authorization Document (EAD) at the time of filing the adjustment petition. This relieves the physician of having to maintain any type of valid nonimmigrant status prior to the final adjudication of the adjustment of status application. The physician may also apply for advance parole, so he or she can travel outside the U.S. while the adjustment application is pending. Note, however, that the physician may have an independent requirement to maintain H-1B status as part of a J-1 waiver service obligation.

### **Will USCIS hold open an adjustment of status application for the aggregate 5 or 3-year period?**

USCIS will not make a final determination on any adjustment of status application submitted by a physician practicing medicine full-time in a medically underserved area until the physician has had the opportunity to prove that he or she has worked full-time as a physician for an aggregate of 5 or 3 years, depending on the application filing date.

Upon receipt of the adjustment application on Form I-485, USCIS will note the date the physician began medical service, provide the physician with a list of evidence that must be submitted after two and six years, and a projected timeline noting the dates by which the physician must send evidence to USCIS.

Under USCIS regulations, physicians with the 5-year service requirement must make an initial submission of evidence no later than 120 days after the second anniversary of the approval of the immigrant petition, (Form I-140). The physician must document at least 12 months of qualifying employment during the first 2-year period. At the end of the physician's four-year balance, evidence must be submitted that demonstrates employment for the final years of the 5-year aggregate service requirement. Because the 9<sup>th</sup> Circuit threw out the requirement to complete service in a six year period in *Schneider v. Chertoff* (2006), it is not clear whether USCIS will have to drop the progress requirement.

Alien physicians with the 3-year service requirement will only be required to submit evidence once, at the conclusion of the 3-years aggregate service.

### **What evidence must be submitted to prove that the physician has been practicing in an underserved area?**

As evidence, the physician must submit individual tax return documents, and documentation from the employer attesting that the physician has in fact performed the required full-time clinical medical service. This attestation must specify the date that the physician began medical service in the practice area or facility and state that full-time medical service has been rendered during the two years. Any breaks in medical service should be noted.

If a physician obtained the NIW based on his or her plan to establish his or her own practice, the physician must submit documentation proving he or she did so, including proof

of the incorporation of the medical practice (if incorporated), business licenses, and business tax returns.

**Do the adjustment of status filing requirements for NIW physicians differ from other adjustment of status applications?**

Yes. Since USCIS cannot make a final adjudication on a physician's adjustment of status application until the physician has submitted evidence documenting the medical service in a shortage area or areas, there are two changes in the adjustment filing procedures.

First, physicians will not be scheduled for fingerprinting at an Application Support Center until he or she submits evidence documenting the completion of the required years of service. Second, physicians will not submit the medical examination report at the time of filing for adjustment. Rather, the medical report is submitted with the documentary evidence noting the physician's fulfillment of the 5 or 3-year medical service requirement.

**What action will USCIS take if the physician does not submit the required evidence needed to complete the adjustment process?**

USCIS regulations state that if a physician fails to file proof of his or her completion of the service requirement in a timely fashion, the agency will deny the application for adjustment of status and revoke approval of the Form I-140. However, USCIS has yet to announce how they will modify their requirements in light of the new court case throwing out the regulation on which this requirement is based.

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3. The ABCs of Immigration: The H-1B Cap

On October 1, 2003, the allotment of H-1B visas provided annually by Congress dropped from 195,000 to 65,000. Out of that number, 6,800 are reserved for the H-1B1 program for nationals of Chile and Singapore. Numbers not used of that 6,800 (which will likely be several thousand) will be made available in the 45 day period beginning October 1<sup>st</sup>.

On June 1, 2006, USCIS announced that it had received enough applications to meet the 2007 cap (which covers the fiscal year running from October 1, 2006 to September 30, 2007). The new cap will begin on October 1, 2006, and until then it will be impossible to obtain new H-1B visas for cap subject employees except for visas leftover from the H-1B1 program. USCIS will describe the process for distributing any reallocated numbers in a future announcement.

**Who is actually subject to the cap?**

Not every H-1B applicant is subject to the general cap. Visas will still be available for applicants filing for amendments, extensions, and transfers unless they are transferring from an exempt employer or exempt position and were not counted towards the cap previously.

The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Note that the statute states that applicants who work AT such institutions are covered so individuals employed by entities other than these institutions but who provide services at the qualifying institution should be cap exempt. An example would be a physician employed by a medical group who serves patients at an exempt university hospital.

Physicians receiving waivers of J-1 home residency requirements as a result of agreeing to serve in underserved communities are exempt. Also, graduates of US masters and doctoral degree programs draw numbers from a "bonus" allotment of 20,000 visas (which will probably also run out in the next few months). As noted above, nationals of Singapore and Chile draw from a separate cap of 6,800 (5,400 for Singapore and 1,400 for Chile).

**When was the last time the H-1B cap was hit?**

The H-1B cap was last hit on August 12, 2005 for the 2006 fiscal year.

**What will happen to petitions that were not filed in time?**

All applications received on May 25, 2006 or earlier will be processed. For applications received on May 26, 2006, USCIS will apply a computer-generated random selection process. According to USCIS, the process will randomly select the exact number of petitions from the day's receipts needed to meet the cap.

Aside from the randomly selected cases received on May 26<sup>th</sup>, all cases filed on that date or later that are subject to the H-1B cap will be returned. Returned petitions will be accompanied by the filing fee.

**Can an applicant re-submit an H-1B application?**

Petitioners may re-submit their petitions when H-1B visas become available for FY 2007. The earliest date a petitioner may file a petition requesting FY 2007 H-1B employment with an employment start date of October 1, 2006 would be April 1, 2006.

**What will happen to the petitions that do not count against the cap?**

Petitions for current H-1B workers normally do not count towards the congressionally mandated H-1B cap. USCIS will continue to process petitions filed to:

Extend the amount of time a current H-1B worker may remain in the United States

Change the terms of employment for current H-1B workers

Allow current H-1B workers to change employers (unless the beneficiary is transferring from a cap exempt employer to a cap subject employer and was never counted towards the cap- in that case the beneficiary will be subject to the cap)

Allow current H-1B workers to work concurrently in a second H-1B position

USCIS will also continue to process petitions for new H-1B employment filed by applicants who will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization.

USCIS will also continue to process H-1B petitions for workers from Singapore and Chile consistent with Public Laws 108-77 and 108-78. And doctors working in underserved communities as a result of receiving a J-1 home residency requirement waiver sponsored by a state or federal agency will also be exempt from the annual cap. Nationals of Singapore and Chile and graduates of US masters and doctoral programs will be counted against caps specifically set aside for those groups.

**What will happen to F and J visa holders who are beneficiaries of an H-1B petition?**

In the past, INS (now USCIS) had safeguards in place for those with F and J visa status. According to 8 CFR Section 214.2 (f)(5)(vi), if it can be determined that all of the H-1B visas will be used before the end of the current fiscal year, the director of USCIS can extend the duration of status of any F-1 student if the employer has timely filed an application for change of status to H-1B. However, in recent years, USCIS has chosen not to exercise this discretion and no word has been given on whether they will or will not do so this year.

8 CFR Section 214.2(j)(1)(vi) has similar language regarding those in J status. If the USCIS director can determine that all of the H-1B visas will be used before the end of the current

fiscal year, the director of USCIS may extend the duration of status of any J-1 nonimmigrant if the employer has timely filed an application for change of status to H-1B. USCIS also declined this past year to exercise this discretion. There is no word yet on plans for this year.

**When will the numbers in the new 20,000 “bonus” cap be filled?**

According to USCIS, for fiscal years 2007, USCIS has received approximately 6,600 advanced degree worker H-1B petitions. Given the pace of usage, these visas should remain available for several more months. To qualify in this bonus cap, applicants must have earned a US master's or higher degree. Graduates of medical residency and fellowship programs do not qualify in this category.

**What will happen if I am not exempt from the cap and my current status expires after the numbers run out?**

In order to deal with the lack of H-1B visas, a number of alternate categories may be available including O-1 visas, TN visas for Canadians and Mexicans, E-1 and E-2 visas, L-1s and J-1 training programs. Many will look at pursuing graduate education in the US and then will be eligible for the bonus H-1B quota.

An option available to many this year will be filing for permanent residency. There are many work-related green card applications that can be filed without a labor certification. And the new PERM labor certification program means that employment authorization can be obtained much earlier. Now that concurrent filing of I-140 and adjustment of status applications area available, it may be possible to secure an employment authorization document in a matter of a couple of months after the green card process is started.

We advise people subject to the cap looking for alternative strategies to consult early with their immigration lawyers.

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4. Ask Visalaw.com

If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto: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 - I have a question for applying green card for my husband through "marriage green card to US citizenship" process. If I file the application for him in the States, can my husband then take one or several short trips out of the States during the waiting period?

A - Generally, you can request a travel document that would allow for multiple trips while waiting on the green card. This "advance parole" document is valid for up to a year and is usually valid for multiple entries. But you should always be careful if your husband has any status violations that could trigger a bar on coming back into the US. Your immigration lawyer can advise on whether that applies in your case.

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Q - Does voluntary departure wipe off unlawful presence?

A - No. Voluntary departure allows you to leave without having a deportation on your record and a potential long term bar associated with being deported. There is a narrow rule that excuses you from the unlawful presence bars if you get a voluntary departure order and leave prior to the ten year bar kicking in. You'll want to consult with an immigration lawyer to make sure you time it precisely right.

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Q - I have a 10 years B-2 valid visa and I am pending for the K-1 visa now. According to the law am I allowed to visit my fiancé in the US?

A - You can attempt to enter, but I think there would be a considerable likelihood that you would be turned away at the border. You would need to demonstrate your intentions of leaving the US upon completion of your authorized stay and that will be very tough given your expression of permanent residency intentions as part of the K visa.

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Q - I would like to know how the new five year J-1 visa rule will be affecting those who have come here in the old scheme. We (my wife and me) are here on J visas and would like to convert to H-1B.

A - The new rule does not change the procedures for converting to H-1B status. There is a provision that requires departing for two years if one wants to reenter on J-1 status, but this does not affect an H-1B application. Of course, a home residency requirement often attaches to a J-1 and this may still be an issue regardless of the new rule.

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Q - If a seventeen years old permanent resident leaves the US in the middle of the year because of a parental decision, being the other parent in her country and she spends six months as she turns eighteen and tries to enter the us, can she lose her permanent residence?

A - I've written an article at <http://www.visalaw.com/06feb1/2feb106.html> on this subject you may find helpful. I would guess that a joint custody arrangement would be an acceptable excuse for a long absence given that this is involuntary on your part. I would want to have a letter from one of your parents' lawyers explaining this to make available at the port of entry each time you arrive in the US. Also, children are usually given more latitude on this question. But as soon as you are an adult in a position to make your own decisions on where to reside, I would certainly try and spend most of your time in the US.

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## 5. Border and Enforcement News

Immigration and Customs Enforcement (ICE) agents concluded a year-long review of the Los Angeles Department of Water and Power (LADWP) with the arrests of five undocumented workers. A US Citizenship and Immigration Services (USCIS) release confirmed that none of the individuals had terrorist connections but will still be processed for deportation. Only one of the individuals faces the threat of a possible criminal prosecution for having allegedly made false claims about US citizenship. According to ICE,

the operation is part of ICE's long term goal of making sure that no undocumented immigrants have access to critical parts of America's infrastructure and secure government operations.

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According to an Immigration and Customs Enforcement release, ICE officials have arrested an Indiana stucco business owner on charges surrounding the hiring of undocumented immigrants. The case was opened in North Dakota where four undocumented immigrants were discovered by North Dakota Highway Patrol officers. Robert Adrian Porcisanu, the owner of Stucco Design, Inc., will be tried under allegations of conspiracy to harbor and transport immigrants and conspiracy to launder money as well as full charges of money laundering, harboring and transporting immigrants and issuing false statements. If convicted, Porcisanu will face up to forty years in prison and a fine of 1.5 million dollars.

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According to S. 2454, Title II, Section 230 the Department of Homeland Security (DHS) is trying to delay new legislative requirements that give the department 180 days to significantly increase the number of individuals who are included in the National Crime Information Center Database (NCIC). Prior to this point, only undocumented immigrants with final orders and warrants for their removal were included in the registry. DHS hopes that this new requirement will be dropped because of the strain it will place on their department and the enforcement issues that will arise out of such a large and varied addition to the NCIC.

Because of the wide spectrum of immigrants being represented in the NCIC, the Department of Homeland Security is concerned that law enforcement officers without a thorough knowledge of immigration law will be vulnerable to performing improper arrests and potentially face law suits for their actions. DHS also fears that the excess of unclear information will cause officers to lose faith in the NCIC. But, even if these issues were not of major concern, the Department of Homeland Security believes it improbable that they can update the National Crime Information Center Database within the time allotted.

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According to an Immigration and Customs Enforcement (ICE) press release, three undocumented immigrants have been arrested at Tyndall Air Force Base in Panama City, Florida. The three citizens of Mexico were doing scaffolding work through a subcontractor when they were discovered by military personnel. One of the immigrants now faces criminal charges for possession of a fake resident alien card while the other two await a hearing before an immigration judge to decide their fate.

The arrests are part of ICE's critical infrastructure protection mission, which seeks to prevent undocumented immigrants from working in sensitive areas of the government. The critical infrastructure protection mission is important to the Department of Homeland Security because of the risk that undocumented immigrants in particular pose to military and other secure areas in the US. More so than a US citizen, undocumented immigrants are vulnerable to being exploited by terrorists and other dangerous criminals. This action has been performed under the new Secure Border Initiative (SBI), which seeks to reduce undocumented immigration and remove undocumented immigrants already in the country.

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A Rhode Island woman was arrested by Immigration and Customs Enforcement (ICE) agents in Providence under allegations that she was in the business of selling false identification documentation to immigrants. The counterfeit documents, which included Resident Alien cards and Social Security cards, were sold for \$125 a pair. According to an ICE news release, the sales happened three times in a four month period. Creating and selling false identification is a felony. Despite the relative infrequency of transactions, the arrest displays the importance ICE is placing on stopping the illegal sale of immigrant documents.

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In Miami, a number of high priority immigrant criminals were turned over to special agent ICE forces. The criminals, who were wanted for a number of crimes including drug trafficking, murder and sexual battery on a child, are now being transferred to immigration courts to be tried for various crimes. Most of the individuals in custody came from Caribbean and South American nations, with the exceptions being a few immigrants from England and Romania.

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Immigration and Customs Enforcement (ICE) agents worked with Mexican authorities to recover a four-week-old baby who was being smuggled across the border for sale. The joint operation culminated in the arrest of the alleged mother Ana Luisa Hidalgo-Rivera and her accomplice Alex Hernandez. The operation was carried out with the help of an undercover investigative journalist who posed as the buyer. After the transaction was completed, all involved were arrested without complications. The criminal investigation was actually initiated by the television network Univision, who notified ICE when they gained sufficient evidence on the issue. ICE officials attributed the success of the operation to both Univision and the cooperation offered to ICE by the Mexican government. The baby is now being held by child protective services in Mexico.

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## 6. 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](mailto:mbjorne@msn.com).

Appeal of the Denial of Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to INA § 203 (b)(1)(C) (AAO, Jan. 2006) ownership and control by United States employer over the management operations of foreign entity is sufficient to establish qualifying relationship between the United States employer and the foreign entity under 8 C.F.R, § 204.5(j)(2).

Petitioner, the company engaged in international hotel operations, sought to employ the beneficiary as one of its subsidiary's *sous* chef. The director of Nebraska Service Center denied Petitioner's Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to INA § 203 (b)(1)(C) determining that Petitioner had not established a

qualifying relationship between itself and the foreign entity, and that Petitioner was not the same employer or an affiliate or subsidiary of the foreign entity as provided by 8 C.F.R. § 204.5 (j)(2). The director acknowledged that Petitioner owned and controlled the hotel, the beneficiary's proposed place of employment in the United States. However, the director determined that Petitioner had not established that he owned or controlled the beneficiary's place of foreign employment, and held only a lease on the foreign property. The director concluded that the beneficiary was an employee of an entity unrelated to Petitioner, and thus, had not been employed by the same employer, subsidiary or affiliate as required under regulation.

The Administrative Appeals Office (AAO) found that when the beneficiary was employed with the foreign entity his duties were subject to the management of Petitioner and Petitioner had the authority to hire and fire the beneficiary based on language contained in the management agreement between Petitioner and the foreign entity. AAO concluded that that Petitioner's right to hire and fire the beneficiary and to direct and control his duties was sufficient to establish the employer-employee relationship, even though the petitioner did not pay the beneficiary's salary. AAO concluded that Petitioner and the management company of the foreign entity owned and controlled by Petitioner were one and the same, found the existence of the qualifying relationship under 8 C.F.R, § 204.5(j)(2), and sustained the appeal .

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#### 7. Government Processing Times

There are new processing times for the following service centers:

Texas (5/15/2006): <http://www.visalaw.com/texas.html>

Nebraska 5/15/2006): <http://www.visalaw.com/nebraska.html>

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#### 8. News Bytes

The US State Department has issued a waiver of a Patriot Act provision to accommodate the unique situation of some Burmese refugees. Condoleezza Rice extended the waiver to over 9,000 Burmese nationals who were being prevented entrance into the US because they indirectly funded rebel groups. The Patriot Act rejects admission to any foreigner who has given aid to rebel groups, regardless of the group's ideologies or the individual's motives. It was concluded by the State Department that though the individuals did provide funding for rebel forces, they posed no security threat to the US or its citizens. According to an article by Rachel Swarns, this move has been welcomed by many, including the United Nations. Some critics reserve that the action has been a long time coming while others argue that the waiver is simply a legislative band-aid that does not address the real problem in US Foreign Policy. The waiver does not apply to a number of other foreigners who are in the same place as the new Burmese refugees, including close to a hundred and fifty Cubans.

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According to a United States Citizenship and Immigration Services (USCIS) bulletin, an influx of I-129 and I-140 forms have caused a backup in the two receiving service centers. This overload will cause a delay in processing times and will require patience from those individuals waiting on return notices. USCIS expects that, depending on the service, receipt issuing times could be as long as two weeks. Those individuals who requested Premium

Processing Service will have their requests processed within the usual 15 days.

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United States Citizenship and Immigration Services (USCIS) has appointed Jeff Conklin as their Chief Information Officer. Director Emilio Gonzales supported his nominee by pointing to Conklin's strong prior work credentials in technology fields and high level of accountability. Prior to being appointed Chief Information Officer, Conklin worked as the Director of Technology Services for the US Department of Education and headed up a number of information systems for the US Department of Defense. Conklin has served ten years in the Marines and graduated from the US Naval Academy.

\*\*\*\*\*

Secretary of State Condoleezza Rice announced the restoration of full diplomatic relations with Libya and subsequently the opening of a new embassy in Tripoli. A press report from the US Department of State pointed to their cooperation with the US in the fight against terrorism as a driving factor in the restoration of diplomatic ties between the two countries. Libya has been removed from the list of state sponsors of terrorism which means that its nationals will have access to visa options like third country processing.

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## 9. International Roundup

In Bandar Seri Begawan, twelve immigrants were arrested for overstaying or misusing temporary stay documentation. A few of the twelve were fined, while others were issued a special pass. Over half of the foreigners who were caught were working in the food industry. Two of those individuals were working in a food stall at the capital. Foreigners working in the food industry without proper documentation are a public threat because they have not received health certification. Most of the individuals apprehended by the Brunei police force were given minor fines or warnings, while a few still await processing.

\*\*\*\*\*

In Belgium, five churches are hosting undocumented immigrants in an effort to curb immigration policy. Protests against the current process for immigrant nationalization and sit-ins to demand naturalization are aimed at policy makers in Brussels, but appear to be falling on deaf ears. According to an article in Expatica News, the increasing protests have had an inverse effect on Interior Minister Patrick Dewael, who seems to be growing less sympathetic to the immigrant protestors.

A number of fasts have been denounced by Dewael, who views them as black mail, and churches who do not view the protests as being in line with their societal and theological goals. Despite negative feedback from the Interior Minister and other government figures, the protesters continue, hoping that their actions will lead to accelerated asylum laws and immigration reform that makes efficient pathways for long term residents to become full citizens in Belgium.

## 10. Legislative Update

According to AILA InfoNet, the Senate agreed to increase border security funding by 1.9 billion dollars. In exchange, the emergency defense funding was cut by an equal amount. The 59-39 vote came after an alternate proposal to increase border funding without decreasing defense funding was voted down by a slim margin.

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H.CON.RES.397 : Honoring 2006 Olympic team member Joey Cheek and recognizing the need to work with international partners to help bring an end to the ongoing genocide in Darfur region of Sudan and the suffering of children in Chad.

Sponsor: Rep Meeks, Gregory W. [NY-6] (introduced 5/2/2006) Cosponsors (21)

Committees: House International Relations

Latest Major Action: 5/2/2006 Referred to House committee. Status: Referred to the House Committee on International Relations.

H.RES.793 : Affirming that statements of national unity, including the National Anthem, should be recited or sung in English.

Sponsor: Rep Ryun, Jim [KS-2] (introduced 5/2/2006) Cosponsors (19)

Committees: House Judiciary

Latest Major Action: 5/2/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.RES.794 : Recognizing the 17th anniversary of the massacre in Tiananmen Square, Beijing, in the People's Republic of China, and for other purposes.

Sponsor: Rep Smith, Christopher H. [NJ-4] (introduced 5/3/2006) Cosponsors (8)

Committees: House International Relations

Latest Major Action: 5/3/2006 Referred to House committee. Status: Referred to the House Committee on International Relations.

H.R.5278 : To amend the Foreign Assistance Act of 1961 to assist Palestinian refugees in the West Bank and Gaza to move to post-refugee status, and for other purposes.

Sponsor: Rep Kirk, Mark Steven [IL-10] (introduced 5/3/2006) Cosponsors (13)

Committees: House International Relations

Latest Major Action: 5/3/2006 Referred to House committee. Status: Referred to the House Committee on International Relations.

H.R.5286 : To improve the "NEXUS" and "FAST" registered traveler programs.

Sponsor: Rep Slaughter, Louise McIntosh [NY-28] (introduced 5/3/2006) Cosponsors (4)

Committees: House Homeland Security

Latest Major Action: 5/9/2006 Referred to House subcommittee. Status: Referred to the Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity.

H.R.5292 : To exclude from admission to the United States aliens who have made investments contributing to the enhancement of the ability of Cuba to develop its petroleum resources, and for other purposes.

Sponsor: Rep Ros-Lehtinen, Ileana [FL-18] (introduced 5/4/2006) Cosponsors (16)

Committees: House Judiciary; House International Relations; House Financial Services; House Government Reform

Latest Major Action: 5/4/2006 Referred to House committee. Status: Referred to the Committee on the Judiciary, and in addition to the Committees on International Relations, Financial Services, and Government Reform, for a period to be subsequently determined by

the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

H.R.5308: To amend the Internal Revenue Code of 1986 to allow residents of border States a deduction for passport application fees.

Sponsor: Rep Poe, Ted [TX-2] (introduced 5/4/2006) Cosponsors (4)

Committees: House Ways and Means

Latest Major Action: 5/4/2006 Referred to House committee. Status: Referred to the House Committee on Ways and Means.

H.R.5335: -- Private Bill; For the relief of Tarveen Kaur Anand.

Sponsor: Rep Sherman, Brad [CA-27] (introduced 5/9/2006) Cosponsors (None)

Committees: House Judiciary

Latest Major Action: 5/9/2006 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

S.RES.458: A resolution affirming that statements of national unity, including the National Anthem, should be recited or sung in English.

Sponsor: Sen Alexander, Lamar [TN] (introduced 5/1/2006) Cosponsors (12)

Committees: Senate Judiciary

Latest Major Action: 5/8/2006 Passed/agreed to in Senate. Status: Resolution agreed to in Senate without amendment and with a preamble by Unanimous Consent.

S.2691: A bill to amend the Immigration and Nationality Act to increase competitiveness in the United States, and for other purposes.

Sponsor: Sen Cornyn, John [TX] (introduced 5/2/2006) Cosponsors (5)

Committees: Senate Judiciary

Latest Major Action: 5/2/2006 Referred to Senate committee. Status: Read twice and referred to the Committee on the Judiciary.

S.2693: A bill to prevent congressional reapportionment distortions.

Sponsor: Sen Burns, Conrad R. [MT] (introduced 5/2/2006) Cosponsors (None)

Committees: Senate Homeland Security and Governmental Affairs

Latest Major Action: 5/2/2006 Referred to Senate committee. Status: Read twice and referred to the Committee on Homeland Security and Governmental Affairs.

S.2795: A bill to exclude from admission to the United States aliens who have made investments contributing to the enhancement of the ability of Cuba to develop its petroleum resources, and for other purposes.

Sponsor: Sen Martinez, Mel [FL] (introduced 5/11/2006) Cosponsors (1)

Committees: Senate Banking, Housing, and Urban Affairs

Latest Major Action: 5/11/2006 Referred to Senate committee. Status: Read twice and referred to the Committee on Banking, Housing, and Urban Affairs.

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11. Notes from the Visalaw Blog

## **PROCEDURAL SNAG THREATENS IMMIGRATION BILL**

Opponents of the Senate's immigration bill have seized on an obscure constitutional argument to block movement of the comprehensive immigration reform bill. The Senate bill contains language calling for the creation of fees and authorizing appropriations and such spending clauses are supposed to originate in the House. House members are threatening to "blue slip" the bill and either force the Senate to go back and pass a new bill or kill the bill all together.

Democratic supporters of the bill are pointing out that the House has a history of waiving this rule and could proceed if they so wish. And the Democrats also are claiming that the constitutional clause being cited by opponents does not cover the Senate bill.

According to a Democratic Fact Sheet being distributed on Capitol Hill:

*The Court said it has interpreted this rule to mean that a statute that creates a particular governmental program and raises revenue to support that program, as opposed to one that raises revenue to support government generally, is not subject to the Origination Clause. [U.S. Constitution; United States v. Munoz-Flores]*

Democrats are also pointing out that the House could easily solve the problem by technically going to conference on the bill it passed last December. Republicans rejected this solution offered by Senator Reid on June 5th.

Interestingly, some Republicans are hinting that if the Democrats compromise on the estate tax repeal legislation, they might be willing to consider the two issues together. Senator Reid told Congressional Quarterly last week:

*"If they want to use another bill, a tax bill, instead of the House-passed immigration bill, then let them come to me with how they're not going to not have this as a Christmas tree of tax measures. It's up to them. They want to use a tax bill, let's see what they can come up with to protect the Senate's position on immigration."*

# posted by Greg Siskind @ 11:07 AM

## **Monday, June 05, 2006**

### **WHY NOT JUST SLAP A BAR CODE ON THEM?**

At first I thought **this Houston Chronicle** story was actually satire from The Onion, but it's actually true.

# posted by Greg Siskind @ 10:33 PM

## **Friday, June 02, 2006**

### **HATE GROUPS SEIZE ON IMMIGRATION ISSUE, PART 2**

A few weeks back I wrote about how many of the supposedly mainstream anti-immigration groups are populated by members of hate groups.

There's more documentation coming about the links between hate groups and the anti-immigration movement. I've been frustrated that the mainstream media has not been picking up on this story that has been well-documented by credible groups like the Southern Poverty Law Center. But **Time Magazine** is running a piece this week that provides a lot of information.

I also noticed a **story** in Alabama about the Ku Klux Klan using the immigration debate to attract members.

# posted by Greg Siskind @ 11:24 PM

### **USCIS EXPLAINS WEIRD H-1B COUNT TO AILA**

Immigration lawyers all over the country are trying to explain to clients today how exactly how the H-1B count jumped 12,000 in one day and hit the cap. We knew the numbers were starting to run low, but for 20% of the H-1B numbers to disappear in a day was simply unbelievable.

Well, the American Immigration Lawyers Association decided to investigate what happened and they reported today what they learned (and for those of you lawyers out there who are not AILA members but handle immigration cases (even occasionally), you are really missing out by not being an AILA member and are doing your clients a disservice in my opinion) :

*Questions are pouring in asking how it could be that on May 25th USCIS indicated that there were as many as 12,000 H-1B quota numbers available, and on May 26th, there were none. As of Wednesday morning, June 1st, USCIS had just finished data-entering cases that were received on May 25th, and began data-entering cases received on May 26th. During the entry of May 26th cases, the cap was reached, making it appear that 12,000 cases arrived overnight.*

*AILA has inquired into this oddity, and it appears that the problem lies in the processing of filings by the USCIS at the VSC. When the USCIS went to Bi-Specialization filing effective April 1, 2006, VSC was unable to handle the volume of cases it was receiving, because all I-129 case types were to be sent to the VSC, leading to data-entry and receipting backlogs from early on. VSC data-entry and receipting remained backlogged, leading to the lag between delivery of a petition to VSC and its entry into the system. As USCIS updated its cap-count reports, the volume of cases sent to VSC increased, further contributing to the backlog in data-entry and receipting.*

*The cap count reports posted by USCIS failed to mention that not all cases received had been input into the system, and that thus the counts did not include all cases received as of the report dates. Ultimately, the combination of the existing backlog in data entry and the volume of new cases delivered last week made it appear that 12,000 cases arrived overnight.*

# posted by Greg Siskind @ 9:36 PM

**Thursday, June 01, 2006**

## **SWIFTNESS OF H-1B CAP BEING REACHED ILLUSTRATES NEED FOR CONGRESSIONAL INTERVENTION**

It took only two months for the H-1B cap to be reached this year even with the addition of 20,000 visas set aside for graduate degree holders. Last year, the H-1B cap was reached on August 4th. In a Thomas Friedman's "flat world" one would think Congress would be rushing to pass legislation to welcome these critical brain workers into the country at a time when the US is competing to remain at the forefront of the world economy. But kneejerk protectionism still holds a many in its grip and Americans will be worse off as a result.

A lot of people don't realize that Congress could greatly alleviate the problem by passing the comprehensive immigration reform bill passed by the Senate last week. There are a number of provisions designed to make it easier for these outstanding workers to come to the US. One would raise the H-1B cap to 115,000 and provide further exemptions for graduate degree holders. Another would make the green card path for those workers easier. New F-4 and J-STEM visas would make it easier for graduate students in science, technology, engineering and math.

# posted by Greg Siskind @ 7:39 PM

## **BUSH STUMPS FOR IMMIGRATION REFORM**

President Bush **delivered a speech** to the US Chamber of Commerce calling on Congress to finish the job and pass an immigration bill.

*Congress is moving forward on immigration reform. The House started this debate by passing a bill that focuses on border security and interior enforcement. Then the Senate had its debate, and it passed a comprehensive bill that also includes a temporary worker program and a plan to resolve the status of illegal immigrants who are already in this country. And now the two versions must be worked out in a conference committee.*

*The House and Senate bills will require effort and compromise on both sides. It's a difficult task. Yet the difficulty of this task is no excuse for avoiding it. The American people expect us to meet our responsibility and deliver immigration reform that fixes the problems in the current system, that upholds our ideals and provides a fair and practical way forward.*

# posted by Greg Siskind @ 7:08 PM

## **H-1B CAP REACHED**

USCIS has just released the following announcement:

# ***USCIS REACHES H-1B CAP***

Washington, D.C. - U.S. Citizenship and Immigration Services (USCIS) announced today that it has received a sufficient number of H-1B petitions to meet the congressionally mandated cap for fiscal year 2007 (FY 2007). The "final receipt date" for H-1B petitions subject to the FY 2007 annual cap was May 26, 2006. Affected H-1B petitions received on that date will be subject to the random selection process described below. H-1B petitions subject to the FY 2007 annual cap that are received by USCIS after the "final receipt date" will be rejected. Additional information regarding the specific number of H-1B petitions processed is available at: [www.uscis.gov/graphics/services/tempbenefits/cap.htm](http://www.uscis.gov/graphics/services/tempbenefits/cap.htm).

**Cap and Set Asides** : Congress has established an annual fiscal year limitation of 65,000 on the number of available H-1B visas, commonly referred to as the "H-1B cap." Under the terms of the legislation implementing the United States-Chile and United States-Singapore Free Trade Agreements, 6,800 of the 65,000 available H-1B visas are annually set aside for the Chile/Singapore H-1B1 program. As a result of reserving 6,800 H-1B1 visas for FY 2007, the H-1B cap for that fiscal year is 58,200. However, USCIS has added back to the H-1B cap 6,100 unused FY 2006 H-1B1 visas, for a total of 64,300, as described below.

Unused Chile/Singapore visa numbers for a particular fiscal year are to be used within the first 45 days of the next fiscal year. As FY 2007 H-1B petitions are approved for start dates beginning no earlier than the first day of fiscal year 2007 and reasonable anticipated usage of approved H-1B petitions for any 45-day period exceeds 8,000, USCIS has incorporated its reasonable projection based on H-1B1 usage to date that 700 H-1B1 visa numbers will be used in FY 2006 into the FY 2007 H-1B cap count by adding the remaining 6,100 unused H-1B1 visas back into that count, resulting in a total cap of 64,300 FY 2007 H-1B visas approvable. Because unused H-1B1 visas for FY 2006 have been already allocated in this manner, there will be no additional later H-1B filing season to use these visas. The 6,800 visas reserved from the FY 2007 H-1B count for FY 2007 H-1B1 purposes are anticipated to be handled in a similar manner with respect to the FY 2008 H-1B cap count during calendar year 2007. This allocation of FY 2006 H-1B1 visas based upon reasonable projections of usage to the end of the fiscal year will not affect the availability of H-1B1 visas in any way; they will continue to be fully available, with any year-end difference between actual and projected usage expected to be minimal.

**Cap Procedures** : In accordance with the procedures announced in the *Federal Register* at 70 FR 23775 (May 5, 2005) (Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004) USCIS has implemented the following process for handling H-1B petitions subject to the FY 2007 cap:

- USCIS closely monitored FY 2007 H-1B filings and used projections to determine the date on which it received the number of petitions necessary to reach the Congressionally mandated cap.
- USCIS determined that the Congressionally mandated cap had been exceeded on May 26, 2006, the "final receipt date."
- USCIS will subject H-1B petitions received on the "final receipt date" to a computer-generated random selection process. This process will enable USCIS to

apply the remaining number of available H-1B visas to petitions received on that day.

- Cap subject H-1B petitions that are not randomly selected in the process described above will be rejected and returned along with the filing fee(s).
- Petitioners may re-submit the petitions when H-1B visas become available for FY 2008.
- The earliest date for which a petitioner may file a petition requesting FY 2008 H-1B employment with an employment start date of October 1, 2007, is April 1, 2007.

**Current H-1B Workers** : Petitions filed on behalf of current H-1B workers do not count towards the Congressionally mandated H-1B cap. Accordingly, USCIS will continue to process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States.
- Change the terms of employment for current H-1B workers.
- Allow current H-1B workers to change employers.
- Allow current H-1B workers to work concurrently in a second H-1B position.

**Cap-Exempt Petitions** : As directed by the H-1B Visa Reform Act of 2004, the first 20,000 H-1B petitions filed on behalf of aliens with U.S.-earned masters' or higher degrees will be exempt from any fiscal year cap on available H-1B visas. For FY 2007, USCIS has received approximately 5,830 exempt petitions.

USCIS also notes that petitions for new H-1B employment are exempt from the annual cap if the aliens will be employed at institutions of higher education or a related or affiliated nonprofit entities, or at nonprofit research organizations or governmental research organizations. Thus, petitions for these exempt H-1B categories may be filed for work dates starting in FY 2006 or 2007.

**H-1B in General**: U.S. businesses utilize the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. As part of the H-1B program, the Department of Homeland Security (DHS) and the Department of Labor (DOL) require U.S. employers to meet specific labor conditions to ensure that American workers are not adversely impacted, while the DOL's Wage and Hour Division safeguards the treatment and compensation of H-1B workers.

# posted by Greg Siskind @ 3:02 PM

**Tuesday, May 30, 2006**

## **FRIST PUSHES FOR QUICK ACTION IN CONFERENCE; PRESIDENT PRAISES SENATE**

Bill Frist (R-TN), the Senate Majority Leader, **urged** the House-Senate conference committee to act quickly to approve an immigration bill and not wait until after the November election.

Congressman James Sensenbrenner, the House Judiciary Committee chair who is the chief sponsor of the immigration enforcement bill that passed the House in December, **told** NBC's Meet the Press "Amnesty is wrong and we should not pass it."

In the mean time, President Bush issued a news release praising the Senate for passing its immigration bill:

*I commend the Senate for passing bipartisan comprehensive immigration reform before the Memorial Day deadline set by its Leaders. I appreciate the hard work of the Leadership and Senators on both sides of the aisle. An effective immigration reform bill will protect our borders, hold employers to account for the workers they hire, create a temporary worker program to take pressure off our border and meet the needs of our growing economy, address the issue of the millions of illegal immigrants already in our country, and honor America's great tradition of the melting pot. The House of Representatives began a national dialogue by passing an immigration bill last year. Now that the Senate has acted, I look forward to working together with both the House of Representatives and the Senate to produce a bill for me to sign into law.*

# posted by Greg Siskind @ 9:26 AM

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## 12. State Department Visa Bulletin

### **IMMIGRANT NUMBERS FOR JUNE 2006**

#### **A. STATUTORY NUMBERS**

1. This bulletin summarizes the availability of immigrant numbers during June. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by May 10th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

#### **FAMILY-SPONSORED PREFERENCES**

First: Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third: Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

**EMPLOYMENT-BASED PREFERENCES**

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Schedule A Workers: Employment First, Second, and Third preference Schedule A applicants are entitled to up to 50,000 "recaptured" numbers.

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	22APR01	22APR01	22APR01	01JAN92	01SEP91
2A*	22APR01	22APR01	22APR01	22JUL99	22APR01
2B	01AUG96	01AUG96	01AUG96	22OCT91	08JUL96
3rd	01AUG98	01AUG98	01AUG98	01MAR93	01JUL88
4th	01MAR95	01MAR95	15AUG94	15AUG93	01NOV83

\*NOTE: For June, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 22JUL99. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 22JUL99 and earlier than 22APR01. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

Employment -					
Based	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	01JUL05	01JAN06	C	C
2nd	C	01JUL04	01JAN03	C	C
3rd	01JUL01	01JUL01	08APR01	22APR01	01JUL01
Schedule A Workers	C	C	C	C	C
Other Workers	U	U	U	U	U
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

#### **B. DIVERSITY IMMIGRANT (DV) CATEGORY**

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. This reduction has resulted in the DV-2006 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For June, immigrant numbers in the DV category are available to qualified DV-2006 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Region Listed Separately	
AFRICA	AF 23,500	Except: Ethiopia 20,400 Nigeria 13,400
ASIA	AS 6,700	
EUROPE	EU 14,200	
NORTH AMERICA (BAHAMAS)	NA 12	
OCEANIA	OC 830	
SOUTH AMERICA, and the CARIBBEAN	SA 1,375	

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2006 program ends as of September 30, 2006. DV visas may not be issued to DV-2006 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2006 principals are only entitled to derivative DV status until September 30, 2006. DV visa availability through the very end of FY-2006 cannot be taken for granted. Numbers could be exhausted prior to September 30.

**C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN JULY**

For July, immigrant numbers in the DV category are available to qualified DV-2006 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Region listed Separately	
AFRICA	AF 27,850	Except: Ethiopia 22,800 Nigeria 14,675
ASIA	AS 7,225	
EUROPE	EU 15,250	
NORTH AMERICA (BAHAMAS)	NA 13	
OCEANIA	OC 930	
SOUTH AMERICA, and the CARIBBEAN	SA 1,610	

**D. RETROGRESSION OF FAMILY F2A CUT-OFF DATE FOR JUNE**

For JUNE, it has been necessary to retrogress the F2A cut-off date for all chargeability areas except Mexico. This has been done in an effort to hold the issuance levels within the applicable annual numerical limits for the affected categories. Further retrogression of the F2A category cut-off date is likely for July.

**E. THE EMPLOYMENT THIRD PREFERENCE "OTHER WORKER" CATEGORY BECOMES "UNAVAILABLE" FOR JUNE**

Continued heavy demand for numbers (particularly for adjustment of status cases at USCIS offices) will result in the 5,000 annual numerical limit being reached during the month of May. Therefore, it has been necessary to make the Employment Third preference "Other Worker" category "unavailable" for June, and it will remain so for the remainder of the fiscal year.

**F. OBTAINING THE MONTHLY VISA BULLETIN**

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is: <http://travel.state.gov>

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

[listserv@calist.state.gov](mailto:listserv@calist.state.gov)

and in the message body type:

Subscribe Visa-Bulletin First name/Last name  
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address:

[listserv@calist.state.gov](mailto:listserv@calist.state.gov)

and in the message body type: Signoff Visa-Bulletin

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

[VISABULLETIN@STATE.GOV](mailto:VISABULLETIN@STATE.GOV)

(This address cannot be used to subscribe to the Visa Bulletin.)

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13. USCIS Issues Memorandum Concerning FBI Name Check Delays in Relation to Naturalization Applications

USCIS has issued a memorandum concerning FBI Name Check delays in relation to naturalization applications. In addition to requesting fingerprint checks, USCIS routinely submits an applicant's information to the FBI for an additional background check known as

the name check. The overwhelming majority of these name checks are completed within a few weeks of the request and virtually all of the name checks are completed within six months. However, in some instances the name check can take upwards of several years to resolve. The delay in this underlying process results in a delay to the naturalization application, as the application cannot be adjudicated until all background checks have been completed.

When a naturalization application takes longer than 120 days to adjudicate from the date of the naturalization examination, an applicant is permitted to bring a lawsuit in federal court and a judge can determine the outcome of the application (INA Section 336(b)). Applicants have recently been filing claims under this section of law where they have completed their naturalization interview, more than 120 days have passed since the interview, and where the application is still pending due to a delay with the FBI name check.

The USCIS memo points out that courts have not been approving naturalization applications where all background checks have not been resolved and have only occasionally given the FBI and USCIS deadlines where the delay has been upwards of four years. To prevent further filings under this section, USCIS will now refrain from scheduling naturalization interviews until all background checks, including the FBI name check, are completed. As for 336(b) actions that will be filed or are already pending, USCIS states that it will vigorously defend their position and will remain confident that the courts will not approve applications that have not completed the necessary security checks.

The memorandum notes that this will not eliminate mandamus actions on FBI name check delays, but will act to limit 336(b) filings.