

Siskind's Immigration Bulletin

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Published by Greg Siskind, partner at the Immigration Law Offices of Siskind, Susser, Haas & Devine, Attorneys at Law; telephone: 800-748-3819, 901-737-3194 or 615-345-0225; facsimile: 901-737-3837 or 615-843-0424, email: gsiskind@visalaw.com, WWW home page: <http://www.visalaw.com>. SSHD serves immigration clients throughout the world from its offices in the US, Canada and the People's Republic of China. To schedule a telephone or in-person consultation with the firm, go to <http://www.visalaw.com/intake.html>.

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1. MESSAGE FROM SISKIND, SUSSER, HAAS & DEVINE

Okay, Okay! We know we're late. But we have a good excuse. On October 21st, the President signed a 4,000 Omnibus Budget Bill that contained a number of incredibly important immigration provisions. The relevant provisions include a lifting of the H-1B cap and a revamping of the H-1B requirements, amnesty for nearly 50,000 Haitians, enactment of the UN Convention Against Torture, a delay in the implementation of the entry/exit control system at the nation's borders and a massive funding increase for INS citizenship processing. Highlights from the bill are in the Documents Collection of our web site at <http://www.visalaw.com/docs> and all of these issues are discussed in this issue.

This month's issue also marks our fourth anniversary and, fittingly, is our largest ever. Aside from the provisions in the budget bill, we also report on the long awaited health care worker regulations that will finally allow nurses, therapists and others to complete their permanent residency processing, several important court cases and the new web-based consular appointment-booking service. Finally, be sure to read our report on some potentially illegal methods used by the INS to adjudicate National Interest Waiver cases.

On to other subjects. The developing news on the H-1B legislation has had an interesting impact on our firm's web site. Many of you have been following our H-1B Emergency Update at <http://www.visalaw.com/h1b.html> since it was launched in March. That page has been one of the most up-to-date resources available to the public - on or off the net - for information on this crucial legislation. The interest in that page has translated into more traffic on our web site than at any time in the four and a half years we have been online. This month we are on track to have more than one million hits, well in excess of our previous record of 827,000.

The firm's tremendous success on the web has been recognized again. Founding partner Greg Siskind has recently delivered a number of American Bar Association-sponsored lectures on the subject of the Internet and the legal profession. The speeches have been presented in Santa Barbara, Beverly Hills, Chicago, New York, Boston and Dallas. He has also been invited to do more presentations in the next few months in Los Angeles, North Carolina, Chicago and Memphis. The site is also catching the attention of the media. In the last few weeks, partner Greg Siskind has also been interviewed by media organizations like the BBC, New York Newsday, the National Law Journal and the Christian Science Monitor.

Last month marked the debut of our new free newsletter, Siskind's Immigration Professional. The newsletter provides notices of job openings, reporters seeking story leads, conference announcements, book and software reviews and other announcements that will be of interest to immigration lawyers, paralegals, foreign student advisors and anyone else who handles immigration matters for a living. If you wish to be added to our email distribution list, just email us at immigration.professional@visalaw.com and be sure to tell us a little bit about what kind of work you do and where you work. More than 400 of our readers who are immigration professionals have already subscribed. We only include professionals on this list so it is important to specify the type of work in which you are engaged.

As always, we remind readers that this publication is put out by Siskind, Susser, Haas & Devine, an immigration law firm, and we are available for telephone or in-person consultations to answer immigration questions and discuss our representing individuals and employers in immigration matters. If interested, please go to <http://www.visalaw.com/intake.html>.

2. LEGISLATIVE UPDATE

Congress wrapped up its business this week and now adjourns for the year. Congress will meet again in January and could look much different after the November elections. But before leaving town, Congress passed several important pieces of immigration-related legislation. Rather than taking our usual approach and reviewing the major developments in this column, we have instead covered each of the major immigration bills and covered them in separate articles in this issue.

The session's most publicized measure, the lifting of the cap on H-1B workers, passed. The same was true of legislation providing amnesty to tens of thousands of Haitians in this country. And Congress enacted the UN Convention Against Torture, something that will help many asylum applicants. The fate of other measures - the restoration of Section 245i of the Immigration and Nationality Act, a new visa category for nurses, the elimination of per country quotas in the employment green card categories, and others - met with a different fate. They must wait until the next session.

While the Congress is out, we are using the time to revamp the H-1B Emergency Update section of our web page to more broadly cover hot issues in immigration law. The Emergency Update has proven to be the single-most popular section of the web page and so we are seeking to duplicate the format with other issues as well. Look for this change to happen before year's end.

3. THE NEW H-1B PROGRAM - GUEST ARTICLE BY SAM UDANI

Last month we published a special newsletter issue covering the H-1B bill after the White House and Republican leaders reached a compromise and the House of Representatives passed H.R. 3736,

which incorporated the compromise language. The conventional wisdom had the bill quickly passing in the Senate and being signed by the President. After all, the Senate had easily passed a much more controversial bill earlier in the session. But easy passage was not to come. Technical corrections were needed in H.R. 3736 and an extremely busy legislative agenda kept the bill from coming up again in the House. An attempt to vote on the bill in the Senate before the House referred the bill failed when Senator Tom Harkin (D-Iowa), blocked the measure. The bill was pronounced dead by many pundits until Senator Spencer Abraham (R-Michigan), the chief backer of the bill, managed to get the language inserted into the massive year end budget bill. Because the budget bill was necessary to keep the entire government operating it had to pass and everything included in the bill would pass as well with little argument.

As we were covering the H-1B legislation for the better part of this year, we needed to turn to numerous people to find out what was happening on the bill. One of the most reliable and informed people with whom we regularly conferred was Sam Udani, a founding partner in Adnet, an advertising placement agency that services immigration lawyers around the country. Sam happens to be one of the nation's top experts on the labor certification program as well and regularly writes and lectures on the subject. This month, we are including an article written by Sam summing up the new bill.

SELECTED HIGHLIGHTS FROM THE NEW H1B BILL by Sam Udani

Outline of article:

- Introduction
- The changed H1B landscape
- Changes in fees
- Changes in recruitment for H1B dependents
- Changes in enforcement
- Changes in employment contracts
- Changes in business structure
- A few notes on Effective Dates and Sunsets
- Effective Dates
- Sunsets
- The price paid for HR 3736
- Fees
- Audits
- H1B dependents
- Conclusion

*** INTRODUCTION ***

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On October 21, 1998, the President signed passed HR 4328, the Omnibus Budget bill that includes the H1B legislation originally debated under the number H.R. 3736. This bill significantly raises the H1B cap from the current 65,000 to 115,000 in FY'99, 115,000 in FY'00, 107,500 in FY'01, and back to 65,000 thereafter. Attorneys in H1B practice should examine the effects of the bill on their clients, particularly if their clients are H1B dependents, a new notion introduced by this bill.

This article is not an exhaustive or scholarly analysis of HR 3736. It is a selective summary of the bill's key provisions that affect H1B practice. It highlights some issues that attorneys representing H1B dependents should take into consideration.

Since this bill's harshest clauses are aimed at H1B dependents, and since this is a new concept, attorneys should pay particular attention to the definition of this new concept set forth in Sec. 103(b)(1) of HR 3736.

An H1B dependent employer is one who has: (i) 25 or fewer full-time equivalent employees and 8 or more H1B aliens, or (ii) has 26 to 50 full-time equivalent employees and 13 or more H1B aliens, or (iii) 51 or more full-time equivalent employees and 15% or more of them are H1B aliens. Full-time equivalent employees are those who are employed in the US. In computing *both* the number of full-time equivalent employees *and* the number of H1B aliens, H1B aliens with either Master's degrees (or higher) or salaries of \$60,000 (or higher), are exempted, and therefore should NOT be counted. However, *until* six months after this bill is signed into law or *until* final regulations on this matter are issued (whichever is later), such aliens are NOT exempted, and therefore *should* be counted. (In determining who is a single employer, the Internal Revenue Code sections referred to later in the article will apply.) This complex definition is not easily expressed as a ratio, and a calculation specific to each client is the best way of determining whether a specific employer is or is not H1B dependent.

*** THE CHANGED H1B LANDSCAPE ***

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CHANGES IN FEES

Sec. 104(a) of HR 3736 imposes a fee of \$500 for many H1B petitions (this fee is in addition to the applicable processing fee). The fee must be paid in two different situations. First, when an alien initially seeks to be granted H1B status. Second, when an alien seeks to extend the H1B status for the first time.

The fee is not payable in a variety of circumstances, as follows:

(1) When the employer is (or is related to, or affiliated to) an institution of higher education for the purposes of INA 212(a)(5)(a).

(2) When the employer is a non-profit research organization or governmental research organization for the purposes of INA 212(a)(5)(a).

(3) When the petition is for concurrent employment.

(4) When the petition is for sequential employment, except when it seeks an extension of stay for the first time.

(5) When the petition is an amended petition, except when it seeks an extension of stay for the first time.

(6) When the petition seeks re-extension of H1B status, beyond the period allowed by the first extension (presuming that such re-extension period is available).

(It is interesting to note an odd exception here. Petitions seeking new concurrent employment will not need to pay a fee *even if* such a concurrent employment application seeks to extend, for the first time, the alien's H1B status.)

The fee will be imposed on petitions filed on or after December 1, 1998. This may or may not necessitate an eventual change in the I-129 form. It will, however, immediately necessitate a change in INS feeing-in and/or

adjudicating procedures. It is therefore likely that there will be a period of confusion and adjustment in the coming months. H1B adjudications might be halted for a couple of weeks until the INS settles on a procedure that reflects the statutory requirements of Sec. 104(a) of HR 3736. Merely filing petitions prior to the President's signature will not help, since the fee will be imposed retroactively on all petitions filed on or after October 1, 1998.

CHANGES IN RECRUITMENT FOR H1B DEPENDENTS

Sec. 102(a)(1) of HR 3736 amends INA 212(n)(1) by adding, inter alia, new INA 212(n)(1)(G)(i)(I), that requires the employer, prior to filing an application to have taken "good faith steps to recruit" US workers "in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered" to alien workers.

This new sub-section will undoubtedly result in confusion over interpretation of the statutory language. Without pretending to offer an exhaustive analysis, here are some of the issues that draw attention.

(1) "good faith" - This will be difficult to define, even though all the evidence submitted with the petition is under penalties of perjury and so ought to be presumed to be in good faith. If defined improperly, this will be problematic for employers.

(2) "procedures that meet industry-wide standards" - This will create a good deal of trouble, even though word-of-mouth is the most common form of recruitment in almost all industries (e.g. see 45 FR 83929). Various USDOL-sponsored studies have identified word-of-mouth to be the most frequently used form of recruitment by employers (see the author's earlier articles). Unfortunately, USDOL may interpret "industry-wide" narrowly, and may use the practices of larger employers as the standard for all employers. In other words, the USDOL may decide that a large print advertising campaign is necessary, even though most small companies in many industries do not advertise in newspapers or magazines.

Furthermore, since different industries have different recruitment standards, making regulations for this clause will likely be extremely difficult (e.g. the automobile industry which is dominated by three huge companies has a different standard as compared to the retail industry which is dominated by mom-and-pop businesses). Fortunately, and thanks to its own technological advances (e.g. America's Job Bank and America's Talent Bank), USDOL now understands that the Internet provides many useful and common forms of recruitment.

(3) "offering compensation" - It is important to note here that it is the "procedures" that must offer "compensation". In plainer words, the advertisements need not contain a salary unless such is the industry-wide standard.

Sec. 102(a)(1) of HR 3736 also amends INA 212(n)(1) by adding, inter alia, new INA 212(n)(1)(G)(ii), which waives recruitment attestations from H1B dependents in cases of aliens who are described in subparas (A), (B) or (C) of INA 203(b)(1). In other words, for H1B purposes, you don't need to recruit if the alien would otherwise qualify for EB1. This creates a processing difficulty for the INS. INS employees familiar with I-129 processing may or may not be familiar with I-140 processing.

Therefore, the INS may need to conduct some amount of training, which could lead to a slowing down of H1B adjudications.

CHANGES IN ENFORCEMENT

Enforcement of LCAs remains, in the main, complaint-based. However, past

willful violators are subject to random investigations. Further, Sec. 103(e) of HR 3736 anoints the USDOL with the power to conduct an investigation on *any* employer (in a designated context). In practice, the USDOL is likely to use the last of the above enforcement routes as its principal investigation trigger.

What this will likely mean is that allegations of H1B abuses by a local newspaper will now lead to prompt action by the USDOL. It will also mean that USDOL will now likely initiate investigations on the basis of complaints from labor unions, occupational associations, etc.

Overall, enforcement activity on LCAs by the USDOL will likely increase significantly. The bill has also significantly increased the penalties for violations. The monetary penalties could be as much as \$35,000 per violation.

Further, violators could be debarred from many immigration programs, e.g. employers found to be in violation may not be able to obtain further Hs, Ls, or petition for permanent residency for their employees. Such debarment could be for as much as 3 years. Violators may also have to make the recruitment and lay-off attestations for future H1B petitions.

Further, violators may be subject to random LCA investigations for a period of up to 5 years.

In view of the increased likelihood of enforcement, and the increased penalties for violations, attorneys should assist their clients to make such changes as may be necessary to comply with the new requirements imposed by this bill.

CHANGES IN EMPLOYMENT CONTRACTS

Sec. 103(a)(vi) of HR 3736 prohibits employment contracts that specify penalties for an employee who ceases employment prior to an agreed date. Employment contracts with provisions within the scope of this section must now be revised. Interestingly, however, this section has the unintended consequence of forcing some US workers into a disadvantaged position as compared to alien workers. (Here's how. In some states, it is permissible, in some situations, to impose penalties on employees who have contracted to work for a certain time, and who leave prior to the agreed date. But Sec. 103(a)(vi) of HR 3736 is explicitly independent of State law. Hence, it disadvantages US workers, by giving alien workers an option to leave an employer, which some US workers may not have.)

CHANGES IN BUSINESS STRUCTURE

Sec. 102(b) of HR 3736 went into effect immediately upon the President's signature. This is a key section, because it defines the new concept of "H-1B Dependent Employer". Since many of the harsh provisions of HR 3736 (particularly the recruitment attestation and the layoff attestation) fall on such employers, attorneys may want to prevent their clients from qualifying as H1B dependents. Some employers may be attracted to the idea of "splitting up" a company into several companies of a smaller size so that the definition of H1B dependent is not triggered (in general, "job-shops" with eight or more employees). However, this is an issue which attorneys may want to consider with care.

Sec. 102(b) of HR 3736 creates, inter alia, new INA 212(n)(3)(C)(ii) which states in full: "any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as a single employer."

The referenced IRC sections deal mainly with employee-benefit issues. However, in the immigration context, they are intended to be used only for definitional purposes. IRC section 414(b) posits the phrase "controlled group of corporations", which in turn is defined at IRC section 1563(a). IRC section 414(c) posits the phrase "partnerships, proprietorships, etc under common control". IRC section 414(m) posits the phrase "affiliated service group". IRC section 414(o) posits the phrase "avoidance ... through the use of separate organizations, employee leasing or other arrangements".

These IRC phrases have complex definitions. A fair amount of tax-law expertise may be necessary to "split-up" a company in a manner so as to avoid "common control" or "affiliation", etc. Immigration attorneys will probably work closely with tax-attorneys and accountants to study this issue. However, this "splitting-up" strategy may be costly, time-consuming and complex. This may make prohibitive the use of creative strategies in specific situations.

*** A FEW NOTES ON EFFECTIVE DATES AND SUNSETS ***

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EFFECTIVE DATES

The lay-off attestation and the recruitment attestation introduced by Sec. 102(a) of HR 3736 will go into effect only on or after final regulations are issued. Since this will necessitate a change in the LCA form, and in view of the USDOL's past history in implementing regulations, it may take many months before the regulations are finalized.

The new \$500 fees will go into effect on December 1, 1998.

The new audit authority conferred on the USDOL by Sec. 103(e) of HR 3736 went into effect immediately upon the President's signature.

SUNSETS

Thanks in part to effective lobbying by the National Association of Manufacturers, the new \$500 fees and the new lay-off and recruitment attestations will sunset when the increased H1B cap sunsets (i.e. on September 30, 2001). However, the new audit authority of the USDOL will not sunset.

*** THE PRICE PAID FOR HR 3736 ***

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FEES

For the first time, fees will be imposed on the H1B program, creating an unfortunate precedent for all Employment-Based immigration. Employment-Based immigration is founded on the value of immigrants to the US economy. By benefiting the US economy, such immigrants in fact create jobs for US workers. However, the new fees fuel a false perception that immigrants are a drain on the US economy.

AUDITS

For the first time, the USDOL will have meaningful power to conduct investigations which have not been triggered by a complaint. Some investigations, which could be on **any** employer, will be initiated without notice to the employer. From the employers' point of view, this was a big price to pay for the extra H1B numbers that HR 3736 made possible.

H1B DEPENDENTS

For the first time, a new category of disadvantaged employers has been created. This gives Congress room to implement new policies of questionable merit first on such disadvantaged employers as a pre-cursor to applying those policies on **all** employers. H1B dependents are merely middlemen (or brokers) implementing what Congress has just re-affirmed is national policy, i.e. the H1B program. Blaming middlemen for market abuses recalls the failings of socialist economic theory.

** CONCLUSION **

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HR 3736 substantially increases the number of H1B visas. This will be of benefit to many American employers, and the American economy generally. However, a high price had to be paid to convince the Administration to support the bill. Attorneys will need to review the specific situations of their H1B clients, and should assist clients to comply with the new requirements. However, for H1B dependents such compliance could be difficult and costly.

endnotes

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The bill text and section numbers used here are from the Congressional Record - House for September 24th, 1998, pages H8579 through H8584. This article is intended only for attorneys in H1B practice. Nothing in the article should be construed as legal advice. Attorneys are cautioned to make their own professional judgment on matters discussed herein.

The author wishes to acknowledge the kind comments by Gary Endelman and Ann Pinchak without the benefit of which this article would not have been possible.

Sam Udani of New York City consults with immigration attorneys throughout the country.

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4. INS MEMORANDUM INDICATES RACIST STANDARDS MAY BE USED IN NATIONAL INTEREST WAIVER CASES

The INS' Chief Adjudications Offices from the Four INS Regional Service Centers recently released a memorandum on standards for National Interest Waiver cases. Aside from containing valuable information on these cases (we will try and discuss the memorandum further in our next newsletter),

the memo appears to show the agency is using illegal discriminatory standards in these cases. The memorandum was recently sent to the American Immigration Lawyers Association to assist attorneys in preparing cases after an important decision was recently issued in the courts.

The controversial section concerns the preparation of testimonial letters by experts documenting the applicant is benefiting the nation. Such letters are often seen as the most important evidence submitted in an NIW case. The INS was discussing which types of letters would be the most effective and which types would be discounted. The following language was used to describe the standard:

"It should be remembered, however, that testimonial letters from low-level colleagues, former college instructors, co-workers, etc. -- particularly when the affiants of such letters appear to be/have been aliens themselves, and of the same nationality as the beneficiary -- could raise CAO eyebrows and may be subject to greater scrutiny than those more objective letters from high-level officials of recognized major organizations."

The language appears to show that INS officers look to the ethnicity of an expert to determine credibility. Presumably, if an expert has a foreign-sounding name, especially if the name sounds to be of the same ethnic group as the applicant, the testimonial letter will not be considered as seriously.

A survey of several immigration lawyers around the country indicates that many feel the INS always used such standards, but most were shocked that they would admit to it in writing.

[Editorial note - The revelation that INS is using such standards should be viewed as quite serious and, in our opinion, merits a serious internal investigation by the agency].

5. NEW HAITIAN AMNESTY BILL BECOMES LAW

Like the H-1B bill, Haitian Amnesty legislation came back to life after it appeared finished for the year. This summer we reported that the Senate had added Haitian amnesty relief to the Treasury and Postal Appropriations bill. The House/Senate Conference Committee considering the bill had agreed to include the provision, but the Conference bill was defeated earlier this month in the House. Lamar Smith, chairman of the House Immigration Subcommittee, spoke out against the Haitian amnesty language and actually distributed flyers to House members asking them to vote against the appropriations bill if the Haitian language was included. A number of prominent Florida Republicans, including Florida Gubernatorial Jeb Bush, son of former President George Bush and brother of Presidential contender Texas Governor George W. Bush, lobbied hard in favor of the bill. Nevertheless, a number of Republican Congressmen voted against the Conference bill and the bill went down to defeat.

Rather than voting on the measure again, the Postal/Treasury appropriations bill was incorporated into the massive budget bill voted on at the tail end of the session. The language of the Haitian Refugee Immigration Fairness Act remained in the final bill.

The Haitian Amnesty bill comes after a year of intensive lobbying by a broad, bipartisan coalition that sought to prevent the deportation of more than 48,000 Haitian refugees in this country. The final bill will largely accomplish that. To benefit from the legislation, a Haitian must have been in the US since 1995 and meet one of the following four categories:

* orphaned, abandoned, or an unaccompanied minor at the time of entering the US;

- * determined to have had a credible fear of persecution and thus, legally permitted to be in the US;
- * applied for asylum before December 31, 1995, or
- * previously been paroled into the US by US authorities for emergent reasons or for reasons deemed to be in the national interest.

The bill's foes had earlier attempted to include language requiring a showing of "extreme hardship" if deportation occurred, but such language was defeated. Applicants for the amnesty program would have until April 1, 2000 to apply for permanent residency. The process should be similar to the Nicaraguan and Central American Relief Act amnesty procedures.

In a related story, more than 400 Haitians were picked up by US Coast Guard officers last month when they were caught trying to reach Florida in a wooden freighter. Their 75-foot boat was spotted and stopped off of Key Largo, Florida and the passengers were transferred to Coast Guard boats. They were repatriated a few days later. Nearly 700 Haitians have been repatriated this year after being found by Coast Guard cutters.

6. LAST MINUTE LEGISLATIVE ATTEMPT TO SPLIT INS FAILS

Representative Harold Rogers (R-KY) nearly succeeded in the final days of the 105th Congress in pushing through legislation to split the INS up and transfer its enforcement responsibilities to a new Bureau of Border and Enforcement Affairs. The INS would have been left with the sole function of administering immigration benefits such as citizenship and green cards.

A number of forces that included the Clinton Administration, the American Immigration Lawyers Association (AILA) and the INS itself, which is implementing its own restructuring plan, opposed the bill. According to AILA director Jeanne Butterfield, "This hasty attempt to overhaul an important agency of the federal government is a prime example of irresponsible legislating that would, if implemented, have dramatically negative consequences for American citizens, business, and on this country's relationships with foreign governments."

The Bill, H.R.4264, would have thrown border enforcement into chaos, according to AILA. AILA also opposed the measure because it did not fully address the service side of the immigration function.

Rogers was ultimately defeated in attempts to include 4264 in the final omnibus spending bill passed by Congress. Senator Spencer Abraham, chairman of the Senate's Immigration Subcommittee, opposed restructuring this year and suggested that Congress proceed more prudently on such a measure. A number of other Senate Republicans, including Kay Bailey Hutchison of Texas and Pete Domenici of New Mexico, spoke out against the change.

Expect the bill to be proposed again early in the next session of Congress.

7. IMMIGRATION AND THE INTERNET: VISAHOMES

Last month we reported on a new web site, VisaJobs.com, that is designed to assist immigrants and would be immigrants find positions with visa-sponsoring employers in America. That site is aimed at filling a need in the immigrant communities in the US that is not being met by more conventional employment sites. Now the creators of that site have completed another site designed to meet the needs of would-be immigrants. The site is called VisaHomes and is at <http://www.visahomes.com>. VisaHomes is designed as a resource to help foreign nationals in the United States with their

relocation needs. The site is primarily designed to help immigrants find professionals to help them with the range of services they will need if they are relocating. In the spirit of full-disclosure, I should note that I am an investor in the site, though VisaHomes is completely independent of Siskind, Susser, Haas & Devine and I am in no way endorsing the site in my capacity as a lawyer.

Why have a site like this even though there are many real estate and relocation sites on the web? For one thing, immigrants have special problems and concerns that are often not appreciated or addressed by real estate professionals. For example, without an extensive credit history in the United States, obtaining a mortgage can be a problem. Immigrants often also have special issues relating to international moves, locating schools appropriate for their children, finding the right neighborhoods, finding accountants with an understanding of the needs of immigrants, etc. The professionals on VisaHomes specifically are interested in working to educate themselves on the needs of immigrants and in helping immigrants to get the customized service they require.

The site is organized in two ways - by type of service being sought and by state and local area. The following types of service professionals are listed on the site:

- * real estate agents
- * rental agents
- * mortgage lenders and brokers
- * movers
- * other professionals (accountants, insurance agents, etc.)

Finally, the site is free of charge to the public.

Another site we ran across this month that may be of interest to readers is Policy.com. The site describes itself as follows:

"Policy.com (www.policy.com) is the Web's most comprehensive public policy resource and community. Drawing from its network of policy influentials, Policy.com showcases leading research, opinions and events shaping public policy on dozens of issues including education, technology and healthcare. Policy.com is non-partisan and free to users."

Each week, the site covers a specific public policy issue at length and provides links to articles on the Internet. During the week of April 13, 1998, the site had an interesting discussion on immigration policy that is worth a look. The URL for that part of the site is <http://policy.com/issuewk/98/0413/index.html>.

If you know of a site you think would be of interest to readers of Siskind's Immigration Bulletin, e-mail me at gsiskind@visalaw.com and we'll try and review the site if we think it is appropriate.

8. CONSULAR FOCUS: NEW WEB APPOINTMENT BOOKING SYSTEM IN PLACE FOR US CONSULATES IN CANADA AND MEXICO

As a reader of Siskind's Immigration Bulletin, you probably are somewhat comfortable with the Internet. After all, this newsletter is only produced for distribution by e-mail and on the Visalaw web site at <http://www.visalaw.com>. That being the case, our readers will probably be very interested in the new web-based appointment booking system being utilized by US consulates in Canada and Mexico for nationals of countries other than Mexico or Canada.

The system was tested on a pilot basis by several law firms including Siskind, Susser, Haas & Devine and the results were very good. In fact, very few changes appear to have been made between the tested version and the one now available to the public at <http://www.nvars.com>. To make an

appointment, one must have a Passport handy and a major credit card (VISA, MasterCard, American Express, Discover, SEARS Canada, Diner's Club /Carte Blanche). The fee for the web booking service is \$30 - well worth it not to have to deal with the 900 number telephone booking system.

After providing basic background information, the applicant will be taken to a list of consulates in the US and Canada. The applicant can then choose a consulate and see a monthly calendar listing the number of appointment slots available each day at that consulate. It is very easy to take a quick look at each consulate to find which ones have slots available. Some of the consulates have hundreds of appointments available each month - Vancouver comes to mind - while others are nearly impossible - Toronto, for example. The web booking system is available 24 hours a day, seven days a week.

For those who wish to book appointments through the touch-tone telephone system instead, the tolled telephone service is still available. If you are in the US, call 900-443-3131. People in Canada should call 900-451-2778. Your telephone bill will be charged for each minute you are on the line. If you wish to bill the call instead to your credit card, call 888-840-0032. This may be needed if your telephone line is blocked from calling 900 numbers. The phone system operates between 7 am and 10 pm Eastern Time. Callers can expect to have difficulty getting through during the peak times of 7 am, 11 am, 2 pm, 4:30 pm and 7 pm Eastern Time. Appointments for border posts outside the Eastern Time Zone can only be made after it is 7 am in that consular post's local time zone.

Following the booking of an appointment by web or telephone, the applicant will be mailed the nonimmigrant visa application form (Form OF-156) and an information sheet for the post where the appointment is scheduled. That paperwork should be taken to the interview. If the paperwork does not arrive before the interview, go to the interview anyway. However, expect delays as a result.

Remember not to book an appointment at a US consulate in Mexico or Canada if you are from another country AND have overstayed the expiration date on your I-94 Form. Students and others with Duration of Status (marked "D/S" on the I-94) are normally not barred from processing in Canada or Mexico even if they are not in valid status because their I-94s do not have finite expiration dates. If this bar on processing potentially covers you, you should consult with an immigration lawyer. Also note that persons seeking "E" visas must normally process in their home countries.

To cancel an appointment, call 888-611-6676 at least two working days before the scheduled time.

Finally, be sure to check with a Canadian consulate to find out if you need a visa to enter Canada. To find out about how to contact the closest Canadian consulate to you, go to <http://www.embassy.org/embassies/ca.html>.

9. GOVERNMENT PROCESSING TIMES

Note: We publish all times available to us. Please do not send request for other processing times. Please also note that your case time may not be as fast (or as slow) as reported below.

Sorry but local processing times are not available this month.

Source: American Immigration Lawyers Association

Vermont Service Center Processing Times

The following is the Vermont Service Center Processing Time Report for period ending September 30, 1998:

Processing Receipt Notice
For Initial Processing

Application/Petition Type Receipt Date From To

BUSINESS & NONIMMIGRANT SERVICES

I-102	Current	15	30
I-129/S New Amended NI Worker	08/24/98	15	30
I-140 Immigrant Worker	06/01/98	60	180
I-360 Pet for Widow/Spec Imm	06/01/98	60	180
I-526 Investor	Current	15	30
I-539 Change/Extend NI Status- Employment Based	09/21/98	30	60
I-539 Change/Extend NI Status- Other	Current	30	60
I-724 Waivers	Current	15	30
I-829	Current	30	180

FAMILY SERVICES

I-129 (F) Finance (e)	Current	15	21
I-130 Immed Rel	08/20/98	60	90
I-130 Preference	05/14/98	200	240
I-751 Remove Conditions	Current	30	45
I-817 Family Fairness	Current	30	60
I-824 Actions of Approved Pet.	Current	60	90

RESIDENT STATUS SERVICES

I-90 A-SAW	Current	30	60
I-131 Reentry Permit/Ref Travel Document	Current	30	60
I-485 Adjustment	11/02/97	120	180
I-589	Current	1	5
I-698 Legalization-Adj. to LPR	Current	30	60
I-765 Employ. Auth.-Asylum Based	09/24/98	30	60
I-765 Employ. Auth.-Other	09/22/98	30	60
N-400 Natz. & Initial Processing	Current	120	180
N-600 Application for Citizenship	09/22/98	60	90
I-90 Replacement Card	12/03/97	30	90

Total Pending Applications (All Types)

10. STATE DEPARTMENT VISA BULLETIN FOR NOVEMBER 1998

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during November. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Immigration and Naturalization Service reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by October 5th 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.

1. 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."

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.)

PREFERENCES

	All Charge-ability Areas CHINA-Except Those mainland Listed born INDIA MEXICO PHILIPPINES				
Family					
1st	01AUG97	01AUG97	01AUG97	01AUG93	26MAR87
2A*	22APR94	22APR94	22APR94	22APR93	22APR94
2B	08FEB92	08FEB92	08FEB92	01JUL91	08FEB92
3rd	15APR95	15APR95	15APR95	22FEB90	15MAR87
4th	08APR88	08APR88	08APR86	15SEP87	15JUL78

*NOTE: For November, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 22APR93.

2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 22APR93 and earlier than 22APR94. (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.)

All Charge-ability Areas CHINA-Except Those mainland Listed born INDIA MEXICO PHILIPPINES

**Employment-
Based**

1st	C	01NOV97	C	C	C	
2nd	C	22MAY96	08JUN97	C	C	
3rd	C	15SEP94	01JAN96	C	C	
Other Workers	01MAR92	01MAR92	01MAR92	01MAR92	01MAR92	
4th	C	C	C	C	C	
Certain Religious Workers	C	C	C	C	C	
5th	C	01SEP97	C	C	C	
Targeted Employ- ment Areas/ Regional Centers	C	01SEP97	C	C	C	C

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

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides 50,000 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. DV visas are divided among six geographic regions. Not more than 3,500 visas (7% of the 50,000 visa limit) may be provided to immigrants from any one country.

For November, immigrant numbers in the DV category are available to qualified DV-99 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:

	All DV Charge- ability Areas Except Those Region Listed Separately				
AFRICA	AF	9,038			
ASIA	AS	2,323			
EUROPE	EU	7,441	EXCEPT:	ALBANIA	EU 3,805 BULGARIA EU 6,997
NORTH AMERICA (BAHAMAS)	NA	24			
OCEANIA	OC	261			
SOUTH AMERICA, CENTRAL AMERICA, and the CARIBBEAN	SA	1,442			

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-99 program ends as of September 30, 1999. DV visas may not be issued to DV-99 applicants after that date.

Similarly, spouses and children accompanying or following to join DV-99 principals are only entitled to derivative DV status until September 30, 1999. DV visa availability through the very end of FY-1999 cannot be taken for granted. Numbers could be exhausted prior to September 30. Once all numbers provided by law for the DV-99 program have been used, no further issuances will be possible.

C. NOTE ON FUTURE VISA AVAILABILITY IN THE EMPLOYMENT THIRD "OTHER WORKERS" PREFERENCE CATEGORY

The cut-off date in the Employment Third "Other Workers" category has moved forward very quickly during recent months. The corresponding increase in number used for adjustment of status cases at INS offices has not yet become apparent, however, since offices need time to process such cases. Once there is a significant increase in INS visa numbers use, future cut-off date movement in this category could stop.

11. BORDER NEWS

* Six illegal aliens crossing the border near Norias, Texas, an hour's drive from the Mexican border, were killed by a freight train while sleeping on the tracks. The possible reason why they were sleeping on tracks is the mistaken belief that sleeping on train tracks offers protection from snakes. A spokesman for Union Pacific, the rail line involved in the accident, said the company is working with the Border Patrol and Mexican authorities to keep people from sleeping on railroad tracks.

* A pregnant woman from Queens, New York is being held in INS detention after spending a weekend in Montreal and returning to the US without a properly filed advance parole document. Her husband fears the ordeal could harm his wife's pregnancy and, as of press time, there is no word when she will be released.

* US Customs Service Officials are detaining nine people from the Dominican Republic who were found as stowaways on a Chinese-owned ship docked at Port Newark, New Jersey. The men apparently lived on candy and water for five days. The crew of the ship was apparently unaware of the presence of the stowaways.

* Immigration agents are investigating the La Quinta hotel chain in connection with the employment of undocumented workers. In a recent raid of seven Phoenix, Arizona-area La Quinta hotels, 48 illegal workers were detained. Most worked in the housekeeping staff. Two former officials with La Quinta in Scottsdale, Arizona also pleaded guilty this month to conspiring to employ illegal workers.

* Arrests of illegal immigrants in Michigan are up sharply. So far this year, eighteen hundred undocumented aliens have been detained, 300 more than all of last year.

* Two Border Patrol agents are under investigation for the shooting of an unarmed illegal alien crossing the border near San Ysidro, California. The shooting victim was said to have refused to drop a rock aimed at the Border Patrol agent. The Federal Bureau of Investigation and San Diego Police are looking into the matter while the two agents are on administrative leave pending the conclusion of the inquiry. This is the first such shooting in the San Diego Border Patrol area since 1995. Also in September, a Border Patrol Agent in San Luis, Arizona shot and killed an illegal alien

also after the victim is alleged to have threatened the officer with a rock. See the discussion later in this newsletter on the impact the shooting is having on Mexican-US relations.

* A woman pretending to be an INS official was arrested after she allegedly tricked more than 1,000 Mexicans into paying her to prepare immigration documents the woman claimed would make them eligible to work. Beth Flores pleaded guilty in San Antonio to falsifying more than 1,400 applications and telling customers they were immigration forms. She charged approximately \$300 per application. Flores was sentenced to more than four years in prison and ordered her to pay back \$500,000 to her victims.

* A Brazilian man is in INS custody after he was arrested for selling phony Florida driver's licenses, Brazilian passports, check cashing cards and checkbooks. Pedro Rodriguez allegedly sold the documents to Brazilian tourists arriving at Miami International Airport.

* Two women were arrested in upstate New York this month for alien smuggling after they were pulled over for suspected drunk driving. An inspection of their van led to the discovery of nine illegal immigrants lying on top of each other. The driver of the van was not drunk but was suffering from sleep deprivation. Police have not determined whether the immigrants were picked up on the US side of the border or the Canadian side. The smuggled immigrants were all Chinese except for a lone Pakistani.

* Border Patrol arrests along the Arizona-Mexican border increased by 42% in Fiscal Year 1998 which ended September 30th. Part of the increase is suspected to be the result of border crackdowns in Texas and California that have caused immigrants to cross more frequently in Arizona's Sonoran Desert. The INS also attributes the increase to more agents, more funding and the heat waves in Texas and California this summer. In contrast, the San Diego Border Patrol reports a 13% drop in arrests. This is considered to be a sign of success by the INS since the decline is presumably due to a smaller number of people crossing. Migrant rights groups claim that border crossers are instead taking more dangerous remote routes.

* The Border Patrol is planning to expand a chain link fence running through downtown El Paso, Texas by up to 20 miles. The INS contends that the fence will help seal the border better and reduce drownings in the new American Canal that separates El Paso from Ciudad Juarez, Mexico. 15 people have drown in the canal this year and rescues are up 50%. Critics of the plan say that the US should be focusing on improving ties between the Juarez and El Paso communities. The Border Patrol also will add more lighting, cameras and microwave technology to decrease crime and illegal border crossings in the area.

* Police in Atlantic City, New Jersey recently arrested thirteen Korean and Thai women on prostitution charges after raiding several massage parlors in the downtown area. The women are believed to be indentured servants brought over by Asian organized crime figures.

* More than 50 Cuban refugees have come ashore in Miami Beach, Florida this month signaling a new wave of migration.

* A Mexican man being detained at the INS detention facility in San Pedro, California committed suicide earlier this month. He was discovered after he hanged himself in his single cell in the facility's "administrative segregation" wing. The INS would not comment on why the detainee was in the segregated portion of the facility.

* A Honduran man is in detention after stowing away in the wheel well of an Iberian Airlines jet flying from Honduras to Miami. Airline ramp agents called paramedics after witnessing the man drop out of the DC-9's rear wheel well and walk away. Emilio Dominguez endured more than two hours of virtually no oxygen and sub-zero temperatures to make it to this country. INS officials were planning to deport Dominguez on the next Iberian Airlines flight to Honduras. [Editor's note - Perhaps there

should be a national interest visa category for people with the stamina and love of America willing to undertake such a dangerous mission?]

* Four men attempting to cross the border in the desert in Imperial County, California were found dead last month. The four are the latest to be added to a 100+ death toll for Mexicans who have died crossing the desert this summer. Another man died 20 miles away the same week after he drowned in the All-American Canal east of Calexico, California.

* An alien smuggler in California was convicted last month for arranging for the smuggling of 280 Chinese nationals via two fishing boats. John Luong, described by prosecutors as being a gang leader, received a three-year jail term.

12. HIGHLIGHTS OF NAFSA/AILA/AGENCY MEETINGS

NAFSA

In late September, members of the National Association of Foreign Student Advisors and officials of the Immigration and Naturalization Service met via conference call. Acting INS Service Centers Director Fujie Ohata was on the call. Ms. Ohata is filling the position of head of service center operations temporarily and will return to the California Service Center.

The first issue discussed was the new INS fee structure. One key change noted is that there are no longer add-on fees on I-129 Forms for items such as consular notification, extensions and change of status. A single flat fee has replaced the confusing fee structure.

NAFSA noted problems with members of the public being able to reach by telephone service center officials to discuss problems. Ohata acknowledged the problem and suggested creating a system where NAFSA would be provided with a few key contact people at each service center. NAFSA also stressed the need for INS to adequately respond to universities and to the general public.

NAFSA further noted inconsistencies in the processing of J-1 employment authorization documents particularly concerning the submission of living expense budgets. The INS will sometimes accept the budget paperwork and sometimes reject it.

NAFSA officials also met with INS officials on August 13th to discuss service center issues. The first issue discussed was the creation of the new Immigration Services Division (ISD) at INS. A new Office of Field Operations within ISD will oversee local and district offices. This will hopefully result in improved coordination between local offices and the Regional Service Centers and Headquarters.

NAFSA raised the issue of when an F-1 student may apply for Optional Practical Training. The law requires the student study for nine months first, but must the nine months be complete at the time of application or at the time the benefit is granted? The INS asked NAFSA to submit the question in writing.

NAFSA noted to the INS an inconsistency among service centers regarding stated educational requirements for national interest and outstanding scholars cases. Some service centers are requiring a doctoral degree as a minimum requirement while others will accept a masters or below if other requirements are met. The INS again asked NAFSA to follow up with a written inquiry.

The INS indicated that it would like to furnish NAFSA with information on the most common types of mistakes made in filing so that processing delays can be reduced.

NAFSA inquired about how I-765s should be filled out for Asian students eligible for Special Student Relief. The question focused on Line 16 of the form regarding the regulation to list for employment authorization. The INS indicated that it would look into the matter and report back to NAFSA.

AILA-INS Immigrant Services Division - 10/1/98

The INS reports continuing software problems with the scheduling of fingerprints at Application Service Centers. Appointments are being manually scheduled. AILA members with clients who have not been scheduled for appointments through the Nebraska Service Center are asked to contact the AILA liaison for the NSC.

The NSC has apparently modified its procedures and is mailing advance paroles to attorneys of record.

The INS confirmed that it will now backdate Employment Authorization Documents to the date of filing to avoid Section 212 problems. For those with gap related problems, contact the Service Center to get a corrected document.

The INS confirmed an increase in fraud referrals involving education and experience documentation for Indian nationals. Typically, a fax is being sent to the US Consulate in Chennai for investigation and the turnaround response time is two to four weeks. The fraud rate on referred cases is 32% for educational documents and 74% for experience letters.

The INS indicated it is prepared to begin accepting the new \$500 scholarship/training fee required under the new H-1B program. The INS will issue a guidance memo soon after the legislation is passed.

AILA-INS Immigrant Services Division - 10/15/98

The Service Centers have started to receive verbal guidance from Headquarters on implementing the NY Dept. of Transportation National Interest Waiver case. INS confirmed that it has reversed its long-standing policy that doctors automatically qualify for a National Interest Waiver by performing services in a medically underserved area. The Service Centers confirmed that they have been holding cases up until the decision on the NYDOT case came out and have now issued Requests for Evidence on a number of cases. The Nebraska Service Center seems to be taking the toughest line - more than 1,100 RFEs have been issued compared with 100 at the Vermont Service Center.

The INS is instructing Service Centers to treat any newly incorporated business, even if it is a subsidiary of a well-established business, to be covered under the new business regulations for L-1 intracompany transfer petitions. AILA will fight INS on this issue.

INS reports continued software problems issuing fee receipts in Investor Petition cases. The "Tiger Team" working on backlogged investor cases at the California Service Center will complete its work this month. Cases needing further evidence will be sent back to the Service Centers for further handling.

AILA-INS Vermont Service Center - 09/23/98

The INS indicated it is beginning to work I-485 cases and is slowly reducing its backlog that is now 14 months. A number of new officers have been hired and are being trained to handle the cases and that the VSC is looking into overtime options to help. The VSC also indicated that it would not follow national guidelines and require new medical examinations when the normal 12-month expiration period passes.

AILA reported serious problems with the issuance of green cards at the VSC since processing has been transferred from Texas. The INS offered an extensive explanation that basically blamed the problem on system and software problems and also on the failure of the district offices to follow proper procedures. The VSC instructed AILA lawyers to go back to the District Offices to resolve the problem. [Editorial note - the explanation provides a clear illustration of a more serious problem with the INS - the failure of INS headquarters to ensure uniformity in processing at the local, regional and central offices of the INS and the standard operating procedure of INS officers to blame another INS office for a customer's problem].

AILA reported that the VSC is producing cards that list the date the card was created in the place where the date legal permanent residence should be granted. The INS has not yet determined how it will correct the problem.

The VSC indicated that it is now using a separate PO Box for naturalization filings. Those cases should be sent to

VSC
P.O. Box 400
St. Albans, VT 05479-0400

All other cases should be filed at this address:

VSC
75 Lower Welden Street
St. Albans, VT 05479-0001

AILA-INS TEXAS SERVICE CENTER - 09/08/98

The INS has still not set a date to begin the pilot electronic filing program for naturalization applications publicized at the AILA annual conference in Houston this past June.

AILA questioned the TSC on exceptionally long processing times for E Visa Change of Status cases. TSC blames lack of personnel for the backlog. They are working on a plan to address the problem.

AILA complained about the backlog on I-824 cases. TSC admitted that it has some I-824 petitions as much as 11 months old but is planning to become current on all petitions within two months.

AILA noted a problem with some L petitions for start up companies being denied because of a lack of sufficient office staff even though the support letters state that the new office will be hiring staff within the first year. This is something the regulations support. TSC asked for case numbers and promised to review the matter with the examiner.

TSC reports little progress in processing I-130 cases for immediate relatives. It is still taking more than eight months [Editorial note: The Vermont Service Center, by contrast, processes these cases in just 60 to 90 days].

TSC reported that direct filing of I-130 cases would probably not happen in Fiscal Year 1999.

AILA complained that I-485 cases are taking as long as 30 days to fee in and this causes problems in cases where advance parole and employment authorization is needed. TSC responded by saying that if the login time takes more than 30 days, it is because of a surge in applications received. As for I-485 processing times, the TSC claims to be processing them within 12 months. [Editor's note - This clearly seems to be false since our firm and several others we know have cases pending as long as 20 months that have few complications and should be clearly approvable.]

An AILA member asked what to do if a petition was filed, but no receipt or canceled check has been received after two months. TSC responded by saying that one should assume the petition has not been entered into the system and it should be refiled. Also send proof of prior filing so that it is handled as if from the original date.

The TSC still prefers to get separate checks for fingerprints in adjustment and naturalization cases.

13. REPORTS OF VISA REVOCATIONS AND DENIALS WORRY IRANIAN COMMUNITY

Last month we posted a very brief article at the end of our newsletter simply stating the following:

"Directors of the INS Service Centers have confirmed to the American Immigration Lawyers Association that they intend to revoke previously approved employment-based immigrant or nonimmigrant visa petitions that would not be approvable under Executive Order 12959. The Service Centers have also indicated that they will deny nonimmigrant extension applications submitted by Iranians in those nonimmigrant categories requiring maintenance of a foreign residence. The Executive Order outlines a boycott on Iranian goods as well as services. The issuance of employment-based nonimmigrant visas to Iranian nationals is considered to be a violation of the rule. If any readers get a revocation notice from the INS, please let me know by e-mailing me at gsiskind@visalaw.com."

In the last month, we have received more feedback from this one paragraph than perhaps any other article ever written in this publication's history. The Iranian Sanctions are particularly harsh and, understandably, developments in this area make many people nervous. The range of interpretation of this article has varied widely and we should have provided more analysis to put the statements in context. To address this concern, we are now addressing the matter further. Also, on the Siskind, Susser, Haas & Devine web site at <http://www.visalaw.com/docs> we have posted a number of key primary source documents relating to Iranian sanctions rules.

Special thanks go to Jan Pederson (<http://www.ilw.com/pederson.html>) who wrote an excellent article on this subject in the May 1998 issue of the AILA Monthly Mailing and who provided me with very helpful information when we spoke recently on this subject.

The economic boycott against Iran stems from two Executive Orders - one signed by President Reagan 11 years ago and one signed by President Clinton in 1995. The Clinton Order prohibits "the importation into the United States ... of any goods or services of Iranian origin." The issue of what constitutes the importation of services has, unfortunately, been interpreted differently by the INS, State Department and Office of Foreign Assets Control, the agency administering the sanctions and the agency that INS and the State Department are supposed to be following on this issue. OFAC has not stated much on this question except for a short policy statement in a July 29, 1997 letter from OFAC to the Secretary of State. Specifically, that letter states that "it is unlawful for a prospective U.S. employer to issue a binding offer of U.S. employment to an Iranian resident in Iran or to advance funds for him to enter for that purpose, as such actions would constitute an unlawful importation (or attempted importation) of Iranian-origin services into the United States."

The OFAC letter also carves out a huge exception for persons in the United States. It reads:

"That section [of the Iranian Trade Regulations] excludes from the definition of the term "goods or services of Iranian origin" any services provided in the United States by an Iranian national "resident in the United States." As a result of that definition, it is not a violation of the prohibition on importing Iranian- origin services to offer employment to an Iranian national once that person is resident in the

United States. By "resident," we mean any Iranian national living in the United States, irrespective of whether the Iranian national is a U.S. permanent resident alien or a temporary resident. Further, if the U.S. employer of an Iranian national resident in the United States has not caused or arranged with others for that person to enter the United States from Iran to work, it is not a violation of the ITR for the U.S. employer to hire the Iranian national."

Aside from the general philosophical question of whether sanctions are good or bad, there is a serious problem with differing interpretations of the OFAC letter's use of the term "resident." The INS and the State Department have taken opposite approaches.

The INS has taken the more liberal view. Pearl Chang of INS Headquarters met with AILA representatives in April and clearly indicated that the INS view is that sanctions only apply to Iranian citizens physically residing in Iran. There would be no bar, for example, to someone changing from F-1 status to H-1B status as long as the applicant is not "residing in Iran" in fact. This is a clarification of an INS General Counsel Memorandum issued in January on the subject.

The State Department has taken a much more restrictive view on the subject. Rather than focus on whether an applicant is "residing" in Iran, the State Department asks whether the applicant is "resident" in Iran. This means that people physically residing in the US but who are here on visas requiring maintenance of a foreign residence are subject to the sanctions. A State Department cable on the matter states the following:

"It would be a violation for a U.S. employer to offer employment to an Iranian national in valid nonimmigrant status in the U.S. who, by definition of his or her immigration status, must have an unabandoned residence abroad (B, F, I, H, M). Hence, Iranians who were recently in the U.S. in one of these valid nonimmigrant categories cannot be considered resident in the U.S. This does not include those Iranians already in the U.S. in a nonimmigrant category that does not require an unabandoned residence abroad by definition (H-1, L-1, C, D, E, G, R, S NIV Immigration status or parole)."

The State Department interpretation means that certain Iranians in the US in categories requiring an unabandoned residence abroad could be held subject to the sanctions if they leave the country. This would also cover people who may have changed to another category like an H-1B visa if they were previously in one of the restricted visa categories. People could very well find themselves unable to get back into the US.

The State Department also has discussed the issue of whether an Iranian resident in a third country may still be subject to the sanctions. It looks to the Immigration and Nationality Act's definition of "residence" which is defined as a "place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Consular officers are to look to the totality of the circumstances so expect to be questioned on whether the person has, in fact, taken up residence in that country as opposed to simply obtaining a legal right to residence in a third country and whether they have family and financial ties to the third country.

So what about the INS statement to AILA reported in our last issue? Has the INS changed its policy somehow? All indications are that the INS has not changed its policy and is, in fact, only revoking visas and denying extensions for a very limited number of people that should have been denied visas because they were residing in Iran at the time the visa was approved. Because the State Department would presumably have denied issuing the visa stamp to enter the US, only a very small number of people should be affected. Calls to AILA and NAFSA confirm this and neither organization is reporting any revocations and visa extension denials. We also called on our readers to let us know of specific examples of revocations or denials and none of you have responded. Should this change, we will try and let readers know quickly.

That is not to say that there is not a serious problem. Many Iranians in the US are, in essence, trapped here. If they leave the country, they will be barred from returning. In some cases, they cannot become permanent residents because they have status violations and are ineligible for Section 245i of the Immigration and Nationality Act. And they cannot process their green cards at US consulates abroad because they could become subject to the sanctions.

So the good news is that there does not appear to be a new crisis. On the other hand, the State Department's overly restrictive interpretation is causing a genuine hardship and it needs to be remedied. Part of the solution will lie in the American Iranian community making its voice heard on the subject. Our firm has already been in contact with several such groups to discuss potential action that can be taken and as news develops on this front, we will, of course, inform readers.

14. VISA SPOTLIGHT - HEALTHCARE WORKER REGULATIONS FINALLY RELEASED FOR NURSES AND OCCUPATIONAL THERAPISTS

After a two-year agonizingly long wait, the INS has finally released interim regulations to resume adjustment of status processing for nurses and occupational therapists. Physical therapists, medical technologists, medical technicians, speech language pathologists and physicians ARE NOT covered and the INS may take another full year to issue regulations affecting these groups.

The new rule implements portions of Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 343 requires that aliens coming to the US to work in covered health care jobs (other than physicians) are inadmissible unless they present a certificate relating to their education, qualifications and English language proficiency.

Section 343 of IIRAIRA specifically requires a certificate either from the Commission on Graduates of Foreign Nursing Schools ("CGFNS") or "a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services. The certification must verify that 1) the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application; are comparable with that required for an American health-care worker of the same type; and are authentic and, in the case of a license, unencumbered; 2) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and 3) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

The INS indicates that the purpose of the rule is to resume the immigration of certain health care workers to avoid disrupting the delivery of critical health care services and to provide for the immigration of workers who filed applications before IIRAIRA went into effect. The rule is also designed to provide a "temporary mechanism" to ensure that nurses and occupational therapists immigrating to the US have education, experience and training comparable to their US counterparts. However, nurses and occupational therapists who meet the requirements of the regulation will be deemed to have satisfied Section 343 even if the final rule changes the requirements.

Why did the INS only cover these two occupations? The INS indicates that it conferred with the Department of Labor and that these occupations have a "sustained level of demand for foreign-trained workers in these two occupations." Also, each occupation has a credentialing organization

with an established track record. One has to wonder, however, that by making the determination only with respect to two professions based on the fact that the overall job demand in other occupations is not as severe, is the INS thwarting the will of Congress in passing Section 343. The statute is designed to ensure that foreign health care workers are adequately qualified. Nowhere in the statute is the INS directed to make determinations on the labor market in an occupation. The INS has effectively put an end to immigration in certain occupation categories by simply not issuing regulations.

The INS has found that the CGFNS for nurses and the National Board for Certification in Occupational Therapy, Inc. for occupational therapists meet the statutory requirements for credentialing. CGFNS failed in its attempt to become approved to credential occupational therapists, a victory for the NBCOT, which had to battle to keep CGFNS from claiming a monopoly on all credentialing. The INS indicates, however, that it will consider requests from other organizations for credentialing rights if the organization can demonstrate a proven track record in issuing certificates for a health care occupation and where there is "a sustained level of demand for foreign-trained individuals." Again, the INS fails to state the legal justification for this standard and the INS' public statement is only likely to fuel litigation against the INS.

The credentialing certificate will not need to have a validity date. But it must contain the following information:

1. the name and address of the certifying organization;
2. a point of contact where the organization may be contacted in order to verify the validity of the certificate;
3. the date the certificate was issued;
4. the occupation for which the certificate was issued;
5. the alien's name, date and place of birth;
6. verification that the alien's education, training, license and experience are comparable with that required for an American health care worker of the same type;
7. verification that the alien's education, training, license and experience are authentic and, in the case of a license, unencumbered;
8. verification that the alien's education, training, license and experience meet all applicable legal requirements for admission to the US under Section 203(b) of the Immigration and Nationality Act; and
9. verification either that the alien has passed a test predicting success on the occupation's licensing or certification examination, provided such a test is recognized by a majority of state licensing boards or that he or she has passed the actual test in the occupation.

For nurses, the Department of Health and Human Services has approved two testing services to test oral and written competency in English appropriate for the kind of health care work in which the alien will be engaged. The two approved services are the Educational Testing Service (ETS) and the Michigan English Language Assessment Battery (MELAB). Occupational therapists may only take the ETS exam. That is the only examination currently recognized by NBCOT. Note, however, that graduates of health professional programs in Australia, Canada (except Quebec), Ireland, New Zealand, the United Kingdom and the United States do not have to take the English exam. One is left to wonder why schools in other English-speaking countries are excluded and why graduates of programs taught entirely in English are not covered by this exception.

HHS has set different scores for each of the occupations covered by this interim rule. The minimum scores are as follows:

- An Occupational Therapist must obtain at least the following scores on the TOEFL 560 (paper based) or 220 (computer based): Test of Written English 4.5; Test of Spoken English 50.

- A Registered Nurse must obtain at least the following scores on the TOEFL 540 (paper based) or 207 (computer based): Test of Written English 4.0; Test of Spoken English 50; or MELAB final score 79 oral score 3+.

- A Licensed Practical Nurse or a Licensed Vocational Nurse must obtain at least the following scores on the TOEFL 530 (paper based) or 197 (computer based): Test of Written English 4.0; Test of Spoken English 50; or MELAB final score 77 oral score 3+.

The procedure for complying with the regulation is fairly straightforward. The would-be immigrant only needs to present the credentialing certificate from CGFNS or NBCOT and the English language certification (if needed) at the time of visa issuance at the Consulate (if outside the US) or at the time of adjustment of status (if in the US).

The INS and the State Department have agreed to waive Section 343 for people coming to the US in non-immigrant visa categories. This has been the case for quite some time, but previously, only six-month periods of stay have been granted. The INS and State Department will now issue one-year admissions. Of course, non-immigrant visas do not mean much to nurses since acquiring H-1B visas is very difficult and most nurse positions do not require a bachelors degree, a prerequisite for the H-1B issuance. But nurses qualifying for TN visas and any other health professionals qualifying for H-1B visas will benefit from this change.

Expect a massive surge in immigrant visa filings to now occur. The INS estimates that they have more than 11,000 applications currently being held in abeyance. And many thousands more are waiting to process at consulates. That means new, possibly massive backlogs will be created, particularly for Filipinos, Chinese and Indian applicants in the EB-3 category.

One should remember that this is an interim rule and the INS is accepting comments until February 11, 1999. Comments should be submitted in triplicate to the

Director, Policy Directives and Instructions Branch
INS No. 1879-97
Immigration and Naturalization Service
425 I Street NW
Room 5307
Washington, DC 20536

The following is information to contact CGFNS about its VISASCREEN credentialing program for nurses:

3600 Market St., Suite 400
Philadelphia, PA. 19104-2651
PH: (215)-349-8767-Applicant Inquiries
PH: (215) 222-8454- Business Information
E-Mail: fnsadmin@cgfns.org

Contact NBCOT at

NBCOT
800 S. Frederick Ave., Suite 200
Gaithersburg, MD 20877-4155
Ph: 301-990-7979
Fax: 301-869-8492
e-mail: mspaldin@nbcot.org

15. BILL TO MODIFY BORDER ENTRY REGULATIONS BECOMES LAW

One of the most controversial immigration items dealt with by Congress in their most recent session is the implementation of Section 110 of the 1996 Immigration Act. That law required the INS to implement a new entry/exit control system at the nation's border crossing points by October 1st of this year. The measure is intended to keep track of foreign nationals who overstay their visas in the US.

Northern lawmakers were especially weary of the new law fearing it would create gridlock at the US-Canadian border and cost the US economy billions. Under the current system, Canadians can generally enter the US in seconds since they do not normally need a visa. Under the new system, each case at the border could take several minutes and could potentially cause people to wait in lines for several additional hours each way. Americans seeking to reenter the US from Canada would face the same queue.

Congress has been debating this issue all session with the House of Representatives supporting a one-year delay in implementation and the Senate favoring an outright repeal of the section.

The INS decided to hold off starting the program on October 1st since Congress was still debating the question. . The agency also said that it is nowhere close to having the technology ready to implement the law and will issue a report to Congress by January 1st.

Congress was unable to come up with a compromise in the normal legislative process and ultimately resolved the issue with language in the massive omnibus appropriations bill passed at the end of the session. A compromise was reached to allow an additional two and a half years before Section 110 would be implemented. The system now is to be in place by March 2000. Congress also added a provision to the statute that requires that system implemented at land borders would not significantly disrupt trade, tourism or other legitimate cross-border traffic.

Northern lawmakers have already indicated they will attempt to push through an outright repeal next year.

16. INS ISSUES REGULATIONS ON CANCELLATION OF REMOVAL CAP

The Executive Office of Immigration Review, the Immigration and Naturalization Service and the Department of Justice have jointly published an interim rule establishing a procedure for processing suspension of deportation and cancellation of removal cases. The regulation is necessary to implement provisions in the 1996 Immigration Act and the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA). Comments on the rule may be submitted through November 30, 1998. The rule is published at page 52134 of the Federal Register.

A major change imposed by the 1996 Immigration Act is the limit to 4,000 the number of people eligible for cancellation of removal (formerly called suspension of deportation) each fiscal year. The annual cap applies to all cancellation cases (even ones filed before the 1996 Immigration Act passed) except for certain cases covered by NACARA.

Shortly after the bill went into effect in October 1996, the cap was reached for the 1997 fiscal year. In fact, the cap was reached just five months into Fiscal Year 1997. The EOIR instructed immigration judges in February 1997 to defer adjudicating cases until further notice. Eight months later, the Department of Justice issued a temporary rule requiring an immigration judge to grant only on a

conditional basis cases meriting cancellation of removal and shortly after that allowed the 1997 cases held in suspension to be approved.

In November 1997, one month later, NACARA passed allowing many Central Americans and Eastern Europeans to process cases under the old suspension of deportation rules and not be subject to the 4,000 cap. NACARA also added an additional 4,000 grants for Fiscal Year 1998 for a total of 8,000 grants.

The Justice Department found that three issues needed to be resolved before a regulation implementing the cap could be granted -

1. How best to convert the 8,000 conditional grants before the fiscal year ended September 30, 1998.
2. How to ensure that all those who received a conditional grant of suspension of deportation or cancellation of removal which could not be granted in Fiscal Year 1998 have an opportunity to receive a grant of relief.
3. How to establish a procedure for future implementation of the cap.

The new regulation creates a process to convert the first 8,000 conditional grants approved in the last fiscal year into final grants. The conditional grants will be converted to final grants by a single order of the Chief Immigration Judge or the Chairman of the Board of Immigration Appeals. This month, all conditional grantees eligible to convert will receive copies of the order and the case will be administratively closed. The INS will have the right to file a motion to reopen these cases within 90 days after the conversion is made. The INS will only succeed in these motions if the applicant committed an act while a conditional grantee that would have rendered him or her statutorily ineligible for such relief. Any conditional grants left from the 1998 Fiscal Year shall be converted to grants for the current 1999 Fiscal Year.

Another issue addressed in the rule is the ability of conditional grantees to travel. This is an important issue since a substantial period of time can elapse between when a conditional grant is made and the final grant is made. The Department of Justice recognized this problem and has created a mechanism to allow temporary absences from the United States. Conditional grantees may now qualify for advance parole documents and can apply for them at local INS offices the same way as adjustment of status applicants can. Also, persons who left the country before the new regulation was enacted will still be allowed to convert their cancellations of removal. The new regulations do not comment on the standard to be used by local INS offices in granting advance parole cases. Hopefully, the INS will apply the more liberal "bona fide personal or business reason" standard now applied in adjustment of status cases as opposed to the old emergency-only standard of the past.

The regulation has a number of sections covering NACARA cases. There are over 1,000 nationals of Nicaragua and Cuba who were granted conditional grants of cancellation of removal in the 1998 Fiscal Year. Those applicants are to be offered the right to convert their cases to NACARA cases in order to free up numbers in the cap. Presumably, most will take the offer because they could adjust their status right away. Also, derivative children and spouses could adjust under NACARA with the principal applicant, something that is not necessarily available under a grant of cancellation of removal.

To qualify for a NACARA adjustment, a person must

1. be a national of Cuba or Nicaragua
2. have been physically present in the US since December 1, 1995 and not have been absent for more than 180 days
3. is not inadmissible for reasons in INA Section 212 (e.g. public charge, illegal entry, etc.)
4. applies for adjustment of status before April 1, 2000.

People who have already met the tests for a conditional grant of cancellation of removal should easily meet the NACARA requirements. Therefore, the regulation states that any application by a Cuban or Nicaraguan conditional grantee for cancellation of removal shall be deemed a concurrent request for NACARA adjustment. Furthermore, all Cuban and Nicaraguan conditional grantees will be sent a notice by INS informing them of the date, time and place at which they must appear at the INS to perfect their request for NACARA adjustment. At the interview, the applicant needs to complete a form to document eligibility for NACARA adjustment. If the applicant is inadmissible for some reason, he or she may apply for any available waiver of inadmissibility at that time. There will be no fees for this process or for waivers filed in conjunction with the NACARA adjustment. But if one applied for a NACARA adjustment before this regulation was published, no refund will be provided.

NACARA adjustees should be sure to bring the following to the INS on the day of the interview:

- the order granting cancellation of removal
- a completed but unsigned Attestation of Alien and Memorandum of Creation of Record of Lawful Permanent Residence, Form I-895, which they will be required to sign in the presence of an officer
- any applications for waiver of inadmissibility, if applicable
- two photographs that meet the specifications in the instructions attached to the I-895

For future cancellation of removal cases, there will no longer be a conditional grant of cancellation of removal. Instead, the Immigration Court will issue grants of cancellation of removal until there are no more available in a fiscal year (judges will receive notification if the cap is about to be reached). Judges must reserve all decisions on grants of cancellation of removal when no more grants are available in a fiscal year. Those reserved decisions must wait until the next fiscal year grants are available. Persons with reserved decisions will be considered to be "in proceedings" and, consequently, they cannot be removed during this period.

If an alien has failed to show any statutory eligibility for relief because there is a statutory bar from such relief, a judge may deny cancellation of removal without a reserving decision. A judge may not deny, however, in any of the following circumstances: an unfavorable exercise of discretion, a finding of "no good moral character" on a ground not specifically noted in Section 101(f) of the Immigration and Nationality Act, a failure to establish hardship as required under the statute.

In order to maximize the number of cancellation grants available, if a judge finds another basis for relief - such as a grant of asylum - the application for cancellation of removal will be denied in the exercise of discretion. However, if the asylum or other claim is overturned on appeal, the denial of the cancellation of removal will be reconsidered.

A separate memorandum sent to Immigration Judges in conjunction with the new regulation instructs judges NOT to reschedule a cancellation of removal case to an earlier date for the purpose of permitting an alien to have his or her case heard at a time when numbers may be available under the cap. Cases CAN be rescheduled if there exists a legitimate docket management situation. So if a judge has a bona fide docket management justification, he can exercise some flexibility to move cap cases up.

Because the rule was released at the very end of Fiscal Year 1998, it went into affect immediately.

17. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW PROPOSES RULES TO STREAMLINE APPEALS PROCESS

The EOIR has issued a proposed rule that would set up a streamlined appellate review procedure for the Board of Immigration Appeals. The EOIR attributes the need for a new rule to a sudden increase

in the number of appeals being filed with the BIA. In thirteen years, the number of appeals filed has jumped from 3,000 a year to 25,000 a year.

The new rule would allow a single BIA member to review cases in order to affirm cases without issuing an opinion. Under current rules, a panel of judges must hear every case and every case requires an opinion. Under the new procedure, the opinion of the lower Immigration Judge would stand as the final agency decision.

An affirmation without an opinion will only be issued when the following criteria are met:

- the result reached in the decision under review was correct;
- any errors in the decision under review were harmless or nonmaterial; and
- either a) the issue on appeal is squarely controlled by existing BIA or federal court decisions and does not involve the application of such precedent to a novel fact situation or b) the factual and legal questions raised on appeal are so minor that a three member BIA review is not granted.

Cases not meeting these criteria will be presented to a three-member panel and an opinion will be issued.

According to EOIR, the new rule will allow the BIA to more effectively allocate resources to more significant cases requiring greater deliberation or that may present unusual or interesting legal questions.

18. COMPUTER CRASH CRIPPLES LABOR CERTIFICATION PROCESSING ACROSS THE COUNTRY

A major computer crash at the Alien Labor Certification Unit within the US Department of Labor's Employment and Training Administration. The crash happened during the week of September 28th and shut down all processing nationwide of H-1B Labor Condition Applications, H-2A petitions, H-2B petitions, and permanent residency labor certification applications.

According to the DOL, the Unit's database crashed shortly after a key employee quit his position for a better job offer. No replacement had yet been hired and no one could be found immediately who had the knowledge to repair the problem.

The problem was fixed within a few days for all areas except the large Regions 2, 5 and 9. These regions account for as much as half of the nationwide workload for cases mentioned above. The shutdown for these regions is believed to be continuing.

The American Immigration Lawyers Association submitted a letter of protest to the ETA on October 21st protesting the continued shutdown noting that it is having a highly detrimental effect on the public.

H-1B Labor Condition Applications must, by law, be processed within 7 days. The backlog in Region 2, for example, are now almost a month. AILA noted that "At a time of great change to the H-1B program, the Department's lack of movement on the accumulated applications is appalling."

AILA has demanded to know DOL's action plan to address the problem. It has suggested manually approving the cases or outsourcing them to the other DOL regions where services are functioning. It is also requesting DOL authorize overtime and the use of contract labor to clear up the growing backlog.

19. NON-PROFIT CORNER: AMERICAN BAR ASSOCIATION LOBBIES CONGRESS ON SEVERAL ISSUES CONCERNING IMMIGRANTS

[Editor's Note: Periodically, Siskind's Immigration Bulletin will spotlight a non-profit organization playing an important role advocating for immigrants in America. If you know of an organization that should be recognized in this column for its important work, please let me know by sending e-mail to gsiskind@visalaw.com]

The American Bar Association, the country's largest organization of lawyers, is playing a leading advocacy role in the immigration arena, particularly through its Coordinating Committee on Immigration Law (of which this publication's editor is a member). The ABA, through its CCIL, has taken positions on a number of important immigration issues and has been actively involved in advocating on immigration policies in the Congress and in the courts.

The ABA's CCIL recently submitted an amicus brief in *Reno v. ADC*, a highly important case testing out deportation provisions in the 1996 Immigration Act. This litigation began a decade ago when the INS commenced deportation proceedings against eight people because of their political affiliation and activities.

The CCIL also sent a policy letter to Judiciary Committee Member Henry Hyde opposing Lamar Smith's naturalization legislation which was recently defeated. CCIL sent a letter to Senate Immigration Committee Chair Spencer Abraham expressing ABA positions on detention, the importance of custody hearings, access to legal information and representation by detained aliens and the need for the INS to apply its Detention Standards to non-INS facilities. [Editor's note: For more information on the seriousness of INS detention problems, see our story on the new Human Rights Watch report condemning INS detention procedures in our September issue].

In its role as advocates for the legal profession, the ABA Governmental Affairs Office recently sent a letter to Attorney General Janet Reno's office expressing opposition to the proposed EOIR/INS disciplinary rules for immigration lawyers.

The ABA will be submitting comments on several pieces of legislation. They include the cancellation of removal cap regulations and the streamlined BIA appeals regulations summarized above.

As a new member of the ABA's CCIL, I am quickly becoming educated on the important work being done by the American Bar Association on behalf of the rights of immigrants. The CCIL has several immigration lawyers as members, but it also has credibility since it has representatives from a number of other practice areas. Carol Wolchok, an extremely able Executive Director who enjoys tremendous respect from the immigration bar, the legal profession generally and members of Congress lead the CCIL. Most importantly, Ms. Wolchok has achieved incredible results on an extremely limited budget.

20. IMMIGRATION APPLICATION FEES RISE; INS ISSUES GUIDELINES

As we have reported in past months, the INS fees increased across the board on October 13th. The only fee in the increase not rising right away are naturalization filing fees which will rise on January 15, 1999.

In connection with the announced increase, the INS recently issued a guidance memo discussing procedures related to change. The memo first notes that applications received on or after October 13th with the incorrect filing fee are to be returned as improperly filed.

The rest of the memo largely discusses how the INS is to disseminate information on the fee increase.

Around the time the fees went final, the INS issued guidance on waiving fees. The INS has discretion to waive any application or petition filing fees if the applicant establishes that he or she is unable to pay the fee. An October 9, 1998 memo discussed what an applicant must show to prove "inability to pay". INS officers should consider the following:

- Within the last 180 days, he/she qualified for or received a "federal means tested public benefit," such as Food Stamps, Medicaid, Supplemental Security Income (SSI), and Temporary Assistance to Needy Families (TANF), or
- His or her household income on which taxes were paid for the most recent tax year is at or below the poverty level contained in the most recent poverty guidelines revised annually by the Secretary of Health and Human Services.
- He or she is elderly (age 65 or older at the time the fee waiver request is submitted.)
- He or she is disabled. The applicant should submit verification of disability (see below, How To Apply for a Fee Waiver.)
- The age and number of dependents who are seeking derivative status or benefits concurrently with the principal applicant.
- Humanitarian and compassionate situations, such as: the applicant is temporarily destitute; the applicant does not own, possess, or control assets sufficient to pay the fee without a showing of substantial hardship; or an applicant is on a fixed income and confined to a nursing home.
- Any other evidence or factors that the INS Service Officer believes establishes an applicant's "inability to pay" the required filing fees.

Documentation to prove the above will be needed as well. Paperwork from government agencies showing qualification for benefits, bills and receipts, employment records, evidence of the applicant's living arrangements in the US, etc. should be provided.

To apply for a fee waiver alongside an immigration benefit, an applicant needs to submit the documentation noted above and an affidavit or unworn letter that is signed, dated and includes the following statement:

"I declare under penalty of perjury that the foregoing is true and correct."

Be sure to write in large print "FEE WAIVER REQUEST" on the outside of the mailing envelope and on the top of the affidavit and each page of supporting documentation.

If the waiver request is denied, the entire package will be returned to the applicant and it should be re-filed with the appropriate fee.

Of course, requesting such a waiver and presenting the evidence above may be just the evidence INS needs to deny a petition on public charge grounds. Be sure the immigration benefit being sought does not have a public charge issue before requesting this waiver. Naturalization cases are probably the most common type of case that will be covered here.

On a related note, the INS says it is ready to begin accepting the new \$500 scholarship/worker retraining fee filed with H-1B applications as a result of the new legislation.

21. STUDY SHOWS IMMIGRATION WILL AFFECT DISTRIBUTION OF SEATS IN CONGRESS

A new study from the Center for Immigration Studies focuses on the impact of immigration on the coming reapportionment of seats in Congress. Every ten years, districts in the House of Representatives are redrawn to reflect changes in the population distribution in the country.

The study found that as many as thirteen seats will change hands by the next census as a result of immigration. This is a sizable proportion of the total of 31 seats expected to change hands in the 2000 election. The study specifically found the following:

- seven states will lose seats after the 2000 census because of immigration - Michigan, Mississippi, Ohio, Pennsylvania and Wisconsin; Georgia and Kentucky would have gained a seat but for immigration**
- six states lost a seat as a result of immigration in the 1980s - Louisiana, Michigan, Montana and Ohio lost a seat; Georgia and Kentucky failed to gain a seat they otherwise would have gained**
- Most of the redistribution is due to legal immigration, not illegal immigration**

The CIS, which normally advocates for more restrictive immigration policies, points to the study as an argument against immigration. According to the CIS, "Without a change in immigration policy, this redistribution will content indefinitely...Immigration distorts our democracy by taking away seats from states composed almost entirely of citizens to create new districts composed largely of non-citizen immigrants who cannot vote."

Representatives of immigration advocacy groups countered that non-citizen permanent residents are future voting Americans so it is legitimate to count them.

Jeanne Butterfield, Executive Director of the American Immigration Lawyers Association, stated that "The founding fathers decided on apportionment by population, not votes. Counting immigrants who live here, pay taxes and serve in the military ... in consistent with that principal."

Analysts expect the shift to benefit Democrats particularly since Republicans are more likely to be perceived as anti-immigrant.

22. NATURALIZATION AND CITIZENSHIP UPDATE

One piece of big news in naturalization and citizenship this month is the final defeat of Lamar Smith's highly restrictive naturalization bill, H.R. 2837, the so-called "Citizenship Integrity and Backlog Reduction Act of 1998."

The bill passed in the House Immigration Subcommittee this past summer, but never made it through the Judiciary Committee. Smith reportedly tried to get the legislation inserted into the omnibus budget bill along with several other immigration provisions, but failed.

Smith's bill could have dramatically increased the processing times for naturalization cases. For example, a provision in the bill would require that during each naturalization interview, the examining officer verify

each of the nearly 60 questions on the application as well as any statement in any supporting document. The average interview time would be expanded considerably and fewer people could be interviewed each day.

The provision could even have been interpreted to mean that an INS officer would be required to independently verify everything on the application form, possibly meaning each case could take many hours to decide.

Another controversial provision in the bill would have made it possible for the INS to take away someone's citizenship instead of a court. There is a serious constitutional question on whether an administrative agency can take away someone's citizenship without due process. Also, the bill would expand the rule for what is a "material" misrepresentation that could lead to denaturalization. Current rules only allow denaturalization if the fact about which the misstatement was made would not actually affect one's eligibility for citizenship. The Smith Bill would make almost any misstatement enough to denaturalize.

The bill would also remove the exemption that people over 75 years of age have from getting fingerprinted. Currently, INS relies on fingerprinting done when a person became a permanent resident and on a name check run with INS. The exemption is in place because many elderly people are infirm with maladies such as severe arthritis and the fingerprint process is considered to be an unnecessary burden.

*Another extremely important piece of news this month is the fact that the INS received a big budget increase from Congress to reduce the backlog in naturalization cases. Over the summer, we reported that the INS had asked for \$170 million in new funding to cut the massive backlog in cases. Congress has responded by including that funding in the massive end of session budget bill signed by the President on October 21st. We will report further on this when the INS releases details on how it plans to spend the money.

The INS recently conducted a study of 7,800 naturalization applications to find out rejection rates and the reasons for such rejections. The study made the following findings:

- 48% of applications are granted, 43% are continued due to lack of supporting documents and 8% are denied

- Of the 8% denied, 44% failed the English or Civics test, 25% had not met the residency requirements at the time of filing, 11% did not show up for the interview, 6% did not meet the good moral character requirement and 13% were denied for other reasons.

* At a recent meeting of the INS with Community Based Organizations (CBOs), representatives of the CBOs expressed concern that applicants could wait several years for their naturalization interview only to be denied for making an honest mistake and "jumping the gun" by applying perhaps only a few days too early. The CBOs asked the INS not to automatically require the applicants to reapply and instead take into account the long wait time faced by these applicants. INS officials agreed to entertain a proposal to not require a new application here.

* A Korean grocer in Pennsylvania has been granted citizenship by a rare special bill in Congress. The man was shot in a robbery in 1996 shortly before he was to take his oath of citizenship. The shooting left him unable to speak or raise his hand to take the oath of citizenship and the INS refused to naturalize him. The special bill eliminates the oath requirement in this case only.

23. AGRICULTURAL GUESTWORKER PROGRAM FAILS TO BECOME LAW

Efforts to include a controversial agricultural guest worker bill in the final omnibus budget bill signed by the President on October 21st have failed. The bill had previously been passed by the Senate as part of the Commerce, State and Justice Appropriations bill, but met with opposition in the House. The CSJ spending bill did not pass before the end of the session so funding for those Federal Departments was rolled into the massive budget bill passed at the end of the session. Proponents of the guest worker program pushed for its inclusion in the final bill, but failed.

The bill would create a new program in addition to the existing H-2A program that would make hiring seasonal farm workers much simpler. A central job registry would have been created and farmers could find foreign workers through the registry. The bill was controversial for many reasons including the fact that farmers would not have to guarantee housing for workers, something that is required in the H-2A program. Farmers would have to provide a housing allowance, however.

Interestingly, the Mexican government came out at the tail end of the legislative process to lobby the US Congress to approve the program. Mexican newspapers have reported that the bill was given top priority by the Mexican government. Mexican government officials refused to comment on the stories.

No word yet on whether the bill's sponsors, Oregon Democratic Senator Ron Wyden and Oregon Republican Senator Gordon Smith, will push for the legislation in the 106th Congress.

24. FRAUDULENT USE OF L-1 VISA PROGRAM UNCOVERED IN CONGRESSIONAL FINANCE PROBE

The Washington Post is reporting that Democratic fundraiser Johnny Chung, the figure at the center of a fundraising scandal being investigated by Congress, set up phony business in California in order to bring Chinese executives in on L-1 intracompany transfer visas. The executives eventually converted to EB-1 permanent residency through the businesses.

The executives who benefited from the fraudulent companies also are listed as contributors to the Clinton-Gore 1996 campaign.

Chung's top assistant, Irene Wu, testified to Congress that the businesses created by Chung had no real business activities. Wu claims that Chung used made up invitation letters to associates in China inviting them to come to the US to business meetings and to oversee business projects.

One company, Marswell Investment Inc. was created by Chung in 1996 and listed Chung as vice president and Liu Chaoying, daughter of a retired Chinese general, as president. The company described itself as being in the business of importing and exporting automobile accessories. Nearly \$80,000 was transferred from Hong Kong to a bank account for the business, but Wu testified that no business was ever conducted.

Chung claims the \$80,000 comes from Chinese military intelligence, but Liu denies this charge.

The INS and the State Department have in recent years seen an upsurge in fraudulent L-1 cases from China and, in fact, Chinese L-1 cases undergo tremendous scrutiny before a visa will be issued. It is common knowledge among immigration lawyers that L-1 cases from China undergo much greater scrutiny than almost any other place except the countries of the former Soviet Union.

25. INS FAILURE TO PROCESS LOTTERY CASES COSTS MANY PEOPLE GREEN CARDS; LAWSUIT PLANNED

We are continuing to hear reports from around the country of individuals who won the DV-98 and DV-97 lotteries who were unable to get green cards because INS offices failed to process their cases before the end of the fiscal year. The problem has been particularly acute at the Chicago INS office which had no system in place for segregating DV-98 cases. We are aware of two examples of cases that were filed promptly in October 1997 but which were never pulled for separate handling. In one case, an applicant's attorney was able to get the case segregated in the summer, but the INS still failed to request fingerprints and the case was decided on the very last day possible after intervention from a Congressman's office. In another case involving almost identical circumstances, the FBI did not get the fingerprints back in time (the INS sent them to the FBI less than one week before the September 30, 1998 processing deadline).

Similar reports have been heard from people filing in places like New York and Orlando.

The problem seems to be more severe this year than in the past as processing times at INS for adjustment cases has gotten slower and slower. Consular processing, on the other hand, seems to be as reliable as ever and cases timely filed there appear to have fewer problems.

Several months ago we wrote about a federal court judge who ordered an INS office to issue a green card to a lottery winner even though the case was not properly completed before the end of the fiscal year. Siskind, Susser, Haas & Devine has been in discussion with a litigation law firm about the possibility of filing a class action law suit against the INS to force them to issue green cards in lottery cases not handled in a timely manner by INS. Specific details are not yet available and, in fact, a final decision has not been made by the firm to pursue the matter. However, if you believe you may benefit from such a case and are potentially interested in joining the class action, please e-mail us at DV-litigation@visalaw.com.

New York Democratic Congressman Charles Schumer is also considering legislation to extend the deadline for lottery processing, but the chances of the legislation passing are not great. In an interview with Schumer's office, we learned that the legislation has yet to be drafted and there is some Republican opposition. Now that Schumer is leaving the House to run for the Senate, his political future is unclear. But if he wins the Senate, his office has indicated that it will pick up the fight again. If and when such legislation is introduced or a class action is instituted, we will inform readers and let them know what steps to take to advocate on the matter.

26. REPORT SHOWS ONE-FOURTH OF NON-MEXICAN INS DETAINEES RELEASED

The Houston Chronicle is reporting that one fourth of non-Mexicans apprehended at the nation's southern border are set free rather than deported to their home countries. The Border Patrol routinely deports Mexicans because the cost of returning a Mexican right across the border is much less than sending a non-Mexican back. And Mexicans often do not even need to be detained because they can be transported across a border crossing point quickly.

INS detention facilities have been suffering from serious overcrowding and are unable to keep families together. Many of the non-Mexicans traveling with family members are freed and given a summons to appear at a deportation proceeding. Often, a mother has small children and the INS is not able to handle caring for the minors. Others frequently released are pregnant women or those with injuries or disabilities, especially people with relatives already in the US.

Last month, we reported on deplorable human rights conditions for immigrants being detained in jails because INS detention centers are full and the discretionary releases from detention are one way to address the problem.

To put the problem in perspective, however, Chief Joe Garza of the Border Patrol notes in the Houston Chronicle report that only 4% of the 246,000 undocumented immigrants caught each year are non-Mexican. Most of the non-Mexicans are from other Central American countries, though alien smuggling rings are more and more frequently bringing Asians through the southern border.

27. JUSTICE DEPARTMENT SETTLES DISCRIMINATION SUIT WITH BLACK INS WORKERS

The United States Department of Justice will pay \$4.1 million to more than 800 past and present black employees of the Immigration and Naturalization Service to settle a discrimination lawsuit. The plaintiffs claim the INS failed to promote them on account of their race. DOJ will pay back wages to the litigants without specifically admitting any discrimination. \$1.5 million in legal fees will also be paid to lawyers and the DOJ has agreed to hire an independent consulting firm to monitor hiring and promotion of black INS employees.

If a judge grants final approval, the case would mark one of the largest awards of its kind in a case against a federal agency. The settlement marks the end of a five year battle with the INS that began with 19 Los Angeles area INS investigators who claimed they were passed up for promotions on account of their race.

28. IMMIGRANT DETAINEES STATE HUNGER STRIKES IN NEW JERSEY

INS detainees in Elizabeth, New Jersey have staged two hunger strikes this month to protest conditions at their INS detention facility.

In 1995, detainees at the same INS facility held an uprising that involved breaking windows and overpowering guards. At that time, the detainees were protesting the length of their detention without hearings and physical abuse being inflicted on detainees. An INS investigation later verified many of the claims and the company running the facility lost its contract. The facility, in fact, remained closed for nearly two years.

Last month, detainees held a hunger strike to protest the excessive delays in granting parole for political asylum applicants. The hunger strikers also protested the amount of food they are being given and the amount of money they are being charged to make telephone calls.

100 inmates participated in the hunger strike, which lasted three days. During the hunger strike, all 260 detainees were confined to their dormitories and attorneys were barred from seeing their clients.

INS officials met with the hunger strikers and Mike Gilhooly, a spokesman for the INS, indicated that the striker's complaints were being taken under advisement.

As of press time, thirty detainees are staging a smaller hunger strike at the same facility. The second strike began October 19th and is focus on complaints about lengthy stays and difficulties getting released to family and friends while asylum claims are pending.

The strikes call attention to the new "credible fear" screenings at border entry points for intending asylum applicants. Immigration rights organizations argue that the INS should be more willing to release asylum applicants who pass the credible fear screenings by INS officials at the time of entry.

Hunger strikers also complained that their complaints from the first hunger strike have not been taken seriously.

The New Jersey detention facility is actually operated under contract with Nashville, Tennessee company Corrections Corporation of America. CCA is generally known for operating prisons around the country, not INS detention facilities. The INS detainees in New Jersey are not being held for criminal misconduct.

Later in this issue, we report on a successful human rights lawsuit filed by one of the New Jersey detainees against the INS in a case involving an unusual application of a 200 year old law.

29. US COUNTIES ON MEXICAN BORDER FORM COALITION TO LOBBY FOR IMMIGRATION MONEY

Counties along the US-Mexican border have formed the US-Mexico Border County Coalition to lobby Congress for more funding to recoup expenses associated with illegal immigration.

The USMBCC is seeking more funds to pay for health care, legal and education costs associated with dealing with illegal immigrants. Nearly 1.3 of the 1.4 illegal immigrants apprehended by the US Border Patrol last year were in the Southwest US.

San Diego County officials contend that undocumented immigrants cost the county \$240 million each year, \$50 million for health care alone.

The USMBCC met in El Paso last month, the second meeting the group has now had. The first meeting took place this past June in San Diego.

30. BOARD OF IMMIGRATION APPEALS INCREASED TO EIGHTEEN MEMBERS

Earlier in this newsletter, we reported on a proposed rule to streamline Board of Immigration Appeals cases so that the BIA could handle a greater volume of cases more efficiently. Last month, the BIA also announced another initiative to address their dramatically growing caseload. The BIA will grow by 20% increasing from 15 to 18 permanent members. The Board was last expanded from 12 to 15 members in 1996. The BIA has not named any persons to fill the new positions.

31. CLINTON ADMINISTRATION CUTS NUMBER OF REFUGEES ADMITTED

Secretary of State Madeleine Albright announced late last month that the Clinton Administration would be cutting the number of admitted refugees from last year's 83,000 to 78,000 for this fiscal year. That would reduce the number of refugees admitted to the lowest level in ten years.

The 78,000 will be broken down as follows:

Africa - 12,000

East Asia - 9,000

Europe (includes 3,000 unfunded) - 48,000
Latin America/Caribbean - 3,000
Near East/South Asia - 4,000
Unallocated - 2,000

The unallocated numbers may be used where any region sees a shortfall.

32. LOTTERY DEADLINE NEARS

People interested in entering the DV-2000 lottery will need to get their applications out immediately if they are to make the October 31st filing deadline.

And in this high tech, high-speed world, the State Department rules mandate use of the slowest means for sending the documents available. DV-2000 rules only permit applications to be sent by regular mail in an envelope of a specified size (see http://www.visalaw.com/lottery_page.html for specifics). That means that overnight mail services may not be used. Applicants outside the US will now need to have their applications mailed from addresses within the US if they are to apply in time. That might involve using an express mail service to send an applicant from overseas to a friend or lawyer in the US. The person in the US would then send the application to the National Visa Center via regular mail.

Rules for DV-2001 will not be announced until next summer, but the State Department is expected to stick to its fall schedule and hold the lottery in October or November 1999.

33. LIBERIANS AND SOMALIANS TO GET TEMPORARY PROTECTED STATUS

Liberians have been redesignated for Temporary Protected Status (TPS) and Somalians have had their TPS status extended by Attorney General Janet Reno. TPS status can be granted by the Attorney General when she finds that the state is experiencing ongoing armed conflict, environmental disaster, or certain other extraordinary and temporary conditions that prevent nationals or residents of the country from returning in safety. Last month, for example, the Attorney General designated Kosova because of the armed conflict there and Montserrat because of a Volcano making the island uninhabitable.

The estimated 10,000 Liberians in the US now can get TPS until September 28, 1999. There was a short gap between the previous TPS period for Liberians and the new designation and, consequently, the status is being redesignated and not extended. The Attorney General had considered letting the Liberian TPS period end, but protests by Liberians and further findings that the ongoing conflict in Liberia remains a real threat led to the redesignation.

All Liberians seeking TPS should submit to their local INS office the TPS application (Form I-821), an I-765 Application for Employment Authorization and proof of Liberian nationality and presence in the US since September 29, 1998. TPS applicants have until March 29, 1999 to register. The only fee required is a \$100 fee for employment authorization. If no employment authorization is sought, then no fee is required (though Form I-765 still must be submitted). The fee may be waived if documentation of inability to pay is submitted (see the article on this subject earlier in this newsletter).

Somalian status has been extended until September 17, 1999. Unlike the Liberians, Somalians need to be either extending previously approved TPS status or must show that they have been in the

United States since September 16, 1991 if they do not have TPS status. The registration period runs through October 27th. The registration requirements are the same as noted above for Liberians except that the applicant must prove Somalian, not Liberian, nationality.

34. LABOR DEPARTMENT PROPOSES NEW REGULATIONS FOR H-2A AGRICULTURAL WORKER PROGRAM

The Department of Labor is proposing new rules to liberalize a number of requirements for employers of H-2A temporary agricultural workers. The following are some of the key proposed changes:

- The proposed regulation would cut from 30 days to 15 days prior to the date worker housing will be occupied that employers are required to assure that their housing is in full compliance with applicable housing standards and be available for inspection.
- The proposed rules would also cut from 60 days to 45 days before the date the employer needs agricultural workers that an application for temporary agricultural labor certification must be filed.
- The requirement that employers use registered farm labor contractors when it is customary in an area for non-H-2A employers to do this could be waived under the regulation if it can be shown that the contractor has a demonstrated history of using illegal workers.
- Employers will no longer have to know the local Job Service in writing when H-2A workers depart for the employer's place of business
- the responsibility for approving H-2A visas for workers outside the US, including petition approval for replacement of H-2A workers upon proof of the H-2A workers' repatriation, will be transferred from the INS to the Department of Labor.

The proposed changes come in the wake of proposals for a new agricultural guest worker program due to complaints relating to the extreme complexity and burdensome requirements of the H-2A program.

35. SUPREME COURT TO HEAR GUATEMALAN ASYLUM CASE

The United States Supreme Court has granted a petition to hear a case from a Guatemalan asylum applicant. The case, *INS v. Aguirre-Aguirre* involves a man who entered the United States without inspection in 1993 via the Mexican-California border from his home country of Guatemala. During deportation proceedings, the man applied for asylum. He testified that he was a student leader in Guatemala and participated in the burning of ten buses and the vandalism of stores as a form of political protest. The judge found the testimony credible and granted asylum and withholding of deportation.

The INS appealed the case to the Board of Immigration Appeals and won. The BIA held that the "nature of his acts against innocent Guatemalans" made him unworthy of a favorable exercise of discretion since the criminal nature of the respondent's acts outweigh their political nature. The BIA did not consider what fate Aguirre would face if deported to Guatemala and did not weigh the character of Aguirre's crimes in relation to his political objectives. The BIA also failed to follow precedent from the Ninth Circuit Court of Appeals, the court immediately below the Supreme Court.

The case was appealed up to the Ninth Circuit that ordered the BIA to reconsider the case. The INS has appealed again and the Supreme Court has now agreed to hear the case, one of only a handful of immigration cases that will be considered this year by the Supreme Court.

36. LULAC/CSS AMNESTY LITIGATION UPDATE

The Center for Human Rights and Constitutional Law (CHRCL), the non-profit organization that serves as plaintiffs' counsel in the amnesty litigation class action suits, has issued a detailed document entitled "A PROPOSAL FOR REGULARIZING THE STATUS OF CERTAIN PERSONS BLOCKED FROM APPLYING FOR LEGALIZATION UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986."

The amnesty cases stem from the legalization program that allowed people in the mid-1980s to become permanent residents if they could prove that they were continuously present since 1982. The INS created a number of requirements that were arguably illegal and turned away a number of people who should have been qualified. Many other people failed to apply because they heard about the INS "frontdesking" policy of turning people away without even accepting their applications.

Those turned away have been fighting the INS in years in the courts in two class action cases - LULAC v. INS and CSS v. Reno. Congress stepped in and passed legislation in the 1996 Immigration Act that stripped federal courts of authority hear legalization claims.

CHRCL is proposing a plan to deal with the cases:

- 1) The INS should accept and adjudicate legalization applications from members of the certified classes in the legalization cases who establish that they visited INS offices during the one-year application period, but were erroneously told they were ineligible to legalize, irrespective of whether they had managed to obtain and fill out official application forms. The Administration retains the legal authority to grant this relief without additional legislation.
- 2) Persons whom the INS discouraged from visiting a legalization office by way of false and misleading publicity should be granted deferred enforced departure for two years while legislation similar to the 1997 NACARA bill, benefiting Cuban, Nicaraguan, Salvadoran and Guatemalan nationals, is pursued on their behalf.

The CHRCL provides considerable detail in its proposal and we will report as others sign on to this deal.

37. COURT: EMPLOYERS CANNOT DISCRIMINATE AGAINST NONCITIZENS LEGAL TO WORK

The US Second Circuit Court of Appeals in Manhattan, a court that is one level below the US Supreme Court, ruled last month that an employer is not permitted to fire a worker just because the person lacks US citizenship.

In the case of Anderson v. Conboy, the court ruled that the United Brotherhood of Carpenters Local 17 unlawfully fired Lindon Anderson, a Jamaican national.

Anderson's lawyer hailed the victory stating "If you are legally here as a noncitizen and you have the right to work under a visa provision, then you cannot be denied the right to work because you're a noncitizen."

Anderson was working for the union as a business agent. The UBC required for the position that the employee be a US or Canadian citizen. When the union learned of his nationality in 1994, it fired him. The lower Federal District Court ruled against Anderson in his civil rights claim stating that anti-bias laws do not protect non-citizens.

The Appeals Court reversed stating that companies do not have the right to discriminate against a non-citizen unless the person is an illegal immigrant.

38. CONGRESS IMPLEMENTS UNITED NATIONS CONVENTION AGAINST TORTURE IN THE WAKE OF BOARD OF IMMIGRATION APPEALS DECISION

One of the provisions in the last minute massive budget bill we have been discussing throughout this issue is the implementation in US law of Article 3 of the United Nations Convention Against Torture. The provision is enacted in Section 2242 of H.R. 4328, the Omnibus Budget Bill.

That section states the following:

"It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

REGULATIONS.- Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."

The Congress and the President's enactment of the UN convention comes in the wake of an important Board of Immigration Appeals decision in a recent case that states that the BIA lacks jurisdiction to adjudicate a claim for relief from deportation pursuant to Article 3 of the United Nations Convention Against Torture. The BIA states as the basis for its decision that there has been no specific legislation to implement the provisions of Article 3, no regulations have been promulgated with respect to Article 3 and the United States Senate has declared that Article 3 is a non-self-executing treaty provision. Presumably, that case would not have the same result if decided today.

The United States is a signatory to the 1984 treaty and the INS actually approved a case on the basis of the Torture Treaty earlier this year. We reported on this case in our May 1998 newsletter.

In May, the INS indicated that there were 80 other cases pending that were relying on this Treaty. The INS has not issued any statements regarding how it will handle these cases now and how it plans to comply with the law's four month deadline to issue regulations.

39. NEW MEXICO OFFICIAL NAMED BORDER CZAR

US Attorney John J. Kelly of New Mexico has been named by Attorney General Janet Reno to assume the position of Border "Czar". Kelly succeeds former US Attorney Alan Bersin. Bersin, from California, became the first Border Czar in 1995 and has been very visible in promoting major Border Patrol operations.

The Border Czar is responsible for coordinating a patchwork of Federal agencies that have responsibilities on the US-Mexican border.

Kelly has held his position as New Mexico's top federal prosecutor since 1993, overseeing a staff of 50. His appointment is somewhat controversial since many expected that another Californian would be named.

40. INS OFFERS TO WAIVE DETENTION RULES IN TEXAS DRUNK DRIVING DEPORTATIONS

The INS appears to be softening its position in its deportation sweep against drunk drivers in Texas. Last month we reported on Operation Last Call, an effort by the INS to deport persons with multiple drunk driving convictions. The courts have held that multiple drunk driving convictions can constitute an aggravated felony. Aggravated felons can be deported and have very few defenses that can be made in a court.

The INS policy change was announced earlier this month at a press conference in Dallas of Democratic Congressman Martin Frost and State Representative Domingo Garcia. Garcia announced that the INS will not automatically deport anyone and that each of the detainees will have a right to a full hearing.

The INS will, on a case by case basis, consider asking the judge to terminate proceedings. That would be the only way to actually end the cases now that they are in the Immigration Court. The INS will probably be most sympathetic in cases where families will be separated. Whether those who are, in fact, deported have any constitutional equal protection arguments will certainly have to be dealt with by the courts.

The INS may have felt pressure to reverse itself after a number of immigration lawyers expressed an interest in challenging the INS in court on the question of whether drunk driving offenses constitute aggravated felonies. That INS interpretation is based on a Board of Immigration Appeals decision called *In re Magallanes-Garcia*. A case was recently filed by immigration lawyer Lisa S. Brodyaga of Harlingen, Texas that would enjoin the INS from deporting drunk driving offenders. Others are expected to also challenge the BIA ruling.

41. IMMIGRATION ISSUES STRAIN US-MEXICAN RELATIONS

This past month, there were a number of developments indicating that immigration issues are causing tension between the US and Mexico. U.S. Border Patrol officers tie much of the stress to the increasing use of violence. In the past few weeks, four unarmed, undocumented immigrants have been shot, two fatally. A third was seriously wounded. The Border Patrol officers claim the victims were throwing stones or rushing at them in cars. Border Patrol agents have also been killed, one shot fatally earlier this year by drug smugglers illegally crossing the border.

A number of Mexican government and human rights officials have expressed shock and concern about the sudden increase in violence. Earlier this month, for example, a number of human rights

experts from Mexico toured the Chicago area to investigate INS detention procedures. This is believed to be the first Mexican delegation to visit the United States on a human rights investigation. The delegation consisted of six representatives of some of the largest human rights organizations in Mexico. The delegation's report is expected to be released before the end of the year.

The Chicago INS appears to be concerned about the accusations of human rights abuses. Shortly before publication time, the INS announced that it would notify the Mexican Consulate in Chicago of planned INS raids. Chicago-area detainees would then have the right to phone the consulate or a lawyer before they are processed for possible deportation.

Mexican government officials are also calling for an investigation of human rights abuses, particularly alleged violations by the Border Patrol. Some specifically point to the doubling of the size of the Border Patrol in a few years as a sign that too many agents are being hired to ensure adequate training.

The Mexican Consular General in San Diego called for a thorough investigation of the shootings and warned that the violence on the border threatens to sour US-Mexican relations. Detainees will have the right to call the consulate and their lawyers

42. COURT: DETAINEES CAN SUE INS FOR RIGHTS ABUSES

A US District Court in Newark, New Jersey has held that immigrants can sue the Immigration and Naturalization Service for human rights violations at INS Detention Centers.

The ruling represents an expansion of rights for illegal immigrants who have traditionally not enjoyed the same rights as citizens or lawful permanent residents.

The case marks the first time that the Alien Tort Claims Act of 1795 has been used against domestic defendants instead of a foreign leader. In the past, the law had been used to help people sue despots like Philippines leader Ferdinand Marcos and Bosnian war crimes suspect Radovan Karadzic.

The defendants are suing the INS for violations at the same facility where detainees are currently staging a hunger strike (see the report on this earlier in this issue).

43. NEW INS DETENTION RULES TAKE EFFECT

New detention mandates in the 1996 Immigration Act have kicked in and the INS expects a flood of new people to be taken into custody. The law's enactment has been postponed for two years because the INS could not get ready quickly enough. Now the law must take force and the INS admits it is not prepared. Many, in fact, expect new "tent cities" to be formed, much like those in Miami in the early 1980s during the Cuban refugee boatlifts. Or the INS could release thousands of current detainees to make way for the new ones where the law mandates detention.

Section 236(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 broadens the list of offenses that require INS detention.

Last minute attempts by the INS to convince the Congress to postpone implementation of the detention provisions failed. Congress did, however, include \$90,000,000 in funding for construction of INS detention facilities in the Omnibus Budget Bill.

The INS also has pledged to do its best to comply and has said it will do more to turn the beds at INS detention centers over more quickly.

Immigrant rights advocates are pushing the INS not to try and track down individuals with old criminal convictions. They are also arguing that the new law only applies where the INS takes someone into custody immediately after release from criminal imprisonment. It would not apply in cases where one is released from prison and the INS does not immediately pick the alien up. That could give the agency the leeway it needs to comply with the law. They also intend to challenge the constitutionality of a provision that requires the mandatory detention of aliens who pose no danger or flight risk.

44. LOTTERY WINNERS FROM EMBASSY BOMBING COUNTRIES TO GET PROCESSING EXTENSION

The US House of Representatives and the US Senate have approved legislation to extend into fiscal year 1999 the visa processing period for diversity applicants whose visa processing was suspended during fiscal year 1998 due to embassy bombings. Lottery winners must complete processing of their cases in a single fiscal year. The Senate passed the bill on October 21st and, as of press time, the President had not yet signed the bill. But he is not expected to oppose the measure. A summary of consulate closures is included in our August issue which is archived on our web site at <http://www.visalaw.com>.

45. IMMIGRANTS IN ALASKA WIN CLASS ACTION SUIT ON STATE DIVIDENDS

Plaintiffs in an Alaska class action have succeeded in forcing the State of Alaska to include legal aliens and their children in the Alaska Permanent Fund Dividends. The Dividends are provided to all Alaska residents each year simply in return for residing in the state. For 1998, the total was \$1540 per resident. The State of Alaska was denying benefits to some legal immigrants.

The case was filed as a class action and won by American Immigration Lawyers Association member Margaret Stock of Anchorage. Several hundred people are expected to benefit.

46. STATE DEPARTMENT RELEASES LIST OF COUNTRIES WITH AUTOMATIC PASSPORT EXTENSION AGREEMENTS

The State Department has released a list of countries that have agreements with the US to honor recently expired passports. A number of countries have agreed to honor their passports as remaining valid for six months beyond the expiration date specified in the passport. The agreements are important because US law requires nonimmigrant visa applicants to have passports that will remain valid for at least six months beyond the date the expected visit to the US is expected to end. Otherwise, a shorter stay in the US will be granted. These agreements mean that visas can often be granted for six months longer.

The countries with treaties are the following:

Algeria

Antigua & Barbuda
Argentina (Added)
Australia
Austria
Bahamas, the
Bangladesh
Barbados
Belgium
Bolivia (Deleted)
Brazil
Canada
Chile
Colombia
Costa Rica
Cote D'Ivoire
Cuba
Cyprus
Czech Republic (Added)
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Finland
France
Germany
Greece
Grenada
Guatemala (Deleted)
Guinea
Guyana (Deleted)
Honduras (Deleted)
Hong Kong (Certificates of identify & passports)
Hungary (Added)
Iceland
India
Iran (Deleted)
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Korea
Kuwait
Laos
Lebanon
Libya (Deleted)
Liechtenstein
Luxembourg
Madagascar
Malaysia
Malta
Mauritius

Mexico
Monaco
Morocco (Deleted)
Netherlands
New zealand
Nicaragua (Diplomatic & official only)
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
St. Kitts & Nevis
St. Lucia
St. Vincent & the Grenadines
Senegal
Singapore
Slovak Republic (Added)
South Africa (Added)
Soviet Union (Deleted)
Spain
Sri Lanka
Sudan (Deleted)
Suriname
Sweden
Switzerland
Syria
Thailand
Togo (Added)
Trinidad & Tobago
Tunisia
Turkey
United Arab Emirates
United Kingdom
Uruguay
Venezuela

47. STATE DEPARTMENT RELEASES FINAL RULE ON FEE WAIVERS FOR CHARITABLE ORGANIZATIONS

The State Department has issued a final rule governing the granting of fee waivers for nonimmigrant visa applicants coming to work for charitable organizations. The rule is quite short and basically says that the charitable organization must be tax exempt under Section 501(c)(3) of the Internal Revenue Code. If it is not a US charitable organization, documentation should be submitted proving the organization's home country government recognizes the organization as a charitable organization. If the organization is based in a country without such laws, the organization can still be exempt if it engages in activities substantially similar to a 501(c)(3) organization.

48. INS COMPLETES TESTING OF PILOT CITIZENSHIP EXAM PROGRAM

The INS has completed testing of a pilot program offering citizenship civics and history testing at five INS Application Service Centers. These are the INS offices where fingerprints are taken. The test program was implemented in Arlington, Virginia; Fresno, California; Philadelphia, Pennsylvania; Providence, Rhode Island; and San Antonio, Texas.

The new program may replace the current system of testing applicants at the time of the citizenship interview or at outside INS-licensed testing centers. The INS is said to be considering switching to such a system nationwide as a result of the discovery of fraud at several outside testing centers. The INS would also like to increase consistency in testing. Applicants who received fingerprint appointment notices took the tests and not to people whom showed up without an appointment.

Approximately 1,500 people took part in the testing program, which ended October 3rd. Eighty-eight percent of these applicants passed the test.

49. LAUTENBERG AMENDMENT EXTENDED FOR ANOTHER YEAR

As part of the Omnibus Budget bill signed by the President this month, the Lautenberg Amendment making special provisions to allow in Jewish and evangelical Christian refugees from the former Soviet Union and Indochina into the United States.

Concerns have grown about an anti-Semitic backlash against Jews in Russia now that the economy in that country has collapsed. The Lautenberg Amendment changes the standard for refugees in that country. It is enough to show membership in particular protected groups as opposed to specific persecution.

As in past years, the Lautenberg Amendment has been given a one year extension.