Siskind's Immigration Bulletin –

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

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1. Openers

Dear Readers:

We received excellent feedback on our new fashion, arts and sports immigration law newsletter. If you missed it, you can see it at our new FAS portal at www.visalaw.com/resources.html.

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Despite an absence of headlines, there have been developments on comprehensive immigration reform in the last week.

First, Congress passed one measure separately that was part of the Senate immigration reform bill last year. The measure was included in the minimum wage bill introduced in the opening hours of the Congress. Employers who have hired illegal workers will be barred from federal government contracts for seven years (ten years if they had government contracts while they were employing illegal workers). The Senate version has an exemption if an employer participates in the BASIC pilot program for employer immigration compliance. We'll need to see if the House agrees to accepting this variance.

Senator Kennedy tried to attach to the minimum wage bill the entire comprehensive immigration reform bill passed last year, but the measure was tabled. We were somewhat amused to see certain anti-immigrant bloggers mistakenly read the congressional record to show that the Kennedy amendment was passed unanimously. A near hysteria followed before people realized the error. We tend to think this is typical of this community – quick to get hysterical without checking the facts.

There was also other important news on the Hill. We were pleased to learn that our friend Blake Chisam, the author of a highly regarded immigration law treatise and a well-respected immigration lawyer from Oklahoma, will be assuming the position of chief counsel to the House Immigration Subcommittee. Blake will bring a depth of knowledge to the immigration reform process that will be greatly needed this year. Good luck Blake!

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In firm news, we are pleased to welcome Elissa Taub, our newest attorney in our Memphis office. Elissa recently relocated from Miami where she was an attorney with White and Case. Prior to that, she was an attorney at Dechert Price and Rhoads in Philadelphia. Elissa can be reached at etaub@visalaw.com. Welcome Elissa!

We also have made the decision to convert Siskind's Immigration Professional, our announcements newsletter, into a blog. This will allow us to get information out in a more timely manner and we think people will find it an easier way to get the latest information on new immigration law books, seminars, employment opportunities, etc. You can see the SIP blog at sip-visalaw.blogspot.com.

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Finally, as always, if you are interested in becoming a Siskind Susser Bland client, please feel welcome to contact us at 800-748-3819 to arrange for a telephone or in person consultation with one of our lawyers.

Kind regards,

Greg Siskind

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2. ABCs of Immigration: H-1B Visas

For thousands of American employers, the H-1B visa program is the primary method for bringing in professional level foreign employees. The visa has been the subject of considerable media attention in recent years because Congress has set limits on the numbers of workers allowed in on H-1B visas.

What is an H-1B visa?

The H-1B is a nonimmigrant classification used by an alien who will be employed temporarily in a specialty occupation or as a fashion model of distinguished merit and ability.

What is a specialty occupation?

A specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are specialty occupations.

Is there a limit on the number of H-1B aliens?

Yes. Under current law, there is an annual limit of 65,000 aliens who may be issued a visa or otherwise provided H-1B status. Under the "L–1 Visa and H–1B Visa Reform Act of 2004", beginning March 8, 2005, up to 20,000 additional H-1B slots are available to graduates of US masters degree (or higher) programs. There are some types of jobs that are exempt from the H-1B cap and these are discussed below.

The number of H-1B visas for FY2004 was reached on the very first day of the fiscal year. Petitions for positions starting on or after October 1, 2005 may be submitted up to 180 days ahead of the requested start date. In other words, applications for the next quota of H-1B visas (excluding the new 20,000 slots for graduates of US educational programs) will be accepted beginning in April 2005.

Who is actually subject to the cap?

Not every H-1B applicant is subject to the cap. Visas will still be available for applicants filing for amendments, extensions, and transfers. The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Physicians taking jobs under State 30 or federal government agency waivers based on serving underserved communities are exempt from the H-1B cap.

What are the advantages to applying for an H-1B?

One of the things that makes this visa so desirable is that, unlike many other nonimmigrant visa categories, it is a "dual intent" visa. This means that a visa will not be denied simply because an individual has intentions to become a permanent resident. The assumption is that if for some reason the permanent residency petition is denied, the person would still have the intention to return home. Thus, assuming the applicant meets all of the statutory requirements for the H-1B visa, the main reason it would be denied is if the consular officer feels there is good reason to believe the applicant will not comply with the terms of the visa (such as having a history of failing to comply with the terms of a visa).

Another advantage to the H-1B category is that the employer does not need to demonstrate that there is a shortage of qualified US workers and, consequently, a labor certification process can be avoided. Aside from documenting that the position offered is in a specialty occupation and that the employee has the appropriate credentials for the job, the employer need only verify that the H-1B worker is being paid the prevailing wage for the work being performed and that employment of a foreign worker is not harming conditions for US workers.

How does one apply?

In an H-1B visa application, the US employer is called the petitioner and the foreign worker is called the beneficiary. After an offer of employment is made, the petition process begins. The first step is for the petitioner to ensure that the worker will be paid at least 95% of the prevailing wage paid to similarly employed workers in the geographic area where the beneficiary will be employed. The employer must also be sure that it is not paying less than the actual wage paid to its other employees with similar qualifications. The prevailing wage can be determined through a private wage survey or through a state Employment Security Agency. The benefit of relying on a state wage determination is that it cannot be challenged later by the US Department of Labor. On the other hand, state determinations are frequently not a close match to the job performed and are slow in being issued.

Once the wage information has been obtained, a Form ETA 9035 Labor Condition Application (LCA) must be submitted to the US Department of Labor. On this form, the employer must submit the wage to be paid, the prevailing wage, and must make certain attestations. The form is submitted by the web or by fax and the Department of Labor only reviews the form to make sure it is properly completed. It does not look to see whether the information is accurate and instead investigates a small percentage of cases where violations of the regulations appear to be occurring.

(For more information, see the Department of Labor's Foreign Labor Certification web page at http://workforcesecurity.doleta.gov/foreign/.)

The certified LCA petition is submitted to USCIS as part of the H-1B petition package. Other

information that should be included in USCIS petition includes documentation of the beneficiary's qualifications, the petitioner's type of business, and the type of work the beneficiary will be per. Each of these will be further detailed below.

Additionally, the employer must send an accompanying fee of $130. (Prior to FY2004, employers were required to submit an additional $1,000 fee to sponsor the H-1B worker, unless specifically exempt. This requirement sunset on October 1, 2003, but there is a possibility that the fee may be reinstated in the future.) Based on USCIS petition approval, the alien may apply for the H-1B visa, admission, or a change of nonimmigrant status.

For more information on the application process, see our H-1B flow chart at http://www.visalaw.com/02dec1/H1B.pdf.

What is the purpose of the LCA?

The LCA serves two related purposes: (1) ensuring that US wages are not depressed by the hiring of foreign labor and (2) that foreign workers are not exploited. On this document, the employer makes specific representations regarding the conditions under which the foreign worker was hired and will be employed. These attestations are as follows:

- The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position
- The employment of H-1B workers will not adversely effect the working conditions of US workers
- When the LCA was filed, there was no strike, lockout or other work stoppage because of a labor dispute
- The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted in a conspicuous place notice that an LCA was filed.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, including its source, whether the state or a private survey is used, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

In addition, the employer must keep other information that need not be made available to the public.

This includes payroll data for all employees in the same occupations as the H-1B worker, a calculation of the actual wage paid the H-1B worker, the raw data behind the prevailing wage determination, documentation of any fringe benefits provided workers, and evidence that the H-1B worker has been given a copy of the LCA. Once approved, an LCA is valid for three years.

(Beginning in 1998, some new requirements were added to the LCA process. However, these requirements apply only to "H-1B dependent" employers, a concept also created in 1998. These requirements sunset on October 1, 2003, were restored in late 2004. Whether an employer is H-1B dependent depends on the following guidelines:

- If the employer has over 50 employees, the employer is H-1B dependent if at least 15% of the workforce is comprised of H-1B visa holders
- If the employer has 26-50 employees, the employer is H-1B dependent if it employs more than 12 H-1B workers
- If the employer has 25 or fewer employees, the employer is H-1B dependent if it employs more than seven H-1B workers

While in most cases the new requirements apply only to H-1B dependent employers, they also apply to employers who have been found to have committed a willful failure or misrepresentation with regard to any attestation made on the LCA. If the employer is H-1B dependent, it must comply with these requirements:

- The employer must attest (swear under oath) that it has not and will not "displace" a US worker during the period from 90 days before the H-1B petition is filed until 90 days after it has been filed.
- The employer must attest that it has taken "good faith steps" to recruit US workers for the job, and that they have offered it to any US worker who applied that was at least as qualified as the H-1B nonimmigrant.)

What is the next action after filing the LCA?

Obtaining an LCA is only the first step in the H-1B process. The application for an H-1B visa must present evidence that will convince USCIS of three basic truths:

- The employer has a legitimate need for a "specialty occupation worker"
- The position offered is in a "specialty occupation"
- The prospective employee is qualified for the position.

1. The employer's need

This is often the easiest aspect of an H-1B petition to demonstrate. As a general rule large and well-known businesses do not have much difficulty in showing they have a need for an H-1B worker. Problems can be encountered if the employer is small, or if the business was recently started. In such cases USCIS has requested evidence relating to the stability of the business, such as tax returns and payroll records. Court decisions have, in the past, said USCIS is not supposed to examine the financial background of a company. However, USCIS routinely asks for such documentation even for many large employers.

2. The nature of the position

Demonstrating that a position is in a specialty occupation is quite easy with some jobs, such as lawyers, accountants, engineers and professors. With many positions, however, it is not so simple. In these situations, the application must carefully define and describe the job. Two volumes published by the Department of Labor are helpful in this area. They are the Dictionary of Occupational Titles and the Occupational Outlook Handbook. The Dictionary of Occupational Titles contains a list of job titles and lists job duties that are associated with each. The Occupational Outlook Handbook lists general educational requirements for entry into certain areas of employment, but often it deals with such broad fields that it is of limited usefulness. While the books are helpful in documenting a case, neither is binding on USCIS and the use of the publication should always be used with caution. Also, the O*Net database provided by the Department of Labor provides helpful information in documenting a position is a specialty occupation.

In cases where the specialty nature of the position is not evident, many types of evidence may be used. Trade and association publications may be presented. Petitioners may also procure affidavits from authorities in the field. Such an affidavit would be especially useful if written by someone who has personally observed the workplace and the position's role in it. One of the best types of evidence is the employer's own hiring practice in hiring for the position. Evidence of the minimum qualifications required for positions below that for which an H-1B worker is sought can also be helpful, especially if such people are required to have a university degree.

If the occupation is little known or is relatively new, extensive documentation will be required to convince USCIS of the need for an H-1B worker. In these cases appropriate evidence would include affidavits from other employers in the field and professional organizations in the field.

3. The alien's qualifications

To qualify as a specialty occupation, the position must require at least a bachelor's degree or its equivalent. Therefore, one of the most important parts of an H-1B case is documenting the alien's education and/or experience. A diploma may be submitted if it indicates the alien's field of study and that field is relevant to the position sought. If this is not the case, transcripts should also be submitted. If the relevance of the subjects studied is not apparent, course descriptions from the school catalog may be included. If the alien did not attend school in the US, their degree must be evaluated by a credentials evaluation service to ensure it is at least equal to a US bachelor's degree. Note that if the alien attended college abroad, and then obtained an advanced degree in the US, no evaluation of their undergraduate degree is required because it is presumed that the US graduate institution would not have admitted the student without at least possessing the equivalent of a bachelor's degree.

While possession of a degree is the most common way of establishing a person's ability to work in a specialty occupation, a degree is not required to obtain an H-1B visa. The applicant can demonstrate through work experience or a combination of education and experience that they have the equivalent of a bachelor's degree. If work experience will be used, USCIS requires affidavits from former employers outlining the alien's responsibilities and skills learned while there. Under USCIS rules, three years of work experience is equal to one year in college.

If there are any additional requirements that the alien must meet to take the position offered, documentation that these requirements are met must be submitted. An example would be when a license is required by the state in which the alien will be working.

How long can an alien be in H-1B status?

Under current law, an alien can be in H-1B status for a maximum period of six years at a time. After this time, an alien must remain outside the United States for one year before another H-1B petition can be approved. Certain aliens working on Defense Department projects may remain in H-1B status for 10 years. Additionally, certain aliens may extend their status beyond the 6-year period in one year increments if:

- 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
- 365 days or more have passed since the filing of an EB immigrant petition.

For whom can an H-1B non-immigrant work?

H-1B aliens may only work for the petitioning US employer and only in the H-1B activities described in the petition. The petitioning US employer may place the H-1B worker on the worksite of another employer if all applicable rules (such as the Department of Labor rules) are followed. H-1B aliens may work for more than one US employer, but must have a Form I-129 petition approved by each employer.

H-1B employees may apply for a change of status from one employer to another. The application process is fairly similar to applying for a brand new H-1B except that the process can be completed in the US without a trip abroad to a US consulate.

How does an H-1B non-immigrant change or add an employer?

One of the easiest ways for an H-1B visa holder to run into trouble with his or her visa status is to fail to comply with immigration regulations when switching employers or changing the terms of his or her employment.

The most difficult problems are often created when someone changes jobs without taking care of immigration issues. In fields like computer programming or physical therapy, it is not unusual for an individual to move frequently from employer to employer. But for an H-1B visa holder, each change can present challenges.

The first basic rule to note is that an H-1B is employer specific. In other words, it is only valid for the petitioning employer and only entitles the recipient to work for the employer approved by USCIS. That means that each time a worker moves to a new employer, a new H-1B approval is required. It is possible to apply for a change of status to switch employers from the US without having to leave and get a new visa stamp, however. But it is important to remember that the process involved will be pretty similar to getting an H-1B visa from scratch.

At one time, it was thought that changing H-1B employers meant that a new visa stamp would be needed the next time someone leaves and reenters after a change of status in the US. USCIS and the State Department now make it clear that as long as the visa remains unexpired the applicant remains in H-1B classification. Note that someone who changed from another visa to H-1B status in the US (such as from F-1 to H-1B) and never has had a visa stamp will still need to get an H-1B visa at a consulate.

What is 'H-1B Portability'?

In October 2000, former President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC21). One of the most sought after provisions in AC21 is the "portability" provision, which eases the process of changing jobs. Under it, H-1B workers can begin working for a new employer as soon as the new employer files an H-1B petition for the worker. In the past, the worker had to wait for the petition to be approved before he could begin working for the new employer. Because this provision applies to petitions for new employment filed before or after the enactment of AC21, workers for whom a new petition was filed can begin work for the new employer immediately.

The primary limitation on this portability provision is that the new employer must have filed a "non-frivolous" petition, which is one with some basis in law and fact. To take advantage of the portability provision, the worker must be in the US pursuant to a lawful admission, and must not have engaged in unauthorized employment since that admission.

The portability provision has created concern among employers about how they will comply with I-9 requirements, which obligate employers to ensure that all employees are legally authorized to work in the US. While the worker who begins working for a new employer after the filing of a new petition is work authorized, the I-9 form contains no provision for such a situation. Employers in this situation should follow current documentation procedures, as well as keeping a copy of the worker's I-94 and a copy of the receipt notice for the new H-1B petition.

How does the H-1B cap affect an immigrant who requests a change in employers?

USCIS has stated that the limit on the number of H-1B visas does not apply in this situation. However, if one leaves an employer and waits more than 30 days to apply for a new H-1B visa, the cap would apply again. Also, if one works for a cap-exempt employer and then switches to an employer that is not exempt from the cap, the cap will apply.

In the case of a concurrent filing of an H-1B application where a person is working for an exempt employer and then seeks additional employment with a non-exempt employer, the cap will not apply to the second position.

What if you change employers and then decide to go back to the first employer?

The news here is good. The H-1B petition continues to remain valid until it expires or until the employer has it revoked. USCIS takes the position that if neither of the above has occurred, one can resume work for the first employer without filing a new petition or an amendment.

What if several employers file H-1Bs for the same worker?

Let's say that two employers successfully file an H-1B and the worker enters to work for Company 1. After coming here, the worker decides to go work for Company 2 instead. Even if the worker never worked before for Company 2, the worker can switch to Company 2 without the need for a new petition. As noted above, a revocation of the petition by Company 2 or the expiration of the visa approval period for Company 2 would mean a new petition is required.

What about the case where an employee accepts a job with a second employer without giving up the first position?

There is no legal reason why this cannot take place. An H-1B worker can work for several employers simultaneously if desired. However, each employer must have a separate approval for the worker to work there. Also, USCIS does not recognize "co-employer" arrangements, so if this is the case either one employer must designate itself as the petitioner, or each employer must file a separate petition.

There are many times when a change in the nature of one's employment will trigger the need to file either an amendment to an H-1B petition or a completely new petition. USCIS position is that if the change in employment is "material" then an amendment must be filed. So, for example, if there is a significant change in job duties, then a new petition will probably be necessary. Also, being transferred to a different legal entity within the same corporation would trigger an amendment. Also, in certain cases, changing job locations could require an amendment.

Mere changes in job titles without a serious change in job duties will probably not require an amendment. The same holds true for raises in salary unless the change is so great that USCIS presumes that the position is really a new one.

Note that changes in the corporate structure of a company could mean that a new H-1B petition must be filed. The general rule is that if a new legal entity is created, a new petition is required. This would be the case, for example, if a company is sold and the new company dissolves the old company without assuming its liabilities. A merger that results in the creation of a new company might also mean that new petitions should be filed. If the new company is what in corporate law is called a "successor in interest" then a new petition is normally not necessary. Changes in a company's name will not trigger the need for an amendment or to refile, but an amendment is useful in order to avoid confusion when the worker reenters the country later on.

Must an H-1B alien be working at all times?

As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full or part-time employment and remain in status. An H-1B alien may also be on vacation, sick/maternity/paternity leave, on strike, or otherwise inactive without affecting his or her status.

Can an H-1B alien travel outside the US?

Yes. An immigrant with H-1B status may reenter the US during the validity period of the visa and approved petition.

What are the filing fees associated with an H-1B visa?

There are four government filing fees that come up in H-1B cases. First, the base filing fee for an H-1B case is applicable in every case. As of publication of this article, that fee is $185.

In late 2004, Congress passed legislation restoring a worker retraining fee. The previously applicable worker retraining fee was reinstated and increased from $1000 to $1500. Employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries pay $750. Previously exempt employers will continue to be exempt from the fee.

The following categories of employers and employees are exempt from the H-1B retraining fee:

- The employer is an *institution of higher education* as defined in the Higher Education Act of 1965; or
- The employer is a *nonprofit organization or entity related to, or affiliated with an institution of higher education.*; or
- The employer is *a nonprofit research organization or governmental research organization*, that is primarily engaged in basic research and/or applied research; or
- This petition is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the $1,000 filing fee was paid on the initial petition or the first extension of stay; This petition is an amended petition that does

not contain any requests for extension of stay filed by the employer; or

- This petition is to correct an Immigration and Naturalization Service error; or
- The employer is a primary or secondary education institute; or
- The employer is a nonprofit entity which engages in an established curriculum-related clinical training or students register at the institution.

Applicants seeking faster processing can pay a $1000 premium processing fee to be guaranteed an answer within 15 days.

Finally, on March 8, 2005, a new $500 fraud prevention and detection came into force.

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3. Ask Visalaw.com

If you have a question on immigration matters, write *Ask-visalaw@visalaw.com*. We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

Q - If someone obtained there permanent residency by marriage and they have had their green card for about eight months, can the petitioner then change their mind and file a petition to revoke residency?

A - Once a person has obtained permanent residency, a spouse cannot do anything to revoke that status

unless they can somehow show that the marriage was entered into fraudulently. It is true that the couple are supposed to jointly file to remove conditions on permanent residency after two years (if the was married less than two years at the time of getting permanent residency), but the immigrant does have the right to file individually if they can show that the marriage is no longer intact but it was entered into in good faith.

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Q - Will a resident of the Philippines living in Malaysia on a 1 year visa be eligible for a K-1 visa to come to the US?

A - Assuming all the other K-1 requirements are met, the fact that a person is residing in a country other than the one of which they are a citizen should not be a problem unless the person is in the other country illegally. The consulate will usually need to see that the person is legally residing in the country where they are applying.

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Q - In an LLC Company ,is it possible to sponsor someone on a H1B visa?

A - Yes, any type of legal employer can apply including partnerships, corporations, sole proprietorships, etc. That's not to say that any employer will qualify since the employer will need to show an ability to pay, a need for the employee, compliance with various labor requirements, etc. But the corporate structure will not matter as long as the business is a US employer.

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Q - I was a foreign student(F-1) graduating from a US college and I'm in the US at present. My wife is an asylee and is in the US as well. She recently filed a petition for permanent residence based on her status since she granted asylum over a year ago. However, I could not apply for a derivative status as her dependent since we married after she was granted asylum here and it turned out I need to wait until she

becomes a US citizen.

According to her profession, she could file an employment-based petition for permanent residence. My question is if I can get any immigration benefits such as Green card, work permit, or adjustment to any legal status from her employment-based petition.

A - If your wife pursues permanent residency via an employment-based petition rather than asylum, then you could very well be able to adjust status with her. This might be a good solution and is worth discussing with your immigration lawyer.

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Q - I have an approved I-751 (application to remove conditions on green card based on marriage to US citizen) and they stamped my passport with I-551 stamp and told me to wait for Actual Plastic permanent resident card. Can I travel with that stamp? Is there any problem if I travel? Also, the stamp says “upon endorsement serves as temporary i-551 evidencing permanent residency for 1 year.”

A - Yes, the I-551 is valid for travel as long as it is unexpired. It has the same legal meaning as the permanent residency card and as long as it is unexpired, you’re fine to use it the same was as a green card.

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4. Border and Enforcement News

Last week, former Border Patrol agents Ignacio ‘Nacho’ Ramos and Jose Alonso Compean turned themselves over to U.S. Marshals to begin serving 11 and 12 years, respectively, in federal prison. The pair were convicted last spring on multiple charges, including assault with a deadly weapon and violating the civil rights of Osbaldo Aldrete-Davila, an undocumented immigrant.

The *Houston Chronicle* reports that on Feb. 17, 2005, Ramos and Compean shot Aldrete-Davila after a foot chase along the Texas-Mexico border. Aldrete-Davila, who was struck by a bullet, had fled a van the agents were pursuing. The van later turned out to be holding over 700 pounds of marijuana.

During their trial, the agents' lawyers argued that they fired on Aldrete-Davila because the believed they had a gun in his possession while chasing him. Prosecutors countered successfully that Aldrete-Davila did not have a gun, the agents had no conceivable way of knowing at the time that he was smuggling drugs, and therefore the agents were unauthorized to shoot the smuggler in the first place.

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This past week, Mayors of Texas border towns met with Homeland Security head Michael Chertoff. The mayors emerged from the meeting confident that an 850-mile fence will not be built on the U.S.-Mexican border. The *Associated Press* reports that seven mayors met with Chertoff at the office of Sen. Kay Bailey Hutchison (R-Tex.), a proponent of a border fence.

Chertoff said that there are still portions of the border where fencing will be effective, but large parts of the border need a mix of technology and guards. "In all cased, we need more boots on the ground." Chertoff said.

A law passed last year provided the Homeland Security Department to spend $1.2 billion for fencing. The law withholds $950 million of the total until the House and Senate appropriations committees approve the department's plan for spending the money.

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5. News From the Courts

The Administrator Appeals Office recently approved a petition of a nonimmigrant visa that was previously denied by an AAO Vermont service center director. The petition was for a Nonimmigrant Worker Pursuant to Section 1010(a)(15)(H)(i)(b) of the Immigration and Nationality Act.

This section of the Act would allow the petitioner to hire a beneficiary through an alternative teacher certification program called *TeacherTrak*. This program allows Texas public schools to hire foreign nationals with a "probationary" teaching certificate. Upon completion of a two-semester teaching "internship" in a public school, participants in the program take an appropriate state teacher certification exam.

The local director denied such a petition on three grounds:

1) USCIS received sufficient numbers of H-1B petitions to reach the cap for FY 2006, and the petitioner did not qualify for an exemption from the cap;

2) The position is not a specialty occupation subject to an exemption; and

3) The beneficiary is not qualified to perform services in a specialty occupation.

The AAO review board ruled that the beneficiary mentioned by the petitioner does indeed qualify for exemption from the FY 2006 H-1B cap. Citing the language of 8 CFR § 214.2(h)(19)(iii)(B), if the petitioner can demonstrate that he or she is an affiliated nonprofit entity or entity of higher learning, it can be exempt from the cap. The counsel of the petitioner proved that since the petitioner was employed by the State of Texas, it does not meet the criteria, and thus, the first prong of CFR § 214.2 was not met.

However, the AAO did affirm the petitioner's assertion that the position is indeed that of a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation. Citing the language of 8 CFR §214.2, the AAO determined that an acceptance could be granted by "an evaluation from an official who has the authority to grant college-level credit for training." The petitioner submitted evidence, including approval from numerous professional evaluators in the Texas University administration; all sponsors confirmed that the beneficiary has a foreign degree that is equivalent to a baccalaureate degree from a U.S. college or university.

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6. Government Processing Times

There are new processing times for the following service centers:

Vermont (1/17/2006): http://www.visalaw.com/vermont.html

California (1/17/2006): http://www.visalaw.com/california.html

Missouri (1/17/2006): http://www.visalaw.com/missouri.html

Nebraska (1/17/2006): http://www.visalaw.com/nebraska.html

Texas (1/17/2006): http://www.visalaw.com/texas.html

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7. News Bytes

The U.S. Citizenship and Immigration Services office in Miami will issue free work permits for as many as 1,000 Cubans who were unable to obtain them because of a computer glitch, the *Miami Herald* reports.

A class-action lawsuit was brought by the immigrant group, with pro bono assistance from Holland & Knight, against the USCIS in federal court in Miami. The suit was filed July 24 on behalf of Cubans who had applied for work permits but were unable to receive them in a timely manner. Court papers revealed that USCIS failed to process applications from immigrants with case numbers beginning with the digits 200; Cuban migrants' numbers were in this category.

As a result, Cubans who qualify for the permit can now apply free for a valid permit lasting one year. The usual filing fee of $180 per permit will be waived.

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8. International Roundup

A new law intended to tighten the U.K. government's grip on immigration have passed in the House of Commons. *The Metro* of the U.K. reports that the UK Borders Bill is nearing acceptance in the U.K. The bill would give greater powers to immigration officers and allow for automatic deportation of some foreign national prisoners at the end of their sentence. The bill would also introduce compulsory

biometric ID cards for non-EU foreign nationals.

The legislation emerges in the midst of a string of immigration scandals, including the admission last year of Immigration and Nationality Directorate head David Roberts that he had not the "faintest idea" how many illegal immigrants were in the United Kingdom. Additionally former Home Secretary Charles Clarke lost his job when it emerged that 1,000 foreign prisoners were released without being considered for deportation.

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A new magazine in Japan bookstores has begun to raise fear of a backlash against the country's foreign community. *The Guardian* reports that "Secret Files of Foreigners' Crimes," a monthly publication, contains over 100 pages of photographs, animation and articles of foreigners committing criminal acts in the nation. The magazine makes liberal use of racial epithets and provocative headlines directed mainly at favorite targets of Japanese xenophobes: Iranians, Chinese, Koreans, and U.S. servicemen.

"It goes beyond being puerile and into the realm of encouraging hatred of foreigners,' Debito Arudou, a naturalized Japanese citizen, told *The Guardian*. "The fact that this is available in major bookstores is a definite cause of concern. It would be tantamount to hate speech in some societies."

The magazine's publication coincides with warnings that foreigners are encouraged to live and work in Japan to counter the effects of population decline and an aging society. The current population of 127 million is expected to drop to below 100 million by 2050, with over a third of Japanese will be aged over 64.

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9. Legislative Update

U.S. Congressman Alcee Hastings has recently filed a bill to temporarily protect thousands of undocumented Haitians who face deportation to the U.S. According to *The Miami Herald*, Rep. Hasting filed the bill in an effort to curb a continuous wave of violence and kidnappings occurring in Haiti. The bill, dubbed by the South Florida Democrat as the Haitian Protection Act of 2007, seeks to give "temporary protected status" to an estimated 20,000 undocumented Haitian citizens living in the U.S.

The bill further aims to prevent the deportation of criminal detainees back to Haiti, where there are fears that, since the 2004 ouster of former Haitian President Jean-Bertrand Aristide, crime and violence in island nation has begun to surge. Last month, the Herald reported that schools in and around Port-au-Prince were forced to close early due to a wave of for-ransom kidnappings of Haitian children.

The bill faces an uphill battle, as it is usually the Department of Homeland Security that decides if a country qualifies for TPS status. Chris Bentley, a spokesman for the USCIS, said that a country being accepted for TPS status based on Congressional action has only occurred once since the status was created, with temporary protected status extended to Salvadorans.

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The Dallas city council announced that they would consider tossing out an ordinance which would ban apartments for renting to illegal immigrants, and replacing it with a revised proposal. The City Council made the decision at an emergency meeting last Wednesday, in which it was proposed and agreed upon that the ordinance will revise the residency and citizenship requirements in the original ordinance.

It was unclear whether the new ordinance would target undocumented immigrants. The original ordinance requires apartment managers to obtain proof that tenants are either U.S. citizens or are in the country legally.

According to the Mexican American Legal Defense and Education Fund, as well as the ACLU, said the city's reconsideration of the ordinance is in response to a lawsuit the filed claiming the initial ordinance was unconstitutional.

City attorney Matthew Boyle said that he was unable to comment on the council's decision or the details of the requested ordinance revisions because they had not been drafted. Council member Tim O'Hare, perhaps the largest proponent behind the original ordinance did not return calls to the *Dallas Morning News*, who broke the story.

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According to a study conducted by the Center for Community Change, a pro-immigration group based in Washington, nearly 35 U.S. towns have approved laws against undocumented immigrants, 35 have defeated any similar ordinances, and 35 others have ordinances pending. The study comes at a time

when opponents of such city ordinances—such as Hazelton, Pa., Valley Park, Mo., and Farmers Branch, Tx.—have begun fighting back, mounting legal challenges against the cities imposing such ord

The *Associated Press* reports that in some of these legal challenges, state and federal judges have blocked ordinance enforcement. In other cases, the towns themselves have backed down, unwilling to fight costly legal battles. After a federal judge blocked Escondido, Calif., from fining landlords who rent to illegal aliens, the City Council killed the measure and agreed to pay $90,000 to the opposing lawyers.

Despite the setbacks in communities where legal challenges have been raised, Bob Dane, a spokesman for the Federation for American Immigration Reform, said his group expects to see more towns pass such laws. "It's a reaction to the inaction in Washington, and you'll continue to see these happen because the local jurisdictions are hit so hard by the cost of illegal immigration."

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For more information on the immigration on Capital Hill, see our blog at www.visalaw.com/blog.html.

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10. Notes from Visalaw.com Blog

Visalaw.Com Blog

- President Puts Another Plug in for Guest Program
- Senator Collins to Introduce Bill Delaying Real ID Act
- Our Blog is One of the Top 100 Most Popular Law Blogs in America
- Ohio Senator Introduces Bill to Expand Visa Waiver to Allies in War on Terror
- Major Report Calls for U.S. to Become More Welcoming to Foreign Tourists
- Lofgren Questions USCIS Fee Increases

Tech Notes

- Will Salary Wars Cripple Big Firm Immigration Practices?
- CES Favorite Gadgets #1
- Google Prepping Free Powerpoint Trial

- Is Wikipedia a Legitimate Source to Cite in Immigration Law?

Visalaw Fashion, Sports, & Entertainment

- Horse Racing Industry Calls on Congress to Reform Immigration Laws
- ICE: Circus Agent Pleads Guilty to Smuggling Aliens and Visa Fraud
- WSJ Reports on Globalization of Modeling Industry
- SSB Fashion, Arts & Sports Portal Debuts
- SSB's Eric Bland Quoted in Article on Fashion Model Visa

Visalaw Health Blog

- NCSBN Confirms Philippines News
- Texas Senator Said to be Introducing Nursing Green Card Recapture Bill Next Week
- NCLEX to be Offered in The Philippines
- USCIS Said to Begin Approving Specialist Physician for National Interest Waivers

Visalaw International Blog

- Canada: Sergio Karas Meets US Ambassador to Canada
- US: Siskind Susser Bland's Fashion, Arts & Sports Immigration Portal Debuts

Siskind's Immigration Professional Blog

- Jobs: American Immigration Law Foundation Seeking Executive Director
- Seminar: Employment Agreements and Cross-Border Employment
- Seminar: AILA Minnesota/Dakotas Chapter CLE
- AILA Midwest Regional CLE Conference

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11. Commentary: Open Letter to Secretary Rice

January 12, 2007

Secretary of State Condoleezza Rice

U.S. Department of State
2201 C Street NW

Washington, DC 20520

Dear Madame Secretary:

The American Jewish community owes its existence to the welcome which first generation Jewish-Americans received in the United States after fleeing religious persecution. Our own history, combined with the fundamental Jewish principle of *Piddyon Shevuyim* (redemption of the captive), compels us to urge that the United States Refugee Program provide a similar welcome to religious minorities who have been fleeing Iraq.

Our community is particularly empathetic to the plight of Iraqi Christians, whose current exodus is reminiscent of the Jewish exodus from Iraq between 1948 and 1970, when approximately 150,000 Jews were forced to flee a civilization where they had resided since biblical times. Only a few dozen Jews remain in Iraq today. According to a report cited in the Department of State's International Religious Freedom Report for 2006, "after a series of church bombings and incidents of violence targeting Christians over the past two years, more than 200,000 non-Muslims left the country or fled to the North."

Many have fled to neighboring countries which are not even signatories to the 1951 Convention Relating to the Status of Refugees, which protects asylum seekers from involuntary return to countries where they may face persecution.

Most Iraqi refugees in these countries cannot work legally to support themselves, and their children cannot attend school. Rather, their children are often forced to work in sweatshops where they are paid little – or nothing at all – as unscrupulous employers realize these refugees have no legal recourse to complain about unpaid wages. Iraqi refugees so fear deportation and attracting the attention of authorities that they avoid seeking emergency medical assistance, and do not contact the police when victimized by crime.

The international community is doing little to protect these asylum seekers. According to a January 2, 2007 article in the New York Times, last year the Syria office of the United Nations High Commissioner for Refugees (UNHCR), which is mandated to protect Iraqi refugees, had to do so with less than one dollar per refugee. This year, the U.S. Refugee Admissions Program – with a resettlement target of 70,000 refugees worldwide - plans to offer resettlement to only a few hundred Iraqis.

According to most estimates, more than 1.2 million Iraqis have fled their country since 2003. The United

States must show greater leadership in protecting them; particularly those religious minorities – the Christians, the Mandaeans, and the Jews – who have no hope of imminent return, as well as the fled after being threatened for having ties to the United States.

We urge the Administration to contribute significantly greater resources toward basic protection and services for Iraqi refugees within the region, schooling for their children, and resettlement to the United States for those whom a safe and voluntary return to Iraq is unlikely, including many Iraqi Christians, Mandaeans and Jews.

We would like to make a special plea for refugees with family ties to the United States. The Jewish community continues to have nightmares from more than 60 years ago, when many of our brothers and sisters in Europe were denied refuge and reunification with family members living in the United States. In the 50 years following the Holocaust, the Department of State seemed to have learned a lesson, and allowed far greater opportunities for Vietnamese, Soviet, Bosnian, and other refugees with family and other U.S. ties to apply for resettlement.

We ask that the Administration give similar consideration to those Iraqi refugees who have family members in the United States – or who are targeted for associating with the United States in Iraq – and permit them to apply directly to the United States for resettlement. The U.S. Refugee Program should no longer require refugees with such ties to the United States to obtain a resettlement "referral" from the UNHCR, which needs to direct its scarce resources toward tending to the protection and assistance needs of all Iraqi refugees in the region.

Thank you very much for your consideration.

Sincerely,

National

American Jewish Committee

American Jewish Congress

Anti-Defamation League

B'nai B'rith International

Hadassah, the Women's Zionist Organization of America

Hebrew Immigrant Aid Society (HIAS)

Jewish Council for Public Affairs

Jewish Labor Committee

National Council of Jewish Women

NCSJ: Advocates on Behalf of Jews in Russia, Ukraine, the Baltic States & Eurasia

The Workmen's Circle/Arbeter Ring

UCSJ: Union of Councils for Jews in the Former Soviet Union

Union for Reform Judaism

United Jewish Communities

Local and Regional

Action for Post-Soviet Jewry

Congregation Eilat of Mission Viejo, California

Fort Wayne Jewish Federation

HIAS and Council Migration Service of Philadelphia

HIAS Chicago

Jewish Child and Family Services of Chicago

Jewish Community Council of Metropolitan Detroit

Jewish Community Relations Council of New York

Jewish Community Relations Council of Southern New Jersey

Jewish Community Relations Council of the Jewish Federation of Greater Hartford

Jewish Family Service of San Diego

Jewish Federation Association of Connecticut (JFACT)

Jewish Federation of Greater Middlesex County

Jewish Federation of Metropolitan Chicago

Jewish Federation of Metropolitan Detroit

Jewish Social Policy Action Network

JFREJ- Jews for Racial and Economic Justice

Metropolitan Council on Jewish Poverty

St. Louis Jewish Community Relations Council

Syracuse Jewish Federation

United Jewish Federation of San Diego County

UJA-Federation of New York

Cc: Ellen R. Sauerbrey

Assistant Secretary, Bureau of Population, Refugees, and Migration

Department of State