

Chapter 1: The Basic Scheme of Immigration

Introduction

Many people come to the United States every year as non-immigrants. That means people who are coming to the USA not to live here permanently but for a specific purpose. These may be students, temporary workers, or visitors for pleasure. They may also be people coming to conduct research in the US or for temporary agricultural or other unskilled labor. They may also be pilots or crewmen on cruise ships. They may be diplomats or other government officials. They may be cultural exchange visitors, coming to learn from the American experience while sharing their native countries' culture, customs and experiences with the American population.

On the other hand, there are immigrants. Immigrants are people who are coming here legally to live and work permanently in the USA. We sometimes refer to immigrants as “green card” holders. Having a green card gives you the right to live and work permanently in the USA. However, to get a green card you must either have a qualifying family relationship with a US Citizen or permanent resident or have a job offer from a US employer. Also, some immigrants may obtain their immigrant status through applications for asylum or other immigration relief through the immigration court. Some applicants may also obtain their green cards as religious workers or as “special immigrants”. Finally, some applicants may obtain their green cards through substantial investments and job creation in the USA.

The day that changed American immigration forever: Following the September 11, 2001 destruction of the World Trade Center, the damage to the Pentagon and the crash of flight 93 in Shanksville, PA, in 2003 the US Congress broke up the Immigration and Naturalization Service (then “INS”) into three separate agencies and made these three agencies part of the “Department of Homeland Security”. Those agencies work with one another to ensure the integrity and security of the United States. These agencies are:

- **USCIS** (United States Citizenship and Immigration Services): Generally provides benefits to aliens whether immigrant or non-immigrant;
- **USCBP** (United States Customs and Border Patrol): They are the “first line of defense” at the borders, airports and seaports to screen people who wish to enter the United States;
- **USICE** (United States Immigration and Customs Enforcement): As the name suggests, this is the enforcement arm of the Department of Homeland Security (DHS). They are responsible for apprehending and deporting criminal aliens or other aliens who have violated the terms of their status in the United States or have entered illegally to the United States.

Who Makes Immigration Law?

Federal authority over immigration law - Article I, Section 8, of the United States Constitution lists the powers granted to Congress, and includes the power “To establish a uniform Rule of Naturalization”.

If only Congress (and not the states) can regulate naturalization, it stands to reason that Congress likewise has the power to regulate all of the processes which ultimately culminate in naturalization.

In addition, immigration is a complex area and immigration rules are often impacted by other agencies such as the Social Security Administration, Department of Labor, Department of Health and Human Services, Housing and Urban Development, and Department of Transportation as well as the Transportation Security Administration.

States rights: Enactment of laws targeting immigrants in order to address perceived Federal inaction (eg: Arizona, Alabama). It remains to be seen whether these state laws will be upheld by the Supreme Court. See the syllabus of the US Supreme Court's decision on the Arizona law, SB 1070. [ARIZONA ET AL. v. UNITED STATES, 132 S. Ct. 2492 (2012), reproduced at the end of this chapter; Also see the Congressional Research Service's report R42719, "Arizona v. United States: A Limited Role for States in Immigration Enforcement" (09/10/2012)]

What's happening with the DEFERRED ACTION for CHILDHOOD ARRIVALS? ("DACA")

As of the time of this writing, President Obama's November 20, 2015 Executive Action on Immigration ("DACA", and later expanded to "DAPA") had been challenged in federal court and the 5th Circuit had overruled it. Due to the death of Supreme Court Justice Antonin Scalia, the Supreme Court was deadlocked 4-4 on the matter, leaving the 5th Circuit ruling standing. The case was remanded to the original court where it had been struck down - the Federal District court in Brownsville, TX. There, a federal judge who had originally ruled against DACA kept the program alive for existing DACA recipients - citing undue hardship to this limited class of DACA recipients. Other courts heard challenges to Trump's decision to rescind DACA, and kept DACA alive. Those cases have made it to the Supreme Court, which, during the week of June 10, was expected to decide whether to accept the challenges to DACA to be heard in the Court's next (2019-2020) term.

The foundation of Federal authority over immigration law:

The Supreme Court held that the Federal Government had the power to regulate immigration in two cases arising out of the states' intent to impose taxes upon alien passengers. In the "Passenger Cases" (48 U.S. (7 How.) 283), the syllabus explained:

"Statutes of the states of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states declared to be contrary to the Constitution and laws of the United States, and therefore null and void.

Inasmuch as there was no opinion of the Court as a Court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States."

Interestingly, the cases reflect the public policy on the exclusion of aliens from the United States - in *Norris v. City of Boston*, one of the two companion cases included in the *Passenger* cases, the decision reported:

"And the jury further find, that the plaintiff in the above action is an inhabitant of St. John's, in the Province of New Brunswick and Kingdom of Great Britain; that he arrived in the port of Boston on or about the twenty-sixth day of June, A.D. 1837, in command of a certain schooner called the Union Jack, of and belonging to said port of St. John's; there was on board said schooner at the time of her arrival in said port of Boston nineteen persons who were passengers in said Union Jack, *aliens to each and every of the states of the United*

States, but none of them were lunatic, idiots, maimed, aged, or infirm."

In *The Chinese Exclusion Case*, 130 U.S. 581 (1889), the Supreme Court summarized decades of commentary, prior decisions, and the laws as pertaining to international treaties as follows:

“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.”

We will examine the grounds for immigration in this chapter, and in other chapters we will explore the grounds for exclusion of aliens from the USA, as well as the numerous grounds for deportation (removal) of aliens.

Who enforces Immigration Law?

Before 9/11, that answer was very clear: the INS (Immigration and Naturalization Service) was the primary agency tasked to execute immigration laws and related regulations. To a lesser extent, the Department of labor and the US Department of State also had immigration-related functions. However, after 9/11, while the duties of the other Federal agencies reflected the overarching demands of national security in all their functions, the INS came under special attention for having not only admitted the 9/11 hijackers, but, ironically, post 9/11, issuing non-immigrant visa extensions to a couple of these hijackers. Congress felt that the INS was broken. As a result, the INS found itself directly in congress' cross hairs. As a result, the INS that practitioners had grown to love (and hate) was broken into three separate agencies and transferred to the newly created 'Department of Homeland Security' (DHS).

Of BICE and Men: Immigration Practice after the fall of the INS

(Note: this article was originally authored by Farhad Sethna and published in 2003 - several changes have been made to reflect present conditions)

On February 28, 2003, the INS we had grown to know and love ceased to exist. It seemed as though even before the ashes from the 9/11 attacks had cooled, the Federal government had replaced the INS with no less than three separate bureaus. All three Bureaus now fall within the jurisdiction of the then newly created "Department of Homeland Security."

The Bureau of Immigration and Customs Enforcement (BICE), is responsible for "interior enforcement." The Bureau of Customs and Border Protection (BCBP) is responsible for cross border traffic of people and goods, and ensuring a uniform immigration and customs policy. Finally, the Bureau of Citizenship and Immigration Services (BCIS) conducts the functions that most people associated with the former INS: approval of petitions for relatives and immigrant workers, asylum and refugee processing, and naturalization.

(Author's note: the "Bureau" designation was subsequently removed and the agencies are now called the United States Citizenship and Immigration Service (CIS) , United States Immigration and Customs Enforcement (ICE), and the United States Customs and Border Protection (CBP))

Even a cursory glance at the functions summarized above will illustrate that there exists a staggering amount of overlap between the three bureaus. How this overlap will eventually play out is yet to be seen. For now, the purpose of this article is to alert readers to the changing dynamics in increasingly complex process that profoundly affects real people each and every day.

The first problem is the lack of rules and infrastructure in certain areas. For instance, the three Bureaus do not yet have a coordinated system for sharing information. Thus, in recent experience, a client was asked the same set of questions at the CIS and then answered more of the same questions across the hall at the ICE. However, this is changing as the same databases can be accessed by various agencies.

The second problem is the location of the physical files on applications, removal (deportation) cases, and other types of benefit cases where there is going to be interaction between the three Bureaus and the DHS's immigration counsel. It is very likely that files will be lost, misplaced, in transit when they are needed, or simply not available to one Bureau because another Bureau has possession. File transfer between departments was already a problem when the INS was one agency; now multiply that problem times three, and add to that a liberal dose of mileage, since the Bureaus may not be in the same location. In fact, the typical CBP office will not generally be located proximally to the ICE or the CIS, since the CBP functions primarily for border security, and offices are consequently based at land borders, ports of entry such as airports and seaports.

The third problem is that the INS reorganization simply puts old wine in new bottles. New bureaus may be created and new titles assigned, but the old culture still remains. It has been, and will continue to be, tedious and frustrating to obtain any meaningful assistance from the Bureaus. With the split, the problem becomes even more difficult: in place of one District Director with authority over all the INS departments, we now have three Bureau chiefs, with their own staff, their own turf, and their individual policies or biases. Multiply this by thirty-two, the number of INS districts, and you will quickly grasp the nature of the problem. The USCIS, USICE and USCBP, especially with the Trump administration have become increasingly unapproachable and unaccountable. It is typical for USCIS to neglect cases and fail to respond to questions. Likewise, USICE will not return calls or provide information on pending cases or detainees. USCBP, working at the Border and up to 100 miles from it apprehends individuals unlawfully present in the USA both at the border and within one hundred miles from the border.

It is not the absence of the laws that weaken the immigration and national security process. Rather, it is the lack of adequate direction and clear policy from the top which placed the INS in its unenviable position after 9-11. With three bureaus, with discrete and overlapping functions, it remains to be seen whether that fundamental managerial problem will be overcome or whether we will have three times the mess.

The fourth problem is the potential inability to obtain information to adequately represent one's clients. Freedom of Information Act requests used to be a time-honored method of obtaining information from the INS, especially on cases that were closed out years, or even a generation ago. However, the Homeland Security Act (which created the DHS), provides for criminal penalties if a government employee accidentally or intentionally discloses information that should not be disclosed in the interest of "national security". An attorney's ability to obtain a file may be severely truncated if the client presents any potential "national security" issues. In the wake of 9-11, the government has been using the constant chant of "national security" to curtail many freedoms. Access to counsel, or meaningful representation in the immigration context, is certainly one of the rights that has been curtailed.

Given the change in the administration, even the immigration court (Executive Office for

Immigration Review) and the Board of Immigration Appeals (BIA) has become politicized, especially after the reign of Attorney General Jefferson Beauregard Sessions III. In just the last year-and-a-half, numerous cases edesignated as “precedent decisions”, having the legal authority to force Immigration Judges to follow their holdings and thus either foreclose or deny immigration relief in many categories of cases. The BIA is the only appellate review available for many immigration cases and thus works under an immense, nationwide caseload. Consequently, the number of cases appealed from the BIA to the federal circuit Courts of Appeals has likewise increased exponentially.

So, what is an immigration practitioner to do? Now, more than ever, it is important to be constantly aware of changing rules and procedures. This is not the time to “dabble” in immigration law. The lives of people are at stake. Even minor mistakes, such as unauthorized employment, a DUI, or a petty theft, can have severe consequences for an alien. An alien’s innocent failure to register a change of address with the DHS can be grounds for denial of immigration benefits and even deportation. The CIS and the ICE are fully conforming to the letter of the law, and then some. The Bureau’s officers are applying the law with the same “shock and awe” approach used on the battlefield.

It remains to be seen whether the INS reorganization truly helps to improve national security. Time will also tell whether the reorganization has improved services to aliens. In the meantime, tread carefully, look twice, and don’t assume that procedures from three months ago will still apply.

As of the time of this writing, numerous changes in the USCIS have increased that agency’s efficiency considerably; for example, most applications for family-based benefits or naturalization are processed in a matter of mere months. Other non-immigrant employment based-applications, such as for change of status, work visas, and other benefits, are likewise adjudicated promptly. Also helping to grease the bureaucratic wheels is the availability of “premium processing”, where for an additional \$ 1,250 “premium process” fee, the USCIS will undertake to adjudicate certain types of applications within 15 calendar days of filing. The USCIS is mostly funded through “user fees”, ie, fees charged to individuals and companies for applications processed by USCIS. Typically, the USCIS increases user fees every two-four years, often by 10-15% across the board or even more.

In a similar vein, ICE’s “processing” of removable aliens has also increased dramatically. ICE has been removing (or deporting) close to 400,000 aliens annually in recent years. ICE detention space has grown nationwide, and ICE budgets have reflected Congress’ intent to fund the enforcement of immigration laws, rather than attempt to find solutions to fix even a part of the problem.

Immigration to the United States

Now that we have established federal authority over immigration law, let us look at the fundamental underpinnings of Immigration Law. How do people get to the United States? To analyze this issue, we will examine the Immigration & Nationality Act of 1952 (INA). Briefly, individuals may enter either as immigrants or non-immigrants. Immigrants - as the name implies - intend to come to the U.S. to live permanently. Non-immigrants, on the other hand may come to the United States temporarily, either for work, business or pleasure.

Immigrants may gain permanent residency (ie, the right to live and work permanently in the United States) through qualifying employment, qualifying family relationship, or as asylees, refugees, as beneficiaries of legalization programs or through the "visa lottery".

Non-immigrants may enter for a variety of reasons. Many of you will be able to relate to your friends who have "student visas". As you will see, students comprise a large portion of the non-immigrants entering the United States every year. Others enter the United States to conduct business. Tourists enter to seek the pleasures of Las Vegas and Disney World. Temporary workers enter to perform needed services for U.S. employers. The "alphabet list" of non-immigrant visas is long, and we will examine some of these categories in this chapter.

Congress also authorized and the State Department has also implemented the "visa lottery". This immigrant lottery is limited to the issuance of 55,000 immigrant visas per year. Visas will be issued through the lottery system to applicants from "underrepresented countries". Applicants must have a minimum of a high school education or equivalent. Since 1995 hundreds of thousands of immigrants have benefitted from the "visa lottery".

1996 saw substantial changes in the immigration law. First was the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which criminalized many activities adding to the list of deportable offenses. Then came the "Welfare Law" (Personal Responsibility Act of 1996). This act barred many aliens, both legal and illegal, from receiving certain kinds of Federal or State support. Finally in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Thus, immigration is a constantly evolving field which is very often subject to political pressure.

Following the 9/11 attacks, Congress passed the USA PATRIOT Act which imposed significant restrictions on immigration processing, judicial review, and due-process protections for aliens.

In 2005, Congress enacted the REAL ID law which also imposed substantial restrictions on judicial review of immigration decisions, heightened standards for asylum applicants, and various other restrictions.

The Law

Source: Immigration and Nationality Act (INA); 8 U.S.C. 1101, *et seq.*

Immigrant Visas

Derivative Beneficiaries: Under the immigration law, Congress has attempted to maintain "family unity". Therefore, if a parent obtains permanent residency, the spouse and minor children of the beneficiary can also immigrate with the parent. These additional immigrants are called "Derivative Beneficiaries" since they derive their immigration status from the primary beneficiary. In order to be derivative beneficiaries however, the derivative beneficiary must be unmarried and under the age of 21 at the time the immigrant visa is granted.

Sec. 201 Worldwide Level of Immigration
[8 U.S.C. 1151]

201(a) In general.--Exclusive of aliens described in subsection (b), aliens born in a foreign state or

dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to—

201(a)(1) family-sponsored immigrants described in section 203(a) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(a));

201(a)(2) employment-based immigrants described in section 203(b) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(b)); and

201(a)(3) for fiscal years beginning with fiscal year 1995, diversity immigrants described in section 203(c) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(c)).

201(b) Aliens not subject to direct numerical limitations.--Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows:

201(b)(1)(A) Special immigrants described in subparagraph (A) or (B) of section 101(a)(27):

- returning LPR;
- returning prior USC;
- Religious worker;
- Taiwanese;
- Panama Canal employee;
- Physicians;
- Child of a G non-immigrant or a G non-immigrant;
- Juveniles adjudicated dependent;
- Service in the US Armed Forces;
- Broadcasters

201(b)(1)(B) Aliens who are admitted under section 207 or whose status is adjusted under section 209.

- Refugees / Asylees

201(b)(1)(C) Aliens whose status is adjusted to permanent residence under section 210 or 245A

- Special Agricultural Workers

201(b)(1)(D) Aliens whose removal is canceled under section 240A(a)

- Cancellation for LPR's

201(b)(1)(E) Aliens provided permanent resident status under section 249

- Registry - Presence in the USA prior to January 1, 1972

201(b)(2)(A)(i) Immediate relatives.--For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

201(c) Worldwide level of family-sponsored immigrants.--

201(c)(1)(A) The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is, subject to subparagraph (B), equal to--
201(c)(1)(A)(i) 480,000 ***

201(c)(1)(B)(ii) In no case shall the number computed under subparagraph (A) be less than 226,000

201(d) Worldwide level of employment-based immigrants.--

201(d)(1) The worldwide level of employment-based immigrants under this subsection for a fiscal year is equal to--
201(d)(1)(A) 140,000

201(e) Worldwide level of diversity immigrants.--The worldwide level of diversity immigrants is equal to 55,000 for each fiscal year.

Sec. 202 Numerical Limitations on Individual Foreign States

202(a) Per country level.--

202(a)(2) Per country levels for family-sponsored and employment-based immigrants.--Subject to paragraphs (3), (4), and (5) the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

Sec. 203 Allocation of Immigrant Visas - (Family-based: Detail)

203(a) Preference allocation for family-sponsored immigrants.

Aliens subject to the worldwide level specified in section 201(c) for family-sponsored immigrants shall be allotted visas as follows:

203(a)(1) Unmarried sons and daughters of citizens.--Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

203(a)(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens.

203(a)(2)(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

203(a)(2)(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

203(a)(3) Married sons and married daughters of citizens.--Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

203(a)(4) Brothers and sisters of citizens.--Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

203(b) Preference allocation for employment-based immigrants. (Employment-based detail)

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

203(b)(1) Priority workers.--Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

203(b)(1)(A) Aliens with extraordinary ability.

203(b)(1)(B) Outstanding professors and researchers.

203(b)(1)(C) Certain multinational executives and managers.

203(b)(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

203(b)(2)(A) In general.--Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

203(b)(2)(B) Waiver of job offer.

203(b)(2)(B)(i) National interest waiver.--Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

203(b)(2)(B)(ii) Physicians working in shortage areas or veterans facilities.

203(b)(3) Skilled workers, professionals, and other workers.

203(b)(3)(A) In general.--Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

203(b)(3)(A)(i) Skilled workers.--Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

203(b)(3)(A)(ii) Professionals.--Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

203(b)(3)(A)(iii) Other workers.--Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

203(b)(3)(B) Limitation on other workers.--Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

203(b)(3)(C) Labor certification required.--An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A).

203(b)(4) Certain special immigrants.

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 101(a)(27)

203(b)(5) Employment creation.

203(b)(5)(A) In general.--Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)--

203(b)(5)(A)(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (c), and

203(b)(5)(A)(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters). ***

203(b)(5)(C) Amount of capital required.--

203(b)(5)(C)(i) In general.--Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be \$1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

203(b)(5)(C)(ii) Adjustment for targeted employment areas.--The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

203(b)(6) Special rules for "K" special immigrants. (Service in US armed forces) -

As defined in 101(a)(27)(K): an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on the date of the enactment of this subparagraph) for a period or periods.

NOTE: Be aware that there is an entire subset of immigration law geared to benefits for those aliens (or citizens) serving in the military. Under such laws, many alien servicemen and/ or servicemen's family receive expedited or fee-free processing of their applications and relaxed standards for waivers in some cases.

203(c) Diversity immigrants. ("Visa Lottery")

203(c)(2) Requirement of education or work experience.--An alien is not eligible for a visa under this subsection unless the alien

203(c)(2)(A) has at least a high school education or its equivalent, or

203(c)(2)(B) has, within 5 years of the date of application for a visa under this

subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

203(d) Treatment of family members.--A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

203(h) Rules for determining whether certain aliens are children.

(Child Status Protection Act) - INA §203(h)(1)-(3) was added by §3 of P.L. 107-208 (CSPA) (8/6/02), and, pursuant to CSPA §8, takes effect on 8/6/02 and applies to any alien who is a derivative beneficiary or any other beneficiary of "(1) a petition for classification under [INA §204] approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition; (2) a petition for classification under [INA §204] pending on or after such date; or (3) an application pending before the Department of Justice or the Department of State on or after such date."

203(h)(1) In general.--For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using

203(h)(1)(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

203(h)(1)(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

In other words, reduce the alien's age by the length of time the immigrant visa petition was pending. If the age of the alien after such reduction is below 21 at the time the visa number becomes available, then the alien qualifies for immigration as a "child", even though the alien's actual age is over 21. The CSPA benefits only those children who did not "age out" (turn 21) before its enactment (August 6, 2002).

"Priority Dates" and delays in processing:

As you have seen from the law, there is a specific number of immigrant visas allocated each year. In some categories, due to the large number of applicants, there is a waiting list. This waiting period can be as long as ten or twelve or even twenty years in some cases. Applicants for permanent admission to the USA are allotted immigrant visas (or "green cards") based on their "priority date". Take a look at the "visa bulletin", published monthly by the U.S. Department of State. Remember-priority dates do not affect non-immigrant visas. At this time, there are no quotas for non-immigrant

visas other than H and U categories.

1. What is a “priority date”?

There are many more applications for immigrant visas (Green Cards) than the law permits for admission. Therefore, people wait for years in the queue to get an immigrant visa. The date that the initial application for that person’s immigrant visa was filed - either through family (for example, a form I-130 for an immigrant visa application for a brother or sister filed by a US Citizen) or employment based immigration (for example, an application for Labor Certification filed by an employer on behalf of a foreign worker) - is the “priority date” specific to that person and the application filed on his or her behalf. There is no “priority date” backlog for Diversity visas - they must be issued and used within the fiscal year. Now, let’s look at a real priority date chart to see how it all falls together.

See the latest Priority Date chart at this hyperlink:

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin>

Then select “US Visas” and then select at the bottom right: “Check the Visa Bulletin”

To further complicate matters: differences between “Final Action Dates” and “Dates for Filing” and the USCIS determination of which chart to use for aliens seeking Adjustment of Status.

2. How to read the visa bulletin:

The columns are for separate countries (High demand countries and everyone else). The rows are for the different “priorities” [categories] of immigration, whether family or employment based. Each cell is the priority date for that particular category of application for that particular country (or worldwide if not specifically itemized).

Diversity Visas are processed after selection by random lottery. The Visa Bulletin shows each month the status of applications from each country. A new quota opens up October 1 of each year (the start of the Federal government fiscal year.) Likewise, a new quota for priority dates begins on October 1 of every year. Sometimes the priority dates may even “regress” (move back), if the Department of State discovers that it has issued more immigrant visas than it should have.

3. The “Golden Ticket”: Immediate relatives - NO quota and therefore NO priority date issue.

Reserved for Parents, spouses and unmarried children under age 21 of US Citizens.

Non-immigrant Visas

8 C.F.R. § 214(a) Regulations.

214(a)(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond ***, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States.***

214(b) Presumption of status; written waiver.

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15), and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) except subclause (b1) of such section) shall be *presumed to be an immigrant* until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15).

101(a)(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens:

A: Ambassador / Diplomat

101(a)(15)(A)

101(a)(15)(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

101(a)(15)(A)(ii) *upon a basis of reciprocity*, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

101(a)(15)(A)(iii) *upon a basis of reciprocity*, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

B: Business Visitor / Visitor for Pleasure

101(a)(15)(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

C: Transit Visa

101(a)(15)(c) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the

Headquarters Agreement with the United Nations (61 Stat. 758);

D: Crewman

101(a)(15)(D)

101(a)(15)(D)(i) an alien crewman...who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

101(a)(15)(D)(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States ***

E: Treaty Trader / Investor:

101(a)(15)(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him:

101(a)(15)(E)(i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national;

101(a)(15)(E)(ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or

101(a)(15)(E)(iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia; ***

F: Student

101(a)(15)(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,

101(a)(15)(F)(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

101(a)(15)(F)(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the

United States institution or place of study from Canada or Mexico;

G: International Organization Representative

101(a)(15)(G) an alien who is

101(a)(15)(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) 22 U.S.C. 288, note, accredited resident members of the staff of such representatives, and members of his or their immediate family;

H: Temporary professional / non-professional worker

101(a)(15)(H) an alien

101(a)(15)(H)(i)

101(a)(15)(H)(i)(a) [repealed]

101(a)(15)(H)(i)(b) subject to section 212(j)(2), who is coming temporarily to the United States to perform services *** in a specialty occupation *** or as a fashion model, ***, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)

101(a)(15)(H)(i)(c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 212(m)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) for the facility (as defined in section 212(m)(6)) for which the alien will perform the services; or

101(a)(15)(H)(ii)

101(a)(15)(H)(ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, ***, or

101(a)(15)(H)(ii)(b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or

101(a)(15)(H)(iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

I: Information media representative

101(a)(15)(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative if accompanying or following to join him;

J: Exchange visitor

101(a)(15)(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j), and the alien spouse and minor children of any such alien if accompanying him or following to join him;

K: Fiancé / Fiancee / Spouse (K-2)

101(a)(15)(K) subject to subsections (d) and (p) of section 214, an alien who

101(a)(15)(K)(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

101(a)(15)(K)(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

101(a)(15)(K)(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

L: Intracompany transferee

101(a)(15)(L) subject to section 214(c)(2), an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

M: Vocational Students

101(a)(15)(M)

101(a)(15)(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and

101(a)(15)(M)(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

101(a)(15)(M)(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

N: Parent or child of special immigrant

101(a)(15)(N)

101(a)(15)(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i), (or under analogous authority under paragraph (27)(L)) but only if and while the alien is a child, or

101(a)(15)(N)(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) or paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

O: Extraordinary Ability alien

101(a)(15)(O) an alien who--

101(a)(15)(O)(i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

101(a)(15)(O)(ii)

101(a)(15)(O)(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

101(a)(15)(O)(ii)(II) is an integral part of such actual performance,

101(a)(15)(O)(ii)(III)

101(a)(15)(O)(ii)(III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or

101(a)(15)(O)(ii)(III)(b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

101(a)(15)(O)(ii)(IV) has a foreign residence which the alien has no intention of abandoning; or

101(a)(15)(O)(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

P: Performer

101(a)(15)(P) an alien having a foreign residence which the alien has no intention of abandoning who

101(a)(15)(P)(i)

101(a)(15)(P)(i)(a) is described in section 214(c)(4)(A) (relating to athletes), or

101(a)(15)(P)(i)(b) is described in section 214(c)(4)(B) (relating to entertainment groups);

101(a)(15)(P)(ii)

101(a)(15)(P)(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

101(a)(15)(P)(ii)(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers;

101(a)(15)(P)(iii)

101(a)(15)(P)(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

101(a)(15)(P)(iii)(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

101(a)(15)(P)(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

Q: Cultural Exchange visitor

101(a)(15)(Q)

101(a)(15)(Q)(i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; ***

101(a)(15)(Q)(ii) the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

R: Religious Worker

101(a)(15)® an alien, and the spouse and children of the alien if accompanying or following to join the alien, who

101(a)(15)(R)(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

101(a)(15)(R)(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

S: Law Enforcement Informant

101(a)(15)(S) subject to section 214(k), an alien

101(a)(15)(S)(i) who the Attorney General determines--

101(a)(15)(S)(i)(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

101(a)(15)(S)(i)(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

101(a)(15)(S)(i)(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

101(a)(15)(S)(ii) who the Secretary of State and the Attorney General jointly determine--

101(a)(15)(S)(ii)(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

101(a)(15)(S)(ii)(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

101(a)(15)(S)(ii)(III) will be or has been placed in danger as a result of providing such

information; and

101(a)(15)(S)(ii)(IV) is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

T: Victim of Trafficking

101(a)(15)(T)

101(a)(15)(T)(i) subject to section 214(o), an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

101(a)(15)(T)(i)(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000;

101(a)(15)(T)(i)(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

101(a)(15)(T)(i)(III)

101(a)(15)(T)(i)(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

101(a)(15)(T)(i)(III)(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

101(a)(15)(T)(i)(III)(cc) has not attained 18 years of age; and

101(a)(15)(T)(i)(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

101(a)(15)(T)(ii) if accompanying, or following to join, the alien described in clause (i) --

101(a)(15)(T)(ii)(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

101(a)(15)(T)(ii)(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

101(a)(15)(T)(ii)(III) (III) any parent or unmarried sibling under 18 years of age of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

U: Victim of Crime

101(a)(15)(U)

101(a)(15)(U)(i) subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

101(a)(15)(U)(i)(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

101(a)(15)(U)(i)(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

101(a)(15)(U)(i)(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

101(a)(15)(U)(i)(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

101(a)(15)(U)(ii) if accompanying, or following to join, the alien described in clause (i) --

101(a)(15)(U)(ii)(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

101(a)(15)(U)(ii)(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

101(a)(15)(U)(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or ***

V: LIFE Act beneficiary

101(a)(15)(V)

(Authors' note: I have left this out because it has become largely irrelevant with the passage of time)

Summary and Analysis of the Law

If you aren't cross eyed yet from all this dense text, you now know there are two major categories for entering the United States, immigrants and non-immigrants. The above law touches upon the various “family-based” immigrant categories -

- immediate relatives of U.S. Citizens
- nuclear families of permanent residents
- Married or unmarried sons or daughters of US Citizens
- brothers and sisters of citizens.

In addition to family-based immigration, as you have also seen, immigration is possible through employment. As you will see in following chapters, it is possible for an alien to obtain a temporary work visa and then obtain "labor certification", leading ultimately to the issuance of a "green card". The employment-based preference categories list the various avenues for permanent immigration based on the employment or the skill of the alien. These are divided into five categories as follows:

1. Priority workers.
 - Aliens with extraordinary ability.
 - Outstanding professors and researchers.
 - Certain multinational executives and managers.
2. Aliens holding advanced degrees or aliens of exceptional ability.
3. Skilled workers, professionals and other workers.
4. Certain special immigrants (religious workers).
5. Employment creation (investor visas).

Application of the Child Status Protection Act: as you can see from the statute above, the age of the child who is over 21, and therefore becomes ineligible for derivative status or immigrant relative status is “reduced” or “credited” by the duration of time it takes (or took) for the underlying visa petition to be adjudicated. In other words, thanks to the CSPA, many children who would have otherwise “aged out” still remain eligible for immigrant visas in the more favorable category of children of citizens (immediate relatives) or LPR’s

In the non-immigrant category, you have seen that there are various avenues available to non-immigrants to enter the United States depending on the purpose of their entry. B-1 visitors (INA § 101 [a][15][B]). business visitors enter the United States to conduct business. F-1 students enter, as the name implies, to study. H workers enter to perform temporary services. As you can see from the H category, it is further subdivided into four main areas. O and P aliens sometimes bring in their unique style of music, composition, art or dance or athletic performance to entertain their U.S. audiences. S non-immigrants enter the United States to provide assistance in law enforcement or national security matters. It is interesting to note that in the case of many of these non-immigrant categories, the principal beneficiary makes the spouse and dependent children eligible for

“derivative” status so that they can similarly obtain non-immigrant visas to enter the USA.

Also note that many non-immigrant visa categories are issued for periods that correspond to equivalent visa categories granted by the respective countries that aliens seek entry from.

Cases

1. Non-immigrant classification: B-1 Visitor for Business - precedent decision

Analysis of Non-Immigrant visa classifications

There are several common features to the non-immigrant classifications discussed above and in other chapters. For example, in almost every class, the alien’s spouse and child or children are permitted to also obtain non-immigrant visas under the same classification. For example, spouses and children of F-1 students are classified as F-2 dependents. Similarly, spouses and children of L-1A and L-1B multi-national managers or executives or other employees are classified as L-2 dependents.

It is also important to note that the various classes of non-immigrants are restricted by law to the activities they can perform in the USA. For example, B-1 or B-2 business visitors or tourists cannot engage in any employment in the United States, with certain extremely limited exceptions for B-1 business visitors. If a non-immigrant is found violating the terms of his or her stay, that alien may be deportable. Additional penalties such as inadmissibility for future non-immigrant visas is another likely consequence.

As we discussed at the beginning of this chapter, the INS issues a non-immigrant with a separate stamp indicating that the alien must depart the USA by a date certain. The alien has the responsibility to depart the USA accordingly. Failure to depart the USA by that date could subject the alien to “removal” proceedings and bar him or her from future entry to the USA.

Let’s now examine a constantly recurring topic: permissible activities for B-1 non-immigrants.

Cases

Matter of Hira**11 I & N Dec. 824**

Decided by Board October 29, 1965 and March 1, 1966;

Affirmed by Attorney General September 30, 1966

In Deportation Proceedings

Volume 11 (Page 824)

An alien who, in behalf of his employer, a Hong Kong manufacturer of custom made men's clothing, travels to various cities in the United States to take orders from, and the measurements of, prospective customers whom he does not solicit but by whom he is contacted as the result of literature distributed in this country by his employer; who sends the order, together with the purchase price, to his employer in Hong Kong; and who receives only expense money while in this country, his monthly salary being sent to his parents in India by his employer, is engaged in intercourse of a

commercial character, and, having indicated he would return to Hong Kong at the termination of his authorized stay, his sojourn here is of a temporary character, and he is eligible for nonimmigrant classification as a visitor for business under section 101(a)(15)(B) of the Immigration and Nationality Act.

A-14493789

11 I. & N. Dec. 824 (BIA 1965); Interim Decision #1647

CHARGES:

Order: Act of 1952 -- Section 241(a)(9) 8 U.S.C. 1251(a)(9) -- Failed to maintain status of admission -- Visitor for business.

Lodged: Act of 1952 -- Section 241(a)(1) 8 U.S.C. 1251(a)(1) -- Immigrant without visa section 212(a)(20), 8 U.S.C. 1182(a)(20) .

BEFORE THE BOARD

The case comes forward on appeal from the order of the special inquiry officer dated April 8, 1965 finding the respondent deportable on the charge contained in the order to show cause and upon the lodged charge, granting him voluntary departure with the further order that if he failed to depart when and as required he be deported to Hong Kong, in the alternative, to India.

The record relates to a native and citizen of India, 28 years old, male, single, who last entered the United States at Detroit, Michigan on or about February 12, 1965 at which time he was admitted to the United States as a visitor for business until April 14, 1965. He had originally entered the United States on or about September 14, 1963 at Honolulu, Hawaii as a visitor for business authorized to remain in the United States until March 14, 1964. On August 26, 1964 the respondent applied for an extension of his temporary stay, setting forth the reason therefor that it was for the purpose of "for further study of market." On the basis of this application on August 27, 1964 he was granted an extension of his stay in the United States as a visitor for business for a period to expire April 14, 1965. The order to show cause was served March 2, 1965 and the hearing in deportation proceedings was held on March 25, 1965.

At the deportation hearing the respondent presented an Indian passport issued at Hong Kong on May 19, 1962 valid to May 18, 1965. The passport contains a "B-1" nonimmigrant visa issued to him at the American Embassy at Hong Kong on September 4, 1963 valid for an unlimited number of admissions to the United States to March 4, 1964. The application for a passport (Ex. 2) indicates that a Mr. Melwani, manager of Mohan's, the respondent's employer, appeared at the Consulate on March 15, 1963 and stated that the respondent would be selling clothes at the New York store. On September 4, 1963 the application for a visa contains a notation that Mr. Melwani has submitted a statement indicating that the respondent is being sent to take orders for the Hong Kong store and the visa was issued on that date to the respondent.

The facts concerning the nature of the respondent's employment are not in dispute. The respondent, in behalf of his employer, Mohan's, Ltd., of Hong Kong, travels to various cities in the United States taking the customers' measurements. The purchase price of the merchandise is sent to the employer in Hong Kong, either by the respondent or directly by the customer. The respondent testified that he does not solicit customers in the United States but takes orders only from persons who contact him as a result of literature distributed by his employer in this country making known his itinerary, the

items he has available for sale and in what hotel he may be contacted.

The respondent testified that he works on a straight salary basis plus an allowance for living and business expenses. His salary is \$600 Hong Kong a month, amounting to approximately \$100 U.S. He testified he receives no percentage of the value of the orders which he takes but might receive a bonus depending on the volume of business upon his return to Hong Kong. While the respondent is in the United States his employer sends his monthly salary to his parents in India. The expense money is estimated to amount to about \$800 per month. He has no other income than that received from his employment by Mohan's Ltd., of Hong Kong.

The respondent has denied that the use of the terms "study the United States business market" and "further study of business market" in his applications for extension of temporary stay (Exs. 3 and 4) were designed to be vague or misleading. He explained that according to his understanding, further study of the market is the same as the business he was doing: a notice would be sent to Hong Kong and the company in Hong Kong would obtain a further extension for the study of the market because they would have knowledge of how much more business they could secure from the United States and he would inform them as to colors and styling which would be in fashion in the United States (pp. 36-37, 57-59). The record indicates that the respondent's employer in Hong Kong buys American textiles. The respondent also testified that his employer formerly made sales in this country entirely through the use of catalogs and other literature and that the individual under such circumstances took his own measurements and then sent the orders to Hong Kong. The respondent displays swatches of materials and he takes measurements in order to overcome complaints arising out of poor fit. The price of men's suits varies from \$75 to \$95, including the customs duty which must be paid by the purchaser upon receipt of his suit, the duty averaging about 20 percent of the cost of the garment which is custom made. The respondent's absence to Canada on or about February 12, 1965 was only for a few hours and apparently he was admitted upon the basis of his nonimmigrant visa.

Section 101(a)(15)(B) of the Immigration and Nationality Act defines the term "immigrant" to mean every alien except an alien who is within one or more of the following classes of nonimmigrant aliens:

(B) an alien (other than one coming for the purpose of studying or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure; * * *

Under the heading of "TEMPORARY VISITORS", 22 CFR 41.25 provides:

Temporary visitors for business and pleasure.

(a) An alien shall be classified as a nonimmigrant visitor for business or pleasure if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(B) of the Act and that: (1) he intends to depart from the United States at the expiration of his temporary stay; (2) he has permission to enter some foreign country upon the termination of his temporary stay; and (3) adequate financial provisions have been made to enable him to carry out the purpose of his visit and to travel to, sojourn in, and depart from the United States.

(b) The term "business", as used in section 101(a)(15)(B) of the Act, refers to legitimate activities of a commercial or professional character. It does not include purely local employment or labor for hire. An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or

other prearrangement shall be required to qualify under the provisions of section 41.55. An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature, requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.

The case is one of first impression. Considerable difficulty has been experienced in the past in arriving at a clear and workable definition of "business" within the contemplation of the statute (Gordon and Rosenfeld, Immigration Law and Procedure, Sec. 2.8(b)). Soon after the term visitor for business was originally designated in the Act of 1924, the Supreme Court ruled that a primary aim of the statute was to protect American labor against the influx of foreign labor, that "business" contemplated only "intercourse of a commercial character," and that persons who sought to make temporary visits to perform labor were not nonimmigrants. 1 *Karnuth v. Albro*, 279 U.S. 231 (1929).

The visitor for business designation was retained in the 1952 Act. The authors, Gordon and Rosenfeld, set forth on pages 127 to 129 of their book on "Immigration Laws and Procedures" numerous examples of cases that have been found by the Board to be bona fide nonimmigrants for business and those who have been found not to come within that designation. The significant considerations to be stressed are that there is a clear intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary, and indeed may long continue; the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations.²

In the instant case we are satisfied that the "business" in which the respondent was engaged was intercourse of a commercial character. The respondent's salary is paid to him in Hong Kong (no funds accrue to the respondent in the United States). The American Consulate in Hong Kong, in granting the respondent the nonimmigrant visa as a visitor for business, had knowledge of the fact that the respondent was an order taker for the Hong Kong firm (Ex. 2). His sojourn in this country is of a temporary character, the respondent having indicated that he would return to Hong Kong upon the expiration of his temporary stay in the United States or extensions thereof.

If the respondent were engaged in taking orders for suits at a wholesale level from large distributors, there would be no questioning his status. The fact that he takes the measurements of prospective customers in the United States, in connection with the business which he does not solicit but whose customers are attracted by literature sent out by the Hong Kong firm, does not warrant a finding that the respondent is not classifiable as a visitor for business. The labor for the orders taken by the respondent is performed in Hong Kong and there appears to be no conflict with local labor. Upon a full consideration of the evidence in the case, we are satisfied that the respondent falls within the category of visitor for business as set forth in the law and regulations. The appeal will be sustained.

Order:

It is ordered that the appeal be sustained and the proceedings terminated.

BEFORE THE BOARD

The case comes forward on motion of the Service dated December 20, 1965 requesting that our order of October 29, 1965 sustaining the alien's appeal and terminating proceedings be reconsidered and the appeal be dismissed.

Briefly, the record relates to a native and citizen of India, 28 years old, male, single, who last entered the United States at Detroit, Michigan on or about February 12, 1965 when he was admitted to the United States as a visitor for business until April 14, 1965. He had originally entered the United States on or about September 14, 1963 at Honolulu, Hawaii as a visitor for business authorized to remain in the United States until March 14, 1964 which was subsequently extended to April 14, 1965. The order to show cause was served on March 2, 1965, the hearing in deportation proceedings was held on March 25, 1965, and an order of the special inquiry officer dated April 8, 1965 found the respondent deportable on the charge contained in the order to show cause and upon the lodged charge, but granted him the privilege of voluntary departure with an automatic order of deportation to Hong Kong or in the alternative, to India, in the event he failed to depart as required. The prolongation of the time the respondent has spent in the United States by virtue of the appeal and the motion to reconsider has not been attributable to the respondent but from considerations arising out of the possible applicability of 8 CFR 3.4 wherein the departure of the respondent might be considered as a withdrawal of the appeal.

The facts as to the nature of the respondent's employment are not in dispute. In behalf of his employer, Mohan's Ltd., of Hong Kong, a manufacturer of custom or made to measure men's clothing, the respondent travels to various cities in the United States and takes orders from customers whom he does not solicit but who contact him as the result of literature distributed by his employer in this country making known his itinerary, the items he has available for sale and in what hotels he may be contacted. The respondent displays swatches of cloth from which the customer makes his choice, he takes the customer's measurements and sends the order together with the purchase price to his employer in Hong Kong. This practice succeeded a prior practice engaged in by the respondent's employer in which the employer made sales in this country entirely through the use of catalogs, the individual taking his own measurements and then sending the order to Hong Kong. However, complaints arose due to poor fit and the present procedure was adopted. The respondent earns a salary of about \$100 a month plus a bonus depending upon the volume of his business, the amount of such bonus being undisclosed. The employer sends respondent's salary to his parents in India and the respondent receives only expense money amounting to about \$800 per month while in the United States.

Aware that the term "visitor for business" contemplated only "intercourse of a commercial character," *Karnuth v. Albro*, 279 U.S. 231, and bearing in mind that the significant considerations to be stressed were that there is a clear intent on the part of the alien to continue a foreign residence and not to abandon any existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary and indeed may long continue; the various entries in the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations, we found that the respondent fell within the category of a visitor for business as set forth in the law and regulations. We found that the business was intercourse of a commercial character, and the fact that he took measurements of prospective retail customers in the United States in connection with the business, under the circumstances of the case, did not warrant a finding that the respondent was not classifiable as a visitor for business.

We recognize that the line of demarcation between a visitor for business, and a person in seeking to enter as a nonimmigrant for employment or labor for which the procedure referred to 22 CFR 41.55, the provisions of section 214(c) of the Act and the supporting evidence required by 8 CFR 214.2(h)(ii) is applicable, is sometimes difficult to draw. However, the Act in section 101(a)(15)(B), still retains the category of a visitor for business. There is no indication that Congress intended to eliminate this category. Upon a determination that the business the respondent was engaged in was intercourse of a commercial character, and after carefully weighing the significant considerations set

forth in prior administrative decisions, we came to the conclusion that the respondent was truly a visitor for business. The argument of the Service that the respondent is not a "businessman" within the meaning of the statute appears to be fallacious. The cases set forth in Matter of G , 6 I. & N. Dec. 255, in note 3 list a grant many cases in which it was held that the alien was entitled to the status of a temporary visitor for business. An examination of these cases shows that the great majority were aliens who could not be considered as "businessmen" or even skilled, but in every case there was involved international trade or commerce and the employment was a necessary incident thereto.

Upon a full consideration of the matters set forth in the motion, we affirm our prior decision. The motion will be denied.

Order:

It is ordered that the motion be and the same is hereby denied.

BEFORE THE ATTORNEY GENERAL

The decision of the Board of Immigration Appeals in this case holding the respondent Hotu J. Hira alias Harry Hira to be a temporary visitor for business within section 101(a)(15)(B) of the Immigration and Nationality Act has been certified to me by the Board for review, pursuant to 8 CFR 3.1(h)(1)(iii), upon motion of the Commissioner of Immigration and Naturalization.

For the reasons stated in the Board's opinions of October 29, 1965 and March 1, 1966 the decision of the Board of Immigration Appeals is affirmed.

Discussion

As you saw in Matter of Hira, above there are numbers of factors that the BIA considers in determining whether an alien has violated the terms of B-1 Visa (or, for that matter any relevant non-immigrant visa).

Can a non-immigrant who entered in a certain visa classification change his or her visa to another classification as to perform tasks precluded by the first visa classification? As a concrete example, let's assume an F-1 student enters the country to study and upon the completion of the course of study finds a job and wishes to work. Can the F-1 student work for an off campus employer after the completion of his or her degree? Can the F-1 student work on campus during the course of study? These and other such practical questions are faced by immigration attorneys day after day. In answer to the above, the F-1 student can change to another visa classification, usually the H-1 visa, upon completion of studies provided the alien has found a job with an employer who is willing to petition the INS, on behalf of the alien, for a change of status for the alien employee. However, certain non-immigrant classes are prevented from changing to other non-immigrant visa classes.

boundaries.

(4) The regulatory definition of “culturally unique” calls for a case-by-case factual determination.

(5) The petitioner bears the burden of establishing by a preponderance of the evidence that the beneficiaries’ artistic expression, while drawing from diverse influences, is unique to an identifiable group of persons with a distinct culture; it is the weight and quality of evidence that establishes whether or not the artistic expression is “culturally unique.”

FOR PETITIONER: Pro se

BEFORE: Perry Rhew, Chief, Administrative Appeals Office

The Director, California Service Center, recommended that the nonimmigrant visa petition be denied and certified her decision to the Administrative Appeals Office (“AAO”) for review. The AAO will withdraw the director’s decision and approve the petition.

The petitioner, a museum and cultural center, filed the nonimmigrant petition seeking classification of the beneficiaries under section 101(a)(15)(P)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(iii) (2006), as entertainers in a culturally unique program. The beneficiaries are musicians comprising the group known as Orquesta Kef. The petitioner seeks classification of the beneficiaries as P-3 entertainers for a period of approximately 6 weeks.

On November 10, 2009, the director recommended denial of the petition, concluding that the petitioner failed to establish that the performance of the beneficiaries is culturally unique. Specifically, the director found that the petitioner failed to meet the evidentiary requirements set forth in the regulations.

Because the petition involves an unusually complex or novel issue, the director certified her decision to the AAO and advised the petitioner that it had 30 days in which to submit a brief or other written statement to the AAO. *See* 8 C.F.R. § 103.4(a) (2012). The petitioner did not submit a brief and the record is considered complete.

I. THE LAW

Section 101(a)(15)(P)(iii) of the Act provides for classification of an alien having a foreign residence that the alien has no intention of abandoning who: (I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and (II) seeks to enter the United States temporarily and solely to perform, teach or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique Congress did not define the term “culturally unique,” leaving construction of that term to the expertise of the agency charged with adjudicating P-3 nonimmigrant visa petitions. By regulation, the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (“USCIS”)), defined the term at 8 C.F.R. § 214.2(p)(3) (2012): “Culturally unique means a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons.”

The regulation at 8 C.F.R. § 214.2(p)(6)(i) further provides:

(A) A P-3 classification may be accorded to artists or entertainers, individually or as a group, coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or

presentation. (B) The artist or entertainer must be coming to the United States to participate in a cultural event or events which will further the understanding or development of his or her art form. The program may be of a commercial or noncommercial nature.

Finally, the regulation at 8 C.F.R. § 214.2(p)(6)(ii) states that a petition for P-3 classification shall be accompanied by:

(A) Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the alien's or group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's skill, or (B) Documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials; and (C) Evidence that all of the performances or presentations will be culturally unique events.

The record of proceeding includes the Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation, a request for additional evidence ("RFE") dated October 19, 2009, the petitioner's response to the RFE, and the director's certified decision dated November 10, 2009. The petitioner's initial evidence included a written consultation from a labor organization, a written contract between the petitioner and beneficiary group, and an itinerary, as required by 8 C.F.R. § 214.2(p)(2)(ii). The director did not request additional evidence with respect to these evidentiary requirements.

II. CULTURALLY UNIQUE: The sole issue certified for review is whether the beneficiary group's performance is culturally unique.

The director acknowledged that the petitioner submitted evidence required by 8 C.F.R. § 214.2(p)(6)(ii) but found the evidence unpersuasive in establishing that the beneficiary group's "hybrid" musical style can be considered culturally unique. Upon review, the petitioner has submitted sufficient evidence to establish that the performance of Orquesta Kef is culturally unique.

In a letter dated September 26, 2009, the petitioner described the beneficiary group and its musical style as follows: "This ensemble is composed of seven musicians from Argentina, who have been performing together between 4 to 8 years and whose music blends klezmer (Jewish music of Eastern Europe) with [L]atin and South American influences." The petitioner also included a short biography of the group, which indicates that the ensemble plays "traditional, classical and contemporary Jewish songs" and "brings together the emotion, passion and spirit of Jewish music." The biography indicates that the band developed "its own and unique musical style" that is "based on the millenary force of tradition and the powerful emotion of the Jewish culture, mixed in with Latin American sounds."

The regulation at 8 C.F.R. § 214.2(p)(6)(ii) requires that the petitioner establish that the beneficiaries' performance is culturally unique through submission of affidavits, testimonials, or letters, or through published reviews of the beneficiaries' work. The petitioner has submitted both types of evidence in support of the petition.

A. Affidavits, Testimonials, or Letters from Recognized Experts

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) requires the petitioner to submit affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the alien's or group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's

skill.

The petitioner provided a letter from Josh Kun, Associate Professor at the University of Southern California's Annenberg School for Communication, who indicates that he is a scholar who teaches, researches, and publishes on both Jewish music and the music of Latin America. Professor Kun establishes that he is familiar with the beneficiary group's body of work and states:

This band's uniqueness lies in their ability to fuse cultures, to use music to meld diverse elements from their native Argentine culture with the multiple musical traditions of Eastern Europe. As South Americans born to immigrant Eastern European parents, they use their music to explore their mixed identities and re-visit ~~tematización and his of the past~~ ~~in its~~ ~~As Argentina today on many of the folk music of his country which~~ they then incorporate into a variety of klezmer forms. . . . Klezmer music is often seen as the music of a specific ethnic group of people. Yet while it originates in Eastern Europe, it is a music [of] change and transformation and has migrated to different parts of the world through the Jewish Diaspora. By mixing with the cultures and influences of the hosting countries where it lands, the music is continually re-imagine in new forms. The Argentine Jewish music of [the beneficiaries] is a great example of these travels and combinations. As leading exponents and innovators of South American klezmer, [the beneficiary group] is has [sic] rightfully been acclaimed as one of the world's most interesting and important ensembles working within the new styles of klezmer music.

The petitioner also provided a letter from Leigh Ann Hahn, Director of Programming and Associate Director of Grand Performances, in Los Angeles, California, who writes:

I have seen [the beneficiary group] perform numerous times in Buenos Aires. In addition to [the beneficiary group] being fine musicians, they embody the spirit of Jewish Argentina. I have followed their career for at least five years, and am continuously captivated by their unique sound and ability to seamlessly fuse cultural influences. Based on my considerable experience, there are no other musical groups in the world who blend klezmer with tango and Argentine folk styles, making them a singular expression of Buenos Aires' Jewish immigrant community.

Finally, the petitioner submitted a letter from Dr. F. John Herbert, Executive Director of Legion Arts, who states that the beneficiary group is "internationally recognized for blending klezmer and tango with Argentine folk styles, creating a singular expression of Buenos Aires Jewish immigrant identity." He describes the group as "outstanding representatives of the cultural traditions of Jewish Argentina, possessing a sound that's absolutely distinctive, accompanied by a recognized ability to fuse diverse social and artistic influences."

B. Documentation That the Performance Is Culturally Unique

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(B) requires the petitioner to submit documentation that the performance of the alien or group is culturally unique, as evidenced by reviews in newspapers, journals, or other published materials.

The petitioner submitted an article by Gabriel Plaza, published in the November 17, 2005, issue of *La Nacion*,

The petitioner also submitted an article by Nicolas Artusi for the largest print and internet newspaper in Argentina, which features the beneficiary group among three bands that create music in Argentine Hebrew and refers to the group as the "Yiddish mom" of Argentine Jewish music.

In her decision, the director acknowledged and included quotations from all of the submitted expert opinion letters and published materials, and reached the following conclusion:

The evidence repeatedly suggests that the group performs a hybrid or fusion style of music, incorporating musical styles from other cultures and regions. A hybrid or fusion style of music cannot be considered culturally unique to one particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons.

The beneficiaries' performance does not evince a style of artistic expression, methodology, or medium which is considered unique to a particular country, nation, society, class, ethnicity, tribe or other group of persons. The performances must be demonstrated to be socially or regionally different or distinct and the evidence of record does not support that.

Although the director selected quotations from all of the above-referenced evidence, she declined to comment specifically on any one piece of evidence, other than noting that Mr. Davidow's review of the beneficiary group's album "fails to even mention that the group's music is considered culturally unique to the Jewish Argentine community."

For these reasons, the director recommended denial of the petition.

III. ANALYSIS

Upon review, the director's reasoning is not supported by the record. The regulations define "culturally unique" as a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe or other group of persons. 8 C.F.R. § 214.2(p)(3). The AAO can find no justification for the director's exclusion from this definition of a distinct artistic expression that is derived from a hybrid or fusion of artistic styles or traditions from more than one culture or region.

Rather, the fact that the regulatory definition allows its application to an unspecified "group of persons" makes allowances for beneficiaries whose unique artistic expression crosses regional, ethnic, or other boundaries.

While a style of artistic expression must be exclusive to an identifiable people or territory to qualify under the regulations, the idea of "culture" is not static and must allow for adaptation or transformation over time and across geographic boundaries. The term "group of persons" gives the regulatory definition a great deal of flexibility and allows for the emergence of distinct subcultures. Furthermore, the nature of the regulatory definition of "culturally unique" requires USCIS to make a case-by-case factual determination based on the agency's expertise and discretion. Of course, the petitioner bears the burden of establishing by a preponderance of the evidence that the beneficiaries' artistic expression, while drawing from diverse influences, is unique to an identifiable group of persons with a distinct culture. To determine whether the beneficiaries' artistic expression is unique, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the entire record. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The director's decision failed to note that the beneficiary group is a klezmer band and seemed to struggle to identify the nature of the group's musical performance, focusing instead on the group's musical influences. Here, the evidence establishes that the beneficiaries' music is, first and foremost, Jewish klezmer music that has been uniquely fused with traditional Argentine musical styles.

The AAO finds the expert opinion of Professor Kun particularly persuasive, because he explains that

klezmer music, while often associated with ethnically Jewish people, is an artistic form that has migrated and is continually mixed with and influenced by other cultures. He also explains how the beneficiaries, as South Americans born to Eastern European immigrants, came to be influenced by both cultures to create something new and unique to their experience. All three opinion letters recognize the existence of a distinct Jewish Argentine culture and identity that is expressed in the beneficiary group's music and opine that the beneficiary group is a "leading exponent and innovator of South American klezmer."

The regulation at 8 C.F.R. § 214.2(p)(6)(ii)(A) specifically permits the petitioner to submit affidavits, testimonials, or letters from recognized experts attesting to the group's performance of a culturally unique art form. USCIS may reject an expert opinion letter, or give it less weight, if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). In the present matter, the director did not question the credentials of the experts, take issue with their knowledge of the group's musical skills, or otherwise find reason to doubt the veracity of their testimony. The AAO finds the uncontroverted testimony to be reliable, relevant, and probative as to the specific facts in issue. Accordingly, the expert testimony satisfies the evidentiary requirement at 8 C.F.R. § 214.2(p)(6)(ii)(A).

Furthermore, the published articles submitted recognize a musical movement in Argentina that fuses Argentine styles with influences from Jewish music and other Eastern European styles. The articles and opinion letters place the beneficiary group directly at the forefront of this trend. Although the director highlighted references to "rock and roll" and other external influences on the beneficiaries' music, the evidence as a whole establishes that the beneficiaries' audience is a Jewish audience. There is nothing in the record to suggest that the beneficiary group is recognized in any circle as a mainstream rock band.

IV. CONCLUSION

The regulations do not require that an art form be "traditional" in order to qualify as culturally unique. Here, the AAO finds the expert testimony and the corroborating evidence to be relevant, probative, and credible. The petitioner has established by a preponderance of the evidence that the modern South American klezmer music performed by the beneficiary group is representative of the Jewish culture of the beneficiaries' home country of Argentina. Accordingly, the group's musical performance falls within the regulatory definition of culturally unique.

Finally, the petitioner has submitted an itinerary indicating that the beneficiary group will be performing its culturally unique music at Jewish cultural centers and temples during its short United States tour. The AAO is satisfied that the group's performances will be culturally unique events, as required by 8 C.F.R. § 214.2(p)(6)(ii)(C).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1362 (2006). Here, that burden has been met.

ORDER: The decision of the director is withdrawn. The petition is approved.

[Source: AILA InfoNet Doc. No. 12051552. (Posted 05/15/12)]

3. Immigrant visa classification - Death of a USC Spouse

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 09a0139p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NELLY SUPANGAN LOCKHART,

Petitioner-Appellee,

v.

JANET NAPOLITANO, Secretary, Department
of Homeland Security, et al.,

Respondents-Appellants.

No. 08-3321

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

No. 07-00823—Kathleen McDonald O’Malley, District Judge.

Argued: January 20, 2009

Decided and Filed: April 8, 2009

Before: COLE and GIBBONS, Circuit Judges; BELL, District Judge.*

No. 08-3321 *Lockhart v. Napolitano, et al.* Page 2

OPINION

COLE, Circuit Judge. The United States Citizen and Immigration Services (“USCIS”) denied Petitioner Nelly Supangan Lockhart’s (“Lockhart” or “Mrs. Lockhart”) application for an adjustment of status to that of permanent United States resident on the ground that she was statutorily ineligible for such adjustment because she was no longer an “immediate relative” under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., upon the death of her husband. Lockhart filed a lawsuit in the United States District Court for the Northern District of Ohio, seeking injunctive, declaratory, and mandamus relief to compel Respondent Janet Napolitano, Secretary of the Department of Homeland Security (“Secretary” of “DHS”), to find, as a matter of law, that she is an “immediate relative” under INA, § 204(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), and to reopen and readjudicate her application for adjustment of status. The sole issue before us is a question of law, which requires us to interpret language of the INA to resolve a matter of first impression in this Circuit. The question is whether an alien-spouse, whose citizen-spouse filed the necessary “immediate relative” petition form under 8 U.S.C. §§ 1187, 1255(c)(4), but died within two years of the qualifying marriage, qualifies as a spouse under the “immediate relative” provision of the INA. For the reasons set forth below, we conclude that a

“surviving alien-spouse” is a “spouse” within the meaning of the “immediate relative” provision of the INA. Accordingly, we **AFFIRM** the district court’s grant of summary judgment for Lockhart.

Problems

Consider the following individuals who would like to **permanently immigrate** to the United States.

- What do you think is the best course of action for each of these intended immigrants?
- Is there an immigrant option available for them?
- What is that immigrant option?

Also consider:

- What if there is no immigrant option?
- Is there possibly also a non-immigrant option available to them?
- If so, what would you advise?
-

There may be more than one option available in each case. List as many options as you think are applicable under the law and the regulations.

PROBLEM	IMMIGRANT OPTION(S)	NON-IMMIGRANT OPTION(S)
A. Martha's parents immigrated to the U.S.A. after she turned 21. Martha is still single but wants to join her parents in the United States. What can Martha do?		
B. Samantha goes off with the U.S. army to do a tour of duty in Germany. There she meets Kurt and they fall in love. How can Samantha and Kurt return to the United States together and keep the flame of love burning bright?		

<p>C. Sheila is the adult married daughter of a U.S. citizen. Sheila's U.S. citizen father wants her to immigrate to the United States. What are the best avenues for Sheila to immigrate? Consider this twist: halfway through the application process, Sheila gets divorced.</p>		
<p>D. Juan is a brilliant physicist who has won numerous national awards and recognition. He wants to reside permanently in the United States to further his research due to the facilities in this country.</p>		
<p>E. Nadine is a Russian foreign student studying computer science in the United States.</p>		
<p>F. Jan is a talented soccer player from the People's Republic of Korea. He visits the USA for a exhibition match and during the tour, he slips away from his team.</p>		
<p>G. Tom, Dick, and Harry are three lawyers with a practice in Germany. They want to form a law firm in the USA to assist investors who want to set up operations in the US.</p>		
<p>H. Abbey Road is a musical group that has been invited to perform at the prestigious annual Grammy awards this year. Seeing that the USA is a better market for their kind of music, they want to immigrate to the USA.</p>		

I. A student in India wants to continue with higher studies in the USA. What options does she have?		
J. Joe Shmoe meets the love of his life on a trip to Thailand. Joe comes to you for advice since he wants to bring his girlfriend to the USA as soon as possible.		
K. What options are available for a person who has to obtain medical treatment in the USA?		
L. Tony Hok is a martial arts exponent who has been invited to showcase his skills at various martial arts venues throughout the USA.		
M. David, a US Citizen, meets Gloria from Greece on her business trip to the USA. David wants to spend more time with Gloria and get to know her better. At some time during their relationship, while Gloria is still in the USA, David proposes to her.		
N. Miguel has been kidnaped from his family in Guatemala and brought across the US border to work in the USA. He escapes from his captors and is apprehended by US law enforcement.		

O. Tomas was brought to the USA at the age of 2 by his migrant farm worker parents who entered the USA without inspection. He is now 18, has graduated from high school, shows great promise in science and math, and wants to go to college.		
P. Rooshtam and Shire Duck, two brothers, want to bring their chain of high-end restaurants, “The Peeking Duck”, to the USA.		
Q. Puppy Queen, a top dog breeder, wants to travel to the USA to explore the market for her puppies in the US market.		
R. Successful gaming magnate, Goombah Tron wants to attract talent from the top US firms to lure them to China to start a software development firm there. While in the USA he also wants to take a few courses on anti-piracy and intellectual property law at Akron Law, a top-rated law school.		
S. Faisal Khan, from Pakistan, wants to come to the USA to learn to fly at a local flight school and get his commercial pilot’s license.		
T. Teresa, from El Salvador, has great fear of returning to her native country on account of gang violence and violence against women.		

<p>U. A spouse of a H-1b worker is seriously assaulted by the H-1b spouse. The victim complains to law enforcement and the spouse is convicted. The victim knows that there is no support available in the couple's home country and has to take care of the couple's two children.</p>		
<p>V. Victor is a talented car designer for the Italian automobile firm Fininparina. He wants to visit the USA to participate in a design contest. While here, he is recruited by a US auto design firm and wants to accept their offer of employment.</p>		
<p>W. Ronaldo and his friends from Brazil enter the USA via air through Miami with valid visas. About three months into their stay, they decide not to return to Brazil since there are better job opportunities in the USA. However, they do not want to remain illegally in the USA. What options do they have?</p>		
<p>X. Movie Director Diego X. wants to make a documentary about street children in the USA. He wants to bring his production team with him to the USA for the shoot, estimated to take 3-4 months.</p>		
<p>Y. Dr. Healey is a dedicated pediatrician. She wants to come to the USA to gain experience at a pediatric hospital to improve her skills.</p>		

Z. Professor Newton, a noted astrophysicist, is offered a tenure-track position at a well known U.S. university.		
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A (Very Short) Glossary of a few selected terms

AAU: Administrative Appeals Unit

AG: Attorney General

BALCA: Board of Alien Labor Certification Appeals

BIA: Board of Immigration Appeals

DHS: Department of Homeland Security

DOJ: Department of Justice

DOL: Department of Labor

DOS: Department of State

EOIR: Executive Office for Immigration Review

EWI: Entry Without Inspection

IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act of 1996

IJ: Immigration Judge

Immigrant: One who intends to reside permanently in the USA

INA: Immigration and Nationality Act

INS: Immigration and Naturalization Service

IRCA: Immigration Reform and Control Act of 1986

Non-immigrant: One who comes to the USA for a temporary, defined purpose

NTA: Notice to Appear

OSC: Office of Special Counsel

USCBP: United States Customs and Border Patrol

USCIS: United States Citizenship and Immigration Service

USICE: United States Immigration and Customs Enforcement

Cases:

(Slip Opinion) OCTOBER TERM, 2011

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARIZONA ET AL. v. UNITED STATES

Cite as: 567 U. S. 387 (2012)

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11–182. Argued April 25, 2012—Decided June 25, 2012

An Arizona statute known as S. B. 1070 was enacted in 2010 to address pressing issues related to the large number of unlawful aliens in the State. The United States sought to enjoin the law as preempted. The District Court issued a preliminary injunction preventing four of its provisions from taking effect. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor; §5(C) makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; §6 authorizes state and local officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States”; and §2(B) requires officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person’s immigration status with the Federal Government. The Ninth Circuit affirmed, agreeing that the United States had established a likelihood of success on its preemption claims.

Held:

1. The Federal Government’s broad, undoubted power over immigration and alien status rests, in part, on its constitutional power to “establish an uniform Rule of Naturalization,” Art. I, §8, cl. 4, and on its inherent sovereign power to control and conduct foreign relations, see *Toll v. Moreno*, 458 U. S. 1, 10. Federal governance is extensive and complex. Among other things, federal law specifies categories of aliens who are ineligible to be admitted to the United States, 8 U. S. C. §1182; requires aliens to register with the Federal Government and to carry proof of status, §§1304(e), 1306(a); imposes sanctions on employers who hire

unauthorized workers, §1324a; and specifies which aliens may be removed and the procedures for doing so, see §1227. Removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens. It also operates the Law Enforcement Support Center, which provides immigration status information to federal, state, and local officials around the clock. Pp. 2–7.

2. The Supremacy Clause gives Congress the power to preempt state law. A statute may contain an express preemption provision, see, *e.g.*, *Chamber of Commerce of United States of America v. Whiting*, 563 U. S. ___, ___, but state law must also give way to federal law in at least two other circumstances. First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance. See *Gade v. National Solid Wastes Management Assn.*, 505 U. S. 88, 115. Intent can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where a “federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230. Second, state laws are preempted when they conflict with federal law, including when they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U. S. 52, 67. Pp. 7–8.

3. Sections 3, 5(C), and 6 of S. B. 1070 are preempted by federal law. Pp. 8–19.

(a) Section 3 intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. In *Hines*, a state alien-registration program was struck down on the ground that Congress intended its “complete” federal registration plan to be a “single integrated and all-embracing system.” 312 U. S., at 74. That scheme did not allow the States to “curtail or complement” federal law or “enforce additional or auxiliary regulations.” *Id.*, at 66–67. The federal registration framework remains comprehensive. Because Congress has occupied the field, even complementary state regulation is impermissible. Pp. 8–11.

(b) Section 5(C)’s criminal penalty stands as an obstacle to the federal regulatory system. The Immigration Reform and Control Act of 1986 (IRCA), a comprehensive framework for “combating the employment of illegal aliens,” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U. S. 137, 147, makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers, 8 U. S. C. §§1324a(a)(1)(A), (a)(2), and requires employers to verify prospective employees’ employment authorization status, §§1324a(a)(1)(B), (b). It imposes criminal and civil penalties on employers, §§1324a(e)(4), (f), but only civil penalties on aliens who seek, or engage in, unauthorized employment, *e.g.*, §§1255(c)(2), (c)(8). IRCA’s express preemption provision, though silent about whether additional penalties may be imposed against employees, “does *not* bar the ordinary working of conflict pre-emption principles” or impose a “special burden” making it more difficult to establish the preemption of laws falling outside the clause. *Geier v. American Honda Motor Co.*, 529 U. S. 861, 869–872. The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on unauthorized

employees. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose. Pp. 12–15.

(c) By authorizing state and local officers to make warrantless arrests of certain aliens suspected of being removable, §6 too creates an obstacle to federal law. As a general rule, it is not a crime for a removable alien to remain in the United States. The federal scheme instructs when it is appropriate to arrest an alien during the removal process. The Attorney General in some circumstances will issue a warrant for trained federal immigration officers to execute. If no federal warrant has been issued, these officers have more limited authority. They may arrest an alien for being “in the United States in violation of any [immigration] law or regulation,” for example, but only where the alien “is likely to escape before a warrant can be obtained.” §1357(a)(2). Section 6 attempts to provide state officers with even greater arrest authority, which they could exercise with no instruction from the Federal Government. This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform an immigration officer’s functions. This includes instances where the Attorney General has granted that authority in a formal agreement with a state or local government. See, *e.g.*, §1357(g)(1). Although federal law permits state officers to “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States,” §1357(g)(10)(B), this does not encompass the unilateral decision to detain authorized by §6. Pp. 15–19.

4. It was improper to enjoin §2(B) before the state courts had an opportunity to construe it and without some showing that §2(B)’s enforcement in fact conflicts with federal immigration law and its objectives. Pp. 19–24.

(a) The state provision has three limitations: A detainee is presumed not to be an illegal alien if he or she provides a valid Arizona driver’s license or similar identification; officers may not consider race, color, or national origin “except to the extent permitted by the United States [and] Arizona Constitution[s]”; and §2(B) must be “implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.” P. 20.

(b) This Court finds unpersuasive the argument that, even with those limits, §2(B) must be held preempted at this stage. Pp. 20–24.

(1) The mandatory nature of the status checks does not interfere with the federal immigration scheme. Consultation between federal and state officials is an important feature of the immigration system. In fact, Congress has encouraged the sharing of information about possible immigration violations. See §§1357(g)(10)(A), 1373(c). The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, 563 U. S., at _____. Pp. 20–21.

(2) It is not clear at this stage and on this record that §2(B), in practice, will require state officers to delay the release of detainees for no reason other than to verify their immigration status. This would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence

without federal direction and supervision. But §2(B) could be read to avoid these concerns. If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would likely survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. Without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that conflicts with federal law. Cf. *Fox v. Washington*, 236 U. S. 273, 277. This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect. Pp. 22–24.

641 F. 3d 339, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., THOMAS, J., and ALITO, J., filed opinions concurring in part and dissenting in part. KAGAN, J., took no part in the consideration or decision of the case.