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## **Immigration**

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# IN THIS ISSUE...

## Immigration



### Featured Articles

The Department of Homeland Security's Final Word on the Social Security Administration "No-Match Letters" 1  
*Article contributed by Leigh N. Ganchan, Haynes and Boone LLP*

Understanding the Complexity of the L-1 Non-Immigrant Visa Category 4  
*Article contributed by James G. Martin, Troutman Sanders LLP*

### Business Immigration

#### ***TN Visa***

DHS Sets Forth Final Rule to Extend the Period of Admission for TN Non-Immigrants 6

### Global Immigration

#### ***Mexico and Cuba***

Mexico And Cuba Say U.S. Embargo Encourages Illegal Immigration 8

#### ***New Zealand***

N.Z. Annual Immigration Is Weakest in Seven Years 8

#### ***United Kingdom***

U.K. Says Business Visitors Must Prove Meetings 9

### Naturalization

#### ***Eligibility***

Second Circuit Affirms Dismissal of Legal Permanent Resident Claim for Naturalization Relief Where Removal Proceedings are Pending 10

### Removal

#### ***Abandonment – LPR***

Second Circuit Holds That the District Court Had Jurisdiction Over a Complaint Under the Administrative Procedure Act 11

False-ID Use by Illegal Immigrants Gets U.S. Supreme Court Review 13

### Selected Cases

Circuit Courts of Appeals 13

# Bloomberg Law

## Bloomberg Continuing Legal Education

### ***Business Immigration – What Employers Need to Know (November 12, 2008)***

BLOOMBERG LAW® invites you to attend an employment law seminar entitled “Business Immigration - What Employers Need to Know,” co-sponsored by The CLE Institute, New York County Lawyers’ Association, at Bloomberg’s New York City headquarters at 731 Lexington Avenue at 59th Street, on Wednesday, November 12, 2008 between 9:00am and 11:55am. Registration begins at 8:00am.

Patricia L. Gannon, a Shareholder with Greenberg Traurig, will moderate a discussion on Current Trends with I-9’s and a discussion on Enforcement, including the New No-Match Regulations issued by the Department of Homeland Security.

Other speakers include:

- Pierre G. Bonnefil, Member, Epstein Becker & Green, P.C.

- Amy C. Cococcia, Partner, Fragomen, Del Rey, Bernsen & Loewy, LLP
- James G. Martin, Of Counsel, Troutman Sanders LLP

There is no cost to attend the event.

Reservations can be made by sending an email to Lisa Cohose at lcohose@bloomberg.net. Please include “11/12 Employment” in the subject line and include your name, company/firm name, address, phone and email address. You may also sign up through BU<GO>.

MCLE CREDITS: This course has been approved in accordance with the requirements of the New York State CLE Board for a maximum of 3 transitional and non-transitional credit hours.

ACCREDITED PROVIDER STATUS — New York County Lawyers’ Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York, March 8, 2007 - March 7, 2010.

## Featured Articles

### ***The Department of Homeland Security’s Final Word on the Social Security Administration “No-Match Letters”***

Article contributed by Leigh N. Ganchan, Haynes and Boone LLP

Referring to the final rule as its “anti-ostrich regulation,”<sup>1</sup> DHS Security Secretary Chertoff expressed the government’s continued belief that, in combination, the guidance in the “No-Match” Rule and the use of E-Verify<sup>2</sup> would reduce the illegal employment of unauthorized workers.<sup>3</sup> Over the years, guidance has been sparse as to whether the receipt of a Social Security Administration (SSA) “no match letter” (sent to employers when SSA is unable to match a worker’s name and Social Security Number (SSN) from the Form W-2 with its own records) creates “constructive knowledge” on the part of the employer that an employee is not authorized to work. The regulation removes any doubt by expressly providing that receipt of a “no-match” letter puts an employer on notice and outlines the steps an employer should take when this situation presents itself. If the discrepancy is not effectively resolved, though, the employer must terminate the employee or risk the imposition of civil and criminal penalties. The regulation would reportedly impact millions workers, many of whom are actually authorized to work regardless of the mismatched information in the SSA database. This article summarizes the final regulation and the concerns of those who oppose its implementation.

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## **The Immigration and Social Security Background Leading to the Regulation The SSA No-Match Program**

The SSA maintains earnings information to determine eligibility for Social Security benefits for which workers and dependents may be entitled.<sup>4</sup> Annually, employers submit employee wages to the SSA on Forms W-2 Wage and Tax Statements; SSA posts those earnings to its Master Earnings File so that workers receive credit for Social Security benefits. When SSA is unable to match a worker's name and Social Security Number (SSN) from the Form W-2 with its own records, that worker's earnings are posted to SSA's Earnings Suspense File until they can be matched.<sup>5</sup>

The Earnings Suspense File reportedly contains more than 255 million mismatched earnings records and is growing at the rate of 8 to 11 million records per year. Although the portion of these earnings that represent unauthorized work is unknown, the U.S. Government Accountability Office reports that the Earnings Suspense File "[c]ontains information about many U.S. citizens as well as non-citizens."

Since 1994, SSA has attempted to correct mismatched records by sending "no-match" letters to employers requesting corrected information.<sup>6</sup> No-match letters have always downplayed the immigration implications of a mismatched SSN. SSA's model 2006 no-match letter for Tax Year 2005 emphasized that receipt of the letter "does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it make any statement about an employee's immigration status."

### **The Immigration Reform and Control Act of 1986**

Effective, November 6, 1986 the Immigration Reform and Control Act (IRCA)<sup>7</sup> subjected employers to criminal and civil liability for knowingly hiring foreign nations who unauthorized to work<sup>8</sup> and for "continu[ing] to employ the foreign national in the United States knowing the foreign national is (or has become) an unauthorized foreign national with respect to such employment."<sup>9</sup> IRCA made it unlawful for employers to hire new employees without complying with an eligibility verification process,<sup>10</sup> which requires the employer to fill out a Form I-9 based on documents presented by the employee that establish identity and work authorization.<sup>11</sup>

The new law also sought to prevent employers from responding to their new obligations by terminating employees solely on the basis of national origin. "Concern with protecting [lawful workers whose work authorization has been questioned or who lack adequate documentation] from discrimination based on national origin engendered by IRCA's employer sanctions was repeatedly expressed by members of Congress."<sup>12</sup> Accordingly,

it became an unfair immigration-related employment practice for an employer "to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment...because of such individual's national origin."<sup>13</sup> The Special Counsel for Immigration-Related Unfair Employment Practices, based within the Department of Justice, enforces these anti-discrimination provisions.<sup>14</sup>

### **DHS's "Safe Harbor" Rule**

On June, 14, 2006, DHS proposed to amend 8 C.F.R. § 274a.1, the regulation that defines "knowledge" under IRCA. DHS proposed to add receipt of a no-match letter to a list of incidents "that may lead to a finding that an employer had...constructive knowledge" of an employee's unauthorized status.<sup>15</sup> The regulation proposed to create "safe-harbor" procedures that the employer can follow in response to [a no-match] letter and thereby be certain that DHS will not find that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the United States."<sup>16</sup>

The procedures are as follows: An employer must check its records for the source of the mismatch within 30 days of receiving the SSA no-match letter.<sup>17</sup> If the discrepancy is not due to error in the employer's records, then the employer, within the initial 30 day period, must request that the employee confirm his information, and advise the employee to resolve the discrepancy with the SSA within 90 days of the no-match letter receipt.<sup>18</sup> The employee must visit a SSA office, bringing documents that prove age, identity, citizenship or alien status, and other relevant documents, such as proof of a name change, as directed by SSA. The discrepancy will be considered resolved only if the employer verifies with SSA that the employee's name matches the number in SSA's records. If the employer and employee cannot resolve the discrepancy within 90 days, they are to complete a new Form I-9 before day 93.<sup>19</sup> For the new I-9 form, the employer may not accept any document that contains the disputed social security number and must only rely upon documents with a photo to establish identity.<sup>20</sup> Thus, an employee cannot maintain his eligibility and attempt to retain his employment based on a SSN found to not match SSA records, *even if* the SSN is in fact accurate and the discrepancy is due to SSA error.

### **The Revised SSA "No-Match" Letter and the DHS Insert**

Coordinating with DHS's regulation, SSA revised its no-match letter. The no-match letter language changed in several ways. First, SSA's model 2007 no-match letter for Tax Year 2006 included a new "common reason" why information reported

to SSA does not match the agency's records: "[t]he name or social Security number reported is false, or the number was assigned to someone else." Second, the no-match letter's description of its immigration implications was less reassuring for employers; it explained that a no-match letter "does not, by itself, make any statement about an employee's immigration status." Third, the letter instructed employers to follow the instructions contained in a DHS letter that was also to be inserted into the SSA no-match mailing.

The DHS insert letter purported to provide employers with "additional guidance on how to respond to the [no-match] letter from the Social Security Administration in a manner that is consistent with your obligations under United States immigration laws." DHS admonished employers who elect to disregard the notice that they could face civil and criminal sanctions. The insert directed employers to follow the steps set forth in the safe harbor provision of the new rule, and assured employers that they would not violate IRCA's anti-discrimination provisions if they follow the steps uniformly and terminate an employee.

Before the sixty day comment period ended on August 14, 2006, labor unions, industry trade groups and businesses submitted approximately 5,000 comments.<sup>21</sup>

### **Implementation Enjoined**

One year after publication of the proposed rule, on August 15, 2007, the agency issued a final rule, with an effective date of September 14, 2007.<sup>22</sup> Within weeks the United States District Court for the Northern District of California preliminarily enjoined the implementation of the rule on October 10, 2007.<sup>23</sup> Thereafter, in March 2008, DHS published a supplemental proposed rule that with minor changes to the text, purported to clarify issues raised by the district court's injunction.<sup>24</sup> The supplemental Final Rule published recently made no further substantive changes.

#### *Opposing Views*

Prior to the court injunction SSA confirmed plans to mail approximately 140,000 no-match letters to employers, pertaining to approximately 8 million employees. Opponents provided numerous legal, financial, and practical reasons for halting these plans including (1) the SSA database is not an immigration database and does not have complete information about immigration status or work authorization; using it for immigration enforcement would result in unjust findings;<sup>25</sup> (2) In December 2006 the SSA Officer of Inspector General reported that 17.8 million of these records contained discrepancies; 12.7 million (or over 70%) pertain to native-born U.S. citizens;<sup>26</sup> (3) the new rule places new burdens on employers to enforce the immigration laws; they are not equipped to understand fully the complexities of immigration

law or to become document review experts; (4) employers who follow the rule will suffer financially when government delays in resolving database discrepancies necessitates the firing of trained workers; (5) additional phone calls and office visits to SSA will divert already strained SSA resources from disability benefits claimants (an estimated three-quarters of a million hearings remain pending.)

### **Ani-Discrimination Law Enforcement Authority**

The Court also found meritorious concerns that authority for interpretation and enforcement of the INA's anti-discrimination provisions has been entrusted not to DHS but to the DOJ, and concluded that DHS exceeded its authority by including certain statements in its regulatory preamble.<sup>27</sup> DHS rescinded the objectionable statements. Simultaneously the Department of Justice (DOJ) issued a notice clarifying that "if an employer follows all of the safe harbor procedures outlined in DHS's no-match rule but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b's anti-discrimination provision." Therefore, reliance on the safe harbor procedures does not rule out a full-scale DOJ investigation.

### **The Costs of Choosing the "Safe Harbor" Rule**

Much argument has centered around the costs of the Regulation. The DHS claims that implementation costs would be minimal. DHS estimates that companies with fewer than 100 workers will pay around \$3,000 to \$7,500 overall, while it will cost larger companies \$13,000 to \$34,000. These estimates do not include the cost of firing and replacing workers who lack legal documentation because DHS does not consider the cost of complying with preexisting immigration statutes to be a direct cost of its rulemaking. In contrast, an economic analysis commissioned by the U.S. Chamber of Commerce found that more than 165,000 lawful U.S. workers could lose their jobs because of their inability to resolve discrepancies with the SSA. The cost to employers is estimated to be at least \$1 billion per year.

### **Enforcement versus Employment**

In spite of DHS's focus on the Regulation's improvement to IRCA enforcement, most opponents urge that the main underlying harm will be to U.S. citizens and other authorized workers who will likely be fired or suffer adverse action due to SSA database errors. The SSA database does not contain real-time data, a technical deficit that slows resolution time and

increases the chances that an employer will have to lay off an individual who may be ardently trying to rectify the situation. Opponents also point to the country's current economic downturn when questioning the wisdom of enacting policies likely to lead to substantial layoffs. Moreover, the regulation has been characterized as a "de facto tax increase on small businesses that perversely puts the highest costs on those with greatest number of American workers."<sup>28</sup> Employers should review their compliance policies and consider how these regulations will factor into them. At a minimum, companies should identify an internal designee to be the recipient of any DHS or SSA correspondence to ensure that these documents are not inadvertently left unaddressed in some manner.

*Leigh N. Ganchan leads the Immigration Practice Group for Haynes and Boone LLP. She provides clients with comprehensive business immigration solutions including immigration policy development, immigration due diligence, compliance audits. Board Certified in Immigration & Nationality Law by the Texas Board of Legal Specialization and recognized as one of Houston's Top Lawyers in Immigration in 2005 and 2006, Ms. Ganchan began her career as an assistant district counsel at the U.S. Department of Justice, Immigration and Naturalization Service.*

## **Understanding the Complexity of the L-1 Non-Immigrant Visa Category**

*Article contributed by James G. Martin,  
Troutman Sanders LLP*

The L-1 visa program, first enacted into law in 1970 by Public Law 91-225, has proved to be an effective tool for businesses that seek to transfer key personnel from qualifying operations abroad to manage or provide specialized knowledge services to qualifying United States-based branch offices, subsidiaries and affiliates. In much the same way that the H-1B program has been subject to shifting political currents, to a lesser extent the L-1 visa program has undergone changes over the years as the U.S. government seeks to ensure that the program is being used solely for its intended purpose and not to circumvent limitations on the uses of other visa categories. Although any abbreviated analytical framework will invariably fail to capture all of the exceptions and nuances of the law, eligibility for L visa classification can be broadly broken down into three components: 1) organizational eligibility; 2) foreign national eligibility and qualifying employment; and 3) practical considerations for L-1 classification. This article will endeavor to provide a brief overview of the aforementioned three components.

### **Organizational Eligibility**

The U.S. entity seeking to employ the foreign national under the L visa classification and the entity for which the foreign national has been employed abroad must have a qualifying relationship. The petitioning L-1 eligible entity must be a "United States or foreign firm, corporation, or other legal entity which..." is conducting business through the "regular, systematic, and continuous provision of goods and/or services" and be a "parent," "branch," "affiliate" or "subsidiary" to the employing entity abroad. See 8 C.F.R. § 214.2(l)(1)(ii)(H-L). The term "parent" is defined in the Federal Regulations as being a "firm, corporation, or other legal entity, which has subsidiaries." See 8 C.F.R. § 214.2(l)(1)(ii)(I). "Branch" is defined as "an operating division or office of the same organization housed in a different location." See 8 C.F.R. § 214.2(l)(1)(ii)(J). The regulations define the term "subsidiary" as being "a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity." See 8 C.F.R. § 214.2(l)(1)(ii)(K). Finally, the term "affiliate" is defined as "one of two subsidiaries both of which are owned and controlled by the same parent or individual, or one of two legal entities owned and controlled

<sup>1</sup> [http://www.dhs.gov/xnews/speeches/sp\\_1224803933474.shtm](http://www.dhs.gov/xnews/speeches/sp_1224803933474.shtm)

<sup>2</sup> E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

<sup>3</sup> "the NO-Match Rule, along with E-Verify, will increasingly make the pleas of ignorance from businesses that seek to exploit illegal labor ring hollow, and equip their responsible competitors with the tools they need to hire and maintain a legal workforce."

<sup>4</sup> 42 U.S.C. § 405(c)(2)(A)

<sup>5</sup> 20 C.F.R. § 422.120(a)

<sup>6</sup> 20 C.F.R. § 422.120(a)

<sup>7</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986)

<sup>8</sup> 8 U.S.C. § 1324a(a)(1)(A),

<sup>9</sup> *Id.* § 1324a(a)(2)

<sup>10</sup> *Id.* § 1324a(a)(1)(B)

<sup>11</sup> *Id.* § 1324a(b)

<sup>12</sup> *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9<sup>th</sup> Cir. 2007)

<sup>13</sup> 8 U.S.C. § 1324b(a)(1)(A)

<sup>14</sup> *Id.* § 1324b(c)(1)

<sup>15</sup> Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 (June 14, 2006)

<sup>16</sup> *Id.*

<sup>17</sup> 8 C.F.R. § 274a.1(1)(2)(i)(A)

<sup>18</sup> *Id.* § 274a.1(1)(2)(i)(B)

<sup>19</sup> *Id.* § 274a.1(1)(2)(iii)

<sup>20</sup> *Id.* § 274a.1(1)(2)(iii)(2)

<sup>21</sup> 72 Fed. Reg. 45611

<sup>22</sup> *Id.*

<sup>23</sup> *AFL-CIO v. Chertoff*, D.E. 135 (N.D. Cal. 2007) (order granting motion for preliminary injunction); see also, *AFL-CIO v. Chertoff*, D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction).

<sup>24</sup> 73 Fed. Reg. 15944 (March 26, 2008)

<sup>25</sup> Even as recently as April 2007 the SSA admitted that it did not have a mechanism for individuals to use to report and correct their information in the database.

<sup>26</sup> Office of the Inspector General, Social Security Administration, Accuracy of the Social Security Administration's Numident File, Report A-08-06-26100, December 2006.

<sup>27</sup> See *AFL-CIO v. Chertoff*, D.E. 135 at 16 (N.D. Cal. Oct. 10, 2007) (order granting motion for preliminary injunction).

<sup>28</sup> Lucas Guttentag, director of the ACLU's Immigrants' Rights Project.

by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.” See 8 C.F.R. § 214.2(l)(1)(ii)(L)(1-3). Although the criteria for a qualifying organization is well defined in the regulations, the same regulations contain one notable exception for a partnership that is “organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms.” See 8 C.F.R. § 214.2(l)(1)(ii)(L)(3) The regulations state that such relationships will be considered to be “affiliate” relationships for L-1 visa purposes. *Id.*

If the qualifying relationship between the U.S. entity seeking to employ the L-1 nonimmigrant and the foreign entity from which that person is being transferred has existed for less than one year, or if the qualifying relationship has existed for more than one year but the U.S. entity has not been systematically carrying out business for one full year on the date of the filing of the L-1 petition, the period of validity of the petition, and hence the L-1 visa will be limited to one year. See 8 C.F.R. § 214.2(l) (7)(i)(A)(3). It is noteworthy, that the Service will approve a petition for a maximum of three years notwithstanding the fact that the U.S. petitioning entity is a “new office” as long as the new U.S. office has a U.S.-based affiliate that has been doing business for more than one year. This is an important point for large commercial enterprises that may have multiple affiliates in the United States and are contemplating opening a new office in the United States as a separate legal entity.

### **Foreign National Eligibility and Qualifying Employment Abroad and in the United States**

The L-1 visa category is broken down into two sub-categories — L-1A and L-1B. As will be discussed in greater detail below, the L-1A classification is for foreign nationals who have been employed abroad in an executive or managerial capacity and who are seeking admission to the United States to serve in a managerial or executive capacity with the qualifying U.S. entity. The L-1B classification is reserved for foreign nationals who have been employed abroad in a specialized knowledge capacity and who are seeking the admission to the United States to assume employment with the qualifying U.S. entity in a specialized knowledge capacity. Generally speaking, with respect to employment abroad, the foreign national must have been employed by a qualifying foreign entity for one full year in the last three years prior to seeking admission to the United States in L-1 nonimmigrant status. See 8 C.F.R. § 214.2(l) (1)(ii)(A). Time spent in the United States in valid nonimmigrant status will not be considered to be an interruption of the

qualifying employment abroad nor will it be counted toward fulfillment of the one-year employment requirement. *Id.*

The terms “executive” and “manager” have clearly defined meanings in the Immigration and Nationality Act. “Executive” is defined as an employee who “directs the management of the organization or a major component or function of the organization; establishes the goals and policies of the organization, component, or function; exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” See INA § 101(a)(44)(B), 8 U.S.C. § 1101(a)(44)(B). “Managerial” is define as an employee who “manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.” See INA § 101(a)(44)(A)(i-iv), 8 U.S.C. § 1101(a)(44)(A)(i-iv). The law specifically states that first-line supervisors are “not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional.” INA § 101(a)(44)(A)(iv), 8 U.S.C. § 1101(a)(44)(A)(iv).

For L-1B classification purposes, “specialized knowledge” is defined as “special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.” See 8 C.F.R. § 214.2(l)(1)(ii)(D). Due to the open-ended nature of this definition of “specialized knowledge,” and numerical limitations on the H-1B visa category, immigration counsel across industries have noticed that the Immigration Service has been increasingly more demanding in requiring detailed explanations and additional documentation of the exact nature of a foreign national’s specialized knowledge. Moreover, the issue of how qualifying U.S. employers utilize the services of L-1B specialized knowledge employees has not escaped the notice of Congress. L-1B classification will be denied where the specialized knowledge foreign national “will be stationed primarily at the worksite of an employer

other than the petitioning employer or its affiliate, subsidiary, or parent ...or the alien will be controlled and supervised principally by such unaffiliated employer; or the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.” *L-1 Visa and H-1B Visa Reform Act of 2004* Pub. L. 108-447, 118 Stat. 2809 (Dec. 8, 2004); INA § 214(c)(2)(F)(i-ii), 8 U.S.C. § 1184(c)(2)(F)(i-ii).

### **Practical Considerations**

Petitions for L classification are initiated by filing an I-129 with supporting documentation with the appropriate USCIS regional Service Center. The proper filing venue for the petition can be easily ascertained from the USCIS web site. Depending on the foreign national's specific circumstances, L-1 employers may seek to change the status of a foreign national candidate to the appropriate L visa category if that person is present in the United States or else opt for a straight petition approval and have the foreign national make application for the L visa at a U.S. consular post abroad. With the exception of a new office, qualifying U.S. organizations may request an initial petition validity of three years. L-1A status holders are eligible to hold L status for up to seven years. L-1B status holders are eligible to renew status for up to five years.

A U.S. petitioner may seek a “blanket approval” wherein subsequent L applications are made directly at U.S. consular posts abroad by the foreign national candidate without the need for an additional individual petition filings with the USCIS if the qualifying U.S. entity and its qualifying foreign parent, affiliate or branch: 1) are “engaged in commercial trade or services;” 2) “has an office in the United States that has been doing business for one year or more;” 3) “has three or more domestic and foreign branches, subsidiaries, or affiliates; and the petitioner and the other qualifying organizations have obtained approval of petitions for at least ten “L” managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or have a United States work force of at least 1,000 employees.” See 8 C.F.R. § 214.2(l)(4).

The L Visa program is fraught with nuance and complexity. As the economy tightens and the nation's immigration laws continue to be subjected to ever-increasing scrutiny, it only stands to reason that L-1 petitions and visa applications will encounter similar treatment by the USCIS and consular posts abroad.

*James G. Martin initially worked as an immigration paralegal for seven years after which time he graduated from law school, was admitted to the New York and New Jersey bars, and has since worked as an attorney in the immigration field for over ten years. Mr. Martin advises both corporate and individual clients on an array of employment-based and family immigration matters. He has appeared in the federal courts on both the trial and appellate levels and has represented clients before the Executive Office for Immigration Review. He currently serves as Of Counsel on the immigration team of Troutman Sanders LLP in New York.*

## **Business Immigration**

### **TN Visa**

#### ***DHS Sets Forth Final Rule to Extend the Period of Admission for TN Non-Immigrants***

***United States Citizenship and Immigration Services, Final Rule Extending the Period of Admission and Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities - TN Non-immigrants, 73 Fed. Reg. 61332 (October 16, 2008)***

On October 16, 2008, United States Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS) issued a Final Rule (the Rule) which increases the allotted period of admission for TN non-immigrants from one to three years. In addition, the Rule also allows for extensions to be granted in three year intervals (instead of the current one-year period) to eligible TN non-immigrants. Spouses and unmarried children of TN non-immigrants (TD non-immigrants) who are otherwise entitled to TD non-immigrant status are eligible to be admitted and seek extensions for the same period of time as the TN principal. The Rule also makes changes to the filing requirements by eliminating the requirement that filing locations be obtained from the regulations, instead stating that such locations will be prescribed by form instructions. Lastly, the Rule revises the text of 8 C.F.R. §§ 214.1(a)(2) and (c)(1) and 8 C.F.R. § 248.3 by replacing the outdated term TC (the previous classification given to Canadian workers under the 1989 Canada-United States Free Trade Agreement) with TN.

#### **The TN Visa**

On December 17, 1992, the United States, Canada, and Mexico entered into the North American Free Trade Agreement (NAFTA or Agreement) which the President signed into law on December 8, 1993 as part of the NAFTA Implementation Act. The NAFTA Implementation

Act created the TN non-immigrant visa classification for Mexican and Canadian professionals who seek admission to the U.S. under NAFTA. NAFTA established four categories of business persons who would be allowed temporary entry into the U.S. to engage in business activities at a professional level: 1) business visitors; 2) traders and investors; 3) intra-company transferees; and 4) professionals. The Rule changes certain regulatory provisions dealing with the fourth category, NAFTA professionals, by amending 8 C.F.R. § 214.6.

A Mexican or Canadian citizen who makes an application for admission as a TN non-immigrant must satisfy to the inspecting immigration officer that their proposed stay is for a temporary period which has a reasonable and finite end, that his or her work assignment in the US will end at a predictable time, and that he or she will depart upon completion of the work assignment. See 8 C.F.R. § 214.6(b). In addition, a TN visa applicant who seeks admission must establish that he or she is a business person who intends to be either engaged in the trade of goods, the provision of services, or the conduct of investment activities. See 8 C.F.R. § 214.6(b).

“Business activities” at a professional level as defined by NAFTA means those undertakings which require for their successful completion that the individual have at least a baccalaureate degree or appropriate credentials demonstrating status as a professional in one of the following professions: Accountant; Architect; Computer Systems Analyst; Disaster Relief Insurance Claims Adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster); Economist; Engineer; Forester; Graphic Designer; Hotel Manager; Industrial Designer; Interior Designer; Land Surveyor; Landscape Architect; Lawyer (including Notary in the province of Quebec); Librarian; Management Consultant; Mathematician (including Statistician); Research Assistant; Scientific Technician/Technologist; Social Worker; Sylviculturist; Technical Publications Writer; Urban Planner; Vocational Counselor; Medical/Allied Professionals; Dentist; Dietitian; Medical Laboratory Technologist; Nutritionist; Occupational Therapist; Pharmacist; Physician; Physiotherapist/Physical Therapist; Psychologist; Recreational Therapist; Registered nurse; Veterinarian; Scientist (Agriculturist (including Agronomist); Animal Breeder; Animal Scientist; Apiculturist; Astronomer; Biochemist; Biologist; Chemist; Entomologist; Epidemiologist; Geneticist; Geochemist; Geologist; Geophysicist; Horticulturist; Meteorologist; Pharmacologist; Physicist; Plant Breeder; Poultry Scientist; Soil Scientist; Zoologist); or Teacher (College, Seminary or University).

## **Changes Made by the Rule**

### **A. Increased Time of Admission, Extension of Stay, and Readmission at the Border**

Mexican and Canadian citizens who meet the criteria for obtaining TN non-immigrant visas are granted admission in one year increments. Upon expiration, a TN visa holder must apply for an extension of stay or seek readmission in TN status. See 8 C.F.R. § 214.6(h). All applications for readmission or extension must meet, at a minimum, the annual submission of documentation and payment of the filing fees specified in 8 C.F.R. § 103.7. However, unlike many employment based non-immigrant visa categories, TN non-immigrant visa holders are not subject to any maximum period of stay so long as they continue to be engaged in TN business activities for a U.S. employer or U.S. entity at a professional level.

This Rule increases the period of time granted to a TN nonimmigrant (and their TD dependents) upon admission, or pursuant to a timely filed request for extension of stay, from a maximum of one year to a maximum of three years.

### **B. Changes to TD Spouses and Unmarried Minor Children**

The Rule also makes certain changes to the present regulations by explicitly stating that spouses and unmarried minor children of TN professionals, if otherwise eligible, may be admitted or readmitted in TD classification for the period of time granted to the TN professional. In addition, the spouse or unmarried child of a TN professional may seek an extension of stay or change of non-immigrant status for the same period as the TN professional.

### **C. Filing Location**

The Rule eliminates references to the specific filing locations contained in the current regulations. 8 C.F.R. § 214.6(h)(1). The filing locations will now only be found on USCIS forms and the USCIS Web site.

### **D. Clarification and Correction**

Finally, the Rule make revisions to the language contained in 8 C.F.R. §§ 214.6(g) and (h) in an attempt to make them more readable. In addition, the text of 8 C.F.R. §§ 214.1(a)(2), (c)(1) and 8 C.F.R. § 248.3 is amended to replace the term “TC” with “TN” (“TC” was made obsolete by NAFTA). Furthermore, USCIS eliminates paragraph (k)(2) from 8 C.F.R. § 214.6, which relates to the now obsolete requirement of a petition for Mexican TN admissions. The Rule would also add a phrase at the end of 8 C.F.R. § 214.6(k)(3) stating that an examining officer must consider all relevant facts in determining the foreign national's eligibility for TN classification, i.e., a strike or labor dispute involving a work stoppage that has not been certified under 8 C.F.R. § 214.6(k)(1).

## Analysis

The Rule is intended to remove certain administrative requirements for TN non-immigrants and U.S. employers and entities by making the TN non-immigrant visa more attractive to qualified professionals and their U.S. employers. In this regard, the Rule seeks to increase the initial period of admission, extend stays, and readmission at the border and provide cost and resource savings. These goals are worthwhile in light of the recent difficulties faced by U.S. employers who have been unsuccessful in obtaining H-1B non-immigrant visas for their prospective employees. It should be noted that the Final Rule does not alter the evidentiary requirements, expand the maximum period of stay in TN status, which is already indefinite, or expand the principle of “dual intent” to TN non-immigrants or their TD dependents. The dual intent doctrine holds that even though a non-immigrant visa applicant has previously expressed a desire to enter the United States as an immigrant and may still have such a desire, that does not of itself preclude the issuance of a non-immigrant visa to him or preclude his being a bona fide non-immigrant. Matter of H-R-, 7 I&N Dec. 651, 654 (INS Reg. Comm’r 1958). DHS determined that it would be inconsistent with Congressional intent and NAFTA to allow TN non-immigrant visa holders to possess dual intent. However, the fact that the dual intent doctrine was not extended to TN non-immigrants was peculiar to say the least. Both H-1B and L non-immigrants may possess immigrant intent. After all the changes made by this Rule are intended make the TN non-immigrant visa as attractive to foreign nationals as the H-1B non-immigrant visa.

## Conclusion

It remains to be seen if the changes made by this rule will make the TN visa comparable to the H-1B visa. U.S. employers who seek to employ Mexican and Canadian citizens and have felt the pinch of the H-1B visa crunch may see the TN visa as more attractive alternative. However, the fact that a TN visa holder cannot possess immigrant intent may be somewhat of a deterrent.

# Global Immigration

## Mexico and Cuba

### ***Mexico and Cuba Say U.S. Embargo Encourages Illegal Immigration***

By Jens Erik Gould

Oct. 20 (Bloomberg) — Mexico and Cuba said in a joint statement that the U.S. economic embargo against Cuba encourages illegal immigration and impedes efforts to stop organized crime gangs that benefit from trafficking migrants.

The two countries agreed to increase cooperation to stop illegal immigration and the theft of boats, according to a statement today from Mexico’s Interior Ministry. Cuban immigrants often steal boats and sail to Mexico before crossing into the U.S. under a policy that allows Cubans who set foot in U.S. territory to stay while those caught at sea are returned to Cuba.

The flow of Cuban immigrants headed for the U.S. through Mexico is increasing and has led to the trafficking of migrants in southern Mexico, where organized gangs help Cubans travel to the U.S. border. In one incident in June, a bus carrying 37 detained immigrants, most from Cuba, was hijacked in Mexico’s Chiapas state.

The agreement will help promote “legal, safe and orderly emigration” and will help combat “illegal immigration, the trafficking of people and other related crimes,” Cuban Foreign Minister Felipe Perez Roque said after meeting with Mexican Interior Minister Juan Camilo Mourino, according to a statement.

The agreement also marks an improvement in diplomatic relations between Cuba and Mexico after they soured during the government of former Mexican president Vicente Fox.

The U.S. imposed a trade embargo against Cuba in 1962 to put pressure on its Communist government, which rose to power in a 1959 revolution led by Fidel Castro, who ceded power to his brother in February. In 2000, U.S. lawmakers eased the rules to allow the export of agricultural and medical goods to Cuba. Shipments increased 31 percent last year to \$447 million.

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## New Zealand

### ***N.Z. Annual Immigration Is Weakest in Seven Years***

By Tracy Withers

Oct. 22 (Bloomberg) — New Zealand’s annual immigration growth fell to the lowest in almost seven years in September, adding to signs that weak consumer spending and demand for housing may delay the economy’s recovery from a recession.

The number of permanent migrant arrivals exceeded departures by 4,403 in the 12 months ended Sept. 30, Statistics New Zealand said in a report released today in Wellington. Net arrivals fell from 4,938 in the year to August and were the lowest since the year to October 2001.

New Zealand's economy contracted in the first half of the year and probably shrank in the third quarter, Reserve Bank Governor Alan Bollard forecast last month. Weak immigration has fanned a slump in housing construction and sent prices lower, crimping consumer confidence.

"Waning net migration is one of the fundamental drivers of the weakening housing market," said Jane Turner, economist at ASB Bank Ltd. in Auckland. "Further weakness in population growth reinforces the negative outlook on the housing market."

Spending on new housing fell 8.2 percent in the second quarter, the third straight decline, the government said last month. House prices fell 6.1 percent in September from a year earlier, according to Real Estate Institute figures.

In September, permanent arrivals exceeded departures by 10 people, seasonally adjusted, the statistics agency said. In the eight months to August, the average gain was 500.

### **Tourism Decline**

Tourist and short-term visitor arrivals fell for a second month in September, which may curb spending in an industry that makes up about 10 percent of the economy.

Short-term visitor arrivals slumped 6 percent from August when they fell 0.7 percent, seasonally adjusted, the agency said. Annual visitor arrivals were lower than a year earlier for the first time since September 2006. Short-term departures by New Zealand residents declined 5.2 percent.

"It is clear that New Zealand tourism is facing difficult times as a result of the financial crisis and that things will be even more challenging in 2009," Tourism New Zealand chief executive George Hickton said in an e-mailed statement. "Because tourism is based largely on discretionary income, we will definitely see an impact on the industry."

—Editors: John McCluskey, Tracy Withers

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## United Kingdom

### ***U.K. Says Business Visitors Must Prove Meetings***

By Kitty Donaldson

Oct. 16 (Bloomberg) — Business visitors to the U.K. will be required to prove they are attending meetings or arranging deals under new rules designed to limit immigration and the ability of criminals to enter the country, the government said.

The Home Office said those wishing to come to the U.K. on business for up to six months must obtain a visa and show they are signing contracts, undertaking fact-finding missions, attending conferences or conducting site visits.

The changes are part of the biggest changes to U.K. immigration rules since the 1960s as the government struggles to stem record flows of migrants. The Home Office has modeled its new visa system for residents on Australia's, one of the most restrictive in the industrial world.

"It makes sense to tighten visit visas at the same time," Immigration Minister Phil Woolas said in a statement in London today. "We are determined to deliver a system of border security which is among the most secure in the world."

The rules won't apply to visitors who are citizens of the 27-nation European Union, who are free to travel and live anywhere within the bloc.

Earlier this year, the government implemented a new points-based immigration system aimed at awarding visas to highly-skilled workers and reducing the scope for people without training or education to come to the U.K.

### **Business Concerns**

"While we broadly support the new system, we think the limit on business visitors staying should be 12 months rather than six months," Katja Hall, director of employment policy at Britain's largest employer organization, the Confederation of British Industry, said in an e-mail. "This would give more flexibility to business and allow foreign workers to combine business trips with tourism more easily."

The Labour government is under pressure from the Conservative opposition to limit migration, which is putting a strain on hospitals, schools and police.

The Home Office also set out details of two new visitor routes for "sportspeople" and "entertainers." Under those plans, athletes coming to a specific event such as the annual tennis championship in Wimbledon, London or to the 2012 Olympic Games will enter the U.K. using a dedicated visa.

Amateur athletes and entertainers traveling to the U.K. for a specific engagement such as the Edinburgh international arts festival also must seek the new visas.

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# Naturalization

## Eligibility

### ***Second Circuit Affirms Dismissal of Legal Permanent Resident Claim for Naturalization Relief Where Removal Proceedings are Pending***

***Ajlani v. Chertoff, No. 07-CV-1170, 2008 BL 223559 (2d Cir. Oct. 07, 2008)***

On October 7, 2008, the U.S. Court of Appeals for the Second Circuit (Second Circuit or Court) affirmed the district court's ruling that it could not order or grant naturalization relief to a legal permanent resident while removal proceedings were pending against him. In reaching this conclusion, the Court joined the other Courts of Appeal that have addressed this issue.

#### **Factual Background**

Majed Ajlani, a Syrian national, entered the United States in 1987 and overstayed his visa. Over the next 13 years, he was convicted for three different crimes. He nonetheless became a permanent resident in 1996 when he married (though later divorced) a U.S. citizen.

In 2004, Ajlani filed for U.S. citizenship and submitted to the initial exam in 2005. In March 2006, his application was granted. Prior to taking the requisite public oath of allegiance, he left the country and tried to re-enter in September 2006. This action prompted border officials to inquire into Ajlani's immigration status, and, based on his prior convictions, the United States Citizenship and Immigration Services (USCIS) served him with written notice to appear for removal proceedings. He appeared before an immigration judge on October 10, 2006, but proceedings were terminated because the government had not filed "the appropriate documents with the Immigration Court to initiate [Ajlani's] hearing." That same

day, other immigration authorities sent Ajlani a notice to appear at a naturalization oath ceremony on October 18, 2006.

On October 17, 2006, USCIS's New York District Director moved to reopen Ajlani's naturalization proceedings under 8 C.F.R. § 335.5, which provides for reopening based on receipt of "derogatory information concerning an applicant whose application has already been granted . . . but who has not yet taken the oath of allegiance." When Ajlani appeared for his scheduled naturalization oath ceremony the next day, he was served with the motion to reopen and was not permitted to take the oath.

The government formally commenced removal proceedings against Ajlani on December 20, 2006, by filing a notice to appear with the immigration court. On December 26, 2006, the immigration court ordered Ajlani to appear for a master removal hearing on January 23, 2007. Due to a series of adjournments caused largely by agency docket backlogs, Ajlani's removal remained pending throughout the instant litigation.

#### **Completion of Naturalization Process**

After the district court granted the government's motion to dismiss for lack of jurisdiction Ajlani's complaint asserting that the government's failure to grant him citizenship was unlawful, Ajlani argued first on appeal that he had completed the naturalization process on October 18, 2006, because his application for naturalization had been granted and he attended the oath ceremony where he recited to oath to himself. The Court found these actions insufficient, however, based on 8 U.S.C. § 1448, which provides that "an alien who has not taken the oath in a public ceremony remains a non-citizen." The Court further noted that the implementing regulations, at 8 C.F.R. § 337.1, likewise require the oath to be taken at a public ceremony. Moreover, 8 C.F.R. § 335.5 specifically states that, when USCIS receives "derogatory information concerning an applicant whose application has already been granted . . . but who has not yet taken the oath of allegiance . . . the Service *shall* remove the applicant's name from any list of granted applications or of applicants scheduled for administration of the oath of allegiance." (emphasis added by Court). Accordingly, the Court concluded that Ajlani's recitation of the oath to himself was insufficient, and declined to recognize this form of "self-naturalization" in light of the applicable regulations.

#### **Removal Proceedings' Status at Commencement of Action**

Next, the Court agreed with Ajlani that no removal proceedings were pending against him when he filed the instant complaint on October 30, 2006, as they did not commence until the government filed a notice to appear with the immigration

court on December 20, 2006. It determined, however, that this sequence of events did not preclude dismissal. The Court noted that when Ajlani opposed the government's motion to dismiss before the district court, he requested a declaration that the pending removal proceedings were unconstitutional and discriminatory, and the district court appropriately construed this as an amendment to his original complaint. As such, the district court was correct both to consider whether this claim could survive the motion to dismiss, and to conclude that it could not for lack of jurisdiction.

The Court reasoned that 8 U.S.C. § 1252(g) states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any foreign national under [relevant provisions of the INA].” Noting that there is an exception for constitutional claims, jurisdiction lies in the courts of appeals only after exhaustion of administrative remedies. The district court therefore lacked jurisdiction over the constitutional challenges, and appellate review was premature.

#### **Court May Not Instruct Government to Grant Citizenship**

Addressing Ajlani's claim that the removal proceedings did not preclude the district court from adjudicating his naturalization claim, the Court first briefly reviewed the relevant law. The Court then observed that, for the district court to have had jurisdiction, Adjani would have needed to show that the Attorney General (AG) failed to decide his naturalization application within the 120-day period. The Court then assumed, without deciding, that there was jurisdiction. Nonetheless, it concluded that dismissal was appropriate.

First, the Court examined Ajlani's request to compel the government to admit him as a citizen, and concluded that 8 U.S.C. § 1429, did not permit a claim for this relief under § 1447(b) pending removal proceedings. It agreed with the Sixth and Fifth Circuits, both of which concluded that an alien may not claim a form of relief under § 1447(b) that is forbidden by §1429. See *Zayed v. United States*, 368 F.3d 902, 905 (6th Cir. 2004); *Saba-Bakare v. Chertoff*, 507 F.3d 337 (5th Cir. 2007). Adopting the reasoning set forth in these decisions, the Court concluded that, while removal proceedings were pending against Ajlani, § 1429 precluded the district court from instructing the government to admit him prior to their completion.

#### **Court May Not Grant Citizenship**

Finally, the Court addressed Ajlani's request for the district court to admit him to citizenship. Because of the Act's silence on whether district courts have this authority, the

Court took guidance from its sister circuits. It observed that the three to consider the question have concluded “the priority afforded removal proceedings by 1429 limits the courts' authority to grant naturalization pursuant to 1421(c) or 1447(b).” See *Saba-Bakare v. Chertoff*, *supra*, *Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2007); *Zayed v. United States*, *supra*.

The Court reached the same conclusion. First, it discussed *Zayed*, which was a challenge to a denial of naturalization under § 1421(c), where the Sixth Circuit noted that the scope of a district court's review under that section “cannot be any greater than the authority of the Attorney General to consider the petition in the first place.” Applying the same reasoning, it concluded that a district court's authority could not be greater than that of the AG, who was vested with “sole authority to naturalize persons” in the first instance. Citing *Zayed*, the Ninth Circuit in *Bellajaro*, ruled that a district court could not grant naturalization or declare the applicant eligible for naturalization pending removal proceedings. Finally, in *Saba-Bakare*, the Fifth Circuit viewed narrowly the district court's ability to grant naturalization relief, holding that the foreign national must wait until termination of the removal proceeding.

#### **Conclusion**

The Court concluded that dismissal of Ajlani's 1447(b) claim was appropriate because he failed to state a claim on which naturalization relief could be granted while removal proceedings were pending. With this decision, the Court joined its sister circuits that have reached the same result under similar facts.

## **Removal**

### **Abandonment — LPR**

#### ***Second Circuit Holds That the District Court Had Jurisdiction Over a Complaint Under the Administrative Procedure Act***

***Matadin v. Mukasey*, No. 06-4742-ag, 2008 BL 226771 (2d Cir. Oct. 08, 2008)**

On October 8, 2008, the United States Court of Appeals for the Second Circuit (Second Circuit or the Court) granted the Petitioner's petition for review and vacated a Board of Immigration Appeals (BIA) decision, because the agency improperly assigned the burden of proof to the Petitioner instead of requiring the government to prove that she abandoned her lawful permanent status by clear, unequivocal, and convincing evidence.

## Factual and Procedural Background

The Petitioner, a native and citizen of Guyana, was admitted in 1994 as a legal permanent resident (LPR). The Petitioner originally immigrated to the U.S. with her father who returned to the Guyana in 1995 leaving her in the custody of her aunt. She left the United States for Guyana on September 2, 1999 and did not return until April 28, 2002 at which time it was determined that she had abandoned her LPR status. She was subsequently ordered deported.

The Petitioner, at age 17, traveled to Guyana in 1999 to care for her ailing father who had recently suffered a severe heart attack. It was her contention that “she was the only person who could take care of him because her siblings all lived outside Guyana, his siblings all lived in the United States, and he was estranged from his wife. . . [The Petitioner] remained in Guyana for the next thirty months, while she nursed him to health and attempted to find someone to run his lumber business for him.” While in Guyana, the Petitioner was employed at various times and married a Guyanese citizen whom she intended to bring back to the U.S. That marriage, however, ended in divorce. She is also the mother of a U.S. citizen child from a subsequent relationship.

In 2002, the Petitioner returned to the U.S. at which time a Department of Homeland Security (DHS) agent concluded that she had abandoned her LPR status and initiated removal proceedings. At a deportation hearing the Immigration Judge (IJ) informed the Petitioner that she bore the burden of proof, stating in his oral decision that when “a permanent resident has been continuously absent for more than a year prior to seeking readmission, the resident has the burden to demonstrate that she did not abandon her lawful permanent residence during the course of her absence.” In finding the Petitioner removable as charged, the IJ made reference to the Petitioner’s passing knowledge of her father’s actual medical condition, inability to name the medications her father was taking, the fact that she owned no property in the United States before she left, and did not work in the United States before departing at age seventeen. The BIA affirmed that decision on appeal.

The Petitioner appealed to the Court, arguing “that the IJ erred by assigning the burden of proof to her, rather than requiring the government to prove that she had abandoned her LPR status by clear, unequivocal and convincing evidence.” She specifically pointed to the IJ’s statement that in cases where the foreign national was absent for more than one year, the burden shifts to the foreign national to show that she has not abandoned her status.

## Analysis

The Court determined that the issue at bar was “what burden of proof an IJ must apply in deportation hearings to determine

whether a lawful permanent resident has abandoned her LPR status.” The IJ had relied on the holding of *In re Huang*, 19 I & N Dec. 749 (BIA 1988), and a DHS regulation, 8 C.F.R. § 211.1(a)(2), to support the proposition that the burden of proof shifts to the foreign national after an absence of more than one year. The Court found that neither authority supported the IJ’s conclusion. The Court determined that *Huang* provided no exception to the rule that the government must establish abandonment by clear, unequivocal, and convincing evidence that a foreign national abandoned her LPR status, even for those who had been continually absent for more than a year. The Court also explained that 8 C.F.R. § 211.1(a)(2) does not provide that the burden of proof shifts to the foreign national after a one-year absence.

The Court concluded that “because the Petitioner left the country as a LPR and the sole question, which is colorable, is whether she abandoned that status during her trip abroad, the DHS bore the burden of proving by clear, unequivocal and convincing evidence that had abandoned her LPR status.” Moreover, the Court determined that because the Petitioner’s claim that she was a returning resident was colorable, the IJ should have required the government to prove abandonment by clear, unequivocal and convincing evidence and it was legal error not to do so. The Court determined that remand was the proper remedy in light of the fact that the agency decision was beset by error and the Court was not empowered to conduct de novo reviews in such instances. However, the Court stated that it had little confidence that the agency, on remand, would conclude that the Petitioner’s trip was not a temporary visit abroad.

In a concurring opinion, Justice Walker found the issue in this case is to be how an IJ should determine whether a foreign national is a returning resident, and who bears the burden of proof in these circumstances. He parted ways with the majority in their analysis of *Huang*, finding that in *Huang* the BIA expressly decided the issue presented by this case. In *Huang*, the BIA cited 8 U.S.C. 1361 and found that the burden of proving admissibility shifted from the applicant to the government when a colorable claim to returning resident status was made. Justice Walker was of the opinion that the *Huang* decision was accorded too much deference and de novo review may have been possible. However, he agreed that *Huang* provided the proper framework for allocating the burden of proof in this case and it was clear the IJ’s decision to shift the burden back to the Petitioner was erroneous in light of *Huang*.

## Conclusion

This case presented an issue of first impression to the Second Circuit and is important in that it clarifies and establishes that in removal proceedings in which there is a question of

abandonment of residence during a trip abroad, the burden of proof is clearly upon the government to prove abandonment. This becomes a fact question that goes beyond the mere assertion that the foreign national remained outside the United States for more than one year.

## **False-ID Use by Illegal Immigrants Gets U.S. High Court Review**

By Greg Stohr

Oct. 20 (Bloomberg) — The U.S. Supreme Court will examine a legal tool used by the Bush administration to imprison illegal immigrants, agreeing to hear arguments from a Mexican man charged with using false documents to get work at a steel company.

The case will determine the penalties facing people who apply for a job using a false Social Security or alien registration number and don't realize that the information belongs to a real person. The question for the court is whether that conduct constitutes aggravated identity theft, a crime that carries a mandatory two-year prison term.

That issue is one that has arisen repeatedly and divided lower courts in the four years since Congress created the crime of aggravated identity theft. The Bush administration joined workers in urging the high court to resolve the question.

The case the Supreme Court will consider involves Ignacio Flores-Figueroa, who began working for L&M Steel Services Inc. in East Moline, Illinois, in 2000 under an assumed name.

In 2006, Flores-Figueroa told his employer he wanted to be known by his real name and to change the information in his file. He gave the company counterfeit Social Security and alien registration cards, each bearing a number that had been assigned to someone else. He was arrested after the company notified federal immigration officials.

Flores-Figueroa pleaded guilty to three charges and a judge then convicted him of aggravated identity theft as well. He was sentenced to six years and three months in prison, two years longer than the sentence he would have received without the identify-theft charges. A St. Louis-based federal appeals court upheld the identity theft conviction.

The provision at issue applies to people who "knowingly" possess or use another person's identification.

### **Identity Theft**

Critics of the administration's approach say the 2004 law was aimed at people who pilfer another's identity to empty bank accounts or get credit cards, not at people who believe they are using a generic false identification.

"Someone who intends to steal another's identity is worthy of greater punishment than one who unintentionally picks an identification number out of thin air that happens to match one already issued to someone else," lawyers for Flores-Figueroa argued in the appeal.

U.S. Solicitor General Gregory Garre, the administration's top Supreme Court lawyer, argued that "the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence."

Garre made that argument in a case that raised identical issues. That case, which the court likely will hold until it resolves the Flores-Figueroa case, involved one of the 1,200-plus workers arrested during December 2006 raids on Swift & Co. meat plants.

The justices will hear arguments early next year, almost certainly after a new administration takes office.

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## **Selected Cases**

### **Circuit Courts of Appeal**

*Kadri v. Mukasey*, Nos. 06-2599, 07-1754., 2008 BL 219004 (1st Cir. Sep. 30, 2008): The First Circuit granted the Petitioner's petition for review and vacated a Board of Immigration Appeals (BIA) order of removal. The Petitioner was a Muslim native of Indonesia who made an affirmative asylum claim on the grounds that he was persecuted based on his sexual orientation. He asserted "that he was ostracized in the workplace and prevented from earning a livelihood as a medical doctor; and that he fears that if returned to Indonesia, he would face continued persecution." The Immigration Judge (IJ) determined that he was credible, found that he belonged to a particular social group, and granted him asylum. The BIA reversed the IJ's decision on appeal. Quoting *Mihaylov v. Ashcroft*, 379 F.3d 15, 21 (quoting *Gailius v. I.N.S.*, 147 F.3d 34, 46-47 (1st Cir. 1998)) the Court concluded that it was necessary to remand a case when the agency's decision "fails to state 'with sufficient particularity and clarity the reasons for denial of asylum' or otherwise to 'offer legally sufficient reasons

for [the] decision.” Here, the Court was unable to determine what standard the BIA used in rejecting the Petitioner’s economic persecution claim. As a result, it remanded the case to the BIA with the instructions that it require the IJ to evaluate the case under the standard set forth *In re T-Z*, 24 I & N. Dec. 163 (BIA 2007).

*Alibasic v. Mukasey*, No. 06-4046-ag, 2008 BL 235896 (2d Cir. Oct. 17, 2008): The Second Circuit granted the Petitioner’s petition for review and vacated a decision of the Board of Immigration Appeals (BIA) because the BIA failed to conduct an individualized analysis of whether the changes in conditions in the Petitioner’s homeland were so fundamental that they are sufficient to rebut the presumption that his fear of persecution is well-founded. An Immigration Judge (IJ) found the Petitioner, an Albanian Muslim, to be credible and eligible for asylum based his testimony of past persecution and other information drawn from the 2004 Country Condition Report. The government appealed, and the BIA vacated the grant of asylum, remanding the case to the IJ to consider the remedy of voluntary departure. The Petitioner made a petition for review of the BIA’s order. The Court rejected the Government’s argument that because the BIA remanded the case to the IJ to consider voluntary departure, there is no final order for their review, and [the Court] therefore lacks jurisdiction to hear this petition. The Court held that a BIA order denying relief from removal and remanding for the sole purpose of considering voluntary departure is a final order of removal that is immediately removable. The Court (relying on the holding in *Passi v. Mukasey*, 535 F.3d 98, 102 (2d Cir. 2008) which stated that the “BIA ‘improperly inferred’ that petitioner was not eligible for asylum ‘because its inference was based entirely on a country report that details general improvements,’ but also indicates that petitioner’s hometown ‘is still troubled by ethnic and political conflict’”) found that the BIA failed to demonstrate that its decision was supported by “substantial evidence in the record,” especially because it does not even address the evidence of continued persecution of Serbian minorities identified by the IJ in supporting materials submitted by Petitioner and in the 2004 Country Report itself.

*U.S. v. Boskic*, No. 07-1188, 2008 BL 238531 (1st Cir. Oct. 22, 2008): The First Circuit upheld the conviction of the defendant because there was no basis for disturbing the jury’s verdict. The defendant was found guilty on two counts of making false statements in his applications for refugee status and permanent residency in the United States. The defendant appealed, arguing that: “(1) the district court should have granted his motion to suppress statements made during an interview with government agents because those statements were secured in violation of his Fifth and Sixth Amendment rights; (2) the court should have granted

his motion for judgment of acquittal because the evidence was insufficient to support a finding of falsity in his two statements.” The Court found that the issue at bar was “the relationship between deceptive interrogation tactics used by law enforcement and the voluntariness of statements under the Fifth Amendment; the attachment of the right to counsel under the Sixth Amendment; and the applicability of the fundamental ambiguity and literal truth defenses in a false statement prosecution.” The Court determined “that testimonial interrogation permits the government to resolve the ambiguities created by non-responsive answers with follow-up questions... the government may lose the opportunity to have a jury resolve the ultimate question of falsity if it is not alert to the need for those follow-up questions.”

*Shin v. Mukasey*, Nos. 06-71955, 06-74052., 2008 BL 239820 (9th Cir. Oct. 23, 2008): The Ninth Circuit denied the Petitioner’s motion to remand, finding that foreign nationals are entitled to file only one motion to reopen and are barred from filing a second motion to reopen. The Court was asked to consider whether a foreign national “who over-stayed her tourist visa, and then paid \$10,000 for the purchase of a fraudulent alien registration card (green card) manufactured by a corrupt federal immigration employee, can bar the government from removing her from this country on the grounds the government is estopped to assert the green card is bogus.” The Court found that the government could not be burdened with the felonious, unauthorized issuance of residency documentation by a thieving employee.

*Malik v. Mukasey*, No. 07-3821, 2008 BL 240054 (7th Cir. Oct. 23, 2008): The Court dismissed the Petitioners’ petition for review because it lacked jurisdiction to review Immigration Judges’ (IJ) decisions regarding the futility of granting continuances. The Petitioners, three brothers, sought to have their removal proceedings continued so that they could apply to become lawful permanent residents based on their marriages to United States citizens. The IJ denied the motion after concluding “that a continuance would be futile since their applications were destined to be denied” due to the fact they had all lied to her, and one lied to the asylum officer during his interview. The Board of Immigration Appeals affirmed, and the Petitioners sought review from the Court. The Court determined that the pivotal issue was whether it had jurisdiction. The Court concluded that even though its ability to review an IJ’s discretionary decisions is limited, its jurisdiction to review questions of law and constitutional claims remained intact. The Court further found that the Petitioners’ argument that the IJ erred as a matter of law when it attributed their father’s fraud to them “misses the mark” because the IJ properly found that each brother was accountable for his own actions and misrepresentations.



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