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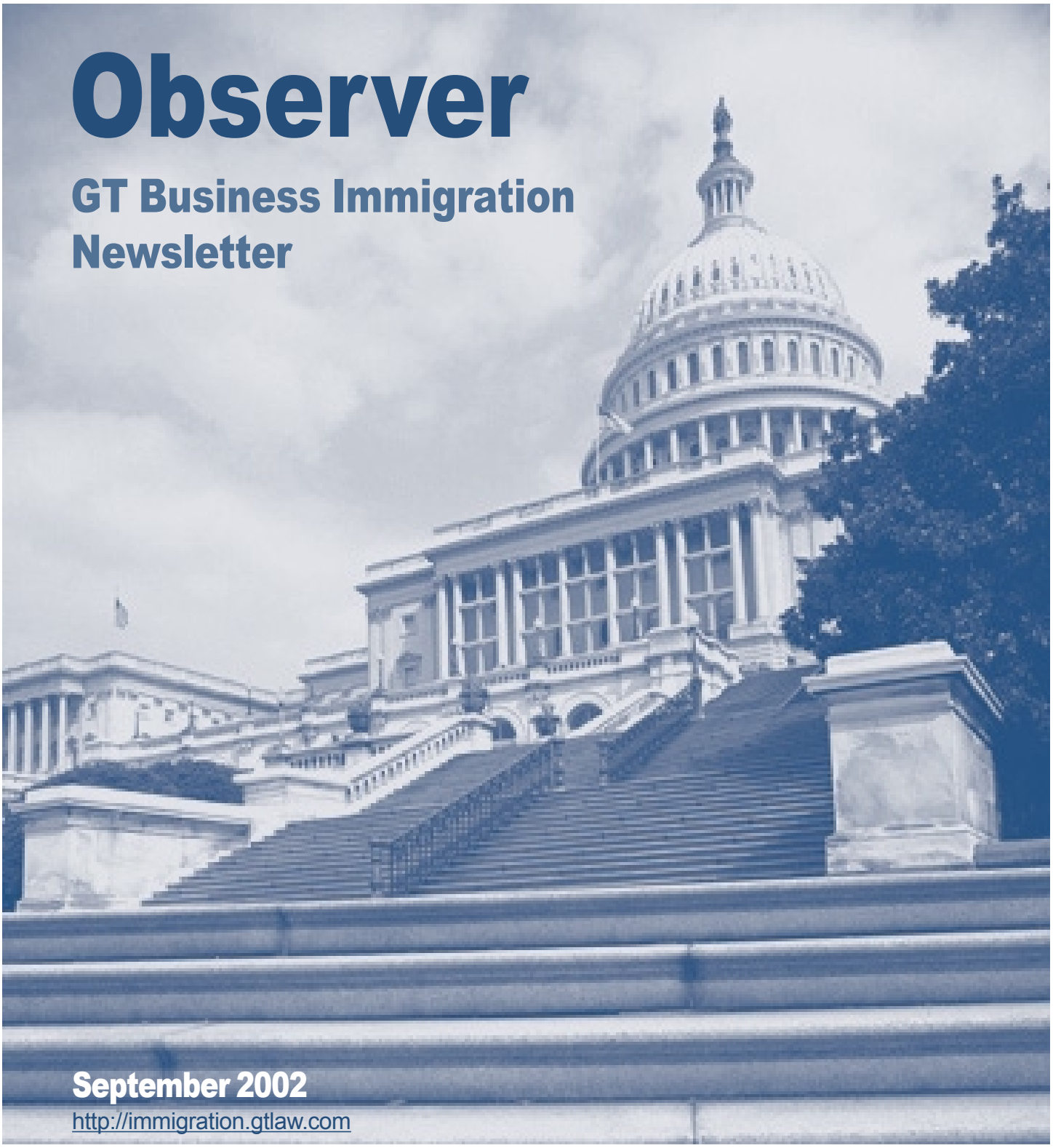
GT Business Immigration Newsletter



September 2002

http://immigration.gtlaw.com

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Observer

September 2002

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September 2002 RESOURCES

September 2002 State Department Visa Bulletin Link:
http://travel.state.gov/visa_bulletin.html

Service Center Processing Times
Vermont: http://immigration.gtlaw.com/processing/ins/vermont.htm

California: http://immigration.gtlaw.com/processing/ins/california.htm

Texas: http://immigration.gtlaw.com/processing/ins/texas.htm

Nebraska: http://immigration.gtlaw.com/processing/ins/nebraska.htm

Department of Labor Regional Processing Times:

http://immigration.gtlaw.com/processing/dol.htm

State Employment Agency Processing Times:
http://immigration.gtlaw.com/processing/sesa.htm

The GT Business Immigration Observer is published by the business immigration practice group at Greenberg Traurig. GT Of Counsel, Dawn M. Lurie serves as the Editor of the Observer. The newsletter contains information concerning trends and recent developments in immigration law. Moreover, the authors analyze and report on relevant immigration related issues as well as legislative issues.

Finally, the GT Observer serves as an invaluable resource to individuals, and human resource managers, recruiters and company executives who must keep current on these matters.

SPREAD THE WORD

If you have enjoyed reading this newsletter and have found useful information in it, we'd greatly appreciate your help in spreading the word about it. You can do this by forwarding a copy to your friends and professional peers and telling them about it.

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Visa Revalidation in the U.S. No Longer Available for Citizens of Seven Countries

In last month's newsletter, our article discussed the impact of additional security checks on visa revalidation by the State Department in the U.S. At that time the State Department informed the American Immigration Lawyers Association that it was reviewing applications on a case-by-case basis for all applicants, including applicants from countries that were on the list of 26 requiring additional security checks. However, in a recent development the State Department has now suspended visa revalidation for individuals from the seven countries that have been identified by the U.S. as state sponsors of terrorism. These countries are currently: North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya.

According to the State Department, this change is being made to comply with section Section 306 of the Enhanced Border Security and Visa Reform Act of 2002. Section 306 relates directly to the issuance of visas to foreign nationals who are nationals of countries deemed to be state sponsors of terrorism. For individuals from North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya, all visa applicants, regardless of gender, must complete DS-157 and DS-156 and appear for an interview with a consular officer. In the cases of A and G visa applicants (except for A-3 and G-5 applicants who must be interviewed), a consular office may waive the interview requirement. Individuals from the seven countries should be aware when making travel plans that visa issuance is taking much longer than in the past. In addition, individuals from these seven countries can probably expect even longer delays for their visa processing and are likely to face even more heightened scrutiny.

Increased Security Measures at Borders Begin on September 11, 2002

The Department of Justice announced the implementation of the first phase of the National Security Entry-Exit Registration System to begin on the one year anniversary of the September 11, 2002 attacks. INS was charged with beginning the program at selected ports of entry on September 11, 2002. The first phase is scheduled to last twenty days. During this initial twenty days the entry-exit registration system will be tested and evaluated. On October 1, 2002, the program will be implemented at all ports of entry to the United States, including land, air and sea.

The National Security Entry-Exit Registration System was mandated by the USA Patriot Act. Congress wanted to create a system where the borders of the country were more secure and wanted foreign nationals to comply with the immigration laws from the time they enter the country until the time they leave the country.

The Entry-Exit system involves fingerprinting some individuals when they enter the country. The criteria for those who will be fingerprinted will be determined by the Department of Justice. The fingerprints will be checked against those of known criminals and terrorists. If fingerprints are matched in the database the individuals will be arrested. The Department of Justice has indicated that from January to July 2002 there were more than 2,000 arrests made based on matched fingerprints. The fingerprint checks will be a valuable resource for identifying known felons who attempt to enter the country.

The registration system will also require individuals to confirm their activities in the country. The system will request address and employment confirmation. In addition, upon departing the U.S., the individuals must confirm their exit with the INS.

The fingerprinting and confirmation requirement will be used for nationals of the following countries Iran, Iraq, Libya, Sudan and Syria. In addition, nonimmigrants whom the Department of State determines to present a security risk based on the criteria established by the Department of Justice as well as individuals identified at the port of entry may also be fingerprinted.

Greenberg Traurig will continue updating our website and newsletter as The National Security Entry-Exit Registration System evolves.

Guest Worker Essential Worker Immigration

EWIC is a coalition of businesses, trade associations, and other organizations from across the industry spectrum concerned with the shortage of both skilled and lesser skilled ("essential worker") labor.

Greenberg Traurig Shareholder Laura Reiff is a co-chair of the coalition. For more information see: www.EWIC.org

Delays in Visa Issuance

The Department of State has increased its security procedures in connection with the visa issuance process. This comes as a direct result of the September 11, 2001 attacks. The Department of State has implemented new visa application forms that request detailed information from applicants as well as security background checks. These additional security measures were implemented as a mandate from Congress. As many of our clients are experiencing, the visa issuance procedures are no longer a simple "drop off and pick up" procedure. People are experiencing processing times from one day to several weeks. What used to be a routine procedure seems to be anything but that in the post September 11 climate of heightened scrutiny and security.

The Department of State has asked for the cooperation of everyone while it makes the necessary adjustments with the visa issuance process. In an effort to explain its security efforts, the Department of State released the special notice below to explain its efforts at security.

Notice on Current Visa Processing Situation

Since the terrorist attacks of September 11, 2001, the State Department has been engaged with other U.S. government agencies in an extensive and ongoing review of visa issuing practices as they relate to the security of our borders and our nation. Through the use of supplemental application forms and other measures, visa applications are now subject to a greater degree of scrutiny than in the past. This scrutiny means that visa applications in some instances take longer to process to conclusion than has been customary. We recognize that individual applicants may experience inconvenience and hardship if their application takes longer to process than they expected. We are doing everything possible to meet the legitimate needs of prospective travelers consistent with the priority we must attach to our security and legal responsibilities.

While our consular officers strive to offer visa applicants as expeditious service as possible, their primary responsibility is to carry out U.S. law and to ensure that applicants to whom they issue visas will not pose a threat to the safety and security of the United States and its inhabitants. This is a serious responsibility that must take precedence over other considerations pertaining to a visa application.

We realize that these necessary security measures may affect the travel plans of visa applicants, especially individuals intending to enroll in or continue college and university studies in the United States. We will make every attempt to meet the legitimate needs of prospective travelers to the United States, consistent with the priority of our security and legal responsibilities. We recommend that individuals build in ample time before their planned travel date when seeking to obtain a visa.

Special security screening procedures affect a limited number of prospective travelers. Our goal is to have assured security within a system that is responsive to everyone wishing to visit the United States. However, delays in processing of visas will continue to occur as the Department of State, working with other agencies, brings new information systems on line. Responding to the attacks of September 11, 2001, Congress ordered that security inadequacies be identified and addressed. By legislative instruction, some of this work was specifically to be accomplished by the first anniversary of the attacks. That work is in course now in accordance with those instructions.

The time needed for adjudication of individual cases will continue to be difficult to predict, as necessary new procedures are refined. Visa applicants affected by these procedures are informed of the need for additional screening at the time of application and should expect substantial delays of six to eight weeks or more before a visa can be issued.

We trust that affected applicants will understand that this waiting period is necessary as we strive to make every effort to ensure the safety and security of the United States for all who are here, including foreign visitors.

GAO Report on H-1b Visas and Deemed Export Controls

The General Accounting Office (GAO) has released a new report entitled "Export Controls: Department of Commerce Controls over Transfer of Technology to Foreign Nationals Need Improvement." The report calls for a "reexamination of the current approach to controlling foreign national access to technology in the United States." Specifically, the GAO called for INS to refer H-1B change of status applications to Commerce Department where controlled technologies are involved. The report also stated that the Department of "Commerce stated that it would contact INS to explore ways of referring to Commerce H-1B change-of-status applications involving employment that might result in access to sensitive technology." The report cited to vulnerabilities in the Department of Commerce's deemed export system that could help China and other countries of concern improve their military capabilities due to the lack of screening of H-1b non-immigrant visa holders. GT will follow up with information as it becomes available.

Can the EEOC & NLRB Continue Protectin Alien Workers, Regarless of their Immigration Status?

Regardless of the March 2002 Supreme Court holding that back pay cannot be awarded to undocumented workers, in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, No. 00-1595, 2002 WL 1275, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have attempted to maintain their stance on protecting immigrant employees, regardless of their immigration status.

Unfortunately, as the Hoffman decision seems to strip both organizations of their enforcement capabilities, their ability to apply their commitment to protecting workers remains to be seen. In fact, following the Hoffman decision, while reinforcing its commitment to protecting workers, the EEOC rescinded a 1999 Enforcement Guidance which advised that federal employment discrimination statutes entitled undocumented workers to monetary relief for discrimination. Then, on July 19, 2002, the NLRB released General Counsel Memorandum 02-06. The Memorandum lays out "procedures and remedies" for aliens who "may be undocumented" and who face workplace discrimination. While the Memorandum attempts to minimize NLRB's role in investigating the immigration status of a complaining employee, it also reinforces the fact that the organization may no longer have the support of the judicial system in cases involving undocumented workers.

What did the Court say in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board?

In Hoffman, the Supreme Court held that "federal immigration policy . . . foreclosed the NLRB from awarding back pay to [an] undocumented alien who had never been legally authorized to work." As a basis for this conclusion the Court points out that it has "consistently set aside awards [by the NLRB] of reinstatement or back pay to employees found guilty of serious illegal conduct." Hoffman at 1280.

EEOC's Response

In response to this decision, the EEOC rescinded a 1999 Enforcement Guidance which advised that federal employment discrimination statutes entitled undocumented workers to monetary relief for discrimination. The organization has also attempted to stress its continued commitment to protecting workers. Specifically, the EEOC remains committed to enforcing laws which protect immigrant employees from discriminatory employment practices, regardless of their immigration status. In its June 27, 2002 rescission announcement, the EEOC stated that it "will not, on its own initiative, inquire into a worker's immigration status" when it enforces employment discrimination statutes." During the announcement, the EEOC spokesperson emphasized the organizations' continued stance that it is still "illegal for employers to discriminate against undocumented workers." (see below for link to rescission text)
The EEOC has stated that while it will comply with the Hoffman decision in its enforcement activities, it will also continue to pursue claims of discriminatory action from all workers. However, in doing so, the EEOC will also need to ensure that the relief sought will be consistent with Hoffman. To date, the commission has yet to make clear the type of relief it will seek for undocumented workers who have been discriminated against by employers while at the same time satisfying the Hoffman holding.

NLRB's Response

The July 19, 2002, General Counsel Memorandum 02-06 provides "procedures and remedies" for aliens who "may be undocumented" and who face workplace discrimination. In this document, the NLRB updated guidelines based on the Hoffman holding. In cases where an employee might be undocumented, investigators and hearing officers at NLRB regional offices are instructed as follows:

1. There will be a presumption of employment authorization. As such, investigators are to refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the employee's immigration status.
2. The employee's immigration status should be investigated only after a respondent (the employer) establishes the existence of a genuine issue.
3. If a party to the complaint raises the issue of an employee's immigration status at a representation case hearing, the hearing officer should not permit the evidence to be unspecified. A brief offer of proof must be presented by the party making the claim.
4. When a complaint appears to involve undocumented workers, regions are instructed to submit the case to the Advice department with recommendations to seek special remedies involving undocumented workers.

The NLRB advises Regions to review questions of status in the compliance stage of a case. However, once there is evidence establishing the unauthorized status of an employee, a back pay remedy is no longer recommended.

NLRB's Attempt to Limit the Impact of Hoffman

The Memorandum also notes the fact that the Court did not pass judgment on cases where employers knowingly hire undocumented workers. This

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Can the EEOC & NLRB Continue Protectin Alien Workers, Regarless of their Immigration Status? (con't)

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specific observation appears to be NLRB's attempt to limit the scope of the Hoffman holding. In taking this stance, the NLRB stated that many remedies will still be available to the complaining worker, including the remedy of conditional reinstatement against employers who knowingly disregard IRCA and the Labor Act.

Some of the guidelines delineated for regional offices handling situations where an employer knowingly hired an undocumented employee include:

1. Seek formal settlement in cases involving employers that knowingly hire undocumented workers and use their lack of work authorization status and undocumented status to threaten and discharge them in retaliation.
2. Compel employers to continue to assist an undocumented worker in his or her efforts to become regularized where the discrimination itself is the employer's discontinuance of its previous support.

Compensation for work already preformed or for unfair demotions may also fall outside of the Hoffman decision. The NLRB also determined that Hoffman does not "preclude compensation for work already performed . . . under unlawfully imposed terms and conditions." According to the NLRB, rather than serving as a punitive remedy in hopes of deterring future violations, this type of compensation makes the undocumented employee whole for uncompensated labor. In the instance of an undocumented worker "demoted" to a lower rate of pay, back pay for the salary that would have been made had the worker kept their previous position is also not necessarily precluded by Hoffman.

Will the NLRB be Successful in its Limited Application of Hoffman?

The NLRB and EEOC stance on questioning the immigration status of workers filing complaints, as well as the NLRB's restrictive interpretation of the Hoffman decision are likely to lead to a number of new lawsuits and claims by employers who are under investigation and who are ordered to pay back pay to undocumented workers. Furthermore, efforts by various federal agencies (including the INS, the Department of State, and the Social Security Administration) to locate undocumented aliens throughout our nation, may allow the NLRB to hold more employers accountable following their determination that the Hoffman decision did not address and therefore does not apply to employers who knowingly employ undocumented workers.

The NRLB's stance and guidelines certainly appear to fall within the Hoffman decision as it stands now, however, as employers begin to utilize the decision to challenge NLRB imposed remedies as they relate to undocumented workers, the application of the Hoffman decision by lower and appellate courts will determine its scope. Such a decision will either continue to limit its impact, or depending on the jurisdiction the decision may be applied broadly thereby rendering NLRB's guidance and attempts to continue protecting all workers, obsolete. The development of NRLB's procedures and the application of this new decision is definitely one that will impact employers in all sectors as they continue to seek workers at all skill levels throughout the nation to fill the numerous positions that U.S. workers are not willing to accept.

NLRB Memorandum:
http://www.nlrb.gov/gcmemo/gc02-06.html

Rescission Announcement:
http://www.eeoc.gov/docs/undoc-rescind.html

Reaffirmation Announcement:
http://www.eeoc.gov/press/6-28-02.html

Global Immigration Seminars

Greenberg Traurig continues its tradition of providing complimentary presentations to companies on outbound immigration issues as well as discussions on money saving tax strategies for employees as well as employers. GT provides information, guidance and assistance to our clients on visa matters relating to the international relocation of personnel to, and between, countries outside of the United States.

Please contact Dawn M. Lurie at (703)903–7527 or luried@gtlaw.com for further information.

Diversity Immigrant Visa Program (DV-2004) Registration Instructions Issued by the Department of State

On August 21, 2002, the U.S. Department of State issued a notice of registration for the 2004 Diversity Visa Program. Entries for DV-2004 must be received by the Kentucky Consular Center (at the address noted below) between NOON on Monday, OCTOBER 7, 2002 and NOON on Wednesday, NOVEMBER 6, 2002. Entries received before or after this period will be disqualified, regardless of when they are postmarked.

The Diversity Visa Program makes 55,000 immigrant visas available each year; however, 5,000 of these visas are allocated to those eligible for immigrant status under the Nicaraguan and Central American Relief Act (NACARA). This reduction began in DV-1999 and remains in effect for DV-2004.

Natives of the following countries are not eligible for DV-2004: Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, Vietnam (Persons born in Hong Kong SAR, Macau SAR and Taiwan are eligible.)

Eligibility Requirements:

An applicant must:

- Be able to claim nativity in an eligible country. Nativity in most cases is determined by the applicant's place of birth, however, if a person was born in an ineligible country but his/her spouse was born in an eligible country, such person can claim the spouse's country of birth, rather than his/her own. Additionally, if a person was born in an ineligible country, but neither of his/her parents were born there or resided there at the time of the birth, such person may be able to claim nativity in one of the parents' country of birth.

And Either:

- Have a high school education or its equivalent. This means successful completion of a 12-year course of elementary and secondary education.

Or

- Have two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform. Occupations meeting this requirement are available from the U.S. Department of Labor. Should you have questions in this regard, please contact Greenberg Traurig Business Immigration Group.

How to Apply:

- An applicant may submit only ONE entry. Should more than one entry be submitted, the applicant will be disqualified from the program.
- The applicant must personally sign the entry in his/her native alphabet. Failure of the applicant to personally sign his/her complete name in his/her native alphabet will result in disqualification from the program.
- There is no specific form for submission of an entry. The following information should be typed or printed clearly on a plain sheet of paper:

  Full name, with the last (surname/family) name underlined.

  Date of birth, showing Day, Month, and Year.

  Place of birth, showing City/Town, District/County/Province, Country (the name should be the name currently in use).

  The applicant's native country if different from country of birth.

  Name, date, and place of birth of the applicant's spouse, and unmarried children under the age of 21. The applicant should include natural children, step-children, as well as all legally-adopted children.

  Full mailing address.

  Photographs. Include a recent photograph. Specifications for the photograph are detailed in the attached document.

  Signature.

Failure to provide any of the information listed above will result in disqualification from the program.

Mailing Instructions

No fee is required, but the correct postage is necessary for the entry to reach the Kentucky Consular Center.

The entry must be submitted by regular or airmail. Entries sent by express or priority mail, or any delivery system other than regular or airmail will result in disqualification.

The envelope must be between 6 and 10 inches long and 3½ and 4½ inches wide. Postcards and envelopes inside other packets are not acceptable.

In the upper left hand corner of the envelope the applicant must write his/her country of nativity followed by the applicant's name and full return address.

The mailing address for entries varies according to the applicant's country of nativity. The addresses are as follows:

Africa (includes all countries on the African continent and adjacent islands):

DV Program
Kentucky Consular Center
1001 Visa Crest
Migrate, KY 41901-1000, USA.

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Diversity Immigrant Visa Program (DV-2004) Registration Instructions Issued by the Department of State (con't)

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Asia (extends from Israel to the Northern Pacific Islands and includes Indonesia):
DV Program
Kentucky Consular Center
2002 Visa Crest
Migrate, KY 41902-2000, USA.

Europe (extends from Greenland to Russia, and includes all countries of the former USSR):
DV Program
Kentucky Consular
Center, 3003 Visa Crest
Migrate, KY 41903-3000, USA.

South America/Central America/ Caribbean (extends from Central America (Guatemala) and the Caribbean nations to Chile):
DV Program
Kentucky Consular
Center, 4004 Visa Crest
Migrate, KY 41904-4000, USA.

Oceania (includes Australia, New Zealand, Papua New Guinea and all countries and islands of the South Pacific):
DV Program
Kentucky Consular
Center, 5005 Visa Crest
Migrate, KY 41905-5000, USA.

North America (includes the Bahamas):
DV Program
Kentucky Consular Center
6006 Visa Crest
Migrate, KY 41906-6000, USA.

Selection Criteria

Selected applicants in the random drawing must meet all the eligibility requirements under U.S. law, including any applicable special processing and/or heightened scrutiny requirements established in response to the events of September 11, 2001. Natives of some countries, including but not limited to countries identified as state sponsors of terrorism, may be required to undergo lengthy and significant scrutiny of their cases.

Selected applicants MUST RECEIVE issuance of their diversity immigrant visas by SEPTEMBER 30, 2004, or they will no longer benefit from the program. This deadline applies to the processing of family members as well.

The list of eligible countries is in the attached Federal Register document.

Notification of Successful Applicants

Only selected applicants will be notified. Notices will be mailed between April and July of 2003, to the address listed on the entry, along with instructions for the application for the immigrant visa.

Being selected does not automatically guarantee issuance of an immigrant visa, even if the applicant is qualified, because of the number of entries selected and registered is greater than the number of immigrant visas available. Therefore, it is important that those selected complete and file their immigrant visa applications immediately.

Additional Information

Interested individuals may call Greenberg Traurig Business Immigration Group or the U.S. Department of State information line at (202) 331-7199. Applicants overseas may contact the nearest U.S. embassy or consulate for instructions. Information is also available at http://travel.state.gov.

Child Status Protection Act Provides for Additional Aging-Out Protection

On August 6, 2002 President Bush signed the Child Status Protection Act which offers age-out protection to foreign-born children of American citizen or U.S. permanent resident parents. Before this legislation, in order to qualify as an immediate relative child or be in included as part of their parent's immigrant petition (I-130 Alien Relative Petition), the child who was being sponsored had to be under the age of 21 and unmarried at the time the petition was adjudicated. Due to large processing delays at INS, by the time the INS got around to adjudicating the case, the sponsored "child" would be over the age of 21 and therefore no longer qualify as a child, i.e. they would "age-out". Under the old immigration laws, in this case the petition then would be shifted to another lower preference category or the age-out child would have to file their own petition causing even longer delays or ineligibility, and in many cases separating families.

Under the Child Status Protection Act, several new protections were put into place to help avoid the aging out problem. These provisions differ depending on the type of case or category under which the child is receiving an immigration benefit. The basic provisions are outlined below:

1. For the unmarried children of U.S. citizens who have had an Alien Relative Petition filed for them, the age of the sponsored child for the purposes of adjudicating the petition is basically fixed by the date of filing.
2. For children of U.S. Permanent Resident parents, who become U.S. Citizens while the Immigrant petition is pending, the age of the child is fixed as to the date the parent becomes a U.S. Citizen.
3. In the case of married children of U.S. Citizens residents who later divorce, the sponsored child's age will be fixed as of the date of his or her divorce.
4. For U.S. Permanent Residents whose children are accompanying or following to join on a petition for an immigrant visa, their children's eligibility will be fixed based on the date that a visa became available to them. However, the children must apply for permanent resident status within one year of a visa becoming available to them.

This act provides additional protection for children who may be aging-out by ensuring they receive immigration benefits. While these provisions provide some protection against the consequences of aging-out, it is always wise to file an immigrant petition as soon as possible.

Immigration News

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