

The Compass[®]

Immigration News

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The Law Firm of Tidwell, Swaim & Associates, P.C.
 A Tradition of Success and Innovation Since 1978



25 Years and Counting ...



Managing Partner,
 David Swaim

From a small single-attorney office in 1978 to the largest, full-service immigration firm in North Texas, Tidwell, Swaim & Associates has witnessed, first-hand, the changes in immigration laws and the

effects these laws have had on the lives of our clients over the last twenty-five years. We've handled over 20,000 cases, in the early years from up-front adjudications, done at one immigration office, to what has become a sprawling, bureaucratic monster with five-year visa processing.

When Sam Tidwell created the firm, in March of 1978, in a small office on Lemmon Avenue in Dallas, the world was a much different place and the immigration world was seemingly in a different universe. Mr. Tidwell retired from the U.S. Border Patrol, attended law school and soon after, opened his immigration practice. His goal was simply to provide the highest level of immigration expertise with outstanding customer service at a fair price. These same standards have guided the firm for the past 25 years and remain our foundation.

WHAT CHANGES WE'VE SEEN

The firm's philosophy has remained the same but the immigration laws and procedures have changed dramatically.

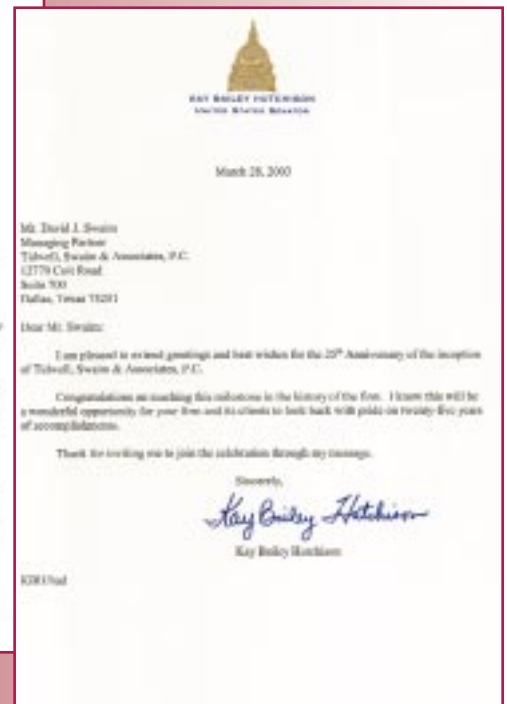


Above: Texas Senator Kay Bailey Hutchinson (R) and Governor, Rick Perry (R), congratulate the firm on 25 successful years.

For the first ten years that Tidwell, Swaim & Associates served its clients, almost all immigration cases were handled in person at the local district office. Believe it or not, most cases such as those for business (H-1s, L-1s, E-2s), immigrant petitions, especially marriage cases, were all adjudicated the same day they were filed! Although this meant spending hours every day at the local district office, it also meant that immigration benefits were almost immediately available. This more simple

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*Tidwell, Swaim
 & Associates Celebrates
 25th Anniversary
 1978 to 2003*



25 Years and Counting

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time provided us with the ability to work with the Immigration Service to resolve issues and disputes which usually was accomplished the same day. It also provoked frustrations because individual INS officers had tremendous power. At least, however, we had the opportunity to discuss issues and resolve differences.

Beginning in 1987, this all changed with the centralization of the immigration process in regional offices and ultimately at the service centers. The maze of bureaucracy and incompetence which characterizes the current immigration process is the polar opposite of those seemingly more innocent days.

EARLY YEARS AT TSA

Throughout these changes many of those who helped Mr. Tidwell establish the firm continue their work here today. Barbara Nelson, our first Senior Paralegal, began in January of 1980 and Justina Wang, currently our Financial Director and Chinese community liaison began with the firm in May of 1982. Mindy Wolfson, our second Senior Paralegal, began in January of 1984.

There have been, and continue to be, dozens of attorneys, paralegals, and administrative support staff who have contributed to the success of the firm over the past 25 years.

I began with the firm in April 1985 and became Managing Partner in December 1991. Some attorneys have joined, left, and rejoined the firm such as Patricia Medrano, who has recently rejoined our firm after serving as an attorney for the city of Dallas. Current attorneys such as our Senior Associate, Maggie Mills, as well as Amy Hsu, and Megan Raesner, continue the tradition which Mr. Tidwell established in the little office on Lemmon Avenue.

Over the years we have seen Tidwell,



Founder, Sam Tidwell, swears in attorney, David Swaim in 1986.

Swaim expand into other locations including offices in Fort Worth in 1982 and Austin in 1983, an international office in Taiwan in 1992, and a second office which was opened in Austin in 1997. The firm has been innovative in several areas of immigration practice including creating one of the first immigration newsletters, *The Compass*, in 1982 and establishing the college and university seminar program in 1980. Many of our readers may still remember Sam Tidwell flying his own airplane to colleges and universities from Florida to California to give seminars to foreign students and faculties. We still continue the seminar program to hundreds of foreign students and faculty each year but leave the flying to commercial airlines.

MILESTONES

Some of the milestones over the past 25 years have been tied to international events. The first major test for our firm was the Iranian hostage crisis in 1979 which forced hundreds of Iranian students in the U.S. to register with the Immigration Service and many subsequently faced deportation proceedings. In 1981, we saw the creation of the current labor certification system by the creation of new DOL regulations and the Technical Assistance Guide

which we still follow today. In 1986, the Amnesty Program was created which actually started in 1987 and continued throughout the late '80s and even into the early '90s. That year, 1987, also saw the creation of the regional offices and a more centralized immigration process. For the first time, detailed F-1 regulations were also implemented in 1987.

The Immigration Act of 1990 created a new quota system as well as significantly changing the H-1 process. These changes both helped and hindered the economic boom which began in the mid '90s and continued until 1999. During this time we saw the greatest expansion of immigrants in the U.S. since the early 1900s. We also saw the Immigration Service completely overwhelmed by its mission and its inability to manage its responsibilities. The laws have changed so significantly that it is unlikely that Sam Tidwell would recognize the substantive law if he were to visit us today. But more importantly, he would be amazed and perhaps disappointed by the manner in which the Immigration Service, now, BCIS, administers the immigration process.

As we are now in the beginning of the 21st century and enter a new period in our history, we extend our gratitude to the thousands of clients, friends and supporters who have helped us over the years and continue to support our firm. One of the great advantages of having a full-service immigration firm is the personal satisfaction which comes from representing small companies, who eventually grow into multinational corporations with thousands of employees, as well as the lonely asylee or the naturalized U.S. citizen attempting to bring her parents to the U.S. from her home country. We reaffirm our dedication to the principals upon which our firm is founded and look forward to being of service to the immigration community in the future. ■

INS: Mis-applying the Definition of 'Managerial Capacity' to the L-1 Classification



BY: PATRICIA MEDRANO
ATTORNEY AT LAW



The L-1 classification, also known as the “intra-company transferee,” is intended to accommodate multinational businesses wishing to transfer key foreign employees to work in the United States for the same business or related business. In order to be eligible for L-1 status, the following requirements must be met: 1) employee must have been employed abroad as an executive, manager, or in a position requiring specialized knowledge; 2) must have worked in that capacity for one continuous year out of the three years by a parent, subsidiary, or affiliate of the U.S. employer preceding the application for admission and 3) the employee will be transferred temporarily to the United States to work in an executive, managerial or specialized knowledge capacity for the same employer or an affiliate or subsidiary of that employer.

Employment in the position of a manager, executive, or one that involves specialized knowledge is essential for both the year abroad and the intended L-1 job assignment. The key terms “executive capacity,” “managerial capacity,” and “specialized knowledge” are defined by regulations. Although managerial capacity is defined by the regulations, the Immigration and Naturalization Service, now known as the Bureau of

Citizenship and Immigration Services (BCIS), has recently applied a more stringent standard when adjudicating L-1 petitions for managers.

To illustrate the scenario, the regulations define “managerial capacity,” to mean an assignment within an organization in which the employee primarily – 1) manages the organization, or a department, subdivision, function or component of the organization; 2) 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; 3) 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 4) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional. As to criterion number

two, the BCIS is requiring that the manager supervise the work of supervisory, professional, or managerial employees, however, the regulations do not mandate such a requirement. Rather, it allows for two alternative managerial functions, either supervising the work of other professional or managerial employees or the managing of an essential function within the organization, or a department or subdivision of the organization. Evidence that the BCIS is misapplying this criterion can be found in criterion three where it explicitly states that “if no other employee is directly supervised [the manager] functions at a senior level within the organizational hierarchy or with respect to the function managed.” From the regulations it is clear that a manager can manage a function of the company without supervisory responsibilities.

The BCIS’ erroneous interpretation is underscoring the importance of the L-1 classification which is intended to permit multinational companies to transfer temporarily qualified key foreign employees to the United States for the purpose of improving management effectiveness and enhancing competitiveness in overseas markets. ■

TSA Welcomes New Attorneys

Associate Attorney, Patricia Medrano, Rejoins Firm to Work with Hispanic Community



We welcome Associate Attorney, Patricia Medrano, back to the firm after 13 years spent as an attorney for City of Dallas. Ms. Medrano will be handling all types of immigration cases including, deportation/removal cases, visa petitions, and federal court litigation and will be focusing on servicing the immigration needs of our hispanic communities.

Upon her return, Ms. Medrano said, "I have heard that 'What I do becomes who I am.' I am excited to be part of this law firm with its experienced and committed staff. My background in government, and the fact that I am a longtime resident of the City of Dallas, will assist me in working with the growing hispanic community to send the message that they can be part of the American dream."

Recognizing the critical need for legal services geared to the hispanic population, Ms. Medrano added, "Latinos are the most loyal customer base and growing by leaps and bounds. Too many times, latinos are taken advantage of in regard to immigration law and given incorrect information. That's why the demand for legal assistance in immigration cases is rapidly growing and it is up to a reputable and experienced law firm like Tidwell, Swaim & Associates to provide hispanic clients with correct legal advice."

Ms. Medrano speaks Spanish and is a member of the Dallas Hispanic Bar Association and LULAC for which she has done volunteer work as well as for Children's Medical Center. She has also given her time and talents to Trinity River Mission, a non-profit education center that promotes educational advancement for residents of West Dallas where she tutored and mentored school age children, volunteered at the Adult Literacy center located on Live Oak, and worked with the StewPot organization, dedicated to feeding the homeless in Dallas.

Born and reared in Dallas, Ms. Medrano attended the University Texas at Dallas where she received a degree in Business Administration/International Finance (1985). In 1988, she graduated from Southern Methodist University Law School.

Associate Attorney, Megan Raesner, Adds Multi-lingual Talents to Firm



Megan Raesner, recently joined the firm as an associate attorney. Ms. Raesner graduated from SMU Law School and attended Vanderbilt University where she graduated with honors and earned a double degree in Spanish and Education.

While at the university, she was involved in several organizations including the International Law Society and Phi Alpha Delta, serving as Chief Justice. Having also attended school in Spain, Ms. Raesner is fluent in Spanish and has studied French, German, and Italian as well.

Managing Partner, David Swaim, commented, "We are fortunate to have both Ms. Raesner and Ms. Medrano with our firm. The knowledge and experience they bring will undoubtedly contribute significantly to the level of service we can offer our clientele."

TSA Posts Successes

FEBRUARY 2003

H-1B - 5

I-140s - 1

I-765 - 7

I-131 - 3

Labor Certifications - 31

Permanent Residence - 9

JANUARY 2003

H-1B - 18

I-140 - 1

I-765 - 6

I-131 - 11

L-1 - 1

Labor Certification - 3

Permanent Residence - 8

DECEMBER 2002

H-1B - 11

L-1 - 6

R-1 - 1

I-140 - 1

I-765 - 29

I-131 - 23

Labor Certifications - 1

Priority Worker - 1

The Registration Dilemma

BY: DAVID SWAIM, MANAGING PARTNER

For the past several months we have seen the NSEER Registration Program grow from a few countries in the Middle East to an ever-expanding list of countries, and ultimately will expand to include all countries if we are to believe recent announcements from the Immigration Service (now BCIS).

The registration program clearly qualifies as the government's most questionable program in many years. The stated purpose of the registration process is to help fight the war on terrorism. However, it is highly unlikely a terrorist or someone suspected of terrorism would actually register under this program. Further, the registration program does not include those who have entered the country illegally, only those you have entered legally as non-immigrants. Therefore, it is not very likely that the program will have any impact on terrorism but, as we have already seen, will have a significant impact on the lives of those who are forced to register.

The registration program applies to male citizens and nationals of the designated countries who are over the age of 16 and who entered the United States as nonimmigrants. It was originally assumed that those individuals who have always maintained proper nonimmigrant status would have no trouble registering. Unfortunately, the INS/BCIS has created a climate of fear and intimidation by ordering valid non-immigrants into removal proceedings simply to prove their status to an immigration judge. Even in those cases in which the individual clearly was in proper status, or had an extension pending, removal proceedings have been instituted and the issues have been brought before an immigration judge. This obviously has nothing to do with fighting the war on terrorism and

everything to do with discriminating against nationals of certain countries.

Furthermore, those individuals who have not maintained proper status must make a very difficult decision. If they are out of status it is virtually guaranteed they will be placed in removal proceedings and ultimately required to leave the United States by an immigration judge. If they choose not to register, and thereafter become eligible for immigration benefits in the future, the INS/BCIS may use the failure to register against them in those proceedings.

There are several common situations where this dilemma arises. The first involves those individuals who filed labor certification applications under Section 245(i) of the Immigration Act prior to April 30, 2001. At that time there were discussions with the Immigration Service regarding whether or not a 245(i) applicant could be removed from the United States. In fact, the Immigration Service concluded that the fact that the 245(i) labor certification application had been filed was not enough, in and of itself, to result in removal proceedings. This position was consistent with the intent of Congress in extending the 245(i) deadline to April 2001. Registration changes all of this. Even if an individual has a valid labor certification pending, and most have been pending for almost two years, the applicant will not be protected from removal proceedings which will almost certainly be initiated if the individual attempts to register.

On the other hand, if the applicant fails to register, eventually he or she may be eligible for adjustment of status based upon the approved labor certification and will have to deal with the Immigration Service's attempts to deny the adjustment of status based upon the failure to register.

Whether or not the Immigration Service can legally deny an adjustment of status application based on failure to register remains to be seen. At this point, the decision is between attempting to register and the almost certainty of being forced to leave the United States, as opposed to refusing to register and then addressing the issue later on in the adjustment of status proceedings.

The Immigration Service has also been disingenuous in publicizing the registration program. For example, the Dallas District Director has stated publicly to a local community group that a 245(i) "application" should protect the individual from removal proceedings. However, the word "application" refers to an application for adjustment of status which is the third and final step in the process. Those individuals who have an "application" for labor certification pending with the Department of Labor do not qualify for this protection.

Another common situation is where the parent of a lawful permanent resident entered the United States as a visitor and thereafter overstayed their status. In this case he would be required to register since he entered as a nonimmigrant, but he also would be placed in removal proceedings since he is out of status. The permanent residence son or daughter will become a U.S. citizen within the next year or two and thereafter be able to petition for the father without regard to his status. Unfortunately, if the father has not registered, to avoid almost certain removal from the U.S., the failure to register may be used against him in adjustment of status proceedings. Again, it is uncertain at this point whether the

Visa Processing Headaches



BY: MAGGIE MILLS,
ATTORNEY AT LAW

As the U.S. and many of our allies have become involved in war in Iraq, visa processing issues have become increasingly more complex. From consulate closings to heightened security, many foreign nationals are finding the once simple task of applying for a non-immigrant visa at the Embassy to be now time consuming and exasperating.

Embassy Closings

In any time of war, U.S. Embassies abroad are on heightened alert. Depending on how close they are located to the area of conflict, Embassy staff may be ordered to return to the United States or maintain only a skeleton staff for emergency U.S. services. In times of war, visa processing for foreign nationals seems to be pushed to the back burner. At the time of this *Compass* printing, the Embassies in Pakistan have closed their doors, except for emergency services. Similarly, the Embassy in Kuwait is operating with a skeleton staff only. Therefore, no visas are currently being processed at these locations.

At all other U.S. embassies, consular services have been infused with new security measures to ensure that all visa applicants pass certain clearance tests before any visas are issued. All men over the age of 16 have to complete an additional visa processing form. Additional name and identity checks are run against various criminal databases. As a result, visa processing has become a more time-consuming and expensive process for foreign nationals around the globe.



IN THESE TIMES
OF HEIGHTENED
SECURITY

Consider a nonimmigrant worker from India who entered four years ago on an H-1B visa. He has been working in the U.S. and maintaining valid H-1B status. He has an I-797 Approval Notice granting an extension of his H-1B status and would like to go to Africa for a holiday in five months. Problem: his visa expired six months ago.

Options in the U.S.

For those already in the U.S. who wish to have their visas extended without leaving the States, most are eligible to apply for “visa revalidation” through the Department of State in Washington, D.C. This is a safe and reliable option for obtaining a new visa. It requires the same forms and procedures as filing for a new visa abroad, except everything is mailed in to the Department of State in Washington. This process takes anywhere from three-to-six months. The disadvantage to this process is that the passport must be mailed with the applications, so that the new visa may be

printed into the passport. Therefore, the applicant will have to live without his passport for several months, which could cause problems if there is an emergency requiring him to depart the United States. However, this is a relatively painless process.

“Automatic Revalidation” in Mexico or Canada

What if he only wants to go to Cancun for a long weekend? Or to Vancouver for his cousin’s wedding in two weeks? In this scenario, there is not enough time to send the passport off to the Department of State, and it would be too expensive and time-consuming to go back to India for visa processing.

Current regulations allow for certain individuals, who have only been in “adjacent territory (Canada or Mexico)” for under a 30-day period, to re-enter the United States, even though the visa in their passport has expired. This is called “automatic revalidation,” and it is only allowed in cases in which specific facts apply. This also requires that the applicant has *not* applied for a new visa while outside the U.S., and that the applicant has valid proof that he has maintained his status.

Automatic Revalidation, although convenient, can be very risky. Keeping in mind that the immigration officers at the airport are given total authority and discretion to determine whether or not the applicant qualifies for revalidation, those hoping to take advantage of this process should call our office before planning any trips to Mexico or Canada. ■

Immigration Updates

BARBARA NELSON, SENIOR PARALEGAL

MINDY WOLFSON, SENIOR PARALEGAL

The Department of State (DOS)

In the last issue of *The Compass*, I reported that the delays in processing certain nonimmigrant visas at the American Consuls worldwide have drastically increased since the establishment of the security clearance checks. Many clients traveled over the holidays and found problems in certain countries especially for male applicants between the ages of sixteen and forty-five. For the most part, clients experience four- to six-week delays in processing. Even though delays are still prevalent, the delays encountered by nonimmigrant applicants from the summer and fall of 2002 are still outstanding. The DOS instructed visa offices to reapply for clearances for applications submitted on or before August 15, 2002. Unfortunately, there continues to be a problem with obtaining security clearances.

Changes to the Visa Waiver Program (VWP): DOS has determined that Belgium will be allowed to continue participating in the VWP program for another year on a "provisional basis." Citizens of Belgium who travel to the U.S. after May 15, 2003 under the VWP, must present a machine-readable passport issued by the Belgium Government. Italy will remain in the program without any change. Uruguay will be terminated from the program as of April 15, 2003. Uruguay has been deleted from the program based on the high number of overstays once in the U.S.

Canadian Landed Immigrants: As of March 17, 2003 all Canadian Landed Immigrants will be required to present a valid passport and visa in order to enter the U.S. If the landed immigrant is a citizen of a country in the Visa Waiver Program, that person can still enter the U.S. based on the requirements of this program. However, he/she must have a valid passport. Check the DOS website for information on how to obtain a visa to the U.S.

The Department of Labor (DOL)

Again, this issue, there hasn't been any significant changes in DOL policy or procedures. We continue to see long delays at all SWA and DOL offices.

The major delays are the 245(i) cutoff of April 30, 2001 and the IT layoff situation. Some SWA offices have indicated that it could take almost one year to complete the April 2001 backlog of regular labor certification cases.

RIR cases are somewhat faster; however, in some offices there is only a slight difference in processing times. Since our last issue, most SWA offices have only progressed by several days to a week in processing labor certification applications.

I have been asked on numerous occasions what about the PERM program? In February we were informed by DOL headquarters that "the preamble is being written now" and the regulations will follow. PERM may be ready sometime between April and July.

We continue to see NOF's issued by DOL on the lay-off issues as well as backlog reduction letters. Once a response is made it ordinarily takes DOL three to four months to act on the response.

Immigration and Naturalization Service Processing Times

California Service Center as of February 15, 2003

I-140 - 10/22/2002 I-485 - 11/16/01
I-765 - 09/09/02 I-131 - 01/15/03

Nebraska Service Center as of March 15, 2003

I-140 - 11/22/02 I-485 - 08/01/01
I-765 - 01/21/03 I-131 - 12/15/02

Texas Service Center as of March 15, 2003

I-140 - 09/13/02 I-485 - 11/01/00
I-765 - 10/22/02 I-131 - 10/22/02

Vermont Service Center as of March 15, 2003

I-140 - 07/01/02* I-485 - 11/15/01
I-765 - 02/11/03 I-131 - 02/14/03

* Nurses are current

State Employment Security Agency / Department of Labor Processing Times as of 3/19/03

Texas SESA

Basic - 04/2001
RIR - 09/2002

Oklahoma SESA

Basic -03/2001
RIR - 04/2001

California SESA

Basic - 04/2001
RIR - 04/2002

New York SESA

Basic - 10/1999
RIR - 04/2001

Illinois SESA

Basic - 04/2001
RIR - 01/2003

Texas DOL

01/2000
07/2002

Texas DOL

same as above

California DOL

05/2002
01/2002

New York DOL

01/2003
03/2003

Illinois DOL

07/2002
12/2002

Immigration Tidbits

Continued from page 6

Registration Dilemma ... Continued from page 5

Bureau of Citizenship and Immigration Services (BCIS)

On March 1, 2003 INS no longer existed. It was replaced by the Bureau of Citizenship and Immigration Services, a division of the Department of Homeland Security. Prior to the establishment of BCIS, there was an internal audit conducted. This resulted in severe backlogs in processing all applications and petitions filed with BCIS (formerly INS). This audit is now over and we have seen improvements in the completion of pending cases. We still, however, see significant delays in the I-140 and I-129 petitions.

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Ironically, with the delays stated above we received notice about an internal audit of the premium processing program. Recall that employers can request faster processing of certain employment-based nonimmigrant petitions. The results of the audit indicated that premium processing "has adversely impacted the time required to adjudicate routine applications and petitions." Results: we will continue to see severe delays in processing in all other categories.

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As of March 31, 2003, BCIS will only accept N-400 (Application for Naturalization) that has an edition date of May 31, 2001 or later. This is due to changes in legislation and changes to the language of the application forms.

Update on Call-In Registration:

Temporary foreign male visitors, sixteen years of age or older, who are citizens of Bangladesh, Egypt, Indonesia, Jordan or Kuwait, and were present in the United States before October 1, 2002, are permitted an additional four weeks to register. The registration period for this group will be in effect from February 24, 2003 until April 25, 2003.

Immigration Service can use this one factor to deny an adjustment of status application.

As the INS/BCIS continues its registration program, and apparently will continue to add more countries to the list, it is important that anyone interested in the immigration process contact congressional representatives to express their concerns regarding this very ineffective and discriminatory program. This program provides no national security protection nor does it aid our country in its war on terrorism. It does, however, create even more fear and chaos for those individuals who have been waiting patiently for years to legalize their status. ■

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