



# The Compass®

## Immigration News

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## The H-1B Cap and F-1 Students



BY: MANAGING PARTNER,  
DAVID SWAIM

As everyone is aware by now, the Immigration Service has reached the 65,000 H-1B cap for this fiscal year. This means that there will be no new H-1B petitions approved until October 1, 2004. Those individuals who are already in H-1 status who need extensions, or those who work for colleges and universities, are not subject to the cap and should have no problems obtaining new petitions.

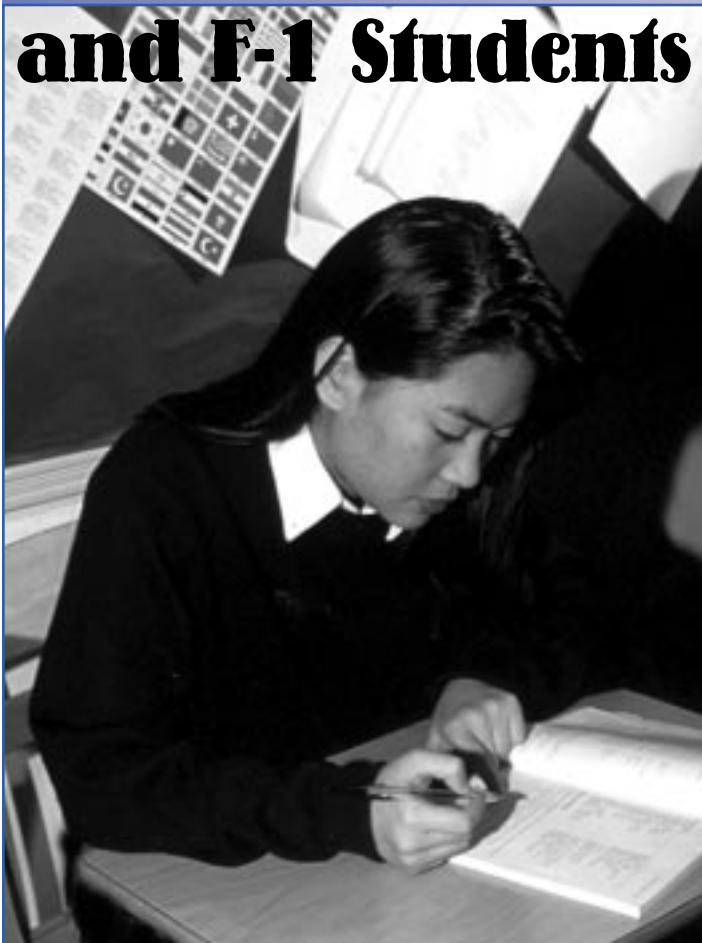
Reaching the 65,000 H-1 cap is not a new issue. Until 1999 there were several years in a row where we reached the cap and ran out of H-1 petitions in the spring of each year. From 1999 until 2003, Congress had raised the cap to 195,000 so the cap was not an issue.

The cap issue raises the biggest problem for F-1 students who have graduated and are working on optional practical training (OPT). This type of work authorization is generally granted in a one year increment without an extension. Therefore, if the OPT expires at a time when there are no more H-1 petitions available, the F-1 student has to make a very difficult decision on his or her options to remain in the U.S.

Typically, OPT will expire in May or June of each year since that is when most students graduate. For example, since we have already reached the H-1B cap for this year, any OPT that expires in May or June means that the student will have to quit work and will not be able to resume employment until October 1, 2004.

There are two possible solutions to this problem. First, the Immigration Service has the authority under its regulations to make a public designation to extend the status of F-1 students until October 1, 2004. Although this allows the student to remain in the U.S. in valid status, it does not authorize employment beyond the expiration of the OPT. As of the

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By: *MAGGIE MURPHY,*  
*SENIOR ASSOCIATE*

Over the last four-to-six months, we have noticed a dramatic increase in the amount of Requests for Evidence (RFEs) issued in L-1 cases filed with the Texas Service Center. After talking to other practitioners in the DFW area, we realized that we are not alone in being bombarded with these RFEs. It seems to be a practice-wide phenomenon.

What is most disturbing is that there have been no changes to the L-1 regulations and no official statements issued by the Service to account for these RFEs. All of a sudden, cases which are filed with evidence sufficient to qualify the employee for an L-1 under the regulations are now being challenged, and the Service is providing no legal basis to support the challenge.

When issued an RFE, we have no choice but to either respond with the evidence requested, or to withdraw the case. Therefore, we are forced to respond to these inquiries and often provide evidence which is repetitive to the evidence filed with the underlying petition package. This often adds weeks to the processing of a case, which is an added problem for those who file via premium processing.

In a federal court case we filed and won recently, the Service stated, under oath, that they do not rely on any information other than the regulations to make a decision on the case. This is absolutely contrary to over 70% of the RFEs received in our office in the last 120 days. Those RFEs cite policy



memoranda issued by the INS in 1994 and 2003 which elaborate on the definition of "specialized knowledge" required for L-1B cases.

Further contrary to its statements made in Federal Court, the Service has advised an American Consulate that it will no longer approve L-1B cases for a particular position. Even though there have been no changes in the regulations, and there has been no official statement from the Service that this is the case, certain officers have derived their own definition of what is necessary to qualify for the L-1 classification, and they have decided that certain job titles will not be granted L-1s.

Although most of the RFEs issued have been in the L-1B category, we have also received RFEs in L-1A cases, also asking for evidence which they already received in the underlying package. It seems as though they aren't even looking at the package of evidence (which often includes 10 – 20 exhibits and is several inches thick) filed with the petition, evidence which establishes that the case is valid under the regulations.

What is the solution? So far, many of our RFE Responses, in which we quote the regulations and provide a

detailed analysis of how the evidence presented fulfills the requirements set therein, have been successful. However, another option is to pursue clarification from the Federal Court.

Filing for review in Federal Court makes the Service accountable for their statements and actions, and this process often has favorable results for our clients. Sometimes it is the only way to get the Service back on track and adjudicating cases according to the regulations. It requires detailed analysis of the adjudication process, and it makes Service officers and supervisors responsible for the actions that they take.

In this tidal wave of RFEs, the Federal Court system may become the craft of choice for sailing out of the storm and avoiding arbitrary decisions void of legal analysis. Only time will tell. In the meantime, we continue in our battle for the accurate and fair adjudication of these petitions, and we seek official clarification of whether there are upcoming changes to the regulations.

If you are interested in learning more about the L-1 visa or about pursuing review of your case in Federal Court, please contact our office for a consultation.



**Emma  
Guzmán,  
Joins Firm  
as Associate  
Attorney ...**

**Playing an  
active role in  
our Hispanic  
community**

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BY: JESSICA LEBEAU  
DIRECTOR OF CLIENT SERVICES

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**M**s. Emma Guzmán has recently joined the firm as an associate attorney. A graduate of St. Mary's University School of Law where she received her J.D., Ms. Guzmán obtained her Bachelor of Science degree in Criminal Justice from the University of North Texas while minoring in Political Science and Sociology. In addition, she is active in many Hispanic organizations including the Greater Dallas Hispanic Chamber of Commerce, the Denton Hispanic Chamber of Commerce, the Dallas Hispanic Bar, the Hispanic Women's Network of Texas, and is currently a chapter president with LULAC. While in law school, she was active in the Hispanic Bar Student Association and was also co-editor of *The Scholar: Hispanic Law Review on Minority Issues*, where she was also published for her article, *The Separation of American Families*, published in the Spring of 1999. Prior to joining the firm, she was a misdemeanor prosecutor and appellate attorney with the Denton County District Attorney's.

Ms. Guzmán said, "Being an immigrant myself, I can empathize with the uncertainty that most foreign-born individuals feel upon arrival in a new country. I'm delighted to be able to help these individuals legally establish residency in the U.S."

Managing Partner, David Swaim, explained, "Ms. Guzmán will be handling all types of immigration law cases, particularly with our Spanish-speaking clients." He continued, "We're looking forward to Ms. Guzmán making significant contributions to our firm's Hispanic programs."

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BY: MINDY WOLFSON,  
SENIOR PARALEGAL

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***New Pilot Program – Dallas District Office  
(Effective May 3, 2004)***

**T**he Dallas District Office has been selected to begin a pilot program designed to complete the adjustment of status process within 90 days of filing; thus eliminating the need for interim employment and travel authorization. Appointments will be scheduled through INFOPASS (not officially up and running yet). The interview process will take approximately three (3) hours.

Acceptance into the Pilot Program does not guarantee permanent residence status. The case cannot be completed on the date of the actual appointment. The case must meet all eligibility requirements and pass all security checks before the USCIS can make a final decision on the case. If it is determined that the case cannot be completed within 90 days, additional instructions on what to do/expect will be sent out. At that time employment authorization and travel documents will be submitted.

All family-based applicants, diversity visa lottery winners, special immigrant juveniles and any other special immigrants with an approved Form I-360 may qualify under this program.

Applicants filing as Asylees, Refugees, Employment-Based, and Life Act **cannot** be accepted under this program.

***Certification of Foreign Health Care Workers  
(VisaScreen Certificates) (effective July 26, 2004)***

The Department of Homeland Security has stated effective July 26, 2004, the following individuals coming into the United States in nonimmigrant status, (H-1C, H-1B, J, O, or TN) must have a VisaScreen Certificate: RNs, LVNs, Physical Therapists, Occupational Therapists, Speech-Language Pathologists, Audiologists, Medical Technicians, Medical Laboratory Technologists, and Physician Assistants.

Immigrant health care workers are currently required to present certification at the time of immigrant visa issuance or at the time of adjustment of status. However, effective July 26, 2004, if the individual is adjusting status, all eligibility requirements must be met at the time of filing the application for adjustment of status. Therefore, the individual must submit evidence of certification at the time the adjustment of status filed. The phone number for the CGFNS office is 215/349-8767.



BY: BARBARA NELSON  
SENIOR PARALEGAL

# Immigration Updates

## THE DEPARTMENT OF LABOR (DOL)

There has been a change in processing permanent labor certifications in Texas. The Texas Workforce Commission has begun transferring its cases to a contractor hired by DOL to process permanent labor certification cases. The contractor is located in Austin, Texas and is being trained by DOL and TWC staff members. There will be approximately 17,000 cases transferred to this contractor. Once the cases are entered into its database, the employer or attorney will be notified to determine if the employer wishes to continue the processing of the case. After this procedure is completed, they will start working on cases filed in chronological order. At this time, we cannot determine the impact this new system will have on the backlog; however, we have been told that it should improve the situation in Texas. After completing the case, the contractor will forward the case to DOL in Dallas for processing.

The overall picture remains the same. Progress on the majority of cases around the country at both the SWA and DOL offices remains the same. Most SWA offices are still working on April, 2001 or earlier. DOL backlogs are increasing including the RIR cases.

We are still awaiting the PERM regulations. There has been some progress since our last issue; DOL sent the proposed regulations to OMB on February 23, 2004. OMB has 90 days to review the regulations. After that time OMB can either request additional time for review, mark-up with comments to DOL, or approve without changes. Once the process is completed DOL will publish the regulations and implementation would be 120 days after publication.

DOL is still in the process of creating two backlog reduction centers – one in Dallas and the other in Philadelphia. These centers will be responsible for processing the older cases so that the extreme backlogs at the state level will be diminished. I hope this will help with the backlogs!

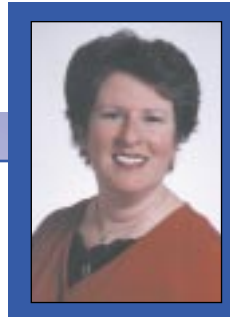
## U.S. CITIZENSHIP AND IMMIGRATION SERVICES (CIS)

Have you experienced significant delays in processing H-1B extensions? The backlogs are substantial in most regions – Texas is processing cases filed on August 22, 2003; California is processing cases filed on September 15, 2003; Vermont is processing cases filed on October 1, 2003; only Nebraska is processing cases timely (February 10, 2004). The processing delays are causing serious problems because an extension cannot be filed more than six months in advance of the petition start date; yet the extensions are taking six and seven months to process. This affects international travel, especially for business travelers, who are unable to determine when or if they can travel. It also affects the processing of new visas to reenter the United States. CIS is aware of this continuing problem, and is taking steps to reduce this backlog.

Some possible good news with EAD cards issued during the adjustment of status application. CIS has sent an interim regulation to OMB to allow the EAD to be issued for the appropriate amount of time needed to complete the permanent residence process. If it clears OMB it will be published in the Federal Register which will list an implementation date. We are unable, at this time, to determine if the same will apply to advance parole documents.

# Processing Times

BY: MINDY WOLFSON,  
SENIOR PARALEGAL



## Citizenship and Immigration Services Processing Times

### CALIFORNIA SERVICE CENTER AS OF 04/05/04

I-140 - 05/28/2003      I-485 - 01/09/2002      I-765 - 02/24/2004      I-131 - 02/23/2004

### NEBRASKA SERVICE CENTER AS OF 04/05/04

I-140 - 06/17/2003      I-485 - 09/26/2001      I-765 - 02/05/2004      I-131 - 02/05/2004

### TEXAS SERVICE CENTER AS OF 04/07/04

I-140 - 02/28/2003      I-485 - 08/21/2001      I-765 - 02/18/2004      I-131 - 12/29/2003

### VERMONT SERVICE CENTER AS OF 03/24/04

I-140 - 05/08/2003      I-485 - 02/15/2002      I-765 - 11/10/2003      I-131 - 10/09/2003

### MISSOURI SERVICE CENTER AS OF 03/24/04

I-129F - 01/08/2004

## State Employment Security Agency / Department of Labor Processing Times as of March, 2004

<u>Texas SESA</u>	<u>Texas DOL</u>	<u>Oklahoma SESA</u>	<u>Oklahoma DOL</u>
Basic – 04/2001	03/2000	Basic – 04/2001	03/2000
RIR – 09/2003	12/2002	RIR – 03/2002	12/2002
<u>California SESA</u>	<u>California DOL</u>	<u>New York SESA</u>	<u>New York DOL</u>
Basic – 04/2001	11/2002	Basic – 04/2001	12/2003
RIR – 04/2003	11/2002	RIR – 06/2001	01/2004
<u>Illinois SESA</u>	<u>Illinois DOL</u>		
Basic – 04/2001	08/2002		
RIR – 09/2003	11/2003		

CHANGES IN TN PROCEDURES FOR MEXICAN NATIONALS

By BARBARA NELSON, SENIOR PARALEGAL

It's hard to believe that the NAFTA agreement was established ten years ago. At the time of enactment, the procedure for obtaining TN status by a Mexican National was to first secure an approved LCA from DOL, then an approved petition from Immigration. Once these two steps were approved, the individual would go to the American Consulate in Mexico and apply for a visa. The NAFTA agreement called for a review of this procedure in ten years. Accordingly, a new regulation now eliminates the petition and LCA requirements. The Mexican National can now apply directly to the AC for a visa. Consequently, this change also eliminates the numerical limitation of 5500 visas.

Effective immediately, Mexican Nationals can apply at an AC worldwide for the TN visa. The individual would submit a visa application with an employment letter from a U.S. employer. The position offered must be a "professional" position and consistent with the professions listed in the NAFTA Appendix. The applicant must present evidence that he or she has the required education and/or experience listed in the Appendix in order to qualify for the visa. In addition, the individual must have a valid Mexican passport.

If granted, the TN visa will be valid for three years with multiple entries (this is subject to reciprocity changes). Spouse and minor unmarried children who accompany the TN will be issued a TD visa. At the port-of-entry, the individual will be issued an I-94 which is valid for one year. The TD will also be issued an I-94 which will also be valid for one year. ■

**The H-1B Cap and F-1 Students Continued from Page 1**

date of this article, the Immigration Service has not made that designation.

Assuming the Immigration Service does not make the designation, the only other option the student has is to enroll in another degree program and receive a new I-20 for admission to that program. This will mean the student will have to formally enroll in a new degree program in the fall of 2004 and pay all of the tuition and expenses for that enrollment.

In the meantime, it is also possible to file an H-1 petition as early as April 1, 2004 with an effective date of October 1, 2004. In fact, if a student has this option it should be filed immediately after April 1, 2004 since it is entirely possible that we will reach the 65,000 cap for next year in October or November.

To summarize the situation, it is important that any F-1 student who currently has an employer who is willing to wait until October 1, 2004 for employment, should immediately file the H-1 petition after April 1, 2004. In addition, the F-1 student must maintain status after the expiration of the OPT and the 60 day grace by either relying on the public designation made by the Immigration Service (if it actually makes the designation) or by enrolling in a new degree program and receiving a new I-20 for fall 2004. This is obviously a very complicated situation and we encourage everyone to consult with a qualified immigration attorney or the International Student Office at your university. ■

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