

IMMIGRATION AND NATURALIZATION COMMITTEE NEWSLETTER

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MESSAGE FROM THE CO-CHAIRS:

The timing of our Fall newsletter is great as it coincides with the start of our new leadership term. We are very excited to welcome our new committee leaders for this year and have planned multiple offerings for committee members to look forward to, including the Year in Review for The International Lawyer publication, immigration related programming at the upcoming Fall Meeting in Buenos Aires and the upcoming Spring Meeting in Washington, DC, quarterly editions of our newsletter, immigration related policy measures, and several membership initiatives to engage our overall committee. We also welcome all committee members to participate in our monthly teleconference calls, become active with the committee, and help launch many of our planned activities for this year.

As we intend to increase the number of newsletters published, we will need your contributions! We welcome any articles and summaries on the subject of US or global immigration law. This is an incredible opportunity to be published in an established and well respected publication for the ABA International Law Section.

We look forward to your participation and see you at the Fall meeting in Buenos Aires!

Best wishes,

Michelle Jacobson & Noah Klug, Co-Chairs

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By: **Erica Lomba and Valarie H. McPherson**, Senior Associates in the Immigration & Nationality Group at Proskauer Rose LLP. They represent companies from Fortune 500 to small and medium-sized entities in the banking, finance, pharmaceutical, medical, publishing, manufacturing and fashion industries, as well as public and private foundations and individuals in a variety of immigration matters including: securing employment-based nonimmigrant and immigrant visas; counseling clients on a wide variety of compliance matters; and developing and implementing corporate policies and procedures relating to employment verification systems and immigration sponsorship.

What do Golfers, Peace Corps Volunteers, Ministers and Tailors Have in Common? They can all qualify to be B-1 Business Visitors in the U.S.!

The B-1 business visitor visa is one of the most commonly utilized visa categories; in 2013 alone over 5 million B-1/B-2 visas were issued.¹ The volume of B visa applications is not surprising, considering that it serves as a catch-all category in which the Department of State has created a long, odd laundry list of permissible activities in the Foreign Affairs Manual (FAM). It may be surprising to learn that foreign nationals seeking to visit the U.S. to serve as members of Board of Directors,² Personal/Domestic Employees,³ Yacht Crewman,⁴ Jockeys⁵ and Musicians⁶ can all use the B-1 visa category; and the only commonality between them is that they are unique circumstances for which no other visa category exists. This creates flexibility that may be refreshing and rare within the U.S. government but also creates a host of opportunity to run afoul of the law because of the difficulty in drawing patterns or conclusions from the numerous and distinctive uses of the B-1 visa carved out in the FAM.

The B-1 visa classification plays an essential role in facilitating the short term business traveler, which is the primary focus of this article. New and unique situations arise daily that have not been contemplated in the FAM and visitors, companies, and immigration practitioners are challenged to reach reasonable conclusions regarding whether an activity falls within the permissible scope of the B-1 classification. The convenience of the B-1 visa category can come at a price if the government determines that the conclusions drawn are incorrect. Misuse of the B-1 visa category may lead to the government's imposition of severe fines and/or a debarment from using the B-1 visa program as recently experienced by Infosys whose questionable B-1 visa practices resulted in a \$34 million dollar fine being imposed!⁷

Regulations and Guidance for Permissible Business Activities

The law defining the B-1 visa category is "loose" at best and the regulatory interpretations do not provide much greater clarity. Therefore, it is no surprise that the B-1 business visitor classification has been dogged by uncertainty and confusion since its inception.

¹See <<http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVII.pdf>>.

² 9 FAM 41.31 N9.2.

³*Id.* at N9.3.

⁴*Id.* at N9.5.

⁵*Id.* at N9.8.

⁶*Id.* at N11.7.

⁷See: *Infosys- Settlement Agreement*.

The B-1 visitor is defined by the Immigration and Nationality Act (INA) as one “having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.”⁸ The INA explicitly excludes as individuals “coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation” from its definition of a B-1 visitor.⁹ The regulations provide that a visitor for business is classifiable as a B-1 and a visitor for pleasure is eligible for B-2 classification, so long as the consular officer believes that the alien intends to depart the U.S. at the end of their temporary stay and they have adequate financial arrangements for the trip.¹⁰ Further, the Code of Federal Regulations defines “business” as “conventions, conferences, consultations and other legitimate activities of a commercial or professional nature.”¹¹ Specifically, the regulations exclude activities that are traditionally viewed as productive, hands-on local employment but allow foreign nationals of distinguished merit to travel to the U.S. with the idea of performing temporary services of an exceptional nature “but having no contract or other prearranged employment.”¹²

The State Department describes legitimate activities of a business visitor as follows:

1. To engage in commercial transactions, which do not involve gainful employment in the United States;
2. Negotiate contracts;
3. Consult with business associates;
4. Litigate;
5. Participate in conventions, conferences, or seminars;
6. Undertake independent research.¹³

Even with all of the ambiguity, the visitor visa classification must remain a viable option for travelers in our ever-increasing global economy. This visa classification helps give the U.S. a competitive edge and facilitates commerce. The B-1 is critical for travel by foreign citizens for a wide variety of reasons such as planning to make business investments,¹⁴ to participating in sporting events,¹⁵ undertaking a medical clerkship,¹⁶ and even something as noble as participating in the training of Peace Corps volunteer program.¹⁷

This visa category is meant to facilitate short-term travel to the U.S. When reviewing B-1 visa applications, Consular Officers typically consider the following factors:

- (a) Does the applicant have a residence in a foreign country, which they do not intend to abandon;
 - (b) Does the applicant intend to enter the United States for a period of specifically limited duration;
- and
- (c) Does the applicant seek admission for the sole purpose of engaging in legitimate activities relating to business or pleasure.¹⁸

However, the guidance on what are “legitimate” and permitted activities while in the U.S. as a B-1 business visitor is a compilation of numerous unrelated and wide-ranging possibilities in the FAM that, although cover a number of situations, leaves too much open to interpretation.

⁸See INA §101(a)(15)(B).

⁹*Id.*

¹⁰22 CFR §41.31(a)(1) and (3).

¹¹*Id.* at (b).

¹²*Id.*

¹³See 9 FAM 41.31 N8.

¹⁴*Id.* at N9.7.

¹⁵*Id.* at N9.4 and N9.8.

¹⁶*Id.* at N10.4-1.

¹⁷*Id.* at N10.6.

First and foremost, immigration regulations do not define the term “employment.” The Merriam-Webster dictionary defines employment as “activity in which one engages or is employed.”¹⁹ The Oxford dictionary defines the employment as “The condition of having paid work;” “A person’s trade or profession;” and “The action of giving work to someone.”²⁰

The closest the relevant regulation gets to the definition of employment is found in the context of what is permissible “business” activity. The FAM allows a foreign national to be classified as a B-1 visitor for business if they are traveling to the U.S. to “engage in commercial transactions which doesn’t involve gainful employment (such as a merchant who takes orders for good manufactured abroad).”²¹ The example of the merchant taking orders for goods manufactured abroad provided in the regulations is a codification of a well-known case, *Matter of Hira*, discussed below in greater detail; however, that case seems simplistic in the face of today’s complex and highly-interconnected work environment.²² The FAM’s seemingly artless definition is likely outdated in today’s technologically advanced global market place because the lines between when one works and when one is “off” have blurred considerably. When was the last time anyone took a vacation, let alone a business trip, without taking along their smart phone or laptop?

The regulation specifies that contract negotiation, consulting with business associates, litigating and participating in “scientific, educational, professional, or business conventions, conferences, or seminars” are permissible B-1 activities.²³ However, it doesn’t address what one is allowed do in terms of “employment” concurrently while attending a convention, conference or seminar. How does the B-1 visitor contend with this when their employer is abroad but they are working in their hotel room via “cloud-based computing” while visiting the U.S. to attend a permissible activity such as a conference?

And there are many other apparently simple B-1 categories which appear to facilitate business growth but contain nuanced requirements that must be taken into consideration by prospective B-1 visitors. For example, the regulation permits a foreign national coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train U.S. workers to perform such services.²⁴ However, in these circumstances, the contract of sale must specifically require the seller to provide such services or training; B-1 visa beneficiary must possess specialized knowledge essential to the seller’s contractual obligation to perform the services or training; and he/she cannot receive remuneration from a U.S. source.²⁵ Not only does this sound resoundingly familiar to some employment-based visa categories (not visitor categories) but it fails to consider how a foreign national and/or his foreign employer should determine the appropriate visa category when planning a business trip to the U.S.

Furthermore, the foreign national and/or his multinational employer may need to account for any tax implications of business visitor’s trip to the U.S. How is the term “U.S. source income” (noted above) defined in the FAM and current tax law? According to the IRS Publication 519, U.S. Tax Guide for Aliens, even remuneration received outside the U.S. can be found to be a “U.S. source income” unless all three (3) criteria are met:

1. Total annual earnings from such services is less than \$3,000;
2. The business visitor is not in the U.S. for more than 90 days in the year; and
3. The services are performed under contract with a nonresident individual, foreign partnership or foreign corporation.²⁶

¹⁸ See 9 FAM 41.31 N1.

¹⁹ See <<http://www.merriam-webster.com/dictionary/employment>>.

²⁰ See <http://www.oxforddictionaries.com/us/definition/american_english/employment>.

²¹ See 9 FAM 41.31 N8.

²² See: 11 I & N Dec. 824 (A.G. 1966).

²³ See 9 FAM 41.31 N8.

²⁴ See 9 FAM 41.31 N10.1.

²⁵ *Id.*

²⁶ See IRS Publication 519, U.S. Tax Guide for Aliens, at Ch. 3, page 15.

However, this seems to run contrary to *Matter of Hira* in which the foreign national was in the U.S. in excess of six (6) months, thus well over the 90 day limit. Clearly, the business visitor cannot only look to tax laws for definitive guidance on permissible B-1 activities because there appears to be a direct conflict with existing immigration law.²⁷

The amalgamation of a multitude of permissible B-1 activities such as an artist or photographer visiting the U.S. to paint or photograph so long as they are not remunerated in the U.S.;²⁸ and professional athletes, like golfers, who may not be paid while in the U.S.; but may compete for prize money,²⁹ contribute to the confusion surrounding the B-1 visa. Although not receiving direct payment for services in the U.S. seems to make logical sense, can a golfer who is competing for prize money while in the U.S. also be paid endorsements from U.S. companies, wear company-sponsored gear at the competition, and/or participate in press events while in the B-1 category? Are these activities the “work” of a professional golfer and/or are they “gainful employment” within the context of the regulation?

Case Law’s Impact on Permissible B-1 Activities

But does anyone (*or any activity*) really fit into the B-1 criteria anymore? Clearly the law, when drafted, did not envision the type of technical advances we have today that allow one to “Skype” into a business meeting 24/7, anywhere around the world; or send emails from any hotel, airport or Wi-Fi hotspot; or respond to the demands of a client at the drop of a hat. In the ever-increasing digital connectedness of humans, and professionals in particular, is anyone really limiting their business activities to the confines of what is defined as permissible under the B-1?

Current and long standing case law doesn’t provide any usable guidance to today’s employer either. Even the FAM recognizes this and states: “It can be difficult to distinguish between appropriate B-1 business activities, and activities that constitute skilled or unskilled labor in the United States that are not appropriate on B status. The clearest legal definition comes from the decision of the Board of Immigration Appeals in *Matter of Hira*, affirmed by the Attorney General.”³⁰

In *Matter of Hira*,³¹ the Board of Immigration Appeals (BIA) determined that a tailor employed by a Hong Kong company who was in the U.S. measuring customers; taking orders for suits to be manufactured and shipped from Hong Kong; receiving his salary (and no commission) outside the U.S.; and not soliciting business in the U.S. was employed in the purview of the B-1 visa category. The decision stated that this was an appropriate B-1 activity, because the principal place of business and the actual place of accrual of profits, if any, was in the foreign country and that business the B-1 visitor “was engaged was the intercourse of a commercial character.” The FAM describes the *Hira* ruling, and related B-1 permissible activities as those that are “incidental to work that will principally be performed outside of the United States.”

However, as a B-1 visitor one may be perplexed in determining how *Matter of Hira* is so different than the recent case involving Infosys Corporation.³² In this case, Infosys, an Indian company operates a consulting company in the U.S. As part of its business, it brings foreign nationals to the U.S. in the B-1 category and maintained that its use of the B-1 visitor was legitimate and consistent within DHS’ factors in determining applicability because it’s business activities are international in scope; the source of remuneration and principal place of business and actual place of profit accrual was India; the B-1 visitors maintained a foreign residence; and only came to the U.S. to perform business activities of a temporary nature.

²⁷ 11 I&N Dec. 824 (A.G. 1966).

²⁸ See: 9 FAM 41.31 N11.6 and N11.10.

²⁹ Id. at N9.4.

³⁰ 9 FAM 41.31 N7.

³¹ 11 I&N Dec. 824 (A.G. 1966).

³² See *U.S. v Infosys Limited*, Settlement Agreement, 10/30/2013.

With respect to the B-1 visa holders, the government claims that Infosys committed systematic visa fraud and abuse. The government charged that Infosys took steps to circumvent the H-1B work visa³³ by using the B-1 visa to fill consulting positions in the U.S. that would be otherwise filled by U.S. workers or H-1B visa holders.³⁴ It contends that the company did this to increase profits, minimize costs, avoid tax liabilities and gain an unfair advantage over the competition.

Specifically, the government had issue with Infosys' use of "invitation letters" that the government claimed made false representations, claiming the trip was for "meetings" or "discussions", to the U.S. Consulates at the time the employee applied for his/her B-1 visa. In addition, Infosys provided a memo to its foreign work force specifically instructing the employees not to use terms like "work," "design" and "testing" and not to mention contract rates since Customs and Border Patrol ("CBP") Officers inspecting business visitors at the ports of entry will not admit a business visitor on the B-1 if s/he is coming to the U.S. to "work". However, Infosys maintained that the invitation letters were accurate and commonly used in the industry.

Notwithstanding the above, Infosys and the U.S. government agreed that in exchange for not pursuing the complaint filed in the Eastern District of Texas and the government not revoking its existing visa petitions or barring it from the H-1B or B-1 programs, Infosys would pay \$34 million dollars to DHS, DOS and the U.S. Attorney's Office pursuant to a settlement agreement.

Interestingly, the FAM allows the B-1 classification to be used "in lieu of" work visa categories. Specifically, it states the B-1 visa may be used instead of the H-1B and H-3 visa for professional employees and trainees, respectively, if the individual is customarily an employee of a foreign firm abroad, being paid abroad, and coming to the U.S. to perform work or training.³⁵ However, the Infosys settlement did not include any discussion of the B-1's use in lieu of H-1B. It seems that the company's defense team may have considered this option but decided against it, since Infosys insisted that the invitation letters used were accurate. Moreover, Senator Grassley and others have decried the use of the B-1 in lieu of H-1B and H-3 as a means to abuse the system.

In addition to the activities defined within the case law, guidance and regulations, within the FAM there is guidance that the consular officers should look to the "principal purpose of admission" in order to classify a nonimmigrant visa applicant.³⁶ Therefore, if the visa applicant is coming to the U.S. for more than one purpose, for example, as a full-time student at a U.S. university but also to travel as a tourist before school starts, the consular officer should classify the visa applicant as a student because studying is the principal purpose of the trip. This seems like a reasonable approach since visitors to the U.S. often undertake several activities while in the U.S.; however, the question becomes, if the principal activity is a business meeting in the U.S., how much time can be spent doing "work" on the "cloud"? "Principal purpose" seems to be a term of art and not yet fully defined by the relevant regulation. Is the concept of "principal purpose" based on the percent of time spent at the meetings versus "working"? Is doing something 51% of the time in the U.S. enough to make that the controlling activity?

³³ The H-1B visa is the most popular work visa utilized by U.S. employers to hire highly skilled professionals but involves numerous challenges, fees and restrictions of its own. See 8 CFR § 214.2 (h).

³⁴ *Id.* at 3.

³⁵ See 9 FAM 41.31 N11.

³⁶ *Id.* at N6.1.

Let's look at historically one of the safest interpretations of the B-1 visitor visa: attending a trade show or a conference in the U.S. But the professionals of today typically "log in" via some portal or use smart phones and/or tablets to work for hours before, after or during conference/trade show attendance. They may be working from a hotel or given a desk, a phone and a computer if they have a branch, parent, subsidiary or affiliate office nearby. They may be working pursuant to an employment agreement which was executed abroad, continue to be compensated from abroad, but the client they are servicing could be in New York while they attend an event in New Jersey. How is this greatly distinguished from what they do when they are at their home office abroad? In this scenario, is the business visitor indirectly engaging in gainful employment in the U.S.? After all, it does not appear that any American workers have been harmed by this situation, but would the government find this to be sufficiently distinguishable from the facts of *Infosys*? Can this situation be analogized to *Matter of Hira*? With the government "tightening the noose" around the B-1 visitor while the demands of global business require the opposite, is it perhaps the percentage of time that one "works" while in the U.S. a distinguishing factor or is the percentage of employees a multinational company may send to the U.S. that is the determining factor?

Conclusion

Business visitors should be careful to understand the types of activities that are permitted while visiting the U.S. and ensure they are in compliance. Multinational employers must take steps to ensure that the B-1 visa program is being implemented properly within their organizations. The State Department has confirmed in meetings with Business and Immigration professionals that there is increased scrutiny of the B-1 visa program. So, it is expected that more companies will come under fire if there are abuses of the B-1 visa program.

Unfortunately, the parameters of the B-1 business visitor visa classification are not precisely defined. Since the guidance is clear that productive local employment is not a valid use of the B-1 visa, companies regularly sending employees to the U.S. for business should strive to be conservative in their interpretation of the law so as to avoid a perception of systematic abuse.

Factors to be considered when determining whether to use the B-1 business visitor classification include:

Frequency of travel to the United States;

Number of days spent in / duration of travel to the United States;

What role the activity plays within the context of the general business enterprise, and, if applicable, the specific project.

Even with the parameters provided in the law and regulatory interpretation, it is still unclear what constitutes permitted activities while traveling to the U.S. as a business visitor. Further, there will continue to be unique situations that arise which were not previously contemplated in the guidance and they will challenge business visitors, companies and organizations to make strategic decisions about the applicability of the B-1 visa.

Because the government is interpreting B-1 permissible activities as narrowly as possible to combat abuse and has instituted a significant fine in at least one case; it is no longer advisable to broadly or loosely interpret the available B-1 guidance. As more B-1 visitors are systematically "plugged-in" and "working" 24/7 and technology continues to evolve and working from home, telecommuting and being "on call" to employers and clients becomes the norm, the immigration laws and government interpretations are becoming obsolete. Therefore, it is recommended that multinational companies institute and observe guidelines so that B-1 applications and entries into the United States are monitored to assure that the purpose of the trips into the United States is consistent with what is permitted within the parameters of a B-1 visa and only in rare situations should trips to the United States exceed the duration of several weeks.

Immigration to the United States of America and its Implications on Human Rights

Humphrey Humberto Pachecker

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Immigrants, documented and undocumented, continue to come to the U.S. for the same reasons they always have; to work, to reunite with family members, and to flee persecution. Further many also hope to escape poverty, abuse, human rights violations, and to pursue the American Dream. This is evidenced by the lack of basic rights in most of their homeland countries. Now more than ever before, thousands are applying for citizenship out of fear; they feel that they must become U.S. citizens to secure their best chances for protection from corrupt law enforcement agencies.

“United States of America, the land of opportunities, the home of the brave” is a well known motto. Since Pilgrims migrated on the Mayflower, there has been no land more suited to reside in and raise a family. A record 1,046,539 persons were naturalized U.S. citizens in 2008. The leading countries of birth of the new citizens were Mexico, India, and the Philippines. Fascination with the United States of America, is an occurrence that takes place all around the world. This country’s enchantment is so powerful that people from any given country would surrender every possession, endure any pain, and even risk their own lives just to arrive here. This is the only place on earth where a person may arrive with only the clothes he or she wears, with no education, and be immediately enthralled with dreams of greatness and, years later, be able to tell its story of glory.

I have found knowledge of the existence of our “American Dream” from people in small towns such as El Escorial in Europe, to the people of another small town named Bahia de Caraquez in South America. The American Dream, is a national ethos of the United States, in which freedom includes a promise of prosperity and success. First expressed by James Truslow Adams in 1931, citizens of every rank feel that they can achieve a “better, richer, and happier life.” The idea of the American dream is rooted in the second sentence of the Declaration of Independence, which states that “all men are created equal” and that they are “endowed by their Creator with certain inalienable Rights” including “Life, Liberty and the pursuit of Happiness.”

The U.S. response to foreign policy involving human rights, has come to depend heavily upon which rights being focused upon. Our policy in word as well as in practice, as it pertains to immigration policy, is not included in our US Constitution which was adopted in 1789. Before this time the U.S. officially favored unrestricted immigration for about the same period of time after the nation’s birth. Later, however, the Constitution granted Congress broad power to regulate foreign commerce in Article I, section 8. Next the civil war, federal law began to reflect the growing desire to restrict the immigration of certain groups, and in 1875 Congress passed the first restrictive status law with the Chinese Exclusion Act.

Nevertheless, in 2010 the U.S. Census Bureau counted over 8 million undocumented aliens inside the country. Based on the Bureau of Census’s experience in miscounting other segments of the population, the Bureau has estimated that there are over 12 million undocumented aliens in the country.

This has turned on some states' alarm switch and several states have been obligated to adopt their own immigration "reform and control law" creating several abrogation issues. Such as the Arizona's anti-illegal immigrants statute trying to second guess the federal government, causing the U.S. Justice Department to file a lawsuit challenging this state's immigration policy claiming that, the invalid law interferes with federal immigration responsibilities and "must be struck down."

Today technology has made the world a concrete single system where people immigrate continuously. There is no an insolate place in the planet. Many world problems exist now without solution, however, unless the U.S. makes a conscious effort with a constitutional solution to help freeing all these people from hunger and poverty the immigration "exodus" to the U.S. will be endless with the possible danger of another civil war. Yet, a great amount of information about this situation and the U.S. immigration foreign policy is readily available, and this great amount of information combined with the theoretical principles formulated here and in my book, does yield some significant implications for our U.S. immigration foreign policy.

These same theoretical principles combined with other more detailed information about what is happening around us, would support other more detailed recommendations for a new immigration reform. An indication that this U.S., immigration problem is a political partitian problem (no different from the one with Obama Care), can be illustrated through an occurrence on the Senate Floor. The Blaze explained a day after Sen. Chuck Shumer, a Democrat of New York, gave a blistering critique of Mr. King on the Senate floor; Mr. Schumer blasted Mr. King for objecting to all attempts to give illegal immigrants a legal status in the U.S. His logic was that Republicans would pay the price politically for following Mr. King's advice. "Let me say, they are following Steve King over the cliff..." "Because not only are they hurting America, but because they are so afraid to buck this extremist- and he is extreme on immigration- they are going to make it certain that they will lose the 2016 Presidential election, that they will make sure that the Senate remains Democratic in 2016 and that the House turns Democratic."

When the conclusion that the acquisition of subsistence is a basic right, meets the assumption that the foreign policy of every nation ought at a minimum to recognize, officially whatever basic rights people have, it follows that the U.S. immigration foreign policy ought to indicate *explicitly* that subsistence rights are indeed basic. Further it should dictate that the compliance of these rights are mandatory, for the participation of these neighbor countries into to the U.S., trade and commerce including immigration visa's quotas.

The immigration dilemma that we have has resulted in many people arriving with visions of equal rights, and fair treatment, but find that they are unable to afford adequate living conditions, and have no equal rights. A lack of diversity has contributed to this, therefore,





it has become necessary that we as a people demand rectified immigration laws. The illusions of grandeur that many arrive with are replaced with the reality of a country that would jail immigrant and refugee children. This country has forgotten what their symbols truly mean.

Lady Liberty has named herself “Mother of Exiles” has called for the “tired, poor, and huddled masses.” She knows that they are “yearning to breathe free” and she wants to adopt the “the homeless, and tempest-tost” who have traveled thousands of miles to escape poverty, hardship and persecution in their homelands. Emma Lazarus served as a conduit for the thoughts of Lady Liberty, and some have shown themselves to be jealous children. Those who were born from her begrudge those who are children of her heart.

NOTE: This article contains the opinions and ideas of its author. It is intended to provide helpful and informative material of the subject addressed in the article which includes excerpts from:

- 1- NATIONAL COUNCIL LA RAZA - *NCLR News releases online 2009.*
- 2- ABA - INTERNATIONAL LAW NEWS *The American Dream Betrayed: ABA Summer 2001- Vol 30 No.:3 2001.*
- 3-HUMPHREY H PACHECKER’S THESIS TO LLM PROGRAM U.M. LAW SCHOOL - IRA KURSBAN – PROFESSOR – *University of Miami Law School – LLM Immigration- Comparative Law – Ira J. Kurzban – professor.*
- 4- THE IMMIGRANT’S UNIVERSE BOOK BY HUMPHREY H PACHECKER -*The Immigrant’s Universe- Humphrey H Pachecker Chapter 1 volume 1-3- 2010.*
- 5- IMMIGRATION LAW - DAVID WISSBRODT *Immigration Law and Procedure in a Nutshell by Dvid Weissbrodt – chapter 3 2010.*
- 6- BASIC RIGHTS - HENRY SHUE –*Subsistence, Affluence, and U.S. Foreign Policy chapter 1 - 13, 1996.*
- 7- <http://www.theblaze.com/stories/2014/05/02/rep-steve-king-passing-immigration-reform-political-suicide-for-gop/>.
- 8-*THE NEW COLLOSUS-EMMA LAZARUS—(1883).*

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Chhaya Prasad Phatarpekar, B.Sc., LL.B, M.A. Legal Studies, and LL.M. The author is an Attorney from India, licensed to practice in State of Maharashtra and Goa. She furthered her professional career in the United States by completing a Master's in Legal Studies from Texas State University-San Marcos and LL.M from University of Houston Law Center. She has gained extensive experience in immigration law while working with students, visitors, skilled workers, employment-based visa holders, and expertise in resolving their visa related issues. She volunteered her time to the YMCA International Services Houston helping asylees and deportees while at the ACLU of Texas she worked on civil rights cases.

A Case for Granting Work Authorization to Spouses of Foreign Students and Work Visa Holders

In her web browser, Aarti typed in www.travel.state.gov to find the visa bulletin for September 2014. She wanted to know whether it would be a good idea for her husband to file a labor certification, who is now in the fourth year of his H-1B status. Her husband is a highly skilled professional working for a Tech company in the United States. To her disappointment, the immigration service was still processing green card applications for Indian advanced degree professionals filed in May 2009.

After browsing for a while, Li closed the New York Times seeing no news about the Comprehensive Immigration Reform Act. Her husband is a foreign student pursuing a Master's degree in Chemistry, soon to join a Ph.D. program. Both women left their thriving careers in India and China to follow their spouses to the United States. With aspirations for a bright future, they felt hopeless like many other spouses of student and employment based visa holders, who were looking forward to seek employment in the United States.

With the Comprehensive Immigration Reform Act not even farthest in sight of passage, spouses awaiting to get employment authorization via their husbands' green card have no option, but to push Congress for grant of work authorization the same way it did in 2002 for the spouses of treaty traders, treaty investors, and intracompany transferees. In 2013, the United States Senate approved a bill that would overhaul the Nation's immigration system. If passed by the House, some of the provisions in the bill will benefit professionals, skilled, unskilled workers, as well as undocumented immigrants in the United States. However, the bill does not address the issuance of work authorizations to spouses of student and work visa holders.

Brief Summary of Visa Categories

The United States Citizenship and Immigration Service (USCIS) classifies immigrants broadly into two categories: immigrants and non-immigrants. Immigrant visa applicants are those entering the United States with the intention of permanently residing in the country, whereas non-immigrants are those who enter the United States for a temporary period lasting between few days to few years. Non-immigrants must leave the country after the term of their authorized stay expires. The non-immigrants include visitors, students, highly skilled workers/work visa holders, seasonal workers, intracompany transferees, exchange visitors/ scholars, treaty traders, treaty investors, artists, fashion models and so on. This article will limit its discussion to foreign students, highly skilled workers/work visa holders, exchange visitors/scholars, intracompany transferees, treaty traders, and treaty investors.

United States on an F-1 visa to pursue academic studies. ¹A work visa, (H-1B) is available to those who seek employment in the United States temporarily to perform services in a specialty occupation. ²These employees are highly skilled professionals. Professionals from Mexico and Canada entering the United States are designated as TN visa holders. Generally, the USCIS allocates J-1 visas to exchange visitors entering the United States for research, teaching, training, and to physicians. ³Treaty traders enter the United States on an E-1 visa, to carry out substantial trade between their country of origin and the United States. ⁴They are employees of multinationals or other organizations of those countries with whom the United States maintains a treaty of commerce and navigation of international scope. ⁵The USCIS assigns an E-2 visa to treaty investors, who invest substantial amount of capital in a bonafide enterprise in the United States. ⁶Intracompany transferees entering the United States on an L visa are employees working at a corporation's overseas branch, affiliate, or a subsidiary transferred to the corporation's office in the United States to perform services in managerial, executive, or other capacity involving specialized knowledge. ⁷Spouses and children often accompany foreign students, work visa holders, exchange visitors, treaty traders, treaty investors, and intracompany transferees on a dependent visa. It is pertinent to note that Congress granted work authorization only to spouses of exchange visitors, treaty traders and investors, and intracompany transferees failing to provide the benefit to spouses of foreign students and work visa holders. All the immigrants come to United States in pursuit of achieving their "American Dream", the path to which is laden with impediments in form of myriad rules and regulations.

"Spouses and children often accompany foreign students, work visa holders, exchange visitors, treaty traders, treaty investors, and intracompany transferees on a dependent visa."

Employment of Foreign Students, Work Visa holders, and their Dependent Spouses.

A foreign student (F-1) in the United States cannot engage in any kind of remunerative employment, with the exception of on-campus employment on a part time basis. Even if the foreign student decides to pursue a doctoral program, a long-term commitment, the rules for employment remain the same. The on-campus employment is often in the form of a graduate instructional assistantship, teaching assistantship or a graduate research assistantship. In a situation where a doctoral program takes anywhere between 5-10 years for completion, the most disadvantaged person is the accompanying spouse of the foreign student, to whom Congress denies the ability to earn a livelihood and pursue an independent career in the United States. Usually, a foreign student (F-1) after earning a graduate degree obtains an H-1B visa to work in the United States. USCIS issues a work visa initially for a period of three years, subject to subsequent renewal for another three-year period by the employer. So the spouse of an F-1 visa holder, changes status from F-2 visa (Dependent of F-1 visa) to H-4 visa (Dependent of H-1B visa holder). Like the spouses of foreign students, Congress does not authorize the spouses of work visa holders (H-1B), and spouses accompanying TNs to accept employment to work in the United States.

¹8 C.F.R. § 214.2(f)(1) (2003).

²8 C.F.R. § 214.2(h)(1)(i) (2001).

³8 C.F.R. § 214.2(j) (2003); *See also* 22 C.F.R § 62.4 (2011).

⁴8 C.F.R. § 214.2(e)(1) (1997).

⁵*Id.*

⁶*Id.*

⁷8 C.F.R. § 214.2(l)(1)(ii) (2009).

**When I
accompanied my
husband to the
US, I gave up my
job in Mumbai,
having no idea
that this would
mean the end of
my career"**

Meghna Damani
Filmmaker





Privileges Bestowed Upon Other Non-Immigrant Spouses

Congress authorizes spouses of exchange visitors (J-1) to work in the United States.⁸ In January 2002, Congress without any opposition passed a bill amending the Immigration and Nationality to grant work permit to spouses of treaty traders (E-1) and treaty investors (E-2) so that they could engage in gainful employment.⁹ In another companion bill, Congress granted work authorization to spouses of intracompany transferees.¹⁰ While arguing in support of these two bills, Wisconsin Congressman James Sensenbrenner and Former Congressman from Florida, Robert Wexler stated that working spouses are becoming a rule rather than an exception, not only in the United States, but also in many other countries.¹¹ They further stated that it was necessary to

grant spousal work authorizations in order to persuade employees from overseas branches of multinationals to move to the United States because their spouses were unwilling to give up their employment in their home countries.¹² In addition, Congressman Wexler stated that a second income was increasingly necessary to maintain a household and that spouses should not have to forgo their ambitions and careers to accompany their loved ones to the United States.¹³

Necessity for Work Permits to Spouses of Foreign Students and Work Visa Holders.

The foreign students and work visa holders like the exchange visitors, intracompany transferees, treaty traders, and treaty investors belong to the same class of non-immigrants. Congress should bestow the same benefits upon the foreign students and work visa holders as they did for the other classes of non-immigrants. As per the current state of law, foreign students pursuing academic studies are not encouraged to apply for green cards. As a result, those students with a Master's degree can apply for a green card only when they obtain a work visa (H-1B). Foreign students pursuing an advanced graduate degree such as a Ph.D. must wait for the green card application process to begin after they complete their Ph.D., which may take five to ten years. During this time, the USCIS does not permit the dependent spouses to seek employment in the United States. This regulation is harsh considering the meager research assistantship paid to the graduate students. The misery does not end after applying for a green card. Processing times at the United States Citizenship and Immigration Services (USCIS) for currently pending green card applications are wrought with delays. Moreover, the wait for highly skilled workers on H-1B visa with green card applications pending at the USCIS seems unending.

⁸ 8 C.F.R. § 214.2(j)(1)(v)(A)(B) (2003); *See* 8 C.F.R. § 274a.12(c) (5) (1992).

⁹ An Act to provide for work authorization for nonimmigrant spouses of Treaty Traders and Treaty Investors. *See* Pub. L. No. 107-124, 2002 U.S.C.A.N. (115 Stat.) 2402 (codified as 8 U.S.C. § 1184(e)).

¹⁰ An Act to provide for work authorization for nonimmigrant spouses of Intracompany Transferees. *See* Pub. L. No. 107-125, 2002 U.S.C.A.N. (115 Stat.) 2403 (codified as 8 U.S.C. § 1184(c) (2)(E)).

¹¹ 147 CONG. REC. 16395-96 (daily ed. Sept. 5, 2001) (Statement of Rep. Sensenbrenner and Rep. Wexler).

¹² *Id.*

¹³ *Id.* (Statement of Rep. Wexler).



Department of Homeland Security Proposes a New Rule for Granting Work Authorizations to Spouses of H-1B Visa Holders

When the new regulation goes into effect, it will benefit spouses of certain H-1B visa holders, who have been waiting for years to be employed in the United States. According to the proposed rule, the USCIS will grant work authorization either to spouses of those H-1B visa holders with an extension beyond their sixth year of stay in H-1B status or to those H-1B visa holders who are beneficiaries of an approved I-140 Immigrant petition.¹⁴ The agency's decision of granting benefits to H-1B spouses stems from the recent increase in departure of highly skilled workers from the United States due to the long wait for the processing of green cards by the USCIS. The proposed rule in the Federal Register goes on to state that limiting the employment authorization only to dependent spouses provides *parity* with other nonimmigrant employment categories, such as L (intracompany transferee), E-1 (treaty trader), and E-2 (treaty investor).¹⁵ The use of the word "*parity*" creates an impression of the agency's benevolence in conferring the same benefits to the spouses of H-1B visa holders as that of spouses of E-1, E-2, and L visa holders. However, DHS fails to consider the disparity it creates when it makes spouses wait for a work authorization until the USCIS approves the H-1B visa holder's I-140 petition or grants an extension beyond the sixth year of H-1B status. It would be unfair not to note that several employers do not file a labor certification for the employee until the fifth year of H-1B. In most cases, USCIS permits filing of an I-140 Immigrant petition only after it approves the labor certification. Thus, on an average, H-1B spouses will have to wait for three to six years even before applying for a work authorization. The DHS does not impose any conditions on E-1, E-2, and L visa holder spouses in getting a work authorization. In fact, E-1, E-2, and L spouses can apply for a work authorization immediately upon entering the United States.

Wait, but how long?

Li knows that her husband is going to be in the Ph.D. program for a long haul. She has already obtained her Masters in Psychology and Speech Communication. After her employer filed for bankruptcy, Li lost her job and hence her work visa. Should she remain unemployed for the next 7 years until her husband completes his Ph.D.? Should spouses such as Aarti with a graduate degree from the United States remain unemployed for years? Isn't it unfair to burden the H-1B spouses by requiring their husbands to have an I-140 approved to be eligible for a work authorization? If spouses of one class of visa holders get a work authorization after entering the United States merely by applying to the USCIS for an employment authorization document, why are spouses of other visa holders denied the same privilege? Spouses of student and employment visa holders deserve to pursue their careers and ambitions that they left behind in their home country the same way spouses of intracompany transferees, exchange visitors, treaty traders and treaty investors do. Just the way a supplemental income is necessary to support a household of intracompany transferees, exchange visitors, treaty traders, and treaty investors, a secondary income is necessary to support a household of student visa holders and work visa holders. Congress conferring benefits only to spouses of selective non-immigrant visa holders is unjustified when all spouses enter the United States as dependents of the principal visa holders. Elie Wiesel in a famous quote said, "There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest." It is time Congress fixes this disparity by granting work authorization to spouses accompanying foreign students and work visa holders unconditionally by amending the Immigration and Nationality Act.



¹⁴79 Fed. Reg. 26887.

¹⁵*Id.* 26891.



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Canadian Citizenship Elusive for International Business Executives

Global mobility is the hallmark of international business employees. However, there is an inherent conflict between the obligation to travel abroad regularly to discharge work duties and the ability to fulfill the requirements to qualify for Canadian citizenship. This conflict was highlighted in the recent case of *Kaindl v. Canada (Minister of Citizenship and Immigration)*.¹

In *Kaindl*, the applicant was a foreign national employed by Siemens, a large multinational. Mr. Kaindl arrived in Canada with his wife and five children on November 1st, 1998, in possession of the appropriate Work Permit and at the request of his employer to work for Siemens Canadian operations. He eventually became a Permanent Resident. Sometime later, due to the significant global downturn in the technology sector and the economy, Siemens decided to close its Canadian operations. After two years searching for work in Canada without success, Mr. Kaindl accepted an offer from his employer to take on responsibilities for Siemens in Austria. As a result of his assignment, he commuted between his workplace in Austria and his family in Ontario for several years. His family remained in Canada, his children attended the local high school, and eventually universities, and became Canadian citizens. Mr. Kaindl's wife became a citizen too. Only Mr. Kaindl did not become a Canadian citizen, as his application was separated administratively by Citizenship and Immigration from those of his family members.

Mr. Kaindl's application was refused on the grounds that he could not meet the residency requirements of Section 5(1)(c) of the Citizenship Act,² which requires that a person be present in Canada for at least three years (1095 days) in the four year period immediately preceding the application for citizenship.

During his hearing before a Citizenship Judge, Mr. Kaindl conceded that it was his choice to accept the position offered by his employer in Austria, but he argued that his absence from Canada was driven by economic necessity, as his efforts to secure a job in Canada were unsuccessful. He was then faced with a stark choice: apply for social assistance or accept the position abroad. He argued that his choice to work abroad was reasonable and in the interest of Canada as he refused to depend on employment insurance and government benefits to survive.

The Citizenship Judge applied the physical residency test set out in the decision of the Federal Court *Re Pourghasemi*³ in arriving at his conclusion not to grant citizenship to Mr. Kaindl, and he found that he had fallen short of the required 1095 days of residency. Mr. Kaindl had been physically present in Canada for only 224 days in the relevant four year period. Further, the Citizenship Judge refused to exercise his discretion to recommend a positive assessment of the application pursuant to Sections 5 (3) and (4) of the Citizenship Act, as he felt it was unwarranted.



The Federal Court reviewed the case and stated that the issue was whether the decision of the Citizenship Judge to refuse the application was correct in law as required by the standard of review test laid out by the Supreme Court of Canada in *Dunsmuir v New Brunswick*,⁴ and whether his decision to decline the exercise of discretion to recommend favourable consideration of the application was a reasonable exercise of that discretion.

In its reasons, the court cited with approval the decision in *Martinez-Caro v Canada*⁵ where it concluded that it was Parliament's intention that residency was to be determined on the basis of physical presence in Canada. In that case, as in *Kaindl*, the applicant was absent from Canada for a considerable period of time. The court held that the Citizenship Judge did not commit an error of law adopting the physical presence in Canada test to determine residency.

Mr. Kaindl did not challenge the correctness of the test but rather he contended that the Citizenship Judge made an error in the calculation of the residency period and, therefore, the outcome might have been different had he counted the dates correctly. He argued that the Citizenship Judge drew an adverse inference on credibility and that affected his approach to the exercise of discretion. The court disagreed and held that there was nothing in the decision to suggest that the Citizenship Judge made any adverse inference concerning the applicant's credibility. Instead, it was apparent that the Citizenship Judge accepted Mr. Kaindl's evidence but applied the physical presence test and held that he did not meet the requirements of the Citizenship Act.

In response to Mr. Kaindl's further argument that Citizenship and Immigration Canada had separated his application from those of his wife and children, who received citizenship and that, therefore the Citizenship Judge did not have a complete picture of the evidence to make a favourable recommendation for the exercise of discretion, the court also rejected his contention. The court noted that the record showed that the applicant testified before the Citizenship Judge and that all the evidence concerning his circumstances was considered. This included not only family circumstances but also his participation in a church choir, home ownership, financial establishment, and the difficult choice that Mr. Kaindl had to make concerning his work abroad.





Finally, the applicant argued that he should be granted citizenship as a father of five Canadian children, and that following the principles set out in *Baker v Canada*⁶ the best interests of the children should be considered. The court found no merit in this argument, and held that there was no support for the proposition that in considering the grant of citizenship the best interests of Canadian children are to be taken into consideration. In addition, the court held that the applicant's status as a Permanent Resident was

sufficient to exercise his parental duties and provide the appropriate guidance, support, and direction to his children. The court noted that this was a very different situation from that where parents are being separated from Canadian children and returned to their countries of origin with little prospect of ever returning to Canada as they may not be granted a work or a visitor's visa.

While the court was sympathetic to the applicant's situation, it reached the inescapable conclusion that the Citizenship Judge did not err in refusing to exercise his discretion and dismissed the appeal.

The circumstances of this case highlight the difficulties faced by international business persons in obtaining Canadian citizenship when they must travel abroad regularly. While there is some flexibility built into the Citizenship Act that may warrant the exercise of positive discretion in borderline cases, it is seldom applied where the applicant spends the majority of his time abroad. An applicant may be able to maintain his Permanent Residency, which, with some limited exceptions, requires that he be physically present in Canada for 730 days in a five year period, but it may be very difficult for him to obtain Canadian Citizenship under current legislation as Citizenship Judges and Federal Court jurisprudence are slowly but surely turning towards a stricter application of the physical presence requirement for the grant of Canadian citizenship. The Federal government has recently proposed legislation that, if enacted, will be more onerous to applications and will enshrine the physical presence test in an expanded fashion, making it more difficult for international business applicants to qualify for citizenship.

¹ 2012 FC 487.

² R.S.C., 1985, c. C-29.

³ [1993] F.C.J. No. 232.

⁴ 2008 SCC 9.

⁵ 2011 FC 640.

⁶ [1999] 2 SCR 817.



Please join us for the ABA Section of International Law 2015 Spring Meeting

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Program Title: Corporate, Employment, Immigration and Family Law Implications of Human Trafficking

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