LANDIS ARN & JAYNES, P.A.
IMMIGRATION SOLUTIONS

August 2010 Newsletter

H-1B Temporary Worker Category under Increased Scrutiny and Attack

by Peter J. Landis, Esquire

The H-1B temporary worker category allows U.S. employers to bring foreign workers with specialized knowledge to the U.S to work on a temporary basis. It can be an effective mechanism for U.S. businesses to address a shortage of professional workers, to secure cutting edge skills and needed expertise, or to simply hire the best and the brightest in order to obtain a competitive advantage. Although the H-1B program has built-in safeguards to ensure that wages and working conditions of U.S. workers are not adversely affected, there is **no** requirement to document the unavailability of qualified U.S. workers in order to successfully petition for an H-1B worker. However, with the downturn of the economy, it seems the H-1B temporary worker category has been under attack on an increasing number of fronts, including by the governmental agencies that are responsible for administering and regulating the program, leaving the impression there is a concerted effort being undertaken to discourage U.S. companies from employing foreign workers.

The Office of Fraud Detection and National Security (FDNS) was created in 2004 by U.S. Citizenship and Immigration Services (USCIS) to detect, deter and combat immigration fraud and to ensure that immigration benefits are not granted to persons who threaten national security or public safety. In the fall of 2009, FDNS initiated an assessment of the H-1B program. This effort has involved site visits, mostly unannounced, to the H-1B employer's principal place of business and/or the H-1B nonimmigrant's work location as listed on the H-1B petition, in order to verify information pertaining to H-1B petitions that have already been approved or are pending at USCIS. In these site visits, the FDNS officer, or an investigator who has been contracted by FDNS to conduct the site visit, arrives at a place of business armed with a copy of the H-1B petition and asks to speak with the employer representative who signed the petition. If that person is not available, the FDNS officer usually asks to speak with another employer representative, such as a human resources manager.

The FDNS officer will ask questions seeking specific information about the nature of the employer's business, its locations and number of employees, and may ask for confirmation that the signature on the I-129 petition filed by the employer is genuine. The FDNS officer will then ask about the position that the H-1B nonimmigrant is performing, such as job title, job duties, work location, and salary. The FDNS officer

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Glossary of Immigration Terms

Immigration terms that are designed to be very precise are often confused or used inappropriately by those not "fluent" in the language of immigration. The two terms defined below are often used interchangeably (and erroneously).

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VISA

U.S. visas are issued by the Department of State. A visa allows the bearer to apply for entry to the U.S. in a certain classification (e.g. student (F), visitor (B), temporary worker (H)). A visa does not grant the bearer the right to enter the U.S., but only authorizes a carrier to transport the holder of the visa to the U.S.. The validity dates on a nonimmigrant visa only relate to when an individual may **apply** for entry into the U.S.

I-94 ARRIVAL-DEPARTURE RECORD

Upon arriving at a U.S. point of entry, Customs and Border Protection inspectors determine the foreign national's admission into, length of stay and conditions of stay in, the U.S. The Customs and Border Protection officer will affix an Arrival-Departure Record (Form I-94) to the foreign national's passport. This Form shows the date of arrival in the United States and the "Admitted Until" date, the date when the authorized period of stay expires, and class of admission. The information transcribed on the I-94 Form is the basis for all further immigration-related activity in which a foreign national may engage while in the United States.

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So, when someone asks, "When does your visa expire?" they may very well mean, "When does your I-94 expire?" The difference between the expiry of these two documents can be a matter of a few days or many years; in either case the ramifications of misunderstanding these crucial pieces of documentation can be great, leading to unintentional overstays, unauthorized employment, denials of future applications or entries, etc.

Bring us Your Outstanding, Your Artistic, Your Productive Foreign Nationals: Immigration Options in the National Interest

by Marcus B. Jaynes, Esquire

The Immigration and Nationality Act - the body of federal laws that controls the United States immigration system - contains a number of provisions for foreign nationals to obtain temporary and permanent immigration status in the U.S. based on employment and/or activities from which the U.S. believes its citizens and residents stand to benefit. The law provides immigration avenues across a broad range of pursuits, from science, technology and national security to rural healthcare and medicine, from culturally unique artistry to acclaimed entertainment and athletics. The economic contributions and competitive advantages that foreign workers have brought to the U.S. are well documented, as are the unfortunate and restrictive aspects of U.S. immigration policy which prevent the U.S. from further harnessing the availability of gifted, productive individuals seeking access to the U.S. and its markets. To the extent that the law already awards exceptionally talented, productive, and visionary foreign nationals with pathways to status in the U.S., we need to expand rather than restrict these provisions, which are critically important to the U.S. economy and to the country's position within the global marketplace of business, science, technology, and industry.

IMMIGRANT STATUS

In addition to family-based options for permanent residence in the U.S. (green card status), and options based on market-tested offers of employment (the Permanent Labor Certification Process), a number of paths exist for permanent residence based on special activities and employment, including the following:

1. Employment-based First Preference Category (EB-1)

This category does not require that the foreign national obtain a certification from the Secretary of the Department of Labor (DOL) that the work in which he or she will engage will not displace U.S. workers—also known as a "labor certification." The category represents a policy determination that the work of some foreign nationals is so extraordinary or outstanding that it warrants a fast-track to permanent residence. There are several sub-categories.

A. Persons of extraordinary ability in the sciences, arts, education, business, or athletics. Here, foreign nationals can petition with or without a prospective employer, and are required to demonstrate sustained national or international acclaim. They must be entering to continue to work in their chosen field, and they must "substantially benefit prospectively the U.S." Evidence of an individual's sustained national or international acclaim may include one-time achievement of a major international award, or, alternatively, an applicant must meet three of ten criteria, including lesser awards; achievement-based memberships in organizations; published material about or by the foreign national in major professional publications; participation in judging the work of others in the field; evidence of original scientific, scholastic, artistic, athletic, or business-related contributions to the field; high salary; and commercial success in the performing arts.

B. Outstanding professors and researchers. Here a beneficiary must have a minimum of three years experience in teaching or research, and establish international recognition in an academic discipline, according to criteria similar to that required to establish "extraordinary ability." These individuals must be coming for a tenure or tenure-track position, or for a comparable position at a university, institute, or with a private employer to conduct research. While no labor certification is required, there must be an offer of ongoing employment from the sponsoring employer.

C. Multinational executives or managers. This category is for foreign nationals who have been employed abroad in an executive or management capacity (for one year in the last three years prior to entry) with a firm, corporation or legal entity, affiliate, or subsidiary with U.S. and foreign operations and are serving or coming to serve in an executive or managerial capacity for the related U.S. entity.

2. Employment-based Second Preference Category (EB-2)

This category is for members of the professions holding advanced degrees, or for persons with exceptional ability in the arts, sciences, or business who will substantially benefit the national economy or culture who are "sought by an employer in the United States." Based on "exceptional ability" and work in the "national interest," applicants may obtain a "national interest" waiver of the labor certification requirement that otherwise is required for the EB-2 category.

A. The "national interest waiver" may be obtained when the Attorney General "deems it to be in the national interest" to waive the requirement that the individual be "sought by an employer in the United States." "Exceptional Ability" is defined as an expertise beyond that which is normally found in the profession. Proving "exceptional ability" can be accomplished by demonstrating three of six criteria surrounding education, experience, and achievement.

B. "National Interest" requires a showing that the foreign national seeks employment in an area of substantial intrinsic merit, that the proposed benefit will be national in scope, and that the foreign national's achievements and skills warrant a waiver of normal labor certification requirement.

C. Physicians in the "National Interest." Physicians can also avoid the labor certification requirement if they agree to work full-time in a clinical practice for a total of five nearly continuous years within a geographic location and a practice specialty area that is designated as medically underserved, as having a shortage of health professionals, or meeting related criteria.

3. Employment-based Fifth Preference Category (EB-5)

This category is for employment-creation and is sometimes

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H-1B Scrutiny *(Continued from page 1)*

may also ask to review a copy of the H-1B worker's pay records, including the most recent paystub and Form W-2. Although this has not yet been reported, the FDNS officer could also ask to review the Labor Condition Application (LCA) Public Access file that H-1B employers are required to maintain for each H-1B employee. After speaking with the employer representative, the FDNS officer sometimes requests a tour of the employer's facility and will normally request to interview the H-1B nonimmigrant. During the interview with the H-1B worker, the FDNS officer will ask about the position that he or she is performing, his or her academic background and previous employment experience, as well as other information about the H-1B worker that may have been included in the H-1B petition. After speaking with the H-1B worker, the FDNS officer may also request to speak with a co-worker or manager to ask them about the position the H-1B nonimmigrant is performing. The site visit usually lasts less than an hour and, provided no evidence of fraud is uncovered, the employer is not likely to hear anything further following the visit.

Site visits, however, do not appear limited to cases in which USCIS adjudicators suspect fraud. Rather, it has been reported that the Vermont Service Center transferred approximately 20,000 cases to FDNS as part of the H-1B assessment program. Assuming the other service center (California Service Center) which processes H-1B petitions transfers a similar number of cases, FDNS officers may be paying visits to a significant number of H-1B employers.

There have also been numerous reports that H-1B workers have recently been subject to increased scrutiny by U.S. Customs and Border Protection (CBP) when entering the U.S. For instance CBP inspectors at the Newark airport have subjected certain individuals, particularly Indian nationals seeking entry in H-1B status, to extensive questioning about who they worked for, how their pay was computed, who paid their salary, their job duties, etc., and, in some instances, individuals were subjected to expedited removal and visa cancelation. CBP headquarters has stated that some of these cases involved individuals who worked for companies under investigation by U.S. Immigration and Customs Enforcement for fraud, but also confirmed it was screening all employment-based visa holders entering the country to determine admissibility and to ensure compliance with entry requirements. CBP at the Newark airport further confirmed it has instituted a policy of conducting random checks for returning H-1B, L-1 and other employment-based visa holders to determine whether there are discrepancies with previously filed petitions.

Practitioners have also reported increased scrutiny of H-1B workers at various U.S. consular posts, particularly in India. Officials have questioned the *bona fides* of an approved H-1B petition and requested information, including information already reviewed by USCIS in adjudicating the initial petition. Many of these requests seem to be fishing expeditions asking for a host of repetitive and oftentimes irrelevant information, which, in effect, creates a "paper wall" that must be overcome before an applicant will be issued an H-1B visa and delays the arrival of the H-1B worker.

USCIS has also recently targeted the H-1B category by issuing a policy memorandum imposing new extra-regulatory requirements on the employer-employee relationship, the types of activities in which H-1B workers can engage, as well as the types of enterprises that can petition for H-1B workers. Although the memo seeks to target the computer consulting industry in particular, it impacts a number of other industries that place employees at third party worksites and introduces a new concept prohibiting the filing of H-1B petitions on behalf of individuals who have an ownership interest in the petitioning H-1B entity, even where the entity is a corporation. We have already begun to see the issuance of new requests for evidence on pending and newly filed H-1B petitions involving these

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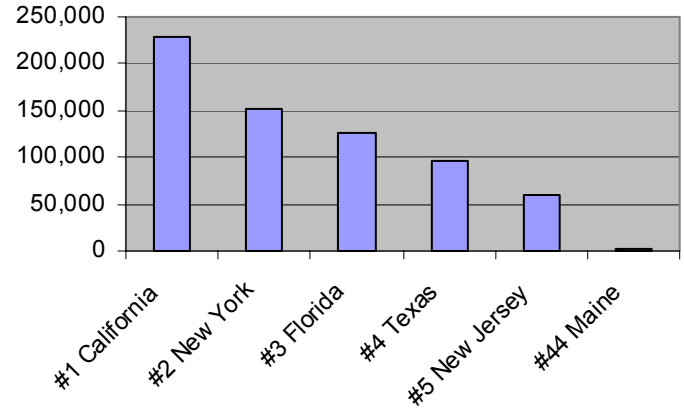
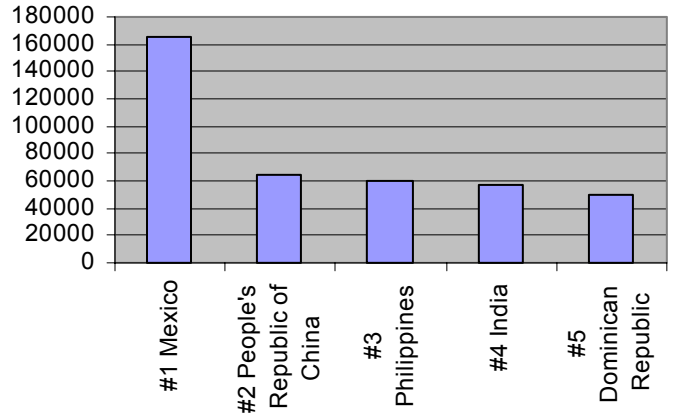
Top 5 States of Residence for New Permanent Residents, 2009

(From Department of Homeland Security Annual Report on U.S. Legal Permanent Residents, 2009)



Top 5 Countries of Birth of New Permanent Residents, 2009

(From Department of Homeland Security Annual Report on U.S. Legal Permanent Residents, 2009)



National Interest *(Continued from page 2)*

called the "investor visa." It provides conditional residency—and ultimately, permanent residency—for those who invest $1 million in a new commercial enterprise that employs at least 10 full-time U.S. workers. A lesser investment of $500,000 may qualify the investor if the investment is in one of the targeted employment areas, including rural, low-population areas or locations that have experienced unemployment at 150 percent of the national average. Pilot programs have been available at times, with relaxed eligibility standards.

NONIMMIGRANT STATUS

Aside from the traditional options of H-1B professionals, H-2B temporary workers, and L-1 intracompany transferees, there are several temporary statuses specifically oriented toward outstanding and unique individuals, from investors and scientists to artists and entertainers.

O-1 Classification - Extraordinary Ability

- The O-1A classification is foreign nationals who have demonstrated extraordinary abilities in the sciences, arts, education, business, or athletics – through sustained national or international acclaim.
- The O-1B classification rewards extraordinary achievement in the motion picture or TV production industries.

P Classification - Athletes and Entertainers

- The P-1A classification is for athletes who are internationally recognized, either themselves or as part of a group.
- The P-1B classification is for foreign nationals who perform with, or as an integral part of, an entertainment group that has been internationally recognized as outstanding for a sustained period.
- The P-2 visa classification is for a foreign national who will be entering the U.S. to perform as part of a group, individually (or otherwise integrally) under a reciprocal exchange program.
- The P-3 classification applies to artists and others entering as part of a "culturally unique program" (including coaching); the program may be commercial or noncommercial and need not be sponsored by an educational, cultural, or government agency.

Q Classification – International Cultural Exchange

The Q classification applies to foreign nationals participating in an international cultural exchange program approved in order to provide employment, practical training, and the sharing of history, culture, and traditions of the individual's country of nationality. The employment must occur in a school, museum, business, or other similar entity and must be designed to exhibit or explain the attitude, customs, history, heritage, philosophy, or traditions of the person's country.

E Classification – Treaty Investors & Treaty Traders

Treaty traders (E-1) and treaty investors (E-2) are in a special category to which some of the traditional nonimmigrant visa rules do not apply. There is an E-3 visa category that is similar to the H-1B but solely for Australians and was created in May 2005. E visas allow a foreign national to remain in the U.S. for an indefinite period under a reciprocal treaty of commerce and navigation between the United States and the country of nationality. The treaty trader (E-1) must be engaged in "substantial trade" between the United States and his or her home country. The treaty investor (E-2) must be developing or directing an enterprise in which he or she has invested a substantial amount of capital.

This article is meant to highlight unique avenues for immigration status in the U.S. To discuss any of these options, or more traditional immigration paths, please contact Landis Arn & Jaynes with your questions, or to arrange a consultation.

Marcus B. Jaynes graduated from the University of Michigan (B.A.) and the University of Colorado School of Law and grew up in Farmington, Connecticut. Marcus moved to Maine in the summer of 2001 and served as a Law Clerk to Justice Susan Calkins of the Maine Supreme Judicial Court, before joining Landis Arn & Jaynes in 2002. Marcus is a member of the American Immigration Lawyers Association and provides representation in all areas of immigration law, including citizenship and naturalization, marriage- and family-based permanent residence, asylum, deportation defense, as well as employment- and business-related immigration, and I-9 compliance and employer sanctions. Marcus also serves on the Board of Directors of Pine Tree Legal Assistance, a Maine non-profit providing free legal assistance to low-income residents of Maine.

Sixth Amendment Right to Counsel Decision

On March 31, the Supreme Court issued a momentous Sixth Amendment decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). In this case, which involved a lawful permanent resident who had pled guilty to a criminal offense without being apprised by legal counsel of the immigration consequences of doing so, the court held **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.** The case is particularly noteworthy for the following reasons**:**

- The court found that **deportation is a "penalty,"** not a "collateral consequence," of the criminal proceeding;
- Professional standards for defense lawyers now require counsel **to determine citizenship/immigration status** of their clients and to **investigate and advise** clients about the immigration consequences of alternative dispositions of the criminal case;
- **The Sixth Amendment affirms that non-advice (silence) regarding immigration consequences is insufficient;** and
- **The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution**

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issues.

So what is an employer to do? Here are a few fundamental guidelines to keep in mind:

- When filing an H-1B petition, carefully review the petition and supporting documentation to make sure everything is truthful and accurate;
- If there are material changes in the H-1B worker's employment, contact legal counsel to discuss what steps need to be taken and whether it is necessary to file an amended H-1B petition;
- Make sure all paperwork/documents that are required to be maintained are properly completed and updated. Employers should retain complete copies of all of their I-129 petitions and supporting documentation in confidential files maintained by designated company officials;
- Have a protocol in place in the event of a visit by USCIS or other government agency requesting information about the employment of workers. Investigators should be immediately referred to knowledgeable employer representatives and legal counsel should be promptly contacted. Employers should request the name, title, and contact information of the investigator and should not speak with government agents or contractors without a witness being present; and
- Employees should be advised and properly prepared when traveling abroad, applying for a visa at a U.S. consulate or entering or returning to the U.S.

Employers should not be intimidated from utilizing the H-1B category. It is also important for employers to let their congressional representatives know how important the H-1B category is to their businesses and to push back against the anti-immigrant forces which are intent on eliminating any type of immigration, even legal immigration that is vital to this country's economy and ability to compete in the competitive global marketplace.

Peter J. Landis *received a B.A. from Tufts University and a law degree from Northeastern University School of Law. He is a member of the American Immigration Lawyers Association, has practiced immigration law since 1980, and has taught immigration law at the University of Maine School of Law. Peter's practice focuses on employment- and business-related immigration. He represents a wide range of clients nationwide, including leading educational and research institutions, government entities, hospitals and other health care providers, as well as a variety of businesses from small companies to large multinational corporations engaged in manufacturing, technology and biotechnology. His work involving employment-based immigration encompasses the filing of labor certifications; petitions for persons of extraordinary ability, outstanding researchers and professors, multinational executives and managers; and national interest waivers. Peter has helped many foreign medical graduates obtain a waiver of their J-1 two-year home residence requirement, change to H-1B temporary worker status, and acquire lawful permanent resident status in the United States. He also works with clients to obtain nonimmigrant status authorizing employment in the U.S. including, E, H-1B, L-1, O, P, and TN status.*

Could You Pass the Naturalization Test?

As part of the process of applying for U.S. citizenship through naturalization, applicants must take a test of their knowledge of U.S. civics. There are 100 questions on the naturalization civics test. Applicants must answer 6 out of 10 questions correctly. How would *you* do?

A. How many amendments does the Constitution have?
B. What is the name of the Vice President of the United States now?
C. Name one U.S. territory.
D. What is one reason colonists came to America?
E. When was the Constitution written?
F. What territory did the United States buy from France in 1803?
G. Before he was President, Eisenhower was a General. What war was he in?
H. What ocean is on the West Coast of the United States?
I. The idea of self-government is in the first three words of the Constitution. What are these words?
J. How many justices are on the Supreme Court?

Answers: a) 27; b) Joseph Biden; c) Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, U.S. Virgin Islands; d) freedom, political liberty, religious freedom, economic opportunity, escape persecution; e) 1787; f) Louisiana; g) World War II; h) Pacific; i) We the People; j) nine

ICE Increases I-9 Audits

According to a recent New York Times article, over the past year Immigration and Customs Enforcement ("ICE") has conducted audits of employee files at more than 2,900 companies. According to official figures the agency has levied a record $3 million in civil fines so far this year on businesses that hired unauthorized immigrants. The article quotes John Morton, the head of ICE, who stated that the goal of the audits is to create "a culture of compliance" among employers, so that verifying new hires would be as routine as paying taxes.

2011 H-1B Cap Count Update

USCIS updated its count of fiscal-year 2011 cap-subject H-1B petitions and advanced degree cap-exempt petitions receipted. As of July 30, 2010, approximately 27,300 H-1B cap-subject petitions were receipted. USCIS has receipted 11,600 H-1B petitions for foreign nationals with advanced degrees. For the fiscal year beginning October 1, 2010 through September 30, 2011, 65,000 H-1B petitions can be approved and 20,000 additional H-1B numbers are also available for persons who have obtained a master's degree or higher in the U.S.

Landis Arn & Jaynes, P.A.
Attorneys at Law
222 St. John Street, Suite 321
Portland, Maine 04102

P: (207) 775-6371
F: (207) 773-3096

www.landisarn.com
info@landisarn.com

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