LANDIS ARN & JAYNES, P.A.
IMMIGRATION SOLUTIONS

August 2009 Newsletter

Impermanent Residence: Understanding and Avoiding the Abandonment of Lawful Permanent Resident Status in the U.S.

by Marcus B. Jaynes, Esquire

Many "lawful permanent residents" of the U.S. take great comfort in having obtained permanent status in the United States, and likewise believe that as long as they pay their taxes, abide by the law, and stay in the U.S. at least part of every year, they can retain their "green card" status indefinitely. Barring the commission of certain crimes, fraud, and other circumstances, lawful permanent residents *are* entitled to live and work in the U.S. indefinitely, and to travel in and out of the U.S. However, as its title suggests, the status of lawful permanent residence presumes "permanent residence" and domicile in the United States. All too often, on a return trip to the U.S., a border official will make a finding that permanent residence has been abandoned by virtue of a person's extended absence from the U.S. and/or the loss of employment, property, and other ties.

Whether or not permanent resident status has been abandoned is a question of a person's intent. However, status can be lost involuntarily and U.S. Customs and Border Protection (CBP) officers will not simply accept a foreign national's statements of intent regarding absences from the U.S. They will inquire into the particular circumstances and the relevant, objective evidence. Fortunately, there are steps that permanent residents can take to protect themselves—for example, by documenting their intent and maintaining ties to the U.S., by returning periodically to the U.S. when abroad for extended periods, and by obtaining re-entry permit documentation in advance of lengthy absences.

The operative question for border officials is whether a permanent resident is returning to an "unrelinquished permanent residence" in the U.S. after a "temporary visit abroad." Officials will first consider the length of the absence. If a permanent resident has been out of the U.S. for more than one year, CBP takes the position that status has been abandoned, and a returning resident is entitled to review of this determination, with a high burden of proof for U.S. officials to demonstrate abandonment. An absence of more than six months but less than a year may also lead to scrutiny at the border. Certainly, CBP may find abandonment based on an absence of less than one year, and will further look to the purpose of a person's departure and the existence of a fixed end point for the visit. CBP will also consider whether the person's permanent home and employment are in the U.S., as well as family ties, financial ties, property ownership, the filing of income tax

(Continued on page 3)

Inside this issue:

Big Changes in 2009

A new firm name…

Landis & Arn, P.A. is pleased to announce that, as of January 1, 2009, Marcus B. Jaynes joined the firm as an equity owner. The firm is now known as Landis Arn & Jaynes, P.A.

Marcus' partnership with Peter Landis & Cynthia Arn follows his dedicated work on behalf of foreign nationals, families, and employers throughout Maine and New England over the last six years, and represents the three attorneys' shared goals and values, building upon nearly 30 years of service to clients.

Marcus graduated from the University of Colorado School of Law. He 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, P.A. as an associate in 2002. Marcus is a member of the American Immigration Lawyers Association and provides representation in all areas of immigration law. Marcus is also a member of the Board of Directors of Pine Tree Legal Assistance, a Maine non-profit providing free legal assistance to low-income residents of Maine.

And a new location!

Landis Arn & Jaynes, P.A. is excited to inform you that we will be relocating to a larger and more accessible space. While still conveniently located in Portland, our new office offers free parking, easy access from I-295, and, with an additional conference room, more scheduling flexibility. Beginning August 3, 2009, you can find or contact us at:

Landis Arn & Jaynes, P.A.
222 St. John Street,
Suite 321
Portland, ME 04102

Phone: (207) 775-6371
Fax: (207) 773-3096

We look forward to continuing to serve your immigration needs in our new offices!

Sponsoring a Foreign National for Immigration: The "Affidavit of Support"

by Cynthia C. Arn, Esquire

Foreign nationals applying for permanent residence (a "green card") in the United States must affirmatively establish that they are not likely to become a "public charge" in the U.S. In other words, they must show that they have sufficient financial resources committed to them, such that they will not require government financial assistance. [This is an interesting requirement because, in fact, permanent residents are not eligible for most forms of public assistance for the first 5 years of their residence in the U.S. (though they are required to pay taxes). Of course, individuals who are not legally present in the United States are not eligible for most forms of public assistance either.] If the foreign national cannot make this showing, the application for permanent residence will be denied. At present, virtually all family-based applicants for permanent residence must show that they have a sponsor willing to make a commitment to support them to at least 125% of the federal poverty guidelines. (In the employment context, the offer of employment in the U.S. shows that the foreign national applicant has sufficient financial resources.)

Prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, this "public charge" determination was fairly subjective and could be met in a variety of ways. It was generally sufficient if the foreign national had an offer of employment, or a sponsor willing to make a non-enforceable affirmation that s/he would provide financial support. However, this changed effective December 19, 1997. This is the date that the **Form I-864 Affidavit of Support** came into effect. The I-864 is required of almost all family-based applicants for permanent residence or an immigrant visa; and it requires very specific documentation. (It is also required in employment-based cases, in certain limited circumstances where a family member of the foreign national applicant has a significant ownership interest in the petitioning employer.)

Most significantly, the I-864 Affidavit of Support is **a legally enforceable contractual agreement** between the petitioner/sponsor, the foreign national/beneficiary, and the federal, state and local governments to whom the foreign national might apply for public assistance. In support of the I-864, the sponsor must provide tax returns and proof of current income. The sponsor must also be a U.S. citizen or permanent resident, and must be domiciled in the U.S.

The petitioning relative ***must*** provide Form I-864, even if her income is not sufficient to meet the requisite level of income (125% of the federal poverty guidelines for her household size). In these cases, a co-sponsor, who must also take on the contractual responsibility of Form I-864 and must also provide

(Continued on page 4)

Commentary: How U.S. Immigration Policy Hurts the U.S. Economy

by Peter J. Landis, Esquire

A growing number of recent studies document what I have long suspected; rather than protecting U.S. workers, increasing restrictions on the legal immigration of foreign workers actually undermines the U.S. economy by hindering efforts to spur technological innovation and impairing America's ability to compete in the global marketplace. Studies by the Harvard Business School, the National Foundation for American Policy, Peterson Institute of International Economics and the National Science Board demonstrate that highly skilled foreign workers actually create new employment opportunities for U.S. workers. A March 2009 Kaufman Foundation Study, on the other hand, shows that in recent years increasing numbers of highly skilled foreign workers in the U.S., often discouraged by the protracted process and long delays in obtaining lawful permanent resident status here, have been choosing to return to their home countries; an indication the U.S. is losing the world's best and brightest to countries that compete with us in the global marketplace. When combined with clear and unambiguous census trends showing the aging of the U.S. population and a projected shortage of workers to replace the baby boomers who are beginning to retire, it is evident that our increasingly restrictive immigration policies seriously jeopardize our economy and put the U.S. at a significant competitive disadvantage.

As noted in the Kaufman Foundation Study, while some people have tried to associate an increase in foreign workers with problems that have plagued our economy, the data verifies the opposite effect. Immigrants have provided the U.S. with an enormous competitive advantage. Between 1990 and 2007, the proportion of immigrants in the U.S. labor force increased from 9.3 percent to 15.7 percent. A significant proportion of these immigrants brought high levels of education and technical skill to the U.S. These immigrants have contributed enormously to the engine that has driven the U.S. economy - the high tech sector - co-founding firms such as Google, Intel, eBay and Yahoo to name a few. In 2006, immigrant-founded U.S. companies employed 450,000 workers and generated $52 billion in revenue. In addition, immigrant inventors contributed to more than a quarter of U.S. global patent applications.

A December 2008 Harvard Business School study shows immigrants comprise nearly half of all of the scientists and engineers in the U.S. who have doctorate degrees and accounted for 67% of the U.S. science and engineering workforce between 1995 and 2006. According to the National Science Foundation more than 58% of graduate students in computer sciences in the U.S. are foreign nationals, as are more than 68% of students in

(Continued on page 5)

Notice for Travelers

U.S. Customs and Border Protection reminds U.S. and Canadian citizens that on June 1, 2009 the Western Hemisphere Travel Initiative went into effect. This requires that travelers – including U.S. and Canadian citizens – at land and sea ports of entry, present an approved travel document to enter the U.S. Visit www.getyouhome.gov for information on this requirement and how to obtain appropriate documents.

USCIS Updates FY 2010 H-1B Count

As of July 10, 2009, approximately 44,000 H-1B cap-subject petitions have been received by USCIS and counted towards the H-1B cap. Approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limits.

Abandonment *(Continued from page 1)*

returns, and other objective evidence. It is also important to note that brief return-trips to the U.S. do not definitively protect against abandonment.

One strategy for permanent residents planning an extended temporary absence from the U.S. is to apply for a re-entry permit in advance of departing. This document is a must if the absence will be longer than one year. Technically, the document prevents CBP from finding abandonment of resident status *solely* based on the length of the absence. Practically speaking, regardless of the expected length of the absence, a re-entry permit (including the act of applying for one prior to departure) is one of the best ways that a permanent resident can express his or her intent to maintain permanent residence.

For permanent residents who have been outside the U.S. for more than one year, it is also possible to apply to a U.S. Consulate for a "returning resident" visa, which requires substantial documentation of ongoing ties to the U.S. and the intent to maintain residence.

The ultimate proactive step that a permanent resident can take to preserve the ability to return to the U.S. following absences abroad is to acquire U.S. citizenship through the process of naturalization. It is important to consider how the acquisition of U.S. citizenship may affect a person's foreign citizenship status, but one advantage of U.S. citizenship is that it essentially cannot be lost (except based on voluntary renunciation, fraud in obtaining citizenship, or commission of certain acts of treason or subversion). In fact, it is also important to remember that, among other naturalization eligibility requirements, a single absence of more than six months from the U.S. is generally considered to interrupt the three- or five-year period of continuous U.S. residence that is required for naturalization, and a permanent resident must generally be physically present in the U.S. for at least half of the required three- or five-year period.

In conclusion, permanent residents should remember that their status can be lost, and that trips out of the U.S. require careful planning and consideration of the issues surrounding the maintenance-abandonment framework. Anyone contemplating lengthy or repeated absences from the U.S.—or with general questions regarding maintenance of status or eligibility for naturalization—should obtain legal counsel regarding the appropriate steps.

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.

ICE Launches Initiative to Step Up Audits of Businesses' Employment Records

On July 1, 2009 U.S. Immigration and Customs Enforcement (ICE) announced it is launching a bold, new audit initiative by issuing Notices of Inspection (NOIs) to 652 businesses nationwide – which is more than ICE issued throughout all of the last fiscal year. The notices alert business owners that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification laws and regulations. Inspections are one of the most powerful tools the federal government has to enforce employment and immigration laws. This new initiative illustrates ICE's increased focus on holding employers accountable for their hiring practices and enforcing the I-9 employment eligibility verification process.

Employers are required to complete and retain a Form I-9 for each individual they hire for employment in the United States. This form requires employers to review and record the individual's identity document(s) and determine whether the document(s) reasonably appear to be genuine and related to the individual. On June 26, 2009, U.S. Citizenship and Immigration Services (USCIS) announced that that the Employment Eligibility Verification Form I-9 (Rev. 2/2/09) currently on the USCIS Web site will continue to be valid for use beyond June 30, 2009.

Support *(Continued from page 2)*

the same documentation, will be required.

The I-864 is intended to keep foreign nationals off public assistance by allowing government agencies to "deem" the sponsor's income to the foreign national for purposes of determining eligibility for the benefit. If the sponsor has sufficient income, the foreign national will be considered over-income for most benefits. However, if the foreign national is granted benefits, the government agency providing those benefits could seek reimbursement from the sponsor. To date, this has not been happening on a large scale, because it is not generally cost-effective. It is difficult to determine, therefore, how such enforcement efforts might actually play out.

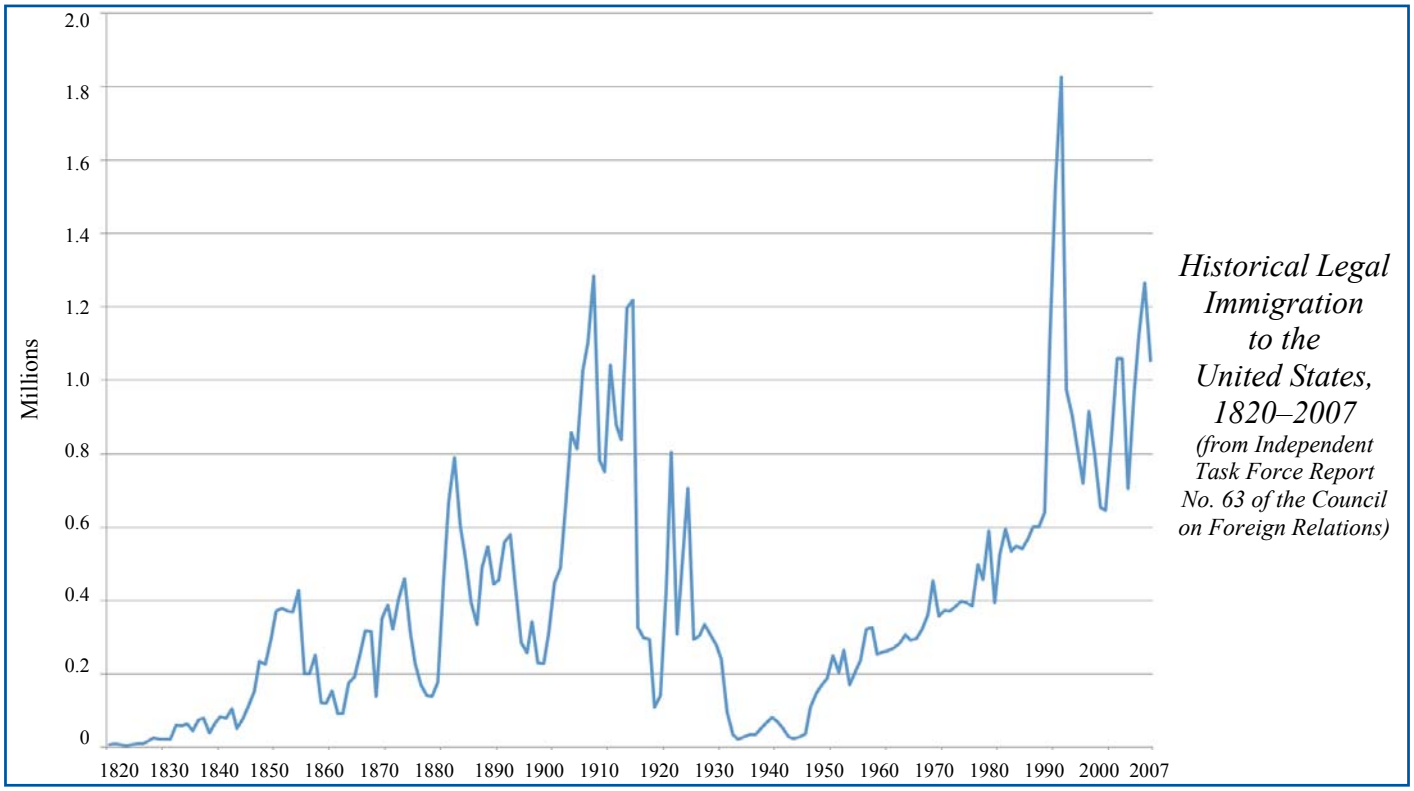
The I-864 Affidavit of Support is enforceable for a substantial time period, potentially for the lifetime of the foreign national. The I-864 terminates upon the first to occur of the following: 1) the foreign national becomes a U.S. citizen; 2) the foreign national accrues 40 quarters under the U.S. Social Security system; 3) the foreign national permanently departs the U.S.; or 4) the foreign national dies. The liability does not necessarily die with the sponsor, however; any benefits that the foreign national received prior to the sponsor's death can be recouped from the sponsor's estate. Termination of the family relationship (for example, by divorce) does not terminate liability under the I-864.

It has also become clear in recent years that the I-864 Affidavit of Support may be enforceable by the foreign national **against the sponsor**. The instructions to the I-864 clearly state: "By signing this form, you, the sponsor, agree to support the intending immigrant and any spouse and/or children immigrating with him or her…" [Form I-864, p.1 (Sponsor's Obligation)]. Part 7 of the I-864 further states: "I agree to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines. I understand that my obligation will continue until my death or the sponsored immigrant(s) have become U.S. citizens, can be credited with 40 quarters of work, depart the United States permanently, or die."

Based upon this language, some courts (in New York, New Jersey, Indiana, Ohio and Florida) have found the document enforceable and ordered support payments to the foreign national spouse.

Because the I-864 Affidavit of Support requirement involves a complex network of financial calculations, obligations, and documentation, it is advisable for participants in the permanent residence process to obtain legal advice before moving forward.

Cynthia C. Arn *received her B.A. from Wellesley College and her law degree from the University of Maine School of Law. Cynthia is a member of the American Immigration Lawyers' Association and serves on the board of the Immigrant Legal Advocacy Project. She has practiced immigration law since 1988, focusing primarily on family-sponsored immigration, deportation defense, citizenship, and asylum.*



Historical Legal Immigration to the United States, 1820–2007
(from Independent Task Force Report No. 63 of the Council on Foreign Relations)

USCIS Announces Premium Processing for most I-140 Petitions

USCIS has announced that most employment-based (EB) immigrant petitions (I-140s) will be eligible for premium processing starting June 29, 2009. Premium processing will be available for Persons of Extraordinary Ability and Outstanding Professors and Researchers, petitions that are not for National Interest Waivers, and petitions for Professionals, Skilled and Unskilled Workers. The only I-140 petitions that are specifically excluded from the program are those for Multinational Executives and Managers, and National Interest Waivers. By requesting premium processing service and paying an additional $1,000 in filing fees, USCIS must initially process the petition within 15 calendar days of its receipt. If, in that time frame, USCIS fails to issue either an approval, a request for evidence, a notice of intent to deny or to open an investigation for fraud or misrepresentation, premium processing will continue, but USCIS is required to refund the $1,000 fee. Although immigrant visas in many categories are either unavailable or significantly backlogged, there may still be reasons why you might want to pursue premium processing. We would be happy to discuss these reasons with you to help determine if there is a significant enough benefit to warrant the additional cost.

Economy *(Continued from page 2)*

graduate electrical engineering programs. Further, a study released in March 2008 by the National Foundation for American Policy (NFAP), *H-1B Visas and Job Creation*, further bolsters the connection between highly skilled foreign workers and the expansion of U.S. jobs. The NFAP found that among technology companies in the Standard and Poor's (S&P) 500, there is a positive and statistically significant association between the number of H-1B temporary "specialty" workers requested by employers and the creation of new job opportunities. According to the NFAP "for every H-1B position requested, U.S. technology companies increase their employment by 5 workers" on average.

As *New York Times* Op-ed columnist Thomas L. Friedman commented in a column on February 10, 2009: "In an age when attracting the first round intellectual draft choices from around the world is the most important competitive advantage a knowledge economy can have, why would we add barriers against such brainpower-anywhere." Indeed, in an earlier column written after attending a graduation ceremony at Rensselaer Polytechnic Institute, Mr. Friedman rhetorically asked why U.S. Department of Homeland Security officials were not present handing out green cards along with diplomas, as so many of the graduates were foreign nationals. One would think we would eagerly welcome these graduates with open arms. Instead, as noted in a recent May 2009 *U.S.A. Today* editorial, "our government tells thousands of them to hit the road – and take their sought-after skills and brainpower to countries and companies that compete with the USA. Talk about a self defeating immigration policy."

Indeed, our outdated visa quota system makes the attainment of lawful status virtually unattainable. The waiting lines for employment-based immigrant visas are absurd. A graduate of MIT with a master's degree in electrical engineering born in India or China, for instance, must wait 10 years to obtain a green card even after the Department of Labor has certified there are no U.S. workers available to perform an offered position. At this time, no immigrant visas are available in the employment-based three (EB-3) preference category for persons with bachelor's degrees, even in science, technology, engineering or mathematics. Even when additional visas become available at the start of the next fiscal year on October 1, 2009, the Department of State currently estimates the worldwide EB-3 cut-off date will be March 1, 2003.

As Federal Reserve Chairman Ben Bernake recently testified before a congressional panel, "Our immigration laws discriminate pretty heavily against talented scientists and engineers who want to come to this country and be part of our technological establishment. By opening doors to more people with top technological skills, you'd keep companies here, and you'd have more innovation here, and you'd have more growth here." Indeed, when companies cannot hire the talent they need here, they go elsewhere. A case in point, in 2007 Microsoft expanded from its home in Redmond, Washington into Vancouver, and did its hiring in Canada, in large part because it could not hire the workers it needed here. Now, if the cost of skilled labor in China and India is a fraction of what it is in the U.S. and our government will not allow American companies to employ highly skilled foreign workers here (even when they must pay the foreign workers wages that will not adversely affect the wages of similarly employed U.S. workers), it does not take a rocket scientist to figure out why U.S. jobs are going abroad.

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.*

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

Let us know what you think…

Please let us know if you would prefer to receive a hard copy or an email version of our newsletter. You can also contact us if you would no longer like to be on our mailing list.

Our old newsletters can also be found on our web site at www.landisarn.com/newsletters.html!

LANDIS ARN & JAYNES, P.A.
IMMIGRATION SOLUTIONS

This is a publication of the law firm of Landis Arn & Jaynes, P.A., located in Portland, Maine. Landis Arn & Jaynes is devoted exclusively to the practice of immigration and naturalization law, providing advice and representation since 1980 in matters involving employment-based and business-related immigration, as well as family-based immigration, naturalization, asylum and deportation defense. The lawyers of Landis Arn & Jaynes, P.A. have established a track record of success and are fully committed to providing the very best immigration advice and representation to their clients. Please call (207) 775-6371 or e-mail info@landisarn.com to set up a consultation appointment so that we can put our expertise and experience to work for you.