LANDIS & ARN, P.A.
IMMIGRATION SOLUTIONS

November 2008 Newsletter

# When Hockey and Immigration Collide

*by Peter J. Landis, Esquire*

In 2003 the Lewiston MAINEiacs broke new ground and became the first Quebec Major Junior Hockey League team to set up operations in the U.S. Founded in 1969, the Quebec Major Junior Hockey League (QMJHL) is made up of 18 teams based throughout Quebec, the Maritime Provinces and, now, Maine. QMJHL along with the Ontario Hockey League and the Western Hockey League comprise the Canadian Hockey League (CHL) a developmental league for hockey players between the ages of 16 and 20 years who have been identified as prospective professional hockey players and selected through a highly competitive process. The highest level of amateur hockey in Canada and the United States, the CHL is in fact the major source of talent for the National Hockey League (NHL). Over fifty percent of the players in the NHL have played in the CHL. To play in the NHL, players must be at least 18 years old. To play in one of the U.S.-based professional minor hockey leagues with NHL affiliated teams like the American Hockey League, players must be at least 20 years old. Many of the CHL players who ultimately made it to the NHL – like Sidney Crosby, Wayne Gretzky, Ray Bourque, Bobby Orr and Patrick Roy – began in the CHL because they were too young to play in the NHL and/or needed additional time and experience to mature and to develop their skills. Although the majority of CHL players are school age and continue to pursue their education, CHL players are not eligible under National Collegiate Athletic Association rules to participate in hockey at a college or university in the United States because they receive small stipends to help defray some of their costs while playing in the CHL.

According to Matt McKnight, President and Governor of the Lewiston MAINEiacs, the team's inaugural season in the fall of 2003 was incredibly challenging. In addition to starting up all of the business and hockey operations, the team had to put together a coaching staff, select players and obtain immigration status for most of the players, who were either Canadian or European. In addition, the head coach was also a Canadian citizen who needed a work visa to coach the team. The immigration options for both players and coaches were quite limited and complicated. Fortunately, the head coach had a long and illustrious coaching career in the QMJHL, the NHL and at the elite international level, and consequently qualified for O-1 status as a person of extraordinary ability in their field. The players were another matter entirely.

Where QMJHL players are prospects and for the most part are not yet players who have achieved national or international renown, the only viable immigration option involved the H-2B category for temporary non-agricultural workers coming to perform a position for which the employer has a temporary need involving either a one time occurrence or a seasonal, peak-load, or intermittent need. Although the team's hockey season clearly met the seasonal-need criteria, the H-2B process presented enormous obstacles including competing for a limited number of annual visas. Serious constraints were also associated with obtaining a temporary labor certification from the U.S. Department of Labor, which made it virtually

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## The Joys of Immigration Law: Family Reunification

One of the joys of practicing immigration law is getting to know people from all over the world. We especially enjoy those cases where we are able to reunite families who have been separated, in some cases for many years. Such was the case with the S. family. Mr. S. came to the U.S. from Africa in 2002, fleeing persecution. He was forced to leave behind his two sons, ages 4 and 6. Ultimately we were able to assist Mr. S. in obtaining permanent residence in the U.S. His sons arrived in the U.S. as lawful permanent residents on March 1, 2008. Now aged 10 and 12, the two boys had not seen their father for 6 years. They are pictured to the left in our conference room with Cynthia Arn. The family resides in southern Maine.

## I-9 Compliance and E-Verify — Ready for Prime Time?

*by Cynthia C. Arn, Esquire*

**What is E-Verify?**

Many employers, aware that they are required by the Department of Homeland Security (DHS) to verify that all of their employees are permitted to work in the U.S., would like more simplicity and certainty in the process. Many have heard of E-Verify and wonder if they can or should make use of the program. The purpose of this article is to explain how E-Verify works and to identify our concerns with the program as it currently exists.

E-Verify is a program administered by DHS, in conjunction with the Social Security Administration (SSA). The program enables employers to electronically verify employment authorization of newly hired workers through the SSA and DHS databases. Employers must still complete and maintain I-9 forms, as before, and cannot use E-Verify as a screening tool. E-Verify can be accessed only after the employee has been hired and completed an I-9. The program is free, but companies may need to develop software that works with the database.

DHS has made E-Verify the cornerstone of its employment verification program, and use of E-Verify is expanding. On November 13, 2008, USCIS announced that, as of January 15, 2009, federal contractors and subcontractors must use E-verify to verify work authorization (www.uscis.gov/files/article/FAR_13Nov08.pdf). A number of states (Arizona, Georgia, Colorado, Oklahoma and Missouri) have also enacted mandates requiring employers to use E-Verify. However, E-Verify remains a controversial program, and pending litigation has prevented any state from enforcing mandated use. Due to concerns about undue burdens on employers and risks to employees, other states (Illinois and California) either have or are considering legislation forbidding employers from using E-Verify.

**How does E-Verify work?**

To use E-Verify, the employer must register online and sign on to a nine-page "Memorandum of Understanding," which sets forth rights and responsibilities of all parties under the program. The MOU can be found on-line at: www.uscis.gov/files/nativedocuments/MOU.pdf. Among other things, the employer must:

- ◊ Post a notice informing employees of their use of E-Verify;
- ◊ Use E-Verify for all new hires regardless of national origin or citizenship status. It may not be used selectively or for previously hired employees;
- ◊ Use E-Verify only after hire and after completion of the Form I-9. Employers may not pre-screen applicants through E-Verify;
- ◊ Promptly provide employees who receive an information mismatch from their Form I-9 and SSA and DHS databases

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## Consular Processing for Nonimmigrant Visas: A Matter of Intent

*by Marcus B. Jaynes, Esquire*

Almost every foreign national who does not already have permission to enter the United States must apply for a visa in order to travel to the United States. In a perfect world, this process would involve simply stating one's intentions and proving one's identity; in the modern world, however, the process inherently involves alleviating the government's suspicions of fraud and illegal immigration activity.

**Introduction and Basic Terminology**

Consular processing occurs when a foreign national submits a visa application to a U.S. Consulate outside the U.S. U.S. Consulates are operated by the U.S. Department of State and are a key component of the U.S. Embassy's operations in a given country. A U.S. Visa—as opposed to an immigration *status*—is a document which is stamped onto a full page of a person's passport and allows that person to present himself at a U.S. Port of Entry (border office at an airport, seaport, or land border) for admission to the U.S. in a particular status. For example, a person might submit an application for a tourist/visitor (or B-2) visa at the U.S. Consulate in Brussels, Belgium; if approved, he might then arrive at Logan Airport in Boston, and present the *visa*, seeking admission to the U.S. as a visitor; the border official might then admit that person to the U.S. in visitor *status*, granting a period of stay in the U.S. of up to six months.

In submitting a visa application, a foreign national would apply for either an immigrant or nonimmigrant visa. An *immigrant visa* is a visa to enter the U.S. as a lawful permanent resident, the status commonly associated with the term "green card." This provides the foreign national with the ability to permanently live in, work in, and travel to and from the U.S. A *nonimmigrant visa* is tied to a temporary stay in the U.S. The subject of this article is the unique analysis that a Consular Officer must undertake to determine whether a nonimmigrant visa applicant truly intends to be in the U.S. temporarily.

**Nonimmigrant vs. Immigrant Intent: Presumed Guilty Until Proven Innocent**

With the exception of certain—but not all—employment-based nonimmigrant classifications (e.g., H, L, O, and P), nonimmigrant visa (NIV) applicants are required to show that they intend to remain in the U.S. temporarily and that they have an intent to return to their home countries at the conclusion of their temporary stay in the U.S.; in some cases, NIV applicants are even required to show that they have an unabandoned foreign residence to which they intend to return.

The requirement to demonstrate nonimmigrant intent is considered so important that a *presumption* of immigrant intent has been written into the law. This presumption requires that,

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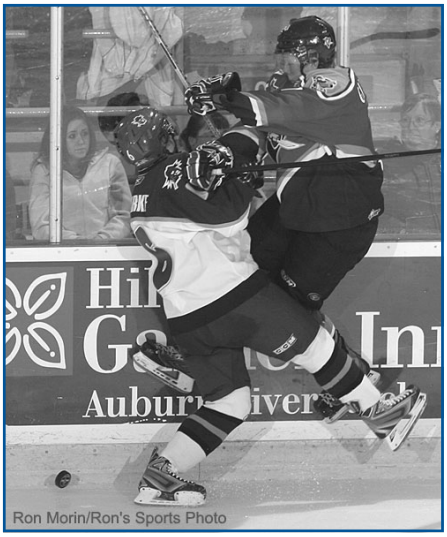
***Hockey*** *(Continued from page 1)*

impossible to complete the process far enough in advance to ensure that the players who made the team would be able to acquire the necessary immigration status by the start of the season. Matt McKnight recalls he did not know if the team would have enough players to start the season right up until the team's first game. In fact, the following season the team could not schedule home games until October 1st because the annual limitation on H-2B numbers had been reached. Consequently the team was forced to spend the first three weeks of its season playing games and practicing in Canada. Although the Lewiston community had welcomed the team with open arms, the immigration process was not nearly so hospitable.


Ron Morin/Ron's Sports Photo

Help was on the way, however. Noting the difficulty the team had encountered in negotiating the immigration process and the importance of the team not only to the city of Lewiston and surrounding communities, but to the state, Senator Susan Collins sponsored legislation in Congress expanding the P-1 visa category for athletes and entertainers to include individual coaches or athletes performing with teams or franchises located in the U.S. that are part of an international league or association of 15 or more amateur sports teams if: 1) the foreign league is operating at the highest level of amateur performance in the foreign country, 2) participation in the foreign league renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship or participate in the sport at a college or university in the United States under the rules of the National Collegiate Athletic Association, and 3) a significant number of players who play in the foreign leagues are drafted by major league or minor league affiliates of such sports teams in the United States. This legislation (Public Law 109-463, Creating Opportunities for Minor League Professional, Entertainers, and Teams through Legal Entry Act of 2006) was passed by Congress and signed into law in December 2006. It provides the Lewiston MAINEiacs, as well as many other amateur and minor league teams in various sports, the ability to bring in foreign prospects and outstanding players in an orderly and timely manner. As explained by Matt McKnight: "The legislation drafted by Senator Susan Collins, dubbed the 'MAINEiacs amendment,' was not only effective in resolving our immigration concerns, but came to the aid of many other organizations and leagues who were facing similar problems utilizing the H-2B visa category for their athletes. It was an exciting opportunity to be consulted in the process of amending the P-1 visa category that now provides our team the opportunity to focus on our core business of recruiting and developing the best available talent, regardless of nationality."

The Lewiston MAINEiacs' experience is a good illustration of how difficult it can be for many businesses to navigate the immigration process. It is also an example of how a pragmatic and common sense legislative approach can help solve serious obstacles created by an immigration system that is unresponsive to the marketplace and help create jobs that benefit both a business and a community.

The attorneys at Landis & Arn are available to answer any questions related to U.S. immigration procedures and laws, including questions regarding the process involved with employing foreign nationals.

*This article is published with the permission of the Lewiston MAINEiacs Hockey Club.*

## Conrad 30 J-1 Program Extended: Number of Flex Slots Increased from 5 to 10

On October 8, 2008, President Bush signed into law an extension of the Conrad 30 program (H.R. 5571 / P.L. 110-362) through March 6, 2009. The program had sunset as on June 1, 2008, meaning that unless extended new J-1 physicians entering the U.S. in J-1 status for the first time after June 1, 2008 would not have been eligible for a waiver of the two year home residence requirement based upon a Conrad 30 waiver. One substantive change in the program is very helpful. Under previous rules, each state has five "flex" slots to be used annually for facilities that are not physically located in federally designated shortage areas if the state health officer certifies that the physician is serving a substantial patient population residing in designated shortage areas. The annual flex slots have been increased from 5 to 10.

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***E-Verify*** *(Continued from page 2)*

with information about how to challenge the information mismatch;

- ◊ Not take any adverse action against an employee because he/she contests the information mismatch. This includes firing, suspending, withholding pay or training, or otherwise infringing upon his/her employment;
- ◊ Provide the employee with eight federal government work days to contact the appropriate federal agency to contest the information mismatch;
- ◊ Terminate the employee if the mismatch cannot be corrected within the specified timeframe;
- ◊ Notify the government if he continues to employ an individual after final non-confirmation; and
- ◊ Agree to become familiar with and comply with the E-Verify Manual (approximately 150 pages).

Failure to report the continued employment of the employee can result in fines of between $550 and $1,100 for each such employee. In addition, if the employer is audited by DHS for their overall compliance with the I-9 program, continued employment of such an individual could result in a charge that the employer "knowingly" employed an unauthorized alien. This carries a fairly high fine, in addition to the fines listed above for failing to report the employee.

**Should Employers Use E-Verify?**

One organization that has filed a negative assessment of the use of E-Verify on a widespread or mandatory basis is the U.S. Chamber of Commerce. "The E-Verify system is not ready for prime time," said Randel Johnson, the Chamber's vice president of labor, immigration, and employee benefits. The sheer amount of data in the SSA and DHS databases (according to DHS, SSA has over 444 million records, and DHS has more than 60 million records in their own database) understandably causes concern over the likelihood of errors in the data, as well as difficulty in having such errors corrected in a timely fashion.

According to the SSA, 7 out of every 100 workers currently run though E-Verify result in an initial mismatch. The SSA database, according to the SSA's Inspector General, has a 4.1 percent inaccuracy rate. According to Jim Harper, director of information policy studies at the Cato Institute in Washington, that means that about 17 million people's names may not be exactly correct or there was an error when their information, such as date of birth, was entered. Though they are here legally, those residents would come back as 'tentative non-confirmations.' "As a matter of simple math, that means that if E-Verify were to go national, on the first day 1 in 25 legal new hires would be bounced out of the system."

Another concern is whether E-Verify will actually produce the desired result. Since E-Verify cannot tell if a worker is submitting a stolen Social Security number, some critics speculate that widespread use of E-Verify may actually encourage identity theft by individuals desperate to find work.

At this point, employers with effective I-9 compliance programs would be hard pressed to find adequate incentive to voluntarily participate in E-Verify. They may have no choice, if they do business in one of the states that may soon require participation in E-Verify, since it is an "all or nothing" proposition. Further, apart from policy and privacy concerns that arise from the government maintaining a massive database about U.S. workers that must be accessed before a person is allowed to work, the potential benefits of an electronic verification system pales in comparison to the huge costs required to ensure that such a massive database is accurate. SSA would need to expand significantly to meet the new burden imposed by E-Verify as a national system. At present, E-Verify is more of a barrier to the hiring and retention of needed workers than it is a quick and easy solution.

The attorneys at Landis & Arn are available to answer any questions related to E-Verify and I-9 compliance.

## Electronic System for Travel Authorization (ESTA)

The Department of Homeland Security has created an internet-based travel authorization system to verify that people who are entering the United States on the **Visa Waiver Program** are pre-authorized to travel before they arrive in the United States. The program only authorizes a traveler to board a carrier to travel to the U.S.; it does not make a determination on a non-citizen's admissibility to the United States. This determination is left to the inspecting Customs and Border Protection officer at the Port of Entry. The use of ESTA for travel pre-authorization will become **mandatory** as of **January 12, 2009**. An ESTA travel authorization will be good for two years, or until the individual's passport expires, whichever comes first. For more information, visit the ESTA website at www.cbp.gov/xp/cgov/travel/id_visa/esta.

## New International Travel Document Requirement

Beginning June 1, 2009, Customs and Border Protection (CBP) will require that all people, including U.S. citizens, entering the U.S. from Canada, Mexico, and the Caribbean be in possession of certain travel documents to establish the identity and nationality of the traveler. As part of its multi-media campaign advertising the initiation of this program, CBP has launched a desktop widget designed to remind travelers to update their travel documents in anticipation of upcoming international travel. Visit www.getyouhome.gov for more information or to download the desktop widget.

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## USCIS Increases Period of Stay for Trade-NAFTA Professional Workers

U.S. Citizenship and Immigration Services announced on October 14, 2008 that it has increased the maximum period of time a Trade-NAFTA (TN) professional worker from Canada or Mexico may remain in the United States before seeking readmission or obtaining an extension of stay. The final rule changes the period of admission for TN workers from one to three years. The TN nonimmigrant visa category is available to eligible citizens of Canada and Mexico with at least a bachelor's degree or appropriate professional credentials who work in certain listed professions as set forth in the North American Free Trade Agreement (NAFTA). Qualified professions identified within NAFTA include, but are not limited to, accountants, engineers, attorneys, pharmacists, scientists, and teachers. Spouses and unmarried minor children of TN non-immigrants are also eligible for three-year periods of admission in a corresponding nonimmigrant visa category (TD) so that they can accompany the principal TN worker.

***NIV*** *(Continued from page 2)*

when presented with a nonimmigrant visa application (with limited exceptions), a consular official must begin with the presumption that the applicant is an intending immigrant, and must not approve the application until adequate evidence is presented to rebut or overcome that presumption. That is, when an applicant presents a visa application indicating on its face that a visa is being requested for *temporary* entry to the U.S., the officer must nonetheless presume that the applicant actually intends to enter the U.S. for the purpose of remaining permanently in the country—whether legally or illegally. Therefore, applicants seeking, for example, to visit (B-2), pursue education (F-1), or participate in an exchange program (J-1), must be prepared to present evidence to show not only that they meet the qualifications of the visa they are requesting, but that they have an intent to return to their home countries following a temporary stay in the U.S. This requires evidence of family ties, employment ties, property ties, financial ties, or other ties to the home country.

**Exception to the Rule: The Doctrine of Dual Intent**

As noted above, even though nonimmigrants must demonstrate that they intend to remain in the U.S. temporarily, certain employment-based nonimmigrants are permitted to have both a short-term intent to be in the U.S. temporarily and a long-term intent to remain permanently. Due to substantial backlogs (and quotas) regarding the availability of permanent residence in the U.S. based on offers of employment, many employers and employees rely on nonimmigrant employment-based visa classifications so that foreign nationals can be present and employed in the U.S. while they are waiting for the permanent resident process to progress. Recognizing that an insistence on the demonstration of nonimmigrant intent for the issuance of nonimmigrant visas to certain foreign workers would be unfair to foreign nationals subject to backlogs and quotas—and gravely detrimental to the productivity of U.S. businesses and the competitiveness and stability of the U.S. economy—the U.S. Department of State and the U.S. Department of Homeland Security have established the doctrine of dual intent in these narrow circumstances.

**The Prevalence of Fraud in Nonimmigrant Visa Processing**

In some countries, it is very difficult—if not virtually impossible—to obtain certain nonimmigrant visa classifications (especially student and visitor classifications) because fraud is so prevalent. Consular officials have learned that many applicants are willing to go to great lengths to create a false impression that they intend to return home after temporarily entering the U.S., so that they can actually enter the U.S. and remain illegally. For example, round-trip plane tickets are often insufficient evidence of nonimmigrant intent, as many applicants are willing to incur the added expense of purchasing travel arrangements that they do not intend to use. Applicants will even go as far as to make tuition payments to colleges and universities that they do not intend to attend.

For legitimate visa applicants who do possess the requisite nonimmigrant intent, this fraudulent activity can make the nonimmigrant visa application process extremely difficult and frustrating, even for an applicant who simply wants to take a vacation to the U.S., attend a wedding, or visit colleges and universities. It is thus critically important for visa applicants to prepare for their interviews by understanding the nature of the immigrant intent presumption, and by assembling the appropriate documentary evidence in connection with both the classification they are seeking as well as the required intent.

The attorneys at Landis & Arn are available to answer any questions related to U.S. immigration procedures and laws, including questions regarding the nonimmigrant visa application process for those intending to visit, study, and work in the U.S.

## PERM Labor Certifications FY2008

◊ 90,039 PERM applications were submitted
◊ Approximately 49,205 cases were certified
◊ More than 27% were certified for employment in the computer industry
◊ 179 countries were represented
◊ 16,569 were from India, almost 5 times more than the next highest represented country: Mexico

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This is a publication of the law firm of Landis & Arn, P.A., located in Portland, Maine. Landis & Arn 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, 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.