Immigration and Naturalization Committee Newsletter

Summer 2005 Volume VIII, Issue 3

Editor: Susan J. Cohen, Esquire
Mintz, Levin, Cohn, Ferris,
Glovksy and Popeo, PC

Contents

Brief Overview of United Nations Activities Involving Migration Issues

UN Decision-Making on Refugee Status: Implications for American Asylum Policy

Attracting Highly Skilled Students and Workers to the U.S.: An Unraveling Affair?

Disregard for Traffic Regulations Could Result in the Denial of U.S. Citizenship

Brief Overview of United Nations Activities Involving Migration Issues

By: Darlene Prescott

In the area of migration, the UN plays many roles, e.g., adoption of legal instruments; provision of legal and humanitarian assistance to migrants and refugees; and the interpretation of international law. This article gives a brief summary of these immigration-related functions of the UN.

UN Legal instruments

While every nation has established laws regulating who can visit, become a citizen, etc., there also exists an international legal regime, covering the rights of migrants, refugees and those involuntarily transported, within a country and to another country. This international legal regime consists, inter alia, of conventions and protocols. For a country to be bound by an international legal instrument, it, of course, must have ratified that instrument and incorporated it into its national legal framework. The importance given to that legal instrument also will be subject to interpretation in many cases by the national judiciary.

The following legal instruments regarding issues relating to migrants and refugees, as well as relating to rights to a nationality, have been adopted under the auspices of the UN: Convention relating to the Status of Refugees (1951); Convention relating to the Status of Stateless Persons (1954); Convention on the Reduction of Statelessness (1961); the Protocol relating to the Status of Refugees (1967); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and the

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000).

There also are a number of other legal instruments that prohibit slavery, including trafficking in persons, which usually involves the transportation of people across state boundaries.

International Law Commission (ILC)

The ILC, which was established by the UN General Assembly in 1947 to develop and codify international law, carries out studies on various issues of international law, and has produced a number of draft legal instruments that have been adopted by UN Member States.

In 1993, an outline on "the law concerning international migrations" was prepared by an ILC member (Guillaume Pambou-Tchivounda). In the outline, it was concluded that the legal framework for international migration lacks conceptual homogeneity and noted that the issue of whether migration problems are a domestic or an international concern has not been resolved. However, as the Commission member pointed out, there are questions that are international in scope, such as transit and transmigration; applicability of national legislation in foreign territory; problems specific to citizens already living in foreign territory as refugees, or who have been expelled or are stateless; and aliens working outside their countries but usually intending to return. The outline calls for an "overhaul of the applicable regime from a unified, global perspective". This topic has been placed on the Commission's long-term program for further consideration.

Notwithstanding the conclusions contained in the outline, at a forum on migration held at Fairfield University in May 2005, it was reported that the United States Government opposed both the formation of a new UN agency to deal with international migration and the creation of a convention on the subject. Instead, the United States favored regional approaches as the most effective way to deal with concerns arising from migration.

At the current, summer 2005 session of the ILC, held in Geneva, a preliminary report on the "expulsion of aliens" was submitted by the Special Rapporteur, Maurice Kamto. The report, which contains an overview of the relevant legal issues raised and the problems associated with their consideration, provides a basis for future consideration of the topic by the ILC members.

Office of the United Nations High Commissioner for Refugees (UNHCR)

The UNHCR, established by the UN General Assembly in 1950, is mandated to safeguard the rights and well-being of refugees.

The 1951 Convention relating to the Status of Refugees (mentioned above) (hereinafter "the 1951 Convention") is the key legal document in defining who is a refugee, the rights of refugees, and the legal obligations of nations. Using the 1951 Convention, UNHCR promotes the basic human rights of refugees and the principle that they should not be returned involuntarily to a country where they face persecution. The 1951 Convention helps them to repatriate to their homeland when conditions permit, integrate into states of asylum or resettle in third countries. UNHCR promotes international refugee agreements, helps governments establish asylum structures and acts as an international watchdog over refugee issues.

UN Office for the Coordination of Humanitarian Affairs (OCHA)

The OCHA coordinates the humanitarian response to complex emergencies and natural disasters, as well as policy development and humanitarian advocacy. It has been determined

that, globally, there are twice as many conflict-induced internally displaced persons (IDPs) as refugees (13 million in Africa alone), while 90 per cent of all refugees stay in their regions of origin. Based on this reality, in July 2004 the UN Secretary-General established the Inter-Agency Internal Displacement Division within OCHA, to promote system-wide improvements in the response to the needs of the IDPs, as well as to provide targeted support to specific country situations.

UN human rights bodies

The UN Commission on Human Rights, established in 1946, is composed of 53 States members, and meets annually in Geneva. The Commission sets standards to govern the conduct of States and acts as a forum for countries to voice their concerns in the human rights area. The Commission adopts resolutions and issues reports on various human rights issues, including those relating to migration. In 1999, the Commission created the post of Special Rapporteur on the Human Rights of Migrants. There also is the newly-created Committee on Migrant Workers, which is composed of a body of independent experts that monitors implementation of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (mentioned above) by its States parties.

Due to criticism of the membership and work of the Commission, the UN Secretary-General has proposed to UN Member States that they replace the Commission with a smaller Human Rights Council. He stated that the new Council should be a "society of the committed" and should be more accountable and more representative. One has to assume that this change would bring about more positive results, including in the area of migrant rights.

UN Security Council, General Assembly & the Secretary-General

All three entities are and have been involved with migration issues. The Security Council has monitored and taken actions in situations, for example, involving forced deportations of peoples, pursuant to its primary responsibility under the UN Charter for the maintenance of international peace and security. The General Assembly, the main deliberative body of the UN, routinely receives reports from the various bodies dealing with migration and refugees matters. The Secretary-General is mandated to submit these reports on the work of the Organization to the General Assembly.

UN specialized agencies

The International Labour Organization (ILO), a specialized agency of the UN, also has adopted conventions in this area, mainly dealing with employment issues of migrants, e.g., the Convention Concerning Migration for Employment (Revised 1949) and the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975).

The ILO further carries out other activities in support of migrants. For example, the Agency carried out a survey of migrants in 1999, which indicated that global migration was on the rise, with both the number of sending and receiving countries increasing. The survey also pointed out that the few countries, such as Australia, Canada and New Zealand, that continued to accept migrants for permanent settlement, have changed their immigration policies and temporary migration has become increasingly favored. Europe also appeared to be adopting policies favoring temporary or project-tied migration. As a result of this trend, it was noted in the survey that some provisions of the migration conventions had become irrelevant.

It appears that the United States is moving in the same direction. President George W. Bush has proposed a new "temporary worker program" to match foreign workers willing US

employees when no Americans can be found to fill the jobs.

The UN Educational, Scientific and Cultural Organization (UNESCO), another UN specialized agency, also carries out work in the migration area. UNESCO explains that it has two main priorities in the field of international migration: 1) promotion of respect for the human rights of migrants; and 2) preparation of policies that can cope with future migration trends.

International Court of Justice (ICJ)

The ICJ, the principal judicial organ of the UN, which considers cases brought by UN Member States, issued a judgment in 1955 concerning the nationality of an individual. The case (*Nottebohm (Liechtenstein v. Guatemala)*) was brought by Liechtenstein, which, at the outbreak of the Second World War, had conferred citizenship upon a German national living in Guatemala. Guatemala had refused to recognize the change of nationality (from a belligerent country to a neutral one) and Liechtenstein had claimed restitution and compensation due to Guatemala's refusal. The Court concluded that the granting of citizenship upon Nottebohm by Liechtenstein was "without regard to the concept of nationality adopted in international relations" and held, therefore, that the claim of Liechtenstein was inadmissible.

Other tribunals

The prosecution of individuals for the deportation of populations has been placed under the jurisdiction of two recently created tribunals (one ad hoc and the other permanent). The International Criminal Tribunal for the Former Yugoslavia was established by Security Council resolution 808, of 22 February 1993, to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. "Deportation", when committed in an armed conflict, is one of the crimes covered by the Tribunal's statute, Article 5 "Crimes against humanity".

Under the statute of the International Criminal Court, of 17 July 1998, one of the crimes that can be prosecuted is "deportation or forcible transfer of population" -- when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (Article 7).

G-4 visas

While many of the Organization's activities in this area may seem far removed from the day-to-day grind of the United States immigration machine, there is a direct connection of UN staff members with the United States Citizenship and Immigration Service. UN staff members who are not United States nationals and who work for the Organization in the United States are given G-4 visas. These G-4 holders (and their spouses) can apply for permanent residence as special immigrants upon retirement from the UN, if the staff member has worked for the UN – in the United States – for a minimum of fifteen years. Many such staff take advantage of this option as they have established roots in the US over the years and returning to their home countries is no longer practicable.

Darlene Prescott, an ABA member, is a Legal Officer with the UN Office of Legal Affairs. The views expressed here are her own and do not necessarily reflect those of the UN. Ms. Prescott earned her J.D. from New York Law School and a B.A. in Anthropology from the University of Texas at Austin. She recently was assigned to the UN peacekeeping mission in East Timor (now Timor-Leste), where she served as Head of the Dili District Land and Property Section.

UN Decision-Making on Refugee Status: Implications for American Asylum Policy

By: Emily E. Arnold-Fernandez and Michael Kagan

For approximately two years, the UN High Commissioner for Refugees (UNHCR) has been re-assessing the way it decides refugee cases in dozens of countries. Beyond affecting the lives of tens of thousands of asylum-seekers every year, the issue of how UNHCR conducts refugee status determination (RSD) has important implications for American refugee and asylum policy.

Whereas governments in Europe and North America adjudicate asylum claims on their own, in approximately 80 countries UNHCR decides refugee applications either in lieu of a government procedure or on behalf of a government. In other countries, UNHCR shares responsibility for RSD with a government and its case assessments are often decisive of the official decision. UNHCR received 71,000 individual refugee claims in 2004, more than the U.S., and is the largest refugee decision-maker in the world.

UNHCR's effort to reform its RSD programs is in large part a response to growing criticism from academic scholars and human rights advocates. Although on paper UNHCR is mandated to protect refugee rights, its RSD procedures have substantial gaps in due process that UNHCR routinely urges governments to avoid. UNHCR offices usually give rejected asylum-seekers no reasons for their rejections, and provide no independent appeal authority. Legal advice is limited, and some UNHCR offices have resisted even the principle of the right to counsel for asylum-seekers. UNHCR offices generally reject asylum applications at rates quite similar to governments.

Most alarming from an American perspective, UNHCR relies routinely on secret evidence, withholding from applicants or their lawyers interview transcripts, case assessments, country of origin information and even reports from medical and psychiatric examinations. Hence, while American advocates have resisted the use of secret evidence in relatively exceptional "security" cases, UNHCR is using it routinely in nearly every refugee case.

More information about UNHCR's RSD activities and the ongoing reform effort can be found at www.rsdwatch.org.

The problems in UNHCR RSD procedures fall first and foremost on asylum-seekers, who face an increased risk that they might be errantly refused protection. But this risk also has ramifications for the U.S., even though UNHCR is not highly involved in American asylum adjudication. UNHCR RSD is tied in to American refugee and asylum policy in at least two ways.

The first and most direct connection is through the refugee resettlement program. Unlike the asylum system, which protects refugees who have already reached American soil, the resettlement system brings to the U.S. refugees who first sought asylum in a third country where basic protection was not available. Such countries are nearly always places where UNHCR conducts refugee status determination. In the Middle East, for instance, the US accepts refugee resettlement applications in Egypt, Turkey, Lebanon, Jordan, Syria, Yemen and Kuwait. In all of these countries, UNHCR is the main RSD decision-maker.

On paper, US asylum officers go on "circuit rides" to these countries to screen refugee cases for resettlement. However, refugees usually can only have their applications submitted if they are referred by UNHCR. Hence, UNHCR is actually the main gatekeeper to the US refugee program. Any refugee wrongfully refused protection by UNHCR will also be effectively refused access to the U.S.

A second connection to the UNHCR system could occur when asylum applicants in the US have passed through a UNHCR RSD country before reaching the United States. The reliability of UNHCR's procedures could become a decisive issue in determining whether the person can apply for asylum in the US, especially if he or she declined to apply to UNHCR or was actually rejected by UNHCR.

Nothing in the Immigration and Nationality Act, the Code of Federal Regulations or the Affirmative Asylum Procedures Manual of the U.S. Citizenship and Immigration Services (USCIS) provides explicit guidance on how much weight a U.S. decision-maker may give a prior RSD by UNHCR, or an applicant's failure to apply for asylum through a UNHCR office abroad. This allows a US asylum officer or immigration judge unfettered discretion to use a UNHCR decision, or even the failure to apply to UNHCR, as a primary basis for denying asylum.

One former trial attorney for the Immigration and Naturalization Service (INS, the predecessor agency to USCIS) reports that in his experience, a negative RSD decision by UNHCR abroad was usually grounds for denial of asylum in the US. Failure to apply to UNHCR was not as detrimental to a US asylum claim as a negative RSD, but could impact a judge's decision. Another practitioner notes that rejection by a UNHCR office was recently raised as a concern by an American immigration judge in an asylum case from the Horn of Africa, but the issue was dropped after concerns were raised about the fairness of UNHCR's procedure.

With the passage of the REAL ID Act (P.L. 109-13) (REAL ID) in May of this year, however, even a positive UNHCR RSD may keep an applicant from obtaining asylum in the US. REAL ID significantly increases the potential for UNHCR proceedings to negatively impact a US asylum claim because it allows a US decision-maker to base an adverse credibility determination on any inconsistency between or within any written or oral statements made by the applicant in any context, including statements made during the UNHCR RSD process.

This raises the possibility that testimony from a UNHCR proceeding could keep an applicant from obtaining asylum in the U.S., even though at UNHCR she would usually be denied the opportunity to review and correct interview transcripts, or to clarify or explain apparent inconsistencies on appeal.

In practice, inconsistencies in UNHCR records have already led to denial of asylum in at least one case. In *Al-Bedairy v. Ashcroft* (121 Fed.Appx. 716, 2005 WL 289952), the 9th Circuit Court of Appeals upheld an Immigration Judge's finding that Al-Bedairy's failure to mention childhood torture in his UNHCR Resettlement Registration Form was grounds for an adverse credibility determination, which led to denial of his asylum application. Judge Sidney R. Thomas, dissenting, noted that "Al-Bedairy testified that he told the UN representative that he was tortured and did not know why that information was not included on his application."

Now that REAL ID allows judges to use inconsistencies in UNHCR RSD records to deny asylum, flaws in UNHCR's RSD procedures bear directly on applicants' ability to obtain asylum in the US. Because of this, US immigration lawyers should be active participants in the dialogue relating to reforming and improving the UNHCR refugee status determination process.

Emily E. Arnold-Fernandez is the Executive Director of Asylum Access, a U.S. nonprofit dedicated to realizing refugee rights in the global south through local legal aid and international policy advocacy. She received her J.D. in 2004 from Georgetown University Law Center, where she was a Global Law Scholar, and is a member of the California State Bar. Executive Director, Asylum Access

415-601-3896, asylumaccess@gmail.com or emily@arnold-fernandez.com

Michael Kagan is an instructor at the Tel Aviv University Refugee Rights Clinic, and has developed refugee legal aid programs in Egypt and Lebanon. He also serves as Secretary of the Board of Directors of Asylum Access. He received his J.D. in 2000 from the University of Michigan Law School and is a member of the New York State Bar. Member of the New York State Bar, Tel Aviv University Refugee Rights Clinic, kaganm@post.tau.ac.il or mikekagan@fastmail.fm.

Attracting Highly Skilled Students and Workers to the U.S.: An Unraveling Affair?

By: Jordana A. Hart

It is no secret that the U.S predominance in science and engineering hinges on the skills of foreign-born talent in America's graduate programs, who then move on to its research labs and corporations.

But holding onto that edge is fast becoming a global battle for the best minds. At its epicenter is a confluence of powerful events: America since 9/11 has become less attractive in the eyes of the world. The government is making it tougher to study and work here. Booming economies like China, Korea and India are increasingly keeping their native talent home. Meanwhile, other nations are updating their immigration policies, offering graduate training in the lingua franca English, and beginning to divert the international flow of skill and knowledge that not so long ago would naturally flow to the U.S.

The numbers are startling, given the short period of time for these trends to develop since 2001. Last year alone, American graduate programs reported an average 30-percent drop in applications by foreign students, who tend to make up more than half of all students enrolled in science and engineering programs.[1] U.S students, trailing their foreign-born peers in mathematics and science, are not even close to filling the gap.[2]

Meanwhile, highlighting what may be a creeping disenchantment with the U.S as a professional destination, the nation has become the *third most difficult business locale* globally for multinationals to assign foreign workers, according to a 2004 survey of more than 130 multinational corporations.[3] The U.S had never even made the top 10 in this category since the survey began a decade ago. Now it trails China and Japan as the third most difficult place for multinationals to relocate workers, according to GMAC Global Relocation Services, the Society for Human Resources Management (SHRM) and the National Foreign Trade Council, Inc., which together conduct the annual survey.[4]

Chief among the complaints by corporate HR and foreign professionals are lingering delays and difficulties in obtaining visas and social security numbers, and an overall restrictionist "culture of no," real or perceived, permeating the visa process for many business executives, engineers, scientists, students, and scholars.[5] Between 2003 and 2004, the U.S was cited 12 percent of the time as posing the greatest assignment difficulties for foreign nationals

---

[1] Science and Engineering Indicators 2004, National Science Board

[2] See *International Outcomes of Learning in Mathematics Literacy and Problem Solving,* National Center for Education Statistics, US Department of Education Institute of Education Sciences NCES 2005-003 (December 2004). See also Editorial, *The Boston Globe* at A12 *(May 27, 2005)*

[3] *Global Relocation Trends 2003/2004 Survey Report*, GMAC GRS/NFTC/SHRM Global at 20 (May 2004) The 134 multinationals that responded include 7,486 offices worldwide and 79 percent have headquarters in the US. To see the full survey, go to www.nftc.org.

[4] Id.

[5] Id. at 23.

asked to relocate here. China, at number one, was cited 23 percent of the time by foreign nationals and Japan 16 percent of the time.[6] In 2002 and prior surveys, the U.S had never been cited as a location posing any significant relocation difficulties or fears.[7]

Are we witnessing the slow unraveling of a long affair?

"For the first time in our history, top scientists and mad intellectuals from elsewhere are choosing not to come here," writes economist Richard Florida.[8] While many countries are now luring foreign creative talent who might normally have come to the U.S and also managing to keep their own talent home, "in effect [the U.S] is saying to highly mobile and very finicky global talent, 'You don't belong here.'"[9]

True, the U.S is grappling with fighting terror at its borders, indeed calling immigration law one of its most important anti-terror tools.[10] Yet the effect of its understandable, yet single-minded and rather ham-fisted tightening of visa regulations and procedures appears to be a chipping away of the nation's long unshakable ability to energize and attract the very brightest.

Admittedly, part of this dismal backsliding is that talented graduate students in China, India and Korea can increasingly get a top-shelf education and good jobs in their own surging economies or in other nations eager to welcome them, including Britain, Canada and Australia.

During the last six months, university presidents and business leaders have been delivering ominous words about the threat to American innovation posed by a freshly competitive world—the renewed vitality of western Europe, Japan and Korea, and the "ravenous growth" of China and India. "We no longer have a lock on technology," David Baltimore, a 1975 Nobel laureate and the current president of the California Institute of Technology, wrote recently. "Europe is increasingly competitive, and Asia has the potential to blow us out of the water."[11]

Foreign Students/Scholars and Visa Mantis

In Fall 2004, US graduate programs reported a 45- percent drop in applications from Chinese students and a 30-percent drop among Indian students,[12] many of whom would enter science and engineering programs.

It is difficult to apportion the overall drop to the various trends and phenomena noted above, but immigration policy is clearly a factor. For example, the F-1 international student visa denial rate since 2001 rose from 27.6 percent to 35.2 percent with a simultaneous 18.5 percent drop in

[6] Id.
[7] For example, in the 2002 survey, foreign professional complaints bout relocating to the US revolved around "understanding the tax systems and medical system." *Global Relocation Trends 2002 Survey Report,* GMAC/NHTC/SHRM Global at 25. See full survey at www.bftc.org.
[8] Richard Florida, *Creative Class War: How the GOP's Anti-Elitism Could Ruin America's Economy,* 36 Wash. Monthly 1-2, 30 (Jan/Feb 2004)
[9] Id. at 34
[10] Mary Beth Sheridan, *Immigration law used in anti-terror fight,* Wash. Post, June 13, 2005 at A3. Authorities have used routine immigration law violations such as overstaying a visa to remove suspected supporters of terrorist organizations, say US Citizenship and Immigration Services officials, which they say is a legitimate use of their power.
[11] David Baltimore, *When Science flees to US,* Commentary, LA Times, November 29, 2004 at B9
[12] Peggy Blumenthal, vice president of education services, Institute of International Education in New York, radio interview, "International Students," *On Point*, WBUR 90.9, Boston, MA (May 24, 2005)

applications.[13] In FY 2003, the consular post in Beijing reported an F-1 visa refusal rate of 63 percent, Chennai 50 percent and Moscow 51 percent.[14] High-skill related visas followed a similar pattern during that period, with visa applications down by 19.4 percent and the visa refusal rate up from 9.6 percent to almost 18 percent.[15]

As an editor for the *Washington Monthly* commented, "For this reason, the last four years of drift may have already done significant damage to America's long-term economic prospects. The pity is, there was no good reason for the drift. Finding ways to strengthen border security while still providing enough visas for educated immigrants and graduate students is hardly the world's most difficult public policy challenge, and every Fortune 500 Corporation in America would cheer such moves."[16]

Since 9/11, a slew of measures to strengthen national security and bring conformity to visa processing have sought to shed light on and end vulnerabilities in the visa processing system. These include the passage of the USA PATRIOT ACT of October 2001, together with the Enhanced Border Security and Visa Entry Reform Act (Border Security Act) of May 2002, and the Homeland Security Act of November 2002 and the Border Security Act implemented the Interagency Border Inspection System (IBIS), which authorizes a series of security checks.

Anthony Edson, director of Visa Services at the Bureau of Consular Affairs of the U.S Department of State recently stated that the delay-causing security screening only affects about 2.5 percent of the 7 million to 9 million annual visitors to the U.S. "It was never our intention to impede the entry of global students and scholars."[17]

In large part, delays for foreign scientists have eased since the U.S Department of State reformed the Visa Mantis program, a primary tool used to screen applicants seeking to study in 200 particular scientific and technical fields considered tied to national security.[18] Visa Mantis aims to identify those visa applicants who may pose a threat to U.S national security by illegally transferring sensitive technology. Visa applicants from China account for more than half of all Visas Mantis security reviews.[19]

The General Office of Accounting (GAO), in its analysis of the visa process for science students and scholars, found that it took an average of 67 days to process Mantis checks in October 2003, and many cases were pending for 60 days or more.[20] The GAO also found

---

[13] US Department of State, Immigrant Visa Control and Reporting Division.
[14] Border Security: Improvements Needed to Improve Time Taken to Adjudicate Visas for Science Students and Scholars, General Office of Accounting, Report GAO-04-371 (February 2004). See full report at http://www.gao.gov/new.items/d04371.pdf
[15] Id.
[16] Benjamin Wallace Wells, *Off Track: America' economy is losing its completive edge and Washington Hasn't Noticed,* Wash. Monthly (March 2005) at http://www.washingtonmonthly.com/features/2005/0503.wallace-wells1.html.

[17] Radio interview, "International Students," *On Point,* WBUR 90.9, Boston, MA (May 24, 2005).

[1]8 Streamlined Visas Mantis Program Has Lowered Burden on Foreign Science Students and Scholars, but Further Refinements Needed, General Office of Accounting, Report GAO-05-198 (February 2005). See full report at http://www.gao.gov/htext/d05198.html.
19 Id.

that the way in which information was shared among agencies prevented cases from being resolved expeditiously. Finally, the GAO found that consular officers lacked sufficient program guidance. By November 2004, the average time to process a Mantis check was down to about 15 days and the number of Mantis cases pending more than 60 days also dropped significantly.[21]

Still, some university leaders, concerned about the obvious drop in applications to their schools, disagree. Importantly, said Michael M. Crow, president of Arizona State University, the real or perceived unwelcome "is affecting the pipeline of those who leave school and stay in the US and do great things."[22] He reported a 30-percent drop in applications from the types of students he calls the "seed corn, the great thinkers around the world" he is trying to attract to his institution's graduate programs.[23]

H-1B Cap

Whether due to a tightening around terror or the burst tech bubble, or both, one of the difficulties for hi-tech, defense and related sorts of businesses has been the cap on the H-1B specialty occupation visa for professional positions that require at least a Bachelor's degree in a field related to the occupation. Congress took the number of H-1B visas from 195,000 in the tech boom period of the 1990s down to 65,000 in fiscal 2004. Indeed, for fiscal 2005, all 65,000 H-1B visas were used up on the first day of the fiscal year. (Companies can apply for them up to six months before the start of the fiscal year.) Congress then appeared to try to soften the blow by introducing 20,000 H-1B visas specifically for holders of U.S Master's degrees or higher in April 2005. These have not been snapped up as quickly as many anticipated. Meanwhile, the American Immigration Lawyers Association reported that petitions for FY 2006 cap-subject H-1B petitions were trickling in more slowly than anyone expected.[24]

Jordana A. Hart is an associate with Ross, Silverman & Levy LLP in Boston, MA, a firm that concentrates in Immigration and Nationality Law. She is admitted to practice law in Massachusetts and is a member of the American Immigration Lawyers Association (AILA) and the ABA.

Disregard for Traffic Regulations Could Result in the Denial of U.S. Citizenship

By: Ileana McAlary, J.D.
Miller Johnson

Most people with traffic violations, such as speeding 5-10 mph or rear-ending another vehicle on a snowy day, worry about whether they will be able to afford their next bill from the insurance company. However, to Permanent Residents seeking U.S. citizenship, monetary concerns are the least of their worries. Civil infractions may lead to a finding that an applicant for U.S. citizenship lacks "good moral character."

Section 101(f) of the Immigration and Nationality Act (the "Act") contains a list of

20 'Border Security: Streamlined Visas Mantis Program Has Lowered
Burden on Foreign Science Students and Scholars, but Further
Refinements Needed', GAO 05-198 (Feb. 18, 2005) at http://www.gao.gov/htext/d05198.html
[21] Id.
[22] See Note 16 supra.
[23] Id.

[24] *Update on Fiscal 2006 H-1B Numbers*, AILA InfoNet. Doc. No. 05061360 (June 13, 2005)

conduct, acts, attributes, and characteristics that preclude a finding of "good moral character." These are expanded upon in Title 8 of the Code of Federal Regulations ("C.F.R.") § 316.10, which contains the regulatory provisions with respect to establishing "good moral character" for purposes of naturalization. An applicant can be found to lack "good moral character" if the applicant has been convicted of murder or an aggravated felony, committed one or more crimes involving moral turpitude for which he or she was convicted, violated any law of the United States, any state, or any foreign country relating to a controlled substance subject to certain exceptions, admits committing any criminal act for which there was never a formal charge, indictment, arrest, conviction whether committed in the United States or any other country, or has been confined to a penal institution during the statutory period for an aggregate period of 180 days or more. Further, aliens who have given false testimony under oath to obtain immigration benefits, have been involved in prostitution or smuggling of illegal aliens, have been habitual drunkards, and aliens who have willfully failed to support dependents will be found to lack good moral character. However, the fact that a person is not within any of the enumerated classes does not preclude a finding that, for other reasons, such person is or was not of good moral character under Section 101(f) of the Act and 8 C.F.R. § 316.10(b)(3)(iii). In other words, these categories are not exclusive.

Unfortunately for aliens seeking U.S. citizenship and practitioners, what constitutes "good moral character" has not been defined in the regulations of the Act or interpretations thereof. Good moral character has been found to be a question of fact and has typically been interpreted as meaning character which measures up to the standards of average citizens of the community in which the applicant resides.[25] Accordingly, establishing "good moral character" does not necessarily require the highest degree of moral excellence.

In cases such as *Repouille v. U.S.*, 165 F.2d 152 (2d Cir. 1947) and *U.S. v. Ekpin*, 214 F. Supp. 2d 707 (S.D. Tex. 2002), courts have held that the United States Citizenship and Immigration Services (USCIS) shall evaluate claims of good moral character on a case-by-case basis, taking into account the elements enumerated in Sections 101(f) and 316.10 of the Act and 8 C.F.R., respectively. "Good moral character" is not a static concept but is a concept that changes as the standards of the community change. *Repouille* supra. USCIS, however, has often failed to compare applicants seeking U.S. citizenship to the average citizen in the community where they reside. Grounds for denial of U.S. citizenship have included speeding 5-10 mph over the limit, improper or prohibited turns, failure to change address on driver's license, unlawful parking, and others. Likewise, applicants convicted of DWI have been found to lack good moral character.

But while USCIS has been steadfast in denying U.S. citizenship to applicants arising out of traffic violations, courts have interpreted the good moral character concept with its purpose in mind, which is to admit as citizens only those who are in general accord with the basic principles of the community. In *Yin-Shing Woo v. U.S.*, 288 F.2d 434 (1961), the court noted that the naturalization statute requiring an applicant to be "well disposed to the good order and happiness" of the United States should be read with its purpose in mind, which is to admit as citizens only those who are in general accord with the basic principles of the community. Likewise, in *In Re Petition for Naturalization of Odeh*, 185 F. Supp. 953 (1960), the United

---

[25] Murphy, Patrick R., An Overview of Good Moral Character with Special Emphasis on Alcohol Dependence or Alcohol Abuse as Evidence of Lack of Good Moral Character, Immigration and Nationality Law Handbook, 2004-05 Ed., Vol.1, citing to 8 CFR §316.10(a)(2) and Interpretation 316.1(e).

States District Court for the Eastern District of Michigan, Southern Division, found that an alien who had 16 traffic tickets between September 1956 and June 1958 involving speeding 5-10 mph over limit, improper or prohibited turns, failure to change address on driver's license, insufficient lights, driving the wrong way on a one-way street, excessive noise, and failure to stop after slightly damaging an automobile was eligible for U.S. citizenship. In the court's view, the traffic tickets did not warrant denial of the petition for Naturalization. The *Odeh* Court explained that the applicant's actions did not constitute the incidents envisioned by Congress as detracting from a person's qualification for citizenship. Last year, in *Cajiao v. Bureau of Citizenship and Immigration Services of the Dept. of Homeland Security*, Civil Action No. H-03-2582 (2004), the District Court for the Southern District of Texas, Houston Division, also held that an applicant who had been convicted of a DWI did not lack "good moral character." The applicant in *Cajiao* admitted that he was guilty of driving while intoxicated. However, the applicant contended that he became intoxicated involuntarily as the result of inhaling paint fumes at his place of employment in December 1998. USCIS insisted that the applicant failed to accept responsibility for his crime of DWI because he continued to argue that he was not voluntarily intoxicated and because he failed to complete the terms of his probation. On those grounds, it denied him citizenship. The court reversed the USCIS decision.

Recently the author was able to successfully reverse a denial of a Naturalization Application. The applicant for U.S. citizenship had received nine civil infractions most of which resulted from speeding 10-20 mph. However, at least two of the nine civil infractions were due to vehicular collisions and driving without a license. The applicant did not disclose these civil infractions on Form N-400 Application for Naturalization after being advised by a USCIS National Customer Service representative that traffic tickets were not the type of violations that needed to be disclosed on the Naturalization Application. During the Naturalization interview, however, the applicant voluntarily disclosed that he had received nine traffic tickets during the previous five years. The Naturalization Application was denied on grounds that the applicant's history of civil infractions demonstrated a disregard for the traffic laws of the United States and, thus, the applicant was charged with lacking "good moral character." The author appealed the denial of U.S. citizenship and was granted the relief requested: reversal of the previous decision and the approval of the Application for Naturalization.

Based on this experience, it is the author's recommendation that applicants for U.S. citizenship disclose civil infractions on Form N-400 even if not required to do so. In a separate page, an applicant should describe the nature of the civil infraction(s), the disposition of the matter, such as whether fines were assessed and paid and, if probation was imposed, whether the applicant complied with the terms of his or her probation. Failure to disclose civil infractions on a Naturalization Application could result in a finding that the applicant lied to obtain an immigration benefit. The process to obtain a reversal on a decision to deny U.S. citizenship can be very time consuming and costly.

The proper procedure to be followed by an applicant denied U.S. citizenship on this or any other ground is to file a motion for a new hearing on Form N-336 with the district office where the Naturalization interview took place. The motion should request a new hearing with a different interviewing officer and must lay out all the facts surrounding the previous interview and explain in detail the reason(s) why the decision on Naturalization must be reversed. Most requests are resolved at the district level. An applicant for U.S. citizenship whose Naturalization Application has been denied should retain legal counsel for the

appeal process. Failing to follow the proper procedures established by USCIS for appealing a denial of U.S. citizenship could have devastating consequences for Permanent Residents.

Ileana McAlary is an associate of Miller Johnson, with offices in Grand Rapids and Kalamazoo, Michigan. Ileana is a graduate of Wayne State University Law School and she studied at the University of Havana Law School in Havana City, Cuba for two years. Ileana is fluent in Spanish and focuses her practice on the areas of immigration law and business law.

Welcome!

We are pleased to bring you the ABA International Law and Practice Section: Immigration and Naturalization Committee Newsletter. Please send all future submissions and/or suggestions to either Susan Cohen at scohen@mintz.com

Disclaimer: The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or Immigration Section. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.