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## Non-Immigrant Category Update

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# NON-IMMIGRANT CATEGORY UPDATE

Jan H. Brown, Esq.\*

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## I. INTRODUCTION

U.S. immigration laws have been in a dynamic state of change for a good part of the last decade. The following is an update of recent changes in both laws and procedures concerning F, J, and M status; the new K-3 and K-4 visas; the H specialty worker category; as well as the new arrangements

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between the Department of State ("DOS") and the Department of Homeland Security ("DHS") as to the processing of visa applications at U.S. Consulates.

## II. DEPARTMENT OF HOMELAND SECURITY VISA OVERSIGHT

The Homeland Security Act of 2002, P.L. 107-296,<sup>1</sup> section 428, gave the DHS a major role in administering the visa issuance process. On September 29, 2003, a Memorandum of Understanding was signed by the DHS and the other agencies affected by section 428 of the Homeland Security Act.<sup>2</sup> Under this agreement, the DOS will continue to manage the visa process and the foreign policy of the United States.<sup>3</sup> The DHS will establish and review visa policy and ensure that homeland security requirements are fully reflected in the visa process.<sup>4</sup> As DOS employees, consular officers and staff who currently work on visa matters will continue to receive direction from the Secretary of State.<sup>5</sup> Additionally, "[c]onsular officers will retain the responsibility for visa adjudication and issuance."<sup>6</sup>

"DHS officers assigned overseas will provide expert advice to consular officers regarding security threats relating to the adjudication of visa applications or classes of applications, review visa applications, and conduct investigations involving visa matters in accordance with the Memorandum of Under-

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<sup>1</sup> See Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10,922 (Mar. 6, 2003) (to be codified at 8 C.F.R. pts. 1, 2, 103, 239). This act, *inter alia*, transferred the functions of the Immigration and Naturalization Service [hereinafter INS] to the newly created Department of Homeland Security, as of March 1, 2003. Thus references below may be to the INS or the DHS, depending on the period of time described.

<sup>2</sup> Report to the Congress on the Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002, 68 Fed. Reg. 56,519 (Sept. 29, 2003); see Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002 (Sept. 29, 2003) [hereinafter MOU], available at [http://www.dhs.gov/intraweb/assetlibrary/DHS\\_State\\_428\\_MOU.doc](http://www.dhs.gov/intraweb/assetlibrary/DHS_State_428_MOU.doc) (last visited Feb. 11, 2004).

<sup>3</sup> See generally MOU, *supra* note 2, para. 2(c), (d).

<sup>4</sup> See *id.* para. 1(b).

<sup>5</sup> See generally MOU, *supra* note 2, para. 6.

<sup>6</sup> *Department of State, Homeland Security Share Visa Oversight*, U.S. Department of State, International Information Programs, Statement by J. Adam Er-eli, Deputy Spokesman, U.S. Dept. of State (Sept. 30, 2003), available at <http://usinfo.state.gov/gi/Archive/2003/Oct/01-374570.html>.

standing.”<sup>7</sup> The DHS will have final decision-making responsibilities over policy areas that include:

- classification, admissibility, and documentation
- place of visa application
- discontinuing granting visas to nationals of country not accepting aliens
- personal appearance
- visa validity periods and multiple entry visas
- the Visa Waiver Program
- notices of visa denials
- processing of persons from state sponsors of terrorism.<sup>8</sup>

Both DOS and DHS will have joint responsibility for the issuance of waivers of documentary requirements, such as lack of a valid passport or a non-immigrant visa, on the basis of an unforeseen emergency.<sup>9</sup> In other cases, consular officers or the Secretary of State may recommend waivers to the DHS.<sup>10</sup>

While it remains to be seen what the practical implications shall be of this restructuring of the visa adjudicatory process, it is quite possible that visa issuance shall become more restrictive as the DHS brings with it a more conservative mandate than does the DOS in terms of facilitating entry into the United States. For example, the DHS now has final authority over place of visa application.<sup>11</sup> Thus, it may become more difficult for an alien to obtain a visitor’s visa, for example, when in a country other than that of the alien’s birth or principal residence.

An alien on vacation far from home may not be able to have the flexibility to decide to visit the United States without first returning to the home country to obtain the appropriate visa. Additionally, persons in the United States who change their status from one non-immigrant category to another, such as from B-2 visitor for pleasure to H-1B specialty worker, may be precluded from obtaining a new visa at a convenient consular post in Canada or Mexico. Such persons may have to travel back to their home countries to request a new visa — a poten-

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<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See* MOU, *supra* note 2, para. 3.

<sup>10</sup> *See id.* para. 3(a)(4).

<sup>11</sup> *See* MOU, *supra* note 2, para. 3(b) .

tial burden not only on themselves, but on their employers who will lose their services for the time required to journey to a distant land.

### III. NEW STUDENT REPORTING REQUIREMENTS

Effective as of September 18, 2002, the Immigration and Naturalization Service ("INS") created the Student and Exchange Visitor Information System ("SEVIS").<sup>12</sup> SEVIS is an internet-based system constructed to monitor the visa adjudication process of foreign students and exchange visitors with F, J, or M visas.<sup>13</sup> The enhanced Border Security and Visa Entry Reform Act ("Border Security Act")<sup>14</sup> mandates at Section 510(c) that "[a] visa may not be issued to a student or exchange visitor unless the DOS has received from [an approved education institution or exchange visitor program] electronic evidence . . . of the alien's acceptance at that institution, and a consular officer has reviewed the applicant's visa record."<sup>15</sup> SEVIS was designed to meet this legislative requirement.

In order for a prospective F-1 visa academic student or M-1 vocational student to study in the United States, the following procedures must be followed: (1) the prospective student applies to an educational institution that has been approved by the DHS; (2) the academic institution completes Form I-20 A/B, Certificate of Eligibility for Non-immigrant Student Status, and enters the requested information into the SEVIS system; (3) the SEVIS system confirms that the institution is INS-approved.<sup>16</sup>

F-1 or M-1 visas shall still not be issued until a member of the consular staff reviews the data and makes the final determination.<sup>17</sup> A current student who needs a new I-20 should expect

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<sup>12</sup> See *Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act as Amended: Transitional Foreign Student Monitoring Program*, 67 Fed. Reg. 58,693 (Sept. 18, 2002) (to be codified at 22 C.F.R. § 41) [hereinafter *Visas: Documentation of Nonimmigrants*].

<sup>13</sup> See *id.*

<sup>14</sup> Pub. L. No. 107-173, 116 Stat. 543 (2002).

<sup>15</sup> See *id.*

<sup>16</sup> See *generally* *Visas: Documentation of Nonimmigrants*, 67 Fed. Reg. at 58,694.

<sup>17</sup> *Id.*

to have his or her information entered and reviewed by SEVIS.<sup>18</sup>

The U.S. Immigration & Customs Enforcement has stated “SEVIS provides a proper balance between openness to international students and exchange visitors, and our nation’s security interest in knowing who has come into our country.”<sup>19</sup> Furthermore, the agency states “SEVIS increases the ability of the INS to maintain up-to-date information on foreign students and exchange visitors in order to ensure that they arrive in the United States, show up and register at the school or exchange program, and properly maintain their status during their stay.”<sup>20</sup>

Essentially, SEVIS is designed to record the careers of international students, including any changes in status. All Form I-20s now must be created using SEVIS.<sup>21</sup> The practical implication of such a system to an alien is that the DHS will be aware more quickly of the moment when the attendance of an alien at an educational institution is terminated.

Since students receive permission to remain in the United States for the duration of their status, such persons are not considered to be unlawfully present until the DHS concludes that student status has been terminated. Former students often have been able to remain in the United States for considerable periods of time without the termination of their status.<sup>22</sup> This is likely to change dramatically.

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<sup>18</sup> Requiring Certification of all Service Approved Schools for Enrollment in the Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 60,107 (to be codified at 8 C.F.R. § 103, 214).

<sup>19</sup> UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM (Dec. 11, 2002), available at [http://www.ice.gov/graphics/news/newsrel/articles/0212FINALRU\\_FS.htm](http://www.ice.gov/graphics/news/newsrel/articles/0212FINALRU_FS.htm) (last visited Apr. 7, 2004).

<sup>20</sup> *Id.*

<sup>21</sup> See generally Visas: Documentation of Nonimmigrants, 67 Fed. Reg. 58,694.

<sup>22</sup> See *Student and Exchange Visitor Information System (SEVIS): Final Rule Implementing SEVIS*, U.S. Citizenship and Immigration Services, available at [http://uscis.gov/graphics/publicaffairs/factsheets/02.12FINALRU\\_FS.htm](http://uscis.gov/graphics/publicaffairs/factsheets/02.12FINALRU_FS.htm) (“Currently, problems arise when a foreign student arrives in the United States and fails to report to his or her school. . . . Before SEVIS, schools did not have an obligation to report individuals’ failure to actually enroll in the school. . . . Schools will now be notified when a student has entered using his I-20 form, thus putting the school on notice that the individual is supposed to be destined for that campus.”).

#### IV. K STATUS AND THE NEW K-3 AND K-4 VISAS FOR SPOUSES AND CHILDREN OF U.S. CITIZENS

Historically, it was difficult for alien spouses and children of U.S. citizens to enter the United States on a non-immigrant visitor's visa to reunite with their U.S. family members as immigrant intent would be presumed and the visa denied.<sup>23</sup> Spouses and children of U.S. citizens living abroad had to obtain an immigrant visa outside of the United States before being admitted as immediate relative immigrants.<sup>24</sup> Consequently, family members could be separated for considerable periods, often longer than a year, while waiting for their U.S. citizen spouses' immigrant petitions to be approved and for their permanent resident visas to be processed.

##### a. *K-1 and K-2 Status: Fiancée and Fiancée's Children*

Recent additions to the K family of visas are best understood in relation to the preexisting K-1 status for the fiancée of a U.S. citizen, and K-2 status for the fiancée's children. A fiancée of a U.S. citizen may receive a K-1 visa to enter the country for the purpose of getting married to the U.S. citizen within ninety days of his or her arrival.<sup>25</sup> If the marriage does not occur within this ninety-day window, the K-1 alien must depart the country.<sup>26</sup> The child of a K-1 status alien may be granted a K-2 visa.<sup>27</sup> The cut-off date for receiving a K-2 visa is one year after the K-1 visa has been issued to the non-immigrant parent.<sup>28</sup>

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<sup>23</sup> "K" Nonimmigrant Classification for Spouses of U.S. Citizens and Their Children Under the Legal Immigration Family Equity Act of 2000, 66 Fed. Reg. 42,587, 42,589 (Aug. 14, 2001) (to be codified at 8 C.F.R. §§ 212, 214, 245, 248, 274(a)) [hereinafter "K' Nonimmigrant Classification"].

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See generally id.*

<sup>27</sup> *See id.*

<sup>28</sup> U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL VOL. 9 - VISAS, § 41.81 n.12 (2004), available at <http://foia.state.gov/masterdocs/09fam/0941081N.pdf> (last visited Apr. 7, 2004).

b. *New K Classifications*

Though these definitions of K-1 and K-2 status have not changed, two new K classifications have been created.<sup>29</sup> On December 21, 2000, President Clinton signed into law the Legal Immigration Family Equity Act (“LIFE” Act).<sup>30</sup> The LIFE Act amended the Immigration and Nationality Act (“INA”) by adding section 101(a)(15)(K)(ii) regarding non-immigrant K classification for spouses of U.S. citizens and their children.<sup>31</sup> The LIFE Act made K status available to spouses and children who are the beneficiaries of pending or approved Form I-130 immigrant relative petitions filed prior to its enactment, and prospectively thereafter.<sup>32</sup>

The INS amended its regulations implementing Section 1103 of the LIFE Act in an interim rule effective August 14, 2001.<sup>33</sup> The LIFE Act and the consequential interim rule expanded the K category to include spouses and the children of spouses of U.S. citizens who are waiting outside the United States subsequent to the filing of an immigrant relative petition.<sup>34</sup>

Only spouses of U.S. citizens and their children are eligible for the new K-3 or K-4 non-immigrant classification. The spouses of U.S. citizens under K status are now classified as “K-3,” and the children of such spouses as “K-4.”<sup>35</sup> K-3 and K-4 visas have specific requirements for filing due to the different nature of the petitions, as set forth at length below.

c. *K-3 Status: Spouses of U.S. Citizens*

To qualify for K-3 status, the spouse of a U.S. citizen must meet several criteria: (1) the spouse must be the beneficiary of a previously filed Form I-130 immigrant relative petition; (2) the spouse must be outside of the United States; (3) the U.S. citizen spouse must have filed Form I-129F for a K-3 visa with the

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<sup>29</sup> The Legal Immigration Family Equity Act of 2000, Pub. L. No. 106-553, § 1103, 114 Stat. 2762 (2000) [hereinafter “LIFE Act”].

<sup>30</sup> *See id.*

<sup>31</sup> *See generally id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See generally* “K” Nonimmigrant Classification, 66 Fed. Reg. at 42,589.

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*



DHS on the alien's behalf.<sup>36</sup> Only one Form I-129F needs to be filed for all K-3 and K-4 beneficiaries in a family. The K-3 visa is valid for two years and can be extended as set forth below.<sup>37</sup>

d. *K-4 Status: Children of the Spouses of U.S. Citizens*

K-4 is a derivative non-immigrant classification for the children of those who are eligible for K-3 classification, as listed above.<sup>38</sup> A child cannot qualify for a K-4 visa unless the U.S. citizen parent or stepparent, as the case may be, files a K-3 petition for the child's alien parent as well.<sup>39</sup> K-4 aliens must be under twenty-one years of age and unmarried to meet the definition of "child" under section 101(b)(1) of the Act.<sup>40</sup>

Since the K-4 is dependent upon the filing of the parent, an I-130 need not be filed on behalf of the child.<sup>41</sup> However, the law does not restrict U.S. citizens from filing a Form I-130 for a child, and the DHS has encouraged that they do so as soon as possible.<sup>42</sup> This would prove beneficial to the child, since the child's age at the time of filing an I-130 on his or her behalf determines the child's eligibility as an "immediate relative" (see section IV below).<sup>43</sup>

An alien with a valid non-immigrant K-4 visa is admitted into the United States for a two year period or until the day before the child's twenty-first birthday, whichever is shorter.<sup>44</sup> Both K-3 and K-4 non-immigrants may extend their status in two-year increments<sup>45</sup> as follows:

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<sup>36</sup> "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,588.

<sup>37</sup> *Id.* at 42,589.

<sup>38</sup> *Id.* at 42,588-89; *see generally* 22 C.F.R. § 41.81.

<sup>39</sup> "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,588-89; *see also* Non-immigrant Classes, 8 C.F.R. § 214.2(K)(10) (2003).

<sup>40</sup> Immigration and Nationality Act § 101(b)(1) (2000); 8 U.S.C. § 1101(b)(1) (2000).

<sup>41</sup> "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,589.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; *see also* 8 C.F.R. § 214.2(K)(10).

<sup>44</sup> *See* "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,589; *see also* 8 C.F.R. § 214.2.

<sup>45</sup> 8 C.F.R. § 214.2(K)(8).

e. *Application Procedures for K-3 and K-4 Visas*

Even though K-3 and K-4 are non-immigrant classifications, recipients are pursuing permanent residence<sup>46</sup> and therefore must satisfy requirements that pertain to applicants for immigrant visas.<sup>47</sup> These requirements are the same as those applied to non-immigrants entering in K-1/K-2 status, and are detailed at 22 C.F.R. section 41.81. The DOS recently revised Notes to 22 C.F.R. section 41.81.<sup>48</sup> The documentary requirements for a K-1 or K-3 visa are:

1. The applicant must undergo the standard IV medical examination by a panel physician;
2. An FBI National Crime Information Center name check must be done by the NVC for each applicant;
3. The applicant must present police certificates, if required; and
4. The applicant must present proof of relationship to the petitioner at the time of the interview.<sup>49</sup>

K-1 and K-3 applicants are subject to public charge provisions.<sup>50</sup> The consular officer may request that the applicant file an affidavit of support (Form I-134) if he or she considers it necessary.<sup>51</sup> A thorough practitioner may therefore want to prepare such a document in advance of the visa appointment for presentation at that time. K-3 and K-4 non-immigrants are covered by the same waivers of certain grounds of inadmissibility as K-1 and K-2 non-immigrants.<sup>52</sup> Accordingly, the Foreign Affairs Manual specifies that:

If it is determined that the K visa applicant is ineligible to receive a visa under INA 212 (a) but that the ineligibility could be waived after (*or as a result of the*) marriage to the petitioner, the consular officer should assist the applicant in completing Form I-601 Application for Waiver of Grounds of Excludability, and submit simultaneously both the Form I-601 (*with the required fee*) and Form OF-221, Two-way Visa Action Request & Response, to the

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<sup>46</sup> See generally "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,590.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 42,589.

<sup>49</sup> FOREIGN AFFAIRS MANUAL VOL. 9, *supra* note 28, § 41.81 n.4(a).

<sup>50</sup> INA § 212(a)(4), 8 U.S.C. § 1182(a)(4); see also Public Charge, 22 C.F.R. § 40.41 (2004).

<sup>51</sup> FOREIGN AFFAIRS MANUAL VOL. 9, *supra* note 28, § 41.81 n.4(b).

<sup>52</sup> FOREIGN AFFAIRS MANUAL VOL. 9, *supra* note 28, § 41.81 n.9.

appropriate INS office abroad with the recommendation concerning the granting on a INA 212 (d)(3)(A) waiver.<sup>53</sup>

In order to obtain a K-3 or K-4 visa for the alien relative, the petitioning U.S. citizen must send Form I-129F, the proof of filing Form I-130, the appropriate fees, and supporting documentation to:

DHS, U.S. Citizenship and Immigration Services  
P.O. Box 7218  
Chicago, IL 60680-7218.<sup>54</sup>

Once the I-129F is approved, the DHS will notify the consulate specified on the form.<sup>55</sup> If the marriage was solemnized in another country, the DHS will notify the United States consulate in that country.<sup>56</sup>

#### f. *Changing To or From K-3/K-4 Non-immigrant Status*

The DHS has concluded that non-immigrants already in the U.S. cannot change from a current status *into* the K status, or *from* K status into another non-immigrant status.<sup>57</sup> The INS interpreted the intent of the K status to be family reunification, and an alien family member currently residing within the country under another status does not need the benefits of the new law.<sup>58</sup> Consequently, "8 CFR 248.1 is amended to prohibit change of status to all non-immigrant classifications in section 101(a)(15)(K) of the Act, including those added by LIFE Act section 1103."<sup>59</sup> K-3 and K-4 aliens in the United States are precluded from applying for adjustment of status.<sup>60</sup>

#### g. *Travel While in K-3/K-4 Status*

Once admitted, aliens with valid K-3 and K-4 visas may travel outside the U.S. as long as they maintain their status in

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<sup>53</sup> FOREIGN AFFAIRS MANUAL VOL. 9, *supra* note 28, § 41.81 n.9.3(a) (emphasis added).

<sup>54</sup> "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,589.

<sup>55</sup> See generally "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,589.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 42,590.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

the United States.<sup>61</sup> They are not required to maintain a foreign residence because it is assumed that they have entered the United States in order to pursue permanent residence.<sup>62</sup>

K-1/K-2 entrants do not have this freedom because the K-1 non-immigrant must be married to the U.S. citizen within ninety days of entry, or they must depart and resume their foreign residence.<sup>63</sup> Once their adjustment of status application has been filed, K-1/K-2 aliens must receive advance parole before leaving the country if they do not wish their adjustment application to be deemed abandoned.<sup>64</sup>

#### h. *Extension of K-3 and K-4 Status*

Even though K-3 and K-4 non-immigrant status is issued initially for a two-year period, those in K-3/K-4 status may extend their status in two year increments so long as their U.S. citizen relative's Form I-130 remains pending.<sup>65</sup> If permanent residence is denied, K-3 or K-4 status expires within thirty days of the date of denial.<sup>66</sup> However, such a person cannot renew K-4 status once the alien parent's adjustment of status application is completed.<sup>67</sup>

To apply for an extension of status after the two-year initial admission, K-3/K-4 non-immigrants must file Form I-539 (Application for Extension of Stay, for an additional ten year period).<sup>68</sup> The alien must show proof of a pending Form I-485 or a pending application for an immigrant visa.<sup>69</sup> If one of these has not been filed, the alien must be the beneficiary of a pending I-130.<sup>70</sup> If the beneficiary is not awaiting adjudication of either of these applications, the non-immigrant must prove "good cause"

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<sup>61</sup> See *id.* at 42,591.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.*; see also Adjustment of Status to that of Person Admitted for Permanent Residence [hereinafter Adjustment to Status], 8 C.F.R. § 245.2(a)(4) (2003).

<sup>64</sup> See "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,591; see also Adjustment of Status, 8 C.F.R. § 245.2(a)(4).

<sup>65</sup> "K" Nonimmigrant Classification, 66 Fed. Reg. at 42,590.

<sup>66</sup> *Id.* at 42,591.

<sup>67</sup> See *id.*

<sup>68</sup> Nonimmigrant Classes, 8 C.F.R. § 214.2(k)(10)(i).

<sup>69</sup> *Id.* § 214.2(k)(10)(B)-(C).

<sup>70</sup> *Id.* § 214.2(k)(10)(A).

under 8 C.F.R. section 214.2(k)(10)(ii) as to why he or she has not filed.<sup>71</sup>

i. *Termination of K-3/K-4 Status*

The INS will send a notice of intent to deny an application for an extension of K-3/K-4 status and allow the applicant thirty days to submit additional evidence.<sup>72</sup> According to 8 C.F.R. section 214.2(k)(11), K-3/K-4 status will be terminated thirty days after:

1. The filed Form I-130 of which the alien is a beneficiary is denied;
2. The alien's immigrant visa application is denied;
3. The alien's application for adjustment of status to lawful permanent resident is denied;
4. The K-3's divorce to the petitioning U.S. citizen becomes final; or
5. An alien in K-4 status gets married.<sup>73</sup>

## V. CHILD STATUS PROTECTION ACT

On August 6, 2002, The Child Status Protection Act ("CSPA")<sup>74</sup> became law. It is therefore advisable, albeit not required, for a U.S. citizen to file an I-130 on behalf of an alien child in K-4 status while the child is unmarried and under the age of twenty-one. A child's K-4 status is terminated once the parent's K-3 status is likewise terminated.<sup>75</sup> This protects the child from "age out," that is, from becoming ineligible for an immediate relative benefit should he or she turn twenty-one before the I-130 is filed. Loss of such a benefit could result in additional years of waiting for permanent residence and loss of legal status in the U.S.

The DOS, in a revised cable on the CSPA, has recently changed its prior position and now shall no longer grant K-4 status to a child who has turned twenty-one.<sup>76</sup>

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<sup>71</sup> *Id.* § 214.2(k)(10)(ii).

<sup>72</sup> *Id.* § 214.2(k)(10)(iii).

<sup>73</sup> See Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole, 8 C.F.R. § 212.2(K)(11)(i)-(v).

<sup>74</sup> Child Status Protection Act, Pub. L. 107-208, 116 Stat. 927 (2002).

<sup>75</sup> See *id.* § 6(k)(1).

<sup>76</sup> See *id.* § 3(h)(3).

## VI. CHANGES TO THE H-1B WORKER CATEGORY

Briefly, an H-1B is an extremely useful vehicle for a non-immigrant with the U.S. equivalent of a baccalaureate degree or higher to come to the United States to accept employment of a specialized nature.<sup>77</sup>

In 1990, Congress imposed a numerical cap of 65,000 H-1B numbers per year.<sup>78</sup> However, as our economy boomed later in that decade, this amount was not enough to meet the demand and, therefore, H-1B cap limitations proved severely ineffective in meeting our economic and employment needs. In response to this situation, Congress raised the fiscal year cap for fiscal years 1999-2003.<sup>79</sup> In fiscal year 2003, for example, 195,000 H-1B numbers were authorized.<sup>80</sup>

Since this law has now run its course, as of October 1, 2003, the 65,000 H-1B cap has returned.<sup>81</sup> Even though the U.S. economy has cooled, as is reflected by only 78,000 H-1B visas subject to the cap being issued in fiscal year 2003, the 65,000 number remains dangerously low.<sup>82</sup> Thus, unless Congress again sets its legislative wheels in motion, there may be a disruption in the orderly processing of H-1B applications before the end of this fiscal year. This may cause serious problems for U.S. businesses and their foreign employees.

## VII. CONCLUSION

Immigration law and procedures remain in a turbulent and evolving state. They reflect two competing trends in the national psyche: the openness of a nation of immigrants versus the fear and xenophobia of a nation under siege. Attorneys and law

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<sup>77</sup> INA, § 101(a)(15)(H)(i)(b), 8 U.S.C.S. § 1101(a)(15)(H)(i)(b); *see also* U.S. Dept. of State, Bureau of Consular Affairs Visa Services, *available at* <http://travel.state.gov/visa/tempwkr.html> (last visited Mar. 24, 2004).

<sup>78</sup> *Id.* § 214(g)(1)(A), Admission of Nonimmigrants, 8 U.S.C. § 1184(g)(1)(A) (2003) (This numerical cap was increased for the years of 1999 to 2003, inclusive, but the cap has since returned to 65,000).

<sup>79</sup> Admission of Nonimmigrants, 8 U.S.C. § 1184(g)(1)(A)(ii)-(vi).

<sup>80</sup> An Act to amend the Immigration and Nationality Act with respect to H-1B nonimmigrant aliens, Pub. L. 106-313, 114 Stat. 1251 (2000).

<sup>81</sup> Immigration and Nationality Act § 214(g)(1)(A)(vii), Admission of Nonimmigrants, 8 U.S.C. § 1184(g)(1)(A)(vii).

<sup>82</sup> Press Release, U.S. Citizenship and Immigration Services, H-1B Petitions Received and Approved in FY 2003 (Oct. 22, 2003), *available at* <http://uscis.gov/graphics/publicaffairs/factsheets/H1-BFY2003.pdf> (last visited Apr. 7, 2004).

students interested in U.S. immigration laws and procedures should be mindful of this dynamic tension to better understand the evolution of our laws and society.