07-5630-cv

To Be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-5630-cv

MORSHEDA AMIN, NASHRAT SHAH AZAD, AND LAMESA NASHRAT,

Plaintiffs-Appellants,

-vs-

MICHAEL B. MUKASEY, ATTORNEY GENERAL, AND DONALD NEUFELD, DIRECTOR, OFFICE OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES, JOHN DOE, UNKNOWN NAMED AGENTS OF THE UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES & UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE APPELLEES

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STATEMENT OF JURISDICTION

The district court (Bryant, J.) had subject matter jurisdiction over this civil immigration matter under 28 U.S.C. § 1331. Judgment entered on November 19, 2007. JA 5. On December 14, 2007, the Plaintiffs filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). JA 5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 for final judgments in civil cases.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the district court properly dismiss Plaintiffs' complaint as moot, since the time for issuance of a visa under the Diversity Visa Program had expired, and, consequently, the court lacked jurisdiction to order the relief requested by Plaintiffs?

II. Should this Court dismiss Plaintiffs' due process and equal protection claims, raised for the first time on appeal, due to mootness and procedural default, and in any event because they are without merit?

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Preliminary Statement

In this civil immigration appeal, Plaintiffs initially sought from the district court an order requiring Defendants to issue them diversity visas which had been denied by United States Citizenship and Immigration Services ("USCIS"). In their amended complaint, Plaintiffs alternatively sought a court order requiring Defendants, *inter alia,* to "restore Plaintiff Morsheda Amin to her student (F-1) [visa] status," or provide "clear and convincing evidence that there are no diversity visa number [sic] available for the fiscal year 2005 . . . ." *See* JA 45-51. The district court correctly concluded that Plaintiffs' claims are moot because, even assuming *arguendo* diversity visa numbers from fiscal year 2005 were still available, statutory law prohibits Defendants from issuing such visas because the relevant fiscal year has ended. Accordingly, the decision dismissing Plaintiffs' amended complaint should be affirmed.

Likewise, this Court should reject Plaintiffs' additional claims, raised for the first time on appeal, that Defendants have violated their rights to due process and equal protection since these claims also are moot. Plaintiffs' due process claim fails for the additional reasons that Plaintiffs forfeited the claim by failing to raise it before the district court and they have no fundamental right to any visa or visa lottery number. Plaintiffs' equal protection argument similarly must fail since Plaintiffs have no fundamental right to federal court review of the denial of their applications for adjustment of status; and the statutory scheme at issue is rationally related to a legitimate

government interest: bringing closure to each fiscal year's diversity visa program. Moreover, Congress' imposition of a strict one-year time limit for the issuance of diversity visas is rational, and the district court's ruling applying the plain and unambiguous terms of the statute is not in any way discriminatory.

For these reasons, as explained in more detail below, the district court's ruling dismissing Plaintiffs' amended complaint should be affirmed.

Statement of the Case

On August 30, 2006, Plaintiffs commenced this action by filing a complaint in the United States District Court for the District of Connecticut (Mark R Kravitz, U.S.D.J.), seeking an order requiring Defendants to issue them diversity visas. JA 2. On December 5, 2006, Defendants filed a motion to dismiss the complaint on the ground that Plaintiffs' claims were moot since the fiscal year for issuance of such visas had ended. *Id.* In response, on December 14, 2006, Plaintiffs moved to amend their complaint seeking alternatively an order requiring Defendants restore Lead Plaintiff Amin to her F-1 student visa status or show that no diversity visa numbers for fiscal year 2005 exist. JA 3. On February 2, 2007, the district court granted Plaintiffs' motion to amend the complaint and thereafter transferred the case to the Honorable Vanessa L. Bryant, U.S.D.J. *Id.*

On June 1, 2007, Defendants moved to dismiss the amended complaint on the ground of mootness. JA 4. On

November 14, 2007, the district court (Bryant, U.S.D.J.) granted Defendants' motion to dismiss the amended complaint. JA 5. Judgment in favor of Defendants entered on November 19, 2007. *Id.* On December 14, 2007, Plaintiffs timely filed a notice of appeal of the district court's decision dismissing the amended complaint. JA 5, 150.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Plaintiffs' Allegations

According to the amended complaint, on June 8, 2004, Plaintiff Morsheda Amin, a resident alien, received a rank order number under the DV Program lottery. JA 47. Based on this rank order number, on November 17, 2004, Amin submitted to the Hartford, Connecticut Office of the United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security, an Application to Register for Permanent Residence or Adjustment of Status (Form I-485), seeking to adjust her status to that of a lawful permanent resident. *Id.* Co-Plaintiffs, Nashrad Shah Azad and Lamesa Nashrat, relatives of Amin, simultaneously sought to adjust their status to that of permanent residents derivatively through Amin, the principal alien applicant. *Id.*

On May 18, 2005, Plaintiffs were interviewed by a representative of USCIS in Hartford regarding their adjustment of status applications. *Id.* Following the interview, USCIS issued to Plaintiffs a Form Letter for

Returning Deficient Applications/Petitions (Form I-72). *Id*. This form indicated that Plaintiff Amin's I-485 application was deficient because it lacked official transcripts from the school Plaintiff Amin allegedly was attending. *Id*. The letter requested Plaintiff Amin to submit to USCIS by August 17, 2005, official school transcripts dating from May 1, 2002, to the present. *Id*.

According to the Amended Complaint, on June 6, 2005, Plaintiffs' attorney sent via overnight delivery a package containing the requested official transcripts. JA 47; *see also* A95-100 (correspondence including transcripts). The package arrived at USCIS's Hartford Office the following day, June 7, 2005, and was signed for by a representative of that office. JA 47.

On August 1, 2006, USCIS issued an official letter (Form I-291) denying Amin's application for adjustment of status stating USCIS "was unable to secure all requirements necessary in order to complete your application before September 30, 2005," the end of the fiscal year when the diversity visa number expired. JA 48. Plaintiffs Azad's and Nashrat's derivative applications for adjustment of status also were denied due to the denial of Amin's I-485. *Id*.

B. District court litigation

On August 30, 2006, Plaintiffs filed a complaint in the United States District Court for the District of Connecticut seeking a writ of mandamus requiring Defendants to issue Plaintiffs "one diversity visa number for the fiscal year

2005 . . . ." JA 13. On December 5, 2005, Defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction due to expiration of the DV fiscal year. *See* JA 2, 24-31. On December 14, 2006, Plaintiffs opposed Defendants' motion to dismiss and moved to amend their complaint. JA 2-3, A 42-44. On February 2, 2007, the district court (Mark R. Kravitz, U.S.D.J.) denied Defendants' motion to dismiss without prejudice and granted Plaintiffs' motion to amend their complaint. JA 3. On April 17, 2007, Plaintiffs filed an Amended Complaint setting forth the same allegations but seeking, *inter alia*, a court order requiring that Defendants "restore Plaintiff Morsheda Amin to her student (F-1) [visa] status," or provide "clear and convincing evidence that there are no diversity visa number [sic] available for the fiscal year 2005 . . . ." *See* JA 45-51.[1]

On June 1, 2007, Defendants moved to dismiss the amended complaint primarily as moot. *See* JA 61-77. In a memorandum decision dated November 14, 2007, the district court (Vanessa L. Bryant, U.S.D.J.) agreed that the case was moot, following this Court's opinion in *Mohamed v. Gonzales*, 436 F.3d 79 (2d Cir. 2006) (per curiam), and entered an order dismissing the amended complaint. JA 147-50. The court further rejected Plaintiffs attempt to demonstrate the existence of a live case or controversy by seeking the alternative remedy of court-ordered restoration of Plaintiff Amin's F-1 student visa status. JA 149. In this regard, the court ruled that the

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[1] On April 30, 2007, the case was reassigned to U.S. District Judge Vanessa L. Bryant. *See* JA 3.

complaint did not directly challenge the revocation of Amin's F-1 status and so the issue was not properly before the court. *Id.*

On December 14, 2007, pursuant to Fed. R. App. P. 4(a), Plaintiffs filed a timely notice of appeal from the district court's order granting Defendants' motion to dismiss. JA 5, 150-51.

SUMMARY OF ARGUMENT

1. The district court correctly concluded that Plaintiffs' claims are moot because, even assuming *arguendo* that diversity visa numbers from fiscal year 2005 are still available, statutory law prohibits Defendants from issuing such visas because the relevant fiscal year has ended. 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (imposing strict one-year time limit on the granting of diversity visas); *Mohamed v Gonzales*, 436 F.3d 79, 80-81 (2d Cir. 2006) (per curiam) ("Despite the harsh consequences of this result," this Court is required to "apply the unambiguous language of the operative statutory framework.").

2. This Court should reject Plaintiffs' additional claims that Defendants have violated their rights to due process and equal protection since these claims are also moot, and were not raised in the district court. Plaintiffs' due process claim must fail for the additional reason that they have no fundamental right to adjustment of status or a visa lottery number.

Plaintiffs' equal protection argument likewise fails since Plaintiffs have no fundamental right to federal court review of denial of their applications for adjustment of status. Moreover, Congress' imposition of a strict one-year time limit for the issuance of diversity visas is rational, and the district court's ruling applying the plain and unambiguous terms of the statute is not in any way discriminatory.

ARGUMENT

I. The district court properly dismissed Plaintiffs' amended complaint as moot, where the time for issuance of a Diversity Visa had expired and the court lacked jurisdiction to order the requested relief.

A. Governing law and standard of review

1. Diversity Visa Program

In 1990, Congress enacted legislation creating the Diversity Visa ("DV") Program which made a limited number of immigrant visas available to individuals from countries with historically low admissions into the United States. 8 U.S.C. § 1153(c) (2005); *see* Immigration Act of 1990, Pub. L. No. 101-649, § 131, 104 Stat. 5978 (Nov. 29, 1990). Aliens interested in acquiring a visa under this program must apply to participate in a visa lottery, the winners of which obtain the right to request further consideration for visa approval. 22 C.F.R. § 42.33(b) (2005). As the public notice relevant to the DV Program

fiscal year makes clear, however, being selected as a winner in the DV "lottery" does not automatically guarantee issuance of a visa, even if the applicant is qualified, because the number of entries selected and registered is greater than the number of immigrant visas available. 68 Fed. Reg. at 51630. The difference between the number of applicants and the number of available visas serves to increase the likelihood that all diversity visas will be issued before they expire at the end of the relevant fiscal year. 22 C.F.R. § 42.33(c) (2005).

The Department of State administers the DV program and "lottery" winners who reside abroad must travel to a United States embassy to apply for further consideration for a visa. *See Nyaga v. Ashcroft*, 323 F.3d 906, 908 (11th Cir. 2003) (per curiam) (explaining DV Program). However, applicants randomly selected for further consideration who are physically present in the United States may apply to adjust their status to that of a lawful permanent resident. *See* 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(a). The Attorney General may, in his discretion, grant an alien permanent resident status if: (1) the alien makes an application for such adjustment; (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) an immigrant visa is immediately available to the alien at the time she files her application. 8 U.S.C. § 1255(a).[2] Due to

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[2] Though the text of Section 1255(a) refers to the Attorney General as the official who may grant an adjustment of status, the authority to adjudicate applications for adjustment (continued...)

"the special benefit it confers upon an alien who would otherwise be required to depart the United States to apply for an immigrant visa, and then return, . . . adjustment [of status] is considered to be 'extraordinary relief.'" *Rahman v. McElroy*, 884 F. Supp. 782, 785 (S.D.N.Y. 1995).

Under no circumstances will immigrant visa numbers be allotted after midnight of the last day of the fiscal year for which the petition was submitted and approved. 22 C.F.R. § 42.33(f). As this Court has explained, "[t]he relevant statutes and regulations impose a strict one-year time limit on the granting of diversity visas. . . ." *Mohamed v. Gonzales*, 436 F.3d 79, 80-81 (2d Cir. 2006) (per curiam). Thus, "'[a]liens who qualify, through random selection, for a visa [under the DV Program] shall remain eligible to receive such visa *only* through the end of the specific fiscal year for which they were selected.'" *Id.* (quoting 8 U.S.C. § 1154(a)(1)(I)(ii)(II)) (emphasis and alteration in *Mohamed*). *See also* 22 C.F.R. § 42.33(a)(1). The last day of the fiscal year for Diversity Immigration Visas is September 30 of the given fiscal year. *Basova v Ashcroft,* 383 F. Supp. 2d 390, 391 (E.D.N.Y. 2005).

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[2] (...continued)
of status has been transferred to the Secretary of the Department of Homeland Security ("DHS") and his delegates at USCIS. *See* 6 U.S.C. §§ 271(b)(5), 557.

2. Mootness

To satisfy Article III, Section 2 of the United States Constitution, plaintiffs must show injury in fact, causation, and redressability. *Friends of the Earth, Inc. v Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000). A case is moot when "it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the [plaintiffs'] injury." *Fox v Bd. of Trustees of the State Univ. of New York*, 42 F.3d 135, 140 (2d Cir. 1994) (internal quotation marks omitted); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as the doctrine of standing set in a time frame . . . .") (internal quotation marks omitted); *Fund for Animals v. Babbitt*, 89 F.3d 128, 132-33 (2d Cir. 1996) (noting intersection between mootness and standing doctrines). Courts must dismiss moot claims for lack of subject matter jurisdiction. *Id.* At all times, the plaintiff bears the burden of proving subject matter jurisdiction. *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996).

3. Standard of review

This Court reviews the district court's dismissal of a complaint, as well as the question of mootness, *de novo*. *See White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 167 (2d Cir. 2007) (reviewing question of mootness *de novo*); *Curto v. Edmundson*, 392 F.3d 502, 503 (2d Cir. 2004) (per curiam) (reviewing dismissal of complaint *de novo*); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 & n.3 (2d Cir. 1998) (reviewing

dismissal of complaint on mootness grounds *de novo*). The Court views all factual allegations in the complaint as true and construes all reasonable inferences in favor of the plaintiffs. *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000). "[D]ismissal is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Curto*, 392 F.3d at 503 (internal quotation marks and citation omitted). *See also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (holding that allegations in the complaint must "raise a right to relief above the speculative level"); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (reading *Bell Atlantic* as requiring "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."), *cert. granted*, 128 S. Ct. 2931 (2008).

B. Discussion

1. The district court correctly ruled that Plaintiffs' claims are moot, because even if a diversity visa number is still available for fiscal year 2005, Defendants lack authority to grant a visa after expiration of the fiscal year and thus, the district court lacked authority to impose a remedy for Plaintiffs' alleged injuries.

In their Amended Complaint, Plaintiffs seek, *inter alia*, a court order requiring that Defendants provide "clear and

convincing evidence that there are no diversity visa number [sic] available for the fiscal year 2005 . . . ." JA 45-51. However, their demand is moot because even assuming *arguendo* visa numbers for fiscal year 2005 remain available, statutory law prohibits Defendants from issuing any diversity visas beyond expiration of the fiscal year on September 30, 2005.

The Attorney General has discretion to grant adjustment of status under 8 U.S.C. § 1255 only if, *inter alia*, "the alien is eligible to receive an immigrant visa." 8 U.S.C. § 1255(a)(2). As this Court has explained, the applicable statutes and regulations governing the DV Program "impose a strict one-year time limit on the granting of diversity visas." *Mohamed*, 436 F.3d at 80-81. *See* 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (aliens who qualify for such a visa "shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected"). In this case, Plaintiffs were eligible to receive a visa under the DV Program only through September 30, 2005, the end of the relevant fiscal year. Because Plaintiffs are no longer eligible to receive immigrant visas, the Attorney General lacks the authority to adjust their status to that of permanent residents and, consequently, "the district court could not provide meaningful relief to the Plaintiffs." *Nyaga*, 323 F.3d at 916. Accordingly, the amended complaint was properly dismissed as moot.

This Court squarely addressed the operation of the strict one-year time limit applicable to DV Program visas in *Mohamed,* a consolidated appeal involving several

plaintiffs who, like the Plaintiffs herein, alleged they had wrongfully been denied diversity visas due to, in some instances, "sheer bureaucratic ineptitude or intransigence." 436 F.3d at 80-81. The plaintiffs in *Mohamed* sought to compel the Attorney General to grant them DV Program visas after expiration of the fiscal years for which they had been selected to apply for adjustment of status. *Id.* at 80. As in this case, the plaintiffs in *Mohamed* further alleged they were denied any meaningful ability for review of the denials of their adjustment applications due to government delays. *Id*. at 81 (citing *Nakamura v. Ashcroft,* 99-CV-2717*,* 2004 WL 1646777, *2 (E.D.N.Y. July 20, 2004) (explaining that "Plaintiffs were victims of a bureaucratic nightmare") (internal quotation marks omitted).[3]

The *Mohamed* Court nonetheless affirmed the district courts' judgments dismissing plaintiffs' complaints as moot, and followed several other circuits in doing so, explaining:

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[3] The regulations promulgated under 8 U.S.C. § 1255 provide that an alien seeking to adjust her status "shall apply to the director having jurisdiction over his or her place of residence . . . ." 8 C.F.R. § 245.2(a)(1) (2005). The regulations further provide that "[n]o appeal lies from the denial of an application by the director, but the applicant . . . retains the right to renew his or her application in [removal] proceedings . . . ." 8 C.F.R. § 245.2(a)(5)(ii) (2005); *see also* 8 C.F.R.§ 1240.11(a)(1) (2005). If the renewed application is denied by an immigration judge, the alien may appeal to the BIA. 8 C.F.R. § 1240.15 (2005).

> Despite the harsh consequences of this result, we are compelled, as our sister circuits have recognized, to apply the unambiguous language of the operative statutory framework.

Id. (citing *Coraggioso v. Ashcroft*, 355 F.3d 730, 734 (3d Cir. 2004) (holding petitioner ineligible for diversity visa due to expiration of fiscal year despite INS's failure to timely adjudicate his parents' adjustment applications); *Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1079 (9th Cir. 2003) (denying petition for review, holding that doctrine of equitable tolling does not apply to "Congressionally-mandated, one-year deadline of the DV Lottery Program"); *Iddir v. INS*, 301 F.3d 492, 501 (7th Cir. 2002) (affirming dismissal of case despite INS's "misfeasance" in failing to timely adjudicate plaintiffs' applications, explaining "[b]ased on the statutory deadline set by Congress, the INS lacks the statutory authority to award the relief sought by the plaintiffs"); *Nyaga*, 323 F.3d at 906 (vacating and remanding with instructions to dismiss case as moot, explaining "[t]he INS's failure to process [plaintiff's] application does not extend [plaintiff's] statutorily-limited period of eligibility for a diversity visa")).

Likewise, in this case, the Court should affirm the district court's dismissal of Plaintiffs' amended complaint alleging wrongful and belated denial of their diversity visas. Plaintiffs were eligible under the DV Program to apply for adjustment of status during the 2005 fiscal year. Plaintiff Amin's adjustment application was denied because she did not meet all "requirements" for adjustment of status by the end of the fiscal year. *See* JA 48. Though

Plaintiffs take issue with the language of the denial letter, the fact remains that college transcripts submitted by Amin demonstrate she was never enrolled as a full-time student as required by her F-1 visa, and so she was ineligible for adjustment of status. *See* JA 99.[4] Moreover, regardless of the reason for the denial, the plain and unambiguous language of the applicable statute prohibits the Government from issuing immigrant visas to Plaintiffs after September 30, 2005. *See* 8 U.S.C. § 1154(a)(1)(I)(ii)(II); 22 C.F.R. § 42.33(a)(1) ("eligibility for a visa under [the DV Program] ceases at the end of the fiscal year in question"). Indeed, Plaintiffs concede that "an immigrant visa number is completely unavailable" to them. *See* Pl. Brief at 9. Because there is no legal remedy available to them, Plaintiffs' claims are moot. As in

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[4] That she (1) has never enrolled as a full-time student and (2) applied for the DV Program lottery suggests that Amin may have improperly secured her non-immigrant student visa in order to avoid having to wait in her home country until a visa became available. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (defining "student" as "an alien having a residence in a foreign country which [s]he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . ."); 22 C.F.R. § 41.61(b)(1)(iv) (alien eligible for student visa if consular officer satisfied that "[t]he alien intends, and will be able, to depart upon termination of student status"); *Lok v. INS*, 681 F.2d 107, 109 n.3 (2d Cir. 1982) ("students may not legally form the intent to remain in the United States under the terms of their visa").

Mohamed, and despite the harsh consequences of this result, this Court should affirm the dismissal of this action.

2. The district court likewise was without jurisdiction to order the restoration of Plaintiff Amin's F-1 student visa.

Plaintiffs argue that this case is not moot because they are not claiming the same relief as the *Mohamed* plaintiffs – a diversity visa – and, even if a visa number is statutorily unavailable to them, they are entitled to some other relief. *See* Pl. Brief at 9-10. However, the only other specific relief requested in the amended complaint is an order compelling Defendants to "restore Plaintiff Morsheda Amin to her student (F-1) [visa] status." *See* JA 45-51. As the district court noted, there are no allegations in the amended complaint relating to the revocation of Amin's F-1 visa. *See* JA 45-51, 149. Plaintiffs do not allege if, when and under what circumstances Amin's F-1 visa was revoked, if any such decision has been administratively appealed or whether Plaintiffs are now in removal proceedings. Though Plaintiffs claim their relief request is sufficient to survive a motion to dismiss under Rule 12(b)(1), *see* Pl. Brief at 11-12, Plaintiffs failed to plead any facts whatsoever relating to the request for restoration of an F-1 visa. *See Bell Atlantic Corp.*, 127 S. Ct. at 1965 (2007); *Iqbal*, 490 F.3d at 157-58 (explaining that plaintiffs must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible"). Consequently, the

district court correctly concluded that this issue was not properly before it. JA 149.[5]

Plaintiffs cite several cases in support of their argument that this case is not moot, including for example, *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 86 (2d Cir. 2005), which explains an exception to the general rule regarding mootness, "in cases that are capable of repetition, yet evading review."*See* Pl. Brief at 7-8. Yet this doctrine does not help Plaintiffs establish a live "case or controversy" under Article III. First, as noted above, Plaintiffs' case is moot not because the injury they allege has abated, but because the redress they seek – issuance of a diversity visa – is no longer available. Second, there is nothing more than a speculative possibility that Plaintiffs could, in the future, suffer the same injury. They offer no basis for supposing that they would qualify for a diversity visa number in the future; that they would obtain one through the lottery; or that immigration authorities would decline to issue such a visa. As the Supreme Court has held, "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *see also, e.g., Van Wie v. Pataki*, 267 F.3d 109,

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[5] The decision whether to issue, deny or revoke any visa rests solely with the United States Department of State and is subject to the doctrine of consular non-reviewability. *See Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir. 1978) ("It is settled that the judiciary will not interfere with the visa-issuing process.") (citations omitted).

114-15 (2d Cir. 2001) (noting "many Supreme Court cases which have rejected the application of the 'capable of repetition, yet evading review' exception in the face of the complaining party's speculative and theoretical assertion that the issue in dispute was capable of repetition").

Finally, to the extent Plaintiffs seek equitable relief, this claim also must fail because courts may not by equity alter statutory provisions. *See, e.g., INS v. Pangilinan*, 486 U.S. 875, 883-85 (1988) ("A Court of equity cannot, . . . create a remedy in violation of law . . . .") (internal quotation marks omitted); *see also INS v. Hibi*, 414 U.S. 5, 7-8 (1973) (per curiam). The Supreme Court's decision in *Pangilinan* is instructive on this point. In *Pangilinan*, sixteen Filipino nationals sought from the district court a declaration of citizenship under a 1942 statute that established a five-year period, ending December 31, 1946, in which aliens serving honorably in the United States Armed Forces during World War II could apply for naturalization. *See id.* at 877-80. Although the *Pangilinan* plaintiffs did not comply with this deadline, they contended that because no immigration official was present in the Philippines to act upon naturalization petitions from October 1945 to August 1946, they remained entitled to file for citizenship after the deadline had passed. The Ninth Circuit agreed, finding the Attorney General's failure to make immigration officials available in the Philippines for a nine-month period to have been in violation of the statute. *See Pangilinan v. INS*, 796 F.2d 1091 (9th Cir. 1986). The Supreme Court reversed, applying the well-established principles that "[c]ourts of equity can no more disregard statutory and constitutional

requirements and provisions than can courts of law," and that "[a] Court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law . . . ." 486 U.S. at 883 (citing *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893), and *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)). In dismissing the claims of all sixteen aliens, the Court stated that the 1946 deadline embodied a congressionally established policy decision that could not be overridden by the courts, either "by application of the doctrine of estoppel, [or] by invocation of equitable powers, [or] by any other means." *Id.* at 884.

Here, as this Court already found in *Mohamed, supra,* Congress has plainly stated that aliens who are randomly selected for further consideration under the DV Program "shall remain eligible to receive such visa *only* through the end of the specific fiscal year for which they were selected." 8 U.S.C. § 1154(a)(1)(I)(ii)(II) (emphasis added); *see also* 22 C.F.R. § 42.33(a)(1), (d), (f). As the Supreme Court determined in *Pangilinan*, the courts cannot, in the face of this clear mandate, craft an equitable remedy in direct contravention of an unambiguous legislative command. Accordingly, the district court correctly dismissed Plaintiffs' amended complaint as moot because it lacked authority to order an effectual legal remedy.

II. Plaintiffs forfeited their due process and equal protection claims by failing to raise them below and, in any event, the claims are without merit.

A. Governing law and standard of review

1. Procedural default

In general, arguments raised for the first time on appeal will not be considered by this Court. *See Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 95 (2d Cir. 2000) (citing *Kraebel v. New York Dep't of Hous. Preservation and Dev.,* 210 F.3d 89, 95 (2d Cir. 2000)) (other citations omitted). Two limited discretionary exceptions to this rule exist: "(1) where consideration of the issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no need for additional fact-finding." *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 302 (2d Cir. 1996) (citations omitted) (declining to decide whether manifest injustice exception would apply due to remand to district court); *Jacobson v. Fireman's Fund Insurance Co.,* 111 F.3d 261, 266 (2d Cir. 1997) (exercising discretion to consider "purely legal" claim raised for first time on appeal that bears on finality of arbitration awards "and implicates a prior decision of this Court that may no longer reflect the current [State] law on that question").

2. Due process

"It is well established that the Fifth Amendment entitles aliens to due process of law in [immigration]

proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). *See also International Immigrants Foundation, Inc. v. Reno*, 1999 WL 787900, * 1 (E.D.N.Y. 1999) (noting those due process rights are very limited) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). A challenge under the Fifth Amendment's guarantee of due process "requires a showing that [a plaintiff has been] deprived of some 'liberty' or 'property' interest." *Singh v. Mukasey*, 263 Fed. Appx. 161, 2008 WL 345460, *2 (2d Cir. Feb. 8, 2008).

This Court and others have found no constitutionally protected property interest in adjustment of status or an immigrant visa. *See Singh,* 2006 WL 345460 at *2 (no property interest in adjustment of status); *Rahman v. McElroy*, 884 F. Supp. 782, 786 (S.D.N.Y. 1995) (no property interest in immigrant visa or a specific adjustment interview date); *Jaskiewicz v. United States Dep't of Homeland Security*, No. 06 Civ. 3770 (DLC), 2006 WL 3431191 (S.D.N.Y. Nov. 29, 2006) ("aliens do not have an 'inherent property interest' in an immigrant visa.") (quoting *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990)). The idea that aliens have due process or other rights that dictate the speed at which the USCIS processes visa lottery applications also has been rejected. *See International Immigrants Foundation, Inc.,* 1999 WL 787900 at *1; *see also Avendano-Espejo v. Dep't of Homeland Security*, 448 F.3d 503, 506 (2d Cir. 2006) (per curiam) (rejecting alien's attempt to "dress up" challenge to removal as a due process violation).

3. Equal protection

"To successfully assert an equal protection challenge, [plaintiffs] must first establish that the two classes at issue are similarly situated." *Yuen Jin v. Mukasey*, - - F.3d - - , 2008 WL 3540347, *11 (2d Cir. Aug. 15, 2008). *See also Jankowski-Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir. 2002). If persons are not similarly situated, the government can treat them differently. *Able v. United States*, 155 F.3d 628, 631 (2d Cir. 1998). Even if the two groups at issue are similarly situated, a statute that does not burden a suspect class or a fundamental interest "is accorded a strong presumption of validity," and is subject only to very deferential rational basis review. *See Yuen Jin* at *11 (quoting and citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Rational basis review requires that the subject classification "be upheld against [an] equal protection challenge if there is *any reasonably conceivable* state of facts that could provide a rational basis for the classification. Where there are plausible reasons for Congress' action, our inquiry is at an end." *Yuen Jin* at *11 (quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313-14 (1993)). Immigration laws in particular merit such deferential review. "Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972) (internal quotation marks and citation omitted).

B. Discussion

Plaintiffs claim that the government's delay in issuing its denial letter deprived them of a constitutionally protected property interest in adjustment of their status to that of permanent residents, in violation of the due process clause of the Fifth Amendment. Additionally, Plaintiffs argue that the court's enforcement of the strict one-year time limit in the diversity visa statute violates the equal protection guarantee of the Fifth Amendment as to those aliens who receive notice of denial of an adjustment application after the fiscal year has ended. *See* Pl. Brief at 10-13. Plaintiffs forfeited these claims by failing to raise them in the district court, and in any event, they are without merit.

As an initial matter, Plaintiffs' constitutional claims falter on the same defect as the other claims: The case is moot because, as this Court held in *Mohamed*, the statutory prohibition on granting a diversity visa after the cutoff date divests the courts of any live case or controversy. 436 F.3d at 81. Consequently, the district court lacks jurisdiction to order relief for these alleged violations.

Additionally, these claims are raised on for the first time on appeal. In general, arguments raised for the first time on appeal will not be considered by this Court. *See Pulvers*, 210 F.3d at 95. Though there are limited discretionary exceptions to this rule, to avoid manifest injustice or if the issue is purely legal and requires no additional fact-finding, they are not applicable here. *See*

Readco, Inc., 81 F.3d at 302; *Jacobson v. Fireman's Fund Ins. Co.,* 111 F.3d 261, 266 (2d Cir. 1997) (exercising discretion to consider claim first raised on appeal where question was purely legal and impacted "the finality and effectiveness of arbitrators' awards, and implicate[d] a prior decision of this Court that may no longer reflect the current state of New York law on that question."). Accordingly, the Court should not consider Plaintiffs' equal protection claim for the additional reason that it was not raised it below.

In any event, Plaintiffs' constitutional claims are without merit. First, Plaintiffs are not members of a suspect class, and contrary to their assertion otherwise, they do not hold a constitutionally protected property interest in adjustment of status or an immigrant visa. *See Singh,* 2006 WL 345460 at *2 (no property interest in adjustment of status); *Rahman,* 884 F. Supp. at 786 (no property interest in immigrant visa); *Jaskiewicz*, 2006 WL 3431191 at *4 ("aliens do not have an 'inherent property interest' in an immigrant visa") (quoting *Azizi*, 908 F.2d at 1134). *See also Elkins v. Moreno*, 435 U.S. 647, 667 (1978) ("adjustment of status is a matter of grace, not right"). The public notice relevant to the DV Program for 2005 makes clear that being selected as a winner in the DV Lottery does not guarantee issuance of a visa, even if the applicant is qualified, because the number of entries selected and registered is greater than the number of immigrant visas available. 68 Fed. Reg. at 51630. Thus, the diversity visa statute and the enforcement of its plain and strict time limit are subject to only rational basis review. *USA Baseball v. City of New York*, 509 F. Supp.

2d 285, 296 (S.D.N.Y. 2007) ("The same rational-basis standard of review [applicable to equal protection claims] applies to substantive due process claims where, as here, the legislative act at issue does not impinge upon a fundamental right.").

Congress could have rationally concluded that the imposition of a strict one-year time limit on the issuance of diversity visas was necessary to continue the orderly administration of the DV Program each fiscal year. *See Ngaya*, 323 F.3d at 915 ("Congress intended to place an ultimate deadline on visa eligibility in order to bring closure to each fiscal year's diversity visa program."). Each applicant for adjustment of status under the diversity visa Program (and otherwise) must meet various eligibility factors and go through criminal background checks that take time. To leave open this process for those DV lottery winners who have applied but not yet had their applications approved (and who might not be eligible in any event) could conceivably result in endless delays that would effectively end the diversity visa program.[6] Thus,

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[6] There is no doubt that Congress intended expiration of an applicant's eligibility to receive a visa after the relevant fiscal year has ended even if there are unissued visa numbers remaining from the relevant fiscal year, as it has at times enacted ameliorative legislation permitting the issuance of visas from expired fiscal years to applicants from certain countries. *See Nyaga*, 323 F.3d at 915 n.8 (citing, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Sec. 637, Pub. L. 104-208, 110 Stat. 3009 (permitting fiscal year 1995 DV Program applicants from Poland to receive (continued...)

there is nothing irrational about Congress' decision to impose a strict one-year time limit for the issuance of diversity visas. Nor is there anything inherently discriminatory about the district court's ruling or this Court's ruling in *Mohamed* enforcing the plain and unambiguous terms of the statute. Accordingly, Plaintiffs' constitutional claims should be rejected.

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[6] (...continued)
diversity visas from fiscal year 1997 visa numbers)).

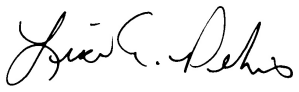
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 15, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



LISA E. PERKINS
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

ADDENDUM

6 U.S.C. § 271: Establishment of Bureau of Citizenship and Immigration Services

* * *

(b) Transfer of functions from Commissioner

In accordance with subchapter XII of this chapter (relating to transition provisions), there are transferred from the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services the following functions, and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date specified in section 455:

(1) Adjudications of immigrant visa petitions.

(2) Adjudications of naturalization petitions.

(3) Adjudications of asylum and refugee applications.

(4) Adjudications performed at service centers.

(5) All other adjudications performed by the Immigration and Naturalization Service immediately before the effective date specified in section 455.

6 U.S.C. § 557. Reference

With respect to any function transferred by or under this chapter (including under a reorganization plan that becomes effective under section 542 of this title) and exercised on or after the effective date of this chapter, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred.

8 U.S.C. § 1101(a)(15)(F)(i)

[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with 1 section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico.

8 U.S.C. § 1153(c) Diversity Immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General--

(i) shall identify–

(I) each region (each in this paragraph referred to as a "high-admission region") for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify--

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions.

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine–

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a low-admission region is the product of–

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of–

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien–

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information.

8 U.S.C. § 1154(a)(1)(I)(ii)(II)

Aliens who qualify, through random selection, for a visa under section 1153(c) of this title shall remain eligible to receive such visa only through the end of the specific fiscal year for which they were selected.

8 U.S.C. § 1255(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa.

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. § 245.1 Eligibility.

(a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. A special immigrant described under section 101(a)(27)(J) of the Act shall be deemed, for the purpose of applying the adjustment to status provisions of section 245(a) of the Act, to have been paroled into the United States, regardless of the actual method of entry into the United States.

8 C.F.R. § 245.2(a)(1) Jurisdiction.

USCIS has jurisdiction to adjudicate an application for adjustment of status filed by any alien, unless the immigration judge has jurisdiction to adjudicate the application under 8 CFR 1245.2(a)(1).

8 C.F.R. § 245.2(a)(5) Decision - -

* * *

(ii) Under section 245 of the Act. If the application is approved, the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of status. An application for adjustment of status, as a preference alien, shall not be approved until an immigrant visa number has been allocated by the Department of State, except when the applicant has established eligibility for the benefits of 1. Public Law 101-238. No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under 8 CFR part 240. Also, an applicant who is a parolee and meets the two conditions described in § 245.2(a)(1) may renew a denied application in proceedings under 8 CFR part 240 to determine admissibility. At the time of renewal of the application, an applicant does not need to meet the statutory requirement of section 245(c) of the Act, or § 245.1(g), if, in fact, those requirements were met at the time the renewed application was initially filed with the director. Nothing in this section shall entitle an alien to proceedings under section 240 of the Act who is not otherwise so entitled.

8 C.F.R. 1240.11(a)(1) Creation of the status of an alien lawfully admitted for permanent residence.

(1) In a removal proceeding, an alien may apply to the immigration judge for cancellation of removal under section 240A of the Act, adjustment of status under section 245 of the Act, adjustment of status under section 1 of the Act of November 2, 1966 (as modified by section 606 of Pub.L. 104-208), section 101 or 104 of the Act of October 28, 1977, section 202 of Pub.L. 105-100, or section 902 of Pub.L. 105-277, or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of § 1240.20, and 8 CFR parts 1245 and 1249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act) shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act, or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 1216.

8 C.F.R. 1240.15 Appeals.

Pursuant to 8 CFR part 1003, an appeal shall lie from a decision of an immigration judge to the Board of Immigration Appeals, except that no appeal shall lie from an order of removal entered in absentia. The procedures regarding the filing of a Form EOIR 26, Notice of Appeal, fees, and briefs are set forth in §§ 1003.3, 1003.31, and 1003.38 of this chapter. An appeal shall be filed within 30 calendar days after the mailing of a written decision, the stating of an oral decision, or the service of a summary decision. The filing date is defined as the date of receipt of the Notice of Appeal by the Board of Immigration Appeals. The reasons for the appeal shall be stated in the Notice of Appeal in accordance with the provisions of § 1003.3(b) of this chapter. Failure to do so may constitute a ground for dismissal of the appeal by the Board pursuant to § 1003.1(d)(2) of this chapter.

8 C.F.R. § 41.61(b)(1) Students - - academic and nonacademic.

* * *

(b) Classification.

(1) An alien is classifiable under INA 101(a)(15)(F)(i) or (iii) or INA 101(a)(15)(M) (i) or (iii) if the consular officer is satisfied that the alien qualifies under one of those sections, and:

(i) The alien has been accepted for attendance for the purpose of pursuing a full course of study, or, for students classified under INA 101(a)(15) (F)(iii) and (M)(iii) Border Commuter Students, full or part-time course of study, in an academic institution approved by the Secretary of Homeland Security for foreign students under INA 101(a)(15)(F)(i) or a nonacademic institution approved under 101(a)(15)(M)(i). The alien has presented a SEVIS Form I-20, Form I-20A-B/I-20ID, Certificate of Eligibility For Nonimmigrant Student Status--For Academic and Language Students, or Form I-20M-N/I-20ID, Certificate of Eligibility for Nonimmigrant Student Status--For Vocational Students, properly completed and signed by the alien and a designated official as prescribed in regulations found at 8 CFR 214.2(F) and 214.2(M);

(ii) The alien possesses sufficient funds to cover expenses while in the United States or can satisfy the consular officer that other arrangements have been made to meet those expenses;

(iii) The alien, unless coming to participate exclusively in an English language training program, has sufficient knowledge of the English language to undertake the chosen course of study or training. If the alien's knowledge of English is inadequate, the consular officer may nevertheless find the alien so classifiable if the accepting institution offers English language training, and has accepted the alien expressly for a full course of study (or part-time course of study for Border Commuter Students) in a language with which the alien is familiar, or will enroll the alien in a combination of courses and English instruction which will constitute a full course of study if required; and

(iv) The alien intends, and will be able, to depart upon termination of student status.

22 C.F.R. § 42.33(a)(1), (b), (c), (d) & (f)

(a) General - -

(1) Eligibility to compete for consideration under section 203(c). An alien will be eligible to compete for consideration for visa issuance under INA 203(c) during a fiscal year only if he or she is a native of a low-admission foreign state, as determined by the Secretary of Homeland Security pursuant to INA 203(c)(1)(E), with respect to the fiscal year in question; and if he or she has at least a high school education or its equivalent or, within the five years preceding the date of application for a visa, has two years of work experience in an occupation requiring at least two years training or experience. The eligibility for a visa under INA 203(c) ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year during which an alien possesses diversity visa eligibility.

* * *

(b) Petition requirement. An alien claiming to be entitled to compete for consideration under INA 203(c) must file a petition with the Department of State for such consideration. At the alien petitioner's request, another person may file a petition on behalf of the alien. The petition will consist of an electronic entry form that the alien petitioner or a person acting on the behalf of the alien petitioner must complete on-line and submit to the Department of State via a Web site established by the Department of State for the purpose of receiving such petitions. The Department will specify the address of the

Web site prior to the commencement of the 30-day or greater period described in paragraph (b)(3) of this section using the notice procedure prescribed in that paragraph.

(1) Information to be provided in the petition. The website will include the electronic entry form mentioned in paragraph (b) of this section. The entry form will require the person completing the form to provide the following information, typed in the Roman alphabet, regarding the alien petitioner:

(i) The petitioner's full name;

(ii) The petitioner's date and place of birth (including city and country, province or other political subdivision of the country);

(iii) The petitioner's gender;

(iv) The country of which the petitioner claims to be a native, if other than the country of birth;

(v) The name[s], date[s] and place[s] of birth and gender of the petitioner's spouse and child[ren], if any, (including legally adopted and step-children), regardless of whether or not they are living with the petitioner or intend to accompany or follow to join the petitioner should the petitioner immigrate to the United States pursuant to INA

203(c), but excluding a spouse or a child [ren] who is already a U.S. citizen or U.S. lawful permanent resident;

(vi) A current mailing address for the petitioner;

(vii) The location of the consular office nearest to the petitioner's current residence or, if in the United States, nearest to the petitioner's last foreign residence prior to entry into the United States;

(2) Requirements for photographs. The electronic entry form will also require inclusion of a recent photograph of the petitioner and of his or her spouse and all unmarried children under the age of 21 years. The photographs must meet the following specifications:

(i) A digital image of the applicant from either a digital camera source or a scanned photograph via scanner. If scanned, the original photographic print must have been 2" by 2" (50mm x 50mm). Scanner hardware and digital image resolution requirements will be further specified in the public notice described in paragraph (b)(3) of this section.

(ii) The image must be in the Joint Photographic Experts Group (JPEG) File Interchange Format (JFIF) format.

(iii) The image must be in color.

(iv) The person being photographed must be directly facing the camera with the head neither tilted up, down, or to the side. The head must cover about 50% of the area of the photograph.

(v) The photograph must be taken with the person in front of a neutral, light-colored background. Photos taken with very dark or patterned, busy backgrounds will not be accepted.

(vi) The person's face must be in focus.

(vii) The person in the photograph must not wear sunglasses or other paraphernalia that detracts from the face.

(viii) A photograph with the person wearing a head covering or a hat is only acceptable if the covering or hat is worn specifically due to that person's religious beliefs, and even then, the hat or covering may not obscure any portion of the face. A photograph of a person wearing tribal, military, airline or other headgear not specifically religious in nature will not be accepted.

(3) Submission of petition. A petition for consideration for visa issuance under INA 203(c) must be submitted to the Department of State by electronic entry to an Internet website designated by the Department for that purpose. No fee will be collected at the time of submission of a petition,

but a processing fee may be collected at a later date, as provided in paragraph (i) of this section. The Department will establish a period of not less than thirty days during each fiscal year within which aliens may submit petitions for approval of eligibility to apply for visa issuance during the following fiscal year. Each fiscal year the Department will give timely notice of both the website address and the exact dates of the petition submission period, as well as other pertinent information, through publication in the Federal Register and such other methods as will ensure the widest possible dissemination of the information, both abroad and within the United States.

(c) Processing of petitions. Entries received during the petition submission period established for the fiscal year in question and meeting all of the requirements of paragraph (b) of this section will be assigned a number in a separate numerical sequence established for each regional area specified in INA 203(c)(1)(F). Upon completion of the numbering of all petitions, all numbers assigned for each region will be separately rank-ordered at random by a computer using standard computer software for that purpose. The Department will then select in the rank orders determined by the computer program a quantity of petitions for each region estimated to be sufficient to ensure, to the extent possible, usage of all immigrant visas authorized under INA 203(c) for the fiscal year in question. The Department will consider petitions selected in this manner to have been approved for the purposes of this section.

(d) Validity of approved petitions. A petition approved pursuant to paragraph (c) of this section will be valid for a period not to exceed Midnight of the last day of the fiscal year for which the petition was approved. At that time, the Department of State will consider approval of the petition to cease to be valid pursuant to INA 204(a)(1)(I)(ii)(II), which prohibits issuance of visas based upon petitions submitted and approved for a fiscal year after the last day of that fiscal year.

(f) Allocation of visa numbers. To the extent possible, diversity immigrant visa numbers will be allocated in accordance with INA 203(c)(1)(E) and will be allotted only during the fiscal year for which a petition to accord diversity immigrant status was submitted and approved. Under no circumstances will immigrant visa numbers be allotted after midnight of the last day of the fiscal year for which the petition was submitted and approved.

68 Fed. Reg. 51627 Notice of registration for the Diversity Immigrant Visa Program.

This public notice provides information on how to apply for the DV 2005 Program. This notice is issued pursuant to 22 CFR 42.33(b)(3) which implements sections 201(a)(3), 201(e), 203(c) and 204(a)(1)(G) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1151, 1153, and 1154(a)(1)(G)).

Instructions for the 2005 Diversity Immigrant Visa Program (DV-2005)

The congressionally mandated Diversity Immigrant Visa Program is administered on an annual basis by the Department of State and conducted under the terms of Section 203(c) of the Immigration and Nationality Act (INA). Section 131 of the Immigration Act of 1990 (Pub. L. 101-649) amended INA 203 to provide for a new class of immigrants known as "diversity immigrants" (DV immigrants). The Act makes available 50,000 permanent resident visas annually to persons from countries with low rates of immigration to the United States.

The annual DV program makes permanent residence visas available to persons meeting the simple, but strict, eligibility requirements. Applicants for Diversity Visas are chosen by a computer-generated random lottery drawing. The visas, however, are distributed among six geographic regions with a greater number of visas going to regions

with lower rates of immigration, and with no visas going to citizens of countries sending more than 50,000 immigrants to the U.S. in the past five years. Within each region, no one country may receive more than seven percent of the available Diversity Visas in any one year.

For DV-2005, natives of the following countries are not eligible to apply because they sent a total of more than 50,000 immigrants to the U.S. in the previous five years (the term "country" in this notice includes countries, economies and other jurisdictions explicitly listed beginning on page 15).

Canada, China (mainland-born),

Colombia, Dominican Republic,

El Salvador, Haiti, India,

Jamaica, Mexico, Pakistan,

Philippines, Russia, South Korea,

United Kingdom (except Northern Ireland) and its dependent territories, and

Vietnam. Persons born in Hong Kong SAR, Macau SAR and Taiwan are eligible

Application Submission Dates

Entries for the DV-2005 Diversity Visa Lottery must be submitted electronically between Saturday, November 1, 2003 and Tuesday, December 30, 2003. Applicants may access the electronic Diversity Visa entry form at www.dvlottery.state.gov during the 60-day registration period beginning November 1. Paper entries will not be accepted.

Requirements For Entry

• Applicant must be a native of one of the countries listed beginning on page 10. See "List of Countries by Region Whose Natives Qualify."

Native of a country whose natives qualify: In most cases this means the country in which the applicant was born. However, if a person was born in a country whose natives are ineligible but his or her spouse was born in a country whose natives are eligible, such person can claim the spouse's country of birth providing both the applicant and spouse are issued visas and enter the U.S. simultaneously. If a person was born in a country whose natives are ineligible, but neither of his or her parents was born there or resided there at the time of the birth, such person may be

able to claim nativity in the country of birth of one of the parents.

• Applicants must meet either the education or training requirement of the DV program.

Education or Training: An applicant must have EITHER a high school education or its equivalent, defined as successful completion of a 12-year course of elementary and secondary education; OR two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform. The U.S. Department of Labor's O*Net OnLine database will be used to determine qualifying work experience. Applicants will also find a link to a Labor Department list of qualifying occupations at the Consular Affairs Web site: http://www.travel.state.gov.

If the applicant cannot meet these requirements, he or she should NOT submit an entry to the DV program.

Procedures for Submitting an Entry to DV-2005

• All entries by an applicant will be disqualified if more than ONE entry for the applicant is received, regardless of who submitted the entry. Applicants may prepare and submit their own entries, or have someone submit the entry for them.

• For the DV-2005 Program, the Department of State for the first time will only accept completed Electronic Diversity Visa Entry Forms submitted electronically at http://www.dvlottery.state.gov during a lengthened 60 day registration period beginning November 1, 2003. *51628

• Also for the first time, the Department of State will send DV lottery entrants an electronic confirmation notice upon receipt of a completed EDV Entry Form.

• The entry will be disqualified if all required photos are not attached. Recent photographs of the applicant and his or her spouse and each child under 21 years of age, including all natural children as well as all legally-adopted and stepchildren, excepting a child who is already a U.S. citizen or a Legal Permanent Resident, even if a child no longer resides with the applicant or is not intended to immigrate under the DV program, must be submitted electronically with the Electronic Diversity Visa Entry Form. Group or family photos will not be accepted; there must be a separate photo for each family member.

Each applicant, his/her spouse, and each child will therefore need a computer file containing his/her digital photo (image) which will be submitted on-line with the EDV Entry Form. The image file can be produced either by taking a new digital photograph or by scanning a photographic print with a digital scanner.

If the submitted digital images do not conform to the following specifications, the system will automatically reject the EDV Entry Form and notify the sender.

• The image must be in the Joint Photographic Experts Group (JPEG) format.

• The image must be either in color or grayscale; monochrome images (2-bit color depth) will not be accepted.

• If a new digital photograph is taken, it must have a resolution of 320 pixels wide by 240 pixels high, and a color depth of either 24-bit color, 8-bit color, or 8-bit grayscale.

• If a photographic print is scanned, the print must be 2 inches by 2 inches (50mm x 50mm) square. It must be scanned at a resolution of 150 dots per inch (dpi) and with a color depth of either 24-bit color, 8-bit color, or 8-bit grayscale.

• The maximum image size accepted will be sixty-two thousand five hundred (62,500) bytes.

If the submitted digital images do not conform to the following specifications, the entry will be disqualified:

• Applicant, spouse, or child must be directly facing the camera; the head of the person being photographed should not be tilted up, down or to the side, and should cover about 50% of the area of the photo.

• The photo should be taken with the person being photographed in front of a neutral, light-colored background. Photos taken with very dark or patterned, busy backgrounds will not be accepted.

• Photos in which the face of the person being photographed is not in focus will not be accepted.

• Photos in which the person being photographed is wearing sunglasses or other paraphernalia which detracts from the face will not be accepted.

• Photos of applicants wearing head coverings or hats are only acceptable due to religious beliefs, and even then, may not obscure any portion of the face of the applicant. Photos of applicants with tribal or other headgear not specifically religious in nature are not acceptable. Photos of military, airline or other personnel wearing hats will not be accepted.

Information Required for the Electronic Entry

There is only one way to enter the DV-2005 lottery. Applicants must submit an Electronic Diversity Visa Entry Form (EDV Entry Form), which is accessible only at www.dvlottery.state.gov. Failure to complete the form in its

entirety will disqualify the applicant's entry. Applicants will be asked to submit the following information on the EDV Entry Form.

1. FULL NAME, Last/Family Name, First Name, Middle name.

2. DATE OF BIRTH, Day, Month, Year.

3. GENDER, Male or Female.

4. CITY/TOWN OF BIRTH.

5. COUNTRY OF BIRTH, The name of the country should be that which is currently in use for the place where the applicant was born.

6. APPLICANT PHOTOGRAPH, (See pages 3 and 4 for information on photo specifications).

7. MAILING ADDRESS, Address, City/Town, District/Country/Province/State, Postal. Code/Zip Code, Country.

8. PHONE NUMBER (optional).

9. E-MAIL ADDRESS (optional).

10. COUNTRY OF ELIGIBILITY IF THE APPLICANT'S NATIVE COUNTRY IS DIFFERENT FROM COUNTRY OF BIRTH, If the applicant is claiming nativity in a country other than his or her place of birth, that information must be submitted on the entry. If an applicant is claiming nativity through spouse or parent, please indicate that on the entry.

11. MARRIAGE STATUS, Yes or No.

12. NUMBER OF CHILDREN THAT ARE UNMARRIED AND UNDER 21 YEARS OF AGE.

13. SPOUSE INFORMATION, Name, Date of Birth, Gender, City/Town of Birth, Country of Birth, Photograph.

14. CHILDREN INFORMATION, Name, Date of Birth, Gender, City/Town of Birth, Country of Birth, Photograph.

Note: Entries must include the name, date and place of birth of the applicant's spouse and all natural children, as well as all legally-adopted and stepchildren who are unmarried and under the age of 21 years, excepting those children who are already U.S. citizens or legal permanent residents, even if they are no longer legally married to the child's parent, and even if the spouse or child does not currently reside with the applicant and/or will not immigrate with the applicant.

Note that married children and children 21 years or older will not qualify for the diversity visa. Failure to list all children will result in the applicant's disqualification for the visa. (See question 11 on the list of Frequently Asked Questions.)

Selection of Applicants

Applicants will be selected at random by computer from among all qualified entries. Those selected will be notified by mail between May and July 2004 and will be provided further instructions, including information on fees connected with immigration to the U.S.

Persons not selected will not receive any notification. U.S. embassies and consulates will not be able to provide a list of successful applicants. Spouses and unmarried children under age 21 of successful applicants may also apply for visas to accompany or follow to join the principal applicant. DV-2005 visas will be issued between October 1, 2004 and September 30, 2005.

In order to actually receive a visa, applicants selected in the random drawing must meet all eligibility requirements under U.S. law. Processing of entries and issuance of diversity visas to successful applicants and their eligible family members must occur by midnight on September 30, 2005. Under no circumstances can diversity visas be issued or adjustments approved after this date, nor can family

members obtain diversity visas to follow to join the applicant in the U.S. after this date.

Important Notice

No fee is charged to enter the annual DV program. The U.S. Government employs no outside consultants or private services to operate the DV program. Any intermediaries or others who offer assistance to prepare DV casework for applicants do so without the authority or consent of the U.S. Government. Use of any outside intermediary or assistance to prepare a DV entry is entirely at the applicant's discretion.

A qualified entry submitted electronically directly by an applicant has an equal chance of being selected by the computer at the Kentucky Consular *51629 Center, as does an entry submitted electronically through a paid intermediary who completes the entry for the applicant. Every entry received during the lottery registration period will have an equal random chance of being selected within its region. However, receipt of more than one entry per person will disqualify the person from registration, regardless of the source of that entry.

Frequently Asked Questions About DV Registration

1. What does the term "native" mean? Are there any situations in which persons who were not born in a qualifying country may apply?

"Native" ordinarily means someone born in a particular country, regardless of the individual's current country of residence or nationality. But for immigration purposes "native" can also mean someone who is entitled to be "charged" to a country other than the one in which he or she was born under the provisions of Section 202(b) of the Immigration and Nationality Act.

For example, if a principal applicant was born in a country that is not eligible for this year's DV program, he or she may claim "chargeability" to the country where his or her derivative spouse was born, but he or she will not be issued a DV-1 unless the spouse is also eligible for and issued a DV-2, and both must enter the U.S. together on the DVs. In a similar manner, a minor dependent child can be "charged" to a parent's country of birth.

Finally, any applicant born in a country ineligible for this year's DV program can be "charged" to the country of birth of either parent as long as neither parent was a resident of the ineligible country at the time of the applicant's birth. In general, people are not considered residents of a country in which they were not born or legally naturalized if they are only visiting the country temporarily or stationed in the

country for business or professional reasons on behalf of a company or government. An applicant who claims alternate chargeability must include information to that effect on the application for registration.

2. Are there any changes or new requirements in the application procedures for this diversity visa registration?

All DV-2005 lottery entries must be submitted electronically at www.dvlottery.state.gov between Saturday, November 1, 2003 and Tuesday, December 30, 2003. No paper entries will be accepted.

The Department of State implemented an electronic registration system in order to make the Diversity Visa process more efficient and secure. The Department will utilize special technology and other means to identify applicants who commit fraud for the purposes of illegal immigration or who submit multiple applications.

The signature requirement on the DV entry has been eliminated and the DV-2005 Diversity Immigrant Visa Program registration period will run from November 1 through December 30. The other major change from last year is that natives of Russia will not be eligible to apply for a diversity visa. (Please see Question 4 below for a description of why natives of certain countries do not qualify for the DV Program.)

3. Are signatures and photographs required for each family member, or only for the principal applicant?

Signatures are not required on the Electronic Diversity Visa Entry Form. Recent and individual photos of the applicant, his or her spouse and all children under 21 years of age are required. Family or group photos are not accepted. Check the information on the photo requirements on page 2 of this bulletin.

4. Why do natives of certain countries not qualify for the diversity program?

Diversity visas are intended to provide an immigration opportunity for persons from countries other than the countries that send large numbers of immigrants to the U.S. The law states that no diversity visas shall be provided for natives of "high admission" countries. The law defines this to mean countries from which a total of 50,000 persons in the Family-Sponsored and Employment-Based visa categories immigrated to the United States during the previous five years. Each year, the Bureau of Citizenship and Immigration Services (BCIS) adds the family and employment immigrant admission figures for the previous five years in order to identify the countries whose natives must be excluded from the annual diversity lottery. Because there is a separate determination made before each annual DV entry period, the list of countries whose natives do not qualify may change from one year to the next.

5. What is the numerical limit for DV-2005?

By law, the U.S. diversity immigration program makes available a maximum of 55,000 permanent residence visas each year to eligible persons. However, the Nicaraguan Adjustment and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning as early as DV-99, and for as long as necessary, 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. The actual reduction of the limit to 50,000 began with DV-2000 and remains in effect for the DV-2005 program.

6. What are the Regional Diversity Visa (DV) limits for DV-2005?

The Bureau of Citizenship and Immigration Services (BCIS) determines the DV regional limits for each year according to a formula specified in Section 203(c) of the Immigration and Nationality Act (INA). Once the BCIS has completed the calculations, the regional visa limits will be announced.

7. When will entries for the DV-2005 program be accepted?

The DV-2005 entry period will begin on Saturday, November 1, 2003 and will last for 60 days through Tuesday, December 30, 2003. Each year millions apply for

the program during the registration period. The massive volume of entries creates an enormous amount of work in selecting and processing successful applicants. Holding the entry period during November and December will ensure successful applicants are notified in a timely manner, and gives both them and our embassies and consulates time to prepare and complete entries for visa issuance.

8. May persons who are in the U.S. apply for the program?

Yes, an applicant may be in the U.S. or in another country, and the entry may be submitted from the U.S. or from abroad.

9. Is each applicant limited to only one entry during the annual DV registration period?

Yes, the law allows only one entry by or for each person during each registration period; applicants for whom more than one entry is submitted will be disqualified. The Department of State will employ sophisticated technology and other means to identify individuals that submit multiple entries during the registration period. Applicants submitting more than one entry will be disqualified and an electronic record will be permanently maintained by the Department of State. Applicants may apply for the program each year during the regular registration period.

10. May a husband and a wife each submit a separate entry?

Yes, a husband and a wife may each submit one entry, if each meets the eligibility requirements. If either were selected, the other would be entitled to derivative status.

11. What family members must I include on my DV entry?

On your entry you must list your spouse, that is, husband or wife, and all unmarried children under 21 years of age, with the exception of a child who *51630 is already a U.S. citizen or a Legal Permanent Resident. You must list your spouse even if you are currently separated from him or her. However, if you are legally divorced, you do not need to list your former spouse. For customary marriages, the important date is the date of the original marriage ceremony, not the date on which the marriage is registered. You must list ALL your children who are unmarried and under the age of 21 years, whether they are your natural children, your spouse's children by a previous marriage, or children you have formally adopted in accordance with the laws of your country, unless a child is already a U.S. citizen or Legal Permanent Resident. List all children under 21 years of age even if they no longer reside with you or you do not intend for them to immigrate under the DV program.

The fact that you have listed family members on your entry does not mean that they later must travel with you. They may choose to remain behind. However, if you include an

eligible dependent on your visa application forms that you failed to include on your original entry, your case will be disqualified. (This only applies to persons who were dependents at the time the original application was submitted, not those acquired at a later date.) Your spouse may still submit a separate entry, even though he or she is listed on your entry, as long as both entries include details on all dependents in your family. See question 10 above.

12. Must each applicant submit his or her own entry, or may someone act on behalf of an applicant?

Applicants may prepare and submit their own entries, or have someone submit the entry for them. Regardless of whether an entry is submitted by the applicant directly, or assistance is provided by an attorney, friend, relative, etc., only one entry may be submitted in the name of each person. If the entry is selected, the notification letter will be sent only to the mailing address provided on the entry.

13. What are the requirements for education or work experience?

The law and regulations require that every applicant must have at least a high school education or its equivalent or, within the past five years, have two years of work experience in an occupation requiring at least two years training or experience. A "high school education or equivalent" is defined as successful completion of a twelve-year course of elementary and secondary education

in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to a high school education in the United States. Documentary proof of education or work experience should not be submitted with the lottery entry, but must be presented to the consular officer at the time of the visa interview. To determine eligibility based on work experience, definitions from the Department of Labor's O*Net OnLine database will be used.

14. How will successful entrants be selected?

At the Kentucky Consular Center, all entries received from each region will be individually numbered. After the end of the registration period, a computer will randomly select entries from among all the entries received for each geographic region. Within each region, the first entry randomly selected will be the first case registered, the second entry selected the second registration, etc. All entries received during the registration period will have an equal chance of being selected within each region. When an entry has been selected, the applicant will be sent a notification letter by the Kentucky Consular Center, which will provide visa application instructions. The Kentucky Consular Center will continue to process the case until those who are selected are instructed to appear for visa interviews at a U.S. consular office, or until those able to do so apply at a BCIS office in the United States for change of status.

15. May winning applicants adjust their status with BCIS?

Yes, provided they are otherwise eligible to adjust status under the terms of Section 245 of the INA, selected applicants who are physically present in the United States may apply to the Bureau of Citizenship and Immigration Services (BCIS) for adjustment of status to permanent resident. Applicants must ensure that BCIS can complete action on their cases, including processing of any overseas derivatives, before September 30, 2005, since on that date registrations for the DV-2005 program expire. No visa numbers for the DV-2005 program will be available after midnight on September 30, 2005 under any circumstances.

16. Will applicants who are not selected be informed?

No, applicants who are not selected will receive no response to their entry. Only those who are selected will be informed. All notification letters are sent within about nine months of the end of the application period to the address indicated on the entry. Anyone who does not receive a letter will know that his or her application has not been selected.

17. How many applicants will be selected?

There are 50,000 DV visas available for DV-2005, but more than that number of individuals will be selected. Because it is likely that some of the first 50,000 persons

who are selected will not qualify for visas or pursue their cases to visa issuance, more than 50,000 entries will be selected by the Kentucky Consular Center to ensure that all of the available DV visas are issued. However, this also means that there will not be a sufficient number of visas for all those who are initially selected. All applicants who are selected will be informed promptly of their place on the list. Interviews with those selected will begin in early October 2004. The Kentucky Consular Center will send appointment letters to selected applicants four to six weeks before the scheduled interviews with U.S. consular officers at overseas posts. Each month visas will be issued, visa number availability permitting, to those applicants who are ready for issuance during that month. Once all of the 50,000 DV visas have been issued, the program for the year will end. In principle, visa numbers could be finished before September 2005. Selected applicants who wish to receive visas must be prepared to act promptly on their cases. Random selection by the Kentucky Consular Center computer does not automatically guarantee that you will receive a visa.

18. Is there a minimum age for applicants to apply for the DV Program?

There is no minimum age to apply for the program, but the requirement of a high school education or work experience for each principal applicant at the time of application will effectively disqualify most persons who are under age 18.

19. Are there any fees for the DV Program?

There is no fee for submitting an entry. A special DV case processing fee will be payable later by persons whose entries are actually selected and processed at a U.S. consular section for this year's program. DV applicants, like other immigrant visa applicants, must also pay the regular visa fees at the time of visa issuance. Details of required fees will be included with the instructions sent by the Kentucky Consular Center to applicants who are selected.

20. Are DV applicants specially entitled to apply for a waiver of any of the grounds of visa ineligibility?

No. Applicants are subject to all grounds of ineligibility for immigrant visas specified in the Immigration and Nationality Act. There are no special provisions for the waiver of any ground *51631 of visa ineligibility other than those ordinarily provided in the Act.

21. May persons who are already registered for an immigrant visa in another category apply for the DV Program?

Yes, such persons may apply for the DV program.

22. How long do applicants who are selected remain entitled to apply for visas in the DV Category?

Persons selected in the DV-2005 lottery are entitled to apply for visa issuance only during fiscal year 2005, i.e., from October 2004 through September 2005. Applicants must obtain the DV visa or adjust status by the end of the Fiscal Year (September 30, 2005). There is no carry-over of DV benefits into the next year for persons who are selected but who do not obtain visas during FY-2005. Also, spouses and children who derive status from a DV-2005 registration can only obtain visas in the DV category between October 2004 and September 2005. Applicants who apply overseas will receive an appointment letter from the Kentucky Consular Center four to six weeks before the scheduled appointment.

List Of Countries by Region Whose Natives Qualify

The lists below show the countries whose natives are QUALIFIED within each geographic region for this diversity program. The determination of countries within each region is based on information provided by the Geographer of the Department of State. The countries whose natives do not qualify for the DV-2005 program were identified by the Bureau of Citizenship and Immigration Services (BCIS) according to the formula in Section 203(c) of the Immigration and Nationality Act. Dependent areas overseas are included within the region of the governing country. The countries whose natives do NOT qualify for this diversity program (because they are the principal source countries of Family-Sponsored and Employment-Based immigration, or "high admission" countries) are noted in parentheses after the respective regional lists.

* * * *

CERTIFICATE OF SERVICE

07-5630-cv Amin v. Mukasey

I hereby certify that two copies of this Brief for the Appellees was sent by Regular First Class Mail delivery to:

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I also certify that the original and nine copies were also shipped via hand delivery to:

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on this 15th day of September 2008.

Notary Public:

_____

Sworn to me this

September 15, 2008

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2011

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ANTI-VIRUS CERTIFICATION

Case Name: Amin v. Mukasey

Docket Number: 07-5630-cv

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 9/15/2008) and found to be VIRUS FREE.

/s/Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: September 15, 2008