Testimony of Gregory Siskind
Attorney
Siskind Susser Bland, P.C. – Immigration Lawyers
Memphis, Tennessee

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Hearing on the Save America Comprehensive Immigration Act of 2007
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Thank you for this opportunity to testify before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law to share my views on the Save America Comprehensive Immigration Act of 2007, which I will refer to as the SAVE Act. The SAVE Act was introduced by Representative Sheila Jackson-Lee.

I am Greg Siskind and I have practiced immigration law for the past seventeen years and am the author of a number of books, book chapters and articles on US immigration law. They include *The J-1 Visa Guidebook*, published annually by Lexis-Nexis, *Siskind's Immigration Bulletin*, a weekly newsletter with more than 40,000 readers, as well as chapters in the American Immigration Lawyers Association books *Immigration Options for Physicians*, *Immigration Options for Religious Workers* and *Immigration Options for Religious Workers* and a chapter on immigration law in the book *The Biggest Mistakes Physicians Make*, published by SEAK. Visalaw.com, the web site I created in 1994, has more than a thousand articles on various immigration topics and was the first web site in the world devoted to the subject of immigration law.

While I will largely focus my remarks on Title II of the SAVE Act regarding the creation of a Board of Visa Appeals, I would first like to make some general comments about the bill. The SAVE Act does not seek to solve every immigration problem in the current system. Rather, Congresswoman Jackson-Lee, the former Ranking Member of the Immigration Subcommittee, has identified a number of the most pressing problems in immigration and has offered solutions that are both straightforward and workable. This includes items that, while important, have not been covered in comprehensive immigration reform proposals introduced in the House or the Senate. SAVE is a "good ideas" bill that will hopefully pass on its own or be largely incorporated in to other legislation that may move through Congress.

A few sections of SAVE that are not covered in pending comprehensive immigration reform proposals are worth special mention:

- provisions making applicants less vulnerable to administrative delays such as one allowing for the sponsorship of adopted children when adoption proceedings

begin prior to the beneficiary turning sixteen (as opposed to the current law requiring completion of the adoption by that age);
- a provision allowing spouses of permanent residents to file for K visas allowing for entrance to the US more quickly once a visa number is available;
- a section providing grandparents, aunts and uncles with the ability to sponsor a grandchild, niece or nephew when an applicant's parents died before the age of eighteen;
- a provision making it a violation of federal law for an employer to threaten an employee with deportation or other immigration consequences if the purpose is to intimidate or coerce;
- expanding the right to counsel for immigrants in bond, custody and detention hearings;
- a sensible, fair waiver availability for persons with minor controlled substance offenses;
- the granting of refugee and asylees benefits to handicapped adult children of asylees and refugees if they are unable to care for themselves or when needed to preserve family unity;
- allowing long-term temporary protected status beneficiaries to seek permanent residency.

All of these ideas as well as many others in the bill are worth consideration and would represent substantial improvements to the immigration system.

As I previously noted, I focus my remarks today on Title II of the bill on the establishment of a board of visa appeals for immigrant visa petitions denied at US consulates abroad. The idea for a board of visa appeals is not new. In fact, Senator Edward Kennedy wrote about the need for such a board back in 1970 in an article he wrote on needed reforms to the US immigration system.[1] While nearly four decades have passed since Senator Kennedy introduced the concept, the need for such a board remains.

Generally speaking, there are two procedures available for people eligible for permanent residency to process their applications. If the aliens are in the United States, after processing an I-130, I-140 or other immigrant visa classification petition with US Citizenship and Immigration Services (USCIS), which indicates that they are eligible for the status being sought, they typically are able to complete their applications domestically by filing an adjustment of status petition with US Citizenship and Immigration Services.

Applicants outside the US processing green card applications based on the very same USCIS-approved immigrant visa classification petitions must instead process their immigrant visa petitions at US consulates overseas.

One of the most serious mistakes a would be immigrant or the individual's lawyer can make in a permanent residency case is assuming that the approval of an I-130 or I-140 immigrant petition by US Citizenship and Immigration Services guarantees the applicant

[1] "Immigration Law: Some Refinements and New Reform," by Edward M. Kennedy, International Migration Review, Vol. 4, No. 3 (Summer 1970), pp. 4-10.

will be able to obtain permanent residency. For instance, the applicant must also be "admissible" to the United States and the rules regarding inadmissibility are extremely complex. Applying the facts to those laws is often quite challenging.

An application can be denied based on a variety of admissibility grounds. One common example is triggering a reentry bar by overstaying an authorized period of stay. The facts in these cases are not always clear cut. For example, an engineer at a well-known company in my home state of Tennessee recently came to me to deal with the problem of being misled by the one of the company's human resource officials regarding the timely filing of an extension of the employee's H-1B application. The company informed the employee that the extension was filed when, in fact, no application had ever been filed. After more than six months of asking, the truth was revealed. Unfortunately, this did not happen soon enough to stop a three year reentry bar from being triggered even though the engineer believed he was complying with US laws.

Sometimes the denial may be based on questions of eligibility for the visa such as the application of the Child Status Protection Act, rules regarding the legitimating of a child who is the child of a US citizen parent not married to the child's other non-citizen parent, issues regarding the legality of a marriage under the laws of the country where the marriage took place, or a broad variety of other legal questions that arise in immigrant visa cases.

For applicants adjusting status in the United States, a denial can be challenged in administrative tribunals (immigration court and the Board of Immigration Appeals (BIA)) and in the federal courts.

However, denial of an immigrant visa at a consular post is almost impossible to have overturned. Section 104(a) of the Immigration and Nationality Act provides

> *The Secretary of State shall be charged with the administration and enforcement of the provisions of this Act …. relating to …. the powers, duties and functions of diplomatic and consular officers of the United States except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas.*

Various court decisions over the past century have held up the principle that a consular officer's decision is not subject to administrative or judicial review. [2]

[2] In the case of *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), the doctrine of Consular Non-reviewability barred a review of the denial of a wife's petition on behalf of her husband even where the consular officer failed to provide the specific reasons for the denial despite the fact that this was what was required under the applicable law.

Even where an applicant has sought review of a denial on the grounds that a consular officer has acted on erroneous information, the court has been unable to assist. A father of three U.S. citizen children sought review of his denial on the grounds that the visa was denied due to erroneous information. He argued that

The opportunity to challenge visa denials by consular officers is minimal. The appeal would have to be made to the officer's superiors at the office and they would not be required to respond to an applicant's challenge to the consulate officer's decision. As a matter of discretion, a case may be referred to the State Department in Washington for an advisory opinion on a pure question of law. Applicants are not permitted to see the advisory opinion and applicants are only notified that the decision has been issued. And the State Department's Visa Office view that an Advisory Opinion Division determination only offers "guidance" to consular officers has been upheld in Federal Court.[3]

The Save Act's Board of Visa Appeals proposal

Title II of the Save America Comprehensive Immigration Act of 2007 will create a Board of Visa Appeals (BVA) within the State Department to review family-based visa appeals. The board would have five members appointed by the Secretary of State, two of whom may be consular officers. The BVA would have the authority to review any discretion decision of a consular officer on a family-based immigrant visa petition. Unlike the current system where the only aspect of a decision that may be reviewed is a consular officer's interpretation of the law, the BVA would be able to review the entire decision of

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if this information were not corrected he would never be able to legalize his entry or residence. *Loza-Bedova v. Immigration and Naturalization Serv*., 410 F.2d 343 (9th Cir. 1969).

Courts have refused to review the denial of a visa based on what a consular officer determined to be an invalid marriage. *DeGomez v. Kissinger*, 534 F.2d 518 (2d Cir. 1976). In this particular case, the court refused to review the denial of a visa denied on the grounds that the consular officer believed the marriage between the husband and his permanent resident wife was a sham. Due to the doctrine of consular non-reviewability the court also refused to interview the wife despite her request that they do so

The court refused to review the decision of a consular officer to deny the husband of a permanent resident a visa even where he sought to prove that the only grounds for his denial was his former political affiliation that he claimed he held only as a result of the turbulent political state in his home country, and further that if he were forced to return to that country, that this would be a threat to his personal safety. *Ben-Issa v. Reagan*, 645 F. Supp 1556 (W.D.Mi.1986).

The court was barred from reviewing the denial of a husband's visa petition on behalf of his alien wife where he sought to prove that she had not been charged with the crimes of "moral turpitude" that her visa denial was based upon. *States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929).

Despite allegations that the consular officer disregarded the Attorney General's controlling interpretation of the law, the court was unable to review the denial of an immigrant visa petition of an unmarried adult daughter of a permanent resident. *Garcia v. Baker*, 765 F.Supp. 426 (N.D. Ill. 1990).

The doctrine of consular non-reviewability barred a father seeking relief when he alleged that a consular officer denied his petition based on the false belief that his permanent resident son was not legitimate. *Grullon v. Kissinger*, 417 F.Supp. 337 (E.D.N.Y. 1976).

[3] *Garcia v. Baker*, 765 F. Suppl. 426 (N.D. Ill. 1990); *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929).

the consular officer and the board itself shall have the authority to override the consular officer when the preponderance of the evidence is contrary to the officer's decision.

Applicants denied immigrant visas will be provided a notice of the availability of the BVA and that a request for review shall be made within 60 days of the denial of the case. Once a request for a review is made, the BVA shall have thirty days to notify the consular officer to provide the Board with a written record of the proceedings in order to review all of the facts of the case. The consular office shall then have up to 30 days to provide the requested documentation.

Applicants will be advised when the Board hearing will occur and shall be permitted to be represented by counsel. The legislative language does not require the State Department to allow for an in-person hearing and presumably the agency will use its discretion to establish a written appeals process in order to operate efficiently. Finally, the State Department shall charge a fee for an appeal sufficient to cover the State Department's cost for the proceedings.

There are a number of reasons supporting the creation of a Board of Visa Appeals.

Fairness

First, there is the basic question of why two persons with the same type of immigrant visa petition and the same set of facts should be entitled to different rights and protections based strictly on where they are physically located?

Arguably, many individuals who are consular processing actually have a *stronger* case for having the option to appeal than applicants in the US who are adjusting status. Adjustment applicants are often in a non-immigrant work status and can continue living in the US while they re-apply (assuming they can present evidence to overcome the basis for the denial). An individuals consular processing is likely going to have to wait several additional years.

Many individuals in the US with immigration status violations are able to process under provisions like Section 245(k) or Section 245(i). Consular applicants generally have no status violations and have been waiting patiently – often for many years – for their cases to be heard. During the comprehensive immigration reform debate this past summer, many opponents of that legislation argued that people who play by the rules should not be treated worse than those don't. Presumably, the lack of an appeals process for consular-processed immigrant visa petitions should cause similar concerns

Another issue of fairness in the consular process versus the adjustment of status process involves the role of the attorney.

Interviews are waived in many easily approvable adjustment of status cases. In those cases where interviews are mandatory or where a USCIS examiner determines that an

interview is appropriate, an applicant is entitled to be represented by counsel. The presence of counsel, of course, can be critical in the determination of a case.

The State Department notes the importance of counsel in the visa process:

> *In the sometimes-complex world of visas, a good attorney can prepare a case properly; weed out "bad" cases; and alert applicants to the risks of falsifying information. The attorney can help the consular officers by organizing a case in a logical manner, by clarifying issues of concern, by avoiding duplication of effort and by providing the applicant with the necessary understanding of the intricacies of the visa process.*[4]

But despite this acknowledgement of the importance of counsel, many consulates around the world bar attorneys from participating in the interview process. The State Department allows consulates and individual consular officers to determine the circumstances if and when an attorney can represent a client. Many consulates have decided to bar attorneys not just from the interview, but even from entering the consulate at all. Communication by an applicant or the applicant's attorney with a consular officer in person or by any means of communication such as telephone or email is often impossible or severely limited.

The interview itself often takes place at a window and lasts just a few minutes with only a few questions being asked and no opportunity for the applicant to address questions relating to the eligibility for the visa. The applicant may have waited many years – as long as twenty years in some cases - for an interview and have his or her entire future hanging in the balance. The burden is on the individual to prove their eligibility; however, they only get one chance to do this. Individuals from foreign nations often lack a highly sophisticated understanding of our nation's laws and are likely to be confused about how best to present their case before a U.S. consular officer.

While an appeals board would not affect the role of the attorney in a consular interview or otherwise alter the interview process, applicants would benefit from representation of counsel in front of an appeals board.

Oversight

While the vast majority of consular officers try to be objective and to make sure that they have a sufficient understanding of the facts and the law to issue a fair decision, the fact is that the consular officer acts as judge, jury and prosecutor, and they do it during an interview that typically only lasts a few minutes. And in smaller posts, a consular office may be inexperienced and have very little supervision.

[4] 9 FAM 40.4 N12.

Consular officers are required to provide a timely, written notice to applicants explaining the reason for a visa denial. In practice, however, the notice may contain virtually no information useful in determining the actual basis for denial of the application and may simply list a section of the statute with no analysis explaining the basis for a negative decision.

A consular appeals board could help in ensuring that consular officers who deny cases are more careful in documenting the reasons surrounding the decision and that the alien will be able to understand the reasons for the denial. And the State Department would get a better sense of problems in adjudications at posts when they have the ability to review the entire records of decisions. If the board is able to determine that certain posts or individual officers are making poor decisions, training can be offered or officers can be assigned to other duties.

The Image of America

As Geoff Freeman, executive director of the Discover America Partnership, noted in testimony before the Subcommittee on International Organizations, Human Rights and Oversight Committee on Foreign Affairs this past March, treatment of visa applicants at US consulates is having serious consequences when it comes to shaping the image American has around the world.[5] As noted in Mr. Freeman's testimony:

- Travelers rate America's entry process as the "world's worst" by greater than a 2:1 margin over the next-worst destination area.

- The U.S. ranks with Africa and the Middle East when it comes to traveler-friendly paperwork and officials.

- 54 percent of international travelers say that immigration officials are "rude."

- Travelers to the U.S. are more afraid of U.S. government officials (70%) than the threat of terrorism or crime (54%).

While a consular appeals board would only apply to green card cases and not the large number of visitor visa denials that occur every day, these are the denials that prevent Americans from bringing family members to the US. The fact that at least some cases will be reviewable will send out a signal that the US is trying to be fair. Sending out the message that our consular officers are arbitrary and capricious does nothing to advance America's public diplomacy efforts.

[5] http://www.poweroftravel.org/freeman_testimony_3_20_07.pdf

Conclusion

A Board of Visa Appeals is long overdue and would ensure that applicants processing immigrant visas at US consulates are now worse off than those processing in the US. The costs would be borne by the applicants, not by US taxpayers, and the quality of adjudications at consulates overseas are likely to improve with the additional oversight.

There are some changes to the proposal that might be worth considering. For example, the current version only covers family-based green cards. Similar problems arise in cases involving employment-based immigrant visas and those cases could also be covered. While I recognize that including non-immigrant visas across the board would dramatically expand the work of an appeals board, Congress might also look at including certain types of non-immigrant visa categories that are relatively small in number and that involve complex legal questions. Those might include, for example, E-2 and E-1 treaty investor and trader cases as well as O-1 extraordinary ability petitions.

Finally, it is important to remember that in most family immigrant cases, the petitioner is a US citizen seeking to be reunited, for example, with a wife, a husband, or a child. They are also being protected by this proposal and they deserve assurance that if they play by the rules, there is a fair system available to their families.

I appreciate the invitation to testify today and am happy to answer any questions.