Siskind's Immigration Bulletin – March 5, 2009

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Siskind Susser serves immigration clients throughout the world from its offices in the US and its affiliate offices across the world. To schedule a telephone or in-person consultation with the firm, go to http://www.visalaw.com/intake.html.

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1. Openers

Dear Readers:

I am sure most of you are like me and worried about the economic doom and gloom we're hearing about on a near constant basis in the news. I draw comfort, however, in knowing that as unique as this situation is for most of us, we have many lessons in history to draw on in determining how to respond to the collapse of the world economy. One thing we learn from history is that the most tempting responses can also be the most disastrous. For example, while conflagrate spending and a lack of living within our means helped get us here, the opposite behavior – saving everything and spending nothing – will guarantee hard times continue for a longer time.

Another behavior that is tempting but which we must avoid is imposing protectionist trade barriers. In the last global depression in the 1930s, the US imposed a massive new tariff scheme called Smoot-Hawley and this triggered a trade war that many economic historians believe helped make that decade's downturn even deeper.

We're seeing similar temptations emerging today and it is vital that our lawmakers resist the urge to unilaterally impose trade barriers. The "Buy American" provisions in the stimulus bill may make average person feel like their friends and family are being given a leg up by favoring domestic employers, but when our companies can't sell their products overseas because retaliatory trade measures are imposed, more jobs will be lost than gained.

The same is true for barriers on trade in services. We're already seeing rumblings in some quarters that it is time to slash H-1B and L-1 visa numbers to protect jobs for American workers. Congress slipped in a provision in the stimulus bill that originally barred H-1Bs going to banks that received bailout funds. It was scaled back, but still makes it very tough for the banks to have access to these talent workers. And we can expect to see more efforts to do damage to the H-1B program.

Unfortunately, just like Smoot-Hawley, we can expect to see the floodgates open on immigration restrictions in other countries if the US goes down this path. Six million Americans work overseas and many play crucial roles helping American companies develop international markets. And slowing down global trade is exactly what we DON'T need right now.

Nevertheless, there will be pressure to make reforms to the H-1B program based on real and not so real problems in the program. In this issue, I write about reforms I think can be made that will make the program run better and address many of the critics.

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In firm news, on March 21st, I'll be presenting in Washington, DC at the International Franchise Assocation's annual expo and I'll be talking about investor visa options in the US. I've got some free tickets to the event, so if any interested readers would like to attend, please let me know. Just email me at gsiskind@visalaw.com and put IFA tickets in the subject.

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Finally, as always, we welcome your feedback. If you are interested in becoming a Siskind Susser client, please call our office at 901-682-6455 and request a consultation. We are a national immigration law firm and work on a broad range of immigration matters for clients locating across the country.

Kind regards,

Greg Siskind

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2. The ABC's of Immigration, Employer Compliance Series: Completing the I-9 Form

Where can I obtain a Form I-9?

USCIS makes the Form I-9 available for download on its website in a PDF format at www.uscis.gov. The form can also be ordered by telephone at USCIS' forms office at 800-870-3676 or at the USCIS National Customer Service Center at 800-375-5283.

Various case management and electronic filing systems make the I-9 available as well. USCIS requires electronically generated I-9s to be legible with no change to the name, content or sequence of information and instructions.

USCIS permits forms to be printed on both sides (as is the actual printed form provided by USCIS) or on single sides.

Is the Form I-9 available in different languages?

USCIS only makes Form I-9 available in English and Spanish. Note also that the Spanish form may only be used for translation purposes and the employer must retain the English language version of the form. The lone exception to this is Puerto Rico where employers have a choice and can retain either the Spanish or English language versions of the form.

Which version of the Form I-9 can an employer accept?

Employers may only accept the June 5, 2007 version of the Form I-9. Furthermore, re-verifications should not be made on the old version of the I-9. In such cases, a new I-9 should be used. Note that USCIS changes the form from time to time and employers should either check the USCIS web site every three or four months, subscribe to or regularly read print and online publications on immigration and employment law or use an electronic I-9 product from a reputable vendor that regularly updates the software for its subscribers.

What documentation can an employee present that shows both identity and employment authorization?

Employees must present documentation of identity and work authorization and can present documents from a pre-set list included in the I-9 Form's instructions. Some documents can prove both identity and work authorization. Some documents prove just identity or just work eligibility and a combination of documents must be presented in order to meet the I-9 requirements. Employers are not allowed to tell employees which documents from the pre-set list they must present.

Documents showing both identification and employment eligibility are provided in List A in the Form I-9's instructions. They include the following:

- a U.S. passport (unexpired or expired) or the new US passport card
- a permanent residency card (a "green card") or alien registration receipt card (Form I-551)
- an unexpired foreign passport with a temporary I-551 stamp
- an unexpired EAD that contains a photograph (Form I-766 (this was added in June 2007), I-688, I-688A, or I-688B)
- an unexpired foreign passport with an unexpired Form I-94 Arrival-Departure Record with the same name as the passport and an endorsement showing the employee's nonimmigrant status showing the individual is eligible to work for the particular employer

Note that several List A items were removed from the list of acceptable documents when USCIS released its new form in June 2007. The following items are *not* acceptable anymore:

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151) (this is an old version of the green card that is no longer valid to prove permanent residency)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

Section 2's area for listing documentation actually provides two spaces for document numbers and expiration dates. The purpose of this is to provide for situations where a foreign passport is used and I-94 is also needed to prove both identity and employment authorization. The passport number and expiration date and the I-94 number and expiration date can then be listed. Otherwise, only one document would be listed by document number and expiration date.

What documentation can an employee present solely to provide the employee's identity?

Form I-9's List B lists documentation acceptable to prove identity and a List B document may be provided with a List C document. List B documents include the following:

- A driver's license or identification card issued by a state or outlying possession of the United States provided it contains a photograph or

information such as name, date of birth, gender, height, eye color, and address.
- An identification card issued by a federal, state or local government agency or entity as long as the form contains a photograph or information such as name, date of birth, gender, height, eye color, and address
- A school identification card with a photograph
- A voter's registration card
- A U.S. Military Card or draft record
- U.S. Coast Guard Merchant Mariner Card
- Native American tribal document
- Driver's license issued by a Canadian government authority

Note that many states have recently enacted requirements making it significantly more difficult for non-immigrants to obtain a drivers license. Furthermore, President George W. Bush signed the REAL ID Act in 2005 which will eventually require states to meet more stringent standards in the issuance of driver's licenses and states not meeting the federal standards could find that their driver's licenses may no longer be acceptable documentation proving identity. If and when that happens, USCIS would likely update the Form I-9 instructions accordingly.

For persons under the age of 18 who cannot present one of the documents listed above, the following may instead be presented:

- A school record or report card
- A clinic, doctor, or hospital record
- A day-care or nursery school record

What documentation can an employee present solely to provide the employee's authorization to work?

Form I-9's List C lists documentation acceptable to prove employment eligibility and a List C document may be provided together with a List B document. List C documents include the following:

- a U.S. Social Security card issued by SSA (other than a card stating that it is not valid for employment)
- Certification of Birth Abroad issued by the Department of State (Forms FS-545 or Form DS-1350)
- Original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlining possession of the United States bearing an official seal
- Native American tribal document
- U.S. Citizen ID Card (Form I-197)
- ID card for use of Resident Citizen in the U.S. (Form I-179)
- Unexpired EAD issued by the DHS (other than those listed under List A)

Where can an employer find illustrations of acceptable documents in Lists A, B, and C?

Part 8 of the DHS's M-274 Handbook for Employers includes a number of illustrations.

May an employer specify which documents it will accept?

Employers may not tell employees which forms to supply. Rather, the employer must simply present the list of acceptable documents listed on the latest I-9 instructions and must allow the employee to choose what will be presented. Employers must then accept the documentation provided as long as the documentation appears genuine. Employers who violate this requirement risk being found liable for committing an unfair immigration-related employment practice that is violation of IRCA's anti-discrimination rules. This rule even applies when an employer writes down an alien number in Section 1 of the Form I-9. Employees are not required to provide documentation to prove statements in Section 1 as long as proper documentation in Section 2 is provided.

The one exception to this rule applies to employers using E-Verify, the government's electronic employment eligibility verification system. E-Verify employers may only accept List B documents with a photograph of the employee.

When will an I-20 presented by an F-1 student prove employment authorization?

Despite there being no reference to an I-20 on the Form I-9, F-1 non-immigrant students may present a Form I-20 in two situations.

First, if a student works on campus at the institution sponsoring the F-1 and the employer provides direct student services, the I-20 will serve as evidence showing employment eligibility. This also is the case for off-campus work at a an employer that is educationally affiliated with the school's established curriculum or for employers contractually required to provide funded research projects at the post-graduate level where the employment is an integral part of the student's educational program.

Second, in cases where an F-1 student has been authorized by a DSO to participate in a curricular practical training program that is an integral part of an established curriculum (e.g. alternative work/study, internship, cooperative education, or other required internship offered by sponsoring employers through cooperative agreements with the school), the student must have a Form I-20 endorsed by the DSO and the I-20 must also list the specific employer as well as the intended dates of employment.
In either case, the Form I-20 would only be used when an employee presents an unexpired foreign passports and a valid Form I-94 (essentially a third document when these other two List A documents are used).

When will a DS-2019 presented by a J-1 exchange visitor prove employment authorization?

J-1 non-immigrant exchange visitors can sometimes work based on the terms of their visa. In order to document employment authorization, the J-1 visa holder can present a Form DS-2019 issued by the State Department along with an unexpired passport and I-94 as acceptable List A documentation.

Can a translator be used by an employee to assist with completing the form?

Yes. If an employee cannot fill out Section I of the Form I-9, he or she can receive the assistance of a translator or preparer. The preparer or translator would read the Form I-9 and instructions to the employee, help the employee fill out Section 1 of the form and then sign the preparer/translator certification block on the form. An employer can serve as translator as long as the translator block is signed as well as the employer verification section.

What if an employee states in Section 1 that they have a temporary work authorization, but present a List C document that does not have an expiration date?

An employer cannot specify that an employee provide documentation relating to the employee's temporary work authorization even if the employee has indicated in Section 1 that they have temporary work authorization. So if an employee has a valid List B document and a valid List C document without an expiration date, the employer is not allowed to request documentation regarding the temporary status of the employee about the matter lest he or she be found guilty of immigration discrimination.

Are there employees that may properly check Box 3 in Section 1 indicating they are an alien without permanent residency in the U.S. but who do not have an expiration date for their status?

Yes. Refugees and asylees are two fairly large groups of individuals who would fit this description. Certain nationals of Micronesia, the Marshall Islands, and Palau are authorized to work in the U.S. by virtue of their status as nationals of those countries. If an employee fits in to one of these categories, they can type "N/A" in the place in section 1.

If an employee provides an alien number (A number) in Section 1 but presents documents without the alien number, can the employer ask to see the document with the alien number?

No. An employer can not ask to see a document relating to the A number or otherwise specify to an employee which documents they are to provide other than providing the employees with the lists of the accepted documents.

What if an employee claims to be a U.S. citizen in Section 1 but presents a "green card" as documentation of identity and work authorization?

Employees who provide this sort of information often don't understand the question since one cannot simultaneously be a U.S. citizen and a U.S. lawful permanent resident. The matter should be brought to the attention of the employee and if a correction is needed, the employee should be able to change the I-9 form and should

initial any changes. According to the DHS M-274 manual (question 14), an employer could be found to have reasonably known the employee is not employment eligible when it receives two contradictory documents.

What if a person claims to be a lawful permanent resident in Section 1 but provides a U.S. passport or birth certificate as documentation of status?

As above, employees who provide this sort of information often don't understand the question since one cannot simultaneously be a U.S. citizen and a U.S. lawful permanent resident. The matter should also be brought to the attention of the employee and if a correction is needed, the employee should be able to change the I-9 form and should initial any changes. According to the DHS M-274 manual (question 14), an employer could be found to have reasonably known the employee is not employment eligible when it receives two contradictory documents.

What types of expired documents may be accepted?

There are a few types of expired documents which can be accepted by employers. An expired U.S. passport is an acceptable List A document. Expired identification documents may be accepted in List B. A final very narrow instance is in the case of Temporary Protected Status holders who have expired EADs. Employers can accept these as well.

What types of Social Security Administration documents may be accepted?

Social Security cards that are marked "not valid for employment" may not be used as a List C document demonstrating employment eligibility. If an employee claims that he or she has become employment eligible, the employee will need to get a new card issued from the SSA.

Employees are also not permitted to use a printout from the SSA of the employee's particulars – name, SSN, date of birth, etc. – as a substitute for an actual Social Security card.

Employees sometimes present laminated Social Security cards. These are not per se invalid unless they say on the back "not valid if laminated".

Are receipts for documents acceptable?

In most cases, a receipt will not be acceptable. A common case is where an employee is waiting on an EAD and has a receipt showing the application has been filed. A receipt for an initial grant or employment authorization or a renewal of employment authorization will not suffice for Form I-9 purposes. But USCIS is limited by law to 90 days to adjudicate EAD applications and they are required to grant an interim employment document valid for up to 240 days at that point. Still, a receipt will not be enough to begin work even after 90 days unless the interim employment authorization has actually been granted.

An exception is made in the case of a receipt for a replacement document when the document has been lost, stolen, or damaged. An employee may use the receipt to demonstrate work authorization for a 90 day period and then must present the replacement document.

A Form I-94 issued with a temporary I-551 stamp will serve as a valid receipt to replace a green card. The individual has until the expiration date of the I-551 stamp or a year from the date of the issuance of the I-94 if the I-551 stamp does not have an expiration date. Note that I-551 stamps are usually approved for a year anyway.

Finally, an I-94 with an unexpired refugee admission stamp may also be used as a receipt for up to 90 days after an employee is hired. The employee would then need to present a valid document demonstrating refugee status.

When an employer does receive an acceptable receipt, the employer should record the document in Section 2 with the annotation “receipt” and any document number in the place for such information. Once the actual document is presented, the employer will cross out the word “receipt” and the accompanying document number and put the number from the new document. The employer should date and initial the amendment.

Can an employee present photocopies of documents rather than original documentation?

With the exception of a certified copy of a birth certificate, an employee is never permitted to present a photocopy of a List A, List B, or List C document.

What should a permanent resident still waiting on the actual permanent residency card to arrive present?

An applicant waiting on a permanent residency card should present the specially issued Form I-94 with an I-551 immigrant visa stamp. The I-94 with the stamp is typically valid for a year.

What documentation should a refugee present to document authorization to work?

A refugee should present an EAD. However, if that application is being processed, the refugee can present an I-94 with a refugee admission stamp as long as the employment card is presented within 90 days.

What if the document presented by the employee does not look valid?

This is a tricky situation for employers. On the one hand, employers are not expected to be document experts. On the other hand, if a document is obviously a phony, an employer should not be expect to be off the hook. DHS requires employers to accept documents that “reasonably appear on their face to be genuine.” Employers need to be careful, however, about being over-zealous since they face the risk of being found

to have committed an unfair immigration-related employment practice if they question the legitimacy of documents that appear to be genuine.

What if the name of the employee on the document is different than the name of the employee on the Form I-9?

If an employee presents a document with a different name than in Section 1, an employer would arguably have reason to believe that the documentation may not demonstrate employment eligibility. The employer should bring the discrepancy to the attention of the employee and see if there is a reasonable explanation (such as a legal name change by the employee).

What if the employee does not look like the person on the presented document or is different than the description of the person on the document (hair color, eye color, height, race, etc.)?

An employer is required to check that the presented documentation and ensure that the documents relate to the individual. If the individual presenting the document does not reasonably appear to be the same person in the identification document, then the employer can reject the documentation.

May an employer correct Forms I-9 after they are completed?

Yes. However, the employer should be careful to make changes in a way that makes it clear to an inspecting official that the form was corrected and also how the form was corrected. Blank fields should be completed and incorrect answers should be lined through (so the original answer is visible) rather than erased. Changes in Section 1 should be initialed and dated by the employee, preparer or translator. Changes in Section 2 should be initialed and dated by the employer.

Are employees required to supply a Social Security Number on a Form I-9?

Employees are not required to supply an SSN unless the employer participates in the E-Verify program. Employers using E-Verify may not ask an employee to provide a specific document with an SSN.

Are there special rules for minors?

Yes. Individuals under age 18 who are unable to produce a List A or List B document can present the following documents to establish identity:

- school record or report card
- clinic doctor or hospital record
- daycare or nursery school record

If a person under the age of 18 is not able to present a List A or List B document or one of the documents note above, Section 1 of the Form I-9 should be completed by the parent or legal guardian and the phrase “Individual under age 18” in the

employee signature space. The parent or legal guardian should then complete the "preparer/translator certification" block. Under List B, the phrase "Individual under age 18" should be stated.

Are there special rules for individuals with handicaps?

Yes. Individuals with handicaps unable to present a required identity document who are being hired for a position in a non-profit organization, association or as part of a rehabilitation program, a special procedure can be used.

Section 1 of the Form I-9 should be completed by the parent, legal guardian, or a representative from the nonprofit organization, association or rehabilitation program placing the individual into a position of employment. The phrase "special placement" should be written in the employee signature space. The person completing the form would then complete the "preparer/translator certification" block. Under List B, the phrase "special placement" should be stated.

Qualifying handicapped individuals include any person who

- has a physical or mental impairment, which substantially limits one or more of such person's major life activities
- has a record of such impairment or
- is regarded as having such impairment

What are the various examples of Form I-9 Documents?

Examples of I-9 documents are Employment Authorization Cards, Visa Stamps, Form I-9 Departure Record, Permanent Residency Documents ("Green Cards"), Social Security Cards, and U.S. Passports.

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3. Ask Visalaw.com

If you have a question on immigration matters, write *Ask-visalaw@visalaw.com*. We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

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Q - My fiancee received her K-1 visa with a validity of only 60 days. (from the consulate in Manila) - what we saw on almost every website that talks about the K1 visa is that it is valid for 180 days. Unfortunately we were not able to find any official information, like from the Department of State.

The problem is that we are still waiting for her daughter's visa. The consulate obviously also does not communicate with applicants and we are afraid that her visa expires before her daughter gets her passport with the visa. If you could

tell us where to find the official regulation about the validity we'd appreciate it a lot.

A - Section 41.81 procedural notes for the State Department Foreign Affairs manual states

"The consular officer must direct the interview to determine eligibility as if the alien were applying for an immigrant visa (IV) in the immediate relative category. The Form DS-156-K, Nonimmigrant Fiancé Visa Application, and the certification of legal capacity and intent to marry, which is contained therein, are both to be sworn to and signed before the consular officer. If the applicant is eligible under immigrant standards, a K visa shall be issued gratis, valid for a single entry and a six-month period. The alien's fingerprints are not required."

So I also don't understand why it was for a shorter period. But I would ask your attorney to check with them and see why FAM Section 41.81 doesn't cover your case.

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Q - I am currently on Optional Practical Training status in Atlanta, GA that expires in May and decided to marry my girlfriend who is an American citizen. Once we marry and file the paperwork to immigrations, how long does it take to obtain a work permit? Would I be allowed to continue working for my current employer after my OPT expires if I haven't received my marriage work permit yet but have filed all the paperwork for change of status? Thanks for your help!

A - You must have a valid employment card to continue working for your employer which means you will want to file early enough to be able to have a new card in place before your current work card expires. The employment card will likely take between 60 and 90 days.

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Q - I am working on H1B. On LCA (Form 9035E), my salary is greater than the "Prevailing Wage". Is my employer allowed to TEMPORARILY (3 months) reduce my salary below the "Rate of Pay" without ammending the H1B petition ? (There's a companywide paycut). If yes, is it OK if the reduced salary is below "rate of Pay" but is higher than "Prevailing Wage" ?

A - Your employer can amend the H-1B to cut the rate of pay, but the floor must be the prevailing wage and you cannot be paid less than other workers in the same position with a similar background (that’s the “actual wage” determination made at the time the case is filed).

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Q - I applied on form I-485 (Employment-base) to adjust status to permanent residence. I was asked to watch for the visa bulletin and my priority date to be current and when it was so I applied the I-485 application in July 2007. My application was received and pending since then. Now I see on the processing time

schedule that my application receiving date was already passed and I thought that I am too close to process my application. I was told by someone that I need to watch again for the visa bulletin and the priority date to be current for my category and then they will process the application. Is that correct? Do I need to look on the visa bulletin twice, one to be eligible to apply for the I-485 and the second time for the processing???

A - Normally, once your priority date becomes current and you file your I-485 adjustment of status paperwork, that's the end of the story and you just need to finish your I-485 processing. But sometimes priority dates retrogress and when they go backwards or become unavailable, your case is essentially put in suspension. You can continue receiving the benefits of adjustment such as employment authorization. But you cannot finish processing. When the date becomes current again, your process can resume. So you will definitely want to keep an eye on the Visa Bulletin issued each month by the State Department to see where things are.

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Q - I am a Canadian RN working in the US on a TN Visa as a travel nurse. Basically I work for one employer but switch hospitals. My company suddenly with no notice cancelled my contract with the hospital I am at because of the hospital's non payment of wages. I was called in and told to not return to the hospital (I was scheduled for that night). The CEO of the company has said that there is no other employment available at this time and I am immediately laid off. The hospital has offered me a full time position and has offered to sponsor my visa. My question is, can the company do this? My Visa is now pulled I assume, do I need to go back home or can I redo a Visa with the hospital as my sponsor? If I can do a new Visa can I go to the US/Mexican border as I am closer, or do I need to be at a US/Canadian border?

A - Laying you off without notice was definitely not the decent thing to do and I'm sorry to hear about your predicament. But you should be able to get back in to status. I'd leave the US quickly and then apply at a port of entry for a new TN admission with the hospital as the petitioner. You can do this in Mexico the same as in Canada. The port inspector will certainly have discretion to give you problems because technically you're out of status, but if you have demonstrated that you have acted expeditiously to leave the country once this happened, my experience has been that DHS officials will be understanding. I would definitely speak to your immigration lawyer about this first, of course.

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4. Border and Enforcement News

Last month, the US Border Patrol pledged to investigate allegations of a quota system at its Riverside, Calif., office, which allegedly required agents to arrest a set number of undocumented immigrants each month or face punishment. *The Los Angeles* Times reports that the issue first surfaced when some of the office's nine agents informed their union representative that they were ordered to make 150 arrests in January or risk having their job schedules rearranged.

"Quotas are unfair," said Lombardo Amaya, union president of Riverside's National Border Patrol Council. "You cannot tell my members that they need to generate this number of apprehensions and if they don't, they don't get their days off or they get their shift changed. I have received complaints from almost the entire office."

Immigrant rights groups say the Border Patrol has been especially active in the Riverside area over the past month, making increasingly more arrests at day labor cites. "It is very concerning to us and we will do our own investigation to see what happened," said Pablo Alvarado, executive director of the National Day Laborer Organizing Network. "I do believe a quota system is in place. We had this suspicion before but I think it has been confirmed," he said. "I can't tell you for sure that what they are doing is illegal, but what is illegal is racial profiling and that's what's happening."

"The Border Patrol has never had a quota system and is not expected to operate on quotas," said Border Patrol spokesman Richard Velez. "Right now these allegations are under investigation. We will soon find out what happened."

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With the construction of the 670-mile security fence along US-Mexico border nearing completion, it has been hit with numerous legal, political, and engineering obstacles that has made finishing the project a challenge, according to *The Wall Street Journal*.

Over the past two years, the factors against fencing have steadily increased. Opponents of the fence have petitioned the Obama administration to halt construction. Environmentalists are demanding a top-level review of the route, which would block rare animal species from critical habitat. Property owners are contesting federal seizure of their land. Engineers are struggling to address flooding concerns. All the while drug smugglers have found numerous ways breach the existing fencing, forcing continuous repair. The culmination of problems has opponents of the fence pleading with the new administration to call a time-out.

Neither President Obama nor DHS secretary Janet Napolitano has signaled plans to halt constructions. "Mr. Obama supports the fencing as long as it is one part of a larger strategy on border security that includes more boots on the ground and increased use of technology," a White House spokesman said.

Currently there is 300 miles of pedestrian 10-foot-tall barriers, built at an average cost of $3.9 million per mile, including land acquisition, according to the Government Accountability Office. Apprehensions, a rough proxy for measuring undocumented crossings, were down 18% at the southern border last year and Border Patrol attributes some of that to the fence. But a report in May by the Congressional Research Service found "strong indication" that undocumented crossers had simply found new routes.

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The Associated Press reports that arrests made by US Immigration and Customs Enforcement agents at worksites hit nearly 6,300 nationwide in 2008, a tenfold increases since 2003. ICE spokesman Tim Counts says Congress has provided for more ICE positions and funding and agents are getting better at their jobs.

Critics have long argued that ICE raids have divided families and communities. But Counts says that immigration law enforcement is no different from any other law enforcement. "People who engage in illegal activity should expect family disruption," Counts said.

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A group of Hispanic lawmakers wants the Obama administration to join in a discussion of whether Maricopa County, Ariz., Sheriff Joe Arpaio has engaged in civil-rights abuses. According to Arizona's *Cronkite News Service*, the Arizona Latino Legislative Caucus says sheriff's deputies have been stopping people for trivial traffic violations but could be racially profiling their targets. Sheriff's deputies have been conducting raids for the past two year in predominantly Hispanic areas. Arpaio has defended the raids as legal and legitimate.

Caucus leader, Phoenix Sen. Richard Miranda said Arpaio's decision to segregate undocumented immigrants in jails portrays them as violent criminals although some have yet to be tried. "It seems to me he's interested in publicity rather than law enforcement at this point," he said. "These are human beings; they are not (trophies) to be paraded around like conquests."

Richard Miranda and his brother, Ben R. Miranda have invited Attorney General Eric Holder and Homeland Security Secretary Janet Napolitano to send representative to a forum discussing Arpaio's actions.

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The recent economic downturn in the US has not been bad news for everyone - for US Customs and Border Patrol, the recession has helped their recruitment process. *CQ* reports that this month, US Border Patrol set an all-time record for applications, approximately 6,000, in a single week, according to agency officials. "I think we'll continue to see that trend," said Chris Gaugler, human resources commissioner for the agency.

Agency Commissioner Ralph Basham said the agency plans to take advantage of the surplus of applicants in its effort to add 11,300 people to its 53,000-employee roster for the year. "There are some good things that come out of the downturn of the economy," he said.

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5. News From the Courts

The US Supreme Court heard oral arguments last month in a case questioning the policy created by the Bush administration to leverage plea bargains from undocumented immigrants. At issue is a 2004 federal law that imposes a mandatory two-year prison sentence. In *Flores-Figueroa v. US,* the Court will consider whether, to secure a conviction under this statute, the Government must show that the defendant knew that the means of identification he used belonged to another person.

In 2000, petitioner Ignacio Flores-Figueroa, a Mexican citizen, used a fake social security number and resident alien card to obtain work at a steel company in East Moline, Illinois. Though the documents bore an assumed name, neither the Social Security number nor the alien registration number on them belonged to a real person. Six years later, Flores-Figueroa acquired counterfeit social security and permanent resident cards in his own name. He presented the new documents to his employer, not knowing whether the numbers on the cards belonged to another person or, like the numbers on his original documents, instead did not belong to anyone. Suspicious, the company contacted federal authorities, who determined that the numbers on the documents had been issued to other actual persons.

After being indicted by a federal grand jury in early 2006, Flores-Figueroa pled guilty to two counts of misuse of immigration documents and one count of illegal entry into the United States. He pled not guilty, however, to two additional charges of aggravated identity theft under 18 U.S.C. § 1028A. At the close of evidence, Flores-Figueroa moved for a judgment of acquittal on the aggravated identity theft charges, arguing that the Government had not established that he knew that the social security and permanent resident numbers he used belonged to other people. The district court denied the motion, agreeing with the Government that such proof was not required under the statute. The district court sentenced Flores-Figueroa to a total of 75 months in prison: 51 months for the predicate offenses and an additional mandatory two-year sentence for aggravated identity theft.

On appeal, the Eighth Circuit affirmed, relying on its recent decision in *United States v. Mendoza-Gonzalez*, which had rejected the same challenge to the Government's interpretation of § 1028A(a)(1).

Flores-Figueroa filed a petition for certiorari, which was granted on October 20, 2008. Flores-Figueroa's petition advanced several arguments. First, he argued that the Court's intervention was necessary to resolve a growing circuit split on the question presented. Three courts of appeals – the First, Ninth, and D.C. Circuits – had previously held that the knowledge requirement of § 1028A(a)(1) extended to the "of another person" element of the offense, requiring the Government to prove that the defendant knew he was using a means of identification that belonged to another person. By contrast, the Fourth, Eighth, and Eleventh, Circuits had reached the opposite conclusion.

Flores-Figueroa further argued that this circuit conflict was considered, mature, and ripe for resolution. Each of the circuits had carefully considered the question presented and wrestled with the same basic arguments. The courts had acknowledged each other's holdings and reasoning, but had been unable to agree on the meaning of the statute. Given the thoroughness of the circuit opinions on the issue, Flores-Figueroa suggested, further percolation would serve no purpose.

Flores-Figueroa also emphasized the importance of the question and the frequency with which it arises, noting that in 2005, the FBI had 1,600 open investigations into identity theft. Moreover, the division of authority on the question is unfair and untenable, because individuals committing precisely the same acts are currently subject to significantly different sentences depending on accidents of geography. Flores-Figueroa next argued that his case presents an ideal vehicle for resolution of the circuit split: the statutory question was the principal basis for dispute in the

district court and the sole question presented on appeal; the facts are undisputed; and the question is outcome determinative.

Lastly, Flores-Figueroa devoted a significant portion of his petition to attacking the Eighth Circuit's decision on the merits, which he characterized as conflicting with the best reading of the statute and violating the rule of lenity.

In its brief in opposition, the United States agreed that the case "presents an important and recurring issue that warrants this Court's review" in light of the "clear and entrenched conflict among the court of appeals" on the question presented. But the government urged the Court to grant the earlier-filed petition for certiorari in *Mendoza-Gonzalez*, and to hold the petition in this case pending its decision in *Mendoza-Gonzalez*.

In his reply brief, Flores-Figueroa countered that the Government had offered no "jurisprudential or discretionary reason for preferring plenary review" in *Mendoza-Gonzalez* over his case. In his view, when "choosing between two cases presenting the same certworthy question," the Court should consider not simply which petition was filed first but which case is more likely to provide "the best and most comprehensive presentation of the legal arguments." That consideration, Flores-Figueroa suggested, favored review in his case, because his petition raised a number of significant arguments not made by the petitioner in *Mendoza-Gonzalez*, and to which the Government has provided no response.

NPR reports that at the Supreme Court on Wednesday, Figueroa's lawyer Kevin Russell argued that the identity theft statute and its mandatory penalty was wrongly applied to Figueroa because the statute requires knowing use of someone else's identity documents, and Figueroa didn't know the Social Security number he was using belonged to a real person.

"It really comes down to a question of whether you can commit identity theft if you don't know that the person whose identity you're mistakenly using even exists," Russell says.

"There's a basic problem here," said Chief Justice John Roberts. "You get an extra two years if it just so happens that the number you picked out of the air belonged to somebody else."

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6. News Bytes

In the final version of the 2009 stimulus bill written into law, Senate and House members also acknowledged provisions regarding immigration issues, most notably those associated with employment visas and employment verification. *Business Week* reports that, with regards to the H-1B visa, banks and other firms are now subject to stricter limits on H-1B hires if they take bailout funding. The US Chamber of Commerce and the American Immigration Lawyers Association had lobbied against inclusion of the provision, which argue that it unfairly penalizes firms that legally hire highly-skilled workers.

The inclusion, introduced by Sens. Bernie Sanders (I-VT) and Charles Grassley (R-IA), was added as a more lenient approach from what Grassley initially proposed - complete dissolution of the H-1B category. "The very least we can do is to make sure that banks receiving a taxpayer bailout are not allowed to import cheaper labor from overseas while they are throwing American workers out on the street," said Sanders in a statement.

One immigration provision to not make the cut to the final stimulus bill is an amendment on E-Verify. According to *The Associated Press*, the Senate's version of the stimulus bill omitted the E-Verify provisions present in the House bill. The amendment's sponsor, Sen. Jeff Sessions (R-AL) expressed his disappointment: "The purpose of the bill is to put Americans back to work. It is common sense to include a simple requirement that the people hired to fill stimulus-create jobs be lawful American residents."

The E-Verify program has faced widespread criticism. Critics point to relatively high error rates in the government databases used to determine initial eligibility. U.S. Citizenship and Immigration Services, which jointly runs the program with the Social Security Administration, estimates that about 4,000 U.S. workers in every 1 million would be initially denied eligibility because of the database errors.

According to *Federal Computer Week*, groups such as the Immigration Policy Center refer to E-Verify as "deeply flawed" because of the error rates and have warned of the danger of American workers losing or risking their jobs because of the shortcomings in E-Verify. They also said E-Verify would slow the impact of the stimulus spending, and expressed widespread approval when the provision was removed.

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The results of a 2000 federal program which aimed to secure visas to undocumented immigrants who were crime victims if they came out to assist police were released this week, and the results are underwhelming. According to *The Associate Press*, over 13,000 immigrants have taken the government's offer but so far, only 65 – just 0.5% - have received their reward. The figures, provided by USCIS, have outraged immigrant advocates.

They say the problem with the "crime victim visa" has been twofold: The government took years to come up with the rules, and now that they are in place many law enforcement agencies are reluctant to provide the required written support so victims can apply. "There's no rational reason why it should take the federal government eight years to implement a law other than there's a callous disregard for the rights of crime victims Congress intended to benefit for cooperating with law enforcement," said Peter Schey, executive director of the Center for Human Rights and Constitutional Law.

Lawmakers created the visa to encourage undocumented immigrants to report violent crimes. While the visa application is free, the government requires undocumented immigrants to apply for a waiver that costs, $545, more than some victims could afford. Under criticism, the government changed the rules in December 2008 to waive the fee on a case-by-case basis.

USCIS spokesman Chris Rhatigan said the government is moving to address the problems, increasing staffing to more quickly review visa applications and meeting with local law enforcement officials to teach them about the program. "We're trying to do the right thing," Rhatigan said.

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As requested by the American Immigration Lawyers Association, the Obama administration has agreed to a 60-day postponement of a regulation changing the types of documents acceptable for employment eligibility verification. *The Journal Record* of Oklahoma City reports that that the postponement until April provides for a period of review and comment of the I-9 regulation. Under the I-9, which was scheduled to take effect during the first week of February, employers could no longer accept expired documents to verify employment authorization.

Doug Stump, secretary of the AILA, said that in recent years the government put into play a three-pronged approach to ensure that US employers assumed responsibility for immigration compliance: employment-eligibility compliance, the troubled E-Verify program and the Social Security mismatch letter program. Mismatch letters inform employers that some information reported for a particular worker does not match his or her records with the agency.

Stump says that currently, the Social Security Administration, which E-Verify is reliant upon, has 17.8 million errors in its database, 70% of them belonging to records of US-born citizens. He said the agency has acknowledged that once the full program comes into play, over 70,000 US-citizen workers will either be terminated by law or their employers must bar them from employment as a result of database errors. "It appears as though the Obama administration is at least going to give it another look before attempting to implement the program," Stump said.

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In one of his first interviews since taking the position, new RNC chairman Michael Steele said the GOP's enforcement-first position on immigration wasn't the problem in the November presidential election, in which Arizona Sen. John McCain fared poorly among Latino voters. According to *The Austin American Statesman*, Steele attributes the poor performance to the party's message. In an interview with Fox News Sunday, Steele said "how we messaged that is where we messed up the last time. We were pegged as being insensitive, anti-immigrant, and nothing could be further from the truth, because you talk to those leaders in the Hispanic community, they will tell you the same thing."

American's Voice, a pro-immigration advocacy group, challenged Steele's assertion. They noted that Republicans in Congress were behind a 2005 bill that would have made 12 million undocumented immigrants felons and that GOP leaders blocked bipartisan attempts at passing comprehensive reforms in 2006 and 2007. "And Steele still thinks that a slight change in tone will bring Latinos back to the GOP?" the group said in a statement.

McCain won only 31% of Hispanic voters in the November election. Estimates of support for Bush range from 40-44% in 2004. McCain, Bush and several GOP leaders have said recently that the GOP's poor image among Latinos hurt Republicans in the 2008 election. Hispanic registered voters ranked education, the

cost of living, jobs, health care and crime ahead of immigration in the most recent nationwide survey by the Pew Hispanic Center. However, the survey found that the immigration issue had become increasingly more important to Latinos since the last election.

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In a petition filed with the FCC earlier this month, the National Hispanic Media Coalition made the claim that hate speech is "prevalent" on national cable news networks and wants the government to do something about it. According to *The Broadcasting and Cable News*, the NHMC, a nonprofit advocacy group, cited a 2007 Media Matters study that concluded that "the alleged connection between illegal immigration and crime" was discussed on 94 episodes of CNN's *Lou Dobbs Tonight*, 66 times on Fox's *Bill O'Reilly*, and 29 times on Glenn Beck's Headline News show. In particular, Lou Dobbs' ongoing criticism of immigration reform and border enforcement has drawn criticism from immigrants' rights groups.

The group said it was not asking the FCC to re-impose the fairness doctrine, something some congressional Democrats have suggested they might want to do, but it does want the FCC to collect data, seek public comment, explore what they say is the relationship between hate speech and hate crimes and explore options for combating it. Saying its critics would raise the "red herring" of the doctrine, NHMC said it "has not called for any such remedy."

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The State Department is bracing itself for the upcoming border passport deadline, as this week, they issued an additional warning to Americans that they won't be allowed to enter the country from Mexico after June 1 without a passport. Last week, deputy assistant secretary of State Brenda Sprague said her office is prepared to handle an onslaught of up to 30 million applications as the deadline nears. "It concerns me to a point," Sprague said. "But I know what we are capable of doing. We have built in so many mechanisms to anticipate the surge in demand."

According to *The Arizona Republic*, Sprague expressed confidence that most Americans were aware of the new law, which affects US citizens reentering the country from border nations and the Caribbean. She said she does not believe huge numbers of citizens will find themselves stranded at US borders, nor does she anticipate increased logjams at checkpoints. "We are a little puzzled," she conceded. "We anticipate a lot of that is the economy and people waiting until the last minute."

Part of the State Department initiative is the approval of wallet-size identification cards, a cheap and convenient alternative to passport books, and are intended for use only by citizens returning to the US through land or seaports from Mexico, Canada, and the Caribbean islands. According to Sprague, about 85,000 cards have been issued nationally.

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A bill has been introduced to the Washington state house, which would authorize the state Employment Security Department to meet and negotiate with foreign representatives to import temporary guest workers for jobs in certain seasonal industries such as agriculture, construction, and hospitality – service professions that

have become dependent on undocumented workers. *The Seattle Times* reports that House Bill 1896 and Senate Bill 5831 would allow the state to immediately step into the recruiter role on behalf of employers who can show they have job vacancies not being filled by domestic workers. Under the legislation, employers would pay the state up to $500 per worker to participate in the program and could see the first wave of foreign workers in the state by the summer of 2010.

Dan Fazio, director of employer services for the Washington Farm Bureau, drafters of the legislation, said getting the state involved would ensure that US workers get first crack at the jobs, while sending a clear message to Congress that growers' labor problems are real. "We're fighting this battle because people believe farmers want to hire only illegal workers," he said. "I'm tired of getting calls from members saying, 'I just found out a guy who has worked for me for 12 years is illegal. What should I do?'"

Under the state's existing programs, employers or labor contractors must demonstrate that hiring foreign workers won't adversely affect US workers and won't depress their wages. Washington growers see an ongoing need for foreign workers, even as unemployment rolls expand across the state, because they don't expect people laid off from Microsoft or Washington Mutual will take jobs in the farm fields of Eastern Washington. "I don't think the current labor conditions will do much to change that," said Jon Warling, a farm-labor contractor who recruits domestic and foreign workers for growers across Eastern Washington. "The folks out of work now are not farm laborers."

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7. Siskind's Legislative Update

The content in Legislative Update is crossposted from Siskind Susser's blogs, and follows the federal and state laws, regulations, and legislative proposals that impact the lives of immigrants. Check out our blog index for listings of the latest blog entries.

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BILL INTRODUCED TO PERMIT E-2 INVESTORS TO GET GREEN CARDS

Congressman Adam Putnam (R-FL) has introduced a bill that would implement #8 of The Ten Ideas I had for using immigration to stimulate the US economy. I don't claim credit for the concept (the bill has actually been introduced in the past) and I happily endorse the plan as something that could provide a real boost to attract foreign capital to the country and help create an enormous number of jobs for American citizens.

The bill's relatively simple. It would create a new EB-5 category for E-2 investors who have been in the country for at least five years in E-2 status, have invested at least $200,000 and creates full time jobs.

Here's the text of the proposal. Contact your member of Congress and let him or her know you support this proposal that will help create jobs for American workers.

E-2 Nonimmigrant Investor Adjustment Act of 2009 (Introduced in House)

HR 1162 IH

111th CONGRESS
1st Session
H. R. 1162

To amend the Immigration and Nationality Act to permit certain E-2 nonimmigrant investors to adjust status to lawful permanent resident status.

IN THE HOUSE OF REPRESENTATIVES

February 24, 2009

Mr. PUTNAM (for himself and Mrs. MYRICK) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Immigration and Nationality Act to permit certain E-2 nonimmigrant investors to adjust status to lawful permanent resident status.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `E-2 Nonimmigrant Investor Adjustment Act of 2009'.

SEC. 2. ADJUSTMENT TO LAWFUL PERMANENT RESIDENT STATUS OF CERTAIN E-2 NONIMMIGRANT INVESTORS.

(a) In General- Section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)) is amended--

(1) in subparagraph (A)(ii), by inserting `except as provided in subparagraph (E)(i)(II),' after `(ii)';

(2) in subparagraph (C)(i), by inserting `and subparagraph (E)(i)(I)' after `Except as provided in this subparagraph'; and

(3) by adding at the end the following new subparagraph:

`(E) SPECIAL RULES FOR CERTAIN E-2 NONIMMIGRANT INVESTORS-

`(i) IN GENERAL- In the case of an alien who has been present in the United States in the status of an alien described in section 101(a)(15)(E)(ii) for at least five years--

`(I) the amount of capital required under subparagraph (A) shall be $200,000; and

`(II) the alien is deemed as satisfying the requirement of subparagraph (A)(ii) if the enterprise has created full-time employment for not fewer than two individuals (or five individuals for each year after the third year in such status) described in such subparagraph (A)(ii).

`(ii) LIMITATION- Not more than 3,000 visas may be made available under this paragraph to principal aliens described in clause (i) in any fiscal year.'.

(b) Effective Date- The amendments made by subsection (a) shall take effect on the date of the enactment of this Act. Periods of presence in the United States in the status of an alien described in section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(E)(ii)) before such date shall be counted towards satisfying the time requirement specified in subparagraph (E) of section 203(b)(5) of such Act (8 U.S.C. 1153(b)(5)) (as added by paragraph (3) of subsection (a)).

(c) Immediate Eligibility of Adjustment of Status of Certain Long-Term E-2 Nonimmigrant Investors- An alien who has been present in the United States as an E-2 nonimmigrant investor for at least five years may be immediately eligible to adjust status to that of an alien lawfully admitted for permanent residence pursuant to the amendment made by subsection (a).

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HOUSE PASSES E-VERIFY AND EB-5 PROGRAM EXTENSIONS

They're included on the Fiscal 2009 Omnibus spending bill and will keep those programs going until September 30, 2009. The Conrad 30 and religious worker expirations are still coming next week unless a separate bill is passed or the Senate decides to get them in their version of the Omnibus.

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ARIZONA HOUSE MEMBERS INTRODUCE NURSE VISA BILL

Arizona Republicans Jeff Blake and John Shadegg and Democrat Ed Pastor have introduced a bill creating a "W" visa that would allow up to 50,000 nurses to enter the US each year in non-immigrant status. The bill has been introduced previously and it is not clear yet that it will be marked up in the House Immigration Subcommittee.

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NEBRASKA LEGISLATURE JUDICIARY COMMITTEE PASSES SANCTIONS MEASURE

The bill will target public employers and state contractors and will require e-Verify on a phased in basis.

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INDIANA SENATE COMMITTEE APPROVES SANCTIONS LAW

The Indiana Senate labor committee has unanimously approved a bill that would revoke business licenses for employers that knowingly hire unauthorized workers. The bill is expected to hit problems in the Indiana House. The Senate is Republican-controlled and the House is Democrat-controlled.

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8. Notes from the Visalaw.com Blogs

Greg Siskind's Blog on ILW.com

- The Brain Flush
- Bill Introduced to Permit E-2 Investors to Get Green Cards
- Consular Officer Convicted of Exchanging Visas for Strippers and Jewelery
- Raid = Rogue?
- House Passes E-Verify and EB-5 Program Extensions
- Immigration Judges Call for Appointing One of Their Own to Run EOIR
- Immigration Reform without All That Messy Reform
- Immigration Measures Introduced in Congress
- USCIS Announces Modest Expansion of I-140 Premium Processing
- Two More Immigration Appointees Announced
- Did The UK Just Launch A Trade in Services War?
- Q & A on The New Military Recruitment Program for Visa Holders and Permanent Residents
- What's The Point of Having a Constitution?
- The Angry Spouse
- President Obama Comments on His Immigration Plans
- Sheriff Joe Must Go
- ICE Investigating Baltimore Office
- Leahy Pushes for Same-Sex Couple Immigration Rights
- Napolitano Lays Out Immigration Plan
- House Judiciary Committee Calls on Justice Department to Investigate Sheriff Joe
- Army Promises Citizenship in Exchange for Service
- 11 Indicted in H-1B Fraud Case
- Harvard Business School Report: Link between H-1B for Scientists and Engineers and Number of Inventions
- Lighter Sanders H-1B Provision Included in Stimulus Bill
- Schumer will Head Senate Immigration Subcommittee

The SSB I-9, E-Verify, & Employer Immigration Compliance Blog

- House Votes to Extend E-Verify for Six More Months
- Workers in California Raid Beat ICE in Court Case
- Nebraska Legislature Judiciary Committee Passes Sanctions Measure
- Indiana Senate Committee Approves Sanctions Law
- Montana Lawmakers Considering Business License Bill
- City Decides to Do Its Own I-9 Audits
- Sheriff Joe Busts His Department's Landscaping Company

Visalaw Investor Immigration Blog

- EB-5 Regional Center Program Extension Update
- Bill Introduced to Permit E-2 Investors to Get Green Cards
- Idaho Program Seeks To Attract Global Investors
- USCIS Warns on EB-5 Partial Sunset
- Orlando EB-5 Regional Center Opens

Visalaw Fashion, Sports, & Entertainment Blog

- Politics, Sports, and Visas
- Former NFL Player Now Working as Border Patrol Agent
- Fresno Hockey Players Face Uncertain Immigration Future

Visalaw International Blog

- Canada: Former Board Member in The Spotlight
- Canada: Immigration from The UK Increasing
- Canada: Sergio R. Karas Quoted in Story on War Criminals
- Canada may Restrict Immigration to Deal with Downturn

Visalaw Healthcare Immigration Blog

- Arizona House Members Introduce Nurse Visa Bill
- Obama Signs Bill Expanding Health Insurance Program To Immigrant Kids
- Despite Rising Unemployment, Nursing Shortage in US Remains Dire
- Phoenix Hospital Sets Up Program for African Refugees
- Cuban Doctors Face Challenges in Resettling in US

The Immigration Law Firm Management Blog

- Best of CES: Telephone and PDA Devices
- BEST of CES: Cameras
- Sending Big Files
- *NY Times*: Is The Billable Hour Dying?

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9. State Department Visa Bulletin for March 2009

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during **March**. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by **February 6th** in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits.

Only applicants who have a priority date **earlier than** the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

FAMILY-SPONSORED PREFERENCES

First : Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second : Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third : Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth : Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT-BASED PREFERENCES

First : Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second : Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third : Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth : Certain Special Immigrants: 7.1% of the worldwide level.

Fifth : Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (**NOTE:** Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

Family	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	22JUL02	22JUL02	22JUL02	08OCT92	15JUL93
2A	01JUL04	01JUL04	01JUL04	15OCT01	01JUL04
2B	22JUN00	22JUN00	22JUN00	01MAY92	01DEC97
3rd	08AUG00	08AUG00	08AUG00	15OCT92	08JUN91
4th	01MAR98	15NOV97	01MAR98	08APR95	15MAY86

***NOTE:** For February, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 22SEP01. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 15OCT01 and earlier than 01JUL04. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability	CHINA-mainland	INDIA	MEXICO	PHILIPPINES

	Areas Except Those Listed	**born**			
Employment -Based					
1st	C	C	C	C	C
2nd	C	15FEB05	15FEB04	C	C
3rd	01MAY05	22OCT02	15OCT01	15AUG03	01MAY05
Other Workers	15MAR03	22OCT02	15OCT01	15MAR03	15MAR03
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105 - 139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States . The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This reduction has resulted in the DV-2009 annual limit being reduced to 50,000**. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For **February**, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off this is filler space right herenumber is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	26,800	Except: Egypt: 16,000 Ethiopia 13,800 Nigeria 9,900
ASIA	13,200	Except: Bangladesh 10,850
EUROPE	19,800	
NORTH AMERICA (BAHAMAS)	6	
OCEANIA	675	
SOUTH AMERICA, and the CARIBBEAN	850	

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2009 program ends as of September 30, 2009. DV visas may not be issued to DV-2009 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2009 principals are only entitled to derivative DV status until September 30, 2009. DV visa availability through the very end of FY-2009 cannot be taken for granted. Numbers could be exhausted prior to September 30.

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN MARCH

For **April,** immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	26,900	Except: Egypt 17,400 Ethiopia 15,700 Nigeria 9,900
ASIA	17,400	Except: Bangladesh 11,000
EUROPE	20,800	
NORTH AMERICA (BAHAMAS)	7	
OCEANIA	715	
SOUTH AMERICA, and the CARIBBEAN	900	

D. EXPIRATION OF TWO EMPLOYMENT VISA CATEGORIES

Employment Fourth Preference Certain Religious Workers:

Pursuant to Section 2(a) of the Special Immigrant Nonminister Religious Worker Program Act (Pub. L. No. 110-391), the nonminister special immigrant program expires on March 6, 2009. No SR-1, SR-2, or SR-3 visas may be issued overseas on or after March 6, 2009. Visas issued prior to this date may only be issued with a validity date of March 5, 2009, and all individuals seeking admission as a nonminister special immigrant must be admitted (repeat, admitted) into the U.S. no later than midnight March 5, 2009.

Employment Fifth Preference Pilot Categories(I5, R5):

Pursuant to Section 144 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Public Law 110-329), the immigrant investor pilot program will expire on March 6, 2009. No I5-1, I5-2, I5-3, R5-1, R5-2 or R5-3 visas may be issued after March 6, 2009.

The initial cut-off dates for the categories mentioned above have been listed as “current” for March. If these categories have not been extended based on legislative action those cut-off dates will become “unavailable” effective March 7, 2009.

E. ACTIVE VISA APPLICANTS REGISTERED FOR PROCESSING AT CONSULAR OFFICES ABROAD AS OF JANUARY 2009

Most prospective immigrant visa applicants qualify for status under the law on the basis of family relationships or employer sponsorship. Entitlement to visa processing in these classes is established ordinarily through approval by Citizenship and Immigration Services (CIS) of a petition filed on the applicant's behalf. When such petitions are forwarded by CIS to the Department of State, applicants in categories subject to numerical limit are registered on the visa waiting list. Each case is assigned a priority (i.e., registration) date based on the filing date accorded to the petition. Visa issuance within each numerically limited category is possible only if the applicant's place on the waiting list has been reached, i.e., the case priority date is within the visa availability cut-off dates published each month by the Department of State. Family and employment preference applicants wait for their visa numbers to become current within their respective categories on a worldwide basis according to priority date; a per-country limit on such preference immigrants set by INA 202 places a maximum on the amount of visas which may be issued in a single year to applicants from any one country, however.

The Department of State requested that the National Visa Center at Portsmouth, New Hampshire provide the totals of applicants on the waiting list in the various numerically-limited family immigrant categories. Those totals are listed below, and reflect persons registered under each respective numerical limitation, i.e., the totals represent not only principal applicants or petition beneficiaries, but their spouses and children entitled to derivative status under INA 203(d) as well. It should be noted that applications for adjustment of status under INA 245 which are pending at Citizenship and Immigration Services offices are not included in the totals which are being presented at this time.

Family-Sponsored Preference Categories

F1:	228,787
F2A:	322,212
F2B:	481,726
F3:	484,230
F4:	1,206,397
Total:	2,723,352

Top Ten Countries

The ten countries with the highest number of waiting list registrants are listed below; together these represent 75.4% of the Department of State total. This list includes all countries with at least 45,000 persons on the waiting list. INA 202 sets an annual limit on the amount of family-sponsored preference visas which may be issued to applicants from any one country; the 2009 per-country limit is 15,820.

Mexico	961,744
Philippines	401,849
Dominican Republic	136,070

China	132,325
India	115,394
Vietnam	109,910
Bangladesh	50,275
Haiti	50,029
El Salvador	48,776
Pakistan	45,905
All Others	671,075
Worldwide Total:	2,723,352

F. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:

http://travel.state.gov

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:
Subscribe Visa-Bulletin *First name/Last name*
(example: Subscribe Visa-Bulletin Sally Doe)

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address :

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

VISABULLETIN@STATE.GOV

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10. 10 Ideas for Reforming the H-1B Program, By Greg Siskind

It has been eight years since Congress made any major changes to the H-1B program, the visa category available to professional workers employed by American employers. Champions of the program point to statistics showing an astoundingly high percentage of start up technology companies were founded by H-1B workers, a high proportion of patents have been issued to individuals on H-1Bs and H-1B workers are filling critical shortages in medicine, education, high tech, engineering and other critical fields.

Opponents of the program point to examples of fraud, the visas are hogged by so-called “job shops” run by overseas-based contracting firms, and, of course, they question why the program is used when unemployment in the US is soaring. Proponents of the program argue for its expansion and want to see no changes to the existing rules. Opponents want to see the program cut dramatically and saddled with an array of new restrictions.

In the background are constraints placed on H-1B policy by our being a signatory to the General Agreement on Trade in Services (GATS). The US now is contractually obligated to maintain a minimum of 65,000 H-1B visas and we are limited in the types of new restrictions we can put on the program lest we be hauled into court. Those who would advocate slashing H-1B visas or imposing a labor certification requirement or other new and onerous requirements could end up forcing the US to defend itself in court. And we also need to be careful not to set off a chain reaction of retaliatory measures that could hamper the ability of nearly six million Americans employed overseas who are developing commerce for US companies.
I believe that both sides have valid arguments and that the H-1B program can be reformed in ways that will satisfy the H-1B critics while at the same time opening more visas for professionals that can make a strong case.
Here are a series of ideas for modifications to the H-1B program that will strengthen the US economy and cut down on the number of applications approved for firms that have been the subject of the harshest criticism.

1. No H-1B cap if an employer can document it is paying 125% of the prevailing wage for similarly employed US workers.
2. H-1B dependent employers and employers that hire more than 50 workers per year will pay a higher filing fee than occasional users of the program.
3. No cap on employers who have fewer than three H-1B employees, have filed fewer than ten H-1B petitions in the last five years or employ fewer than 1% of their workforce working in H-1B status.
4. No cap for doctoral level H-1B positions.
5. No cap if an employer can show that the occupation has an unemployment rate at least 50% lower than the national average.
6. No cap if an employer receives a labor certification documenting the lack of availability of American workers to fill the position.
7. Label as H-1B dependent positions in occupations that the Bureau of Labor Statistics has certified have an unemployment rate that is equal to or higher than the national unemployment rate.
8. Allocate H-1B visas on a quarterly basis rather than once a year.
9. Employers that don’t use an allocated H-1B visa within six months will pay an additional fee of $5000 for each quarter the H-1B visa is not used of the visa is forfeited.
10. Charge employers a $7,500 penalty/access fee to bypass the H-1B quota.

The common themes here are to favor employers who are less likely to be accused of trying to displace American workers and to make it harder for any particular employers to “game” the system to hoard H-1B visas at the expense of the vast majority of American employers who use the program sparingly and who often have no access to vital employees.

1. No H-1B cap if an employer can document it is paying 125% of the prevailing wage for similarly employed US workers.

One of the chief complaints about the H-1B visa is that employers are paying H-1B workers less than Americans. Employers are required by law to document that they are paying their H-1B workers the prevailing wage – the wage paid in the community to similarly employed workers – as well as similarly employed workers at their own company. Critics of the program complain that employers are using wage data that is not accurate or hiring more junior foreign workers to replace more experienced Americans.

There are many employers who desperately need H-1B workers and who are willing to pay far higher than the prevailing wage if they had access to those workers. If an employer is willing to pay a substantially higher salary to an H-1B worker, they are not endangering anyone's job and the employer should have access to the worker (assuming they meet the rest of the H-1B requirements). I've picked 125% as a number that I think people will see is a serious hurdle, but I'd be interested in hearing what others think.

2. H-1B dependent employers that file more than 50 H-1B petitions per year will pay a higher filing fee than occasional users of the program.

Six of the top ten users of the H-1B program gobbled up nearly 10,000 of the visas. These six companies are all based abroad and they supply contract labor in the information technology sector. While I don't know it for a fact, their business models strongly suggest that they are H-1B dependent employers. If we had no H-1B cap (which is my actual preference), then I would not be so concerned about a few companies filing so many petitions. But when we are faced with a scarce commodity, I have a problem with a few companies disproportionately using up the visas. The vast majority of American companies wanting to access the system only need to file a few H-1B petitions a year and when they have identified a candidate and need to file, visa numbers are long gone.

Instead, a few companies that set up an infrastructure to recruit vast numbers of professional workers impose themselves as middlemen by gobbling up visas and then serving as gatekeepers to available workers. This is blocking access to employers needing visas for workers who are more likely to stay in the US and provide their talent to the country on a long term basis. I would consider a fee of at least a few thousand dollars as an incentive for job shop employers to choose their best prospects for H-1B filings and consider holding off on filing for others when the H-1B quota is filling up quickly. I would also consider using the funds to underwrite scholarships at public colleges and universities in science, technology, engineering and mathematics programs.

3. No cap on employers who have fewer than three H-1B employees, have filed fewer than ten H-1B petitions in the last five years or who employ fewer than 1% of their workforce working in H-1B status.

The vast majority of complaints I have seen by H-1B opponents relate to employers who use large numbers of H-1B workers. Employers who use the program sparingly are not the abusers that make the headlines and they should have access to H-1B workers when they need them from time to time. I've tried to come up with a formula for choosing which firms should be considered "light" H-1B users, but others may have additional thoughts.

4. No cap for doctoral level candidates educated at US institutions.

When I hear H-1B critics complain about the program, I rarely here them tell us that we're accepting too many Ph.D. holders. 59% of engineering and computer science doctoral degrees are going to foreign students here in the US. Forcing those workers to leave is a tremendous waste of our national resources and only subsidizes our competitor nations. Sure I'd like to see Americans using up more of those doctoral program slots. But that's a process that will take a major national commitment of resources and many years to accomplish. In the mean time, we need American-educated doctoral candidates to stay.

5. No cap if an employer can show that the occupation has an unemployment rate at least 50% lower than the national average.

There are a number of occupations that even in this severe recession are facing shortages or workers. Teachers and nurses come to mind. When the cold hard data is examined and an employer can document that it is looking to fill a job in one of these severe shortage occupations (as demonstrated by Labor Department figures), they should get a break.

6. No cap if an employer receives a labor certification documenting the lack of availability of American workers to fill the position

The labor certification process applicable in the green card and H-2B processes is onerous, time consuming and very expensive. Employers must undergo extensive recruitment and must be meticulous in demonstrating that they are only listing the minimum requirements and are fairly considering American workers for the position. Employers willing to undergo that process can document that Americans are not being passed over and they should have access to the H-1B program. While imposing a labor certification requirement might violate GATS (see my introductory remarks), allowing employers to avoid the H-1B cap by supplying a labor certification should be okay because it is not restricting those seeking one of the minimally required 65,000 slots.

7. Label as H-1B dependent positions in occupations that the Bureau of Labor Statistics has certified have an unemployment rate that is equal to or higher than the national unemployment rate.

This might be considered controversial as it could pull a lot of petitioners into the dependency rules that are currently exempt, but if the H-1B program is largely intended to help employers find workers in difficult to fill occupations, then we should. In my opinion, be tougher on employers hiring workers in occupations that are at or greater than the national unemployment numbers.

8. Allocate the H-1B visa on a quarterly basis rather than once a year.

This could really go a long way to leveling the playing field for employers that have been regularly shut out of using the program because of the job shop visa hoarding. The big H-1B users leverage the fact that they have a recruiting infrastructure and economic model in place where they can file thousands and thousands of H-1B applications on a single day for undefined positions many months away. If the H-1B cap was divided into quarters and employers could file four times a year rather than

just once, this would dramatically help those companies that only hire a few H-1B workers per year or who hire people who are not graduating from their degree programs prior to April 1st each year. For example, physicians don't finish their medical training in US programs until June 30th each year. They are generally not eligible for the H-1B visa until they have completed their training so an application for their H-1B cannot be submitted until July. But by that point each year, the H-1B visas are all used up by the April 1st filers. Quarterly filing would give employers like these a chance.

9. Employers that don't use an allocated H-1B visa within six months will pay an additional $5000 fee for each quarter the H-1B visa is not used or throw the visa back in to the H-1B quota

Job shop employers file H-1B petitions by the thousands and then often have no actual work for an employee to do. These employers are benched (illegally) by some of the worst companies and other H-1B visa holders simply sit on their suitcases at home waiting for months on end for a job that may or may not happen. In the mean time, American employers who have positions that need someone immediately have to watch those positions remain unfilled because the visas are not available. This is a tremendous waste and is not serving the American public. Employers that file H-1Bs for workers that they don't have real jobs ready to go should pay a penalty if they want to keep an H-1B visa "on reserve."

10. Charge employers a $7,500 penalty/access fee to bypass the H-1B quota.

Finally, if the chief complaint about H-1B workers is that they drive down wages for Americans, allowing employers to pay a huge fee to access the program is another way to demonstrate that they are not harming US workers and should be able to access the program. $7500 plus the regular $3000+ filing fees plus lawyer fees plus payment of the prevailing wage would make the hiring of an H-1B worker expensive enough that US workers have nothing about which to worry. I'm not sure if $7500 is the right number and will be interested in hearing what others think.

These proposals are intended to both expand the H-1B program and also further restrict it in order to ensure that employers that have the most worthy claims to using the H-1B visa have ready access to them and employers that have been the subject of the most complaints find the H-1B program no longer nearly as easy to use as in the past.

Let me know your thoughts!