Siskind's Immigration Bulletin – October 31, 2008

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1. Openers

Dear Readers:

With just four days to go until Election Day, the entire world is waiting in eager anticipation for the outcome of the balloting. I can think of few elections in my lifetime where the future seemed so uncertain and most voters are likely giving more consideration to their choices this year than in the past.

Immigration advocates are certainly watching the races around the country closely. At a general level, the worsening economy certainly will have an impact on the topic. We've seen reports of a dramatic decline in illegal immigration that is partly due to

the lack of economic activity in the US. Immigration restrictionists credits the drop as well to more enforcement and they probably are right as well. How will unemployment rising in the US affect the immigration debate? Will fewer illegally present workers help offset the increase in the size of the unemployed population?

And what of immigration reform legislation? Congress got close twice in the last few years. The Democrats have generally been the party that has favored the legislation so the expected Democratic pick ups in the House and Senate should bode well for a reform package. But will health care, banking reform, tax bills, etc. all push immigration to the side? Or will the Hispanic community in this country successfully remind the Democrats that they had a lot to do with their improved prospects this year?

Whoever becomes President will likely support reform legislation given their track records. And both candidates have a personal connection likely to make them see immigration in a more sympathetic light. Barack Obama is the son of a Kenyan immigrant. And he spent several years of his childhood overseas. John McCain's own daughter Bridget was adopted from Bangladesh and is of a different race. Each candidate has said the right things (though McCain's rhetoric in the Republican primaries was certainly a lot harsher). Given this, I think the key to reform will be just how different the Congress looks.

In any case, immigration advocates need to be forceful in pressing for reform to be included in the new President's First 100 Days agenda. Immigration will only become a tougher issue to handle as the economy worsens, midterm elections dilute the Democratic gains and other legislative priorities squeeze the issue off the agenda. Advocates need to demand that immigration not be pushed aside.

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In firm news, I've just returned from speaking on an immigration law panel at the annual meeting of the International Bar Association in Buenos Aires, Argentina. This was my third trip to this wonderful city and it was great to see my many lawyer friends from around the world. The meeting also gave a chance for the members of Visalaw International (www.visalawint.com) to meet. I helped found this global alliance of immigration lawyers several years ago and the IBA annual meeting is always a nice place for our members to gather.

I also returned from attending the excellent EB-5 Seminar put on by USAdvisors.org in Orlando, Florida. Michael Gibson put on an excellent program and it was a unique opportunity for lawyers, investors and regional center representatives to gather to discuss the investor immigration program.

My colleague Karen Weinstock will be a speaker on Tuesday, November 11th at a program entitled "Immigration Compliance for HR Professionals" being organized by our firm ant The McCart Group. The program is being held at The Buckhead Club in Atlanta. You can find more information at http://www.visalaw.com/seminar.pdf .

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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.

Kind regards,

Greg Siskind

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2. The ABC's of Immigration: Immigration Issues Related to Layoffs and Corporate Downsizing

By Greg Siskind

The recent startling economic news has many experts predicting that unemployment in the US will rise again as companies downsize their workforces to remain competitive. Already, some companies are terminating workers in large numbers. Some of those workers are immigrants and the challenges facing these workers are potentially more serious than for their American counterparts.

Employers engaged in layoffs also are faced with considerable challenges including managing the legal aspects involved in the downsizing process while trying to do their best to help their employees transition to new employment. Generally, most employers are well aware of their obligations under the labor and employment laws applicable to lay off situations. Likewise, most employers understand the need to provide their employees information on the layoff process, including information on benefits continuation, how to apply for unemployment compensation, and, in some cases even provide career transition counseling and job search services for their employees. However, in the case of employers that employ alien workers, the individuals responsible for managing the downsizing process often overlook the significant immigration-related consequences impacting both the employer and its alien employees when layoffs take place.

This article is intended to provide guidance to employers and their foreign national employees in dealing with layoff situations. While there is no way to "sugarcoat" being laid off or having to terminate employees, properly attending to immigration matters during the downsizing process can at least prevent making a bad situation even worse.

At the outset, however, it is important to stress that when an employee learns he or she is to be laid off, an immigration lawyer should be contacted immediately to discuss taking the necessary steps to ensure the worker remains in status and that decisions are not made that will have unnecessarily harmful effects. Employers terminating workers should also consider lining up immigration counsel to advise employees as one of the services provided to workers being terminated.

What are the immigration related consequences of layoffs on alien employees in non-immigrant status?

For employers that employ foreign nationals, the company's alien workforce consists of two separate groups of employees: nonimmigrant workers and immigrant workers. Nonimmigrant workers usually fall under the H-1B, L, E and TN temporary visa categories. The most common nonimmigrant employment visa, H-1B, is used for an "alien who is coming to perform services in a specialty occupation" in the United States. L visas are used for intra-company transferees that enter the US to render services "in a capacity that is managerial, executive, or involves specialized knowledge", while E visas are used for "treaty traders and investors" as well as Australian specialty occupation workers. Finally, the TN category includes "Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level" as listed in the North American Free Trade Agreement. As compared to nonimmigrant workers, immigrant workers are those who have obtained or are in the process of obtaining lawful permanent residency.

Nonimmigrant work visas are generally issued for the specific purpose of employment with a particular employer. Thus, a nonimmigrant residing in the US under one of the temporary work visa categories is legally authorized to remain in the US only as long as they are employed with the particular employer noted in their visa application. If the employee is laid off, they immediately lose their visa status. As a result, employers that lay off nonimmigrant employees with little or no notice put these individuals in the difficult situation of having to quickly find an alternative visa status in order to remain legally in the US. If the nonimmigrant employee cannot secure an alternative status, he or she must choose between remaining in this country illegally or leaving everything behind and returning to their home country to possibly seek a new visa status from abroad.

If the nonimmigrant is married, or has children, his or her dependants must also leave the country as their legal status is derived from the visa status of the nonimmigrant worker. This can be particularly hard when, for example, children must be pulled out of school in the middle of the school year or someone in the family is receiving regular treatment for a medical condition. And returning to legal status once an employee becomes illegally present can be extremely difficult.

Securing an alternative visa status without notice, or with only a little notice, is not easy, but the employee needs to act very quickly once he or she learns of the termination. Even if the nonimmigrant is fortunate enough to secure an alternate employment offer, he or she will not be permitted to begin work for the new employer under most nonimmigrant work visa categories until a new visa petition is actually approved, something which could take up to several months. An exception is available to those working under the H-1B visa category. Those workers may normally start work for a new employer immediately upon filing a new visa petition. A more likely scenario is for the employee to file to change to visitor status. This strategy will allow the worker to remain legally in the US, though not authorized to work. As long as the application is filed while the worker remains employed, the worker will remain in status for up to 120 days while the visitor change of status application is pending. The worker will also have to file a new non-immigrant application once a new position is found.

For those previously holding an H-1B filing for a new H-1B, H-1B "portability" remains available in most cases and work for the new employer can begin immediately upon filing the new H-1B change of status petition. One additional good piece of news for H-1B visa holders, however, is that if a worker was counted against

the H-1B cap for the prior position, the worker should not need to be counted again and the new employer does not need to go through the H-1B lottery.

L-1, E-1 and E-2 applicants very often need to find a new visa category to remain in the US. Because L-1s are intracompany transfers and must be working for an employer that employed them for a year outside the US within the prior three, the odds are pretty low that they will qualify to work for a different employer in the same status. So changing to another non-immigrant category will likely be necessary. E-1 and E-2 status is tied to working for an employer with the same nationality as the employee. In order to remain in the E-1 or E-2 status, the worker must find another employer from his or her country and be employed in a managerial, executive or essential skills position. Like the L-1 employee, a laid off E-1 or E-2 worker will probably need to switch to another non-immigrant visa category. TN and E-3 workers are in better shape because if they can find a job in the same occupation and, in the case of an E-3, are paid the prevailing wage, their status can continue with a new employer.

In situations where the nonimmigrant remains in the US in a visa category that prohibits employment or while an employment-based visa is pending, the individual is generally not eligible to collect any type of unemployment compensation under most states laws because unemployment statutes usually require that an individual must be available to work and authorized to accept work to be eligible for unemployment compensation. Thus, unlike their US counterparts, these alien workers must get by without any supplemental income during this interim period even though unemployment taxes were deducted from their wages while they were employed.

What should a non-immigrant employee do if they fall out of legal status?

If the nonimmigrant employee is unable to secure a legal visa status after being laid off, any time spent out of status has the potential to create significant future problems that the nonimmigrant often does not realize. Even minor periods of time spent out of legal status can render the nonimmigrant ineligible for certain immigration benefits. For example, in the final stage of the green card process, an individual usually has the choice of completing the process from within the US (referred to as adjustment of status) or at the US Consulate located in their home country. However, individuals who have spent any period of time out of status are potentially not eligible to adjust status and must endure the disruption of having to return home to complete their green card process. Furthermore, USCIS has recently begun cracking down on workers who engage in any unlawful employment even after an adjustment application has been filed. An adjustment applicant must therefore be very careful to make sure that he or she has a valid employment authorization card just in case he or she loses their non-immigrant work status.

Individuals who spend longer periods of time out of status are faced with considerably more serious consequences. Under immigration law, individuals who are unlawfully present in the US for a period of six months to one year are barred from reentering the US for three years. Individuals unlawfully present in the US for over one year are barred for ten years.
Persons in this situation may be able to convince an examiner to exercise discretion and approve a late-filed change of status petition based on extraordinary circumstances beyond the control of the alien. But a prudent person should assume

the decision will be no and should be cognizant of the fact that the longer a person remains out of status, the harder it will be convince a consular officer to approve a visa.

Is there a grace period allowing a period of time for a worker to find a new position without being considered out of status?

No. Workers terminated from their positions are considered out of status immediately upon their termination unless they have a change of status petition filed before they are terminated. During the recession in 2001, USCIS' Efren Hernandez III, the then Director of the Business and Trade Services Branch, announced that the agency did not provide or recognize any "grace period" for maintaining H-1B status. While USCIS suggested it was considering allowing a 60 day grace period in a June 2001 memorandum, nothing ever came of the proposal and no grace period is available to laid off H-1B workers.

There is a ten day grace period following the expiration of the admission period noted on the Form I-94, but this would not apply to prematurely terminated workers.

What are the immigration related consequences of layoffs on alien employees with pending green card applications?

For employees with pending green card applications, a layoff can present different problems. Often, after having an opportunity to evaluate an alien employee's skills and future potential, an employer will agree to sponsor the alien for lawful permanent residency status, commonly referred to as "green card" status. A lawful permanent residency ("LPR") application generally consists of three steps. First, through a process called labor certification or PERM, the employer must prove to the satisfaction of the Department of Labor that it has not been able to find a domestic employee to fill the alien's position. Second, after the labor certification is complete, the employer files an immigrant petition with the USCIS. Finally, after the immigrant petition is approved, the employee files a petition for the adjustment of his or her immigration status to the status of a lawful permanent resident with the USCIS. The entire LPR process may take several years.

The LPR process is predicated on the idea of granting an alien permanent work authorization to work for a particular employer in a particular position. Thus, alien employees who are laid off during the first two steps of the LPR process cannot continue with their application, and must restart the entire process with another employer if they remain interested in securing LPR status. Alien employees laid off during the third step of the process may or may not be able to continue the LPR process depending on their situation.

Historically, alien employees could not switch employers before their status was adjusted without risking invalidation of their underlying immigrant petition. However, under a law passed in October 2000, an alien employee whose adjustment of status application has been pending for over six months can now switch employers without validating his or her immigrant petition as long as they will be working in a position similar to the position noted in their labor certification and immigrant petition. Obviously, during a recession, finding work in one's occupation may not be easy and if a worker accepts employment in field not closely related to the field that served as

the basis for the green card application, adjustment portability may not be available. Note also that the worker must be working in the new position at the time the adjustment petition is adjudicated.

What are the immigration related consequences of layoffs on alien employees who are already permanent residents?

For alien workers who have already secured LPR status, the impact of being laid off is not much different from that of a US worker. The alien green card holder would continue to be in lawful permanent residency status while he or she looks for new employment. Many immigrants who have recently obtained their green card status may be rightfully concerned about leaving their positions too quickly after getting permanent residency. The USCIS will sometimes accuse an individual of not having appropriate intentions when they got permanent residency. However, an involuntary termination of employment will not trigger that type of problem since the applicant presumably did not intend to leave the employer. Also, depending on the applicable state law, the alien LPR might be eligible for unemployment compensation because he or she is lawfully present in the US and is available and authorized to accept employment.

What are the immigration related consequences of layoffs on employers employing foreign nationals?

When downsizing includes laying off a company's alien workers, the employer must be cognizant of its affirmative duties under immigration law with respect to those workers. For most employment-related visa types, the employer has an affirmative responsibility to notify the USCIS when an alien's employment has been terminated so that USCIS can revoke the individual's visa. With respect to H-1B employees, the employer also must provide the H-1B worker return transportation to their home country at the employer's expense.

In the H-1B context, these affirmative responsibilities are particularly important because employers that do not comply with these obligations run the risk of being subject to continuing wage obligations for the H-1B employee. Under the anti-benching provisions of the H-1B regulations, an employer must continue to pay an H-1B employee their normal wages during any time spent in nonproductive status "due to the decision of the employer." In a layoff situation, the employer's payment obligation ends only if there has been a "bona fide" termination of the employment relationship, which the DOL will deem to have occurred when the employer notifies the USCIS of the termination, the H-1B petition is canceled, and the return fare obligation is fulfilled.

In addition to complying with its affirmative immigration obligations when laying off alien workers, an employer must also be aware of other possible consequences of its downsizing strategy, particularly with respect to the H-1B visa program. One possible issue that could arise in a layoff scenario concerns severance benefits provided by the employer. Under H-1B regulations, all employers employing H-1B workers are required to provide these workers with fringe benefits equivalent to those of its US workers. While the DOL has not said whether severance benefits would fall under the definition of "fringe benefits," DOL could possibly interpret the failure to provide

similar severance benefits to both US and H-1B workers as a violation of the H-1B regulations.

Another possible issue that may arise with downsizing relates to how the resulting change in the employer's workforce impacts its calculation of "H-1B dependency," a concept outlined in the final H-1B regulations issued by the DOL in December 2000. Under these regulations, an employer with 25 or fewer employees is considered "H-1B dependent' if it has more than 7 H-1B employees. Employers with between 26 and 50 employees are considered "H-1B dependent" if they have more than 12 H-1B employees. An employer with over 50 employees is "H-1B dependent" if more than 15% of its employees are H-1B visa holders.

When an employer lays off a significant number of workers, regardless of whether they are US or H-1B workers, it is important that the employer recalculate if it is an H-1B dependent employer. Non-dependent employers that become dependent will become subject to a myriad of additional legal requirements applicable to H-1B dependent employers such as additional recruiting requirements. Likewise, an H-1B dependent employer could become non-dependent following a downsizing, thus relieving itself from many burdensome obligations.

If you are an H-1B dependent employer, downsizing can present even more issues to consider. Under a new immigration law, H-1B dependent employers filing a visa petition must attest under oath that they have not displaced a US worker for a period of 90 days before and 90 days after the petition is submitted. A "displacement" occurs when an employer lays off a US worker from a job essentially equivalent to that offered the H-1B worker. A US worker that accepted an offer of voluntary retirement is not considered to have been "laid off." Also, a lay off does not result when the employer offers the US worker a similar employment position at equivalent or higher terms in lieu of termination. To comply with these anti-displacement provisions, H-1B dependant employers are required to keep detailed records relating to all layoffs impacting US workers.

H-1B dependent employers that place their H-1B employees with secondary employers where there are "indicia of employment" between the secondary employer and the H-1B worker can also sustain displacement liability when the secondary employer lays off US workers. Under the new H-1B regulations, US workers at secondary employers are also protected from displacement by H-1B workers. Thus, if an H-1B dependent employer is placing an H-1B employee with a secondary employer, the H-1B dependent employer must use due diligence to make sure the secondary employer has not displaced any US workers in a position equivalent to that offered the H-1B worker for a period of 90 days before and after filing the H-1B petition. Secondary employers who lay off workers are not subject to any liability, so the H-1B dependent employer is obliged to make inquiries as to the secondary employer's layoffs and cannot ignore constructive knowledge that the layoffs have occurred.

Employers that violate either the primary or secondary employer displacement prohibitions can be subject to both monetary penalties and/or be barred from using the H-1B program. This being the case, H-1B dependent employers who have laid off US workers or place employees with secondary employers who have laid off US workers must be extremely careful when hiring new H-1B employees.
Employers that lay off workers could also jeopardize permanent residency applications pending for the company's workers. With USCIS and DOL examiners

now regularly searching the Internet for information on petitioners and beneficiaries, practitioners are already reporting more and more denials of PERM and immigrant visa petitions based on examiners' finding media reports of downsizing at the employer. Employers will need to be prepared to document that the sponsored worker is not employed in an occupation where US workers have found themselves terminated.

What are some proactive strategies for preventing negative immigration consequences for employers and employees during downsizing?

With careful planning, employers can protect themselves and their employees from most of the immigration problems associated with corporate downsizing discussed above. Here are some general guidelines to keep in mind when developing your company's layoff strategy:

1. Try to provide alien employees who will be laid off as much advance notice as possible. With advance notice, alien employees are in a better position to take steps to secure an alternate visa status, allowing them to remain legally in the US without having to spend time out of status, or being required to leave the country. Also, employers should try to fully understand each individual's immigration situation. Often, employers may learn through this exercise that by keeping an alien employee employed for a few more weeks or months, the alien employee can secure immigration benefits that would take several years to reprocess if the employee had to start over. If you feel you do not fully understand the immigration issues facing your alien employees, you should work with an immigration attorney to help develop a comprehensive transition plan.

Some progressive employers will provide laid off workers with access to an immigration lawyer to assist the worker in maintaining status. The cost associated with this may be offset for some workers by not having to reimburse the workers for transportation costs to their home country since proper counseling may result in the worker not having to leave the country at all.

2. Laid off workers should be very careful not to allow themselves to fall out of status even for a day. If a new work status application cannot be filed before being terminated, the worker should consider filing an application to change to visitor status. Interviewing for a new job is an acceptable visitor visa activity.

3. Make sure you are aware of all of the affirmative immigration-related obligations that apply to you based on the types of alien employees you are laying off. Different visa categories have different requirements when terminating employment, and a failure to comply with these requirements could result in considerable financial liability on the part of the employer.

4. As layoffs occur, make sure you constantly reassess whether the resulting change in the makeup of your workforce impacts the "H-1B dependency" determination. A change in your company's classification could result in a substantial increase or decrease in legal compliance obligations.

5. If you are an H-1B dependent employer, carefully consider how layoffs at your company, or at companies where you place your employees, impact the prohibition

against displacing US workers.

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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 - I was born in the USA and brought to Canada by my parents as an infant. I want to return to the USA to live. I have a very old criminal record. Can I move down to the states?

A - If you were born in the US, you're a US citizen (with the very, very minor exception of certain children of diplomats). A criminal record does not change that fact and you should be able to get a passport to return.

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Q - What application type would I fall under when applying for the I-131 travel document: the re-entry permit or the advance parole? I am married to a U.S. Citizen and have filed all the necessary forms such as the I-130, I-485, & I-765. As well as, I have done the biometrics for the I-485 and I-765. If I file for the advance parole, can I place a date of travel that I am not sure of?

A - You file the I-131 and request advance parole. Reentry permits are for people who already are permanent residents. You should put your estimated travel date, but if you don't travel at that point or change your plans, USCIS is normally pretty flexible.

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Q - If someone is entering America on a visa waiver and they stay for 10 days how long does that person have to be out of country before they can re-enter America again? Is there a time limit that someone on a visa waiver has to be out of country before they can re-enter. I read that they can only stay in America for 90 days, but I could not find how long they had to stay out, if there is any time limit.

A - There is no time limit to stay outside the US. If someone stays 89 days and then tries to enter within a few days, a border officer may be suspicious, however, about the person's intentions. But a short trip followed by reentry a short time later will probably not be as big of a deal as long as the visitor has a credible story explaining their travel plans.

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Q - I am an international graduate student on F-1 visa, but I also have an approved family immigrant petition [section 203 (a)(2)(B) INA, unmarried child 21/older of permanent resident] pending with a priority date of April 2001. I have searched for

jobs with my F-1 visa for the Curriculum Practical Training (CPT) program but to no avail.

Is it possible for me to file for an Employment Authorization Document with the Notice of Action (I-797) of my family based petition i received from the US Department of Justice?

A - Unfortunately, you can't get an employment card based solely on having a filed or approved I-130 tied to your family green card petition. You must wait until your priority date is current and you have filed an adjustment of status application.

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Q - I would like to sponsor my friend who lives in England to be my nanny. What is the first step we should do to get this done and can we sponsor her? She does not have a visa at this time. Please help us get this done. We think it would be a great opportunity for her.

A - The only viable option in most cases for sponsoring a nanny is the J-1 au pair visa. Your friend would have to be under 26 and you would need to work through an au pair agency. The article on our web site at http://www.visalaw.com/05aug3/2aug305.html may be helpful.

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4. Border and Enforcement News

The number of arrests of undocumented immigrants along parts of the US-Mexico border has decreased from last fiscal year, which has government officials citing the lower number as a proof that it is succeeding in defending its border from immigrants. *The Houston Chronicle* reports that the number of arrests in border regions for all of Arizona, and much of Texas have dropped drastically: there have been 78% fewer border arrests compared to the previous fiscal year. The El Paso sector alone, among the most heavily-trafficked stretch of border, arrested 30,126 immigrants, a 60% drop from the previous year.

Though the government cites the decrease in arrests as proof that the increase in border patrol agents and harsher laws against immigrants are an affective deterrent, immigration experts warn that this conclusion the federal government should be taken with skepticism. "Total number of arrests" is the only criteria the government is using to measure its success. But the government isn't considering other potential explanations, some of which may better explain the decline in border arrests. Some data even conflicts with the government's standard for success: the Rio Grande Valley and San Diego sectors of border actually increase their numbers of arrests in 2007.

Despite their vague goalposts for "success," there is reason to believe there has been a gradual decline in border crossings; last week's Census Bureau report claimed that there were approximately 500,000 undocumented border crossings in 2007, down from 1.8 million the year before. In explaining the unknown quantities of immigrants entering that don't get reported, officials cite the weakened construction industry and other service sectors have discouraged undocumented border entries. "It's as much an indicator of the economy as of stepped-up enforcement," said vice president Michael Fix of the nonpartisan think-tank Migration Policy Institute. "If you

look at it broadly, what you see is the rate of increase of immigrants is slowing a little bit."

"When the number of apprehensions are up, they claim it's a sign of success because they're apprehending more," says Michael A. Olivas, professor of immigration law at the University of Houston. "When it's down, it's because they're deterring more. And either of those is efficacious, from their point of view—they've got it covered coming and going."

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A Connecticut immigration judge this month ruled that there is sufficient cause to hold hearings to determine whether the arrests of undocumented immigrants last year in New Haven violated their constitutional protections, *The New Haven Register* reports. Attorneys for the immigrants brought suit, contending that ICE agents who raided two separate residences had conducted illegal searches, lacked probable cause, and arrested immigrants solely on race, all violations of the Fourth and Fifth amendments. If determined to be obtained illegally, their request to suppress any evidence gathered by ICE would likely be granted at trial.

In their defense, attorneys for US Immigration and Customs Enforcement filed briefs that showed they stood by their officers' conduct, arguing that the immigrants had not proven their cases. Judge Michael Strauss factored this argument in his ruling which tossed out the plaintiffs' contentions that their First and Tenth amendment rights were violated as well.

While not a complete victory, attorneys for 11 of 31 undocumented immigrants picked up by ICE in the raids were pleased with the ruling. "I think all of our clients were delighted to be able to have a chance to tell their story, not just to the judge … but to the community at large," said Stella Burch, a Yale Law School student who has worked on this case since the first raid on June 6. The 16 immigrants present at the hearing broke into cheers when the ruling was explained to them by their attorneys outside the courthouse.

This case is the latest in an increasing trend being seen in immigration courts: violations of an immigrant's constitutional protections. Under the language, constitutional protections apply to all people living in the US; not just its documented citizens. The attorneys for some of the plaintiffs believe that this evidentiary hearing will be Connecticut's first lawsuit against ICE on the basis of constitutional protection.

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A federal judge has denied a motion asking her removal from the case of a former Agriprocessors Inc. supervisor who is awaiting sentencing on immigration violations charges. *The Associated Press* reports that Martin De La Rosa-Loera, who pled guilty to aiding and abetting the harboring of undocumented immigrants, filed court documents asking for Chief Judge Linda R. Read to recuse herself, questioning her impartiality. He argued that Reade worked with the federal government in making arrangements for fast-track judicial proceedings in Waterloo for hundreds of people arrested in the May 12 raid of Agriprocessors, and that she should not have presided over the cases.

He also cites that Reade defended the government's actions in a May 24th article in *The New York Times*. "Indeed the government has failed to cite one case in which a court publicly commented to the press regarding charges in a criminal case in which disqualification was not found to be warranted," he argued in court documents. His motion sought to avoid the participation of any judge who was proactively involved in the immigration enforcement proceedings related to the raid.

In her order issued last week, Reade said she was simply performing her official duties as chief judge for the Northern District of Iowa. She said that in his arguments, De La Rosa-Loera repeatedly confuses logistical cooperation with "collusion or involvement in the executive function of pursuing prosecution," arguing that De La Rosa-Loera "has not demonstrated that the undersigned has displayed a deep-seated favoritism that would make fair judgment in his case impossible."

Explaining her *Times* quote, Reade says her comments were in response to a question about immigration lawyers' criticisms about court proceedings. "The court merely answered the reporter's questions about the federal criminal process," Reade wrote, noting that De La Rosa-Loera's case wasn't pending at the time of her comments. "The two statements attributed to the undersigned were isolated and a far cry from the actions and statements of judges in the cases that defendant cites in support of the motion."

She said she will go forward with sentencing De La Rosa-Loera, who supervised four departments at Agriprocessors. The processing plant was raided earlier this year by ICE agents, resulting in one of the largest immigration raids in US history.

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In a new report by the Government Accountability Office, a number of disparities have been found in the US asylum approval process, with some conditions being more favorable and more likely to lead to approval than others, *The Miami Herald* reports. The GAO report, for example, found that immigrants petitioning for asylum in New York are much more likely to obtain a favorable asylum ruling that other spots in the US; the GAO found that New York courts are 420 times more likely to approve asylum than in the rest of the country.

In addition to geographical differences, the GAO also discovered disparities based upon the petitioning immigrants and the courts themselves. Petitioners who have been detained are more likely to obtain approval than those who have not. Additionally, male judges are 60% more likely to approve asylum petitions than their female counterparts.

The findings correspond with an earlier report by Transactional Records Access Clearinghouse, an independent organization at the University of Syracuse, which has collected and analyzed data based on nationwide asylum approvals. According to its findings, the national average of asylum petitions denied between 2002-07 was 58.8%. The average of denials during same period in immigrant-rich Miami was 78.5%, compared to New York's 38.3%.

In order to resolve the discrepancies, the GAO report recommended that the Executive Office for Immigration Review, a division of the Justice department, "identify the judges that need training."

"Our immigration court system is not independent, and is not subject to supervision, which has resulted in the selection of judges for political reasons," said Kerry Sherlock, adjunct director of the American Immigration Lawyers Association. "Those that are looking for a safe refuge in our country should be treated with the same consistency and justice if they apply in Kansas or in California. The result should be the same," she added.

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Immigration and Customs Enforcement officials have entered into an agreement with the Las Vegas Police Department that would allow local officers at the Clark County Detention Center to identify immigration violators and work with ICE to initiate deportation proceedings, Las Vegas' KVVU News reports.

The department is a high profile addition of city and county applicants to the 287(g) partnership with ICE, a pact that empowers local officers to do some forms of immigration policing. 287(g) alliances have met with some resistance and lawsuits since its implementation, with some critics suggesting that this allows local law enforcement to perform duties outside of their scope and act with little to no regard for federal law and an immigrant's Constitutional privileges.

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5. News From the Courts

***Rranci v. Att'y Gen. of the U.S.*, (3d Cir. Aug. 22, 2008)**

In sum, we hold that Petitioner satisfied the procedural requirements of Lozada. Because the BIA erred in applying the law to the undisputed facts of the case, it abused its discretion in dismissing the appeal and affirming the IJ's denial of his motion to reopen. It appears that Annex I of the United Nations Convention Against Transnational Crime would apply to witnesses in criminal proceedings, such as Petitioner, who testify about smuggling crimes. On remand, the BIA should determine in the first instance how current U.S. law reflects compliance with the Convention.

Petitioner, a citizen of Albania, initially filed for, but withdrew, his application for asylum, withholding of removal and Convention Against Torture (CAT) relief. His application for relief was based on serving as a material witness in a criminal case against the smuggler who brought him to the United States. The smuggler was an alleged chieftain in Albanian organized crime. The Department of Justice (DOJ) acknowledged in a letter that Petitioner's cooperation was an important factor in convincing the smuggler to plead guilty. In support of his claim for asylum, Petitioner stated that he feared being killed for having helped in the case against the smuggler. He also stated that he understood from the DOJ that the smuggler would be removed to Albania about two months after his conviction. Petitioner also understood from the DOJ that his own removal hearing would be waived and that he would be protected and not deported to Albania. According to Petitioner, the smuggler's brother had threatened that Petitioner would be killed upon his return to Albania.

At his scheduled asylum hearing, Petitioner's attorney entered the courtroom without Petitioner and came out recommending to Petitioner that he accepted voluntary departure in lieu of an asylum hearing. Petitioner claims that his attorney told him he would be arrested if he did not agree to leave. Petitioner stated that he was forced into the agreement to accept voluntary departure because he was afraid. The immigration judge granted voluntary departure. Petitioner, however, failed to depart and hired new counsel. New counsel moved to reopen Petitioner's case arguing that prior counsel had provided ineffective assistance of counsel. His counsel also argued that the "state-created danger doctrine" prohibited his removal to Albania. The IJ denied the motion to reopen and the BIA dismissed his appeal stating that Petitioner failed to establish that his former counsel was aware of the allegations of ineffective assistance or had an opportunity to respond to the allegations.

On review, the Third Circuit began its analysis by addressing "the state-created danger doctrine." The court noted that this doctrine imposes on the government the constitutional duty to protect a person against injuries inflicted by a third-party when the government affirmatively places the person in a position of danger the person would not otherwise have faced. The court held, however, that it has stated unequivocally that the "state-created danger doctrine" has no place in immigration jurisprudence. *Kamara v. Att'y Gen. of the U.S.*, 420 F.3d 202, 216 (3d Cir. 2005). The court also held that the "state-created danger doctrine" was not an appropriate basis for a motion to reopen because it did not satisfy the requirement of "new facts." 8 CFR §1003.2(c)(1).

Regarding Petitioner's ineffective assistance of counsel claim, the court began its analysis by noting that the ineffective assistance of counsel in removal proceedings violates the Fifth Amendment's guarantee of due process of law, *citing Fadiga v. Att'y Gen. of the U.S.*, 488 F.3d 142, 155 (3d Cir. 2007). The court, *citing Matter of Lozada*, stated that to proceed with an ineffective assistance claim, a person must: 1) provide an affidavit attesting to the relevant facts, 2) inform former counsel of the allegations and allow him an opportunity to respond, and 3) the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities and, if not, why not. 19 I&N Dec. 637, 639 (BIA 1988). The court found that Petitioner met the first prong by providing his own affidavit. As to the second prong, Petitioner's new counsel submitted a statement regarding his conversation with Petitioner's former counsel in which former counsel stated that it was in Petitioner's best interest to accept voluntary departure and denied telling Petitioner that he would be imprisoned if he did not depart voluntarily. Former counsel also conceded in the conversation that he was unaware of the "state-created danger doctrine." The court rejected the BIA's reasoning that Petitioner failed to establish the second prong of *Lozada*.

As to the third prong, the court held that although Petitioner lacked a compelling excuse for not pursuing disciplinary action against his former counsel, it would consider that he had satisfied the necessary procedural requirements under *Lozada*, noting that the third prong does not necessarily sink an ineffective assistance of counsel claim. *Fadiga*, 488 F.3d at 156-57. The court found that the policies underlying the third prong had been met, namely: 1) identifying, policing and correcting misconduct in the immigration bar, 2) deterring meritless claims of ineffective assistance, 3) highlighting the expected standards of lawyering for immigration lawyers, 4) reducing the need for an evidentiary hearing, and 5) avoiding collusion between counsel and clients.

In determining whether competent counsel would have acted differently and whether Petitioner was prejudiced by his prior counsel's performance, the court held that the possibility that prior counsel erred in his representation was strong and remanded the issue to the BIA. On the issue of prejudice, the court noted that the standard was not a stringent one and that Petitioner need only show a probability sufficient to undermine the outcome. The court acknowledged that Petitioner would have faced an uphill battle on his asylum and withholding claims to establish that he would be harmed on the basis of a protected ground. The key question, according to the court, was whether he could have established a CAT claim. The court held that based on his affidavit, the evidence of his cooperation in the criminal case, and the circumstantial evidence of the threats Petitioner faced, it could not say that it was implausible that Petitioner would be tortured or killed if returned to Albania. The court found that there may be a reasonable likelihood that the pervasive bribery and involvement of various Albanian officials would constitute a "willful blindness" to the tortuous conduct. The court, therefore, remanded the issue of prejudice to the BIA.

Lastly, the court looked at the issue of whether an applicant who serves as a government witness in the United States can be removed to his home country if the person he made a statement or testified against has threatened his life. The issue, one of first impression for the court, was the extent to which the United Nations Convention Against Transnational Organized Crime affects the removal of an individual such as Petitioner. The Convention was ratified and took effect in 2005. The court noted that Art. 24(1) of the Convention provides that each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation of witnesses in criminal proceedings who give testimony concerning offenses covered by the Convention. The court found that Annex I of the Convention, relating to offenses, appeared to apply to witnesses such as Petitioner. The court declined to adopt the "state created danger doctrine" as a vehicle for implementing the Convention and expressed skepticism that it would apply in this context. The court did note that the Senate report and a letter from President Bush indicated that current U.S. law already complies with the Convention. The court ordered that on remand the BIA should determine how current law reflects compliance with the specific provisions of the Convention that are relevant to Petitioner's claim.

The petition for review was granted.

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6. News Bytes

President Bush announced earlier this week that the US it will be extending the number of countries eligible for the Visa Waiver Program by seven: by the end of 2008, citizens of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea. Additionally, six other countries were deemed “roadmap” countries—Bulgaria, Cyprus, Greece, Malta, Poland, and Romania—which means they are on track to qualify for future visa waivers.

President Bush, during his announcement, said the decision to extend the waiver to these particular countries was contingent for assisting the US in combating terrorism, saying that the accepted countries “agree to share information about threats to our people,” and also were receptive in accepting the Department of Homeland Security’s

request for foreign travelers to the US to comply with new travel standards and use biometric passports.

The new waiver moves the list of nations under the visa waiver program to 27. Citizens from a waiver country traveling to the US can stay no longer than 90 days, and must carry valid documentation that it is traveling on a DHS-approved air or sea carrier.

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Immigrants who wish to one day become US citizens will face a drastically altered US citizenship exam. The new test was introduced by USCIS for use at all testing centers throughout September to October, *The San Jose Mercury News* reports. "We're trying to encourage civic learning and attachment," said USCIS Citizenship chief Alfonso Aguilar. "The test is not harder. It's just a better test. It follows a basic US history and civics curriculum. It's more on concepts than rote memorization."

The test's old content, which was created in 1986 with no input from scholars or historians, has long faced criticism from scholars and policymakers as being inane and rewarding memorization. Gone are questions about what the US flag looks like, what the name of the immigration form you fill out when applying for citizenship, and questions about US history now focus on the historical significance. For example, "Who was president during the Civil War?" has now been replaced with "What was one important thing that Abraham Lincoln did?"

As with the old test, applicants will be provided the list of 100 possible questions and answers in order to help them study. When they are called in for the exam interview after several months, they must give the correct answer in English to at least six of ten selected questions to pass.

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Social scientists have created a new mathematical formula which will allow countries to predict immigration trends, *Reuters* reports. The model, based on a detailed study of the flow of people into 11 countries including the US, UK and Australia from 1960 to 2004, was created at Rockefeller University, and the results were released earlier this month.

The formula looks at factors such as population size and density of the countries people are leaving as well as those they are entering, and the distance and other correlations between these places. "I think that the model we have will permit international institutions and countries to do a much better job of projecting future migrant flows as part of overall population projections," said project leader Joel Cohen.

The study came about to replace what Cohen considered inadequate existing models to predict immigration trends. Cohen said existing models used by the UN and others to predict population flows had often been inadequate and inaccurate.

From the results of his survey, the data suggest that people from South Asia, including Pakistan and Bangladesh, and from Southeast Asia, including Vietnam and the Philippines, are immigrating in increased numbers to Gulf states due to the oil

economies there. Also, immigrants from Latin America are entering Canada and the US in increased numbers, while immigrants from the Middle East and Africa tend to favor immigration to Europe.

The findings were reported in the Proceedings of the National Academy of Sciences, and the study can be found at http://www.pnas.org.

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Although the medical community continues to engage in debate over the widespread use of Gardasil, a vaccine that helps prevent cervical cancer, there is one demographic that as of Aug. 1, is legally required to receive it: immigrant women entering the US. *The Wall Street Journal* reports that the federal policy has come under heavy fire from some immigrant advocates who argue that forcing foreigners to take the costly vaccine saddles them with an unfair financial burden, as they are required to pay for the vaccine themselves. In addition to drastically increased visa application fees, young women must add the $120 vaccination to their costs as well. "It's outrageous; it's creating an economic barrier," said Tuyet Duong of the Asian American Justice Center.

The policy also has some health policy experts taking issue with it, viewing the requirement as excessive. Some of the CDC physicians and experts who promoted Gardasil in the US say they never intended to make the vaccine mandatory to young female immigrants. "If we had known about it, we would have said it's not a good idea" said Dr. Jon Abramson, former CDC Advisory Committee member and one of the initial supporters of the vaccine. Dr. Abramson questioned the necessity of it, in comparison to other required vaccinations: "We don't want someone coming into the US who hasn't been vaccinated against measles or chickenpox," said Abramson, noting that since sexual intercourse is the only means of communicating the disease that Gardasil prevents, the risk "is not something that endangers kids in a school setting or puts your population at risk."

Despite the controversy, a spokeswoman for USCIS said that the agency stands by their decision to classify Gardasil as a mandatory vaccine, citing recommendations by the CDC. A CDC spokesman responded to this claim, saying that the CDC immunization committee that pushed Gardasil didn't realize that their decision would affect tens of thousands of immigrants each year.

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Last week, via press release, US Citizenship and Immigration Services (USCIS) announced that it will extend the maximum period of stay for any Canadian or Mexican nationals currently working in the US under the Trade-NAFTA (TN) Professional Worker visa program. The updated rule changes the initial period of admission for TN workers from one year to three years, making it equal to the initial period of admission given to H-1B professional workers.

According to the statement, USCIS believes the updated rule will ease administrative burdens and costs on TN workers, and employers of TN workers will benefit by increasing the amount of time they'll have access to these employees, and put less pressure with regards to seeking an extension of the worker's visa.

The TN visa classification is a category available only to eligible Canadians and Mexicans with at least a bachelor's degree or appropriate professional credentials who work in certain qualified fields pursuant to the North American Free Trade Agreement (NAFTA). Qualified professions identified within NAFTA include, but are not limited to, accountants, engineers, attorneys, pharmacists, scientists, and teachers.

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In a meeting in Washington with U.S. Secretary of Homeland Security Michael Chertoff and Deputy Secretary of State John Negroponte, Israel's Interior Minister Meir Sheetrit discussed waiving the need for a visa for Israelis to visit the United States, *Yediot Achronot* reported Friday.

The change in policy would begin to be formulated later this month. To qualify, Israel would have to switch from a paper to a biometric passport system.

Some 313,000 Israelis have traveled this year to the United States. The process for obtaining an entry visa requires a fee, an interview at the embassy and a long wait.

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The Houston Chronicle reports that last week about 70,000 Hondurans received their eighth extension of their temporary protected status, a protection granted to foreign nationals to stay in the US after their native country has suffered a natural disaster; the government estimates that an additional 300,000 Honduran, Nicaraguan and El Salvadoran nationals are currently eligible for the extension.

Despite some critics suggesting the word "temporary" is a misnomer, immigrant advocates for temporary status is not permanent. Jose Cerrato, president of the Palm Beach County Honduran Organization, cites examples of other countries whose residents have had temporary protected status granted which was later allowed to expire—including Rwanda, Bosnia-Herzegovina, and Sierra Leone. "Honduras still hasn't recovered physically or economically," said Cerrato.

To show their support for the eventual renewal of temporary status, last week over 100 people held a candlelight vigil in front of West Palm Beach, Fla.'s Paul G. Rogers Federal Building. The temporary status would alleviate the suffering for undocumented immigrants here and Haitians at home, supporters said. "The people over there depend on the people over here," said supporter David Joseph.

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7. International Roundup

The Quebec government today announced several measures to help immigrants better integrate into Quebec society, *The Montreal Gazette* reports. Immigrants will now be able to take free French courses before they leave their home country - either online or at an Alliance Française.

Starting next January, all immigrants coming to Quebec will have to sign a

declaration saying they will respect Quebec's common values. They must promise to learn French and respect the fact that Quebec is a secular society where men and women have equal rights. The declaration will be included in the application to immigrate to Quebec and anyone who refuses to sign it will not be permitted to move here. “Coming to Quebec is a privilege, not a right,” Immigration Minister Yolande James said yesterday at a press conference.

The province also plans to favor immigrants who have the job skills that the Quebec labor market needs. Once they arrive in Quebec, the government will ask immigrants to attend seminars on adapting to life here and will increase the amount of support it gives to immigrants who are having trouble finding work.

James said the government also wants to persuade businesses to hire more minorities and said the public service must also hire more minorities. At present, minorities make up 19 per cent of the public service. The government's goal is to reach 25 per cent. Many of the measures announced today were suggested by the Bouchard-Taylor commission on reasonable accommodation.

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The number of new work permits which may be issued to aliens in 2008 was increased from 5,000 to 15,000, after the demands of employment recorded at the Romanian Immigration Office (ORI) increased to nearly 14,000 in September, according to Government release.

Romania’s *Curierul National* reports that 13,699 applications from employers for issuing new work permits were registered during the period 1 January - 19 September 2008. 10,000 of them were resolved positively, 1,880 applications were rejected and 1819 applications are pending, according to the Romanian Immigration Office.

The government this week decided to supplement the number of work permits issued to foreigners, after the National Employment Agency (ANOFM) had announced there was a shortage of approximately 50,000 employees in the Romanian labour market, in particular in the fields of construction, textiles and services.

Most extra-Community workers working legally in Romania come from Turkey - almost 4,200 people - and are followed by Chinese and citizens of the Republic of Moldova, according to ORI inspectors.

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According to *BBC News,* immigration is the issue most Londoners are worried about for the next five years, a survey has shown.

The London Matters poll asked more than 2,200 people from both London and across Britain for their views on a range of issues facing the capital. Londoners cited immigration (34%) as the biggest issue, followed by crime (21%) and housing (13%). Terrorism polled just 6% of votes. The study also found 23% Scots do not like anything about London. Those outside London chose crime as the biggest issue facing the capital (24%).

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The Philippines has some of the best laws and programs in promoting the rights and welfare of its migrant workers, according to an economist, *The GMA News* of the Phillippines reports. In a speech at the ongoing 2nd Global Forum on Migration and Development in Manila on Monday, Prof. Lawrence Dacuycuy, chairman of Department of Economics at the De La Salle University, said that government's active role in promoting the rights and welfare of overseas Filipino workers (OFWs) all over the world can be attested to by the creation of the Overseas Welfare Workers Administration (OWWA) and Philippine Overseas Employment Administration (POEA).

Both agencies assist overseas workers in case of contractual and other difficulties with their employers. In places abroad with big concentration of Filipino workers, labor offices (Philippine Overseas Labor Office) are attached to Philippine diplomatic missions to help distressed workers.

Dacuycuy also stated that the institutions established by the Philippines to promote and protect its migrant workers' rights continue to set the standards other countries emulate.

Dacuycuy also gave the national government high marks for its efforts to improve the quality of skills and English language proficiency of Filipino caregivers and seafarers, two of the top skills categories of OFWs, with training being provided by the Technical and Skills Development Agency (Tesda). The Philippines cemented its lead as the top provider of high-caliber seafarers to the world for its sailors' English proficiency and seamanship skills.

He also lauded the Department of Labor and Employment's (DOLE) 'Supermaid' program which aims to provide more skills and trainings to OFWs engaged in household services abroad.

Likewise, Dacuycuy cited the government for creating a mechanism for giving re-employment and reintegration opportunities to OFWs displaced by the recent conflicts in Iraq and Lebanon.

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8. Legislative Update

A new survey released this month shows that states that pushed legislation to expand immigrant rights have a much higher rate of success in passing legislation than states that to crackdown on undocumented legislation, *The Congressional Quarterly* reports. The study, conducted by nonpartisan immigration think tank Migration Policy Institute, with research assistance from New York University Law School, was conducted using the states' legislative data for 2007, a record year for these types of bills. Of the bills that sought to impose regulations on stopping undocumented immigration, approximately 20% of these bills ended up being rejected or expired; contrast this with the bills introduced to assimilate and expand immigrants' rights—their failure rate was only around 8%. The results also showed that out of the 1,059 immigration-related state bills introduced, only 167 (16%) were enacted.

The findings by MPI also revealed that states which had prior experience with immigration legislation had a significant impact on what types of future immigration

bills would be introduced. "It's interesting that politicians in traditional immigrant-receiving states—those that account for two-thirds of the foreign-born population in the US—were more interested in introducing bills that dealt with immigrant assimilation issues than other types of measures," said the report's author, Laureen Laglagaron. The study also concluded that states with a long history of immigration also had a more diverse docket on both sides of the immigration issue, and were more likely to include legislation related to assimilation, language services and curbing of human trafficking.

The MPI database on state legislation is available at: http://www.migrationinformation.org/datahub/statelaws_home.cfm.

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Despite assurances made earlier this year by the Bush Administration to hastily introduce a law to reverse a 15-year-old law banning HIV-positive foreigners from entering the US, nearly two months have passed with the administration not taking the steps needed to put the new law into practice, *The Associated Press* reports. In an effort to expedite the law, fifty-eight members of the US House sent Bush a letter urging him to take "swift action" on the issue.

This is the second such appeal from Congress for the Bush administration to take action. Last month Senators John Kerry [D-MA] and Gordon Smith [R-OR], co-sponsors of the measure, wrote to Health and Human Services Secretary Michael Leavitt, urging that the administration must act now.

The enactment rests on Leavitt, who as HHS Secretary, has yet to write the new rule, submit it for public comment and finalize it. According to HHS spokeswoman Holly Babin, the department is "working hard to revise the regulation and it's our goal to have it completed during this administration," but warned that it was "a time-consuming process."

The letter follows off the heels of the UN international AIDS conference in Mexico City, where current UN Secretary Ban Ki-moon, said these types of restrictions "should fill us with shame" but praised the US for ending the ban, adding that its decision could set a precedent for other countries that exclude people with HIV. Currently, only about a dozen countries around the world, including Libya, Russia, Saudi Arabia, Sudan, and Ki-moon's own South Korea, still ban travel and immigration for people with HIV.

"Congress has sent a clear signal that we can't fight discrimination and stigma abroad until we end them at home said Victoria Neilson, legal director for Immigration Equality. "Congress has done its part—now it's time for HHS to act." Advocates said that having won international plaudits for the new law, it's time to follow through.

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Earlier this month, the Alabama State Board of Education passed a new policy denying undocumented immigrants admissions to any of the state's two-year colleges, *The Associated Press* reports. The policy, which takes effect next spring, was passed on a 4-0 vote, with one member, Ethel Hall, abstaining. From the policy, applicants to any of Alabama's community colleges will be required to show an

Alabama driver's license, state ID card, an unexpired US passport, or an unexpired US permanent resident card. All international applicants must additionally provide a US Visa and an official translated copy of their transcripts, as long as proof of adequate financial support.

Hall said she was hesitant in voting because there was too brief a discussion for such a sweeping bill, which was introduced in less than two weeks before it was voted on. "I don't think we've done the kind of research we need to do in order to approve the policy," Hall said, describing her own personal brushes with discrimination, such as being denied admission to the University of Alabama despite extensive qualifications, as a point of concern. "It's been very, very, dear to me because I have been one of those who have been excluded and I was certainly capable and an American-born citizen," Hall said. "So I cannot support this policy until I am given additional information.

Given the depth of the policy, there was considerable outcry from immigration advocates, with many present during the board's public comment period. Shay Farley, spokeswoman and attorney fro the Alabama Appleseed Center for Law and Justice, questioned the policy's necessity and warned that it could produce unintended consequences. "We are bound by federal law to provide education to any student, K-12, regardless of legal status," she said. "A lot of children are brought by their parents; they did not choose to come here. If we deny them a two-year college education, where will they go for education?"

Raul Gonzales, director of Legislative Affairs for the National Council of La Raza warns that while most state and local prohibitive measures like this usually don't succeed, he finds the Alabama ruling troubling. "They need to make sure in their zeal to deny public higher education to undocumented immigrants that they may deny those services to US citizens who don't have documentation," he said.

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9. Notes from the Visalaw.com Blogs

Greg Siskind's Blog on ILW.com

- Aggravation for Agriprocessors
- McCain Versus Obama: Where The Candidates Stand on Immigration
- Use Immigration to Rebuild the American Economy
- Tancredo Contemplating Run for Colorado Governor?
- NILC Issues Advisory Memo to Clear up Confusion over No-Match Rule
- Mayor Bloomberg: Memo to The Next President on Immigration
- Chuck Todd: Hispanics Are Key to An Obama Win
- No-Match Update
- Immigrants of the Day: Immigrant Players of the Tampa Bay Devil Rays
- DHS Won't Implement No-Match Rule until Judge Okays
- Pelosi Indicates Democrats Will Move On Immigration Reform
- Summary of the No-Match Rule
- Justice Department Gives Blessing to No-Match Rule
- DHS Ignores Court and Publishes New Final No-Match Rule

- Immigrants of the Day: Immigrant Players of the Philadelphia Phillies
- "Today We March, Tomorrow We Vote"
- FAQ: Immigration Issues Related to Layoffs and Corporate Downsizing
- Las Vegas Becomes Latest 287(g) City
- Microsoft Backs Aid Plan for Immigrant Kids
- Bush Announces Visa Waiver List Expansion

The SSB Employer Immigration Compliance Blog

- Agriprocessors HR Employee Pleads Guilty
- *Orlando Sentinel*: No-Match Rule Won't Solve Problems
- Third Circuit to Hear Hazelton Arguments This Week
- IFCO Managers Plead Guilty to Conspiracy to Employ Illegal Aliens
- Poultry Plant Managers Appear to be Target for Criminal Prosecution
- Phoenix Business Owners Grow More Anxious over Immigration Enforcement
- Small Towns Worried About Impact of Raids on Meat and Poultry Plants
- Judge Issues a Verdict in Rhode Island

Visalaw International Blog

- Canada: Another PNP Program under Scrutiny
- Canada: Seasonal Foreign Agricultural Workers Try to Unionize
- Australia Announces eVisitor Visa for 35 European Countries
- Canada: Immigration and Elections
- Canada: Sergio R. Karas to Lead in IBA Panel Discussion
- Canada: Sergio R. Karas Quoted in Toronto Star Article
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Visalaw Healthcare Immigration Blog

- DOS Issues Final Health Care Worker Rule
- President Bush Signs Conrad Extension Law
- Pakistani Doctor Fitting in Well in East Tennessee
- Delaware Hospitals Short of Bilingual Nurses
- *NY Times* Reports on Use of J-1 Waiver Program in The Empire State
- Hospitals to Lose Funding for Caring for Immigrants
- Coalition Publishes Ethics Code for Recruiting Foreign Nurses
- House Judiciary Committee Passes Nurse Visa Bill
- Ombudsman Hears Concerns Regarding Nurse Visa Crisis

Visalaw Fashion, Sports, & Entertainment

- Soprano Will Skip US Trip Due to Visa Headache
- BALCA Denies Labor Certification Holding Singer Position not Full Time
- Cuban Soccer Players Defect
- Nigerian Soccer Player Wins Asylum Case in 8th Circuit Court
- LPGA to Require Players to Learn English
- Immigrants Contribution to Olympics Noted

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10. Campaign '08

With Election Tuesday closing in, and thousands of minority voters ready to participate in their first presidential election, a pro-immigration group has launched a new television ad campaign to play in swing states, intending to revive the discussion of immigration, *The Las Vegas Sun* reports. Mexicans and Americans Thinking Together, a nonprofit, nonpartisan group, launched the 60-second ad last week, urging both sides of the aisle in Washington to reach a consensus, and pass a comprehensive immigration reform plan. "Let's finish the job by enacting comprehensive immigration solutions," the ad says. "We need to bring the estimated 12 million undocumented workers who are in our country into a legal system of employment."

The ad, according to group spokesman and former Texas Rep. Henry Bonilla, said the aim of the ad was to encourage a neutral solution to the immigration issue. Bonilla stresses that the tone and message of the ad were carefully created to not push any particular agenda, saying that the group tried to stay away from phrases that "stir people up. We're by no means saying one aspect has to be involved. We're saying everyone has to keep this fire burning, so that there is a solution at the end."

An effort at federal immigration reform came in 2006, when current Republican presidential nominee John McCain co-sponsored the comprehensive bill. It ultimately died on the Senate floor as a consensus could not be reached; McCain did not support a 2007 bill. Both McCain and Democratic presidential candidate Barack Obama have both expressed the need for immigration reform. McCain has said that he would not reintroduce the bill he once supported in the Senate.

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New Mexico governor Bill Richardson has begun campaigning for Democratic presidential nominee Barack Obama this month, stressing to supporters the importance the Hispanic vote will carry this election, and that the issue of comprehensive immigration reform is still an important issue, and one that voters must be mindful of when they cast their votes.

Speaking at a rally in Pueblo, Colorado, *The Pueblo Chieftan* reports that Richardson acknowledged that most Hispanics want a fair, comprehensive immigration policy that gives undocumented immigrants already present in the US an opportunity to legalize their status by paying back taxes.

"McCain walked away from his own sensible, comprehensive immigration plan," Richardson told the audience. "Obama hasn't walked away. He still supports it." McCain was an original sponsor of the legislation bill in 2006, but has since backed away from this legislation since he began campaigning for president, opting instead for simply increasing border security.

Citing a July survey from the Pew Hispanic Institute, Frank Sharry of the pro-immigration think tank America's Voice notes that Latino voters could make up as much as 10% of the electorate this November, compared to 8% in 2004. Though it has been dwarfed by other issues, immigration policy still weighs heavily in the minds of Latino voters: "In English, there isn't much of a debate going on," Sharry told *The Arizona Republic*. "In Spanish, it's a huge topic."

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At a campaign stop in North Carolina earlier this month, Democratic presidential candidate Barack Obama suggested that the children of undocumented immigrants should have an opportunity to attend public community colleges, *The News & Observer* of Raleigh reports. Obama said children who attended public schools should have the chance to continue to improve themselves rather than being consigned to the fringes of society. "For us to deny access to community college, even though they've never lived in Mexico, at least as far as they can tell…is to deny that this is how we've always built this country up," Obama said in an interview with a NC news station.

The stance by Obama represents a contrast on the immigration issue from his Republican rival John McCain. Last month, McCain issued a statement, in which he opposes "giving amnesty or public benefits to undocumented immigrants." McCain has not yet specifically addressed the issue of whether they should be permitted to attend public colleges.

Obama's NC interview further clarified his stance on immigration, in which he favors tightening border security and cracking down on employers who knowingly hire undocumented immigrants. However, he stresses that there must be a path to citizenship for those currently in the US. "I think we don't want them in the underground economy," Obama said. "We want them contributing, and it makes sense for us to provide them some pathway. If they've been here a certain period of time, and they've been good citizens, let's try to figure out how we can work them into the fabric of our society."

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11. State Department Visa Bulletin for November 2008

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during **November**. 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 **November 8th** 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	01MAY02	01MAY02	01MAY02	15SEP92	01MAY93
2A	08FEB04	08FEB04	08FEB04	15JUL01	08FEB04
2B	15JAN00	15JAN00	15JAN00	22APR92	15JUN97
3rd	01JUL00	01JUL00	01JUL00	15SEP92	08MAY91
4th	15NOV97	08JUN97	22JUL97	22JAN95	22MAR86

***NOTE:** For November, 2A numbers **EXEMPT from per-country limit** will be unavailable because the annual limit for such visas have been reached. This will only impact the processing of Mexico F2A applicants.

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
Employment-Based					
1st	C	C	C	C	C
2nd	C	01JUN04	01JUN03	C	C
3rd	01MAY05	01FEB02	01OCT01	01SEP02	01MAY05
Other Workers	15JAN03	15JAN03	15JAN03	15JAN03	15JAN03
4th	C	C	C	C	C
Certain Religious Workers	U	U	U	U	U
5th	C	C	C	C	C
Targeted Employment	C	C	C	C	C

Areas/ Regional Centers					

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 **November**, 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	12,500	Except: Egypt: 5,900 Ethiopia 6,300 Nigeria 6,000
ASIA	5,300	

EUROPE	11,000	
NORTH AMERICA (BAHAMAS)	3	
OCEANIA	325	
SOUTH AMERICA, and the CARIBBEAN	550	

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-2008 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 NOVEMBER

For **December,** immigrant numbers in the DV category are available to qualified DV-2008 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	15,100	Except: Egypt 8,700 Ethiopia 7,900 Nigeria 6,700
ASIA	6,850	
EUROPE	12,900	
NORTH AMERICA (BAHAMAS)	4	
OCEANIA	440	
SOUTH AMERICA, and the CARIBBEAN	750	

D. EMPLOYMENT VISA AVAILABILITY

The level of demand being received from Citizenship and Immigration Services (CIS) Offices indicates that they have a significant amount of cases with priority dates that are earlier than the established cut-offs. This is likely to result in slow forward

movement of the cut-off dates for most Employment categories during the next few months. Sudden changes in the CIS demand patterns could result in fluctuations in the monthly cut-off dates, and retrogressions cannot be ruled during FY-2009.

E. 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