

Siskind's Immigration Bulletin – January 17, 2011

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## 1. Openers

Dear Readers:

A new year begins and we expected a relatively slow run of news until Congress would get in to gear. But early 2011 has surprised immigration watchers.

The first shockwave came with the surprise announcement that Steve King, the firebrand anti-immigrant Congressman from Iowa would be passed over for Chair of the House Immigration Subcommittee. I can remember testifying a few years back in front of the House Immigration Subcommittee and waiting for Mr. King to come after me after I testified about a bill I helped to draft to create an appeals system for consular denials. To my surprise, he saved his questions for my friend Chuck Kuck who had the temerity to speak in favor of bill language to grant due process rights to immigrants in deportation proceedings. Mr. King's colleague Elton Gallegly probably doesn't have a voting record that is much better, but he's not going to be the lightning Mr. King would have been, especially over King's signature issue – repealing birthright citizenship.

Last week we all know about the murder of six people and the wounding of Congresswoman Gabrielle Giffords and more than a dozen others in Tucson. The immigration debate in Arizona's increasingly hostile, violent tone was brought in to the public conversation especially given the death of Federal Judge John Roll who had ruled in a controversial immigration case. The assassination attempt and the memorable speech by President Obama at the University of Arizona are raising hopes that a sense of civility might return to Washington and progress on issues like immigration might be possible.

Perhaps we're seeing signs of that new civility this week. Aside from Steve King's being passed over for the Immigration Subcommittee Chair, we saw speeches from Republican presidential contenders Jeb Bush and Newt Gingrich urging their party to move to the center on immigration issues. We also saw the normally no-compromising anti-immigrant Center for Immigration Studies publish a proposal for a new DREAM Act – certainly not the one pro-immigrants groups would have written, but one with potential room for negotiation.

Maybe I'm reading too much in the tea leaves, but I'm an optimist by nature and hope the new year ends with progress on immigration, something that we have not been able to report in nearly a decade.

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In firm news, I have co-written an article for Bloomberg on immigration compliance issues facing the health care industry and we include that article in this issue.

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Readers are reminded that they are welcome to contact my law office if they would like to schedule a telephone or in person consultation with me or one of my colleagues. If you are interested, please call my office at 901-682-6455.

Regards,

Greg Siskind

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## **2. ABCs of Immigration Law: EB-5 Immigrant Investors**

Congress created the EB-5 immigrant investor visa category in the Immigration Act of 1990 in the hopes of attracting foreign capital to the US and creating jobs for American workers in the process. The overall advantage of the EB-5 visa category is that it allows the beneficiary to engage in commercial enterprise anywhere in the US subject only to some restriction in the pilot program targeting certain areas. There are 10,000 visas available in the category each year, one-half of which are reserved for people who participate in a Pilot Program option designed for targeted investments in approved regional areas. This article addresses the requirements and issues for both options available under the EB-5 visa category.

### **What are the filing procedures for the EB-5 visa?**

An applicant for the EB-5 visa must file Form I-526, Immigrant Petition by Alien Entrepreneur with the appropriate regional USCIS Service Center including fees and evidence supporting the application as described in this article.

### **What are the basic requirements for the EB-5 visa?**

There are three basic requirements as follows:

- First, the alien must establish a business or invest in an existing business that was created or restructured after November 19, 1990
- Second, the alien must have invested \$1 million (\$500,000 in some cases) in the business
- Third, the business must create full-time employment for at least 10 US workers

## **How does the EB-5 investor meet the requirement for a qualifying business?**

There are several ways of meeting the requirement for a qualifying business:

- The creation of an original business;
- The purchase of an existing business with simultaneous restructuring or reorganization such that a new commercial organization results; or
- Expansion of an existing business created after November 1990 through the investment of the required amount and the creation of ten new jobs
- Invest in a "troubled business"

Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise, including sole proprietorships, partnerships, holding companies, joint ventures, corporations, business trusts, etc. A holding company with its subsidiaries would also qualify if each subsidiary is engaged in the active conduct of business. Noncommercial activities, such as home ownership, do not qualify. Also, the alien must be actively involved in the business, and cannot be a passive investor.

## **What types of investments meet the requirements for the EB-5 investor?**

The investment can be in the form of cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the alien provided that he or she is personally and primarily liable and the assets of the new commercial enterprise are not used to secure any of the indebtedness. The definition specifically excludes capital acquired by unlawful means.

How does one qualify a "troubled business" for an EB-5 investment?

According to USCIS, to qualify you must:

1. Invest in a business that has existed for at least two years.
2. Invest in a business that has incurred a net loss, based on generally accepted accounting principles, for the 12 to 24 month period before you filed the Form I-526 Immigrant Petition by an Alien Entrepreneur.
3. The loss for the 12 to 24 month period must be at least equal to 20 percent of the business's net worth before the loss.
4. Maintain the number of jobs at no less than the pre-investment level for a period of at least two years.
5. Be involved in the day-to-day management of the troubled business or directly manage it through formulating business policy. For example as a corporate officer or board member.
6. The same investment requirements of the new commercial enterprise investment apply to a troubled business investment (\$1,000,000 or \$500,000 in a targeted employment area).

## **How much investment is required to be an EB-5 investor?**

The basic investment amount is \$1 million. The required investment is \$500,000 for a business established in a "targeted employment area." Targeted employment areas include:

1. Rural areas, defined as any area other than one within a metropolitan statistical area or within the boundary of a city or town with a population of 20,000 or more; and
2. Areas having an unemployment rate that is at least 150% of the national average.

For a Pilot Program investment, the threshold is a \$500,000 capital contribution to a designated **Regional Center** which allocates portions of the capital in the form of business loans to small business within the targeted area.

### **What entities qualify as Regional Centers for the purposes of the Pilot Program?**

Any economic unit, public or private, involved with the promotion of economic growth of a particular region may qualify as a Regional Center. To qualify as a Regional Center, the organizers of the center must show how the center plans to focus on a regional area within the US, present a business plan that appears reasonable, an economic analysis demonstrating how jobs will be created and information on how much money has been committed and marketing efforts already undertaken.

### **What happens if the Regional Center is terminated?**

If the Regional Center is terminated within any investor's two-year qualifying period, a formal notice will be sent to any alien granted lawful permanent residence on a conditional basis under the Pilot Program for investment within the Regional Center.

### **How may the EB-5 Investor invest in a qualifying new enterprise?**

There are several ways an EB-5 applicant can qualify by investing in a new enterprise. The EB-5 investor can create an original business purchase an existing business or expand an existing business. Investment in an existing business must result in a substantial change in the business' net worth or number of employees by at least 40%. The EB-5 investor must meet the required investment amounts of \$1,000,000. Furthermore, the EB-5 investor must demonstrate that the investment capital was obtained from a legal source and the required capital is at risk for investment purposes.

### **What evidence is required for an application for the EB-5 investor investing in a new enterprise?**

The EB-5 investor should provide evidence of creation of a new enterprise, or investment in an existing enterprise including, but not limited to the following:

- Articles of incorporation, partnership agreements, organizational documents
- Evidence of lease agreements for the qualifying enterprise
- State business licenses

- Evidence that the required amount of capital has been transferred
- Evidence that investment has resulted in the substantial increase of net worth
- Documentation of sources of capital
- Documentation of intent to invest or actual commitment to invest capital
- Documentation of assets purchased or transferred from abroad for the qualifying enterprise

**How many full-time jobs must be created by the EB-5 qualifying investment?**

The investment must create at least 10 full-time jobs for US citizens, lawful permanent residents or other immigrants lawfully authorized to be employed in the United States. Full-time employees are defined to include workers working at least thirty-five hours per week. This includes conditional residents, temporary residents, asylees, refugees, and recipients of suspension of deportation, but does not include non-immigrants. In calculating the required number of employment positions, the investor may not include spouses or children, but may include other family members who are employed by the business.

The 10 positions must be full time. This means employment of a qualified employee in a position that requires a minimum of 35 working hours per week.

**Can a commercial enterprise involving multiple investors be used as a basis for classification as an EB-5 investor?**

Yes. Multiple investors may establish a new commercial enterprise which can be the basis for the EB-5 classification. However, each investor applying for the classification must meet the requirements for the EB-5 classification separately. For example, each investor must create 10 jobs for US workers.

**Must the EB-5 Investor be involved in the management of the qualifying enterprise?**

Yes. An EB-5 investor must be engaged in the management of enterprise either through day-to-day managerial control or through policy formulation. A purely passive role is not permitted. An EB-5 should submit documentation verifying such a role which may include the following:

- A statement of position or title and a description of duties
- Evidence EB-5 investor is a corporate officer or member of the board of corporate officers
- Evidence demonstrating management role of EB-5 investor if qualifying enterprise is a partnership

**3. Ask Visalaw.com**

In our Ask Visalaw.com section of the SIB, attorney [Ari Sauer](#) answers immigration law questions sent in by our readers. If you enjoy reading this section, we encourage you to visit Ari's blog, [The Immigration Answer Man](#), where he provides more

answers to your immigration questions. You can also follow The Immigration Answer Man on [Facebook](#) and [Twitter](#).

If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto: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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1) Question:

I have been sponsoring an employee for an H1-B for 3 years. He has a bachelor's degree and he had 2 years of experience before he came to work for me. Since he now had a bachelor's degree and 5 years experience, can I sponsor him for an EB2 petition? I have been told that his experience working for me does not count towards the 5 years, but intuitively it doesn't make sense. That would mean that someone else can sponsor him for an EB2 but I can't. Can you please explain this to me?

Answer:

It is not just an issue of him using his experience. It is a question of what is the actual minimum requirement to perform in the position. In order to sponsor him under the EB2 category, the position has to have a minimum requirement of a masters degree or the equivalent (generally a bachelors and 5 year of post degree experience) to be able to perform the duties of the position. Since your employee has been working in the position for the past 3 years without a master's degree or the equivalent, then clearly the job can be done without a master's degree or the equivalent.

Under certain circumstances you may be able to sponsor the employer for a different position, if a master's degree is required to perform the duties of the new position. And yes, other employees may be able to sponsor this foreign national for an EB2 for this position, if they can show that a master's degree is a requirement to perform the duties of the position at their company.

In the meantime, if you file the PERM application early enough, you should be able to continue extending his H-1B until he is eligible to apply for the green card under the EB3 category.

For more information on the EB2 category, visit:

<http://www.visalaw.com/05jun3/2jun305.html>

For more information on the EB3 category, visit:

<http://www.visalaw.com/05jun4/2jun405.html>

2) Question:

My father has been a U.S. permanent resident since 1997. About 9 years ago he took a trip and ended up staying abroad for 4 years before returning to the U.S. He came back to the U.S. on his green card and has remained in the U.S. since then. He is planning to apply for citizenship status but worried about his 4 year absence from the US in the earlier part of his status. Should he be worried about this gap in resident status?

Answer:

One of the requirements for applying for U.S. citizenship (or naturalization) is maintaining U.S. permanent residence for a continuous period of 5 years prior to filing for naturalization (3 years if filing as the spouse of a U.S. citizen).

Traveling abroad for a trip that lasts more than 6 months creates a rebuttable presumption that the foreign national was not maintaining their continuous U.S. permanent residence. This presumption can be overcome by showing the naturalization officer that the foreign national continued to maintain a U.S. residence despite the 6 month long trip.

However, a trip abroad that lasts longer than a year will cause an automatic break in continuous U.S. residence. This makes the foreign national ineligible for naturalization. When the person returns to the U.S., their continuous permanent residence will begin again from the day they reentered the U.S. on their green card. However, they are not required to accrue another 5 years of continuous permanent residence. Rather they only need to accrue 4 years and a day of continuous permanent residence to be eligible again for naturalization.

There is an exception to this rule. Some green card holders are eligible to file an N-470 which will allow them to maintain their continuous U.S. permanent residence despite their trip abroad of more than one year.

So since your father has been continuously maintaining his U.S. permanent residence for more than 4 years and a day since he returned from his trip, the fact that he was abroad for more than a year should not make him ineligible for naturalization.

P.S. Readers should be aware that long trips abroad of more than one year can result in a determination that the foreign national has abandoned their U.S. permanent residence resulting in the foreign national not being allowed to return to the U.S. on their green card. U.S. permanent residents are cautioned to consult with an immigration law attorney prior to any trip abroad that is expected to last more than one year, and it is recommended that they obtain a reentry permit.

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#### **4. Border and Enforcement News:**

##### **50 immigrant Chipotle workers fired in Twin Cities**

*FOX News Twin Cities* reports that Chipotle fired around 50 workers at five different locations in the Minneapolis-St. Paul metro area. The Minnesota Immigrant Rights

Action Committee believes that all of the fired workers are Latino and claims the firings were in response to an administrative audit by ICE that requested documents relating to the workers' legal statuses.

<http://www.myfoxtwincities.com/dpp/news/50-immigrant-chipotle-workers-fired>

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### **Border Patrol agent shot to death near Arizona-Mexico border**

*The Associated Press* reports that a shootout between border patrol agents and bandits near the Arizona-Mexico border left one American agent dead and a suspect wounded. Brian A. Terry, 40, was killed while waiting in a remote area near the border city of Nogales for suspected bandits known for targeting illegally present immigrants. The shooting occurred in a violent smuggling corridor near Tucson that accounts for half of the marijuana seizures along the 1,969-mile southern border. National Border Patrol Council President T.J. Bonner and Arizona Governor Jan Brewer pointed to the shooting as evidence of ever-increasing danger along the border and the need for tougher enforcement.

<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-us-border-agent-killed,0,3579590.story>

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### **Massachusetts to check immigration status of arrestees**

*The Boston Globe* reports that the Massachusetts State Police will formally join Secure Communities, a controversial federal program that screens all people who are arrested and fingerprinted to determine their immigration status. If a person is discovered to be an illegally present immigrant, that individual will be forced to report to ICE and face possible detention and deportation. Public Safety Secretary Mary Beth Heffernan said the State Police agreed to sign up because the Obama administration has called for the system to be expanded nationwide by 2013. The Boston Police Department was a pilot for Secure Communities and already runs the program.

[http://www.boston.com/news/local/breaking\\_news/2010/12/mass\\_to\\_check\\_i.html](http://www.boston.com/news/local/breaking_news/2010/12/mass_to_check_i.html)

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### **Haitians in U.S. brace for deportations to resume**

*The New York Times* reports that ICE will resume deportations of Haitians in mid-January for the first time since an earthquake devastated the country in January 2010. Federal officials suspended deportations immediately after the earthquake and granted temporary protected status to Haitians living in the United States, allowing them to remain temporarily and work. ICE officials said that the agency is deciding whom to deport in a manner 'consistent with our domestic immigration enforcement priorities' and plans to focus on Haitians who have been convicted of crimes. Those Haitians who were eligible for temporary protected status will be shielded from deportation until the status expires in July. So far, ICE has revealed that 351 Haitians are in detention.

Many Haitian immigrants and advocacy groups are concerned that the influx of deportees will be detrimental to Haiti, which has struggled with the rebuilding effort and is amid a cholera epidemic that has claimed more than 2,500 lives.

<http://www.nytimes.com/2010/12/20/nyregion/20haitians.html?partner=rss&emc=rss>  
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### **Berkley joins other California cities in opposing ICE's Secure Communities**

*The San Francisco Examiner* reports that Berkley joined San Francisco, Santa Clara, and Arlington in opposing Secure Communities when the Berkley City Council voted to opt-out of the program. The City of Berkley maintains its status as a Sanctuary City and argued that the program would undercut a longstanding tradition as a city of refuge.

Civil rights advocates have expressed concern that the implementation of Secure Communities could lead to racial profiling and the separation of families. Angela Chan of the Asian Law Caucus argued that immigrant victims of domestic violence and other crimes could be dissuaded from alerting the authorities for fear of being reported to ICE.

<http://www.sfexaminer.com/blogs/under-dome/2010/12/civil-rights-groups-petition-harris-secure-communities>

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### **52 year old who came to U.S. as a toddler to be deported**

*AlterNet.com* reports that Mike Burrows, a 52 year old man who was born in Canada but moved to Glendale, California at the age of two when his father got a job with Capitol Records. However, because of the 1996 Illegal Immigration and Immigrant Responsibility Act (IIRIRA), he faces deportation. IIRIRA states that those in the country without proper documentation would be deported for a period of time. Previously, criminal offenses that would have meant more than a five year prison sentence would result in immediate deportation, but under the 1996 law, even minor infractions could lead to deportation. For Burrows, a 1978 misdemeanor for shoplifting applied IIRIRA retroactively and has led to deportation hearings.

[http://www.alternet.org/story/149097/52\\_year\\_old\\_who\\_came\\_to\\_us\\_as\\_a\\_toddler\\_to\\_be\\_deported](http://www.alternet.org/story/149097/52_year_old_who_came_to_us_as_a_toddler_to_be_deported)

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### **100,000 travelers used pilot programs to enter the U.S.**

*The Los Angeles Times* reports that 100,000 travelers have used the pilot program known as Global Entry to bypass long passport processing lines at U.S. international airports since 2008. Under the program, pre-approved travelers who have undergone an extensive background check and paid a \$100 five-year membership fee can use an electronic kiosk as part of the immigration and customs process. Members can go directly to the kiosk, where they must insert a passport or resident card, provide fingerprints, and answer customs declaration questions. They then bring a transaction receipt to a customs agent before leaving the area.

[http://latimesblogs.latimes.com/money\\_co/2010/12/100000-travelers-visit-us-through-pilot-program.html](http://latimesblogs.latimes.com/money_co/2010/12/100000-travelers-visit-us-through-pilot-program.html)

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## **Officials arrest Chinese ready to fly from Thailand to the U.S. on fake visas**

*The Associated Press* reports that U.S. and Thai officials arrested 12 Chinese nationals accused of trying to fly from Bangkok to Los Angeles using fake visas. The suspects confessed to paying a Taiwanese man \$24,000 each for a forged visa. Investigations showed that the visas bore the same numbers as authentic ones issued to Polish citizens by the U.S. Embassy of Warsaw.

[http://www.latimes.com/news/nationworld/world/wire/sns-ap-as-thailand-chinese-arrested\\_0,6186059.story](http://www.latimes.com/news/nationworld/world/wire/sns-ap-as-thailand-chinese-arrested_0,6186059.story)

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## **Border commissioner touts greater enforcement**

*The San Diego Union Tribune* reports that Alan Bersin, the head of Customs and Border Protection, praised improved technology and heightened security for helping his agents detain a record percentage of illegally present immigrants last year. He pointed to surveillance equipment, more fencing, and the doubling of Border Patrol agents in the past decades as important factors in the success.

However, Bersin noted that there are still serious problems areas. For example, while Border Patrol agents are apprehending 90 percent of those attempting to cross the border into the U.S., much of the cash and guns going south to Mexico is not confiscated. Certain areas such as the border near Tucson have become trafficking hotbeds. Bersin believes border enforcement must be part of a larger three-prong immigration plan that should also include improving the visa system and creating a path to citizenship for illegally present immigrants already in the country.

<http://www.signonsandiego.com/news/2011/jan/05/border-commissioner-touts-greater-enforcement/>

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## **5. News from the Courts:**

### **Feds settle suit over medical care at immigration jail**

*The San Diego Union Tribune* reports that a federal lawsuit filed in 2007 by the ACLU against ICE over medical care at a detention facility in Otay Mesa was settled with a pledge that the government will provide a broader range of treatment and increase mental health care. The lawsuit alleged that detainees endured long waits for medical treatment and did not get the medications needed for chronic illnesses. The settlement requires that ICE meet standards of care specified by the national Commission on Correctional Health Care.

<http://www.signonsandiego.com/news/2010/dec/16/feds-settle-suit-over-medicalcare-otay-immigratio/>

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### **Judge: ICE agents not immune to prosecution**

*The Associated Press* reports that U.S. District Court Judge Stefan Underhill dismissed the federal government's argument that ICE officials are immune from lawsuits. The ruling advances a civil rights lawsuit brought by 11 illegally present immigrants who were brought into custody by ICE agents in New Haven, CT in June 2007.

[http://www.necn.com/12/17/10/Judge-ICE-agents-not-immune-toprosecuti/landing\\_nation.html?&blockID=3&apID=4bcd795820764aca89a22875a6aac79b](http://www.necn.com/12/17/10/Judge-ICE-agents-not-immune-toprosecuti/landing_nation.html?&blockID=3&apID=4bcd795820764aca89a22875a6aac79b)

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### **Judge rules U.S. must provide incapacitated immigrants with lawyers**

*The Los Angeles Times* reports that U.S. District Court Judge Dolly Gee ruled that two mentally disabled immigrants must be given lawyers to fight deportation. In March, the ACLU of Southern California filed a lawsuit on behalf of Jose Franco-Gonzalez, 29, and Guillermo Gomez-Sanchez, 48, arguing that these men's mental incapacities made them unable to voice their own interests. Both men are free pending a bail hearing ordered by Gee. Franco, who has an IQ no higher than 55, was convicted of assault with a deadly weapon and Gomez, a paranoid schizophrenic, served two years in jail for a 2004 assault conviction.

<http://latimesblogs.latimes.com/lanow/2010/12/us-must-provide-disabled-illegal-immigrants-with-lawyers-judge-rules.html>

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## **6. News Bytes:**

### **Workers' safeguards strengthened by New York law**

*The New York Times* reports that Governor David Paterson signed into law strong protections against wage theft. The law will take effect in April and strengthens penalties against employers who steal workers' pay and protects whistleblowers from retaliation. According to a report by the National Employment Law Project, lost wages total more than \$18.4 million a week in New York City, where some employers in the restaurant, retail, and construction business pay below the minimum wage and fail to pay overtime. Whereas under previous law employers found to have stolen workers' wages had to only repay a 25 percent penalty, under the new law employers can face penalties up to 100 percent. In addition, it adds a \$10,000 penalty for employers who fire or threaten workers who speak out.

<http://www.nytimes.com/2010/12/14/nyregion/14wage.html?partner=rss&emc=rss>

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### **Immigrants make paths to suburbia, not cities**

*The New York Times* reports that census data from the last decade shows that immigrants are settling in greater numbers in small towns and suburbs rather than in major cities. In Los Angeles County, for example, the number of foreign-born residents remained largely unchanged from 2000 whereas outside of Atlanta, Georgia in Newton County it quadrupled over that same time period.

The American Community Survey was conducted using samples taken from about one in ten Americans between 2005 and 2009. The survey claims that last decade's booming housing industry and the availability of jobs in industries such as construction and the food business contributed to the increase of immigrants in rural and suburban areas.

<http://www.nytimes.com/2010/12/15/us/15census.html>

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### **Important notice for naturalization applicants**

USCIS reports that as of January 5, 2011, some civics test answers will change due to the recent federal elections.

Answer civics test questions **20**, **23**, and **47** using the answers below:

**Question 20:** Who is one of your state's U.S. Senators now?

Answers will vary. Give the name of one of your state's U.S. senators who will serve in the 112<sup>th</sup> Congress beginning January 5, 2011.

**Question 23:** Name your U.S. Representative.

Answers will vary. Give the name of your U.S. Representative who will serve in the 112<sup>th</sup> Congress beginning January 5, 2011.

**Question 47:** What is the name of the Speaker of the House of Representatives now?

(John) Boehner

### **USCIS requests more info on EB-5 termination**

*The Victorville Daily Press (CA)* reports that city officials are hopeful that a USCIS request for further documentation is a good sign that the city might be allowed to continue raising funds through the EB-5 visa investor program. The request came in responses to Victorville's appeal of USCIS's decision to terminate the city's program. The city hopes to use the program to fund a waste treatment plant.

<http://www.vvdailypress.com/news/uscis-25104-victorville-info.html>

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### **Texas wants to provide wealthy Mexican investors with investor visas**

*Hispanically Speaking News* reports that the City of McAllen, Texas has applied to USCIS to become a regional center for the EB5 investment program. The McAllen Economic Development Corporation and the McAllen City Commission hope to attract wealthy Mexican investors to come to the city and apply for U.S. citizenship.

<http://www.hispanicallyspeakingnews.com/notitas-de-noticias/details/texas-city-wants-to-bring-in-wealthy-mexican-investors-provide-investor-vis/3980/>

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## 7. Washington Watch:

### **GOP might pass own version of DREAM Act in 2011**

*The Hill* reports that outgoing Senator Bob Bennett (R-UT) said that Republicans have privately discussed writing a version of the DREAM Act during the 112<sup>th</sup> Congress. With the most recent version of the DREAM Act failing to pass through Congress in 2010, Bennett believes Republicans have the responsibility to write a bill and push for comprehensive immigration reform.

*The Associated Press* reports that Senator John McCain (R-AZ) said he would support comprehensive immigration reform once 'the borders have been secured.'

<http://thehill.com/blogs/blog-briefing-room/news/133143-sen-bennett-gop-might-pass-own-version-of-dream-act-next-year>

<http://www.latimes.com/news/nationworld/nation/wire/sns-ap-us-new-congress-mccain,0,7834852.story>

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### **Rare immigration bills pass Congress**

*The Associated Press* reports that the 111<sup>th</sup> Congress passed private immigration bills that waived immigration restrictions for two Japanese citizens trying to remain in the United States. The first bill allows Hotaru Nakama Ferschke, whose husband Marine Sgt. Michael Ferschke was killed in Iraq in 2008, to remain in the U.S. with her young child. The second bill allows Shigeru Yamada to remain in California. He came to the United States when he was 10 years old but his mother was killed three years later in a car accident. He was never formally adopted and would have been deported in the near future.

<http://www.google.com/hostednews/ap/article/ALeqM5hmfSKyEasoAscY2Byb4Mag5hfqLw?docId=f4e6fcb71dad460cbd27c963c40bcc59>

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### **Obama's political arm vows to revive DREAM Act**

*The Hill* reports that Mitch Stewart, the director of Organizing for America (OFA), President Obama's political arm within the Democratic National Committee, vowed to revive the DREAM Act after it failed to pass before the end of the 111<sup>th</sup> Congress. Stewart chastised Republicans for 'holding reform hostage to political games' and reassured liberal and Hispanic voters that they would seek to pass the immigration bill again in the future.

<http://thehill.com/blogs/blog-briefing-room/news/134577-obamas-political-arm-vows-to-revive-dream-act>

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### **Congress taps H-1B fees to pay for legislation**

*Computerworld* reports that Congress is considering extending the visa fee increase through 2021 to help pay for legislation such as the 9/11 responders health care bill

and the border security bill. In August, Congress increased H-1B visa fees by \$2,000 and L-1 visa fees by \$2,250. The Congressional Budget Office (CBO) estimates show that revenue from the visas is gradually rising.

Since Congress is relying on visa fees to fund legislation, some people are speculating that they will be deterred from putting restrictions on the H-1B program and even possibly expand the visa cap beyond its current limit of 85,000. A longstanding effort by Senator Dick Durbin (D-IL) and Senator Charles Grassley (R-IA) that seeks to limit the number of H-1B or L-1 visas to 50% of a company's U.S. workforce could also be in jeopardy because it would eliminate a main source of funding for congressional legislation.

[http://www.computerworld.com/s/article/9201982/Congress\\_taps\\_H\\_1B\\_fees\\_to\\_pay\\_for\\_legislation](http://www.computerworld.com/s/article/9201982/Congress_taps_H_1B_fees_to_pay_for_legislation)

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### **Senator Manchin apologizes for missing votes on immigration**

*The Hill* reports that Senator Joe Manchin (D-WV) apologized for missing votes on the repeal of the military's 'don't ask, don't tell policy' and the DREAM Act because he was attending a Christmas party. Manchin said the party was one of the few opportunities he would have to spend time with his family during the holiday season, but was criticized by his allies in Congress and constituents in West Virginia. He vowed to not miss a vote under such circumstances again.

<http://thehill.com/blogs/blog-briefing-room/news/134739-sen-manchin-apologizes-for-missing-key-votes>

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### **Steve King unveils birthright bill**

*Politico* reports that Rep. Steve King (R-IA) introduced a bill on the first day of the 112<sup>th</sup> Congress that challenges birthright citizenship. Rather than alter the 14<sup>th</sup> amendment, which King argues would be very difficult to do, King hopes to amend the Immigration and Nationality Act so that only children of citizens, legal immigrants permanently living in the country, or immigrants in the military would be granted citizenship.

<http://www.politico.com/news/stories/0111/47125.html>

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## **8. Updates from the Visalaw.com Blogs**

[Greg Siskind's Blog on ILW.com](#)

- [GOVERNMENT ACCOUNTABILITY OFFICE RELEASES REPORT ON H-1B PROGRAM](#)
- [A BRAIN GAIN](#)
- [GOP MOVING BACK TO CENTER ON IMMIGRATION?](#)
- [IMMIGRATION EMPLOYMENT COMPLIANCE AND THE HEALTH CARE INDUSTRY](#)
- [NFAP: NEW H-1B FEES FOR STAFFING COMPANIES VIOLATES US TRADE AGREEMENTS](#)
- [H-1B EXHAUSTION TARGET: FIRST WEEK OF FEBRUARY](#)
- [ISSA BILL WOULD GRANT 55,000 GREEN CARDS TO US](#)
- [THE GOP DREAM ACT PLAN?](#)
- [TUCSON SHOOTER TIED TO ANTI-IMMIGRATION GROUP](#)
- [REPRESENTATIVE GIFFORDS SURVIVES SHOOTING](#)
- [THE AAO UNMASKED](#)
- [BREAKING: STEVE KING DENIED IMMIGRATION SUBCOMMITTEE GAVEL](#)
- [H-1B EXHAUSTION TARGET: FEBRUARY 7, 2011](#)
- [AND HERE WE GO - BIRTHRIGHT CITIZENSHIP LATEST IMMIGRATION WEDGE ISSUE TO MOVE FRONT AND CENTER](#)
- [ANTI-IMMIGRATION CENTER FOR IMMIGRATION STUDIES SUGGESTS WILLINGNESS TO COMPROMISE ON DREAM ACT](#)
- [ARIZONA ANTIS PUSHING BIRTHRIGHT CITIZENSHIP MEASURE](#)
- [USCIS PLANNING TO MOVE TO PRE-REGISTRATION PROCESS FOR H-1B CAP CASES](#)
- [REPUBLICAN PRESIDENTIAL HOPEFULS SKIP HISPANIC FORUM](#)
- [OBAMA TO BLAME FOR DREAM'S FAILURE?](#)
- [OBAMA TO ADDRESS IMMIGRATION PLANS IN STATE OF THE UNION ADDRESS](#)
- [TESTER STARTING TO FEEL THE HEAT](#)
- [SCHUMACHER-MATOS: DREAM ACT LATEST IN LONG HISTORY OF SHAMEFUL ACTS IN CONGRESS](#)
- [OBAMA MEETING WITH CONGRESSIONAL HISPANIC CAUCUS MEMBERS](#)
- [H-1B EXHAUSTION TARGET - FEBRUARY 19, 2011](#)
- [PLAN B - THE EXECUTIVE OPTION](#)
- [WHAT A GUY](#)
- [FOX NEWS ACCUSES ACTRESS PENELOPE CRUZ OF HAVING AN "ANCHOR BABY"](#)
- [USCIS OMBUDSMAN SEEKING IMMIGRATION LAW ANALYST](#)
- [DREAM ACT FAILS 55 TO 41](#)

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

- [E-VERIFY USE DOUBLES IN A SINGLE YEAR](#)
- [NEW M-274 EMPLOYER I-9 HANDBOOK RELEASED](#)
- [RHODE ISLAND ABANDONING E-VERIFY MANDATE](#)
- [FLORIDA TO REQUIRE STATE AGENCIES TO USE E-VERIFY](#)
- [JUSTICE DEPARTMENT SETTLES SUITS IN OREGON AND NORTH CAROLINA](#)
- [LATEST ISSUE OF USCIS E-VERIFY NEWSLETTER](#)

### **The Visalaw Healthcare Immigration Blog**

- [BLOOMBERG: MY ARTICLE ON I-9 COMPLIANCE FOR HEALTH CARE EMPLOYERS](#)

### **Visalaw Fashion, Sports, & Entertainment**

- [UTAH JAZZ'S KIRILENKO NATURALIZES](#)

### **The Visalaw H-1B Blog By H-1B Book Author Karen Weinstock**

- [USCIS UPDATES H-1B CAP COUNT FOR JANUARY 7, 2011 -- AT 58,700](#)
- [USCIS UPDATES H-1B CAP COUNT FOR DECEMBER 31, 2010 -- AT 57,300](#)
- [USCIS PROPOSES REGISTRATION FOR H-1B EMPLOYERS](#)
- [EXPORT CONTROL QUESTIONS SUSPENDED FOR 60 DAYS](#)
- [H-1B FEDERAL EXPORT REQUIREMENT CHANGES](#)
- [USCIS UPDATES H-1B CAP COUNT FOR DECEMBER 17, 2010 -- AT 53,900](#)
- [USCIS UPDATES H-1B CAP COUNT FOR DECEMBER 10, 2010 -- AT 52,400](#)

### **Karen Weinstock's Visalaw Georgia Immigration Blog**

- [NEW LEGISLATURE, NEW ANTI-IMMIGRANT PROPOSALS](#)
- [OUTGOING GA GOVERNOR PERDUE SOFTER ON IMMIGRATION?](#)
- [FORSYTH COUNTY TO START SHARING INFORMATION WITH ICE](#)
- [GEORGIA LAWMAKERS SPLIT ON ILLEGAL IMMIGRATION](#)
- [GEORGIA CONTINUES TO BE AGGRESSIVE ON IMMIGRATION](#)

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## **9. State Department Visa Bulletin: February 2011**

*Number 29  
Volume IX  
Washington, D.C.*

### **A. STATUTORY NUMBERS**

1. This bulletin summarizes the availability of immigrant numbers during **February**. 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 January **11th** 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 which has been announced in this bulletin.

2. Section 201 of the Immigration and Nationality Act (INA) 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, DOMINICAN REPUBLIC, 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 Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
1st	01JAN05	01JAN05	01JAN05	01JAN05	22JAN93	01AUG94
2A	01JAN08	01JAN08	01JAN08	01JAN08	01APR05	01JAN08
2B	15APR03	15APR03	01JAN97	15APR03	01JUL92	01JUN99
3rd	01JAN01	01JAN01	01JAN01	01JAN01	22NOV92	22OCT91
4th	01JAN00	01JAN00	01JAN00	01JAN00	01JAN96	15JAN88

\*NOTE: For February, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01APR05. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01APR05 and earlier than 01JAN08. (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.)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	01JUL06	C	08MAY06	C	C
3rd	01APR05	01JAN04	01APR05	22FEB02	08JUL03	01APR05

Other Workers	01MAY03	22APR03	01MAY03	22FEB02	01MAY03	01MAY03
4th	C	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C	C
5th	C	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C	C
5th Pilot Programs	C	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-2011 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-2011 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:

<b>Region</b>	<b>All DV</b>	
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	<b>Chargeability Areas Except Those Listed Separately</b>	
<b>AFRICA</b>	26,100	Except: Egypt 20,200 Ethiopia 15,000 Nigeria 12,100
<b>ASIA</b>	14,850	
<b>EUROPE</b>	17,600	
<b>NORTH AMERICA (BAHAMAS)</b>	7	
<b>OCEANIA</b>	810	
<b>SOUTH AMERICA, and the CARIBBEAN</b>	900	

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-2011 program ends as of September 30, 2011. DV visas may not be issued to DV-2011 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2011 principals are only entitled to derivative DV status until September 30, 2011. DV visa availability through the very end of FY-2011 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 **March**, immigrant numbers in the DV category are available to qualified DV-2011 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:

<b>Region</b>	<b>All DV Chargeability Areas Except Those Listed Separately</b>	
<b>AFRICA</b>	31,950	Except: Egypt 24,275 Ethiopia 18,650 Nigeria 13,100
<b>ASIA</b>	17,200	
<b>EUROPE</b>	20,450	
<b>NORTH AMERICA (BAHAMAS)</b>	7	
<b>OCEANIA</b>	900	
<b>SOUTH AMERICA, and the CARIBBEAN</b>	1,025	

#### D. RETROGRESSION OF FAMILY CUT-OFF DATES

Continued heavy applicant demand for numbers in the Family Fourth preference category has required the retrogression of the Worldwide, China-mainland born, Dominican Republic, and India cut-off date for the month of February.

It has also been necessary to retrogress the Dominican Republic F2B category for the month of February.

Further retrogressions cannot be ruled out should demand continue at the current levels for some categories and countries.

Please Note: Applicants entitled to immigrant status become documentarily qualified at their own initiative and convenience. By no means has every applicant with a priority date earlier than a prevailing cut-off date been processed for final visa action. On the contrary, visa allotments are made only on the basis of the total applicants reported documentarily qualified each month, compared with the amount of available numbers. For example, during the past month, over 17,300 of the applicants who have become documentarily qualified in the Family preference categories have priority dates earlier than the cut-off dates established for January. Demand for visa numbers can fluctuate from one month to another, with the inevitable impact on cut-off dates.

Following are examples of possible cut-off date actions based on demand:

Numbers Available	Demand with Priority Dates Prior to the Current Cut-off	Next Month's Cut-off Date Will
3,000	1,000	Advance
3,000	3,000	Remain the same
3,000	5,000	Retrogress

#### 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](mailto: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](mailto: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](mailto:VISABULLETIN@STATE.GOV)

(This address cannot be used to subscribe to the Visa Bulletin.)

Department of State Publication 9514  
CA/VO: January 11, 2010

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## **10. Employment Eligibility Immigration Compliance: Managing I-9 and E-Verify Risk in the Healthcare Industry**

[http://www.visalaw.com/Greg\\_Bloomberg\\_Article](http://www.visalaw.com/Greg_Bloomberg_Article)