

Siskind's Immigration Bulletin  
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Siskind Susser serves immigration clients throughout the world from its offices in the  
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1. Openers
2. The ABC's Of Immigration – Earned Legalization Proposals
3. Ask Visalaw.com
4. Border News
5. News From The Courts
6. Government Processing Times
7. News Bytes
8. International Roundup
9. Legislative Update
10. State Department Visa Bulletin – November 2003
11. Former INS Agent Sentenced For Bribery
12. GAO Releases Study on Issuance of Social Security Numbers to Noncitizens
13. Immigrant's Son Runs For Governor of Louisiana
14. Senate Committee Delays DREAM Act Vote

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1. Openers

Dear Readers:

If you have watched the news of late, you are no doubt hearing stories about the  
outsourcing of American jobs, the unfair trade practices of our global competitors  
and the replacement of American workers with imported workers.

CNN's Lou Dobbs and many others are lumping all of these stories together and calling for an end of the "exporting of America." This is a backlash against an evolution toward globalization that has accelerated in recent decades as technological advances, the liberalization of economies and the reform of political systems around the world have created a truly global marketplace for goods, services and ideas. America has benefited from the changes more than most countries though you would hardly appreciate this if you only watched the news.

We have one of the world's most open economies and that has led to Americans enjoying higher living standards than nearly any other people in the world. While most people around the globe look to their governments to protect them economically, Americans generally believe in the free market and don't trust bureaucrats and politicians to get it right. Whatever the roots of this thinking - perhaps coming from the deep-seated belief in liberty which guided the foundations of this country or the rugged individualism that became part of the American ethos during the settlement of the frontier - economists generally agree that Americans have it right. The freewheeling US economy encourages innovation and risk-taking and allows companies much more freedom to make the best business decisions. The upside of taking such risks are enough to get American businesses motivated to take on the world and lead in industry after industry.

Despite what we hear night after night on Dobbs' Moneyline show, Americans are still winning the globalization race, a competition that began generations ago. There is absolutely nothing new in today's protectionist rhetoric. We have the same complaints every time there has been an economic downturn. In past years, we heard about the exporting of manufacturing jobs to Central America and Asia (today we hear the same about high tech jobs being lost to India). In nearly every generation - dating back to the nativist parties of the 18th century - we hear complaints about immigrants taking jobs for Americans. And for much of the 1980s we heard about how Japan was using unfair trade practices to become the world's new economic powerhouse (today we hear the same about China).

If the naysayers of past years were to be believed, the US would long ago have been relegated to the lower echelon of countries and not the leader in just about every area. But Americans have largely ignored the protectionists and allowed our companies to confidently take on the competition. As a country, we've been rewarded handsomely. We're seeing these benefits today even in a recession. Our measurement of suffering has certainly changed. We have 6% unemployment, a figure that other countries would practically consider full-employment even in a booming economy. A higher percentage of Americans own homes than in nearly any point in our history. The average American's daily living standards today are extravagant in comparison to generations past. We cannot lose sight of the fact that our country's development is probably one of the greatest success stories in the economic history of the world.

With our success comes a fear of losing it all. What if the sun is really setting on America's leading role in the world's economy? The natural reaction is to lash out against those perceived to be threatening our success. Keep out immigrants. Protect US industries from competition. Punish countries that don't allow American companies access to their markets as openly as we allow theirs.

We must resist the temptation of protectionism. Protectionism NEVER works in the long run. Sure those in protected industries will get a temporary boost from being insulated from competition. And some Americans may keep jobs that might go to an immigrant. But the country as a whole loses a lot more. Companies become less competitive globally. Prices rise and consumers have less buying power. When companies can't bring in foreign workers - either because American workers are unavailable or too expensive - they outsource their entire operations and employed US workers lose their jobs (and consequently spend less which causes more layoffs as profits continue to dwindle). Most credible economists will not defend protectionism - either in the importation of goods or labor - as sound economic policy. Of course, we only need to look to Japan - the country that we complained about being too protectionist and keeping out American firms in the 1980s. They've been in an endless recession with an economy that has not been dynamic enough to bounce back. Many credit the government's tight controls on imports and its highly inflexible labor force as contributing to their misery.

The folly of Dobbs and others of the same mind is believing that America's situation today is truly different than that which we faced in yesteryear. It is not and, in fact, in every generation there were protectionists who have claimed that the threats of the day were unique. Americans' willingness to work hard, our entrepreneurial, individualist spirit and our distrust for paternalistic government interference in our economic affairs are the attributes that led to success in the past and will ultimately ensure we continue to thrive no matter what the doom-and-gloomers have to say.

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Readers of this newsletter know that my Openers column has been the main place where I express my opinion. We deliberately avoid editorializing beyond this column and that has a lot to do with why the publication is trusted by so many people with different perspectives on immigration law. Folks that would like to hear more commentary as well as breaking news updates will be interested in our new weblog. You can see the regularly updated page at [www.visalaw.com/blog.html](http://www.visalaw.com/blog.html). Those of you familiar with "blogs" know that they are one of the hot new ways to deliver content on the web. You may be interested in knowing Siskind Susser actually created the first legal weblog back in 1998. Longtime readers will remember the H-1B Emergency Update page that we maintained when the H-1B cap first became a serious problem. That section of our web site was actually the earliest example of a blog on a legal subject (though that page actually preceded the coining of the term "blog" - at least to the best of our knowledge). Now that the H-1B debate is heating up again and there are so many other important issues to discuss, we've decided to revive our blog. We're looking forward to getting your feedback and plan on rolling out more blog features soon.

Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients. We would love to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

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## 2. The ABC's Of Immigration – Earned Legalization Proposals

### **What is “earned legalization”?**

“Earned legalization” is the term describing a work-benefits program for undocumented aliens in the United States, where work is rewarded with the opportunity to receive legal status. Undocumented immigrants who have been in the U.S. for a certain period of time can earn their legal status in the U.S. This program differs from amnesty because amnesty automatically pardoned millions of aliens who illegally entered or remained in the U.S.

In 1986, President Ronald Reagan signed the Immigration Reform and Control Act (IRCA), which allowed certain aliens who had lived in the U.S. for a certain period of time to become lawful permanent residents. The main amnesty provision of the law, section 245A, allowed the millions of illegal aliens to obtain legal status. The section designated a one-year application period from May 5, 1987 to May 4, 1988. In order to qualify, applicants had to establish that they had illegally resided in the U.S. since January 1, 1982 and had maintained “continuous physical presence” since November 6, 1986. Those aliens granted amnesty were pardoned from their immigration violations.

The goal of the proposed earned legalization program is to move away from this concept of amnesty. If a bill on earned legalization is passed, undocumented workers must earn their legal status instead of receiving automatic legal status.

### **Who supports earned legalization?**

Several policymakers have voiced their support for the program and have proposed ideas for undocumented workers to earn their legal status.

On September 3, 2003, Senator Joseph Lieberman (D-CT) issued a press release stating that as President, he would ensure that undocumented immigrants who lived in the U.S. for five years, paid taxes, and followed the law would earn the right to become residents with a new, one-time earned legalization option.

At the Democratic presidential candidate debate on October 9, Senator Lieberman, along with Senator John F. Kerry (D-MA) declared that earned legalization is the solution to the problem of America’s estimated 8.5 million undocumented immigrants. Senator Kerry has issued a statement that undocumented workers who have been in the United States for a significant amount of time, who have held a job and who can pass a background check should be eligible to earn full citizenship

Representative Dick Gephardt (D-MO) re-introduced his bill, known as “The Earned Legalization and Family Unification Act of 2002,” on October 8, 2003. Under this act, taxpaying undocumented immigrants who have been in the country for at least five years, who have a work history of two years, and who can pass a criminal background check can obtain legal status in the U.S. The bill would also unite families by reforming the visa system to eliminate backlogs to family unification.

This summer, Senator John McCain (R-AZ) introduced similar legislation. The “Land Border Security and Immigration Improvement Act” was designed to ensure that there is “no longer an underground class of undocumented immigrants.” An earned

legalization program will allow undocumented workers to “emerge from the shadows.”

Governor-elect of California, Arnold Schwarzenegger, has also voiced support for an “earned adjustment” process, similar to the legislation introduced by Senator McCain.

All proponents for an “earned legalization” program agree that the program will benefit the economy as well as strengthen homeland security by allowing immigration enforcement officials to focus on those undocumented immigrants who pose security threats.

### **When will an earned legalization bill be passed?**

While there is much support for an earned legalization program, an actual law will probably not be passed for some time. Post-September 11 security concerns have overridden earned legalization proposals in the past and policy experts, such as Josh Bernstein, director of federal policy at the National Immigration Law Center, believe that current proposals are still “works in progress...and are a bit of a long shot for next year.” However, Bernstein is optimistic that “eventually something will pass.” A more limited program for farm workers has been introduced and is seen to have a better chance of passage in the near term.

Representative Gephardt's bill, H.R. 3271, was introduced on October 8 and was referred to the House Committee on the Judiciary. The bill has 15 co-sponsors in the House. Senator McCain's bill, S. 1461, was introduced on July 25 and was referred to the Senate Committee on the Judiciary, and it is cosponsored by Senator Lindsey Graham. A similar bill, HR 2899, was introduced in the House by Congressmen Jim Kolbe and Jeff Flake.

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### 3. Ask Visalaw.com

*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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Q - I am a landed immigrant of Canada from India. I came to the U.S on Student Visa in August 2001 from Canada. At that time, i did not need to get F1 Visa. I just entered on F1 status valid until D/S and INS stamped on I 94 and I-20 of the school. I am currently on OPT and it will be expired in February 2004. Now, I want to do another Master Program at school. Can I continue my F1 status? After getting an admission, can I re-enter to the U.S on the basis of new I 20 and my F1 status and I 94 card valid until D/S since August 2001.

I'm in the U.S and if my H1B approve, can I reenter to the U.S from Canada directly or do I have to apply at U.S consulate in Canada for H1B VISA? Is there any visa stamp H1Bin the passport?

A - Even though you are a landed immigrant, you will still need to apply for a machine-readable visa (and a machine readable passport if you have an older passport) before returning from Canada. You will need to apply whether you want the F-1 status or the H-1b status again. If you stay in the US and want to transfer to a different US school after your OPT, this may be possible without applying for a new visa, but the next time you leave the US to visit Canada, you will need to apply for a visa to return. A visa application in your situation (assuming that you have been maintaining your status) should not be a problem.

You can find more detailed information about the Canadian visa requirements at:

[http://www.usconsulatetoronto.ca/content/content.asp?section=visas&document=landed\\_newrequirements\\_021803](http://www.usconsulatetoronto.ca/content/content.asp?section=visas&document=landed_newrequirements_021803)

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Q - I'm a student in California under a J1 visa, and I applied for a 100% time job, I have great chances to get that job but the university said that I'm only allowed to work 50%, otherwise they discontinue my visa, send me back to my country and I have to live there for 2 years before applying for a new J or H visa. My question is if there is any exception to that law or possibility to change my visa immediately, w/o the 2-year rule?

A - Your responsible officer ultimately decides whether or not you can work full-time or part-time and who you can work for. If they are not permitting you to work full-time, that may be because you are still taking classes and you have not graduated yet. If you are subject to the 2-year home country residency requirement, then you may have to get a waiver before you can stay in the US longer or before getting a work visa. It is a fairly complicated process. Please send me more information about what you do, how long you have been in the US, etc. and I will try to assist you more.

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Q - My mother has just immigrated to U.S and is a green card holder. She is from India. If she sponsors her children (all unmarried - 2 in India and me, a Canadian Citizen in Montreal, Canada) how would the case be handled for me. Will I be treated as a Canadian citizen and under Canadian quota or since my mother is from India I will be treated in Indian quota? Can you tell me what is the current processing time if under Canadian quota?

A - You are not likely to see much of a difference in the processing of the case. There is no backlog for Indian family petitions so the waiting time for Canadians and Indians is the same. You should expect the wait to be several years - probably at least six.

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Q - I wanted to ask how the 36 month limit on J1 status was counted from when you enter the US initially or from the start date on the DS2019 (IAP66). Also, does this 36 month limit apply on a 'per program' basis or is the limit on the sum of all J1

programs? And how hard is it to get an extension to the 3 year limit? I have been told you need an excuse like "The lab burned down and all the monkeys died".

A - 1. The three years for a research scholar/ professor in the J-1 category starts counting from the day that they entered the country in the J-1 status or from the beginning date of their DS-2019, whichever comes later. Example:

DS-2019 covers from 01/01/03 to 12/31/06. J-1 does not enter the US until 02/01/03. The three years begin on that date.

DS-2019 covers from 01/01/03 to 12/31/06. J-1 enters the country early on 12/01/02. The three years start ticking on 01/01/03.

2. The three year limit applies to the entire stay in the US. So, if the J-1 spent one year with Sponsor A, and then transferred her program to Sponsor B, he has only two years left. This also goes for J-2s. After a year in the J-2 status if the J-2 wishes to change to a J-1 and begin his own program, then he has only two years left. The J-1 may leave the country at the end of his program, and then return to begin a new program subject to the 12 month rule. This is different than the two-year home country residency requirements and is often confused with it. It is a very confusing area of the regulations. Basically, what it says is for a person to be eligible for a new research scholar or professor program:

22 CFR 62.20(d)(ii) The participant has not been physically present in the United States as a nonimmigrant pursuant to the provisions of 8 U.S.C. 1101(a)(15)(J) for all or part of the twelve month period immediately preceding the date of program commencement set forth on his or her Form DS-2019, unless:

(A) The participant is transferring to the sponsor's program as provided in Sec. 62.42; or

(B) The participant's presence in the United States was of less than six months duration; or

(C) The participant's presence in the United States was pursuant to a Short-term scholar exchange activity as authorized by Sec. 62.21.

So, if you wish to bring a participant back with a DS-2019 for a new program beginning on 01/01/03 and if the person is outside of the US, you look to see if the person was in the J-1 status in the last 12 months (from 01/01/02 to 12/31/03), and then you see whether or not he was in the J-1 status for more than 6 months. If not, then he is eligible. So, let's say that this person left the US after completing a 3 year J program on 5/30/02. He will be eligible to begin a new program with a DS-2019 beginning date of 01/01/03.

3. It is possible to authorize an up to 6 month discretionary extension if the person's program objective is not complete. The extension should be given by the responsible officer after close scrutiny. Because this is based on RO discretion, it is a much less stricter standard than extensions beyond the 6 months. If you can document that the J-1 needs up to 6 months to finish up the research, then that is fine. You can do this through SEVIS and there is a work-around specifically for this.

If you wish to extend it beyond 6 months (Department of State has the authority to extend it up to 6 years), you need to make an official request (with a fee) to the EVP. The participant must be funded by her government or the US government and

you must have a compelling reason. If this is a NASA sponsored scholar, it should be possible. You can find the regs about extensions at:

22 CFR 62.20(h)(i) Duration of participation. The permitted duration of program participation for a professor or research scholar shall be as follows:

(1) General limitation. The professor and research scholar shall be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete his or her program, which time shall not exceed three years.

(2) Exceptional circumstance. The Department of State may authorize a designated Exchange Visitor Program sponsor to conduct an exchange activity requiring a period of program duration in excess of three years. A sponsor seeking to conduct a discrete activity requiring more than the permitted three years of program duration, but less than six years of program duration, shall make written request to the Department of State and secure written Department of State approval. Such request shall include:

- (i) A detailed explanation of the discrete exchange activity; and
- (ii) A certification that the participation of selected research scholars will be financed directly by United States or foreign government funds.

(3) Change of category. A change between the categories of professor and research scholar shall not extend an exchange visitor's permitted period of participation beyond three years.

(j) Extension of program. Professors and research scholars may be authorized program extensions as follows:

(1) Responsible officer authorization. A responsible officer may extend, in his or her discretion and for a period not to exceed six months, the three year period of program participation permitted under paragraph (i) of this section. The responsible officer exercising his or her discretion shall do so only upon his or her affirmative determination that such extension is necessary in order to permit the research scholar or professor to complete a specific project or research activity.

(2) Department of State authorization. The Department of State may extend, upon request and in its sole discretion, the three year period of program participation permitted under paragraph (i) of this section. A request for Department of State authorization to extend the period of program participation for a professor or research scholar shall:

(i) Be submitted to the Department of State, unless prevented by extraordinary circumstance, no less than 60 days prior to the expiration of the participant's permitted three year period of program participation; and

(ii) Present evidence, satisfactory to the Department of State, that such request is justified due to exceptional or unusual circumstances and is necessary in order to permit the researcher or professor to complete a specific project or research activity.

(3) Timeliness. The Department of State will not review a request for Department of State authorization to extend the three year period of program participation permitted under paragraph (i) of this section unless timely filed; provided, however, that the Department of State reserves the right to review a request that is not timely filed due to extraordinary circumstance.

(4) Final decision. The Department of State anticipates it will respond to requests for Department of State authorization to extend the three year period of program participation permitted under paragraph (i) of this section within 30 days of Department of State receipt of such request and supporting documentation. Such response shall constitute the Department of State's final decision.

4. If the person is subject to the 12 month bar, you can always bring the person back as a short-term scholar (which is limited to 6 months)

5. The final J regs for SEVIS are not out yet. The proposed regs were going to extend the 3 years to 5 years. If that passes, the existing Js may be grandfathered in, but I am not sure when this will happen.

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Q - If I got a copy of the favorable recommendation for a waiver of the 2 yr HRR (J1) from the DOS, that was also forwarded to the BCIS, what are the next steps I should do in filing for AOS/I-485? Should I apply for a waiver from the BCIS this time, or will the copy of the DOS recommendation serve the purpose of the waiver, as supporting evidence to my I-485 application? My waiver application was favorably recommended based on a NO-Objection Statement.

A - You can proceed with filing your I-485 (I assume you qualify for adjusting) now that you have your DOS recommendation. You don't need to apply for a waiver from the INS/BCIS/USCIS at this point. It should be automatic based on the earlier waiver application submission and you should get a filing receipt soon. But you should only need to include evidence of the DOS waiver recommendation when you or your lawyer submits the adjustment application. Good luck!

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Q - A friend would like to know what the procedure is to get a student visa for a 10-year-old boy from Columbia to go to school in the United States. A family is willing to sponsor him. What forms are required and what is the process?

A - It all starts with finding a school that will admit and sponsor him. The school must be approved for admitting F-1 (student visa) students. Once the school admits the student, they will issue him a federal admission document called Form I-20 and then using that form he applies for a student visa at a US Consulate abroad (assuming that he is not in the US yet). At this stage his sponsorship will be important. After that he can enter the US up to 30 days before his school starts. Keep in mind that his stay in the US will be limited to 1 year if he is attending a public school. However, if he enters the US for a private school, then he can study as long as he wants to. You should be careful in making that none of his documents (Form I-20, Form I-94 (form given by the immigration when a person enters the US), and passport) does not expire. You should get new forms BEFORE the expiration of those documents.

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Q - My five-year of Permanent Residence (PR) comes up in Oct. 2004. When is the earliest I can file for citizenship?

A - You can apply 90 days ahead of that anniversary date. Good luck.

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#### 4. Border News

The United States and Canada recently opened the first joint-operated border crossing, between central Washington state and the Okanagan Valley of British Columbia. The crossing is located at a large commercial port facility, and it includes a two-lane highway exclusively for cargo truck traffic. The \$31 million facility is co-operated by the U.S. General Services Administration and the Canada Customs and Revenue Agency.

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Immigration and Customs Enforcement (ICE) Agents working undercover in Baghdad have arrested a man for allegedly violating the Arms Export Control Act and International Traffic in Arms Regulations. Regard Yakou, 43, is suspected of brokering the manufacture and export of six armored patrol boats to Saddam Hussein, from November 2000 to July 2003. Yokou was transported to JFK International Airport to appear in the Eastern District New York court. Yakou's father, Sabri Yakou, was also arrested this month in New York for his alleged involvement in the scheme. ICE officials said the case "sends a message to those who thought they could violate the arms embargo, and cynically expected that the evidence would be lost within the borders of Saddam Hussein's terrorist regime. The message is: We can reach you there, too. And will."

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Last week during a subcommittee hearing, House Agriculture Committee Chairman Bob Goodlatte claimed the Department of Homeland Security was refusing to brief the panel on a border security program that merges personnel from three federal agencies into a single unit. The DHS's "One Face At the Border" initiative was launched in order to cross-train border agents and simplify the entry process. Goodlatte said the Department's plans may be "insufficient to protect American agriculture against the unintentional introduction of plant and animal pests and disease." The DHS said officers will receive additional training to perform agricultural inspections, but Goodlatte said the agency could not find time to brief the Agriculture Committee when officials appear on Capitol Hill, leaving the Committee in the dark.

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#### 5. News From The Courts

##### Miah v. Ashcroft

In this case from the Third Circuit, a national of Bangladesh, Bismillah Miah ("Miah"), petitioned for review of a decision of the Board of Immigration Appeals ("BIA" or "Board"). The Board had ordered Miah removed to his home country.

The Immigration Judge had denied Miah's petition for political asylum and withholding of removal on the basis that Miah's testimony lacked credibility and

corroboration to sustain the burden of proof. The BIA rejected the Immigration Judge's adverse credibility determination, but still dismissed the appeal on the grounds that Miah had failed to corroborate the events on which he based his claim. The Third Circuit held that the BIA failed to properly analyze the issue of corroboration in accordance with previous rulings.

The Third Circuit Court held that while the BIA emphasized that Miah failed to produce documentary evidence corroborating the specifics of his claim, the BIA did not explain which "particular aspects of his testimony it would have been reasonable to expect him to have corroborated." Similarly, the BIA merely reiterated the Immigration Judge's findings regarding Miah's attempts to corroborate his story. Thus, the BIA's failure to provide its own rationale precluded meaningful review.

The court held that while it might be appropriate for the BIA to adopt an Immigration Judge's findings regarding corroboration in certain cases, the BIA erred by doing so in this case. Here, the Immigration Judge found Miah not to be credible because "his testimony regarding the alleged incidents lacked sufficient detail."

In this case, testimony found to be incredible by the IJ was transformed into credible testimony by the BIA. However, the BIA did not explain how the transformation affects the degree of corroboration required for Miah to sustain the burden of proof. In other words, once Miah was deemed to be a credible asylum applicant, which of the events on which he bases his claims must then be corroborated and to what degree?

The Third Circuit held that because the BIA's failure of explanation made it impossible to review its rationale, the matter has to be remanded to the BIA so that it can refer the case to the Immigration Judge with instructions to assume credibility and conduct a new corroboration analysis.

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Clark v. Ashcroft

In this case from the United States District Court for the Eastern District of Pennsylvania, Dennis Clark petitioned the court for Writ of Habeas Corpus. The Writ was granted.

Dennis Clark ("Clark"), an alien in detention, sought a Writ of Habeas Corpus when he claimed that his continued detention by the Bureau of Immigration and Customs Enforcement ("BICE") violates his Fifth Amendment due process rights. The Government responded that the petition must be denied because Clark's extended detention was entirely attributable to his failure to provide accurate personal information.

Initial deportation against Clark had began in April 1991 when he was serving time for a theft conviction. At that time Clark swore that he was born in Kingston, Jamaica, and had entered the U.S. in 1979. However, he was not deported and in 1995 he was released, pending final removal. Between 1996 and 1998 there were numerous arrests for thefts and receiving stolen property, but no convictions. However, Clark had pleaded guilty to burglary and trespass in 1998; he was convicted twice in 1990 for theft and receipt of stolen property; and he pleaded guilty to criminal attempt and theft in 1990. In 1998, Clark again entered INS

custody after his arrest by the INS officials. He had remained in custody since that date. But in June 2001 he claimed that he was a citizen of the United Kingdom, and communicated with the British Consulate General in Houston, TX, and applied for a U.K. passport.

Following a custody status review in January of 2003, the INS refused to release Clark for failure to assist in obtaining a travel document. The report stated that Clark had failed to provide any documentation regarding his identity or citizenship to assist the INS in effecting his departure from the United States.

The court found that the INS had over two years to obtain travel documents from the United Kingdom in order to effectuate Clark's removal from the United States. Communications with the British consulate commenced on May 22, 2002. The government had not shown any evidence of how Clark had not cooperated since that time.

Using the dates set forth, Clark's post-order removal period lasted a maximum of one year, 11 months (June 6, 2001, to the date this court stayed Clark's removal, May 30, 2003). And it lasted a minimum of just over one year (May 22, 2002, to May 30, 2002). Either way, the 90 day statutory period for removal had ended. The court, therefore, found that the 90 day statutory removal period had expired and that Clark's actions were insufficient to toll that period.

The court held that the longer an alien is detained beyond six months, the less foreseeable his removal becomes. The court concluded that the INS had detained Clark beyond a reasonable removal period for at least three months, or at most one year, two months. Either period would have been sufficient to conclude that Clark's removal would no longer be reasonably foreseeable. Continued detention of Clark would have been in contravention to the laws of the United States. So, although the BICE and Clark may effect his removal some day, the court concluded that his removal was not reasonably foreseeable. Therefore, Clark's petition for a writ of habeas corpus was granted, and BICE was ordered to release Clark under supervision, pending his final removal from the United States.

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## 6. Government Processing Times

There are no new processing times to report this week.

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## 7. News Bytes

Mike Berry, the Health and Human Services administrator handling the HHS J-1 shortage-area waiver program, has informed the American Immigration Lawyers Association (AILA) that HHS has suspended the program temporarily pending conclusion of a policy review. The HHS stopped taking applications effective October 1, 2003. Berry was unable to provide an approximate date for the program's reopening, but he said he expects the review to be completed soon.

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The State Department's chief of the Immigrant Visa Control and Reporting Division, Charles Oppenheim, has informed the American Immigration Lawyers Association that the movement of family immigration priority dates will remain fairly consistent for the next year. Security clearances are delaying the movement of numbers somewhat, but the delays are seen as being temporary. Oppenheim also indicated that employment-based visas should also not retrogress this fiscal year with the possible exception of "other worker" cases. If "other workers" cases retrogress, it would not likely happen until next summer at the earliest.

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A member of AILA has learned from a conversation with a visa officer in CDJ that, starting a few months ago, CDJ takes the position that if a visa applicant was ever apprehended by INS/BCIS and sent back to Mexico, post 4/1/97, this constitutes a "removal," and therefore a subsequent EWI (entered without inspection), accrual of more than one year unlawful presence and departure in the BIG (non-waivable) ten year bar. Thus, if an individual is caught near the border, is voluntarily removed without a removal hearing or expedited removal, this is still a removable circumstance and the individual is inadmissible under 212(a)(9)(A)(ii)(I). The Visa Office is said to have agreed with this interpretation.

\*\*\*\*\*

A U.S. Census Bureau report shows that naturalized Blacks, Asians, and Hispanics have higher homeownership rates than U.S. born Blacks, Asians, and Hispanics.

According to "Moving to America – Moving to Homeownership: 1994-2002," 51 percent of Black naturalized citizens own their homes, while 49 percent of Black native-born citizens own their homes. 70 percent of naturalized Asians own their own homes, compared to 57 percent for native-born Asian citizens. As for Hispanics, 63 percent of naturalized Hispanics own their own homes, while 54 percent of native-born Hispanic citizens own their own homes.

In 2002 alone, 70 percent of native-born citizens own homes, as compared to 68 percent of naturalized citizens, and 35 percent of noncitizens.

\*\*\*\*\*

Poor, legal immigrant children in the United States may now be eligible for food stamps under a new government program. The program, which took effect October 1, is a part of the 2002 farm bill. The program will provide food stamps to children whose families earn less than a specified maximum income. It is estimated that around 60,000 immigrant children could benefit from the new program. Illegal immigrant children are still not eligible to receive government issued food stamps.

\*\*\*\*\*

In one of his final legislative actions as California Governor, Gray Davis vetoed a bill that would qualify some illegal immigrants for a free community college education. Davis also vetoed a bill that would have expanded recognition of Mexico's consular identification card by requiring California cities to accept it as a valid document. The

vetoed come just weeks after Davis signed legislation granting driver's licenses to illegal immigrants.

Davis said he vetoed the college tuition bill because of the state's poor economy, saying, "I believe deserving immigrant students should have the opportunity to pursue a good quality education so that they can productively contribute to our economy."

\*\*\*\*\*

U.S. Citizenship and Immigration Services released two employer information bulletins recently. The first covers internationally recognized alien athletes, artists and entertainers

([http://www.immigration.gov/graphics/lawsregs/handbook/OBL\\_16.pdf](http://www.immigration.gov/graphics/lawsregs/handbook/OBL_16.pdf)) and the

second deals with I-9 documentation review

([http://www.immigration.gov/graphics/lawsregs/handbook/OBL\\_103.pdf](http://www.immigration.gov/graphics/lawsregs/handbook/OBL_103.pdf)).

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## 8. International Roundup

Last week European Union leaders agreed to the creation of a new agency to manage Europe's expanding frontiers. Following a two-day EU summit in France, the European Commission plans to draw up a formal proposal next month for the launch of the Border Management Agency. The agency will coordinate monitoring of land, air and sea borders, especially in the Mediterranean, where illegal immigration is a pressing concern, but the agency will not encroach on the rights of EU member states to patrol their own borders.

\*\*\*\*\*

A British Court of Appeals dismissed the claim of a woman diagnosed with the AIDS virus that deporting her to Uganda, where she could die untreated, would amount to a violation of her human rights. The woman entered the country on a false British passport in March 1998 and has been receiving NHS treatment at a London hospital.

\*\*\*\*\*

Estonia and Romania are set to approve an agreement to mutually abolish visa requirements for the two countries' citizens. According to the agreement, Estonian citizens will be able to stay in Romania without a visa for up to 90 days in a six-month period and vice versa. The agreement does not include work authorization. Romania is the only EU country with which Estonia does not currently have a visa-free travel agreement.

\*\*\*\*\*

In Japan, the seizure of faked travel documents was up 42% to 1,739 in the first half of the year, over 2002. The Justice Ministry said they intercepted about 850 forged passports, half seized from Chinese nationals.

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## 9. Legislative Update

On Wednesday, President Bush signed [H.R. 2152](#) in to law (P.L. 108-99), amending the Immigration and Nationality Act to extend for an additional 5 years the special immigrant religious worker program.

\*\*\*\*\*

The following bills were recently introduced in Congress:

[H.R.3273](#): To amend the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to allow States and localities to provide primary and preventive care to all individuals.

Sponsor: Rep Green, Gene [TX-29] (introduced 10/8/2003)

Latest Major Action: 10/8/2003 Referred to House committee. Status: Referred to the House Committee on Energy and Commerce.

[H.R.3284](#): To improve the health of residents of, and the environment in, the United States-Mexico border area.

Sponsor: Rep Reyes, Silvestre [TX-16] (introduced 10/8/2003)

Latest Major Action: 10/8/2003 Referred to House committee. Status: Referred to the Committee on Energy and Commerce, and in addition to the Committees on Education and the Workforce, Agriculture, Financial Services, Transportation and Infrastructure, International Relations, and Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

[H.R.3289](#): Making emergency supplemental appropriations for defense and for the reconstruction of Iraq and Afghanistan for the fiscal year ending September 30, 2004, and for other purposes.

Sponsor: Rep Young, C. W. Bill [FL-10] (introduced 10/14/2003)

Related Bills: H.RES.396, H.RES.401, S.1689

Latest Major Action: 10/17/2003 Resolving differences / Conference -- Senate actions. Status: Senate insists on its amendment, asks for a conference, appoints conferees Stevens; Cochran; Specter; Domenici; Bond; McConnell; Burns; Shelby; Gregg; Bennett; Campbell; Craig; Hutchison; DeWine; Brownback; Byrd; Inouye; Hollings; Leahy; Harkin; Mikulski; Reid; Kohl; Murray; Dorgan; Feinstein; Durbin; Johnson; Landrieu.

[H.R.3293](#): To amend titles XIX and XXI of the Social Security Act to provide States with the option to expand or add coverage of pregnant women under the Medicaid and State children's health insurance programs, and for other purposes.

Sponsor: Rep DeGette, Diana [CO-1] (introduced 10/15/2003)

Latest Major Action: 10/15/2003 Referred to House committee. Status: Referred to the House Committee on Energy and Commerce.

H.R.3306: To amend the Immigration and Nationality Act to remove from an alien the initial burden of establishing that he or she is entitled to nonimmigrant status under section 101(a)(15)(B) of such Act, in the case of certain aliens seeking to enter the United States for a temporary stay occasioned by the serious illness or death of a United States citizen or an alien lawfully admitted for permanent residence, and for other purposes.

Sponsor: Rep Case, Ed [HI-2] (introduced 10/16/2003)

Committees: House Judiciary

Latest Major Action: 10/16/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

H.R.3309: To amend the Immigration and Nationality Act to restore certain provisions relating to the definition of aggravated felony and other provisions as they were before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

Sponsor: Rep Filner, Bob [CA-51] (introduced 10/16/2003)

Committees: House Judiciary

Latest Major Action: 10/16/2003 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[S.1734](#): A bill to amend titles XIX and XXI of the Social Security Act to provide States with the option to expand or add coverage of pregnant women under the medicaid and State children's health insurance programs, and for other purposes.

Sponsor: Sen Lincoln, Blanche [AR] (introduced 10/15/2003)

Latest Major Action: 10/15/2003 Referred to Senate committee. Status: Read twice and referred to the Committee on Finance.

For a review of all the immigration bills introduced this year, visit our legislative chart at [www.visalaw.com/advocacy.html](http://www.visalaw.com/advocacy.html).

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## 10. State Department Visa Bulletin - November 2003

### A. STATUTORY NUMBERS

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 October 6th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

2. Section 201 of the Immigration and Nationality Act (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: MEXICO, INDIA 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.)

Priority Dates for Family Based Immigrant Visas				
	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Family				
1 <sup>st</sup>	15JUN00	15JUN00	15OCT94	22AUG89
2A*	08OCT98	08OCT98	15MAR96	08OCT98
2B	01MAY95	01MAY95	01DEC91	01MAY95
3 <sup>rd</sup>	01AUG97	01AUG97	15NOV94	01MAY89
4 <sup>th</sup>	15JAN92	15AUG90	15JAN92	08OCT81

\*NOTE: For November, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15MAR96. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15MAR96 and earlier than 08OCT98. (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.)

Priority Dates for Employment-Based Immigrant Visas				
	All Chargeability Areas Except Those Listed	INDIA	MEXICO	PHILIPPINES
Employment-Based				
1 <sup>st</sup>	C	C	C	C
2 <sup>nd</sup>	C	C	C	C

3 <sup>rd</sup>	C	C	C	C
Other Workers	C	C	C	C
4 <sup>th</sup>	C	C	C	C
5 <sup>th</sup>	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C

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

#### 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-2004 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-2004 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:

All DV Chargeability Areas Except Those Listed Separately

#### *Region*

AFRICA: AF 11,700 Except: Ethiopia 9,000

ASIA: AS 5,600 Except: Bangladesh 2,800

EUROPE: EU 10,100

NORTH AMERICA (BAHAMAS): 3

OCEANIA: OC 400

SOUTH AMERICA, and the CARIBBEAN: 500

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-2004 program ends as of September 30, 2004. DV visas may not be issued to DV-2004 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2004 principals are only entitled to derivative DV status until September 30, 2004. DV visa availability through the very end of FY-2004 cannot be taken for granted. Numbers could be exhausted prior to September 30. Once all numbers provided by law for the DV-2004 program have been used, no further issuances will be possible.

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

For December, immigrant numbers in the DV category are available to qualified DV-2004 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:

All DV Chargeability Areas Except Those Listed Separately

##### *Region*

AFRICA: AF 14,450 Except: Ethiopia 12,400

ASIA: AS 7,000 Except: Bangladesh 4,100

EUROPE: EU 13,900 Except: Albania 10,100

NORTH AMERICA (BAHAMAS): 5

OCEANIA: OC 500

SOUTH AMERICA, and the CARIBBEAN: SA 1,075

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#### 11. Former INS Agent Sentenced For Bribery

A former employee of the Immigration and Naturalization Service (INS) was sentenced to serve four years and eight months in jail this week, after pleading guilty to charges of conspiracy to commit bribery. Anthony Fitzgerald Brown of Lancaster, Texas, admitted to solicitation and receipt of thousands of dollars in bribe money in order to issue Employment Authorization Documents (EAD) to immigrants who were ineligible to work or to reside in the United States. Brown was also accused of having destroyed government files to conceal evidence of the illegally issued EADs.

Fifteen other defendants have been charged, along with Brown, in a 26-count indictment. The defendants were accused of conspiracy to defraud the United States, conspiracy to commit bribery and fraud in connection with identification documents, unlawful production of U.S. government identification documents and bribery.

Brown admitted that he solicited and accepted thousands of dollars in bribes for approving, requesting, and causing Employment Authorization Documents (EADs) (INS Forms I-766) to be made and delivered to aliens who were not eligible to receive them between January 2001 and March 1, 2003. Brown then disposed of the files and supporting documentation to conceal evidence that the EADs were unlawfully issued.

Brown has been ordered to surrender to the Bureau of Prisons on December 3 to begin his sentence. He will be placed on three years of supervised release following his prison term.

On March 28, 2002 another INS agent, Salvador Olivas of Avondale, Arizona, was indicted and charged with converting to his own use over \$6,000 in cash, seized in the course of Special Agent Olivas's employment, from a criminal suspect.

A conviction for an employee of the United States converting to his own use the cash of another carries a maximum penalty for ten years in prison, a \$250,000 fine, or both.

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## 12. GAO Releases Study on Issuance of Social Security Numbers to Noncitizens

The General Accounting Office (GAO) has released a study of the Social Security Administration's (SSA) procedures for issuing social security numbers (SSNs) to noncitizens. The GAO found that the SSA has taken steps to prevent the inappropriate assignment of SSNs to noncitizens. SSA staff must now verify noncitizens' identity documents with the Department of Homeland Security (DHS) and continues to require visual inspection of the documents prior to issuing a SSN. The GAO said it found some weaknesses in this process, as some SSA field staff interviewed "are relying heavily on DHS's verification while neglecting SSA's standing inspection practices, even though both approaches are necessary."

The SSA has also launched initiatives to ease the burden on field offices by implementing "Enumeration at Entry" (EAE), which relies on the State Department and the DHS to authenticate information provided by applicants.

The report finds that the SSA actions to strengthen the process are accompanied by persisting weaknesses in two areas of its enumeration process, areas which "could be exploited by individuals – citizens and noncitizens alike – seeking fraudulent SSNs." The two areas are the assignment of SSNs to children under age 1 and replacement Social Security Cards.

GAO investigators posing as parents of newborns were able to obtain two SSNs using counterfeit documents. The study also finds that replacement cards can be obtained by citizens with "relatively weak documentation," which then could be used for illicit purposes or sold to noncitizens.

The GAO recommends that the SSA further strengthen its enumeration policies. Specifically, the GAO suggests that the SSA perform systematic reviews of field office compliance, enhance the modernized enumeration system, develop an evaluation plan to assess the EAE initiative, revise its requirement for verification of birth records of U.S. citizens who apply for an SSN to require third-party verification of the birth records of children under age 1, and reassess policies for issuing replacement Social Security cards to deter abuse.

This report is available online at: <http://www.gao.gov/new.items/d0412.pdf>

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### 13. Immigrant's Son Runs For Governor of Louisiana

Obscured by a media storm that descending on California for the recall election, which resulted in the election of Austrian immigrant and Hollywood movie star Arnold Schwarzenegger, Bobby Jindal's campaign has been relatively quiet. Jindal, the son of an Indian immigrant, finished first in an open primary for Louisiana governor earlier this month, pulling in 33 percent of the vote. Since none of the 17 candidates received more than 50 percent of the vote in the primary, the top two candidates – Jindal and Lt. Governor Kathleen Blanco – advance to a Nov. 15 runoff election.

Ethnicity and gender have been notable issues in the campaign, as both candidates could be considered minorities. While Jindal is an Indian-American, Blanco is a Cajun, a native of the former French colony, and she would be the first woman elected Governor of Louisiana if she wins. Political research groups say both candidates would make history, because of their ethnic backgrounds. Almost 70 percent of the electorate is white Protestant. Jindal, a conservative Republican, received very little support from black voters, who make up about 30 percent of the electorate. Polling data shows white male voters heavily favor Jindal, while white female voters are evenly split between the two candidates.

Jindal, 32, is a former Assistant Secretary of the Department of Health and Human Services, and his campaign has emphasized his strong ties to the Bush Administration. Contrary to misconceptions, Jindal is not an immigrant; he was born and raised in Baton Rouge.

Blanco, 60, completes her second term as Lieutenant Governor at the end of this year. She has worked in the public sector for 20 years, as State Legislator, Public Service Commissioner and Public Service Commission Chairman.

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### 14. Senate Committee Delays DREAM Act Vote

The Senate Judiciary Committee was expected to vote on a bill last week that would grant legal status to high school students or graduates who are illegal immigrants. The Development, Relief and Education for Alien Minors (or DREAM) Act is sponsored by the Committee's Chairperson, Republican Utah Senator Orrin Hatch, along with 35 others. The bill is supported by two-thirds of the committee members, but during Thursday's meeting, a few members of the Committee, including Republican Senators Jeff Sessions, John Kyl, John Cornyn and Saxby Chambliss, spoke out against the legislation and introduced some 30 amendments to effectively gut the bill.

After a 2 1/2 hour debate, Senator Hatch decided to postpone the issue until the Committee's next meeting, October 23. Hatch said the delay would allow time to review the amendments and see if the opposing sides could find a compromise.

The DREAM Act would allow U.S.-raised undocumented immigrant children to pay in-state college tuition and an opportunity to earn permanent residency. The bill would grant legal status to teenage undocumented aliens who have been in the United States before age 16, and at least five years before the bill is enacted, have graduated from high school, and have no criminal record. The bill also bans the

deportation of young aliens and gives them six years to earn permanent resident status by either attending college for at least two years, serving in the military or performing community service.

"We have a choice to either keep these talented young people underground or give them a chance to contribute to the United States," Hatch said.

Republican opponents say the DREAM Act will encourage more illegal immigration.

"It sends the wrong message that America has immigration laws, but we don't intend to enforce them," Sessions said.

Hatch countered that it will not encourage more illegal immigration because it applies only to those who were in the country at least five years before the bill passes.