

Siskind's Immigration Bulletin  
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Siskind Susser serves immigration clients throughout the world from its offices in the US, Canada, Mexico, Argentina and the People's Republic of China. To schedule a telephone or in-person consultation with the firm, go to <http://www.visalaw.com/intake.html>.

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Visit [Visajobs.com](http://www.visajobs.com), the online career network, and create your new account (<http://www.visajobs.com>).

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1. Openers
2. The ABC's of Immigration: Inadmissibility - Criminal Grounds
3. Ask Visalaw.com
4. Border and Enforcement News
5. News From The Courts
6. Government Processing Times
7. News Bytes
8. International Roundup
9. Legislative Update
10. Guest Column: The REAL ID Act: A Radical and Misguided Approach to Immigration Reform, by Peter Schey
11. Guest Column: Chintakuntla's Revenge: Can Education And Experience Co-exist Under PERM?, by Gary Endelman
12. Western Hemisphere Travel Initiative Introduced
13. Nationwide Poll Shows Support Among Voters for Proposed Immigration Reform

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1. Openers

Dear Readers:

We are following several major developing immigration stories this week. In what will likely be one of the most important immigration stories of the year, the US Senate is debating a funding bill for the Iraq War as well as relief for tsunami victims that could have important immigration consequences. That bill is one of the "must pass" pieces of legislation that the Congress takes up each year.

What does a spending bill have to do with immigration? As it turns out, quite a bit. The House of Representatives version of the bill contains the notorious REAL ID bill, which would toughen drivers license requirements for immigrants and also dramatically tighten asylum rules. The Senate was hoping to keep REAL ID out of their bill, but the chances of this happening are lessening. In the mean time, pro-immigration advocates are pushing for their own provisions to be included including raising the H-2B visa quota, the AgJobs bill, and a measure to allow nurses to reclaim unused EB-3 numbers. I've been closely involved with the third item. Nurses don't have access to a non-immigrant visa and most are from the countries facing the recent three-year rollback of priority dates. Given the severe nursing shortage in the US, the need for these nurses is clear and many will opt for other countries also facing shortages if the Congress fails to act quickly.

Whether these provisions will make it into the spending bill is the subject of intense debate right now. By next week, we should have a better idea of the answer.

Majority Leader Frist has been trying to keep the immigration provisions out in order to speed up debate on the spending bill. He promised this week that immigration reform will be taken up THIS year in order to persuade his colleagues to let a "clean" version of the spending bill pass. Shortly after Frist made these comments, Senators John Cornyn (R-TX) and John Kyl (R-AZ), announced plans to begin work on immigration reform in the Senate Immigration Subcommittee. Cornyn chairs that committee and Kyl is a member as well. The two will introduce a comprehensive immigration bill that is designed to strengthen border enforcement as well as create a work visa plan along the lines outlined by President Bush last year.

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On April 11<sup>th</sup>, President Bush announced that Eduardo Aguirre, Jr., the Director of USCIS, will be leaving his post to become the new US Ambassador to Spain. No word yet on who will be replacing Aguirre, but the news is a disappointment to many who have praised his achievements in reducing backlogs at the USCIS. We wish the soon-to-be ambassador good luck in his new position.

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Another story we are still watching is the H-1B saga. USCIS was supposed to issue rules allowing for issuance of an extra 20,000 H-1Bs based on a bill President Bush signed last year. They had until March 8, 2005 to deal with this, but we are now five weeks past the deadline and USCIS has still not issued rules. In the mean time, applicants can apply for numbers for the next fiscal year beginning October 1<sup>st</sup>. USCIS has indicated that applications filed with October 1<sup>st</sup> start dates can be converted to earlier dates once the rules for the 20,000 visas are announced. But this does little answer many of the questions employers, applicants and lawyers have regarding the proper way to file these cases. We can only advise readers that we will pass on information as we receive it.

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In firm news, we would like to introduce you to Deanna Helstrom, an associate attorney in our New York office. Deanna has actually been with the firm for the past three years as a law clerk and we're pleased that she has now joined us as an attorney. Deanna adds to the firm's legislative advocacy capabilities in addition to being a promising immigration lawyer. She worked on Capitol Hill in the office of Senator Patty Murray (D-WA) and received a bachelor's degree in political science at George Washington University. She also handled immigration matters in the New York office of Senator Hilary Clinton. Deanna attended Brooklyn Law School in New York where she graduated last year and she worked as an intern in the New York immigration court. Deanna can be reached at [dhelstrom@visalaw.com](mailto:dhelstrom@visalaw.com). Welcome Deanna!

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Arda Beskardes, an attorney in Siskind Susser's Memphis office, will be a featured speaker at the Turkish American Business Conference to be held at Stanford University on May 21<sup>st</sup>. For more information on the program, go to [http://www.marketwire.com/mw/release\\_html\\_b1?release\\_id=84411](http://www.marketwire.com/mw/release_html_b1?release_id=84411) .

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Finally, as always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. 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: Inadmissibility - Criminal Grounds

The need to prevent criminals from entering the US has been one of the longest standing parts of US immigration law. In some form or another, criminal convictions have been used to deny entry to the US since the creation of the country.

### **What is considered a criminal ground for inadmissibility?**

There are six basic criminal grounds for inadmissibility:

- Crimes involving moral turpitude,
- Violations of controlled substance laws,
- Conviction of more than one offense,
- Drug trafficking,
- Prostitution and commercialized vice, and
- Commission of a serious crime in the US for which the immigrant asserted immunity from prosecution.

### **What is moral turpitude?**

Moral turpitude is one of the most amorphous concepts in immigration law. There is no definition of moral turpitude, although many courts have attempted to construe one, using phrases such as an act of baseness, depravity or vileness. While there is no set definition, it

is clear that the moral turpitude involved must be part of the essence of the offense. A crime involving moral turpitude need not have resulted in a conviction for it to render a person inadmissible, and admitting to an act that has the elements of a crime involving moral turpitude is sufficient to bar entry. Where an actual conviction occurred, the only issue is whether the offense was a crime involving moral turpitude. Where there is only an admission, a number of other steps are required. First, it must be clear that the act admitted to could have been criminally prosecuted in the place where it occurred. Second, the immigrant must fully understand the elements of the crime to which they have admitted. Third, while the immigrant needs to say that he/she is guilty of an offense, he/she does need to admit to all of the essential elements of the offense. Fourth, the admission must be totally voluntary.

### **What type of controlled substances violations will make me inadmissible?**

Beginning in 1952, convictions for violating laws relating to controlled substances became a ground of inadmissibility. Convictions of conspiracy and attempt will also render a person inadmissible.

### **What type of multiple criminal convictions will make me inadmissible?**

Multiple criminal convictions will make a person inadmissible, regardless of the seriousness of the offense, whether the multiple convictions were the result of the same general enterprise. However, the person must have been sentenced to at least five years in prison. Offenses that are considered "purely political" are not included.

### **Do I have to be convicted of drug trafficking to be considered inadmissible?**

Drug traffickers are inadmissible, even if there is no conviction, so long as the consular or immigration officer "knows or has reason to believe" that the immigrant has been involved in trafficking.

### **Do I have to be convicted of prostitution to be considered inadmissible?**

A person coming to the US to engage in prostitution, or who has engaged in prostitution within ten years of their application for entry, is inadmissible, as are those who have made financial profit from prostitution. No criminal conviction is required, and the bar applies even to nationals of countries where prostitution is legal. Those who have been forced into prostitution are not inadmissible.

### **What is considered to be a serious criminal offense?**

Those who committed a serious criminal offense in the US, claimed immunity from prosecution and then left the US are inadmissible. A serious criminal offense is any crime of violence, and driving while under the influence of drugs or alcohol or reckless driving if the crime resulted in the injury of another person.

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3. Ask [Visalaw.com](http://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.

Q - I'm writing to you as I came across your article "The ABC's of Immigration: C Visas for Aliens in Transit through the U.S. And D Visas for Crewmembers".

I understand that a **D visa holder** cannot adjust status in the U.S. If the person got married to a U.S. Citizen ( the person has been married to a U.S. Citizen for about 5 years but she never left the U.S., as she was supposed to in accordance with her D visa), can she file an I-130 and try to Consular process abroad. I guess the real question I am asking is **would she be able to apply for a Waiver of Inadmissibility?**

A - With a few narrow exceptions (battered spouses, spouses of government employees, etc.), she is not eligible to adjust her status unless she qualifies under 245(i). She may consular process on the I-130, but since she has overstayed her D visa for a such a significant period of time, she will probably be subject to the 10-year bar to reentry. However, she should be eligible to apply for a waiver of inadmissibility under INA Section 212(a)(9)(B)(v) as she is the spouse of a U.S. citizen, and as long as it can be shown that refusal of admission would result in extreme hardship to the citizen husband. No regulations have been issued addressing the procedure to apply for such a waiver, but a waiver under Section 212(a)(9)(B)(v) is currently applied for by filing Form I-601 with the consular post.

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Q - I filed a (Petition for Alien Fiancée) form that was received by the USCIS on Feb 12th, but I am still waiting for approval within 150-180 days. Since she is my fiancée and I want her to visit me and at the same time attending my sister's wedding in July 20. My question is, can she visit me while waiting for USCIS approval? And after approve we will marry within 90 days as require by USCIS.

A - A visit to the US while the K visa application is pending is probably going to run into trouble. Visitors are required to document that they do not intend to immigrate to the US. Someone who has filed for a fiancée visa will have problems showing this. You're better off trying to visit her during that time.

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Q - Can a Child who got her permanent green card through her (US citizen step mother) apply for her natural mother? Her natural father is also a green card holder and is currently not married to either her natural mother or US step mother.

A - Once she becomes a US citizen she can file for her mother without any problem.

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Q - Is there a way to get my cousin to the United States from Nigeria? I think she classifies as a refugee based on her circumstances. The only form I have found is the I-602, but I don't think it applies to her because she is not a felon.

A - She would need to seek refugee status. The USCIS has set up a page on its web site at <http://uscis.gov/graphics/howdoi/refapp.htm> that explains how one can apply for refugee status.

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My German passport is expired. I need to know a website from where I can download some forms to get it renewed.

Try [www.embassy.org](http://www.embassy.org) which has links to all the embassies and consulates in the US. Most embassies have downloadable passport renewal application forms on their web sites.

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#### 4. Border and Enforcement News

Fifty Mexican nationals were deported from South Florida last week for a variety of immigration law violations according to the *Miami Herald*. U.S. Immigration and Customs Enforcement officials said the Mexicans deported Thursday included 14 convicted felons and 36 non-criminals who had violated their immigration status. Officials said the deported felons had convictions ranging from sexual abuse to narcotics possession to armed robbery. The deported individuals were flown out on a U.S. government aircraft operated under the Justice Prisoner and Alien Transportation System run by the U.S. Marshals Service.

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U.S. Customs and Border Patrol (CBP) last week announced the publication of the CBP Advanced Passenger Information System (APIS) Final Rule in the Federal Register. The rule finalizes the requirement for all commercial air and sea carriers to submit advanced information on all passengers and crewmembers prior to entry to or departure from the United States. An Interim Rule, in place since December 31, 2001, mandated that inbound commercial air carriers electronically submit passenger data prior to arrival in the U.S. Today's rule is the first consolidation of regulations from the former Immigration and Naturalization Service and Customs Service. According to a press release from CBP, the publication of this regulation expands the reporting mandate to include inbound and outbound APIS data from commercial air and sea carriers, however, it will waive certain data elements that are currently mandated but that are duplicative of information held by other U.S. Government entities, such as the State Department.

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#### 5. News From The Courts

Isla v. Gonzales, 2005 U.S. App. LEXIS 3686 (9<sup>th</sup> Cir.).

On petition for review of a removal order issued by the Board of Immigration Appeals, the Ninth Circuit held that the Petitioner was given insufficient notice of the consequences of her

acceptance of advance parole, and was therefore improperly denied the ability to apply for adjustment of status in her removal proceedings, and granted a petition for review.

The Petitioner was present in the country pursuing a claim for asylum, and applied for advanced parole in order to travel to the Philippines to visit her ailing father. Advance parole was granted and she was issued a parole authorization form, which stated that if the Petitioner's request for asylum were denied, she would be subject to exclusion proceedings.

Upon her return to the U.S., the Petitioner withdrew her application for asylum in order to pursue an adjustment of status. The Service responded by initiating removal proceedings, and charging her as an "arriving alien" without valid entry documents.

Prior case law in the Ninth Circuit stated that an alien granted advanced parole cannot be deprived of the substantive and procedural rights that would have otherwise been available to her prior to leaving the country if she is not given sufficient notice of the consequences of acceptance of advanced parole. The form given to the Petitioner only warned her of consequences if her asylum application were *denied*. The form did not state that by accepting advanced parole, she would be forfeiting certain rights to pursue other forms of discretionary relief, such as the ability to apply for adjustment of status.

The Ninth Circuit found that since the form inadequately informed the Petitioner that she would be deprived of substantive and procedural rights if she accepted the advance parole, a petition of review should be granted.

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## 6. Government Processing Times

Processing times are available this week for the following service centers:

Nebraska (04/01/2005): <http://www.visalaw.com/nebraska.html>

California (04/07/2005): <http://www.visalaw.com/california.html>

Vermont (04/07/2005): <http://www.visalaw.com/vermont.html>

Missouri (04/07/2005): <http://www.visalaw.com/missouri.html>

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## 7. News Bytes

U.S. Immigration and Customs Enforcement (ICE) is extending the time frame for stays of removal granted to aliens from countries affected by the Dec. 26, 2004, earthquake and tsunami disaster in Southeast Asia. Previously, ICE temporarily suspended all alien removals to Sri Lanka and the Maldives through April 7, 2005. Under the original policy, all citizens of Sri Lanka and the Maldives who were afforded a stay of removal for 90 days, beginning December 30, 2004, however this period is now being extended through July 8, 2005. The granting of the stay of removal is automatic; no request or petition is necessary. Non-criminal aliens from other nations affected by the tsunami were allowed to request a stay of removal to remain in the United States temporarily.

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Admiral David Stone has informed Homeland Security Department Secretary Michael Chertoff of his intention to step down as the head of the Transportation Security Administration (TSA), according to a press release from TSA. Stone will become the third

TSA leader to leave since the agency was created in 2002. Stone will step down in June after a replacement is named. No reason was given for his departure.

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U.S. Citizenship and Immigration Services (USCIS) recently released new processing times for adjustments for Asylees. By law, only 10,000 asylees can adjust status to Lawful Permanent Resident per year; however, the Service's website stated that it is receiving between 25,405– 43,881 applications per year. As a result, as of January 10, 2005, approximately 186,170 asylee adjustment applications were pending. USCIS anticipates that it will process pending applications according to the following schedule:

**Date Received (Mail Date)    Timeframe to be Processed**

Feb. 18, 1996 - May. 30, 2000	Oct. 1, 2004 - Sep. 30, 2005
May 31, 2000 - Apr. 12, 2001	Oct. 1, 2005 - Sep. 30, 2006
Apr. 13, 2001 - Mar. 7, 2002	Oct. 1, 2006 - Sep. 30, 2007
Mar. 8, 2002 - Jun. 20, 2002	Oct. 1, 2007 - Sep. 30, 2008
Jun. 21, 2002 - Sep. 30, 2002	Oct. 1, 2008 - Sep. 30, 2009
Oct. 1, 2002 - Feb. 6, 2003	Oct. 1, 2009 - Sep. 30, 2010
Feb. 7, 2003 - May. 23, 2003	Oct. 1, 2010 - Sep. 30, 2011
May 24, 2003 - Sep. 26, 2003	Oct. 1, 2011 - Sep. 30, 2012
Sep. 27, 2003 - Feb. 25, 2004	Oct. 1, 2012 - Sep. 30, 2013
Feb. 26, 2004 - Jun. 21, 2004	Oct. 1, 2013 - Sep. 30, 2014
Jun. 22, 2004 - Nov. 8, 2004	Oct. 1, 2014 - Sep. 30, 2015
Nov. 9, 2004 - Jan. 10, 2005	Oct. 1, 2015 - Sep. 30, 2016

USCIS emphasized on its site that these dates are approximations, and unforeseen occurrences may delay processing.

For more information regarding adjustments for Asylees, visit [www.uscis.gov](http://www.uscis.gov).

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Texas Attorney General Greg Abbott last week announced he has shut down three fraudulent East Texas immigration-consulting businesses. Abbott secured temporary restraining orders against the operations. The latest lawsuits were filed under the Texas Deceptive Trade Practices Act and accused all the defendants of misrepresenting to consumers that they were qualified to provide immigration-related services such as dispensing advice and counseling about U.S. immigration law and preparing immigration documents. None of the accused is an attorney or accredited by the Board of Immigration Appeals. Individuals who believe they have been the victims of a scam should report it to the Office of the Attorney General at 1-800-252-8011.

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The Congressional Research Service (CRS) recently issued a report for Congress focusing on U.S. immigration policy on asylum seekers. In FY2003, there were 42,114 claims for asylum filed with USCIS, and by the close of the fiscal year, there were 262,102 asylum cases pending at USCIS. The report stated that USCIS asylum officers approved 11,434 cases in FY2003, and the percentage of cases approved was 29% of cases decided. The percentage of Executive Office for Immigration Review (EIOR) asylum cases approved was

37% of cases decided in both FY2002 and FY2003. At the end of FY2003, there were 158,624 cases pending for Asylees to adjust to legal permanent resident (LPR) status, and a person who receives asylum today would wait about 16 years to become an LPR due to numerical limits in the law.

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The Congressional Research Service (CRS) recently issued a report for Congress regarding the 9/11 Commission's recommendations for biometric identifiers and border security. In its final report, the 9/11 Commission concluded that funding and completing a biometric entry-exit screening system for travelers to and from the United States is necessary for national security. The Commission noted that US-VISIT is already in place, but considers it a first phase in a process that should be consolidated with US-VISIT in order to streamline border inspections. Based in part upon the commission's recommendations, Congress included biometric provisions related to entry/exit control in the Intelligence Reform and Terrorism Prevention Act of 2004.

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U.S. Department of Homeland Security announced last week in a press release that foreign visitors departing from Philadelphia International Airport are required to follow checkout procedures before departing on their flight. Visitors must provide two index finger scans and take a digital photo as part of a pilot program to test and evaluate an automated biometric exit process.

The exit procedures being piloted at Philadelphia require foreign visitors to go through one of the following processes:

- Visitors departing the United States will check out of the country at exit stations located within the airport.
- Visitors still use the exit station but will also be required to present their receipt at the departure gate to confirm that they checked out at the exit station.

US Customs and Border Protection Officers will provide foreign visitors with a card explaining the exit process with they arrive in the United States.

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## 8. International Roundup

Dutch police detained 23 undocumented immigrants on Sunday morning in Zevenbergen and arrested a 39-year-old Estonian truck driver on human smuggling charges. Ten of the illegal immigrants were found hiding in the truck and police found another 13 elsewhere on the industrial terrain. The 21 men and two women were of Asian ancestry. A small number of them had Chinese identification documents, but it is not yet certain whether all of them originated from China. It is not yet certain how far the Asians traveled in the Estonian man's truck and investigators are trying to determine if the driver is linked to a human smuggling gang or not. The truck driver is being remanded in custody and will appear before a judge later this week.

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Spain's government has relaxed the rules for an amnesty for undocumented immigrants, a move expected to bring hundreds of thousands of more applications for legal residency.

Already more than 300,000 have applied for legal residency and work permits under a special program that ends on May 7, 2005. According to the previous rules, an immigrant hoping to be granted residence and work papers had to prove, by means of a specific 'enrolment' document, that he or she was registered as living in a Spanish municipality prior to August of last year. The new rules announced this week will allow immigrants to use other documents to establish residence. Exactly what documents will be accepted has yet to be clarified, leading to confusion.

Since the process began in early February, some 313,000 undocumented immigrants - mostly from Latin America, North Africa and Eastern Europe - have applied, in conjunction with their employers, to receive the amnesty. In order to be granted residence and work permits, a candidate must demonstrate that he or she has a contract for employment in Spain for at least six months. For agricultural and domestic workers, the period is three months.

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## 9. Legislative Update

[H.R.1483](#): -- Private Bill; For the relief of Roger Paul Robert Kozik.

Sponsor: Rep Davis, Danny K. [IL-7] (introduced 4/5/2005)

Committees: House Judiciary

Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1484](#): -- Private Bill; For the relief of Syan Simeonov Stoyanov.

Sponsor: Rep Davis, Danny K. [IL-7] (introduced 4/5/2005)

Committees: House Judiciary

Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1485](#): -- Private Bill; For the relief of Alzoubi Muhammed.

Sponsor: Rep Davis, Danny K. [IL-7] (introduced 4/5/2005)

Committees: House Judiciary

Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1486](#): -- Private Bill; For the relief of Candelaria P. Roxas.

Sponsor: Rep Hinojosa, Ruben [TX-15] (introduced 4/5/2005)

Committees: House Judiciary

Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1487](#): -- Private Bill; For the relief of Praveen SitaRama Bobba.

Sponsor: Rep Hinojosa, Ruben [TX-15] (introduced 4/5/2005)

Committees: House Judiciary

Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1488](#): -- Private Bill; For the relief of Mehmet Kenan Tas.  
Sponsor: Rep Hinojosa, Ruben [TX-15] (introduced 4/5/2005)  
Committees: House Judiciary  
Latest Major Action: 4/5/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[H.R.1531](#): -- Private Bill; For the relief of Veronica Kehinde Akintade.  
Sponsor: Rep Owens, Major R. [NY-11] (introduced 4/6/2005)  
Committees: House Judiciary  
Latest Major Action: 4/6/2005 Referred to House committee. Status: Referred to the House Committee on the Judiciary.

[S.732](#): A bill to authorize funds to Federal aid highways, highway safety programs, and transit programs, and for other purposes.  
Sponsor: Sen Inhofe, James M. [OK] (introduced 4/6/2005)  
Committees: Senate Environment and Public Works  
Senate Reports: 109-53  
Latest Major Action: 4/6/2005 Placed on Senate Legislative Calendar under General Orders. Calendar No. 68.

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

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10. Guest Column: The REAL ID Act: A Radical and Misguided Approach to Immigration Reform, by Peter Schey

*Peter Schey is president of the [Center for Human Rights and Constitutional Law](#). The Center is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, and the poor.*

The more extreme anti-immigrant crowd in Congress is on the verge of winning a major a victory that will harm the national security, devastate immigrant and refugee families, and substantially increase the undocumented population living in the United States.

Those who care about national security, safe highways, or humane treatment of migrants, should immediately write and telephone their Senators urging them to oppose the REAL ID Act when it comes before the Senate in the next few days.

As with many other bad legislative ideas that are enacted under the radar without hearings where the merits of proposals can be discussed and evaluated, the REAL ID (H.R. 418) recently was endorsed by the House of Representatives without a single hearing and is now on a fast track as a rider to an Emergency Supplemental Appropriations bill for Iraqi war and tsunami relief efforts to be voted on by the Senate in the coming days.

Passage by the House of the REAL ID Act is something akin to legislative vigilantism. International standards and this country's historic commitment to legitimate asylum seekers

are abandoned in favor of harsh, irrational, and probably unconstitutional policies. Bounty hunters are encouraged to track down suspected undocumented migrants. Legitimate national security concerns are cast aside in favor of irrational xenophobic policies that scapegoat migrants for the crimes of terrorists.

There are many reasons why the Senate would be well advised to reject this radical and foolish proposal.

#### *Cracking down on asylum seekers*

First, the REAL ID Act will deny refuge to those fleeing persecution by substantially heightening already stiff rules asylum-seekers must overcome to win relief from deportation. Rigorous rules have already greatly reduced the small size of successful asylum seekers in this country. In 2003, the most recent year for which the US Citizenship and Immigration Services (CIS) makes statistics available, only 15,470 migrants of all nationalities were granted asylum by the CIS. That was a major decrease in approved cases from the 25,773 granted in 2002, 28,689 in 2001, and 22,859 in 2000. The numbers of asylees granted lawful permanent resident status has also decreased substantially over recent years, with 44,927 cases approved in 2003, compared with 126,084 in 2002, 108,506 in 2001 and 65,941 in 2000.

The proponents of the REAL ID law will only be happy when these numbers approach zero. However, as virtually all migration experts understand, when people are fleeing persecution, torture, or death, insurmountable asylum laws on a country's books will not stop the migrants' flight to freedom. Instead, these migrants will simply live in undocumented status, glad to be alive even if they're living underground, surviving in a black market economy, and subject to exploitation in a multitude of ways. I have yet to meet an asylum seeker who studied U.S. asylum law before fleeing his or her persecutors and entering this country in search of safe haven.

The REAL ID will also violate binding obligations the United States has undertaken under the several international instruments, including the United Nations Protocol Relating to the Status of Refugees which provides, in part, that no state shall deport any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or owing to such fear, is unwilling to return to it.

In terms of the fight against terrorism, there is no reason to believe any potential terrorist would ever come to the United States and seek asylum as his or her ticket into the country. It is unquestionably far easier for a potential terrorist to come enter this country as a tourist or foreign student. Asylum applicants must provide a wide range of detailed information about their backgrounds not required of applicants for other visas. It is also well known that asylum seekers are detained at our air and sea ports pending review of their cases. Terrorists are not looking for ways to be detained by the U.S. Government the moment they arrive here.

The notion that the national security is in any way served by making it more difficult than it already is to obtain asylum in this country is ludicrous. It will simply add to an already large population of undocumented migrants who live in this country without the Government knowing who they are, what they are doing, or where they live. That will obviously not help the nation's security in any way.

### *Cracking down on migrants freedom of speech*

The REAL ID Act next aims its hammer at non-citizens who have the temerity to support liberation struggles in their home countries or make donations for things like tsunami relief to non-military social services groups that are linked to armed groups fighting to overthrow repressive regimes. Under the REAL ID Act, Nicaraguans who supported the U.S-backed "Contras" fighting to overthrow the Sandinista Government would all be tossed out of the United States. So would those who supported Nelson Mandela's African National Congress, or who sent money to a fund to win Mandela's freedom from a life sentence in prison.

This portion of the REAL ID Act is a real gift to dictators and repressive regimes all around the world. Many of the same anti-immigrant legislators who seek to ban migrants from supporting struggles for democracy in their home countries are the staunchest defenders of the Second Amendment's right to bear arms in the United States. They obviously agree that the use of arms in the American Revolution and other revolutions against repressive regimes throughout history were fully justified. They forget that even the preamble to the Universal Declaration of Human Rights recognizes the legitimacy of "rebellion against tyranny." Nevertheless, the REAL ID Act tells the world's repressive regimes and dictatorships that migrants fleeing to the United States will be prohibited on pain of deportation from in any way supporting those fighting to topple these regimes. Indeed, migrants will not even be permitted to support non-military groups providing social services to suffering communities if such groups have any links to groups engaged in armed struggles to overthrow brutal dictatorships.

This policy of course in no way helps the national security unless one believes that our security is somehow mysteriously enhanced by supporting dictatorships around the world. Indeed, support of repressive regimes, in this case by muzzling their opponents in the United States, may if anything encourage terrorist acts against the United States.

### *The federal judiciary is out of control – let's hammer migrants to ease Congressional frustration*

Next, unable to secure their pound of flesh from an independent judiciary they consider out of control, it is relatively easy for frustrated anti-immigrant legislators to take a slap at the judiciary when it comes to non-citizens. The REAL ID Act restricts a federal judge's authority to review cases involving migrants who have been treated unlawfully by the Department of Homeland Security. Most troubling, the law would take away a federal judge's ability to temporarily halt a deportation while the judge was reviewing an appeal of the migrant's case. This is like passing a law that prohibited any federal judge from granting Terri Schiavo's parents a temporary stay to save her life while the court reviewed their appeal.

Under present law a federal judge may only grant a temporary stay of deportation if the judge is convinced that a migrant's appeal raises substantial issues and establishes a likelihood of success on the merits of the appeal. This rule protects migrant's with legitimate appeals from premature deportation while also safe-guarding against delay in the execution of a deportation order if the appeal appears to have little merit.

Many of the same legislators who believed that a person in a 15-year vegetative state should in effect have every possible access to federal appeals so that a life would not be wrongfully ended, have no trouble sending an asylum seeker back to his or her persecutors even in the face of death while his useless appeal remains pending before a powerless judge. Migrants must now it seems pay the price for Congress' frustration with constitutional rules relating to the historic writ of habeas corpus, the separation of powers,

and independence of the judiciary.

*Cracking down on migrant drivers licenses – let's support unsafe streets and highways and make sure we cannot track down terrorists*

Next the REAL ID turns its anti-immigrant legislative hammer on immigrants' ability to get drivers licenses. The proposed law ignores the fact that in December 2004 the Congress passed the The Intelligence Reform Act, which includes detailed and comprehensive federal standards on state-issued driver's licenses and IDs to improve security and reduce fraud. The provisions of the Intelligence Reform Act were recommended and endorsed by the 9/11 Commission.

Under the proposed new law, several million immigrants, including those who have played by the rules and come forward to apply to legalize their status, will be cut off from driving legally regardless what their state laws require. Do the supporters of the REAL ID Act truly believe that these migrants will immediately sell their cars and stop driving to work to support their families because a new federal law takes away their driver's licenses?

For the most part people drive to get back and forth to work, and people work to survive and support their families. It should be reasonably clear to any thinking person that if the REAL ID Act is enacted into law, the vast majority of migrants will simply keep driving on our streets and highways without testing, licenses, registration, or insurance. The REAL ID Act is a good idea if you own a morgue and support traffic deaths, or an insurance company and support high uninsured motorist premiums.

From the standpoint of national security, this portion of the REAL ID Act, like many of its other provisions, will simply drive people underground and steer them clear of government information data bases, including DMV records, that are used in the fight against terrorism. Thanks to the REAL ID, unlike the 9/11 terrorists, the next round of terrorists in this country won't even have DMV records to tell us who they are, where they've lived, or what their fingerprints look like. Under the REAL ID law, the next round of terrorists will be using easily obtained fake drivers licenses. There will be no DMV records to tell us where they have lived or are living now, or what their fingerprints look like. Usama Bin Laden should be chuckling at this proposal.

*Supporting private vigilantism – let's get some bounty hunters to round up those migrants*

Next, in a nod to the recent swell in anti-immigrant vigilantism by xenophobic private militias operating along the U.S.-Mexico border, the REAL ID Act will make migrants fair game for private bounty hunters who are provided unprecedented authority to "pursue, apprehend, detain and turn over" immigrants subject to orders of removal. This new writ of arrest dispensed to untrained and unsupervised private citizens will certainly increase vigilantism and lead not only to wrongful and violent chases, detentions, and arrests, but also lawsuits for false arrests against the federal Government. Enforcing the nation's immigration laws is best left to trained and supervised officers of the Department of Homeland Security, not private bounty hunters.

*Fortress America – let's build a Berlin Wall in a place no terrorists are likely to enter the country*

Finally, in order not to miss any really bad idea, the REAL ID Act turns its attention on irregular migration across the Mexico-US border. Rather than including any rational policy change to reduce the flow of unlawful border crossing, the REAL ID instead places its trust

in a fortified "fence" along our borders with Mexico and Canada.

Migrants have been crossing fences and barriers for thousands of years in order to feed their families, reunite with their families, or escape persecution. Those who support a Berlin Wall solution to this country's immigration policy failures should better understand the family values that drive migrants to cross dangerous and difficult frontiers in order to join their families or find work so their families at home may escape extreme poverty.

A rational solution to unlawful border crossing might include, for example, serious enforcement of penalties against employers who hire undocumented workers, a realistic adjustment of the quotas under which people may immigrate lawfully, and a major reduction in CIS backlogs that leave people in undocumented status for many years forcing them to cross the border illegally whenever they need to be with ill or dying relatives or simply visit their families. The powerful "push" factors that encourage undocumented migrants to enter the United States unlawfully, combined with the "pull" factors of employment and family reunification, will always trump the fences that anti-immigrant policy makers may construct.

Building a fence along the Mexico and Canada borders is nothing more than a wasteful distraction in the fight against terrorism. It is like closing a back door to your house while leaving the front door wide open. Foreign terrorists are far more likely to enter the country "legally," rather than risk apprehension at the time of entry by crossing the border without inspection. Furthermore, a fence without guards is easily climbed over or tunneled under. Neither the White House nor the Congress have ever agreed to fund anything close to the number of Border Patrol agents required to effectively guard the U.S. borders.

### *Conclusion*

Mark Twain once said that to the man who only has a hammer, everything begins to look like a nail. That, unfortunately, is the problem with the authors of the REAL ID Act. Their sledge-hammer approach to immigration reform is counter-productive from the standpoint of the national security, and inhumane in its treatment of migrants who may rightfully seek benefits under existing federal law and international treaties.

It is worth noting that none of the ideas in the REAL ID Act come from the 9/11 Commission's comprehensive report or national security experts.

If enacted, the REAL ID will swell the numbers of undocumented migrants living in this country, with no federal or state agencies knowing who they are, where they work, or where they live. That may help Al Qaeda in its pursuit of terrorism, and will also be welcomed by employers across the land who exploit undocumented workers to increase profits. Rather than reduce the number of undocumented migrants living here, the REAL ID Act will increase the size of this population by blocking avenues to come forward and legalize their status. At the same time, rather than in any way helping in the fight against terrorism, the REAL ID Act will be welcomed by repressive regimes around the world as well as criminals considering a terrorist operation in the United States.

The REAL ID Act is full of real dim-witted and dangerous ideas that should be forcefully rejected by the Senate and the House-Senate Conference Committee that will soon decide the fate of the Emergency Supplemental Appropriations bill for Iraqi war efforts and tsunami relief efforts. Senators should think about immigration policy reform with their heads, not with the hammer offered them by the House authors of the REAL ID Act.

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11. Guest Column: Chintakuntla's Revenge: Can Education And Experience Co-exist Under PERM?, by Gary Endelman

*Gary Endelman practices immigration law at BP America Inc. The opinions expressed in this column are purely personal and do not represent the views or beliefs of BP America Inc. in any way nor do they represent the views of Siskind Susser. This article is copyrighted by ILW.COM and is reprinted with permission. You can read other articles by Mr. Endelman, and subscribe to future articles at [www.ilw.com](http://www.ilw.com).*

The DOL and legacy INS could never get together on a common approach to education and experience for labor certification. PERM continues this confusion. The absence of a shared understanding by DOL and the USCIS will discourage e-filing of the ETA 9089 and increase the chances for an audit. It will also make PERM adjudications take longer than necessary and require lawyers to prepare their cases with great care to explain why their client qualifies as an advanced degree professional under the EB-2 category, something of surpassing importance given the recent retrogression in the EB-3 preference. All of this may aptly be termed as "Chinatakuntla's Revenge", harkening back to a signal victory in May 2000 when the noted San Francisco-based law firm of Berry, Appleman & Leiden persuaded a federal district court that their client had the equivalent of a Master's degree based on attainment of a baccalaureate and five years progressive experience. While the immigration bar understandably embraced this happy result, it served to postpone the need for the DOL and USCIS to forge a consensus on these key issues, thus setting the stage for the present problem that will come center stage after March 28th.

The decision in *Chintakuntla v. INS*, No. C99-511 MMC (N.D. Cal) flowed from an earlier legacy INS regulation at 8 C.F.R. 204.5(k)(2) that held, and still holds, a bachelor's degree and five years progressive experience to be the equivalent of a Master's degree. On March 20, 2000, the Service published a memorandum designed to provide field guidance for adjudicators when the ETA 750 Part A form did not clearly indicate whether a person with a bachelor's education must have five years post-graduation progressive experience in the profession in order to satisfy the minimum requirements for the advertised job. As part of the settlement in *Chintakuntla*, the legacy INS published this entire memorandum in the [Federal Register on July 3, 2000](#). At the time, all parties could live with the resultant ambiguity, indeed, even profit by it since the labor certification system was not software driven. This will all change with PERM. What no one wanted to define will now become not a platform for advancement of our client's interests, but a potential reason for major delay in their fulfillment.

Noted immigration attorney Sheela Murthy cogently summarizes highlights of the first PERM training session held by DOL in Chicago, Illinois on January 11, 2005. She relates to her readers what DOL top brass think will trigger an audit under PERM:

"Under PERM, there are certain programmatic "flags" that will trigger DOL case audits. Audits will be triggered by responses on the forms. The DOL is using technology to detect anything odd, down to whether the phone number provided for a company is a cell phone number." <http://www.murthy.com> (January 27, 2005).

There is going to be a lot that looks "odd" when lawyers start trying to complete the ETA 9089 form for clients who want to qualify under the EB-2, particularly if they are from India or mainland China, but do not have a Master's degree. The problem is one of nomenclature, a Master's simply means something different to DOL than it does to the USCIS. DOL thinks in terms of Specific Vocational Preparation ("SVP") levels which limit how much experience

any employer can require; while these are a creature of the DOT, which will now be discarded under PERM, the SVP concept will live on within the umbrella of the O\*NET job zones. For DOL, a Master's equates to four years experience. The same degree equates to far more than that when translated into immigration-speak. To the USCIS, as both Chintakuntla and 8 C.F.R. 204.5(k)(2) mandate, a Master's translates into a Bachelor's with five more years tacked on to reach the EB-2 holy grail. Since the DOL counts the Bachelor's degree by itself as the equivalent of two years work experience, when we crosswalk Chintakuntla into the world of the SVP, we wind up with a grand total of seven years for the Master's! So, something that means four years to DOL can wind up meaning a whole lot more than that. Now, when you add on to the Master's the extra requirement of work experience, the tote board count becomes even more eye poppin'.

Now, when the attorney could lay all of this out in writing for the DOL, the confusion could be contained within manageable boundaries and the trained DOL professionals got used to reviewing these tricky formulations. No problem. PERM is an entirely different animal. PERM is designed to be a web based submission submitted to contract workers who will not have anything else but the ETA 9089 form and the PERM software to guide them in deciding whether to audit or not. Whatever the extent of their training is going to be, Chintakuntla may not be on the syllabus. Section H of the ETA 9089 is where the rubber will hit the road.<sup>[1]</sup>

Question 4 asks what the minimum education is, so you answer "Master's". This brings you to Question 6 where you specify the number of years experience that the job demands. Say, you ask for zero experience, just the Master's and nothing else is ok.. So far, so good- the EB-2 looks safe and secure, right? Take a deep breath and motor on to Question 8 where things start getting dicey. Yes, you say to Question 8, there is an alternate combination of education and experience that is required- now you summon up all your courage to tackle 8A, remember what they taught you in law school about being a zealous advocate, and check off the box next to Bachelor's. Skip down to Question 8C which asks the seemingly innocent question about how much experience you need to complement the alternate education. AHA! Gotcha! What do you say to that one? Do you put zero experience since you listed that earlier in Question 6? If you do that, how does your client who did not earn a Master's qualify for the EB-2? What about the five years progressive experience that you need to fit snugly within the Master's? So, knowing the need to be ethical, you say that five years experience is required. That loud buzzing sound in your ear is the PERM software going haywire because your primary requirements and alternative requirements are not the same. In the software driven world of PERM, you have a problem.

Not only can the unsuspecting attorney walk into a trap over a conflict between answers to Questions 6 and 8C, but what you have likely now may burst the confines of your SVP category, so that your job requirements might no longer be regarded as "normal" for the occupation, even though this term is nowhere defined under 656.3 of the PERM regulations. Let's use a different example to make this point. Say, you now want a Master's and 4 years experience for an Engineer which has an SVP rating of 8 (4-10 years). Your client only has the Bachelor's but tons of experience. No problem, right? You simply use the Bachelor's + 5 years formula to qualify for the Master's and just add on another four years experience which the client clearly has. Don't relax just quite yet, counselor. You now have an SVP problem: the Bachelor's counts for two years + another nine years experience for a grand total of eleven years ! You are now on the wrong side of the SVP divide and there is trouble in Dodge City. The normalcy cops who guard the gates east of eden outside Question 12 are going to raise their red flag when you check off "NO" to their inquiry. However necessary your experience requirements are to the EB-2 claim, they are not normal to the occupation. By this time, your blood pressure has zoomed off the charts, your labor certification is

spiraling out of control and your client is on the phone wanting to know where things went south.

There is an answer. For those cases where the attorney needs to take advantage of Chintakuntla, a web-based submission should be avoided at all costs. You must file by mail and prepare a short, well-reasoned and logical memorandum that explains why your client really has the equivalent of the Master's and is a worthy EB-2 candidate. How you are going to get around the prohibition in 656.17(a)(3) of not providing any supporting documentation with the application might be a bit of a problem, although, as both DOL and the USCIS constantly remind lawyers at every turn, legal argument does not rise to the level of documentation. In the end, the DOL and USCIS are going to have to sit down and do something they have conspicuously avoided doing, namely coming up with a common strategy to deal with education and experience for labor certification. Robert Divine and Harry Sheinfeld should buy each other a tall cold one sometime real soon and discuss how the intersection of Chintakuntla and PERM has made both of their lives more interesting. Doubtless, when the architects of PERM thought of all the possible problems they might encounter, this one was not at the top of the list. Indeed, it may not even have been on the radar screen. But, it is there now since PERM is a software-driven process. The marker that Chintakuntla laid down must be paid in full.

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<sup>1</sup> On page 17 of DOL's FAQ there is a question that bears discussing in the light of Chintakuntla: "Does the alien beneficiary need to have a bachelor's or higher degree to qualify for a professional occupation?" "No, the alien does not need to have a bachelor's or higher degree to qualify. However, if the employer is willing to accept work experience in lieu of a baccalaureate degree, such work experience must be attainable in the US labor market and the employer's willingness to accept work experience in lieu of a degree must apply equally to US applicants and must be stated on the application form." The form itself (Section H) does not exactly allow the employer to say precisely that. Question 8 asks if there is an "alternate combination" of education and experience that is acceptable? Questions 8B and 8C follow this up by asking (1) what education and (2) what experience would be required for this "alternate combination". Now, it would seem that this combination of three questions taken together are meant to allow the employer to "accept work experience in lieu of a degree" but the words are not the same and the possibility for confusion exists. One wonders why the form did not simply use the same terms that the answer to the FAQ used so that the intent of the employer and the meaning of what the employer would accept are transparent and evident to all.

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## 12. Western Hemisphere Travel Initiative Introduced

On April 5, 2005, the U.S. Departments of State and Homeland Security announced in a media note the Western Hemisphere Travel Initiative, which will require all U.S. citizens, Canadians, citizens of the British Overseas Territory of Bermuda, and citizens of Mexico to have a passport or other accepted secure document to enter or re-enter the U.S. by January 1, 2008.

Currently, U.S. citizens, and some citizens of other countries in the Western Hemisphere are not required to present a passport to enter or re-enter the U. S. when traveling within the Western Hemisphere. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA, also known as the 9/11 Intelligence Bill), signed into law on December 17, 2004, mandated that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require U.S. citizens and foreign nationals to present a passport, or other secure document when entering the United States.

The Departments of Homeland Security (DHS) and State (DOS) are issuing an Advance Notice of Proposed Rulemaking (ANPRM) on the plan to the public and requesting input and/or comment on the suggested documents and possible alternative documents that can meet the statutory requirements. A more formal rulemaking will be issued later this year following review of those comments to implement the first phase of the initiative. This rulemaking will take into account comments received from the advanced notice as well as soliciting further comments on the rulemaking itself. For more information, visit [www.state.gov](http://www.state.gov).

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### 13. Nationwide Poll Shows Support Among Voters for Proposed Immigration Reform

The Tarrance Group, a polling and strategic research firm, recently conducted a nationwide survey of likely voters regarding immigration reform. The group's findings show support among likely voters for the proposed outlines of bipartisan legislation on immigration reform. The poll found that 75% of likely voters favor a proposal that has the following components:

- Registration of undocumented workers as temporary guest workers,
- Provides temporary work visas for seasonal and temporary workers,
- Provides newly registered workers with a multi-year process for legal residency and eventual citizenship,
- Provides newly registered workers with no preferential treatment for citizenship,
- Provides tougher penalties for workers or employers who violate these laws, and
- Puts a priority on reuniting close family members.

The poll found that 78% of Republicans, 77% of Independents and 70% of Democrats are supportive. Support is also solid across demographic lines, as 78% of whites, 67% of African Americans and 70% of Hispanics are supportive.

69% of likely voters indicated that they would be more likely to support a Congressional candidate who supported this type of immigration proposal.