

Siskind's Immigration Bulletin  
February 15, 2005

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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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1. Openers

Dear Readers:

We have been reporting for several weeks on H.R. 418, the Real ID Act. This is another piece of legislation that sounds great at first glance, but then a host of problems are discovered the more you examine it. The bill purports to be about making driver's licenses harder to fake. That sounds easy to support. But then you learn that the federal government is mandating standards that states must meet without actually providing states with the funding to implement those standards. And states that offer driver's licenses to people without legal documents will be punished even if the state has made the decision that for public safety reasons they want to ensure that all drivers on the road get licensed. Finally, the rule will make it much more difficult for people with non-immigrant visas to get drivers licenses. They are going to have to reapply every year. If your state is like my home state of Tennessee and has a terribly disorganized and delay-burdened DMV, having to get re-licensed every year will be a major burden for people who are here legally. And it basically takes us to the point of having a national identification card without having any public debate on this highly controversial idea.

The bill also contains harsh provisions that allow judges to dismiss asylum cases based on inconsistencies in the applicant's testimony even if the applicant had a good reason for being inconsistent and even in the discrepancy is not germane to the main issues in the case. The US has dramatically toughened its rules regarding asylum over the last few years and there is no evidence to support the notion that this change in the law will make us any safer from terrorism.

This week, Margaret Stock writes a guest commentary on another controversial section of the law governing charitable contributions. We also will report on the status of the bill in the Senate. The Senate is not expected to be interested in keeping some of the more controversial sections of the bill, but the politics on the legislation are volatile right now.

We also have an interesting commentary by regular contributor Gary Endelman regarding the interplay between the new PERM program and the rollback in EB-3 numbers. Speaking of EB-3 numbers, the unskilled EB-3 worker category has suddenly backlogged by several years. Applicants in that category need to get their cases filed by the end of the month in order to avoid being stuck waiting to file for several years.

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In firm news, I received a copy of a book this week in which I have authored a chapter. The book is called THE BIGGEST LEGAL MISTAKES PHYSICIANS MAKE. I have written, not surprisingly, the chapter on immigration mistakes. The book is available online at the publisher's web site at [www.seak.com](http://www.seak.com).

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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: Bringing Mandamus Suits Against the USCIS

Nearly every person who has ever dealt with the USCIS knows that in some cases, the agency simply fails to move forward with a case despite taking every conventional effort possible. In these cases, there is ultimately only one action that the aggrieved party can take to force the agency to act – filing a lawsuit. This type of lawsuit is commonly known as a “writ mandamus.” A writ of mandamus is a form of civil action designed to compel a government actor to perform a duty owed to the plaintiff. It is important to note that mandamus is not used to force the USCIS to reach a favorable result, but only to take action that it is legally obligated to take. It can result in a denial of the application.

Before filing the lawsuit, there are a number of steps that should be taken. This is so that when the suit is filed, the plaintiff has clearly done everything they can, short of filing a lawsuit, to resolve the problem. A plaintiff who appears in court without having attempted to resolve the situation in other ways will not be particularly sympathetic, whereas one who has will be.

The first step to take when processing on a case that has gone beyond the stated time is to make inquiries with the USCIS. Members of the American Immigration Lawyers Association have access to fax numbers that can be used to make these inquiries at the USCIS Service Centers, as well as numbers for local USCIS offices that are not always publicly available. AILA also has a liaison system that can be used to make inquiries. Under AILA's rules, several fax inquiries need to be made over a specific time period before a liaison inquiry will be submitted to USCIS. While there are no requirements for inquiries at local offices, faxing in an inquiry at least two times over a one to two month period is advisable.

If no resolution is reached, the next step is to draw up the legal complaint that will be filed in court. The suit will be filed in the federal court with jurisdiction over the petitioner or applicant. There are a number of formal requirements for the complaint such as including a statement that jurisdiction and venue are properly with the court. The lawsuit must also lay out the facts of the case, including efforts that have been taken to resolve it. It is a good idea to initially send copy of the complaint to the USCIS office handling the case, along with a letter explaining the situation and noting that if the case is not resolved within a certain period, generally 30 days, further action will be taken. This step will often have the desired effect, if not producing a decision, of at least prompting the USCIS to begin working on the matter. If the USCIS asks for additional evidence (which can sometimes function as a delaying tactic) and still will not action after the requested documentation is supplied, the mandamus process should be resumed.

If sending the complaint does not produce results, it should be rewritten to include the latest efforts to resolve the case and sent to the USCIS again as well as to the appropriate US Attorney. This is the stage at which most cases are resolved. The US Attorney, understandably, does not want to spend time in court defending USCIS' failure to take action. The US Attorney often contacts the USCIS office and pressures them to act.

If, after a month, there is still no action on the case, the complaint should be updated again and prepared for actual filing. Procedures vary from jurisdiction to jurisdiction, but the general process is the same. The complaint is taken to the clerk of court where it is registered as filed. When filing a suit against the government, a copy of the complaint must be sent to the government actor who has failed to act (the head of the USCIS office involved), the proper US Attorney, and the US Attorney General.

Again, this action often has the effect of prompting the USCIS to take action. If not, the parties proceed with the case. As in any federal case, the first step is a conference with the judge assigned to the case, the plaintiff's attorney, and the US Attorney representing the government. At the conference, the judge makes efforts to help the parties resolve the dispute. If this effort fails, the case proceeds to trial. Given the large caseload of federal courts, this process can take many months. A few months after the trial, the judge issues a decision. If the decision is favorable to the plaintiff, the decision will also include an order compelling the USCIS to take action on the application. If the USCIS fails to act, officers of the agency are subject to being held in contempt of court.

It is the rare case where there has been an excessive delay that does not result in a favorable resolution at least at the trial stage of a mandamus case. But the good news is that most of these cases can be resolved favorably without having to go to court at all.

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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.

Q - I am a Salvadoran Temporary Protected Status applicant. My daughter who is 4 years old came to the U.S. on April 2004. Can she apply for T.P.S. based on my status? I did put her name in my initial application.

A - Your daughter is not eligible for TPS if she just arrived last year. There are circumstances under which one can file late for TPS but the applicant still had to be here on the date of enactment. Here is a link to a web site with all the information on TPS.

[http://uscis.gov/graphics/services/tps\\_inter.htm](http://uscis.gov/graphics/services/tps_inter.htm)

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Q - Is it possible to receive H-1B status for a job of only 10 hours a week?

A - Yes. There is no minimum number of hours per week for an H-1B approval.

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Q - I have a brother who is a US citizen living in Florida can he sponsor me?

A - He can sponsor you for a green card, but expect a wait of at least a dozen years because of a limited number of visas in that family category.

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Q - My husband who is incarcerated has been once before an immigration judge about 4 years ago. He was told he would be deported back to Mexico and a detainer was placed on his parole release. Will he have to appear before a judge again before being deported and if not how long can they detain him here in the US before deporting him to Mexico after his prison release? Also will immigration automatically pick him up at prison or may he be released and then deported later?

A - It sounds like he has already been ordered removed and the Service is just waiting for him to complete his sentence. They can hold him while they are in the process of removing him. It usually takes about 90 days to be removed. If removal is not foreseeable because of a lack of travel documents or because the country will not accept him, he may be released on bond and an order of supervision. This most likely not the case in Mexico.

They will not release him before removing him. Sometimes they will allow him to be escorted to his home to pick up what articles he needs to take with him.

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Q - I am working at a university with my OPT permit. Currently, my H-1B application is pending. Recently, I got a job offer from a for-profit company. I want to move to and work for the company with my OPT permit. Can I start working for the company and then apply for a cap-subject H-1B visa while my non-cap-subject H-1B application is pending? Of course, before I move to the company, I should cancel the contract I made with the university.

A - That's a tough question because the rules in this area are very unclear. I believe that the only way you could do something like this would be if you were seeking concurrent H-1B approvals and you probably would need to get the university job approved first.

You did not say what type of degree you received. If it was higher than a bachelor's degree, you may be eligible for one of the new 20,000 slots opening up next month.

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Q - I have a brief visa question for you. I work for a law firm that represents an infant who was severely burned in an accident 5 years ago. A suit is pending; however, the only witness to the accident is located in Jamaica. Is there a special Visa that he could get for purposes of testifying in a civil trial? I read your article on S-Visa's, and was wondering if there is a civil counterpart. Otherwise, would a B1 Visa be proper.

A - The B-1/B-2 visitor visa is the appropriate category. I probably would provide a letter explaining the purpose of the trip, provide the witness with a roundtrip ticket long enough only to cover the expected period needed to be here in connection with the suit, and verification from you that all of the witnesses expenses here will be covered. It would also help if you could provide something from the court backing you up on the need for the witness to come here to testify and requesting the consular officer grant the visa.

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#### 4. Border and Enforcement News

U.S. Border Patrol agents in the Tucson sector came under gunfire three times last week. Since October 1, the Tucson sector has had 80 reported attacks. The most recent ones were reported to the FBI, however the agency is not investigating the shootings. At the current rate, the assaults on agents could match an overall high of 341 in fiscal year 1999.

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Two dozen illegal immigrants with criminal backgrounds could be deported or prosecuted after their arrests this week by federal authorities and suburban police, according to officials in Chicago. It was the third sweep targeting gang members and others with criminal records in Chicago's suburbs in the last 17 months, according to U.S. Immigration and Customs Enforcement.

Immigration agents and police from seven northwest and west suburban departments arrested 23 Mexican nationals and a Guatemalan in a sweep that began Monday night. Nineteen were known street gang members.

All had previous arrests on drug and other charges, including aggravated assault, firearms, theft, and traffic violations. All were men, mostly in their late teens and early 20s. The

sweep was conducted as a result of investigations begun by local police and turned over to immigration agents.

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## 5. News From The Courts

U.S. Court of Appeals Holds that Alien Smuggling Statute Requires an Actually Illegal Entry  
Rosas-Lopez v. Ashcroft, 2005 U.S. App. LEXIS 789 (9<sup>th</sup> Cir.).

The Ninth Circuit Court of Appeals held that in order to be in violation of the alien smuggling statute, found at 8 U.S.C. § 1182(A)(6)(E), an actual illegal *entry* into the United States is required.

The Petitioners, natives and citizens of Mexico, are married with five children. Four of the children are natives and citizens of Mexico, and one child is a native and citizen of the United States, born after the family's entry into the U.S. in the mid-1980s. The U.S. citizen child has health problems and requires medical treatment in the U.S. When served with notices to appear for removal proceedings in 1998, the Petitioners applied for cancellation of removal under 8 U.S.C. § 1229b(b).

The Immigration Judge found that the Petitioners failed to qualify for cancellation of removal because they could not establish "good moral character" as required by 8 U.S.C. § 1229b(b)(1)(B). The Immigration Judge determined that the Petitioners had been involved in alien smuggling in violation of 8 U.S.C. § 1182(A)(6)(E), by bringing their four children into the U.S. on valid 72-hour border crossing cards and then keeping them in the U.S. beyond the terms of the border crossing cards. The Immigration Judge determined that the actual entry itself was legal, but that keeping the children in the U.S. beyond of the terms of the border crossing cards placed the Petitioners in violation of the alien smuggling statute.

The Ninth Circuit reversed and remanded the Immigration Judge's decision and the Board of Immigration Appeals' affirmation, stating that the plain language of the statute focuses on *entry*. Section 1182(A)(6)(E)(i) reads, "any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is inadmissible." The Ninth Circuit held that since the four children *entered* legally with valid border crossing cards, that the Petitioners did not violate 8 U.S.C. § 1182(A)(6)(E). The case was remanded for further consideration of the Petitioners' applications for cancellation of removal.

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## 6. Government Processing Times

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

Nebraska (02/15/2005): <http://www.visalaw.com/nebraska.html>

Texas (01/31/2005): <http://www.visalaw.com/texas.html>

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## 7. News Bytes

In a recent 2-0 vote, Canyon County, Idaho commissioners passed a resolution to declare the county a disaster area because of illegal immigration. According to the *Idaho Press-Tribune*, Commissioner Robert Vasquez authored the resolution because he said an influx of illegal immigrants poses a serious enough threat to its residents to be considered an emergency due to money spent on indigent medical care and incarceration of illegal immigrants. Vasquez also referenced county detention officers being exposed to tuberculosis and an outbreak of syphilis in Canyon County this year, and linked the spread of these diseases to illegal immigration. He also said that undocumented immigrants are responsible for the most crime in the county, and cited a 20 percent increase over 5 years of undocumented immigrants making applications for county welfare. Immigration advocates are adamantly expressing their opinion against Vasquez and his resolution.

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A flood of senior managers are preparing to leave the Homeland Security Department, and some outside observers are worried that this could affect several efforts of the department. The resignations include Secretary Tom Ridge, Deputy Secretary James Loy, Undersecretary for Border and Transportation Security Asa Hutchinson, Undersecretary for Information Analysis and Infrastructure Protection Frank Libutti, Assistant Secretary for Infrastructure Protection Robert Liscouski, and Executive Director of the Office of State and Local Government Coordination and Preparedness C. Suzanne Mencer.

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In Washington, D.C. last week attorneys filed a petition for habeas corpus in the United States District Court for the District of Columbia on behalf of the hundreds of unrepresented people who remain detained by the United States Government at Guantánamo Bay. These nameless detainees join more than 70 whose cases challenging their continued imprisonment are already being addressed in federal court.

The suit, spearheaded by lawyers from the Center for Constitutional Rights (CCR), is captioned "John Does Nos. 1-570 v. Bush" because the names of the detainees kept in indefinite detention have been withheld. Until now, without the names of the detainees and without physical access to them, lawyers have been unable to help those who wish to seek their day in court under the Supreme Court's decision last June in *Rasul v. Bush*. In that case the Supreme Court held that each detainee has the right to challenge his detention in federal court.

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According to a media note from the State Department, Over 6.3 million entries for the 2006 Diversity Visa Lottery were received during the two-month electronic registration period, from noon on November 5, 2004, through noon January 7, 2005. Anti-fraud technology in use for the 2006 Diversity Visa Lottery detected 31,334 exact duplicates, which were then eliminated from the eligible entry pool. An additional 5,221 entries were eliminated through the utilization of facial recognition and knowledge discovery software.

Persons submitting entries to the 2006 lottery received a notice of receipt containing the name, date of birth and country of chargeability for the registrant, as well as a time/date stamp when entries had been successfully registered. The number of winning entries by country of chargeability will be available later this year after the random lottery process is complete.

There have been several instances of groups or individuals attempting to defraud Diversity Visa Lottery entrants. Lottery entrants selected as winners in the Diversity Visa random drawing are notified by the Department of State's Kentucky Consular Center. No other organization or company is authorized by the Department of State to notify Diversity Visa Lottery entrants of their winning entry. Notification of winning entries will be sent to the winning entrants by mail only between May and July 2005 and will provide further instructions, including information on fees connected with immigration to the United States.

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## 8. International Roundup

Bahamian authorities intercepted a boat carrying 31 Haitian migrants, bringing to more than 400 the number caught trying to enter the country this year according to officials.

The 25 men and six women were apprehended in a 45-foot slope east of New Providence Island Saturday night, the Royal Bahamas Defense Force said. They were turned over to immigration officials and are being processed at a detention center in the capital, Nassau.

The migrants had been at sea for a week after leaving Port-de-Paix on Haiti's north coast, according to the Defense Force.

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Insurance company Axa paid 600,000 euros (778,000 dollars) to the families of 58 Chinese who were suffocated to death in a Dutch truck smuggling them into Britain, the company said Friday.

The truck was insured with Axa when the bodies of the 58 were found at the British port of Dover after it crossed the Channel from Rotterdam in June 2000. Only two of the immigrants escaped alive.

The driver was sentenced to 14 years in prison by a British court in April 2001, while nine other people found guilty of involvement in the smuggling, including two Chinese, were jailed for up to 10-and-a-half years in the Netherlands in June 2002.

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## 9. Legislative Update

Several faith-based groups are opposed to H.R. 418, a Republican-sponsored immigration and border security bill that could move quickly through the House with a spending package for the wards in Iraq and Afghanistan. The groups say the bill, sponsored by House Judiciary Committee Chairman James Sensenbrenner proposes asylum law changes that would hurt refugees fleeing religious persecution and should be debated in full committee hearings. Sensenbrenner maintains that the changes will prevent would-be terrorists from slipping into the country by abusing the asylum system. The changes are tucked into a bill that seeks to prevent undocumented immigrants from getting drivers' licenses and to complete a fence on the California-Mexico border.

[H.RES.78](#) : Recognizing the importance of designating the Republic of Poland as a program country for purposes of the visa waiver program under section 217 of the Immigration and Nationality Act and urging the Secretary of Homeland Security and the Secretary of State to assist Poland in qualifying for such program.

Sponsor: Rep Emanuel, Rahm [IL-5] (introduced 2/9/2005)

Committees: House Judiciary

Latest Major Action: 2/9/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.606](#) : To authorize appropriations to the Secretary of the Interior for the restoration of the Angel Island Immigration Station in the State of California.

Sponsor: Rep Woolsey, Lynn C. [CA-6] (introduced 2/2/2005)

Committees: House Resources

Latest Major Action: 2/2/2005 Referred to House committee.

Status: Referred to the House Committee on Resources.

[H.R.608](#) : -- Private Bill; For the relief of Geert Botzen.

Sponsor: Rep Lee, Barbara [CA-9] (introduced 2/2/2005)

Committees: House Judiciary

Latest Major Action: 2/2/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.671](#) : -- Private Bill; For the relief of Saikou A. Diallo.

Sponsor: Rep Crowley, Joseph [NY-7] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.672](#) : -- Private Bill; For the relief of Maria Cristina Degrassi.

Sponsor: Rep Lantos, Tom [CA-12] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.673](#) : -- Private Bill; For the relief of Denes and Gyorgyi Fulop.

Sponsor: Rep Lantos, Tom [CA-12] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.674](#) : -- Private Bill; For the relief of Kuan-Wei Liang and Chun-Mei Hsu-Liang.

Sponsor: Rep Lantos, Tom [CA-12] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee. |

Status: Referred to the House Committee on the Judiciary.

[H.R.675](#) : -- Private Bill; For the relief of Maria Del Refugio Plascencia and Alfredo Plascencia-Lopez.

Sponsor: Rep Lantos, Tom [CA-12] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.677](#): -- Private Bill; For the relief of Kadiatou Diallo, Laouratou Diallo, Ibrahima Diallo, Abdoul Diallo, Mamadou Bobo Diallo, Mamadou Pathe Diallo, Fatoumata Traore Diallo, Sankarela Diallo, and Marliatou Bah.

Sponsor: Rep Rangel, Charles B. [NY-15] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.678](#): -- Private Bill; For the relief of Griselda Lopez Negrete.

Sponsor: Rep Wilson, Joe [SC-2] (introduced 2/8/2005)

Committees: House Judiciary

Latest Major Action: 2/8/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[H.R.789](#): -- Private Bill; For the relief of Alemseghed Mussie Tesfamical.

Sponsor: [Rep King, Peter T.](#) [NY-3] (introduced 2/10/2005) Committees: House Judiciary

Latest Major Action: 2/10/2005 Referred to House committee.

Status: Referred to the House Committee on the Judiciary.

[S.201](#): -- Private Bill; A bill for the relief of Katarina Galovic Gnall.

Sponsor: Sen Stevens, Ted [AK] (introduced 1/31/2005)

Committees: Senate Judiciary

Latest Major Action: 1/31/2005 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.202](#): -- Private Bill; A bill for the relief of Gustav F.K. Wallner.

Sponsor: Sen Stevens, Ted [AK] (introduced 1/31/2005)

Committees: Senate Judiciary

Latest Major Action: 1/31/2005 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.210](#): -- Private Bill; A bill for the relief of Renato Rosetti.

Sponsor: Sen Coburn, Tom [OK] (introduced 1/31/2005)

Committees: Senate Judiciary

Latest Major Action: 1/31/2005 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.220](#): -- Private Bill; A bill for the relief of Mohamad Derani, Maha Felo Derani, and Tarek Derani.

Sponsor: Sen Levin, Carl [MI] (introduced 1/31/2005)

Committees: Senate Judiciary

Latest Major Action: 1/31/2005 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.221](#): -- Private Bill; A bill for the relief of Luay Lufti Hadad.

Sponsor: Sen Levin, Carl [MI] (introduced 1/31/2005)

Committees: Senate Judiciary

Latest Major Action: 1/31/2005 Referred to Senate committee.

Status: Read twice and referred to the Committee on the Judiciary.

[S.227](#): -- Private Bill; A bill for the relief of Ernesto Guillen.

Sponsor: Sen Murkowski, Lisa [AK] (introduced 2/1/2005)

Committees: Senate Judiciary  
Latest Major Action: 2/1/2005 Referred to Senate committee.  
Status: Read twice and referred to the Committee on the Judiciary.

[S.234](#) : -- Private Bill; A bill for the relief of Majan Jean.  
Sponsor: Sen Dodd, Christopher J. [CT] (introduced 2/1/2005)  
Committees: Senate Judiciary  
Latest Major Action: 2/1/2005 Referred to Senate committee.  
Status: Read twice and referred to the Committee on the Judiciary.

[S.262](#) : A bill to authorize appropriations to the Secretary of the Interior for the restoration of the Angel Island Immigration Station in the State of California.  
Sponsor: Sen Feinstein, Dianne [CA] (introduced 2/2/2005)  
Committees: Senate Energy and Natural Resources  
Latest Major Action: 2/2/2005 Referred to Senate committee.  
Status: Read twice and referred to the Committee on Energy and Natural Resources.

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. State Department Visa Bulletin

### **IMMIGRANT NUMBERS FOR MARCH 2005**

#### **A. STATUTORY NUMBERS**

1. This bulletin summarizes the availability of immigrant numbers during March . Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by February 8th in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only applicants who have a priority date earlier than the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date.

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

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

## FAMILY-SPONSORED PREFERENCES

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

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

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

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

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

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

## EMPLOYMENT-BASED PREFERENCES

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

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

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

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

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

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

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all

qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
<b>Family</b>					
1 <sup>st</sup>	22FEB01	22FEB01	22FEB01	22OCT94	15NOV90
2A*	15NOV00	15NOV00	15NOV00	15DEC97	15NOV00
2B	15SEP95	15SEP95	15SEP95	15MAR92	15SEP95
3 <sup>rd</sup>	15JAN98	15JAN98	15JAN98	08APR95	01JUL90
4 <sup>th</sup>	01MAR93	01MAR93	22JUL92	01MAR93	22OCT82

\*NOTE: For March, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15DEC97. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15DEC97 and earlier than 15NOV00. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability Areas Except Those Listed	CH	IN	ME	PH
<b>Employment-Based</b>					
1 <sup>st</sup>	C	C	C	C	C
2 <sup>nd</sup>	C	C	C	C	C
3 <sup>rd</sup>	C	01MAR02	01MAR02	C	01MAR02
Other Workers	01JUL01	01JUL01	01JUL01	01JUL01	01JUL01
4 <sup>th</sup>	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5 <sup>th</sup>	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C

CH = China (mainland born), IN = India, ME = Mexico, PH = Phillipines

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

## 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-2005 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 March , immigrant numbers in the DV category are available to qualified DV-2005 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Region Listed Separately		
AFRICA	AF	22,800	Except: Nigeria 17,600
ASIA	AS	5,900	Except: Bangladesh 4,700
EUROPE	EU	17,150	
NORTH AMERICA (BAHAMAS)	NA	13	
OCEANIA	OC	650	
SOUTH AMERICA, and the CARIBBEAN	SA	1,300	

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-2005 program ends as of September 30, 2005. DV visas may not be issued to DV-2005 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2005 principals are only entitled to derivative DV status until September 30, 2005. DV visa availability through the very end of FY-2005 cannot be taken for granted. Numbers could be exhausted prior to September 30. **Once all numbers provided by law for the DV-2005 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 APRIL

For April , immigrant numbers in the DV category are available to qualified DV-2005 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Region Listed Separately		
AFRICA	AF	25,100	Except: Nigeria 19,700
ASIA	AS	7,000	Except: Bangladesh 5,300
EUROPE	EU	18,200	
NORTH AMERICA (BAHAMAS)	NA	13	
OCEANIA	OC	775	
SOUTH AMERICA, and the CARIBBEAN	SA	1,450	

#### D. OVERSUBSCRIPTION OF THE EMPLOYMENT-BASED THIRD PREFERENCE "OTHER WORKER" CATEGORY

Continued heavy applicant demand, primarily for CIS adjustment of status cases, has required the oversubscription of the Employment Third preference "Other Worker" (EW) category for March. This action has been necessary in order to hold EW number use within the FY-2005 annual numerical limit.

Because of the relatively low (5,000) annual limit for the EW category, it is possible that the supply of numbers could be exhausted prior to the end of the fiscal year.

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11. Guest Column: Somethin's Gotta Give: PERM And The Pressure For Larger Immigrant Quotas, 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).*

In recent weeks, observers of the immigration scene have noticed two key events that will reshape the future of employment-based immigration for some time to come. First, came the retrogression of the employment-based third preference, the EB3, for skilled workers and bachelor's degree professionals born in India, mainland China and the Philippines. While the United States Department of State has indicated that movement forward on EB3 dates is unlikely before March at the earliest, informed sources speculate that April is a more plausible estimate. Even then, there is no guarantee of any advance. Second, the US Department of Labor took a flying leap with both feet squarely into the future by finally announcing what many predicted would never come, namely publication of a final PERM rule. What, if anything, do these developments have in common?

Naturally enough, the focus on PERM has been to master the rule in all its byzantine complexity. Lawyers want to know what it means for their clients and how they can use it to their best advantage. This is no small task and there is not much time for anything else right now. That is why any examination of how PERM relates to anything else is a real eye-opener. This is a classic example of the cost of complexity, an excellent illustration of how an overly technical immigration system where a few sentences in statute can produce a hundred page regulation prevents even informed observers from being able to, or even having an interest in, taking a step back from the overwhelming reality of detail to take in the big picture.

While many anxious visa watchers take comfort in reassuring predictions emanating from Foggy Bottom, there is no reason to think that other employment-based categories, most notably EB-2 advanced degree holders, will not soon suffer the same fate as their less fortunate EB-3 brethren. Truth is that the full impact of the 245(i)-inspired tsunami of labor certifications has not yet registered. More than a few of these cases just now coming on stream will be for alien beneficiaries with advanced education. Moreover, if PERM works the way DOL hopes it will, the pressures on the EB-2 category can only intensify and soon. Labor certification does not exist in a vacuum. It is not an end unto itself, although the architects of PERM may be glad when the approved labor certification becomes someone else's problem. More labor certifications will mean more I-140 petitions. More I-140 petitions will prompt USCIS to dispose of them in a prompt manner in order to reach Director Eduardo Aguirre's goal of a six-month adjudication by FY 2006. What then? Will we not have a whole host of labor certifications all dressed up with nowhere to go?

In an [insightful overview of the PERM process](#), immigration attorney David Nachman highlighted this unanticipated but nonetheless all too real phenomenon: success with PERM means growing backlogs for EB-2 advanced degree professionals:

"This means that while it may be the case that one is able to quickly obtain an approved L/C, that same person is likely to have to wait an extended period of time for immigrant visa processing or adjustment of status since the demand for the visa numbers...is likely to outpace supply. Presently, it appears that this phenomenon is likely to occur faster in the EB-3 category, but it is conceivable that ripple effects may be felt in the EB-2 advanced degree visa classification in years to come. Unfortunately, the PERM implementation will present the opportunity for DOL to quickly shift the blame for backlogs to other administrative agencies."

In the preliminary comments to PERM, DOL indicated that it was not concerned with the possible return of 245(i) and did not regard that as a reason to delay or avoid PERM. A healthier respect for the relevance of 245(i) would appear to be very much in order. The

very success of PERM depends, in no small measure, on the successful conversion of the LC backlog, much of which is directly linked to the April 30, 2001 245(i) qualification date. An unsuccessful upgrade means that many of the 315,000 pending labor certification cases will be abandoned to the tender mercies of backlog reduction, a daunting prospect for a rescue mission that has funding for only two years. Clearly, DOL does not want to run two labor certification systems in tandem for the long haul. Yet, a successful PERM upgrade will mean that tens if not hundreds of thousands of I-140s will cascade into an immigrant quota system that is not ready for them and that will be shocked into crisis by their unwelcome arrival. Indeed, Congress does not even know that they are on the way.

A functional shutdown of the EB-2 and EB-3 preferences for an extended period could have a profoundly adverse impact for those H-1B beneficiaries who want a 7th year. The very existence of a 7th H-1B year is largely due to the delay in Legacy INS adjudications of I-140 and DOL decisions on aging labor certifications that languished for years before anyone could decide their fate. Indeed, this was a classic example where delays elsewhere worked to the advantage of the H1B temporary worker and his/her employer. What happens to this 7th H-1B year when the magic of PERM eliminates delay and the USCIS pushes the I-140s through the system full throttle? What rationale exists then for the USCIS to allow more time in H-1B status when there is nothing pending? It is true that, in years past, INS/CIS officials, such as Efren Hernandez have, in speeches or correspondence, taken an enlightened view by holding that the alien did not have to follow up on I-140 approval within any designated period of time to file for adjustment of status or seek an immigrant visa. Yet, this was in the age before PERM when delay at DOL was the order of the day; PERM has ushered in a new dawn, or so we are told.

Unless and until Congress expands the immigrant quotas, another band-aid will have to be applied to amend the American Competitiveness in the 21st Century Act so that a 7th or 8th year in H-1B status is possible with an approved I-140 even when visa unavailability prevents action to acquire lawful permanent resident status. This can be done either through stand alone legislation or, more likely, as an attachment to an appropriations bill in the waning hours of a congressional session when everyone is anxious to leave town. The very fact that we are now talking about ways to extend a "temporary" visa like the H-1B for 7 years, or even longer, gives the lie to its label. This is no "temporary" status but a bridge to the green card that will continue to be expanded to accommodate all the cars that want to cross over to their real and true destination. Let us be honest and acknowledge the H-1B for the halfway house to the green card that it has become.

It is true that, even if the success of PERM causes the EB system to seize up in uncontrollable spasm, CIS may allow a 7th or 8th H-1B year while it waits for immigrant visa numbers to rebound. One devoutly hopes that a merciful providence will cause such a wise and compassionate administration to visit itself upon us. Yet, given the political pressures of the wider world in which we live, given the fact that there is a wide and growing disconnect between elite and mass opinion on immigration, given the civil war within the GOP itself over this very issue, particularly in the House of Representatives where the Republican caucus has shown itself notably resistant to Presidential control in the past, can we who are charged with zealously protecting the legitimate interests of our clients sleep soundly in reliance upon the enduring quality of compassion? Perhaps the best guarantee of a future 7th H-1B year would be to file the labor certification before PERM takes effect and wait for backlog reduction to reach us.

It would not surprise many to contemplate a situation where DOL approves the labor certification, USCIS approves the I-140 and the H-1B alien runs out of time. Then, what? While lawyers and federal regulators tend to compartmentalize the immigration process and

focus on the individual completion of its separate and distinct parts, neither employers nor aliens think that way. To them, the only thing that counts is the prize at the end. If an approved labor certification or an approved labor certification does not enable that alien to get the green card, what good is it? That will be what the client thinks when the lawyer has to explain the reality of immigrant quota restrictions. Moreover, if an alien has to leave, what employer is going to hold open that job for very long? So, after spending a lot of money, the alien has no job, and the employer has no worker. The labor certification may be valid but, truth be told, who cares then?

Recently, Congress passed the H-1B Visa Reform Act of 2004. As a result of heavy lobbying by pro-immigration advocates, the Congress exempted 20,000 H-1B cases filed for Masters and Ph.D. graduates of American universities from the H-1B numerical quota of 65,000 numbers. The consequences of this for both the labor certification and the immigrant quota system are clear and present. A blind man could see them. More H-1Bs will mean more labor certifications, more I-140 petitions and a greater hunger for the green card. An enlightened view of H-1B administration is going to only turn the screws even tighter on the immigrant quotas already groaning under the heavy weight they must bear.

The entire employment-based immigration system, and all those who toil in its vineyards, has taken a holiday from history in recent years when visas were plentiful and waiting periods were a thing of the past for greybeards to grouse about at intimate gatherings over their favorite beverage. Indeed, this has come to be accepted as the natural order of things, so much so that, like the bull market of the 1920's or the dot.com boom of the late 1990's, it seemed destined to last forever. The reality is, however, that immediate visa availability since 2001 is a direct consequence flowing from the collapse of the labor certification system. It is hardly accidental that the phasing out of 245(i) and the setting of April 30, 2001 as a threshold eligibility date coincided with the decision by the Visa Office of the State Department to propel priority dates forward in all virtually all employment categories with astonishing rapidity. Only when sheer numbers overwhelmed the labor certification system, when the INS/CIS pace of adjudication slowed to a crawl, could the problem of visa retrogression magically vanish. Failure in one part of the system meant progress elsewhere down the line. Precisely because DOL could not certify cases, employers could not file I-140s, and aliens could not file for adjustment of status. PERM, if it works like we all hope, will change all that. What price victory?

The advent of PERM will compel the Congress in the not too distant future to revisit the bedrock issue of immigrant visa quotas. Not to do that will only serve to negate any gains that PERM produces and frustrate those who have relied on PERM to rescue the employment-based immigration system. This will not happen immediately to be sure. Doubtless, all sides will let the pressure build up so that a new emergency campaign can be launched with the attendant lobbying and fundraising until, at the eleventh hour when business and the bar are in full cry, Congress, especially those members up for re-election, can ride to the rescue. Solving any immigration problem before the fever stage does not win many votes. There is no political gold to be mined now. When the hour of our latest deliverance is upon us, if the uninitiated want to understand why the success of PERM resulted in our immigrant quotas bursting at the seams, we could do worse than remember that old Tin Pan alley torch song of yesteryear: "Somethin's Gotta Give!"

**Labor Certification by Joel Stewart - "THE PERM BOOK" will include an essay by Gary Endelman. For more info on this book, [see here](#).**

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According to reports in the Associated Press yesterday, Hakeem Olajuwon, the basketball star, gave more than \$80,000 to charities the government later determined to be fronts for the terror groups al-Qaida and Hamas.

Olajuwon told the AP he had not known of any links to terrorism when the donations were made, prior to the government's crackdown on the groups, and would not have given the money if he had known. Olajuwon was born in Nigeria, and became a US citizen in 1993. As a US citizen, he cannot be deported-but had he not obtained his US citizenship prior to making these charitable donations, H.R. 418, a bill being debated on Capitol Hill today, would require his deportation. H.R. 418, "The REAL ID Act," would broaden the definition of "engage in terrorist activity" to include activities such as Olajuwon's charitable contributions. Under present law, an alien can argue that he did not "engage in terrorist activity" if he can show that he did not and should not have reasonably known that his charitable donation would further terrorist activities. Under H.R. 418, however, someone like Olajuwon would have to show "by clear and convincing evidence" that he did not know the charities were connected to terrorism. Olajuwon would have difficulty meeting this standard, because at the time he made his donations, the U.S. government had cut off government grants to the charities, a former fundraiser for the charities had been publicly named as a terrorist, and numerous news organizations had reported that one of the charities was under scrutiny for possible terrorist ties. H.R. 418 is also retroactive-if enacted, it will cover all acts and conditions constituting a ground of inadmissibility or deportability, even if those acts took place years ago.

Although Federal law enforcement officials said they were not investigating Olajuwon, H.R. 418 will apply to any aliens who made similar charitable contributions in the past. The grounds of deportability and inadmissibility will apply even to donations that were made before the government designated the charities as terrorist fronts. An alien's family members can also be deported under this proposed law.

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### 13. Spouses Who Filed in New York Are Not Getting Fast-Tracked

Over 2,000 foreign spouses of United States citizens who paid hundreds of dollars in fees to get on what they thought was a 90-day government fast track to a green card interview learned last week that they were instead stuck in the two year backlog with everyone else. A spokesman for the United States Citizenship and Immigration Services confirmed that the eight-month-old fast track program was halted in New York last week but was continuing indefinitely in Los Angeles, Miami, Chicago and Dallas to attempt eliminating paperwork backlogs.

Spokesmen for USCIS said the pilot program was dropped last week because it was not meeting its goals: to handle applications within 90 days and to detect a higher incidence of fraud among marriages. He said no refunds were due because the program was an internal management tool and not a guarantee that applicants would be on a fast track.

Some immigration lawyers are disputing these claims, saying that if a marriage-based case was filed in New York after April it was on an expedited track. Some lawyers advised clients stuck in the waiting list to re-file, even though it meant paying fees again, because in most cases approval was granted within four months.

Other immigration lawyers in New York are saying that it was up to the government to end the program, but are critical of the lack of notice. Many applicants now have expiring work authorization and travel permits. Those already scheduled for interviews may still be handled on the fast track, but those who applied in December and January - roughly 2,000 couples - can expect a two-year wait instead.

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#### 14. State Department Official Indicted on Visa Fraud Charges

A U.S. Department of State official was indicted on fraud and bribery charges for allegedly issuing visas to Armenian foreign nationals in exchange for cash. The official, Piotr Parlej, was arraigned last week in U.S. District Court in Washington and pleaded not guilty to visa fraud, bribery and conspiracy charges.

The U.S. Magistrate Judge presiding over the case ordered Parlej to remain in jail while he weighs the prosecutions' argument that the defendant is likely to leave the country if freed on bond. In regard to him being likely to flee the country, prosecutors noted his very few ties to the United States and none in the Washington region with the exception of one friend.

As a U.S. consular, Parlej's duties included interviewing visa applicants and issuing visas if the necessary qualifications were met. The indictment alleges Parlej issued unwarranted visas to six foreign nationals in Armenia for as much as \$10,000 on each occasion.

The State Department's Diplomatic Security Service led the investigation and, upon informing Parlej of the allegations, urged him to come back to the United States. He returned to the Washington region, where he was arrested.

If convicted, Parlej faces between five and 15 years in prison and a fine of up to \$250,000 on each count.

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#### 15. Visa Mantis Program Extends Time in US for Some Scientists and Students

The State Department has extended the time many foreign students and scientists can remain in the country before renewing security clearances in response to concerns that strict visa requirements are discouraging them from coming to the United States.

The clearance is required for foreigners working in areas the government deems sensitive, including fields like chemistry, engineering and pharmacology. The change will lengthen the validity of the clearance to up to four years for students, two for working scientists, making it easier to remain in the United States for the duration of work or study programs. Until now, they had to reapply for clearance each year. The State Department consulted with the Department of Homeland Security before granting the extension.

The security clearance program, known as Visas Mantis, was established in 1998 to prevent scientists from illegally transferring technology out of the country. After the Sept. 11 attacks, the caseload increased and the process became more time-consuming. Several of those who carried out the Sept. 11 hijackings had been issued student visas. A study released last February by the Government Accountability Office found that scientists had been waiting an average of 67 days for a decision on their Visas Mantis clearances. The office is to release a follow-up report on Friday at the annual meeting of the American Association for the Advancement of Science.

The State Department has taken other steps to expedite Visas Mantis security clearance, including investing \$1 million in technology upgrades. The agency estimates that the extension will reduce by 50 percent the number of Visas Mantis clearances to be handled each year.

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## 16. House Backs Real ID Act

The U.S. House of Representatives approved last week a sweeping set of rules aimed at forcing states to issue all adults federally approved electronic ID cards, including driver's licenses.

Under the rules, federal employees would reject licenses or identity cards that don't comply, which could curb Americans' access to airplanes, trains, national parks, federal courthouses and other areas controlled by the federal government. The bill was approved by a 261-161 vote.

The measure, called the Real ID Act, says that driver's licenses and other ID cards must include a digital photograph, anti-counterfeiting features and undefined "machine-readable technology, with defined minimum data elements" that could include a magnetic strip. The Department of Homeland Security would be charged with drafting the details of the regulation.

Republican politicians argued that the new rules were necessary to prevent terrorists from being in the United States, saying that four of the Sept. 11, 2001, hijackers possessed valid state-issued driver's licenses.

States would be required to demand proof of the person's Social Security number and confirm that number with the Social Security Administration. They would also have to scan in documents showing the person's date of birth and immigration status. Another portion of the bill says that states would be required to link their DMV databases if they wished to receive federal funds. The information that must be shared includes all data fields printed on drivers' licenses and identification cards, and complete drivers' histories, including motor vehicle violations, suspensions and points on licenses.

About 95 percent of the House Republicans voted for the bill, which had been prepared by the judiciary committee chairman, F. James Sensenbrenner, a Wisconsin Republican. More than three-fourths of the House Democrats opposed it.