

Siskind's Immigration Bulletin –  
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Siskind Susser serves immigration clients throughout the world from its offices in the US and its affiliate offices across the world. 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:

The debate on massive immigration reform is about to heat up in Washington. Over the next month, the Senate is expected to produce a bill and have a vote on an immigration bill. Will they follow the lead of the House of Representatives and pass a bill focused entirely on enforcement? Or will they pass a comprehensive bill that deals with border enforcement as well providing a legal means for employers to hire guest workers? And if there is a guest

worker component to the bill, will the bill provide a path to legalization for the eleven million undocumented immigrants in the country?

We do know what the first draft of the Senate bill looks like. We've just received the 300+ page Chairman's Mark of the bill which draws on provisions from the Sensenbrenner, Cornyn and McCain-Kennedy bills. There is a guest worker part to the bill, though not the broad legalization plan that some were supporting. I am analyzing the bill and will report next week.

If the Senate passes a bill, there will be a clash with the much more restrictive House when the two bodies try and reach a compromise bill. There are a number of factors that could influence the outcome. Will the White House, which has been vocal in supporting guest worker legislation, use its influence to the fullest extent? And given the serious political problems facing the White House today, how much power does the President really have anymore over his party in Congress?

It is now two years since President Bush's famous nationally televised speech calling for immigration reform. Over the last two years, people on all sides of the immigration debate have been gearing up for the battle about to take place. We'll be covering this debate closely and will send out special alerts as news develops. We will also provide information to you, our readers, on weighing in with members of Congress via fax and email.

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Not surprisingly, immigrants contributed greatly to the success of the US Olympic team. That continues a long tradition, of course. Congratulations to Tanith Belbin, the newest American on the US team who with partner Ben Agosto, won a silver medal in Ice Dancing, the first US medal in the sport in three decades. And kudos to Korean-born Hyo Jung Kim who competed in short track speed skating and Russian-born Denis Petrukhov, who also represented America in ice dancing.

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In firm news, I will be speaking on two panels at the annual immigration law conference of the State Bar of Texas. The meeting is Thursday and Friday of this week in Houston. I'll be speaking about immigration resources on the Internet on one panel and then I'll be moderating a panel on dual representation, client agreements and fee agreements. If you're interested in attending, you can view a course brochure and register online at <http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&IID=5835>.

Kudos to Karen Weinstock in our Atlanta office who is nominated in the 2006 International Women of Influence Awards presented by GlobalEXECWomen and the International Council. The award goes to top female business and technology executives. Well done Karen!

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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,

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

Congress created the EB-5 immigrant investor visa category in the Immigration Act of 1990 in the hopes of attracting foreign capital to the US and creating jobs for American workers in the process. The overall advantage of the EB-5 visa category is that it allows the beneficiary to engage in commercial enterprise anywhere in the US subject only to some restriction in the pilot program targeting certain areas. There are 10,000 visas available in the category each year, one-half of which are reserved for people who participate in a Pilot Program option designed for targeted investments in approved regional areas. Although the investment requirement is less, the Pilot Program will expire September 30, 2008. This article addresses the requirements and issues for both options available under the EB-5 visa category.

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

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

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

There are three basic requirements as follows:

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

Since its creation, the USCIS created the category very harshly, taking a series of actions that have severely limited its use. For example, in 1998 the INS General Counsel issued a highly restrictive interpretation regarding the validity of certain types of programs commonly used to set up the required business enterprises (Siskind Susser covered this in our April 1998 newsletter at <http://www.visalaw.com/98apr/23apr98.html>). Second, the USCIS has launched a series of investigations against companies that assist people in setting up their investments (covered in January 1999: <http://www.visalaw.com/99jan/35jan99.html>). Lawsuits were filed to attempt to force the INS into reversing its position, but they did not succeed (covered in February 2000: <http://www.visalaw.com/00feb3/10feb300.html>). Congress stepped in, however, and in 2002 it ordered the INS to reconsider its decision.

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

There are three ways of meeting the requirement a qualifying business:

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

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

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

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

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

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

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

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

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

Any economic unit, public or private, involved with the promotion of economic growth of a particular region may qualify as a Regional Center. Proposals for participation in the Immigrant Investor Pilot Program should be submitted to the Assistant Commissioner for Adjudications and should include the following documentation:

- A description of the regional focus of the Regional Center and how it will promote economic growth
- Details on how jobs will be created indirectly through increased exports, but not necessarily exports directly generated by the activities promoted through the regional center.
- A description of capital, both sources and amounts, committed to the Regional Center as well as the promotional efforts both employed and projected by the sponsors of the Regional Center.
- Forecasts of the positive impact on the regional and national economy.

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

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

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

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

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

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

- Articles of incorporation, partnership agreements, organizational documents
- Evidence of lease agreements for the qualifying enterprise
- State business licenses
- Evidence that the required amount of capital has been transferred
- Evidence that investment has resulted in the substantial increase of net worth
- Documentation of sources of capital
- Documentation of intent to invest or actual commitment to invest capital
- Documentation of assets purchased or transferred from abroad for the qualifying enterprise

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

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

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

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

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

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

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

- A statement of position or title and a description of duties
  - Evidence EB-5 investor is a corporate officer or member of the board of corporate officers
  - Evidence demonstrating management role of EB-5 investor if qualifying enterprise is a partnership
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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 got married two years back when I as on an H-1B and my spouse now has an H-4. We separated and are about two weeks from getting a divorce. She's trying to get H-1B status before we divorce.

She's asking for a copy of my passport and visa, my I-94, my pay stubs, my W-2s and my H-1B approval. Does she need these documents for her H-1B?

A - She needs to show you were maintaining H-1B status in order to show she has been maintaining H-4 status. So your providing those documents to her would be helpful. Also, while I am not a divorce lawyer, I suspect that deliberately making it difficult for your wife to maintain legal status will look very bad to a divorce judge.

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Q - How can I get a work permit if I was sponsored while section 245i was still effect back in March 2001?

A - The answer depends on whether your case is far enough along that you are eligible to file an adjustment of status petition. That would require any underlying application - such as a labor certification or an I-130, for example - to be approved and for a priority date in your green card category to be currently available. If you are eligible to file for adjustment of status, then you can request a work permit and you should have permission to accept employment within 90 days of that point. Your immigration lawyer should be able to advise you on how close you are to being able to file for adjustment of status.

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Q - I have a question that arose from a meeting with a tax attorney specializing in expatriates. We agreed that it is advantageous for my wife to relinquish her green card status because we are living outside the US and are not likely to return to the US, and she is earning substantially more than the IRS-allowed exclusion. (I am a US citizen and we have been filing jointly). My question is whether she must do anything to formally surrender the green card, or does it automatically lapse/become invalid after a period of one year from the most recent departure from the US?

A - Your wife can go to the US consulate closest to you and complete a form I-407 to formally relinquishing permanent residency status. You should also be able to mail your green card to USCIS or the consulate with a letter requesting relinquishment of your residency status and the I-407 form.

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Q - I am wondering how I should go about a process. I am currently going through a divorce of which I have been separated from my husband for sometime now. However, I am currently engaged to someone who lives in Malaysia. I am curious to know will I need to wait until the divorce is final to start the K-1 fiancé visa process or can I start the process now.

A - Your divorce must be final for you to proceed with a K-1 fiancé visa petition.

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Q - My wife and I are expecting our first child in April. What we would like to do is have my niece who lives in the UK come and be our Nanny. We would like to do this through a nanny agency. What we would like to know is how we (both us and my niece) go about this. Is it possible?

A - If your niece is between the age of 18 and 26, she may be able to enter as an au pair on a J-1 exchange visa. Only a handful of au pair agencies are authorized to act as a sponsoring agency and I believe most will allow you to identify the candidate for the au pair spot (as opposed to their making the match). You can very helpful information on the au pair program on the State Department web site at [http://exchanges.state.gov/education/jexchanges/private/aupair\\_brochure.htm](http://exchanges.state.gov/education/jexchanges/private/aupair_brochure.htm) Designated sponsors can also be found on that site at <http://exchanges.state.gov/jexchanges/>. Good luck.

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#### 4. Border and Enforcement News

According to *The Washington Times*, Department of Homeland Security Secretary Michael Chertoff announced recently that nearly \$1 billion of the department's proposed \$42.7 billion budget for next year will be used for new U.S. Border Patrol agents, upgraded electronic security measures, and more fences, roads, and detention beds. Chertoff said that there has been an over-100 percent increase in the last fiscal year in border violence aimed at Border Patrol agents, and the department is not going to tolerate it.

Border Patrol Chief David V. Aguilar told the *Times* that there have been 192 assaults on his agents since the start of the new fiscal year in October. The new budget will use \$458.9

million for 1,500 new Border Patrol agents, which will equal a 42 percent increase in the agent work force since September 11.

The budget also calls for:

- \$100 million for technology that will enhance electronic surveillance and operational response capability along the border.
- \$30 million to complete the construction of the San Diego border infrastructure project that includes multiple fences and patrol roads to enable quick enforcement response.
- \$410.2 million for an additional 6,700 detention bed spaces.

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Texas Governor Rick Perry announced 'Operation Rio Grande' to improve law enforcement from El Paso to Brownsville, according to *The Houston Chronicle*. The governor said that the new initiative will seek to better protect security within 100 miles of the border. The Governor placed the State Operations Center on highest alert, an emergency status typically reserved for natural disasters such as hurricanes.

The new initiative follows his December announcement of \$10 million in state aid for 'Operation Linebacker,' which allows local law enforcement to provide greater support to U.S. border officers.

Provisions of 'Operation Rio Grande' include:

- An unspecified number of state troopers acting as rapid response teams to trouble spots.
- Covert patrols and surveillance by Department of Public Safety investigators with specialties in narcotics, motor vehicle theft and criminal intelligence.
- DPS helicopters, planes and special weapons and tactics teams along with plans for regional rapid response teams.
- Texas Rangers to conduct a border-wide investigation into drug-related skirmishes with alleged members of the Mexican military.
- Canine search teams from the Texas Department of Criminal Justice, game wardens from the Texas Parks and Wildlife and road barriers from the Texas Department of Transportation.

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Federal immigration officials have said that they will not abandon the practice of impersonating occupational safety officials to round up undocumented immigrants, according to the *New York Times*. Last July, federal agents arrested 48 workers at Seymour Johnson Air Force Base in North Carolina on charges of being illegal immigrants after the agents tricked the workers into attending what was billed as a mandatory training session sponsored by the federal Occupational Safety and Health Administration. The federal Labor Department, North Carolina officials, and immigrant and job safety advocates criticized the ploy. They, along with other immigration advocates, argued that the sting might cause immigrant workers to distrust safety officials just as the authorities were stepping up efforts to reduce the disproportionately high injury rate among Hispanic workers.

Lawyers for several labor and immigrant groups met with officials at Immigration and Customs Enforcement on Jan. 30, where the officials again refused to rule out using a safety-related ruse to lure immigrant workers. Ana Avendano, a lawyer with the A.F.L. - C.I.O. explained, ". . . The population of workers that we're dealing with is suffering the highest mortality rate and highest injury rate on the job." Michael Chertoff, Secretary of Homeland Security, said that ruses involving health and safety were not appropriate. Boyd, a spokesman for Immigration and Customs Enforcement, said the employment of illegal immigrants at sensitive facilities like military bases posed a serious threat to domestic security. "We've got an obligation under the law to do what we need to do to remove those people immediately from a position where they could do potential harm." said Boyd. Furthermore, he emphasized that ruses are a standard law enforcement policy.

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State legislators in Arizona and Texas are considering taxing electronic money transfers to pay for what they contend are immigration-related border security and social service costs, according to *The Frontera NorteSur*. A total of \$20 billion-plus dollars in remittances flows from the United States to Mexico.

In Arizona, a House appropriations committee approved a resolution that would place an 8 percent state tax on electronic money transfers abroad. The tax will be used to pay for a double and triple-walled border fence between Arizona and Mexico. The proposed wall is in addition to the one envisioned in the Sensenbrenner immigration bill that the US House of Representatives passed last year. Arizona State Representative Russell Pearce estimated the remittance tax would generate \$80 million dollars every year. US citizens and legal residents of Arizona also would be required to pay the tax when sending money abroad. In Texas, a bill that taxes remittance monies is under consideration by state legislators. They propose to use money from the remittance tax to pay for emergency hospital costs.

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Seventeen people were arrested in connection with a smuggling ring that was operating along the Canadian Border. The smugglers, who were of both American and Canadian origin, used a variety of methods to bring people across the border, including freight trains, car trunks and the cargo beds of semi trucks. The smuggling outfit appeared to cater primarily to Asian and Eastern European citizens. In the bust, seventy-four immigrants were detained as they tried to cross the border.

The bust brought with it concerns over the nature and number of individuals who made it into the U.S. The arrests were the result of joint cooperation between Canadian and U.S. officials. The Department of Homeland Security along with the Royal Canadian Mounted Police and the Canada Border Services Agency had been working on the investigation for two years. Twenty-three people have been charged in relation to the smuggling outfit and authorities said they expect more arrests in the near future.

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New legislation has been drafted to put a stop to tunneling across the Mexico-U.S. border. There is no provision in border policy that explicitly outlaws the construction or use of tunnels. Senator Dianne Feinstein (D-CA) has proposed legislation for congress that would eliminate the loophole tunnels pose for border security.

This proposal comes after the discovery of a half-mile long tunnel was discovered in Otay Mesa. The underground passage, which was apparently built for the smuggling of drugs, is just one of eight which have been discovered this year. Convicting the individuals in charge of tunnel construction has proven difficult for Americans working to combat the problem because the work is usually done by laborers who are ignorant of their employer. No details have been released on how the new legislation will make it easier to convict tunnel operators, but those found guilty of financing or building a tunnel could face up to 20 years in prison.

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According to Jerry Seper of *The Washington Times*, violent clashes are on the rise along the Mexican border. Since October, there have been 192 assaults on Border Patrol Agents. Department of Homeland Security Secretary Michael Chertoff has expressed a stern determination to stop the assaults through increased funding for border-related security. In order to help combat the spiking clashes, a billion dollars of the proposed Department of Homeland Security budget will be put towards hiring new border agents, improving electronic surveillance, adding new fences and detention beds.

In a press conference in Washington, Chertoff presented the clashes along the border as not just a threat to his agents, but the American people as well. Hoping to show his resolve for protecting Border Agents and U.S. citizens, he expressed support for his men applying the "rules of engagement" along the border.

Besides cracking down on border violence, the money should help put a stop to former "catch and release" tactics that were the result of limited bed space for captured immigrants. The Department of Homeland Security hopes that new roads and electronic surveillance equipment will facilitate quicker response times for Border Agents and increased fencing will help to deter potential border crossings in the future.

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## 5. News From the Courts

The News From the Courts column is written by Maria Bjornerud, an immigration attorney with an office in Southaven, MS. Originally from Russia, Ms. Bjornerud is licensed to practice law in Tennessee and Mississippi. She can be contacted via email at [mbjorne@msn.com](mailto:mbjorne@msn.com).

TANDIA v. GONZALES, Docket No. 03-4942, 2006 U.S. App. LEXIS 2907 (2nd Cir. 2006) held that "safe third country" or "safe haven" standard did not apply to decisions made on or after January 5, 2001; on or after January 5, 2001, an IJ should evaluate an alien's stay in third countries under "firm resettlement" standard; the IJ's finding that Petitioner's testimony was not credible was not supported by substantial evidence.

JUDGES: WINTER, CABRANES, PARKER:

Petitioner, a national of Mauritania, asserted that he suffered persecution on the basis of race at the hands of the "white Moor" regime governing the country. Petitioner fled to France, where he visited his sister to acquire more money for his journey, and in about a month, traveled to the United States. Petitioner stated that he feared future persecution upon his return to Mauritania because authorities there continued to search for him. As the

alternative basis for his fear, he claimed to participate in a United States-based group, the African Liberation Forces of Mauritania (FLAM) that opposes the current government.

The IJ found that the Petitioner's testimony lacked credibility and concluded that, while "white Moors" had persecuted some of their "black African" countrymen, Petitioner failed to establish either that he personally was persecuted or that he had a well-founded fear of persecution upon return. The primary reasons the IJ articulated in support of her adverse credibility finding were (1) that Petitioner could not remember whether certain statements he made before the IJ contradicted statements he had made at his asylum interview and (2) that he failed to offer certain evidence to bolster his claims, such as offering his sister as a witness or documentation of his activities with FLAM in the United States. The IJ also added that, even if Petitioner's testimony were credible, she would exercise her discretion to deny him asylum because (1) he committed some low-level crimes while in the United States and (2) he found a "safe haven" in France before arriving the United States.

Petitioner sought review of the BIA order affirming without opinion an IJ's decision to deny Petitioner's requests for asylum and withholding of deportation based on the finding (1) that Petitioner did not demonstrate past persecution or a well-founded fear of future persecution and (2) that Petitioner found a "safe haven" in France before arriving in the United States, giving the IJ the discretionary authority to deny Petitioner's asylum application even if he had demonstrated persecution.

The court examined the IJ's finding that Petitioner found a "safe haven" in France. The court found that the IJ's decision was dated January 8, 2001, three days after the repeal of the regulation giving IJs discretion to deny asylum to applicants staying in a "safe third country" before arrival in the United States. 8 C.F.R. § 208.13(d). See Asylum Procedures, 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000) (effective date of January 5, 2001). The court held that an IJ finding concerning a "safe third country" or "safe haven" cannot rely upon 8 C.F.R. § 208.13(d) if contained in a decision dated on or after January 5, 2001. In such cases, sojourns in third countries will be evaluated under the standards governing the review of an IJ's decision based upon a finding that an applicant was "firmly resettled" in a third country before arriving in the United States. See 8 C.F.R. § 208.15 (defining aliens who have "firmly resettled"); 8 U.S.C. § 1158(b)(2)(a)(vii) (barring such aliens from receiving asylum).

Petitioner's stay in France would be relevant only to a finding that he had "firmly resettled" in a third country before arriving in the United States. The court concluded that because the IJ explicitly found that Petitioner was not firmly resettled, Petitioner's stay in France could not support a denial of his asylum claim.

The court also reviewed Petitioner's asylum claim. The court held that the IJ's finding that Petitioner did not suffer or fear persecution was not supported by "substantial evidence." The court noted that no transcript of the asylum interview about which the IJ questioned Petitioner was in the record, and therefore was not available to the court on review. The court concluded that the IJ's reliance upon that testimony to find Petitioner not credible involved impermissible speculation and conjecture. Petitioner's inability to remember whether he made certain statements to the asylum officer did not allow an inference that he made such statements.

The court granted the petition for review, vacated the BIA order and remanded to the BIA for further proceedings.

SALL v. GONZALES, No. 03-4840, 2006 U.S. App. LEXIS 2682 (2nd Cir. 2006) held that "firm resettlement" under 8 C.F.R. § 208.15 should be determined under the totality of circumstances and a formal offer of resettlement was only one of the factors to be considered; mere passage of time standing alone was not conclusive on the issue of firm resettlement; vacated the BIA order and remanded for further proceedings.

JUDGES: WINTER, CABRANES, PARKER:

Petitioner, a native and citizen of Mauritania, asserted that he had been persecuted on account of his race by "white Moors" running the country. Petitioner testified that "white Moor" soldiers came to his home, briefly imprisoned Petitioner and then forced him at gunpoint to cross into Senegal because he was black and therefore undesirable. In Senegal he was met by Red Cross workers and placed into refugee camp where he stayed for four-and-one-half years. Dissatisfied with conditions at the camp, he went to Dakar where he helped unload and carry goods for tips. After nine months in Dakar, he paid someone to transport him to the United States, where he arrived in March 1995 and entered without inspection.

At removal proceeding, Petitioner conceded deportability and applied for asylum, withholding of removal, and, in the alternative, voluntary departure. The IJ first found that Petitioner was ineligible for asylum because he had been "firmly resettled" in Senegal before applying for asylum in the United States based on findings that Petitioner had lived in Senegal for about five years "and was clearly under no impediments to work or to travel within the country." In the alternative, the IJ found that Petitioner had not demonstrated a well-founded fear of persecution and therefore did not meet the definition of a "refugee," based on his findings that the Red Cross letter introduced by Petitioner into evidence had "limited probative value," due to the fact that it was signed by a Senegal Red Cross official in Saint-Louis, a Senegal city purportedly "not in a region in which the refugee camp is located." The IJ could not verify legitimacy of the letter from Petitioner's mother. The IJ denied Petitioner's application for asylum and withholding of deportation. The BIA affirmed without opinion.

The court determined that under 8 C.F.R. § 208.15, an alien was "firmly resettled" if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement. The court concluded that the plain language of the regulation supported the application of the "totality of circumstances" test to determine whether "firm resettlement" took place. While a formal offer of resettlement is one of the factors, it is not conclusive. The court pointed out that underlying purpose of asylum regulations was to reserve the grant of asylum for those applicants without alternative places of refuge abroad, regardless of whether a formal "offer" of permanent settlement has been received. 8 U.S.C. § 1158(a)(2)(A).

The court held that the IJ's determination that Petitioner had been "firmly resettled" in Senegal was not supported by substantial evidence. Additionally, the court found that the IJ had misstated the burden of proof. While an "applicant has the burden of proving, by a preponderance of the evidence," that he has not been firmly resettled, the initial burden to establish prima facie case of resettlement rests with the government.

The Court held that mere passage of four years, standing alone, did not constitute firm resettlement. The court instructed the IJ to consider the totality of the circumstances on remand, including whether Petitioner intended to settle in Senegal when he arrived there, whether he had family ties there, whether he had business or property connections that

would connote permanence, and whether he enjoyed the legal rights that permanently settled persons could expect to have.

The court determined that Petitioner's testimony was consistent with the legitimacy of the Red Cross letter because the discrepancy in the location of the refugee camp was easily explained by the fact that the Senegal regions were re-named in 1984.

The court vacated the BIA order and remanded so that IJ may consider whether Petitioner qualified for asylum now that the Red Cross letter was determined to be legitimate.

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#### 6. Government Processing Times

There are new processing times for the following service centers:

Vermont (2/8/2006): <http://www.visalaw.com/vermont.htm>

California (2/8/2006): <http://www.visalaw.com/california.html>

Missouri (2/8/2006): <http://www.visalaw.com/missouri.html>

Nebraska (2/15/2006): <http://www.visalaw.com/nebraska.html>

Texas (2/15/2006): <http://www.visalaw.com/texas.html>

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#### 7. News Bytes

The Department of Homeland Security (DHS) announced the appointment of Igor V. Timofeyev as senior advisor for refugee and asylum policy. Homeland Security Secretary Michael Chertoff called for this senior policy position as part of his agenda for the department.

As senior advisor for refugee and asylum policy, Timofeyev will help to guide the department's policies that protect legitimate asylum and refugee seekers and uphold our nation's deep commitment to human rights. Timofeyev is a native of Russia and himself a refugee.

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US Consulate General Toronto recently announced that it is now offering instant notification of status changes in Treaty Visa cases. The Consulate will send instant status notifications via email to all cases in which an email address is provided in block 23 of the DS-156 application form.

With newly received cases, the Consulate will continue to fax or mail copies of the login letter generated once the case is entered into the computer system. After this, if an email address was provided on the DS-156, then no further correspondence will be faxed or mailed. Updates will be sent only to the email address on file. Status notifications can only be sent to the email address indicated on the DS-156. In order for the status notifications to be sent to a legal or other representative, the email address must be indicated in the space on the application form. Contact email addresses can only be changed by submitting a new, signed form DS-156 to our office.

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According to a statement from the U.S. Embassy in Paris, it continues to experience an increasing demand for visas. As of now, French travelers in need of visas have a nine-week wait to obtain an interview appointment, and the back-log is growing. The U.S. Embassy in Paris will now have diplomatic staff to conduct roughly 50 percent more visa interviews per day. Additionally, some U.S. embassies or consulates in Europe will now accept visa appointments from French citizens. French citizens may now contact the U.S. embassies or consulates in Berlin, Bern, Brussels, Frankfurt, London, or Madrid for visa appointments. The U.S Embassy's release stated that biometric passports will soon be issued by the French authorities so that its citizens will once again be able to travel to the United States, in most circumstances, without a visa.

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Handwritten visa application forms for the United States are about to become obsolete in Abu Dhabi and Dubai. In order to expedite the process of acquiring a visa, a new Electronic Visa Application Form (EVAF) is being required for visa seeking individuals. Hoping to eliminate long processing times, the forms will allow individuals to fill in the necessary documentation before arriving at the Consulate or Embassy.

Abu Dhabi and Dubai have taken other steps to expedite the process of visa applications by allowing individuals to apply for student visas up to one hundred and twenty days prior to their expected departure. Both cities in the United Arab Emirates are offering priority to student and emergency medical visas. Already, average waiting times are down to 1-2 days in Abu Dhabi and 5-6 days in Dubai.

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Human rights groups are criticizing Bush's expedited removal program for its failure to ensure that potential asylum seekers are not deported. Groups point to cases in which legitimate fears have been ignored and asylum was not offered to individuals who would qualify for protection. Studies have shown that immigration agents do not refer individuals with credible fears of persecution to asylum hearings 15 percent of the time. Personnel problems are compounded by judicial disparities in asylum seekers. Rachel Swans of *The New York Times* points to concerns that asylum is being offered based on an individual's background and access to legal council.

The Department of Homeland Security (DHS) claims that missed asylum cases are extremely rare and defend the expedited removal process. The Department of Homeland Security has recently hired its first senior adviser for refugee and asylum policy, Igor V. Timofeyev. One of Mr. Timofeyev's primary tasks will be to ensure that safeguards are put in place to prevent legitimate claims of fear and persecution from being ignored by the Immigration officials. A former refugee from Russia, Igor Timofeyev believes that his department is making a genuine effort to make immigration effective and sensitive to potential asylum seekers.

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## 8. International Roundup

According to *The Associated Press*, two U.S. military deserters, Jeremy Hinzman and Brandon Hughey, were denied political asylum in Canada and have asked for a court review, arguing authorities rejected them without considering the legality of the Iraq war. Defense lawyer Jeffrey House asked a federal court to order Canada's Immigration and Refugee Board to rehear the cases of Hinzman and Hughey. Hinzman, 26, fled to Canada in search of asylum just days before his U.S. Army unit was to deploy to Iraq to fight in a war he says is illegal under international law. He is facing a court-martial in the United States and up to five years in prison. Hughey, 20, who was with the 1st Cavalry in Fort Hood, Texas, is also seeking a review of his case. He was denied refugee status in September. About 20 Americans have fled the military and applied for refugee status in Canada, according to House. The board's decision in March dealt a blow to other deserters in Canada who argue that serving in Iraq would force them to commit crimes against civilians.

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Italian police have uncovered an operation, "Operation Pyramid", that directed Chinese undocumented immigrants from Malta to the Italian mainland. According to *The Malta Independent*, Operation Pyramid included 10 teams from the crime prevention units and 10 mobile squads from Rome, Aquila, Teramo, Chieti and Ancona. Eighteen Chinese and 11 Italians were arrested. The investigations found that the undocumented immigrants used a 'parallel bureaucratic channel' to issue them with false residence and work permits and allowed their relatives to join them. This was supported by a fictitious network of restaurants, clothes shops, which supposedly employed them. Once the permits were issued, they were destroyed so that the undocumented immigrants could never be traced again. The cost of a work permit renewal was e7,000 and to have three relatives join them cost e18,000.

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## 9. Legislative Update

According to *The Washington Post*, Sen. Emmett W. Hanger Jr., who previously wanted to prevent all undocumented immigrants in Virginia from getting the residents' tuition break at state universities changed his mind and has proposed the first legal avenue for some to pay the reduced fee. The senator amended his bill to offer the lower, in-state tuition to undocumented students who are pursuing legal residency, who graduated from a Virginia high school and whose families have paid income taxes for at least three years. Senator Hanger, Jr. states that this proposal will be an incentive to help undocumented students. The senator's bill will still bar undocumented immigrants whose parents have not been paying taxes or who are not actively seeking to become legal from receiving in-state tuition. The bill received unanimous and bipartisan support from the Senate's Education and Health Committee, including several members who previously opposed the idea.

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According to *The Washington Times* Hispanic leaders along with both documented and undocumented immigrants lobbied to the General Assembly on February 1, 2006 to oppose pending measures that they say will scare people and hurt the economy. The lobbyists included the Virginia Coalition of Latino Organizations, the American Jewish Committee and the Virginia Hispanic Chamber of Commerce.

With a 77-22 vote, the House approved a measure that would give 50 state troopers the authority to detain undocumented immigrants. Delegates are also expected to pass a bill that denies undocumented aliens college admission and a measure that requires students who cannot prove their legal presence to pay out-of-state tuition rates, even if they graduated from a Virginia high school.

Supporters of the measures argue that undocumented immigrants take spots from legal Virginia residents at public colleges and universities. Immigration activists claim that denying an education to undocumented immigrants is unfair because they pay taxes that contribute to the state's education system and Social Security that they cannot legally collect when they retire.

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In Georgia, a new immigration bill has been proposed by state Senator Chip Rogers (R-Woodstock) in order to help curb the number of undocumented immigrants entering the state. The bill, which targets businesses who hire immigrant workers, will deny tax relief to employers who cannot supply proper documentation that their employees are legal residents of the United States. This new legislation is aimed at encouraging companies to abide by immigration policies through financial incentives.

The bill places the burden on the employer to prove the nationality of its employees, yet many businesses are not complaining. The bill does not explicitly fine employers for hiring undocumented immigrants.

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United States Senator Barbara Mikulski (Dem. MD) wants to extend a temporary work visa program that allows migrant workers to fill seasonal jobs along the East Coast. Prior to congress modifying to the rules to allow more seasonal migrant workers, many businesses suffered due to a lack of available help. Of the seasonal industries that are supported by migrant workers, crab factories in Maryland will be one of the biggest beneficiaries if Mikulski's proposals get through congress. Because of this, the crabbing industry has voiced plans to lobby Mikulski's ideas and expects to gain popular support for their cause

Critics of Mikulski's plan say that migrant workers take jobs away from Americans while others point to the human rights violations that occur in migrant workplaces. Despite these objections, lawmakers from other states are offering their support in hopes that the three year reprieve that Mikulski is proposing will benefit their economies.

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The Subcommittee on Immigration, Border Security and Claims will hold an oversight hearing at 12:00PM on Wednesday, March 2, 2006 in Room 2237 of the Rayburn House Office Building. This is an oversight hearing on violence and incursions along our southern border.

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According to *The Associated Press*, Republican Sen. John McCain says that President Bush needs to do more to help push a temporary guest worker program through Congress. The

Bush administration has considered the idea of a temporary worker program since Bush took office in 2001, but it was hindered by the Sept. 11, 2001 terrorist attacks. In early 2004, Bush laid out guidelines for a temporary worker program.

Majority Leader Bill Frist, R-Tenn., has told lawmakers the Senate will begin considering immigration legislation March 27. The Senate Judiciary Committee is expected to vote on a bill on March 2. The House passed an immigration enforcement bill last year that called for building fences on the U.S.-Mexican border, allowing local law officials to enforce immigration laws, and requiring employers to verify the legal status of their employees.

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S.2049 - A bill to improve the security of the United States borders and for other purposes.

Sponsor: Sen Domenici, Pete V. (introduced 11/17/2005)

CRS Summary: Introduced. Go to the Web page to see the new summary.

<http://www.congress.gov/cgi-lis/bdquery/z?d109:SN02049:/>

S.2241 - A bill for the relief of Carmen Shahrzad Kulcsar.

Sponsor: Sen Feinstein, Dianne (introduced 2/2/2006)

CRS Summary: Introduced. Go to the Web page to see the new summary.

<http://www.congress.gov/cgi-lis/bdquery/z?d109:SN02241:/>

S.2326 - A bill to provide for immigration reform, and for other purposes.

Sponsor: Sen Domenici, Pete V. (introduced 2/17/2006)

Bill Status: 2/17/2006: Introductory remarks on measure.

(CR S1464-1465)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:SN02326:/>

S.119 - A bill to provide for the protection of unaccompanied alien children, and for other purposes.

Sponsor: Sen Feinstein, Dianne (introduced 1/24/2005)

Short title as passed Senate: Unaccompanied Alien Child

Protection Act of 2005

<http://www.congress.gov/cgi-lis/bdquery/z?d109:SN00119:/>

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## 10. Halliburton Subsidiary Gets Contract to Add Temporary Immigration Detention Centers

According to the *New York Times*, the Army Corps of Engineers has awarded a contract worth up to \$385 million to Kellogg Brown & Root, the Halliburton subsidiary that has been criticized for overcharging the Pentagon for its work in Iraq. The contract is for Kellogg Brown & Root to build temporary immigration detention centers.

KBR would build the centers for the Homeland Security Department to use for housing in the case of an unexpected influx of immigrants, such as during a natural disaster or when new programs arise that require additional detention space. The contract with the Corps of Engineers runs one year, with four optional one-year extensions.

A spokesman for Immigration and Customs Enforcement explained that the centers will only be built if an emergency situation arises. A spokesman for the corps said that the centers could be at unused military sites or temporary structures and that each one would hold up to 5,000 people.

Federal auditors rebuked the company for unsubstantiated billing in its Iraq reconstruction contracts, and it has been criticized because of accusations that Halliburton, led by Dick Cheney before he became vice president, was aided by connections in obtaining contracts. Halliburton executives denied that they charged excessively for the work in Iraq. Officials of the corps said that they had solicited bids and that KBR was the only responder.

In recent months, the Homeland Security Department has promised to increase bed space in its detention centers to hold thousands of undocumented immigrants awaiting deportation. In the first quarter of the 2006 fiscal year, nearly 60 percent of the undocumented immigrants apprehended from countries other than Mexico were released on their own recognizance. Domestic security officials have promised to end the releases by increasing the number of detention beds. Advocates for immigrants fear that the new contract is another indication that the government plans to expand the detention of undocumented immigrants, including those seeking asylum. ICE spokesmen denied that the KBR contract is intended to detain and remove more undocumented immigrants.

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#### 11. Department of State Begins Issuance of an Electronic Passport

According to a State Department press release, the department is phasing in the issuance of the new Electronic Passport (e-passport). As part of a pilot program, on December 30, 2005, the Department of State began the issuance of a limited number of new e-passports. According to the release, the goal of e-passports is to facilitate international travel for U.S. citizens and enhance border security.

The passports combine face recognition and contactless chip technology. The chip will hold the same information as the formerly issued passports, which will remain valid until their dates of expiration.

According to the *National Journal's Technology Daily*, concerns have been raised over the e-passports capability to protect privacy of personal information. The Department has said that the new passports have an anti-skimming device on the front cover and are equipped with basic access control (BAC) technology to prevent skimming and eavesdropping. Research by the American Civil Liberties Union shows that the cost to produce e-passports will increase from the current rate of \$2.40 up to more than \$10 each. According to the Department, the rates for first time passport applicants will remain the same this year. The Department of State plans to issue the first full validity e-passport to the American public later in 2006, and will issue e-passports to all domestic passport agencies by the end of the year.

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#### 12. Interoffice Memorandum on I-751 Petitions

In an interoffice memorandum of the US Citizenship and Immigration Services (USCIS), Associate Director Michael Aytes responded to problems of marriage being used to

circumvent immigration laws. A cross-national married couple can apply for a “petition to remove conditions on residence” from the USCIS through an I-751. If the petition is seen as legitimate, then the couple can legally immigrate to the United States. However, if the couple is seeking to use marriage to avoid immigration laws, then any I-751 petition is denied.

In the past, it has been the job of a District Director of the US Citizenship and Immigration Services to deny an I-751 petition under the belief that it was being used to evade standard immigration procedures. However, Aytes’ memorandum gives USCIS Service Center Directors the power to “deny I-751 petitions and waive applicable interviews.” When an application is under question, it is forwarded to the Office of Fraud Detection and National Security where a detailed report is returned to the Service Center Director. The Director must then inform the couple of the intent to deny the petition in order to allow for an appropriate defense. If the Service Center Director is still convinced the petition is being used as a way around immigration laws after a defense has been given, then the director has the power to deny the petition without sending the case forward to District Directors.

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### 13. Latin American Nations Resent Immigration Legislation

Numerous Latin American governments have voiced displeasure over the changing immigration policies in the United States. Diplomats from eleven Latin American nations are joining together to lobby Washington in hopes of defeating a bill that will include a fencing project along the U.S.–Mexico Border. The countries, which see U.S. policy shifts as an overreaction to terrorism, argue that closing off immigration along the Mexican border will be problematic for both the United States and Latin America.

The Mexican border serves as an entry point for not only Mexican citizens, but all of Latin America. Critics of the proposed fencing project argue that the fencing project expresses a lack of appreciation for the contribution that immigrant workers make to the U.S. economy. Undocumented migrant workers also play a key role in their own countries by pumping American dollars back into their home economies.

The coalition of diplomats has demanded that the United States create guest-worker programs and legalize undocumented immigrants, as well as voicing displeasure over proposals for tougher border enforcement. The controversial bill has already passed in the House and will be voted on by the Senate in the upcoming month.

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### 14. Religious Groups Protest Immigration Laws

Religious groups of almost every faith and denomination are trying to combat immigration laws they feel are unjust and inhumane. Articles this past week appearing in the *Los Angeles Times*, *The Christian Science Monitor*, and *The New York Sun* each depicted a united religious movement to reform immigration policies.

Religious and secular aid groups are reeling after two church-based humanitarian workers were arrested for attempting to help three sick immigrants in the Arizona desert. The prospect that religious groups could be the target of criminal investigations has many aid organizations openly criticizing current counter-immigration tactics. According to Arin Gincer of the *Los Angeles Times*, much of the attention is on proposed legislation that would

“expand the definition of 'smuggling' to anyone who 'assists' or 'directs' an illegal immigrant to reside or remain in the U.S.”

Supporters of the current immigration policies are angered by religious aid groups who persist in helping undocumented immigrants as they cross into the United States. Though they agree that immigrants should be treated humanely, groups who support the current tactics for border security argue that helping individuals as they cross the border is equivalent to encouraging people to break the law.

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#### 15. President Extends TPS Status for Central Americans

According to a press release from U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS) has announced a decision to extend Temporary Protected Status (TPS) for an additional 12 months El Salvador, Honduras and Nicaragua. USCIS will provide additional information about the re-registration process and answers to frequently asked questions upon publication of Notices in the Federal Register soon. Re-registration applications will not be accepted before the registration period is announced for each nation.

Under this extension nationals of El Salvador, Honduras, and Nicaragua who have already been granted and remain eligible for TPS will be able to continue living and working in the United States for an additional 12 months. This extension covers approximately 225,000 Salvadorans, 75,000 Hondurans, and 4,000 Nicaraguans. This extension of these TPS designations will expire on September 9, 2007 for El Salvador and on July 5, 2007 for Honduras and Nicaragua.