

Siskind's Immigration Bulletin -
December 16, 2005

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1. Openers

Dear Readers:

Our winter hiatus is over and we're glad to be back. When last we left you, we reported on the passage of the harsh bill H.R. 4337 passed by the US House of Representatives. The Senate will come back into session from its winter recess this week and the House comes back at the end of the month. The Senate is expected to take up immigration legislation

almost immediately and word is that Senator Specter and other immigration moderates will seek to pass a bill with guest worker provisions. If that happens, the House and Senate will have to negotiate a compromise bill. Expect a huge battle over the final language. It is very possible no compromise will be reached and a bill will not be passed at all.

One change in congressional dynamics that could affect the outcome is the sudden shakeup in the leadership of the House of Representatives. Representative Tom DeLay announced last week that he is giving up his position as Republican Majority leader. While DeLay is certainly not known for being particularly pro-immigration, his nickname "The Hammer" was earned for a reason and he certainly had the power to twist arms and deliver votes for the President.

Just prior to press time, Missouri Representative Roy Blunt announced that he had secured enough votes to take over as the next Majority Leader. Who is Roy Blunt? He has been in Congress for nine years and has risen through the Republican ranks and is now the Majority Whip, a position DeLay previously held. As far as his immigration record, he normally votes to toughen immigration enforcement (for example, he voted for H.R. 4337, the bill noted above) but he has voted in the past for more H-1B numbers and in favor of Section 245(i) of the Immigration and Nationality Act. His main opponent, Ohio Representative John Boehner, on the other hand, voted against H.R. 4337, one of the few Republicans to break ranks and vote pro-immigration.

The key, of course, is how Blunt will deal with Majority Leader Frist and the White House. If the White House and the Senate push for a guest worker program, will Blunt push back and defy the other leaders of his party?

US Citizenship and Immigration Services announced this week that it is preparing to dramatically alter the way it processes benefits applications. According to USCIS, they will be moving from "an outdated, paper-driven system to one where customers create on-line accounts." Individuals, employers and attorneys will set up web accounts and provide information that can be linked to all of their applications. The accounts will resemble in many respects the PERM online system used by the US Department of Labor in green card petitions. USCIS will collect more information on the front end than it does in the current system, but, according to the agency, it will eliminate redundancy because customers will not have to give the same information repeatedly.

USCIS has posted proposed account registration forms as well as sample forms for H-1B filing at <http://uscis.gov/graphics/lawsregs/whatsnew.htm>. Comments are being accepted until February 13, 2006. Instructions for sending comments are included in the Federal Register notice linked on the web site noted above.

<http://www.abanet.org/abastore/index.cfm?section=Main&fm=Product.AddToCart&pid=5110500>

The big news in Washington this week has been the confirmation hearings of Judge Samuel Alito to assume the seat of retiring Supreme Court Justice Sandra Day O'Connor. Judge Alito's record on many issues has been closely analyzed since he was nominated including

immigration. The reviews are mixed. An analysis of Judge Alito's immigration opinions published by professors from Yale Law School had this view:

"While other appellate courts recently have criticized the Board of Immigration Appeals' (BIA) failure to make reasonable decisions regarding the deportation or asylum claims of immigrants, Judge Alito was prepared to uphold the BIA's decision to deport immigrants in seven of eight deportation decisions reviewed and to uphold the BIA's decision in seven of nine asylum cases."

But others come to Alito's defense. Pepperdine Law Professor Roger Alford criticizes the Yale report's conclusion:

"A comparison with other federal appellate judges reveals that Judge Alito is 44 percent *more* likely to reverse the BIA than the typical federal appellate judge. Judge Alito has affirmed the BIA in seven of eight deportation decisions, and affirmed the BIA in seven of nine asylum cases. That's a reversal rate of 3 out of 17 cases, or 18 percent. That may sound harsh to the folks who wrote the Alito Project. But it is not. According to an [article](#) in the *New York Times* today, the government wins more than 90 percent of immigration cases in federal appeals courts. So while the average federal appeals judge will reverse no more than 10 out of 100 immigration cases, Judge Alito would on average reverse 18 out of 100 immigration cases, or 44 percent more cases than the typical appellate judge."

Immigration did come up during the hearings, but not in the enforcement context. New York Senator Chuck Schumer asked Judge Alito about whether a baby born in the US to undocumented parents has a constitutional right to citizenship. Alito refused to answer the question saying it would be inappropriate since the question may come before him on the Supreme Court.

In firm news, my law partner David Jones and I have just returned from our annual pilgrimage to the Consumer Electronics Show. We're at work now on our annual articles on our show visit for publications distributed by the American Bar Association and the American Immigration Lawyers Association. This is always a fun article to write and we were overwhelmed, as we always are at CES, by the incredible gadgetry.

This week I was named for the third year straight as one of the 150 best lawyers in Tennessee by Business Tennessee Magazine (see www.visalaw.com/news/). Congratulations to my friend Linda Rose who was the only other immigration lawyer to make the list.

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

2. ABCs of Immigration: Immigration Options for Gay, Lesbians and Transgender Individuals

As the world becomes a smaller place through globalization, more and more individuals are traveling abroad, for pleasure, for school, and for employment. Individuals who are in gay or lesbian relationships face difficulties in staying together when coming to the US either as immigrants or nonimmigrants. Furthermore, those individuals who have immigration issues related to sexual orientation or transgender may have questions about their rights under federal laws. This article explores the issues and provides information and assistance to the gay, lesbian and transgender communities for immigration purposes.

Are legally binding unions recognized as a marriage in an immigrant or nonimmigrant visa where marriage is an essential basis for qualification?

In 1996, Congress enacted the Defense of Marriage Act (DOMA), which states that a qualifying "marriage" for the purposes of federal law exists only between a man and a woman. Accordingly, a US citizen cannot petition for a green card for a same sex partner. This is true even if the couple has entered into a legally binding arrangement, such as the civil unions now performed in Vermont, or other similar domestic partnerships found in other countries. Given the anti-homosexual bias that is dominant in Congress, any legislation that may recognize familial rights of gays and lesbians in domestic partnership likely will not pass.

Will a marriage involving a transsexual individual be recognized for immigration purposes?

In recent case decided by Board of Immigration Appeals (BIA), *In Re Lovo*, the BIA held that a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act. Since the state where the marriage occurred recognized the change in sex and considered the marriage valid, the BIA also found the marriage to be valid. The BIA overturned the decision of the Nebraska Service Center Director who denied the petitioner's instant visa petition under the INA on the basis that Congress has not enacted legislation that officially recognizes a marriage where one of the parties has undergone a sex change. This decision marked a victory for the recognition of marriage of transsexual post operatives by federal laws.

How can people in a same sex partnership stay together as immigrants or non-immigrants?

In this article, we outline some of the ways people in such a predicament can stay together. Detailed information on the visa categories mentioned below is available in other ABC's of Immigration articles which can be found online at <http://www.visalaw.com/abcs.html>.

Student visas

Assuming that they otherwise qualify, the foreign national can enter the US on a student visa. They must, of course, comply with the terms of the visa, and the visa will eventually expire, meaning that the person must either leave the US or find another visa status.

Work visas

Work visas allow a person to live and work in the US for, in some cases, an indefinite period of time. The primary drawback to most common work visas is that they allow the person to live in the US only for a limited period of time. For example, the time limit on H-1B visas is six years and for L visas it is five or seven years. There are some work visas that may be renewed indefinitely. The O visa for people of extraordinary ability can be issued in three-year increments for an indefinite period of time, as long as the visa holder is doing work in the area of their extraordinary ability. The E visa, for people making an investment to start a business in the US, can be issued in five-year increments for an indefinite period. TN visas for Canadian and Mexican professionals can also be renewed without limit.

Regardless of how long a person can live and work in the US on a work visa, however, there will always remain the fact that they are not permanent residents, and could be separated from their loved one on the whim of an employer or a down turn in economic conditions.

Green cards

Because a US citizen in a same sex relationship with a foreign national cannot file for his or her immigration, the foreign national has to seek a green card through another route. If they have a qualifying family member (for example, a US citizen parent or sibling) the family member can apply for their immigration. This is, however, a long process. Permanent residents can file for their adult children, but these cases involve an even longer wait.

Often, a quicker way of obtaining permanent residence is through an employer who is willing to sponsor the foreign national.

The foreign national can also apply for a green card through the diversity visa lottery if they are from a qualifying country. Given that only 50,000 visas are available each year and the fact that there are millions of applicants, this is by no means a sure way of getting a green card. Please refer the ABCs of Immigration at

<http://www.visalaw.com/abcs.html> for more information about each of these categories.

Can homosexuality be a basis for asylum?

A final way that the foreign national in a same sex partnership can remain in the US is through an asylum application. In recent years, courts have approved asylum cases submitted by homosexuals, a recognized social group, who show past persecution or well grounded fear of persecution due to sexual orientation, in the individual's home country. Information about laws relevant to sexual orientation in most countries can be found on the following websites:

The International and Lesbian and Gay Association World Legal Survey website at <http://www.ilga.info/index.html>

The International Gay and Lesbian Human Rights Commission website at <http://www.iglhrc.org>.

What resources are available to same sex partners or gays and lesbians with immigrations issues?

The bottom line is that couples in same sex relationships must be creative in devising workable visa strategies. If you are interested in learning more about immigration issues that affect the gay and lesbian community, visit the website of the Lesbian and Gay Immigration Rights Task Force at <http://www.lgirtf.org>

3. Ask Visalaw.com

If you have a question on immigration matters, write 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 have a green card and the visa category on it says E22. It is a derivative visa of E21 (my husband's visa category) We had filed for I 824 and then got the green card in a year's time. My question is whether my green card is conditional or independent of his green card? If it is conditional what are the conditions?

A - Only green cards based on marriages to US citizens or based on investing large sums of money are conditional. The rest are unconditional and there is no need to prove a second time that the basis for the green card is met.

Q - Our immigrant visa interview is already on February 7, 2006 and they said the visa will be given just a few days after. I would just like to know if it is possible that a member of the family goes to the US first ahead of the principal applicant.

A - Unfortunately, dependants may not precede the principal applicant in entering the the US after permanent residency is granted.

Q - My mother visited me last year on B-2 visitor visa and she requested an extension after her 6 month stay. My mother and I went back home on November 20th and we didn't not get the approval letter until we left. I got the letter last week when I came back to US and the letter was postmarked on November 30th. She was granted to stay until 10/31/05 but she overstayed until Nov 20th without knowing that she didn't have visa. She had visited US several times before and left on time. Will it be a problem when she apply for another US visa? What are the consequences of this overstay?

A - She should be fine, but you'll want to keep documentation of the date the application was filed, when she left and when the notification was mailed by USCIS. If you can then show that you always acted in good faith, you will likely have not problems regarding the overstay period. She did not trigger a reentry bar because the overstay was only a few weeks. I don't believe the visa was automatically cancelled due to an overstay since the extension was granted and the departure occurred prior to the notice being issued. This might be an issue to explore further with your immigration lawyer, however.

Q - I have an H-1B visa. My employer just applied for a labor certification via PEPM. I am a part-time worker and a second employer has given me full-time work. I have not given up my current work. Can I have two jobs? If the second employer doesn't apply for an H-1B visa, can I do work for him? Can I employ myself?

A - Any employer can file a labor certification for a position even if the worker doesn't consent (or even know). However, the job must be full time in order to be approved. It should be okay to have more than employer filing a labor certification on your behalf and this is not all that unusual. You cannot file a labor certification in a self-employment situation. As for the second employer, you need to have a second concurrent H-1B approval in order to take on the additional work.

Q - One of my friends, currently a Chinese citizen, is now on F-1 visa in the US. She will become a French citizen next month and get a new French passport. In theory, her Chinese passport becomes invalidated as soon as she becomes a French citizen. When she comes back from France to the US, she will have a new French passport and the invalidated Chinese passport which has a valid US F-1 visa. Will she still be able to enter the US?

A - I think she'll be fine as long as she has both passports when she enters the US - the one with the visa and the new one. The port officer should be informed that the preference is to now enter using the new passport, but the old passport is being presented because that's the one with the visa. I'm copying a colleague for an opinion on this.

4. Border and Enforcement News

A recently released report from the Migration Policy Institute states that "false positives" associated with the FBI's National Crime Information Center (NCIC) database have likely caused the wrongful detention of immigrants. The study finds that from 2002 to 2004, officers received erroneous immigration hits in almost 9,000 cases when they queried names in the database. The rate of false positive was 41 percent overall, while some agencies had error rates at 90 percent.

The report uses data released by DHS and provides information regarding how the NCIC is being used, by whom and against which immigrants. The full report is available online at http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.

The U.S. Department of Homeland Security (DHS) recently announced the scheduled expansion of the US-VISIT program's biometric entry procedures to additional land border ports of entry along the U.S.-Canada border. The ports along the border starting US-VISIT entry procedures are in Vermont, Idaho, Washington, North Dakota, Maine and New York. The ports in these areas that began processing visitors are part of a multi-phased deployment of US-VISIT entry procedures to additional land border ports.

No changes will be made to the US-VISIT process or to the classifications of visitors subject to US-VISIT as the result of this expansion to added locations. US-VISIT applies to all visitors who apply for entry with a nonimmigrant visa or raveling under the Visa Waiver program.

U.S. Immigration and Customs Enforcement (ICE) agents last week executed federal search warrants at two facilities, Golden State Fencing Company in Oceanside and Riverside, owned by a Southern California military subcontractor that has come under scrutiny twice in the last six years for hiring unauthorized workers. ICE agents arrested 17 unauthorized workers.

The searches and arrests are pat of an ongoing criminal investigation into Golden state's hiring practices. In 1999 and 2004, ICE conducted audits of the firm's hiring records, resulting in warnings to company officials about serious criminal and civil consequences for failing to comply with the orders. Subsequent to the second audit, ICE launched an investigation into the company.

ICE agents also recently audited about 300 employee records for the company's Riverside facility. That review identified more than 100 employees who were unauthorized to work, including three individuals the company had been ordered not to re-hire based on the 1999 audit.

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.

ZHICAY v. ASHCROFT, 3:05-CV-315, 2005 U.S. Dist. LEXIS 29699 (Dis. Con. 2005) holds that an alien who is physically present in the United States does not have to return to his country in order to apply for admission after deportation; habeas corpus petitions seeking review of final orders of removal can be filed directly with the Court of Appeals; the court can review final decisions by the USCIS based on pure questions of law.

Judge: DRONEY:

The Petitioner filed a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, seeking review of her 1995 in abstentia deportation order and protection of her right to apply for adjustment of status and to reapply for admission after deportation. The Court transferred Petitioner's writ of habeas corpus seeking judicial review of her removal order to the United States Court of Appeals for the Second Circuit. The court granted petition to adjudicate her pending applications for permission to reapply for admission and for adjustment of status.

The Petitioner entered the United States unlawfully and two years later was placed into deportation proceedings and ordered deported in absentia. Petitioner never departed, got

married, and eventually was taken into custody. Subsequently, her husband was granted LPR status.

The Petitioner's habeas petition challenged in part the final order of deportation entered against her in 1995 on the ground of insufficient notice. The habeas petition also sought an order to afford the Petitioner a fair immigration proceedings and application for adjustment of status. The Petitioner had two pending applications with the USCIS: one for permission to reapply for admission after deportation through a Form I-212 ("I-212"), as required by 8 C.F.R. § 212.2, and another for adjustment of status through a Form I-485 ("I-485"), as required by 8 C.F.R. § 245.1.

The court transferred the portion of the Petitioner's case that challenges the Petitioner's removal order to the Second Circuit Court of Appeals pursuant 8 U.S.C. §§ 1252(b)(2) and (b)(9), Pub. L. 109-13, 119 Stat. 311 (Real ID Act). The Court retained jurisdiction under the Real ID Act over habeas corpus petitions challenging physical custody and over Petitioner's habeas corpus petition seeking protection for her right to apply for immigration benefits by affording her fair immigration proceedings.

The court held that the Petitioner did not have to return to her country before filing her I-212 request for permission to reapply for admissibility. The court concluded that, under 8 C.F.R. § 212.2(e), Petitioner could seek permission to reapply for admission from within the United States. Additionally, under § 212.2(g)(2) since Petitioner was physically present in the United States but was ineligible to apply for adjustment of status, she should file the application with the district director having jurisdiction over her place of residence. 8 C.F.R. § 212(g)(2).

The Court declined to adjudicate the Petitioner's applications filed with the USCIS. See *Succar v. Ashcroft*, 394 F.3d 8, 25 n.22 (1st Cir. 2005). While the court could review the government's denial of an I-212 or I-485 if such denial was based on a purely legal, nondiscretionary reason, the court determined that Petitioner's applications for permission to reapply for admission and for adjustment of status were not ripe for review because were still pending. The court ordered the USCIS to adjudicate Petitioner's applications in a timely fashion.

BENSLIMANE v. GONZALES, No. 04-1339 (7th Cir. 2005) holds that a motion for continuance may be judicially reviewable if it has effect of a substantive ruling on an application to adjust status.

Judges: POSNER, RIPPLE, ROVNER:

The Petitioner entered on a visitor's visa and overstayed. In removal proceeding, the Petitioner admitted removability but claimed that he had married a U.S. citizen two months earlier and that she had filed a petition, Form I-130, requesting that he be given a visa as a legal resident of the United States. Concurrently with his wife's I-130, the Petitioner filed an application for adjustment of status, Form I-485. The USCIS acknowledged the filing, and informed Petitioner that it would take 26 months for him to be granted an interview on the application.

At the removal hearing, the Immigration Judge noted that had Petitioner and his wife filed the visa petition and adjustment of status application forms jointly, he could have continued the removal proceeding until the visa petition was adjudicated. Even though the forms had

been filed jointly, they had been placed on a different adjudicative track from the removal proceeding. The Immigration Judge ordered the Petitioner to re-submit his I-485 application to the court within 60 days.

Petitioner's attorney mistakenly thought that I-485 could not be filed with the court until the I-130 had been adjudicated and requested a new continuance to await the adjudication of the visa petition I-130. The judge denied the request and ordered Petitioner removed, since adjustment of status was the only basis on which he was resisting removal. The BIA affirmed the IJ's denial of the motion for a continuance and the resulting order of removal.

The court determined that while the denial of the Petitioner's motion for a continuance was discretionary, it was nevertheless judicially reviewable because the denial of the motion had the effect of a substantive ruling on the application to adjust Petitioner's status.

The court found that the BIA's affirmation of the Immigration Judge's denial was in effect an unjustifiable punishment for an attorney's mistaken belief that the filing of the I-485 form would be premature, and therefore, arbitrary.

The Court vacated the order of removal and directed the BIA to stay removal pending the ruling on the visa petition and completion of the adjustment of status proceeding.

6. Government Processing Times

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

California (01/06/2006): www.visalaw.com/california.html

Vermont (01/06/2006): www.visalaw.com/vermont.html

Nebraska (01/06/2006): www.visalaw.com/nebraska.html

Texas (12/30/2006): www.visalaw.com/texas.html

Missouri (01/06/2006): www.visalaw.com/missouri.html

AAO (12/28/2006): www.visalaw.com/aao.html

7. News Bytes

According to the *Federal Register*, the Employment and Training Administration (ETA) of the Department of Labor is amending its regulations related to the H-1B and H-1B1 programs to generally require employers to use Web-based electronic filing of labor condition applications. The final rule also implements technical and clarifying amendments to ETA's H-1B and H-1B1 regulations. Among these amendments are provisions to reflect Congressional reinstatement of certain evidence and obligations applicable to employers that are H-1B dependent or have committed willful violations of H-1B requirements. This final rule is effective on January 4, 2006.

A report released last week by the Pew Hispanic Center suggested that recent Mexican immigrants in seven cities across the United States typically traded jobs in Mexico for the prospect of work in this country. According to the survey, most undocumented Mexican immigrants in the United States had been employed in Mexico. Once in the United States

they found that their undocumented status was no barrier to being hired and opted to keep the jobs they could obtain in the US rather than return to their native country. The report states that the current workers in the US were taken from the heart of the Mexican labor force. The full report is online at <http://pewhispanic.org/reports/report.php?ReportID=58>.

According to the Associated Press, groups of protesters rallied nationwide last weekend against undocumented immigration and relaxed border security. The protests, dubbed "Stop the Invasion" were organized in 19 states, but in several cities the rallies had poor turnouts. In one California suburb, the AP reported about two dozen protesters gathered outside a store with American flags and were then surrounded by more than 100 immigrant supporters who shouted "Racists go home." One man was arrested for assault.

8. International Roundup

Four members of a gang thought to have made millions organizing more than 120 sham marriages for Nigerian immigrants were jailed in London last week. Desmond Woghiren, 40, and his cousin Frank Woghiren, 30, both of Enfield, North London, were given nine and six years respectively. George Tanimowo, 38, from Luton, and Idemudia Aigbedion, 40, from East London, got five and four years. Desmond Woghiren used his security and cleaning company as a cover to fly in Dutch women to marry the would-be immigrants.

According to *Expatica News*, the Belgian federal government has asked the High Council for Employment to investigate the impact on employment levels if Belgium were to open up its borders to workers from the 10 new EU member states.

Belgium must make a decision about any possible change to the transition regulations imposed on workers from the 10 new EU states by May 1, 2006. It will examine the impact of not extending the restrictive transition phase, the current situation of workers from 10 new states in the Belgian jobs market, the impact on illegal employment and the need for a supervisory system to prevent fraud. The study must be completed by mid-February and it must take into account the European Commission report to be released in January. Unions and employers will need to respond by mid-March.

9. Legislative Update

H.R.4437 - To amend the Immigration and Nationality Act to strengthen enforcement of the immigration laws, to enhance border security, and for other purposes.

Sponsor: Rep Sensenbrenner, F. James, Jr. (introduced 12/6/2005)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:H.R.4437:/>

H.R.4448 - To amend the Immigration and Nationality Act to permit the admission to the United States of nonimmigrant students and visitors who are the spouses and children of United States permanent resident aliens, and for other purposes.

Sponsor: Rep Pallone, Frank, Jr. (introduced 12/6/2005)

<http://www.congress.gov/cgi-lis/bdquery/z?d109:H.R.4448:/>

10. State Department Visa Bulletin

IMMIGRANT NUMBERS FOR JANUARY 2006

A. STATUTORY NUMBERS

1. This bulletin summarizes the availability of immigrant numbers during **January**. 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 December **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".

Schedule A Workers: Employment First, Second, and Third preference Schedule A applicants are entitled to up to 50,000 "recaptured" numbers.

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	PHILIP-PINES
Family					
1 st	22APR01	22APR01	22APR01	08AUG94	22AUG91
2A*	15JAN02	15JAN02	15JAN02	15FEB99	15JAN02
2B	22JUN96	22JUN96	22JUN96	08FEB92	22JUN96
3 rd	01JUL98	01JUL98	01JUL98	08OCT94	08FEB91
4 th	15JUN94	15JUN94	22DEC93	01SEP92	01OCT83

*NOTE: For January, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 15FEB99. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 15FEB99 and earlier than 15JAN02. (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
Employment-Based					
1 st	C	01JAN02	01JUL03	C	C
2 nd	C	01JUN01	01JAN01	C	C

3 rd	01APR01	01APR01	01JUN99	01MAR01	01APR01
Schedule A Workers	C	C	C	C	C
Other Workers	01APR01	01APR01	01APR01	01APR01	01APR01
4 th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5 th	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C

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

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This reduction has resulted in the DV-2006 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 **January**, immigrant numbers in the DV category are available to qualified DV-2006 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 Listed Separately		
AFRICA	AF	9,000	Nigeria 6,400
ASIA	AS	3,100	Except: Bangladesh 3,025
EUROPE	EU	6,800	
NORTH AMERICA (BAHAMAS)	NA	6	

OCEANIA	OC	330	
SOUTH AMERICA, and the CARIBBEAN	SA	550	

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-2006 program ends as of September 30, 2006. DV visas may not be issued to DV-2006 applicants after that date. Similarly, spouses and children accompanying or following to join DV-2006 principals are only entitled to derivative DV status until September 30, 2006. DV visa availability through the very end of FY-2006 cannot be taken for granted. Numbers could be exhausted prior to September 30.

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

For **February**, immigrant numbers in the DV category are available to qualified DV-2006 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	11,600	Nigeria 8,150
ASIA	AS	3,900	
EUROPE	EU	8,300	
NORTH AMERICA (BAHAMAS)	NA	6	
OCEANIA	OC	400	
SOUTH AMERICA, and the CARIBBEAN	SA	700	

D. OBTAINING THE MONTHLY VISA BULLETIN

The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:

<http://travel.state.gov>

From the home page, select the VISA section which contains the Visa Bulletin.

To be **placed on** the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

listserv@calist.state.gov

and in the message body type:

Subscribe Visa-Bulletin First name/Last name(example: Subscribe Visa-Bulletin Sally Doe)

To be **removed from** the Department of State's E-mail subscription list for the "Visa Bulletin", **send an e-mail message to the following E-mail address:**

listserv@calist.state.gov

and in the message body type: **Signoff Visa-Bulletin**

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

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

VISABULLETIN@STATE.GOV

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

Department of State Publication 9514
CA/VO: December 8, 2005

11. Guest Column: After The Fall: Making Sense Out Of Sensenbrenner 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.

Now we know how Tom Paine felt at Valley Forge. It has been a cold December for those who think immigration is good for America. On December 16th, the House of Representatives approved the Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (H.R.4437), perhaps the most draconian bill of recent memory, and, a mere three days later, the House approved an agreement with the Senate on a comprehensive budget reconciliation package stripped bare of any pro-immigration provisions. While there is some satisfaction in the fact that the House did not get the higher L fees that it sought, this is cold comfort. Truth be told, it was a tough week, the worst in a long time, and the shock among pro-immigration circles, both on Capitol Hill and beyond, is palpable.

For the first time in a long time, the Republican House defied the US Chamber of Commerce, the National Association of Manufacturers and other corporate lobbying groups who sought to block adoption of a mandatory electronic employment eligibility verification system that would link Social Security Administration and Homeland Security databases. Such business opposition is not hard to figure out. Electronic verification would be on top of, not as a substitute for, the current I-9 compliance regime. Not only would new hires be subject to electronic verification, but all private sector employers would be compelled to reverify existing employees within six years; federal, state and local governments, not to mention non-governmental employers at critical infrastructure facilities, such as airports and nuclear power plants, would only have three years. All private sector employers must electronically check their entire workforce by 2012.

The political clout of their natural allies could not carry the day against the popular appeal of the proposal by House Judiciary Committee Chair James Sensenbrenner (R-WI) who benefited from the absence of House Majority Leader Tom DeLay, busy with his own legal troubles back in Texas. With DeLay not there to whip the GOP House Caucus into line, the Republican House Leadership removed Senate language that would have revolutionized employment-based immigration from the budget conference report as the price of pacifying anti-immigrant House members who had sent a letter to Speaker Hastert and Acting Majority Leader Roy Blunt(R-Mo) threatening to vote against the budget if the good stuff stayed in. Whether they would have acted on their threat will never be known, but the possibility of their doing so was enough to make House budget conferees beat a hasty retreat. While there was a deal to be made, one in which pro-immigration provisions were sold as a potent enhancement to House Republican leaders desperate for new sources of revenue, the need to pass a federal budget, particularly with no Democratic votes, trumped everything else. Hastert and Blunt simply did not have the margin within their own Caucus to call Tancredo's bluff. Originally in the draft Conference Report, Section 8001 was taken out before a final vote. Other pro-immigration lobbying efforts by the immigration bar and its traditional comrades in arms were too little, too late.. But, this is sadly no longer news. Pro-immigration lobbyists were most effective in the good old days when immigration was an inside the Beltway game. You met with a few friendly legislators who depended on your technical expertise and usually something could be quietly and quickly worked out. Three things have made this impossible. First, the Immigration Reform and Control Act made all US employers junior immigration agents by mandating completion of the I-9 employment verification form as a condition of hire. No longer would it be acceptable for American companies to hire those illegal aliens who had made their way through the maze. Now, immigration became a daily fact of business life. As was predicted, IRCA did not solve the problem of illegal migration, so much as defer the day of reckoning for a future time. The marker for IRCA has now come due. Second, the Immigration Act of 1990 tripled the number of employment visas, but fatefully, at the last minute, chose not to reform the labor certification system that, even then, had broken down as the inevitable contradiction of mass migration and micromanagement became too heavy to bear. . Moreover, IRCA introduced the concept of amnesty as a way to cope with rising illegal migration without doing anything to restore the structural imbalance between family and employment-based options that had made it necessary to come in under the shadows in the first place. That was what IMMACT 90 was supposed to do- serve as the second act to IRCA's overture. Yet, the number of immigrant visas for the other worker category- a paltry 10,000 (originally only 5,000)- was, and always has been, wholly inadequate to the task and the demand, thus leaving both desperate aliens and equally anxious employers little incentive but to act in an extra-legal fashion. What the law did not make provision for , the economy did. Third, 9/11 changed the world and everything in it would never be the same. Immigration was now synonymous with terrorism and those who hated both immigration and the immigrants now had a powerful new club to swing. They set about wielding it with gusto. Lou Dobbs meet Mohammed Atta.

As bad as HR 4437 is, the real loss is the removal of the pro-immigration provisions that had been enshrined in section 8001 of the Senate budget package. It is impossible to overstate the stimulus that Senate Budget Bill section 8001 would have injected into an employment immigration system that is on life support. Even its authors do not realize what has been lost. Restoration of up to 90,000 unused immigrant visa numbers that had been gathering dust is only the least of it. Much more was at stake. The additional unused H-1B numbers that Section 8001 would have made available would have been a shot in the arm for desperate US employers with openings where these foreign nationals are sorely needed. Section 8001 would have tripled the number of employment-based immigrant visas simply

by not counting family members against the 140,000 cap. Just by backing out dependents , the EB quotas would have been utterly transformed. Good bye backlogs! But wait, I rejoice too soon. Not counting family members would erase much of the current EB backlog, but does nothing to guard against its re-emergence, phoenix-like from the ashes. The day for immigration reform on the cheap is long since gone never to return. Section 8001 did not enlarge the EB quota nor give employment based migration priority over family migration, something that must happen if the same, or even longer, backlogs, are not to come back with a vengeance . There was one other fly in the ointment, namely that the architects of Section 8001 did not realize the need to amend the Child Status Protection Act so that, while Mom and Dad waited for their day of green card deliverance to arrive, their kids would have aged out. The CSPA only freezes a dependent's age if there is a current priority date. How many parents are going to wait patiently for final adjustment approval if their kids have to go home?

Removal of Section 8001 from the Budget Reconciliation Conference Report can be a temporary setback if we play our cards right. Congressman Sensenbrenner has long and loudly proclaimed that he is not against all immigration, just the illegal variety. Fine. Let's take him at his word. He is, after all, the architect of the new E-3 visa that enables 10,500 Australians to get around the H-1B cap. Congressman Sensenbrenner has his enforcement-only bill now so he should be prepared to support us when we seek to attach Section 8001 to broadly bipartisan legislation in the upcoming session of Congress. If Congressman Sensenbrenner means what he says, and he usually does, this might be a golden opportunity to bring Section 8001 back to life.

Having said that, in the long term, Section 8001 meant a lot more than HR 4437 does not mean that the number of poison pills in Sensenbrenner's bill do not make it exceedingly painful to swallow. Purely from a \$ standpoint, the bill does not work, particularly at a time when the Administration wants to rein in federal spending, eliminate the estate tax, scrap the alternative minimum tax, rebuild the Gulf Coast, keep defense spending at record levels, pay for a new prescription drug benefit under Medicare and make the President's tax cuts permanent. Did I forget Iraq?. The Congressional Budget Office estimates that initial implementation will cost \$1.9 billion with more in later years as additional restrictions come on stream. Just do the math. Providing DHS with secure access to a reliable database of Social Security numbers will not come cheap. When you factor in the need for the Social Security Agency to answer phone inquiries, handle personal visits and produce replacement SSN cards for people whose employers get a nonverified electronic response, you begin to get some idea of why the Social Security folks are less than wild about this new toy. Take off the price tag, and HR 4437 still does not look too good. Here are some holiday treats that you probably will not stuff into your stocking over the fireplace:

All visitors processed in the US VISIT system will now offer up ten fingerprints to enhance the reliability of biometric data collection. Think that is going to shorten the lines at your friendly airport?

Illegal presence in the USA goes from a civil offense to a crime punishable by a year in the pokey. This covers anyone who overstays or violates the terms of their visa. Advising such aliens on their legal options, or helping them to become legal, could easily be prosecuted as harboring. How's that for chilling the attorney-client relationship? It is hard to imagine that the feds will arrest millions of people, but it is not beyond imagining to speculate that they might move against high profile lawyers, corporate employers, and non-profit advocates, if only to make an example out of them, and scare the hell out of everyone else. Nothing succeeds like intimidation. The criminalizing of immigration misconduct, often innocent and frequently the direct product or inevitable result of government inefficiency, recalcitrance or

sheer refusal to abide by law or logic, is a blatant attempt to convert understandable public concern into overt xenophobia . It is grandstanding masquerading for public policy and must be denounced as such.

Jack Kemp, former Secretary of Housing and Urban Development and the Republican Vice-Presidential Candidate in 1996, has done just that:

H.R. 4437 is so overreaching that it would effectively transform any relative, employer, co-worker, co- congregant or friend of an undocumented immigrant into an "alien smuggler" and a criminal. The legislation's far-reaching "smuggling" provisions go far beyond any common-sense definition of a "smuggler" and include average Americans going about their business. It also inappropriately conscripts the American business community into the U.S. government's immigration police force by requiring burdensome investigative and reporting activities where prospective employees are concerned:

<http://www.humaneventsonline.com/article.php?print=yes&id=11112>

The maximum period for voluntary departure shrinks from 120 to 60 days. You might not get even that if you cannot pay to post a bond nor prove up hardship to excuse you from such obligation.

There is a new ten year statute of limitations for immigration-related crimes.

State and local law enforcement can now investigate, arrest and detain, or even transfer to federal custody, any alien in violation of immigration laws. The very population that is most vulnerable to crime, that is most in need of protection, and has the most reason to distrust the police, now has one more reason to keep quiet. Will this make our cities safer?

Expedited removal moves inland to lasso any alien arrested within 100 miles of the border up to 14 days after entering the USA and any nonimmigrant visa holder must give up the right to challenge a refusal to admit, regardless of how arbitrary or capricious, save for asylee or refugee claims. Due process is simply too much trouble.

The time you must wait after a naturalization interview to take your case to federal court has just been extended from 120 to 180 days. Even then, if you do manage to get to the courthouse, all the judge can do is send your case back down to the CIS with instructions to behave; no longer can the court order an outright grant.

The border with Mexico is to be militarized. HR 4437 authorizes two layers of fencing and the installation of additional barriers with priority given to certain high entry sections. One wonders what will happen to our northern border with Canada and how effective any attempt to seal off thousands of miles will be. Beyond that, the moral position of the USA in the rest of an already suspicious world will be seriously compromised. What are we to tell other countries when they seek to build their walls? What will be the consequences be for our foreign relations with our neighbors, the same neighbors that we are pressing for trade concessions and security cooperation? At a time when the reaction against globalism is in full swing throughout the Western Hemisphere, is this really the time to retreat behind a Fortress America?

Yet, one wonders if there are sections in HR 4437 that may not serve as common ground, small beachheads that can be enlarged with hard work and much good will. At a certain stage of one's life, following small victories and big defeats, you arrive at a place where a decent respect for the opinions of others forces you to admit that some things are true even if James Sensenbrenner believes them to be true. Try these on for size:

Congressman JD Hayworth, Republican from Arizona, proposed the elimination of the Family Fourth Preference with all the numbers shifted over to the employment side of the ledger. Predictably, our crowd went nuts. Why? With due appreciation for cultural lifestyle and ethnic diversity, most Americans love their adult siblings, but we do not live with them. The brothers and sisters of US citizens are coming here to work and they should enter on work visas with proper labor market protection. In fact, they would get here much faster this way, thus demonstrating yet again, if this still needed proving, that rhetoric is not reality nor good intentions a satisfactory substitute for sound public policy. The same argument can and must be advanced to support Section 1102 of HR 4437 that, at long last, eliminates the Diversity Lottery, a flawed experiment in social engineering that has no apparent rationale to sustain it.

Section 207 of HR 4437 provides that a false claim to US nationality, not just to US citizenship, is a bar to admission. This is yet another example of Congress' dislike for the Ninth Circuit, here a reaction against *U.S. v. Karanoui*, 379 F. 3d 1139, 1140 (9th Cir. 2004) in which the Court held that a noncitizen defendant who had checked off the box on the I-9 form claiming to be a "citizen or national of the United States" had not violated 18 U.S.C. Section 911 ("whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned more than three years, or both") on the theory that a claim to US nationality was not a claim to US citizenship. While this is certainly true, it is virtually inconceivable that someone who answers this question in such a manner knows the difference. The concept of owing permanent allegiance to the United States without being a citizen, precisely the definition of "US National", belongs to America's distant imperial past when Cuba, the Philippines, and Puerto Rico fell to Uncle Sam as the spoils of a short but sweetly victorious war with Spain. With such singular exceptions as Micronesia and American Samoa, it is hard to find a US national today, nor did the Ninth Circuit find one. This is a wonderful example of why reliance on a legal technicality defies common sense, so much so that the very integrity of those who hold fast to it cannot help but suffer in the public's perception.

Section 219 of HR 4437 directs USCIS to establish a pilot program for backlog reduction within six months. What's not to like?

Section 604 of HR 4437 makes it a deportable offense to unlawfully procure citizenship, commit domestic violence, engage in stalking, neglect a child and child abandonment. Unless I have been educated beyond my intelligence, which is certainly possible, it is hard to figure out what is so terrible here.

Section 606 of HR 4437 makes the commission of three drunk driving offenses grounds for a one way ticket out of town. For all those who have lost close friends or family to this terrible crime, I fail to understand why Sensenbrenner is wrong. Canada bars anyone with even one DUI and few think of that country as a bastion of reaction. The same can be said for Section 613 which adds sexual abuse of a minor as an aggravated felony. Is defense of antisocial behavior our new badge of intellectual sophistication or civic virtue?

Section 1201 would require DHS to notify a foreign government when their citizens naturalize in the United States. Under Section 349 of the Immigration and Nationality Act, and even under HR 4437, continued use of a foreign passport after naturalization is not a basis for loss of US citizenship. It should be. Such conduct is manifestly inconsistent with the oath of citizenship in which one renounces all other allegiances. Either change the oath or change the law. Doing neither tolerates the kind of hypocrisy that breeds cynicism and undermines respect for law.

Those who condemn Sensenbrenner, even with good reason, must look in the mirror and ask themselves why such harsh measures could have been enacted by Congress in so short a time, while neither the President nor Senators McCain and Kennedy have anything but a big goose egg to show for their efforts over a much longer period. Partly this reflects Sensenbrenner's power in the House itself and his mastery as a parliamentarian, or more aptly stated, the behind the scenes wizardry of Representative Lamar Smith (R-TX). Yet, there is more to it than this. What is most striking is the extent to which the pro-immigration forces lack reliable and effective lines of communication with the Republican Congressional leadership, particularly in the House of Representatives. Had such entree existed, the hunger for new revenue streams would have been linked much earlier and much more securely to the need for passage of Section 8001. We will all pay for a failure by the pro-immigration forces, our forces, to adjust to the impact of 9/11 and the fact that the Democrats no longer control Congress. Much of the information we are told by those we think are in the know comes from friendly Democrats who simply are excluded from the meetings and the decisions that count. This must change if the law is to be changed, if HR 4437 is to be blocked in the Senate and future bills like it are to be strangled in their cradle. So, this leaves us with a choice. We can become reconciled to more and deeper defeats, finding solace in resignation and healing our wounds in the balm of self-righteousness. We can denounce the 'Culture of No' at conferences and dinner parties, secure in the false belief that intellectual superiority is a fair exchange for political impotence. As each new law comes along, we can talk to our natural allies and confer with those who share our values. We can have another emergency campaign and put forward reasons to oppose the latest blow that are both legally justified and morally sound. And we can lose again.

There is another way, a better way. We can do something new, we can enter the arena, we can be more concerned with practical results than ideological purity. We can roll up our sleeves and make painful, dirty, slow progress by compromising with those whom we neither agree with nor respect on non-immigration matters. We can stop treating all opponents as if they were the same, as if their concerns, which are not ours, lack any legitimacy or are not honestly felt or strongly embraced. There are many in the Tancredo camp that we will never reach. They do not want any immigration, legal or illegal. There is no way to reach them nor should we try. They belong in the muck of privilege and prejudice into which we should never descend and from which we can never emerge. Yet, there are others who opposed Section 8001 and voted for HR 4437 who can be reached. Our task is to find out how, to speak to their hearts and to learn a common language whose most honest expression can unite us all. That is the way forward.

There is a price, however, to be paid for coming to terms with reality. Those who favor more immigration must cease and desist from their reflexive opposition to any enforcement measure. There is nothing wrong with enforcement if it is tied to a wider social purpose, if it seeks to facilitate, rather than prevent, immigration that is manifestly in the national interest. That is the true objection to HR 4437, not that it hurts, because enforcement often hurts and frequently should, if it has any teeth. The real problem with Sensenbrenner is that his vision consists of enforcement not to aid policy, but as a substitute for it, not to promote immigration, but to discourage it. More than the aliens themselves, America is the real loser. To change their approach on enforcement, pro-immigration supporters must change their view of immigration itself. If one believes, as most supporters of immigration have always believed, that immigration is international social work whose fundamental justification lies in helping the individual alien, then opposition to enforcement necessarily follows for the burden of such enforcement falls most harshly upon the object of their compassion. It must be so. Only when immigration advocates are primarily concerned with the deployment of immigration as a strategic tool to promote core national objectives will

they be intellectually and emotionally capable of deciding what enforcement to embrace and what to resist. This must happen if an enlightened immigration policy can ever hope to regain control of the national debate and silence Lou Dobbs once and for all. Unless we adopt a more nuanced approach towards enforcement and recognize that new benefits must come with strings attached, ours will remain a minority position in the country at large. Does this make sense? Does it benefit our clients? Does it get us what we want?

The question is not whether enforcement will be front and center in the immigration conversation but, rather, how it will be used and towards what ends. If we who favor immigration do not embrace enforcement and seek to fashion it in our image, then we should not be surprised when our foes shape it in their own. That is precisely what has been happening, and that is one big reason why HR 4437 hurts as much as it does. There are some provisions that deserve our constant condemnation and unremitting hostility; yet, there are others that we should have supported or, at a minimum, sought to modify or moderate. Once you give the American public the distinct impression that only the other side wants to make them safe, even if they are wrong, even if they are only seeking to elicit favorable headlines, you are starting off from a posture of political weakness and playing catch-up is rarely enough to ward off disaster.

For a long time, our side just didn't get it. While they could read the calendar, their hearts and minds were still stuck on September 10, 2001, a time when Congress was poised to revive Section 245(i) forgiveness and abolish the I-9 employer sanctions regime. Finally, about one year ago, they got religion. President Bush put the issue of guest workers center stage and Senator McCain signed on to S.1003, The Secure and Orderly Immigration Act of 2005. Title IV of S. 1003 deals entirely with enforcement, most notably Section 402 that, precisely as HR 4437 does, mandates establishment of an Employment Eligibility Confirmation System to allow employers to verify an employee's identity and employment authorization. Indeed, it would not be too much of an exaggeration to say that the inclusion of enforcement was the price that Sen. Kennedy and his allies paid for having Sen. McCain come on board. There was a hearing on S. 1003 before the Senate Judiciary Committee on July 26, 2005 (I testified at one of the panels for that hearing), but no action after that. Since then, leading conservative pro-immigration advocates, like Tamar Jacoby, have called for a melding of McCain- Kennedy's guest worker provisions with the enforcement mechanism of S. 1438, the so-called "Cornyn- Kyl" Bill , more formally known as the Comprehensive Enforcement and Immigration Reform Act of 2005 whose chief architects are Sen. John Cornyn (R-TX) and Sen. Jon Kyl (R-AZ).

Had McCain-Kennedy been introduced sooner, had the Senate Republican stalemate over immigration been broken, perhaps Rep. Sensenbrenner would not have moved ahead with his own bill, being forced instead to respond to what the Senate had done. There being no Senate action, Rep. Sensenbrenner saw an opening to press his own enforcement agenda and he took it, brilliantly and decisively. His victory in the House may come back to haunt the Republican Party, much as the GOP enactment of national origins quotas in 1924 turned generations of immigrants towards the Democratic banner and as Proposition 187 ultimately derailed the presidential aspirations of California Governor Pete Wilson. Republican stalwart Jack Kemp plays the role of Cassandra:

The so-called Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005 (H.R. 4437)...is so overreaching that, in my opinion, it could become the Proposition 187 of the 21st century...the effect was to drastically alienate Hispanic voters in California from the Republican Party... It's true our borders are broken and the problem is huge, but Republicans have the opportunity today to take the lead on reforms and fix our immigration system. Sending this legislation to the President to be signed is sure to be perceived as

anti-immigrant and, indeed, anti-growth:
<http://www.humaneventsonline.com/article.php?print=yes&id=1112>.

How many pro-immigration organizations have invited people like Jack Kemp to serve on their boards? How many Executive Directors of pro-immigration groups have served on the campaign committees of Republicans like Kemp, Rep. Jeff Flake (R-AZ) or Rep. Chris Cannon (R-Utah)? Why are there not more Tamar Jacobys out there? I ask these questions as a life-long Democrat whose political baptism came in volunteering for Bobby Kennedy when he ran for the United States Senate in 1964, went "Clean for Gene" in 1968, stayed up till 2Am to hear McGovern's acceptance speech, and who still regards Bush v. Gore as illegitimate. If we want immigration policy to be bipartisan, as it must be if it is to create a sustainable national consensus grounded on compassion and enlightened self-interest, then immigration advocates must become bipartisan, not a left-leaning interest group most concerned with advancing the election prospects of the Democratic Party. There is nothing wrong with caring about the Democratic Party first and immigration second if one is honest about their intentions and their purpose. Putting either immigration or the Democratic Party first are both equally moral positions. What is immoral is to pretend to be one when secretly being the other. Far too many immigration interest groups will suddenly fall mute if speaking out means that Republicans get the credit. We need honest priorities openly expressed if the national conversation on immigration is to achieve the kind of results we claim we want and which I believe we do want.

We live in a time when civility is a sign of weakness and sincerity is subject to proof. Now, now more than ever, the vital center must hold. It is in the wake of Sensenbrenner's bill that champions of immigration must seek to create a third way that has within its big tent ample room for those Sensenbrenner supporters who realize that America needs an outward looking immigration policy integrated with the global economy and responsive to the manifold challenges of the digital age. For those who prefer the security of ancient hatreds, this will not be a time of opportunity but remain one of bitterness and suspicion. Yet, it can be more than that if we but have the will to chart a new course towards those whose dreams have not been ours. We owe it to our clients and our country to try. Rather than abandoning our beliefs, we must marry our deepest convictions to an abiding concern for America's future. When the German Army invaded Russia in June 1941, Prime Minister Winston Churchill immediately went to the well of the House of Commons to urge all out support for Marshall Josef Stalin. Asked how a lifelong foe of Bolshevism could take such a stand and reach out to those who had always been his most bitter foes, Churchill responded with words that we, who seek to make sense out of Sensenbrenner's bill, would do well to take to heart: " If the Nazis invaded hell, I would say a good word for the Devil in the House of Commons!" Amen, Winston. We are all right behind you.

12. Computer Staffing Firm Ordered to Pay for Immigration Law Violations

Computech Inc., a computer staffing firm in Southfield, MI, has agreed to pay \$2,250,000 in back wages to 232 computer professionals and a \$400,000 fine to settle immigration law violations, according to a news release from the US Department of Labor.

An investigation by the Labor Department's Wage and Hour Division found that Computech brought non-immigrant H-1B workers into the U.S., but failed to pay them the minimum required wage rates in the areas where they were employed. The investigation also

disclosed the Computech frequently “benched” the workers without compensation contrary to the rules of the H-1B program.

A press release from Computech states that the Department of Labor investigated Computech five years ago and only decided to issue a determination on the matter this year. It states that Computech and the Department have reached a settlement in which Computech admits no wrongdoing and voluntarily agrees not to sponsor H-1B workers for a period of 18 months. It also points out that the settlement relates to employment of workers between five and seven years ago, and not to Computech’s current employment practices. The Department has not raised any issues regarding the company’s compliance since August 2000.

13. Aytes Announces Changes in I-864 Affidavits of Support

In one of his first major policy pronouncements since replacing Bill Yates as Director of Operations for USCIS, Michael Aytes has issued a memorandum that makes significant changes in the way I-864 Affidavits of Support are handled in green card applications.

The most important changes are as follows:

1. Only the most recent year's tax return is now required instead of the most three years. Aytes notes that the Immigration and Nationality Act requires three years, but gives USCIS discretion to vary from that requirement.

2. Until now, local offices could decide whether to require the I-864 at the time of filing or at the time of the interview. From now on, the I-864 must always be submitted at the time of filing the application.

3. If the income on the I-864 is enough to meet the 125%/100% income requirement, an examiner is directed to not issue a request for evidence.

4. If the income on the I-864 is not enough, the examiner is directed to inquire into the current year's income, not ask for more information about income in the year of the tax return.

The changes take place immediately. However, if an adjustment is pending already, the examiner should still request the I-864 at the time of the interview.

14. USCIS Issues Guidance on E-3 Australian Specialty Occupation Workers

U.S. Citizenship and Immigration Services (USCIS) issued guidance last week regarding E-3 nonimmigrant Specialty Occupation Workers. USCIS provided specific information on the eligibility requirements and documentation needed for individuals wishing to either change their nonimmigrant status to that of an E-3 worker or to extend their E-3 status.

To qualify for E-3 classification, an alien must, among other things, be an Australian national who is seeking employment in a specialty occupation requiring possession of a bachelor's degree or higher (or its equivalent), and possess the appropriate degree (or its equivalent) in the field in which the alien wishes to work. E-3 nonimmigrant status is initially granted for a period of no more than two years. Extensions of stay may be granted indefinitely in increments not to exceed two years.

Congress has established a yearly cap of 10,500 new E-3 workers. For purposes of the cap, "new E-3 workers" are those who, coming from abroad, are admitted initially in E-3 classification or those who change their nonimmigrant status to E-3 classification or change employers while in E-3 status. Unlike the dependent of an alien in H-1B nonimmigrant classification, the dependent spouse of an E-3 temporary worker may apply for and receive work authorization.

An alien seeking to be admitted in E-3 nonimmigrant classification at a U.S. Port-of-Entry must possess a valid E-3 visa issued by the U.S. Department of State. Aliens already in the United States may request a change of status to E-3 or extend their E-3 status by filing a Form I-129 (Petition for a Nonimmigrant Worker) directly with the Vermont Service Center. The cost for filing the request for change of status or extension of stay is \$190. In addition to the Form I-129, applicants must include the following documentation:

- Proof of Australian nationality,
- A letter from the prospective U.S. employer describing the alien's occupation, the alien's anticipated length of stay, and salary/remuneration arrangements,
- Evidence that the alien meets the educational requirements for the position to be filled (a bachelor's degree or higher or its equivalent in the specific specialty occupation),
- Evidence that the alien meets any licensing or other occupational requirements, and
- Evidence that the prospective U.S. employer has filed with the Department of Labor a labor condition application (LCA) specifically designated for E-3 Specialty Occupations.

More information about the E-3 temporary work visa and temporary worker programs in general is available on the USCIS website at www.uscis.gov and on the Department of State website at www.state.gov.

15. USCIS Introduced New Director

On January 4th, Department of Homeland Security Deputy Secretary Michael Jackson swore in Dr. Emilio Gonzalez as the new Director of U.S. Citizenship and Immigration Services (USCIS). Nominated for the position in September 2005, Dr. Gonzalez appeared before the Senate Judiciary Committee on October 18, 2005, and was confirmed by the U.S. Senate on December 23, 2005.

Dr. Gonzalez will immediately begin his tenure as USCIS Director. According to a press release from USCIS, Dr. Gonzalez brings a passion for immigration work and a wealth of

policy experience with him to his new position. According to DHS, as a Cuban immigrant and naturalized American, Gonzalez shares a special connection with the American immigrant population.

16. Gonzales Orders Crackdown on Abusive Immigration Judges

Attorney General Alberto Gonzales has responded to reports of abusive immigration judges by sending out a warning memorandum to all immigration judges in the US as well as a separate memorandum to members of the Board of Immigration Appeals.

Gonzales expressed his concern regarding judges who “fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice.”

Gonzales noted that while most immigration judges are doing their jobs professionally, there are some whose conduct is intemperate or even abusive. To deal with these problem judges, he has ordered a comprehensive review of both the immigration courts and the Board of Immigration Appeals to include a report on the quality of work and the manner in which it is performed.

Problems with immigration judges and the administrative appeals process have recently made front page news. The New York Times ran a story in late December (<http://www.nytimes.com/2005/12/26/national/26immigration.html?oref=login>) regarding scathing criticism being leveled against immigration judges by judges on the US Circuit Courts of Appeals. Conservative judge Richard Posner of the 4th Circuit concluded that “concluded that ‘the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.’”

According to the Times story, the Circuit Court in Philadelphia stated in September “that it had ‘time and time again’ been forced to rebuke immigration judges for their ‘intemperate and humiliating remarks.’ Citing cases from around the country, the court wrote of ‘a disturbing pattern’ of misconduct in immigration rulings that sent people back to countries where they had said they would face persecution.”

Some observers are blaming changes made under former Attorney General John Ashcroft that dramatically reduced funding and staffing levels at the Board of Immigration Appeals. The changes have made it difficult for the BIA to critically review most of the cases it reviews.

That has led to a dramatic rise in the number of appeals to the US Circuit Court of Appeals and many of the decisions going to these courts are coming with virtually no analysis from the BIA.

According to the Times story, “The solution to some of what recent criticisms identified as problems, several federal appeals court judges said, is to add positions to the immigration board and to require judges there to explain the reasons for their decisions.”