

Siskind's Immigration Bulletin – February 10, 2009

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Immigration lawyers Siskind Susser serve clients throughout the world from their offices in the US and their 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

Depending on your perspective, this past week represents a very positive week when it comes to immigration or an ominous sign of the future. Congress passed health care legislation opening up the children's health care program in the US to legal immigrant children previously excluded. The House of Representatives also passed a

bill mandating the reporting of deaths by the nation's immigrant detention centers. But this week also marked the passage of legislation in the House stimulus package that would mandate use of the flawed e-Verify system by employers around the nation who receive stimulus money (without any reciprocal provision dealing with the millions of illegally present immigrants).

And the Senate passed an amendment to its stimulus bill barring banks receiving bailout money that would require them to operate under the H-1B dependent employer rules. The amendment originally barred the banks from even using the H-1B program, but someone apparently reminded the sponsoring Senators that the US is legally bound by the General Agreement on Trade and Services and that version of the amendment would likely land the country in court and potentially set off retaliatory measures by other countries.

There is reason to be optimistic that we'll see positive immigration legislation this year. But there will be a lot of temptation to enact protectionist measures that allow members of Congress to tell constituents that they're helping preserve their jobs. But despite the fact that jobs seem different than traded goods, make no mistake about the fact that trade in services is still a form of trade and that protectionism in that arena has the same results as protectionism in the trade of goods. History tells us that protectionism didn't cause the Great Depression. But we also know that the Smoot-Hawley tariffs bill passed after the Depression started by a Congress feeling the same pressures as today, set off a global trade war that ended up sinking the world economy in to a deeper downturn. We need to be careful not to repeat history's mistakes.

Congress will be tested again in a few weeks when it must deal with the extension of three important employment immigration programs. Parts of the investor visa and religious worker visa programs will expire. And a critical physician immigration program that sends American-trained international physicians to medically underserved communities around the US expires as well. Anti-immigrant groups will be hard at work as usual to demonize the programs. But whether Congress remembers that the message of these groups was thoroughly rejected at the polls last November is not yet clear.

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I'll be speaking on a national teleconference entitled "Immigration Compliance Update 2009: I-9s, E-Verify, Crackdowns and the "Obama Effect" at 1 pm central time on Thursday, February 12<sup>th</sup>. The program is being presented by HRTrainingCenter.com and registration details can be found at <http://hrtrainingcenter.com/showWCDetails.asp?TCID=1005106> .

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Finally, as always, we welcome your feedback. If you are interested in becoming a Siskind Susser client, please call our office at 901-682-6455 and request a consultation. We are a national immigration law firm and work on a broad range of immigration matters for clients locating across the country.

Kind regards,

2. The ABC's of Immigration: Employer Compliance Series - I-9 General Concepts

For the next several bulletins, our focus in this section will deal specifically with providing vital information employers need to know when dealing with immigrant hires, the immigration laws associated with them, and the necessary steps employers must take to ensure legal compliance. This series is excerpted from The Employer's Immigration Compliance Desk Reference, the upcoming publication written by Greg Siskind.

**What is the Basis for Employment Verification?**

In 1986, Congress was debating many of the same questions as in recent years regarding illegal immigration and the best way to gain control of the border. The debated ended with passage by Congress of IRCA and ratification by President Ronald Reagan.

Central to IRCA was a section that created an employer sanctions system that requires all employers in the U.S. to verify the identity and employment authorization of nearly all employees hired since the law was passed in 1986. Employers would basically become a central part of the immigration enforcement process by having to take over responsibility for verifying that the employer's employees are legally in the country. Shortly after the law passed, the INS created Form I-9 to document that the employer has met its IRCA obligations. Employers are not permitted to knowingly hire unauthorized immigrants and properly completing the Form I-9 is the method for employers to demonstrate they lack knowledge that an employee is not eligible to be employed.

Coupled with the provisions sanctioning employers who fail to verify the employment authorization and identity of its employees are provisions barring certain immigration-related practices by the employer including engaging in discrimination based on citizenship or immigration status or national origin and requiring documentation different from or in addition to what IRCA actually requires (document abuse). Employees are also protected from retaliation when they file a complaint using the anti-discrimination rules.

**Which government agency regulates compliance with the employer sanctions rules under IRCA?**

While DOJ was responsible for enforcing compliance with IRCA's employer sanctions rules when IRCA passed, the responsibility was transferred to ICE when DHS was created in 2002.

**What is a Form I-9?**

The Form I-9 is the one page form employees complete verifying their identity as well as proving they are allowed to work in the United States. The form itself has three parts. Section 1 includes basic biographical information on the employee and also asks the employee to certify that he or she is a citizen, permanent resident, or authorized to work under another status. The second section is completed by an employer who must verify, and attest under penalty of perjury, which documents an employee presented to prove their identity and right to work and that the paperwork was completed in a timely manner. Employees may present items from a List A in the I-9 instructions that prove both identity and authorization to work (such as a U.S. passport) or a combination of an identification document from a List B in the instructions and a document in List C of the instructions that demonstrates employment authorization. The third section is reserved for employers who must periodically update the I-9 Form if the employee is not authorized to permanently work in the United States.

Note: The I-9 was updated in June 2007 and all employers must be using the new form as of December 26, 2007. The form is largely unchanged except for shortening the list of acceptable List A, B, and C documents consistent with changes passed by statute in 1996.

### **When must the I-9 Form be completed?**

The Form I-9 process must start on the day an employee starts work. The employee must complete the first section of the I-9 form on that day and must provide the supporting documents noted above within three days of the date of hire. If the documents are not presented by that point, the employee must be removed from the payroll (though it is permissible to suspend the employee rather than terminating the employee all together). While it is possible to require people to complete the I-9 form before the *first day of employment*, many immigration lawyers caution against this. DHS' I-9 handbook tells employers that the employee must have been *offered and accepted* the job and that the form should not be used to screen job applicants lest there be a charge of nationality discrimination. To the extent an employer chooses to have I-9s completed before the date of hire, they should only be requested after a position has been offered and accepted and there should be a uniform policy applicable to all employees receiving an offer of employment having to complete the I-9 ahead of time.

Note that the three day requirement to produce the supporting documents also applies to recruiters and referrers for a fee as well as state employment agencies.

### **What if an employee is being hired for less than a three day period?**

Employees being hired for less than a three day period must complete Section 1 on the day of hire and the employer needs to sign the verification attestation in Section 2 as well on the day of hire. Employees for jobs that are intended to last three days or fewer must therefore present their documents on the day of hire.

### **In a nutshell, what are an employer's Form I-9 requirements?**

Employers (and others required to retain Form I-9 as described below), have six basic obligations:

- Have employees fully and properly complete Section 1 of the Form I-9 no later than the date employment commences;
- Review the required documents to provide identity and employment authorization to ensure that they are genuine and apply to the person presenting them;
- Properly complete Section 2 of the Form I-9 and sign and date the employer certification;
- Retain the Form I-9 for the required retention period;
- Reverify employment authorization for employees presenting time-limited EADs;
- Make the Forms I-9 available for inspection if requested by DHS, OSC, or DOL.

### **Are employers the only entities required to verify employment eligibility using Form I-9?**

Aside from employers, agricultural associations and farm labor contractors also must complete Forms I-9 for individuals recruited or referred for a fee. The term “refer for a fee” and “recruit for a fee” do not include union halls that refer union members and non-union members.

Recruiters and referrers for a fee are permitted to designate agents to handle the I-9 process including national associations as well as the actual employers of the employees. If the employer is designated to handle the process, the employer must provide the recruiter or referrer with a copy of the I-9 and the recruiter or referrer still is liable for IRCA violations.

Recruiters and referrers subject to the I-9 rules must abide by the timing and recordkeeping requirements described later in this chapter and must make the I-9 forms available to ICE, OSC, or DOL officers. Fines and penalties applicable to employers apply to these recruiters and referrers as well.

Some state employment agencies also certify people they refer to employers. State employment agencies may elect to provide employees with certification of employment authorization and if the agency refers a job to an employer and sends a certification of employment eligibility within 21 days of the referral, the employer does not need to complete a Form I-9. Employers must still check the certification to make sure it refers to the person actually hired and must retain the certification as they would a Form I-9.

State agencies providing this service need to comply with the I-9 employment verification rules. One exception is that individuals may not present receipts for documents as they may in certain cases with I-9s completed by employers.

When a state employment agency wants to refer an individual again after he or she has previously been certified, the state agency can rely on the prior I-9 if the individual remains authorized to be employed and the employee is referred to an employer within three years of completion of the initial I-9. State agencies must

retain the I-9 for a period of at least three years from the date the employee was last referred and hired.

### **What is the employee's responsibility in completing the Form I-9?**

Employees are required to complete Section 1 of the Form I-9 stating the employee's name, address, SSN, date of birth, and whether the employee is a U.S. citizen or national, lawful permanent resident or an alien with authorization to be employed. If the employee is a permanent resident, he or she must provide an alien number and if the employee is an alien with employment authorization, the employee's alien or admission number and the expiration date of the employment authorization, if applicable. Employees must also sign the form attesting that the statements and documents are not false.

Employees are also required to present to the employer, recruiter or referrer for a fee, or referring state agency, documentation from the authorized list of documents demonstrating identity and employment authorization.

### **Are there any employees not required to complete a Form I-9?**

IRCA requires all employers have all employees hired after 1986 complete I-9 verification paperwork. The Form I-9 requirement applies to all employees including U.S. citizens and nationals. Employees who are not hired do not need to complete I-9 Forms and employers who selectively choose who will and will not complete I-9s could face penalties under anti-discrimination rules. Volunteers are not subject to I-9 rules since they receive no "remuneration" for their services. Independent contractors are also not subject to the I-9 rules, but employers should note that if they contract work to companies they know use unauthorized employees, they could be held liable as well under IRCA. Persons transferring within a company are not required to complete an I-9 form, but the easiest practice is usually to complete a new I-9 anyway rather than having to document the I-9 was done previously. Employees rehired by a company need not complete a new I-9 as long as they resume work within three years of completing the initial form I-9. Also, it is not necessary to complete a new I-9 after

- an employee completes paid or unpaid leave (such as for illness or a vacation),
- a temporary lay-off,
- a strike or labor dispute,
- gaps between seasonal employee.

### **What if an employee is a volunteer or paid in ways other than with money? What if an employee receives a signing bonus prior to starting work?**

DHS regulations consider a person to be hired for purposes of the employer sanctions rules at the time of the "actual commencement of employment" for "wages or other remuneration." "Employment" is defined to mean service or labor performed by an employee for an employer.

Based on these definitions, employees who receive a signing bonus but who have not actually begun employment would not be required to complete a Form I-9 until actual work for the employer commenced.

True volunteer positions no pay is received and the employee does not receive any other type of benefit in lieu of pay (such as food and lodging). While it is quite possible Congress did not intend to include positions where a charitable organization has provided meals and lodging to volunteers not receiving any pay for their labor, the rules do not seem to make an exception and the charity should err on the side of completing Form I-9s for the volunteers.

### **Is a new I-9 required for employees who are transferred within a company?**

No. Promoted and transferred employees do not require a new Form I-9.

### **Do independent contractors need to complete a Form I-9?**

No. Employees employed by an independent contractor are to be verified by the contractor. However, ICE has targeted employers when they have been able to demonstrate that the employer deliberately used a contracting firm to circumvent IRCA and knew that the contractor's employees were not employment authorized.

DHS' regulations define "independent contractor" to include individuals and entities who control their own work and are subject to control only as it pertains to the results. Employers should note that just because someone is called a contractor and issued a 1099 or an entity is paid which then pays the employee, does not mean that ICE will consider the arrangement to be a contractor relationship as opposed to an employer-employee relationship. The agency will examine the nature of the relationship to determine whether it really should be classified as an employment relationship where employees should be completing the Form I-9.

According to ICE, the following factors are considered in determining if a relationship is a contractor or an employment arrangement:

- who supplies the tools or materials
- whether the contractor makes services available to the general public
- whether the contractor works for a number of clients at the same time
- whether the contractor has an opportunity for profit or loss as a result of the services provided
- who invests in the facilities for work
- who directs the order or sequence in which the work is to be done
- who determines the hours during which the work is to be done

### **Are domestic service employees (such as housekeepers, kitchen help, and gardeners) required to complete I-9s?**

Sometimes. The term "employee" is defined by DHS to exclude those engaged in "casual domestic employment." "Casual domestic employment" includes individuals who provide domestic service in a private home that is "sporadic, irregular or intermittent."

In DHS' M-274 guide for employers specifically notes, however, that "those who employ anyone for domestic work in their private home on a regular basis (such as every week)" are required to have the employee complete a Form I-9.

The M-274 guide is not controlling law in and of itself and is merely interpreting IRCA. One could argue that certain domestic employees who show up every week at a private home are independent contractors meeting the tests described in the regulations.

One way to determine if a domestic service employee is an employee or not is if the IRS would consider an employer obligated to withhold taxes, pay social security, etc. If a tax specialist advises that withholding is required based on the nature of the relationship, then employment verification should occur. Even if this is not the case and even if an employee is paid in cash, it may still make sense to have the employee complete a Form I-9.

### **Under what circumstances would a returning employee not be required to complete a new Form I-9?**

A returning employee does not need to complete a new I-9 in certain instances where he or she is considered to be continuing prior employment. These include

- when an individual is returning from an approved paid or unpaid leave of absence (such as on account of illness, pregnancy, maternity, vacation, study, family leave, union activities or other temporary leave of absence approved by the employer)
- when the individual is promoted or demoted or receives significant raise
- when the individual is temporarily laid off for lack of work
- when the individual is out on strike or in a labor dispute
- when the individual is reinstated after a finding of wrongful termination
- when an individual transfers units within the same employer (the I-9 may be transferred to the new unit)
- when there is a merger, acquisition or reorganization and the new employer assumes the Form I-9 responsibilities from the prior employer
- when the employee is engaged in seasonal employment

The employer claiming that the employee is continuing in prior employment must show that the employee expected to resume employment at all times and that the employee's expectation was reasonable. Factors to be considered include, but are not limited to whether the

- employee was employed on a "regular and substantial basis;"
- individual complied with the employer's established policies regarding absence;
- employer's past history of recalling employees indicates a likelihood that the individual will be recalled;
- position has not been taken over by another employee;
- employee has not sought benefits like severance or retirement indicating that the employee would not be resuming work;
- financial condition of the employer indicates an ability to resume employment; and

- history of communications between the employer and employee indicates the intention to resume employment.

**Are employees who return to work after a labor dispute required to complete a new Form I-9?**

No. DHS regulations specifically state that employees returning after a labor dispute are considered to have been continuously employed.

**Are seasonal employees required to re-verify their Form I-9s?**

No. DHS regulations consider seasonal employees to be continuously employed.

**Are there special rules for employer associations?**

Yes. Agricultural associations who refer employees to individual employers are required to complete Form I-9s for employees referred for a fee to employers. The association can assign the task to the employer in certain cases as well as to national associations.

**Do employers of part-time employees need to complete I-9s for those employees?**

Yes. There is no exemption from the verification requirements because an employee is not full-time unless the employee is considered an independent contractor or the person is engaged in casual, non-regular domestic work in a private home.

**Can an employer require job applicants to complete Form I-9s?**

No. Employers should not complete Form I-9s for individuals applying for jobs. Only those individuals actually offered employment who have accepted should be requested to complete the Form I-9. See the next section of questions on the timing of completing Form I-9 for those individuals.

**What privacy protections are accorded employees when they complete Form I-9?**

DHS regulations state that information contained on the Form I-9 may only be used to verify an individual's identity and employment eligibility and to enforce immigration law. Presumably this bars both the government as well as employers for using I-9 information for any other purposes.

Employers with electronic I-9 systems are also required to implement a records security program that ensures that only authorized personnel have access to electronic records, that such records are backed up, that employees are trained to minimize the risk of records being altered and that whenever a record is created,

accessed, viewed, updated, or corrected, a secure and permanent record is created establishing who accessed the record.

### **Which foreign nationals are always authorized to work in the United States?**

In order to determine whether an employee will require sponsorship for a visa from an employer, it helps to know which types of foreign nationals are entitled to work incident to their status in the United States. DHS lists 16 types of cases where a foreign national is entitled to work in the U.S. simply on the basis of their status. Note that with the exception of permanent residents who show their I-551 card, the authorization to work in the other categories is demonstrated by an employment card issued by USCIS:

- Lawful permanent residents (“green card holders”)
- Certain persons processing under the 1986 immigration act (there should be very few people, if any, still in this group)
- Persons admitted as refugees
- Persons admitted as parolees
- Person in asylum status (note that the expiration date on the employment authorization card does not mean the bearer’s work authorization has expired)
- K-1 fiancé visa holders
- N-8 parents and N-9 dependent children processing for permanent residency on the basis of a family member working in the for an international organization
- Certain citizens of the Federated States of Micronesia or the Marshall Islands
- K-3 spouse visa holders
- Individuals granted withholding of deportation or removal for the period they hold that status
- Certain persons granted voluntary departure by virtue of membership in a specific nationality group
- Persons holding Temporary Protected Status for the period of time their country’s nationals are granted that status
- Individuals granted voluntary departure under the Family Unity Program of the 1990 Immigration Act
- Persons granted Family Unity benefits under the LIFE Act
- Persons holding V visa status based on certain family-based green cards filed before 2001
- Persons holding T visa status as victims of trafficking

### **Which foreign nationals are sometimes authorized to work in the United States?**

Certain individuals can live and work in the U.S. based on working for a specific employer and meeting certain conditions. USCIS lists 19 such categories and persons in these categories are authorized to work on the basis of possessing a valid I-94 as opposed to an EAD:

- A-1/A-2 foreign government officials (individuals must work only for the sponsoring foreign government entity)
- A-3 personal employees of A-1 or A-2 visa holders

- C-2/C-3 foreign government officials in transit (individuals must work only for the sponsoring foreign government entity)
- E-1/E-2 treaty investors and traders employed by a qualifying company
- F-1 students working on campus or engaged in curricular practical training (CPT employees must have a properly annotated I-20)
- G-1/G-2/G-3 representatives of international organizations (individuals must work only for the sponsoring foreign government entity or international organization)
- G-5 personal employees of G-1/G-2/G-3 visa holders
- H-1B /H-2A/H-2B/H-3 temporary employees and trainees
- I representatives of foreign media organizations
- J-1 exchange visitors (only within the guidelines set forth in the DS-2019 form)
- L-1 intra-company transfer
- O-1/O-2 aliens having extraordinary ability in the sciences, arts, education, business, or athletics and accompanying aliens.
- P-1/P-2/P-3 athletes, artists or entertainers
- Q-1 international cultural exchange visitors employed by the Q-1 petitioner
- R-1 religious employees
- NATO-1/NATO-2/NATO-3/NATO-4/NATO-5/NATO-6 employees of NATO
- NATO-7 personal employees of NATO employees
- TN professionals from Canada and Mexico working pursuant to the NAFTA treaty
- A-3/E-1/E-2/G-5/H-1B/H-2A/H-2B/H-3/I/J-1/L-1/O-1/O-2/P-1/P-2/P-3/R-1/TN who have expired I-94s but have timely filed for an extension (employment authorization continues for 240 days or until the application is denied).

Note that the E-3 visa for Australians is not included presumably because the category is new and USCIS has not updated 8 CFR §274a.12.

There are also a group of visa categories where an individual can apply for employment authorization and such individuals must have an EAD to work:

- Spouses and unmarried dependent children of A-1 and A-2 visa holders
- F-1 students seeking optional practical training in his or her area of study or because of severe economic hardship (after getting support of school's international student officer)
- Spouses and unmarried children of G-1, G-3, and G-4 international organization representatives
- J-2 spouses and unmarried minor children of J-1 visa holders
- M-1 student seeking practical training in an area directly related to his or her course of study as recommended by a school official on Form I-20
- Dependents of aliens classified as NATO-1 through NATO-7
- Asylum applicants who have had their cases pending for more than 150 days
- Applicants with a pending adjustment of status to lawful permanent residency application
- Certain applicants with pending suspension of deportation and cancellation of removal cases
- Parolees admitted on public interest or emergency grounds
- B-1 visitors who are personal or domestic servants of certain non-immigrant work visa holders

- Domestic servants of U.S. citizens accompanying or following to join the U.S. citizen who has a permanent home or is stationed in a foreign country and who is temporarily coming to the United States
- Employees of foreign airlines who would otherwise be entitled to E-1 visa status and who is precluded from E-1 status because the person is not of the same nationality as the airline
- Individuals under final orders of removal and who are released on an order of supervision because the person's home country refuses to accept them (such cases are approved in the discretion of USCIS)
- Temporary Protected Status applicants
- Certain legalization applicants under the 1986 Immigration Act and LIFE Act
- Witnesses or informants in S visa status
- Q-2 Irish peace process cultural and training program visitors
- T-1 victims of trafficking immediate family members

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### 3. Ask Visalaw.com

If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto:Ask-visalaw@visalaw.com). We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

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Q - I have recently graduated with a Master's degree from a reputable U.S. university in December 2008. I am currently working full-time under the work authorization granted by my F-1 optional practical training, which started on Jan 5, 2009 and ends on Jan 4, 2010. I am in the negotiation process with my employer regarding the possibility of them sponsoring my H-1b work visa (they have never done it before). One of the questions they raised is that once an employer terminates employment with an employee under H1b visa, the employee only has 10 days to find another H1b sponsoring employer or he/she must be out of the country. My boss is not sure if this is in my best interest and she wants to know if they did sponsor my H1b and somehow things didn't work out, would I have the rest time of my OPT (if my H1b visa becomes valid on Oct 1 then I would still have about three-month's OPT unused) to fall back on so I wouldn't be constrained by the 10-day time frame to look for a job (which is considered mission impossible).

A - Two things. First, once you switch in to H-1B status, your F-1 status ends. So you won't be able use your employment card anymore. You might be "portable", however, which means that you would likely be able to switch employers quickly while you wait on your new approval. You should also know that there is no ten day grace period that allows you to remain legal if you are terminated before the end of your H-1B time. You do have the ability to remain legally in the US for ten days at the end of your H-1B stay, but that only applies when your I-94 expires. I would discuss these options, of course, with your immigration lawyer.

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Q - Hi. I would like to know how I would go about bringing criminal charges against a federal officer, (USCIS), that works overseas, (U.S. consulate in Ho Chi Minh City)? While I am aware that federal employees are immune to prosecution, that rule does not apply when there has been a violation of the U.S. constitution and a violation of oath to uphold the U.S. constitution. Hence, a double felony. Your help on this matter is greatly appreciated. Thank you in advance.

A - I would contact the Department of Homeland Security's Office of Inspector General which is responsible for investigating misconduct by employees of the agency (and USCIS is under DHS). They may refer the matter for criminal prosecution if the facts warrant. You can find out more by going to [http://www.dhs.gov/xoig/about/gc\\_1163703329805.shtm](http://www.dhs.gov/xoig/about/gc_1163703329805.shtm).

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Q - My current status in the US is H1-B. I am employed full time for 40 hours per week. My employer is reducing the work week for the entire firm from 40 to 35 hours with a corresponding pay cut (about 12%). This change is planned to be only temporary for 2 months starting on February 1st. How does this affect my H1-B status?

A - You will likely need to amend your H-1B petition to reflect the change in hours. If you do that, I don't think you would have further problems assuming your salary remains the same on an hourly basis. But your immigration lawyer will be able to do the checking to make sure there are no issues with payment of the prevailing or actual wage.

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Q - Can the priority date from a previously approved I-40 petition be used on the I-130 that was submitted by beneficiary of the I-140 after becoming a permanent resident? The derivative beneficiary could immigrate because she turned 21 before she could immigrate.

A - The answer to your question is no and yes. You cannot transfer the I-140 priority date to the new I-130. However, under the Child Status Protection Act, you may be able to apply under the F2A preference category using the original I-140 petition, which the CSPA states may automatically convert into an F2A I-130 petition.

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Q - I am a 21 year old single mom and my 5 year old daughter is a U.S Citizen. I am currently here in the U.S with a tourist visa. I want to ask if she can petition me to be a permanent resident here because I heard she can, because she is still dependent and the mother should take care of her.

A - Though your daughter is a citizen by virtue of her birth in the US, she is not permitted to petition for you until she is 21 years old. You would not be entitled to stay because you are taking care of her. If you are not qualified to remain in the US through some other avenue and you don't want to violate US law by remaining in the US illegally, your choice would be to take your daughter abroad with you or arranging for your daughter to be cared for by someone in the US while you are

abroad. Assuming you choose the former (as most people do), then your daughter could come back to the US later. Her citizenship is permanent and a long absence from the US won't matter.

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#### 4. Border and Enforcement News

President Bush, in one of his final acts in office, commuted the prison terms of Jose Alonso Compean and Ignacio Ramos, two former US Border Patrol agents convicted of shooting an unarmed Mexican drug smuggler who fled across the Rio Grande. *The Los Angeles Times* reports that the clemencies were prompted by sustained pressure from Republican lawmakers in California, Texas and other border states, and were granted without input from the Justice Department.

Compean and Ramos were convicted of shooting admitted drug smuggler Osvaldo Aldrete Davila in the buttocks as he fled a van loaded with marijuana in 2005. They testified at their trial that they thought Aldrete Davila was armed and that they had shot him in self-defense. But the prosecution said there was not evidence linking Davila to the van, that the agents had not reported the shooting, and that they tossed their shotgun casings into the Rio Grande to hide the evidence. The agents were found guilty of assault with a dangerous weapon, violating Davila's civil rights, and defacing a crime scene.

The response from Capitol Hill was mixed. "A gross miscarriage of justice has finally been righted," said Rep. Ed Royce (R-CA), who spoke to Bush about the agents' plight. However, one Justice Department official, under anonymity argues that "there was obstruction of justice; they shot a man in the back. I am speechless. These are terrible clemency cases."

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Women held at immigration detention centers in Arizona face dangerous delays in health care and widespread mistreatment, according to a new study by the University of Arizona, the latest of studies to report on conditions of such centers throughout the US. According to *The New York Times*, the study was conducted from August 2007 to August 2008 by two University organizations, Southwest Institute of Research on Women and the James E. Rogers College of law, and was released Jan. 13.

Researchers examined the conditions facing women in the process of deportation proceedings at three federal immigration centers in Arizona. The study concluded that immigration authorities were too aggressive in detaining the women, who rarely posed a flight risk, and that as a result, they experienced severe hardships, including a lack of prenatal care, treatment for cancer, ovarian cysts and other serious medical conditions, and in some cases, being mixed in with federal prisoners.

Katrina S. Kane, who directs Arizona detention and removal operations for ICE, dismissed the study as unsubstantiated accounts from a limited number of detainees and their advocates. "Reports such as this, while alleging to be unbiased, do great harm to the public's understanding of the complex issues involved in immigration law enforcement," Ms. Kane said.

The director of border research for the institute, Nina Rabin, countered that interviews with detainees, former detainees and their lawyers corroborated a pattern of endemic mistreatments. Ms. Rabin said she had spoken with immigrant advocacy groups around the US, many of whom stated that mistreatment of women at the centers was not unusual. "We were pretty shocked to learn about all the ways in which life is made endlessly difficult for these women," Ms. Rabin said, especially those who were pregnant or had recently given birth.

In one of several cases documented in the study, a woman being held at the Central Arizona Detention Center who experienced excruciating abdominal pain for months after she had been forced to undergo female genital mutilation in West Africa was told by the center's staff to "exercise and watch her diet," her attorney Raha Jorjani said. After nearly six months, the woman, who had been convicted of a nonviolent crime, was taken to a hospital where an ultrasound revealed a cyst the size of a five month-old fetus, Ms. Jorjani said. She added that immigration officials suddenly released the woman with no money or health insurance to treat the cyst.

The SIROW report is available online at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>.

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A handful of Hispanic House and Senate members met earlier this month to lay out a new strategy to get a sweeping immigration reform bill passed, and discuss the increase in workplace raids that have increased as a result of a current lack of such a reform bill. *The Hill* reports that Capitol Hill's highest-ranking Hispanics, including House Democratic Caucus Vice Chairman Xavier Becerra (CA), as well as Congressional Hispanic Caucus Chairwoman Nydia Velazquez (D-NY), CHC Immigration Task Force Chairman Luis Guterrez (D-IL), and Sen. Robert Menendez (D-NJ), the sole Hispanic in the US Senate.

The lawmakers met to devise strategies to convince President Obama that the issue of immigration reform is necessary. "I don't believe that the president-elect grasps and understands the magnitude of the damage that is currently being caused [by immigration raids]" Guterrez said. "He understands the need for comprehensive immigration reform. What I don't think we've been able to bring to his attention in an effective manner is the plight of the millions of undocumented workers." Even though President Obama has given Hispanics a clear message during the 2008 presidential election campaign that comprehensive immigration reform is a priority of his, the Hispanic Caucus received no indication from the Obama administration he intends to reverse the workplace raids policy.

With the Congressional agenda fixated on the economy, Democratic leaders in both the House and Senate have said next to nothing about immigration since the November 2008 election. Despite the large increases by Hispanics in the House, the chance of response from the Senate regarding reform looks grim. Of the two senators who sponsored the failed Comprehensive Immigration Reform Act of 2007, Sen. Ted Kennedy (D-MA) has suffered personal health problems, and there is uncertainty of where Sen. McCain (R-AZ) currently stands on the issue.

Despite the uphill battle for Hispanics to push a successful act, President Obama remains pledged to tackle the issue. "No one has been more devastated by our

economic crisis than the Latino community, particularly because many Latinos are employed by the construction industry where there are no houses being built," the president said. "But I'm not going back on my commitment. My goal is for the process towards reform to start this year."

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Last week, the Justice Department's Office of Professional Responsibility began investigations into accusations of federal agents accused of beating a man being deported to Mexico, *The San Diego Union-Tribune* reports. Representatives of ICE and Border Patrol met with Mexican consular and immigration officials in San Diego this week to discuss the incident, which occurred on January 22.

According to US immigration officials, Agustin Castillo Hernandez, 33, attempted to escape as agents were preparing to send him through the turnstile into Tijuana at the San Ysidro border crossing. Shortly after, agents gave chase and caught him. A witness said the agents repeatedly kicked Castillo while he was apprehended

An ICE spokeswoman said last week that the agents had used "necessary force." According to the Mexican Consulate, and as confirmed by US officials, the independent probe could take two weeks to six months.

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*NBC News* reports that federal officials announced that immigration agents arrested 1,970 alleged undocumented immigrant gang members in Los Angeles, Orange, Riverside, and four other California counties in 2008. The arrests were part of Operation Community Shield, a nationwide anti-gang effort by US Immigration and Customs Enforcement.

Of those arrested, more than 850 were prosecuted on state or federal charges, including firearms violations and undocumented reentry to the US after deportation, ICE reported. Others were foreign national gang members who were arrested on administrative immigration violations and placed in deportation proceedings.

"These arrest statistics are further proof of ICE's major role in combating gang-related crime in Los Angeles," said Robert Schoch, head of ICE's Los Angeles office. "Our immigration and customs authorities are proving to be powerful weapons in this effort, and we'll continue working closely with local law enforcement to attack and dismantle the gangs that have terrorized our communities," Schoch said.

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According to Fort Lauderdale's *The South Florida Sun Sentinel*, advocates and congressional leaders have begun to renew their efforts to have the US government grant temporary protected status of undocumented Haitian immigrants, after the request for the country to receive the status was denied last month. The renewal for support came about mere moments after Rep. Alcee Hastings (D-FL) was sworn into Congress, where he reintroduced a bill to grant temporary status. He pledged to meet with Obama administration members to push the issue.

The government halted Haitian deportations in September after four tropical storms ravaged Haiti, raising the hopes of advocates that the outgoing Bush administration

would grant temporary protected status. But days before Christmas, immigration officials started deporting Haitians again.

On Dec. 19, DHS Secretary Michael Chertoff wrote Haitian President Rene Preval, explaining that temporary status would not be granted. After consulting with the State Department and USCIS, Chertoff wrote, he “concluded that Haiti does not currently warrant [TPS] designation.”

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5. News From the Courts

**Robinson v. Napolitano (3rd Cir. Sep. 9, 2008)**

*Eligibility for an immediate relative visa depends upon the alien's status at the time USCIS adjudicates the I-130 petition, not when that petition was filed. This becomes dispositive in the situation when a citizen spouse dies before the citizen spouse and the alien were married for two years. A marriage that lasted two years can be presumed to have been bona fide, and in that period the surviving spouse would have developed settled expectations. Congress could reasonably determine that an alien with a pending I-130 petition who had been married to a US citizen for less than two years at the time of the citizen spouse's death is not entitled to LPR status.*

Petitioner, a citizen of Jamaica, entered the US in 2002 on a B-2 non-immigrant visitor visa and married a US citizen in February 2003. In March 2003, Petitioner's husband filed for an I-130 (Petition for Alien Relative) visa on behalf of Petitioner as “immediate relative.” At the same time, Petitioner filed an I-485 application to adjust her immigration status to that of a lawful permanent resident (“LPR”). Petitioner's husband died in a boating accident on October 15, 2003. On October 15, 2005, USCIS informed Petitioner that her I-130 petition had been automatically terminated upon the death of her husband. USCIS said Petitioner could no longer be considered an “immediate relative” because her husband's death occurred before the couple had been married for two years.

Petitioner filed a petition for a writ of mandamus and a complaint for declaratory and injunctive relief in US District Court against DHS Secretary Michael Chertoff and USCIS Director Emilio Gonzalez, requesting that USCIS reopen her I-130 petition and I-485 application and reinstate her status as an “immediate relative” of a US citizen. The complaint also asked the court to order USCIS to abstain from using the death of Petitioner's husband as a discretionary factor in adjudication of Petitioner's I-485. The court denied Defendants' motion to dismiss and granted summary judgment in favor of Petitioner. The court ordered USCIS to process her I-130 petition and I-485 application, holding that Petitioner “is an immediate relative under 8 USC § 1151(b)(2)(A)(i) and for the purposes of adjudicating an I-130 petition.

Defendants appealed the ruling, arguing that the language of 1151(b)(2)(A)(i) indicates that a spouse remains an “immediate relative” after the death of his or her citizen spouse only if the couple had been married for two years at the time of the citizen's death. To support this, Defendants note the present tense language of 8 USC §1154(b), the statutory provision governing the grant of immigrant visas. Petitioner argued that the language grants a separate right for widows to self-

petition for visas, not a limitation on the definition of “spouse,” and that the language tense has no bearing on her status, as visa eligibility is to be determined at the time of filing.

On review, the court held that the District Court, which held that the present tense language statute erred in their interpretation of the statute. The court held that the statutory language makes plain that the facts in the petition – including – the alien’s spousal status – must be true *at the time* USCIS decides the petition.

The court also held that Petitioner’s “time of filing” claim misinterprets the scope of the statute. The court states that the statutory language shows that eligibility at the time of filing is merely a necessary condition; it does not establish that eligibility at that time is sufficient if the citizen spouse dies before the adjudication.

Addressing Petitioner’s two-year argument, the court rejected the Petitioner’s interpretation of spousal requirements under the relevant statutes. The court holds that the language of 1151(b)(2)(A)(i) is straightforward. The court cites their previous ruling in *US v. McQuilkin*, 78 F.3d 105 (3rd Cir. 1996), decision that the death of a citizen spouse terminates immediate relative status if the death occurs before the petition is granted, with the sole exception of a couple who had been married for two years at the time of the citizen spouse’s death. With the current case, the court concludes that the spouse ceases to be an immediate relative when the citizen spouse dies *unless* the couple had been married at least two years at the time of death.

The court also rejected Petitioner’s argument that the definition of “spouse” remains fixed regardless of if the spouse is deceased. The court holds that the language of 1151(b)(2)(A)(i), clearly distinguishes between a living spouse and a surviving spouse when the statute states that “an alien who *was* the spouse of a citizen of the US for at least 2 years at the time of the citizen’s death...shall be considered...to remain and *immediate relative*.”

One judge, Nygaard, dissented. The dissent contended both the decision, as well as the government agencies involved, have misinterpreted the language of §1151(b), and that this mistake has been endemic in the history of §1151(b) cases. Nygaard argues that Congress had obvious intent to use “spouse” in the context of §1151(b) to also refer to a marital bond between the deceased spouse and a surviving spouse, and that the majority opinion failed to give the term consistent meaning.

Nygaard specifically points to the two sentences of §1151(b), the crux of the majority decision. The dissent argues that the language and structure of both sentences in §1151(b)(2)(A)(i) implicitly indicates two distinct tracks for an alien spouse to obtain an immediate relative classification: petition by a living spouse, or self-petitioning. Nygaard opines that the statutory language simply does not mandate the termination of I-130 petitions upon the death of a petitioner, and that the second sentence of §1151(b) can only be applicable to an alien who is not the beneficiary of a pending or approved I-130 at the time of the death of the petitioner, a classification not pertaining to the Petitioner. The dissent argues that the application of the two-year marital requirement to even those who have already filed an I-130 implicitly invalidates the marital status of those who are wed less than two years before the petitioner spouse’s death.

The dissent concluded with an impassioned argument which states that Petitioner, who did everything required of her to ensure her legal status, is simply being punished for bureaucratic factors outside of her control: "This interpretation creates an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval. Nor do I believe that Congress intended to sanction the disregard that the department has shown towards persons like Osseritta Robinson. She has committed no crime. She is innocent of any misbehavior. She is a grieving widow and the lone parent of the Robinsons' U.S. citizen child. This same department whose delay or inaction forecloses Osseritta Robinson's chance of becoming an American, now so diligently pursues the avenues of her expulsion. It contends that the statute is ambiguous and then urges upon us the least reasonable and least humane alternative. My view, wholly in the margin, is that it is untoward of this nation of immigrants, we who have passed through the portals of citizenship, to coldly and impassively slam the door behind us on innocent aspirants who dream to follow."

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## 6. News Bytes

Former Republican National Committee Chair Jim Nicholson spoke out during the GOP electoral challenges this month, urging Republicans to reach out to Hispanic voters by reassessing their position on immigration. "We have to better inform and motivate and align with the Hispanic voters," Nicholson said in an interview with *Politico*. "That's one of the key issues that the party and its leaders need to convene, and, you know, have a very open, transparent discussion about developing a party position on."

Nicholson, whose home state of Colorado turned blue in 2008 due in large part to heavy Democratic voting among Hispanics, said Hispanics could be open to Republican ideas. "The Hispanic voters ... in this country are center-right, more conservative, more family- and work-oriented people," he said. "We have to overcome some of the predilections that they have about Republicans so that we get more of their votes."

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Last week, Department of Homeland Security Secretary Janet Napolitano said that she intends to "rethink" a program that would require every state to issue more secure driver's licenses by the end of the year, *USA Today* reports. The new licenses, required under a 2005 federal law, aim to prevent criminals and potential terrorists from getting fake IDs. But the licenses have been opposed by many governors, citing the cost. Added opposition comes from the American Civil Liberties Union, which claims the cards are, in effect, a national ID card.

"It really has taken the form of a huge unfunded mandate on states which are struggling with huge cuts right now," Napolitano said, shortly after being sworn in as head of DHS. "There's a lot of thinking out there that an enhanced driver's license that wouldn't necessarily be the Real ID ... might be a better way to go and achieve a lot of the same objectives for a lot less cost."

Last year, DHS extended a May 11 deadline for states to issue new, tamper-resistant licenses. States now have until Dec. 31 to issue new licenses that require applicants to present documentation in person showing they are in the country legally. Napolitano said she will meet with governors to discuss the license program required under the Real ID law and “look at its cost compared to its value.”

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Nashville recently voted down an English-only measure during a special election, *The Tennessean* reports. The measure would have forced all Metro Nashville government business to be conducted in English. The final vote was 32,144 for English only and 41,752 against. With 19% voting, this is the largest turnout for a special election in the US in over a decade.

Metro Councilman Eric Crafton, with support from his Nashville English group, introduced the bill, arguing that the city would save money in translation services and become more unified as the result of more immigrants learning English. After the final tallies, Mayor Karl Dean called for the city to move on from this chapter. “The results of this special election reaffirm Nashville’s identity as a welcoming and friendly city and our ability to come together as a community – from all walks of life and perspectives – to work together for a common cause for the good of our city,” he said.

Overall, the ‘one country, one language’ sentiment pushed by Crafton to galvanize voters didn’t resonate because Nashville is becoming cosmopolitan and comfortable with its diversity, said University of Illinois professor Dennis Baron, who has written extensively on English-only measures. “Nashville refused to be alarmed by unwarranted language endangerment,” he said. “This is a good sign. As I’ve said, these things tend to pass. The forces against the measure worked very hard.” Baron said English-only measures are often veiled attempts against immigrants and non-English speaking groups. The argument over English-only found itself framed around Latinos and undocumented immigration, but it also would have affected the thousands of refugees the federal government resettles in Nashville.

Numerous complaints were also levied towards the expense of holding the special election, with some voting against the measure due to the election’s \$280,000 price tag. “This is a waste of taxpayer money,” said Nashville resident Ruth Hall. “It’s wrong, and I voted against it.”

The defeat of English-only is a sign that voters recognize bad policy, said Maria Rodriguez, director of the Florida Immigrant Coalition who has fought against similar measures in that state. “Voters are not duped anymore,” she said. “They know when they see bad policy that is going to be costly and that’s not progressive.”

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A group of civil rights advocates have filed a lawsuit against the Texas Department of Public Safety to block a law which would require additional requirements for driver’s licenses for immigrants. *The Associate Press* reports that the lawsuit, which seeks to block the law’s enforcement, argues that it discriminates against people illegally. The suit was filed on behalf of three immigrant women, all legally working in the US, who have been denied or likely will be denied license renewals because the DPS doesn’t accept their work authorization statuses.

The law, which first took effect last October, requires all immigrants to show an official work authorization proof in the form of an official employment authorization document every six months to renew their licenses. Jim Harrington, the group's attorney, called the law "an unconscionable burden on immigrant survivors of domestic abuse and discriminatory against the Hispanic community."

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Rhode Island Governor Carcieri's March 2008 executive order on undocumented immigration has generated so much confusion in the state that a panel appointed to monitor the order's unintended consequences has recommended he make a clarifying statement to explicitly explain the details of the order. According to *The Providence Journal Bulletin*, the order has been widely misunderstood and misinterpreted by immigrant communities, as well as by the police and the public, causing chaos and worry among documented and undocumented immigrants, panel members said.

The panel, a mix of Providence's religions leaders, community advocates, and people from government, law enforcement, and business, gathered its impressions during a series of listening sessions with members of the Providence immigrant community. The sessions, panel members not, underscore a high level of fear.

"I know of a family in New Bedford that drives around Rhode Island to get to Connecticut because they are afraid to drive through Rhode Island," said one session attendee at St. Edward Church in Providence.

"I know of a man who has been cashing his paycheck at Stop & Shop for years. After the executive order, the clerk at the store refused to cash his check. This is discrimination legitimized by the executive order," said another St. Edward session attendee.

When he signed the order, Carcieri said it would enable an array of state government agencies to address the issue of undocumented immigration and take control of problems that had been dropped by the federal government. The order was designed to require state agencies and vendors to verify the legal status of all employees, using the federal E-Verify database to screen new employees for the state and for state vendors to make sure they are legally permitted to work in the US. It also calls for some state troopers and corrections staff to be deputized with immigration enforcement powers, and it calls for swifter deportation of prisoners found to be undocumented.

Stephen Brown, executive director of the RI affiliate of the ACLU, said that the panel reports provide an excellent summary of the fear in the immigrant community. While Brown did not suggest that the executive order initially created these fears, he said it has exacerbated them and resulted in the police being overly aggressive in question people during traffic stops about where they are from. "It would help if the General Assembly restricted the police enforcement of federal immigration laws and clarify when passengers can be questioned on suspicion of criminal activity," Brown said.

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A federal court judge recently issued a split decision in court challenges brought by 17 immigrants who charged that their arrests last year by federal agents were unconstitutional. Judge Michael Strauss found that six of the plaintiffs have made a prima facie case that constitutional violations took place, and will be allowed to pursue claims against ICE, according to *The New Haven Register*.

Lawyers at the Jerome N. Frank Legal Services Organization at Yale University are seeking to suppress evidence obtained by ICE when it arrested a total of 32 people in New Haven and North Haven in June 2007. They allege that the officers conducted illegal searches and seizures, detained the 32 without reasonable suspicion, and arrested them without probable cause.

Yale Law professor Michael Wishnie said that shifting the burden to ICE to justify its actions is traditionally unusual in immigration courts, although the practice has been happening more frequently since the federal government stepped up enforcement against undocumented immigrants since 2006. Wishnie says that Straus will now hold departure hearing for 10 of the 11 remaining cases, at which point he said the men will seek voluntary departure rather, than a departure order by the government. Voluntary departure makes it easier to seek legal entry at a later date, but in either situation, Wishnie said the men will appeal Straus's rulings on the constitutional issues to the Board of Immigration Appeal. If they lose there, they will take their cases to the 2<sup>nd</sup> Circuit Court of Appeals in New York.

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The Department of Homeland Security reversed a an enforcement rule last week, saying that it has lifted a new rule requiring high-level approval before federal agents nationwide could arrest fugitive immigrants. *The Associated Press* reports that the rule, initially imposed by the Bush administration mere days before the election of President Obama, required that immigration agents obtain approval from ICE field office directors or deputy directors before arresting fugitives. An approval would depend on an internal review that would consider, among other issues, "any potential for negative media or congressional interest."

The directive made clear that US officials worried about possible election implications of arresting Zeituni Onyango, the half-sister of Obama's late father, who at the time was an undocumented immigrant living in public housing in Boston. A copy of the directive, "Fugitive Case File Vetting Prior to Arrest," was released to the AP just over two months after it was requested under the Freedom of Information Act. The submitted copy censored parts of the document, including the names targeted under the directive, but the uncensored portions made no mention of President Obama, or Onyango.

Onyango, who sought asylum from Kenya several years ago, and was instructed to leave the country four years ago upon rejection of asylum, has her hearing scheduled on April 1 in a Boston immigration court.

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## 7. Siskind's Legislative Update

The content in Legislative Update is crossposted from [Siskind Susser's blogs](#), and follows the federal and state laws, regulations, and legislative proposals that impact the lives of immigrants. Click on any of the articles' links for similar stories.

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## [HOUSE PASSES BILL REQUIRING DETENTION FACILITIES TO REPORT DEATHS](#)

The US House passed a bill that got little attention this week that was a step in the right direction. Here is a press release from the ACLU offering details:

### **House Passes Bill To Expand Reporting Of Immigrant Deaths In Detention** *Deaths In Custody Reporting Act Provides Overdue And Welcome Accountability, Says ACLU*

*FOR IMMEDIATE RELEASE*  
*February 3, 2009*

*WASHINGTON – In the wake of recent reports about the November death of an immigrant detainee at the Piedmont Regional Jail in Virginia, the U.S. House of Representatives passed a bill today that encourages detention facilities to promptly report detainee deaths to the U.S. attorney general. Under the Deaths In Custody Reporting Act, which reauthorizes and expands an existing Bureau of Justice Statistics program, state and federally-run facilities that receive funding from the federal government will lose ten percent of their allotment if they fail to provide details of detainee deaths in a timely fashion. The American Civil Liberties Union urges the Senate to follow suit and also pass the law, which is sponsored by Representative Bobby Scott (D-VA).*

The following can be attributed to Joanne Lin, ACLU Legislative Counsel:

*“All too often, family and friends of immigrant detainees find out about the tragic deaths of their loved ones by word-of-mouth or through news reports instead of by prompt and direct communication. The ACLU applauds the House for taking action to prevent unreported deaths of immigrants in U.S. detention facilities. When detention facilities know that they could lose federal funding if they don't report the details of deaths that occur in their custody, their incentive to avoid these tragic instances will increase.*

*“The ACLU commends Representative Bobby Scott and House Majority Leader Steny Hoyer for leading the effort to bring about badly needed transparency and accountability in our state and federal detention facilities.”*

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## [SENATE ADDS ANTI-H-1B PROVISION TO STIMULUS BILL](#)

Yesterday, the Senate passed by voice vote an amendment relating to H-1B applications by banks that received bailout money. I've prepared a detailed post about the provision, but have held off on putting it up because there was a last minute modification to the language posted online and I am still trying to get the final language. A number of web sites have been summarizing the version of the language that is posted online, but I have reason to believe the final version had significant changes. So please be patient and I'll make sure I've got the right language before I start telling folks what it means.

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### **SENATE PASSES BILL PROVIDING HEALTH COVERAGE FOR IMMIGRANT KIDS**

The House passed this even before the President was sworn in. The bill now brings in a large number of legal immigrant children in to the Children's Health Insurance Program. Pro-immigrant groups are applauding the measure. From a press release from the National Conference of La Raza:

*Legal immigrant children in the U.S. are today one step closer to accessing critical health care services. The Senate approved the "Children's Health Insurance Program Reauthorization Act," (SCHIP) a bill that will provide more health insurance opportunities for approximately four million children in the U.S. and includes legal immigrant children and pregnant women in the scope of its coverage. The National Council of La Raza (NCLR), the largest Latino civil rights and advocacy organization in the U.S., fought to end a five-year waiting period for legal immigrant children and pregnant women that has shut hundreds of thousands out of Medicaid and SCHIP for a decade. The bill was passed by a vote of 66-32. The bill's passage affirms President Barack Obama's recent actions and statements supporting healthcare for every child in the U.S.*

*"Including legal immigrant children in the reauthorization of SCHIP affirms American values. America is not a country that chooses which children get health coverage and which do not," said Janet Murguía, NCLR President and CEO. "Latino children continue to be the most uninsured ethnic group in the country. Yesterday's vote provides a strong signal that the new Congress is committed to addressing the issues that affect the Latino community."*

*Murguía also lauded the leadership of several Senators who helped advance the legislation in spite of receiving public criticism for their support of the bill. "We are glad that Congress chose not to play games with the health care of America's children. Majority Leader Harry Reid (D-NV) and Assistant Majority Leader Richard Durbin (D-IL), and Senators Jay Rockefeller (D-WV), Olympia Snowe (R-ME), and Robert Menendez (D-NJ) should be especially commended for their sustained efforts in the fight to achieve healthcare for our littlest ones," noted Murguía.*

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### **NASHVILLE SAYS NO TO ENGLISH-ONLY AMENDMENT**

I'm proud of my former hometown (though I'm there often enough for work that it still is a home away from home). The city has been known for its hospitality over the years - it once actually garnered an award for the friendliest city in America. But in recent years, it's hostile treatment of immigrants has been making national headlines. That largely stems from the city's aggressive sheriff and the use of its police force as immigration agents.

The city made headlines again in recent months for its attempt to pass a measure that would require require all city business be conducted in English.

The proposal was controversial enough to garner the warning of another large city that passed an English-only amendment - Miami. The Miami Herald last week ran [this editorial](#) warning the voters of Nashville about a host of unintended

consequences that city experienced and why voters eventually decided to kill the requirement. I grew up in Miami and remember the chaos that surrounded that referendum.

So yesterday voters in Nashville could have voted to continue down the same anti-immigrant path. Instead, they soundly [rejected the proposal](#) by a 56-44 percent margin.

I'm also glad to see the main sponsor of the proposal taking a civil tone in defeat: *On the losing side was Eric Crafton, a Metro Councilman from Bellevue. Crafton had pushed a measure to make English the official language of Metro government for two years. After a failed attempt to pass a Council bill, Crafton gathered signatures of Davidson County voters.*

*His first attempt, which would have put the proposal on the November presidential election ballot, was disallowed by the Davidson County Election Commission. Crafton went back to the drawing board and gathered more signatures to force the special election.*

*In defeat, Crafton promised to abide by the "wisdom of the voters," adding that he was glad the issue was finally decided at the ballot.*

*"I think it's been a net-positive for Nashville," Crafton said. "We've had a discussion, the people have decided. I always said I would support the collective wisdom of the citizens and they gave a clear statement tonight."*

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## 8. Notes from the Visalaw.com Blogs

### [Greg Siskind's Blog on ILW.com](#)

- House Passes Bill Requiring Detention Facilities to Report Detainees
- Senate Adds Anti-H-1B Provision to Stimulus Bill
- New SPLC Report Details Links of Nativist Groups to White Nationalists
- *NY Times*: ICE Misled Congress on Use of Raid Funds
- Why We Need the H-1B Program Now More than Ever
- We're Just Misunderstood
- AG Nominee Says He'll Take a Look at Reversing Compean Case
- Gillibrand Starting to Sound like a New York Senator Should
- .04%
- The Nativists Are Restless
- New I-9 Form Delayed Two Months
- Senate Passes Bill Providing Health Coverage for Immigrant Kids
- Congressional Hispanics Oppose Inserting E-Verify Provisions in Stimulus Package
- Gillibrand Pledges to Revisit Past Immigration Positions
- Breaking News: E-Verify Contractor Rule Now on Hold until May
- Anti-Immigrants Discover My Blog
- White House Considering Repealing Directive Related to President's Aunt

- Could Immigration Reform be an Economic Stimulus?
- Another GOP Leader Calls on Party to Rethink Immigration Views
- Senator Advocates Microsoft Fire Foreign Nationals First

#### [The SSB Employer Immigration Compliance Blog](#)

- Lawyers Warn of Need for Diligence in Employer Compliance
- Utah Legislators Propose Delaying Rollout of Parts of Sanctions Bill
- Oregon Court Reviewing County's Sanctions Law
- Rhode Island Lawmakers Consider Mandating E-Verify for All Companies
- Wyoming Legislators Consider Bill Modeled on Oklahoma's Sanctions Bill
- Alabama Construction Company Owner Indicted on Harboring Charge
- New I-9 Form Delayed Until April
- Boss of Mass. Factory Sentenced in Connection with 2007 Raid
- E-Verify Contractor Rule Delayed Again
- More IFCO Indictments Handed Down
- Arkansas Sanctions Bill Gains Supporter
- Is Georgia Ignoring Sanctions Law?

#### [Visalaw Fashion, Sports, & Entertainment](#)

- Former NFL Player Now Working as Border Patrol Agent
- Fresno Hockey Players Face Uncertain Immigration Future

#### [Visalaw Healthcare Immigration Blog](#)

- Despite Rising Unemployment, Nursing Shortage in US Remains Dire
- Phoenix Hospital Sets up Program for African Refugees
- Cuban Doctors Face Challenges in Resettling in US

#### [Visalaw Investor Immigration Blog](#)

- Orlando EB-5 Regional Center Opens
- Idaho Technology Initiative to be Funded as EB-5 Regional Center
- Ohio Group Files a Regional Center Petition
- British Nationals Looking to Florida for a Second Home
- Philadelphia Regional Center Aids in City's Convention Center Expansion
- USCIS Announces all EB-5 Matters to be Handled at CSC

#### [The Immigration Law Firm Management Blog](#)

- Sending Big Files
- *NY Times*: Is The Billable Hour Dying?
- Tech: Track Travel Plans with Triplt
- Education: Use the Web to Learn a New Language
- Finance: Shoeboxed.com Scans Your Receipts
- Marketing: Get a Logo
- Postage and Shipping - Trackmyshipments

## 9. Bush Administration Rule Strips Immigrants of Appointed Legal Representation

Among one of the last actions taken by the outgoing Bush administration, Attorney General Michael Mukasey ruled that immigrants facing deportation do not have an automatic right to an effective lawyer, stoking outrage among immigration advocates who say the government aims to weaken immigrants' right to fair hearings.

*The Associated Press* reports that Mukasey, in his 33-page decision, said that the Constitution does not entitle someone facing deportation to have a case reopened based upon shoddy work by a lawyer. He said Justice Department officials do have the discretion to reopen such cases.

In explaining his ruling, Mr. Mukasey said that the Sixth Amendment right to a lawyer applied only in criminal cases and that deportation was a civil action. He wrote that the due process clause, part of the 5th and 14th Amendments, applied in criminal and civil proceedings but that the guarantee of due process applied only to actions of government and not to actions by private individuals like an immigrant's lawyer.

"There is no constitutional right to counsel, and thus no constitutional right to effective assistance of counsel, in civil cases," he wrote.

According to *The New York Times*, Mr. Mukasey did leave open one avenue of appeal for illegal immigrants who have been wronged by their lawyers. He said the immigration courts could allow an immigrant to reopen a case "as a matter of administrative grace" in cases of extreme lawyerly error that probably changed the outcome of the initial removal proceeding. The opinion included detailed rules for reopening a removal order.

Immigrant groups argued that Mukasey's decision, which came nearly two weeks before the Bush administration left office, rejects decades of established legal precedence and threatens a population already vulnerable to fraud. "People pretend to be lawyers and hang up a shingle and tell the client, 'I am a lawyer and I am going to represent you,' and then they don't," said Nadine Wettstein, director of the American Immigration Law Foundation's Legal Action Center. "If that were to happen, this decision says 'tough luck.'"

Mukasey's ruling comes after a series of instances in which immigrants claimed poor legal representation and sought to have their cases reopened after they were ordered to leave the country by an immigration court. The country's immigration court system does not track how many immigrants seek to reopen cases for this reason, said Susan Eastwood, spokeswoman for ICE.

"The law was settled until the Bush administration came in," Lucas Guttentag, director of the Immigrant's Right Project for the American Civil Liberties Union, one of several groups criticizing the ruling.

Immigration attorney Louis Piscopo said making immigrants think twice about who they hire to represent them in court is a good thing, but not via Mukasey's rule. Rather, he said the ruling would instead end up hurting many immigrants who are duped by unscrupulous attorneys, making it harder for them to get a fair hearing. "It is stripping away protections for people," Piscopo said. "The decision does say you

have no right to counsel, which could mean since you don't have a right to counsel, whatever kind of counsel you get, it doesn't matter."

The Obama administration could overturn the Mukasey decision, but the rule could affect the lives of thousands of immigrants facing imprisonment and deportation before new office of US Attorney General Eric Holder could address the matter. Obama administration spokesman Nick Shapiro pledged that president Obama "will review all 11<sup>th</sup>-hour regulations" during his first days as president.