



## JUNE 2013 IMMIGRATION UPDATE

*Posted on June 3, 2013 by Cyrus Mehta*

### Headlines:

**1. [Senate Committee Approves Comprehensive Immigration Reform Bill](#) -**

On May 21, 2013, the Senate Judiciary Committee approved an amended S. 744, the "Border Security, Economic Opportunity and Immigration Modernization Act of 2013," by a bipartisan vote of 13-5. The bill now goes to the Senate floor.

2. [Signaling Flexibility Within Limits, USCIS Releases Final Version of EB-5 Policy Memo](#) -USCIS has released the final version of a long-awaited memorandum on EB-5 adjudications policy that went through four iterations beginning in November 2011.

3. [CBP Releases Travel Tips, Improvements in Arrival Process for International Travelers](#) -The agency released its "Top 10 Travel Tips."

4. [Federal Judge Enjoins Arizona Sheriff's Office From Immigration Enforcement, Racial Profiling](#) - federal judge ruled that the Maricopa County Sheriff's Office engaged in impermissible racial profiling and enforcement of federal immigration law.

5. [USCIS Issues Reminder About New I-9 Version, Releases Q&A's on Monitoring and Compliance](#) - As of May 7, 2013, employers must use the latest version of the I-9 employment eligibility verification form for new hires.

6. [DHS Orders Verification of Student Visas in Wake of Boston Bombings](#) - Border agents are to use flight manifest information to verify student visa status, and check any for which that information is not available against a DHS database.

7. [Employment-Based Third Preference Visa Numbers Advance Significantly](#) - The employment-based third preference category cut-off date for most countries advanced significantly for the second month in a row, but this rapid

rate is not expected to continue.

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USCIS seeks experts in performing arts, health care, and information technology.

**9. [DHS Changes US-VISIT Name](#) -** The US-VISIT program is now called the Office of Biometric Identity Management (OBIM).

**10. [ABIL Global: Applying to Naturalize as a British Citizen - Are You of Good Character?](#) -** The United Kingdom's Home Office announced changes to the way it assesses criminal convictions, affecting how it will assess the "good character" requirement for naturalization applications.

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**Details:**

**1. Senate Committee Approves Comprehensive Immigration Reform Bill**

On May 21, 2013, the Senate Judiciary Committee approved an amended S. 744, the "Border Security, Economic Opportunity and Immigration Modernization Act of 2013," by a bipartisan vote of 13-5. A full Senate vote is likely in June.

The comprehensive immigration reform legislation was developed by a "Gang of Eight" bipartisan group of senators and introduced on April 17. The Gang of Eight includes Sens. Marco Rubio (R-Fla.); John McCain (R-Ariz.); Lindsey Graham (R-SC); Jeff Flake (R-Ariz.); Chuck Schumer (D-NY); Robert Menendez (D-NJ); Michael Bennet (D-Colo.); and Richard Durbin (D-Ill.). Numerous amendments were proposed during committee markups, and some were accepted.

Among other things, the bill would offer a pathway to legal permanent residence through "registered provisional immigrant status" for 10 years for an estimated 11 million undocumented persons who arrived in the United States before December 31, 2011; introduce a new visa for lower-skilled, nonagricultural foreign workers; and reduce the backlogs in the employment and family preferences. It also would create a startup visa for entrepreneurs. It would include an increase in visas for both high- and low-skilled workers. The limit on H-1B workers would increase from 65,000 to 110,000 annually, although companies with at least 15 percent foreign workers would have to meet certain conditions.

A move to give same-sex spouses equal rights under immigration law failed.

Kenneth Palinkas, president of a union representing 12,000 U.S. Citizenship and Immigration Services (USCIS) immigration adjudications officers and staff, issued a statement on May 20, 2013, opposing the legislation. Noting that his union, the National Citizenship and Immigration Services Council, was not consulted when the "Gang of Eight" crafted the legislation, he charged that S. 744 "will damage public safety and national security and should be opposed by lawmakers." Among other things, he said USCIS has been turned into an "approval machine" that "serves illegal aliens and the attorneys which represent them," and blamed an "onslaught of refugees" for "the strain put on our Social Security system" that is depleted "as soon as their feet touch U.S. soil." The National Immigration and Customs Enforcement Council (NICEC), a union for ICE officers, blasted the legislation in a letter to Congress signed by Mr. Palinkas also.

Department of Homeland Security (DHS) officials countered Mr. Palinkas' statement, stating that many safeguards were added in recent years, such as an anti-fraud unit created in 2010, an increase in anti-fraud officers, scrutiny of employee decisions, a focus on security threats, and expansion of requirements for biometric screening. Commenting on one of the programs Mr. Palinkas criticized, deferred action for childhood arrivals, the *New York Times* quoted Peter Boogard, a DHS spokesperson, as noting that "everting back to a system that treats violent criminals the same as children brought to this country through no fault of their own would only undermine the integrity of the immigration system and force law enforcement agencies to divert limited resources from focusing on those who pose real threats to their communities." A *New York Times* editorial on May 21, 2013, called the letter to Congress "a screed, a grab bag of misdirection, scary talk and lies." The editorial concluded, "The country is better served by the saner, more responsible law-enforcement officials, like the sheriffs, police chiefs and attorneys general who have lined up behind the bill, saying the current system undermines law enforcement by forcing the undocumented to live in anonymity and fear." For a further rebuttal of Mr. Palinkas' statement, see TAn Immigration Attorney's Response To Statement Of USCIS Union President Opposing Senate Immigration Bill, S. 744, <http://blog.cyrusmehta.com/2013/05/response-to-request-for-evidence.html>.

Among other reactions, immigration activists in the Senate committee room chanted, "Yes, we can!" when the bill passed. A nonprofit association for the IT industry, CompTIA, also applauded the compromise bill. CompTIA released a

statement noting that "any of our membership are small and medium-sized technology firms that benefit from a strong pipeline of talent throughout the industry. We were pleased to see included in the legislation language akin to the INVEST and STEM visas. Allowing STEM advanced degree holders to remain in the U.S. with a green card gives an opportunity to recruit talent that they might not otherwise have access to. Allowing foreign entrepreneurs willing to stay and invest in our country also makes sense, as more than a quarter of all technology and engineering businesses launched in the U.S. between 1995 and 2005 had an immigrant founder."

The text of the bill as introduced is available at

<http://thomas.loc.gov/cgi-bin/query/z?c113:S.744>:. The list of amendments and their outcome in the markups is available at

<http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm>. The NICEC letter is available at

<http://www.documentcloud.org/documents/698783-law-enforcement-letter-on-immigration-bill.html>.

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## **2. Signaling Flexibility Within Limits, USCIS Releases Final Version of EB-5 Policy Memo**

U.S. Citizenship and Immigration Services (USCIS) has released the final version of a long-awaited memorandum on EB-5 adjudications policy that went through four iterations beginning in November 2011.

The memo begins by reviewing the purpose and structure of the EB-5 immigrant investor program and reviews terminology and definitions, noting that the program's purpose is "to promote the immigration of people who can help create jobs for U.S. workers through their investment of capital in the U.S. economy."

Regarding the "preponderance of the evidence" standard, the memo notes that adjudication of EB-5 petitions and applications must establish each element by showing that what is claimed is "more likely so than not so." This is a lower standard of proof than the "clear and convincing" or "beyond a reasonable doubt" standards. "The petitioner or applicant does not need to remove all doubt from our adjudication," the memo states. Even if an adjudicator has some doubt, if the petitioner or applicant submits "relevant, probative, and

credible evidence" that leads to the conclusion that the claim is more likely than not, or probably true, the petitioner or applicant has satisfied the standard of proof.

The memo allows a degree of flexibility in certain areas, such as "to account for the realities and unpredictability of starting a business venture," although it cautions that this is not an "open-ended allowance." The memo notes, for example, that the EB-5 program allows an immigrant investor to become a lawful permanent resident, without conditions, if he or she has established a new commercial enterprise, substantially met the capital requirement, and can be expected to create within a reasonable time the required number of jobs. All of the goals of capital investment and job creation need not have been fully realized before the conditions on the immigrant investor's status have been removed. Rather, the memo states, the regulations require the submission of documentary evidence that establishes that it is more likely than not that the investor is in "substantial" compliance with the capital requirements and that the jobs will be created "within a reasonable time."

USCIS has some latitude in interpreting what constitutes "within a reasonable time," the memo notes, adding that the regulations require that the business plan submitted with the Form I-526, Immigrant Petition by Alien Entrepreneur, establish a likelihood of job creation "within the next two years." Because the law contemplates two years as the baseline expected period in which job creation will take place, the memo explains, jobs that will be created within a year of the two-year anniversary of the immigrant's admission as a conditional permanent resident or adjustment to conditional permanent resident status may generally be considered to be created within a reasonable period of time. Jobs projected to be created beyond that time horizon "usually will not be considered to be created within a reasonable time, unless extreme circumstances, such as *force majeure*, are presented," the memo warns.

Following the theme of flexibility with limits, the memo acknowledges that business strategies "constantly evolve." Therefore, the Form I-924, Application for Regional Center, provides a list of acceptable amendments, including "changes to organizational structure or administration, capital investment projects (including changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities), and an affiliated commercial enterprise's organizational structure, capital investment instruments or offering memoranda." The memo

notes, however, that such formal amendments to the regional center designation are not required when a regional center changes its industries of focus, geographic boundaries, business plans, or economic methodologies, unless the regional center elects to pursue an amendment because it seeks certainty in advance of adjudication.

The memo also notes that unless there is reason to believe that a prior adjudication involved an objective mistake of fact or law, USCIS should not reexamine determinations made earlier in the EB-5 process. Absent a material change in facts, fraud, or willful misrepresentation, the memo states, USCIS should not re-adjudicate prior USCIS determinations that are subjective, such as whether the business plan is comprehensive and credible or whether an economic methodology estimating job creation is reasonable.

Other topics the memo discusses include targeted employment areas; new commercial enterprises; purchases of existing businesses that are restructured or reorganized; expansion of existing businesses; pooled investments in non-regional center cases; evidence of the establishment of, or investment in, a new commercial enterprise; job creation; qualifying employees; the sequence of individual investor filings; business plans; and the impact of "material changes" to a project.

The 27-page memo is available at

[http://www.uscis.gov/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20\(Aproved%20as%20final%205-30-13\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20(Aproved%20as%20final%205-30-13).pdf).

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### **3. CBP Releases Travel Tips, Improvements in Arrival Process for International Travelers**

U.S. Customs and Border Protection (CBP) announced on May 22, 2013, that it is easing the international arrival process with new technology and procedures, including automating the I-94 Arrival/Departure Record and expanding self-service kiosks.

CBP said that additional steps travelers can take to smooth their arrival process include familiarizing themselves with U.S. rules and regulations before departing. The agency released its "Top 10 Travel Tips" (edited):

- Join Trusted Travelers through Global Entry, SENTRI, or NEXUS. (See

[http://www.cbp.gov/xp/cgov/travel/trusted\\_traveler/](http://www.cbp.gov/xp/cgov/travel/trusted_traveler/)).

- Know the required travel documentation for your trip. (Hint: you will need a passport for air travel!) (See <http://www.travel.state.gov/>.)
- If you are from a Visa Waiver country, don't leave home without your Electronic System for Travel Authorization (ESTA). More on getting your Electronic System for Travel Authorization before boarding your flight. (See <https://esta.cbp.dhs.gov/esta/>.)
- For those traveling by air or sea on a visa, CBP has automated the I-94. Find your I-94 number at <https://i94.cbp.dhs.gov/I94/request.html>.
- Complete your Customs Declaration (your flight staff will hand out the form) before you deplane. What is eligible for duty exemptions? (See [http://www.cbp.gov/xp/cgov/travel/id\\_visa/kbyg/customs\\_duty\\_info.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/kbyg/customs_duty_info.xml).)
- Know what merchandise you can bring to the United States (See [http://www.cbp.gov/xp/cgov/travel/id\\_visa/kbyg/prohibited\\_restricted.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/kbyg/prohibited_restricted.xml).)
- Many agriculture products can bring damaging pests and diseases into the country; check to see what may be harmful. (See [http://www.cbp.gov/xp/cgov/travel/clearing/agri\\_prod\\_inus.xml](http://www.cbp.gov/xp/cgov/travel/clearing/agri_prod_inus.xml).)
- Allow for lines at ports of entry. Summer is a busy travel season; be prepared and work with CBP officers as they do their job. (See <http://www.cbp.gov/xp/cgov/about/>.)
- Monitor border wait times. Know what ports of entry have lighter traffic, or use an alternate to avoid delays. (See [http://www.cbp.gov/xp/cgov/travel/wait\\_times/](http://www.cbp.gov/xp/cgov/travel/wait_times/).)
- Take it with you! (See <http://www.cbp.gov/>.)

CBP also announced the opening of a seasonal border station at Ely, Minnesota, from May 25 until September 7, 2013, to help with the busy summer tourist season.

The CBP announcement including the travel tips is available at

[http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/national/05222013.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/05222013.xml).

The announcement about the seasonal border station is available at

[http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/local/05212013\\_4.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/local/05212013_4.xml).

A FAQ on the I-94 automation is available at

[http://www.cbp.gov/linkhandler/cgov/newsroom/fact\\_sheets/travel/i94\\_factsheet](http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/i94_factsheet)

[et.  
ctt/i94\\_factsheet.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/travel/i94_factsheet).



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#### **4. Federal Judge Enjoins Arizona Sheriff's Office From Immigration Enforcement, Racial Profiling**

In *Melendres v. Arpaio*, G. Murray Snow, a federal judge for the District of Arizona, ruled on May 24, 2013, that the Maricopa County Sheriff's Office (MCSO), under Sheriff Joseph Arpaio, engaged in impermissible racial profiling and enforcement of federal immigration law by singling out Latino day laborers and others.

Patrols by MCSO included using traffic stops as a pretext to detect occupants of vehicles who may be in the United States without authorization. Among the issues in the lawsuit were whether the MCSO was permitted under the Fourth Amendment of the U.S. Constitution to question, investigate, and/or detain Latino occupants of vehicles it suspects of being in the United States without authorization when it has no basis to bring state charges against such persons, and whether the MCSO uses race as a factor in forming suspicion or probable cause. The court noted that MCSO lost authority to enforce the civil administrative aspects of federal immigration law when ICE cancelled that authority under its "287(g) program," which had delegated authority to enforce federal immigration law to a maximum of 160 MCSO deputies under Immigration and Nationality Act § 287(g).

The court ruled that the MCSO is permanently enjoined from detaining Latino occupants of vehicles in Maricopa County based only on a "reasonable belief," without more, that they are in the United States without authorization. The MCSO is further permanently enjoined from using race or Latino ancestry as a factor in determining whether to stop any vehicle in Maricopa County with a Latino occupant, and from enforcing federal immigration law.

The court noted that the MCSO "continues to engage in law enforcement efforts against unauthorized aliens, and continues to aggressively assert its authority to do so." In doing so, the court said, the MCSO erroneously trained its patrol deputies that they had authority to continue enforcing federal immigration law. "To the extent that MCSO implemented faulty instruction from ICE through the racially biased policies and practices governing its enforcement operations, its own implementation of those operations was also significantly flawed by its failure to observe normal standards of police conduct," the court noted.



The 142-page decision is available at

[http://kpbs.media.clients.ellingtoncms.com/news/documents/2013/05/24/mele\\_ndres\\_v\\_arpaio.pdf](http://kpbs.media.clients.ellingtoncms.com/news/documents/2013/05/24/mele_ndres_v_arpaio.pdf).

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## **5. USCIS Issues Reminder About New I-9 Version, Releases Q&A's on Monitoring and Compliance**

U.S. Citizenship and Immigration Services (USCIS) issued a reminder that as of May 7, 2013, employers must use the latest version of the I-9 employment eligibility verification form for new hires. The new form has a revision date of "03/08/13 N" in the lower left corner of the first instructions page. It expires on March 31, 2016.

Q&A's on the E-Verify monitoring and compliance functions are available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e05971eb810e9310VgnVCM100000082ca60aR CRD&vgnnextchannel=51e6fb41c8596210VgnVCM100000b92ca60aRCRD>.

A USCIS I-9 blog explaining details about the new form is available at <http://blog.uscis.gov/2013/05/employers-have-you-made-switch-to-new.html>. The new form is available at <http://www.uscis.gov/files/form/i-9.pdf>.

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## **6. DHS Orders Verification of Student Visas in Wake of Boston Bombings**

The Department of Homeland Security reportedly has ordered U.S. border agents to verify the validity of student visas for every international student arriving in the United States, effective immediately. Border agents are to use flight manifest information to verify student visa status, and check any for which that information is not available against a DHS database, according to the Associated Press, which obtained a copy of an internal memo circulated by David J. Murphy, of U.S. Customs and Border Protection, on May 3, 2013.

The order follows news that one of the students accused of hiding evidence after the April 15 Boston Marathon bombings, Azamat Tazhayakov, had returned to the United States in January without a valid visa. Reportedly, the border agent at the airport in New York where Mr. Tazhayakov entered the United States on January 20 did not have access to the Student and Exchange

Visitor Information System (SEVIS) and didn't send Mr. Tazhayakov to secondary inspection where SEVIS information would have been available. All border agents will now be able to access SEVIS. One of the bombers, Tamarlan Tsarnaev, was a U.S. permanent resident and the other, Dzokhar Tsarnaev, was a U.S. citizen. Tamarlan is dead and Dzokhar is in custody.

Delays are expected at ports of entry for international students as a result of the new order.

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## **7. Employment-Based Third Preference Visa Numbers Advance Significantly**

The employment-based third preference category cut-off date for most countries advanced significantly for the second month in a row, as reflected in the June 2013 Visa Bulletin.

The Department of State's Visa Office said this recent rate of movement is not expected to continue in the future. Rapid forward movement of cut-off dates is often followed by a dramatic increase in demand for numbers within three to six months, the Visa Bulletin explains. Once such demand begins to materialize, the cut-off date movement will begin to slow or will even stop for a period of time.

For June, the employment-based third preference cut-off date for China is September 1, 2008; for India, January 8, 2003; for Mexico, September 1, 2008; and for Philippines, September 22, 2006. For all other chargeability areas, the date is September 1, 2008. The dates for the "Other Workers" categories in June are the same, except for China-mainland born, which is October 22, 2003.

In May, the corresponding cut-off dates were December 1, 2007 (China, Mexico, and All Chargeability Areas Except Those Listed); December 22, 2002 (India); and September 15, 2006 (Philippines).

For June, the employment-based first preference is Current. Second preference is also Current except for China-mainland born, which is July 15, 2008; and India, which is September 1, 2004.

The June 2013 Visa Bulletin is available at

[http://www.travel.state.gov/visa/bulletin/bulletin\\_5953.html](http://www.travel.state.gov/visa/bulletin/bulletin_5953.html).

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## 8. USCIS Seeks New Private-Sector Experts for Entrepreneur Initiative

For its "Entrepreneurs in Residence" initiative, U.S. Citizenship and Immigration Services (USCIS) is now seeking new private sector experts, using the Department of Homeland Security's Loaned Executive Program, in the areas of performing arts, health care, and information technology. USCIS said the introduction of expert views in these areas will help the agency gain additional insights and strengthen its policies and practices in areas critical to economic growth.

USCIS has also enhanced its online resource center for entrepreneurs, Entrepreneur Pathways. Over the past year, there have been nearly 30,000 visits to the site, USCIS reported. The site provides entrepreneurs seeking to start a business in the United States a way to navigate the immigration process.

USCIS said three aims are key to the initiative: "producing clear public materials to help entrepreneurs understand relevant visa categories; equipping USCIS staff with the right tools to adjudicate cases in today's complex business environment; and streamlining USCIS policies to better reflect the realities faced by foreign entrepreneurs and startup businesses."

For more information on opportunities for private sector experts, go to <http://www.dhs.gov/loaned-executive-program>. The USCIS announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2b6be424ac48e310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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## 9. DHS Changes US-VISIT Name

The US-VISIT (United States Visitor and Immigration Status Indicator Technology) program is now called the Office of Biometric Identity Management (OBIM). The Department of Homeland Security (DHS) explained that OBIM provides biometric identification services that help federal, state, and local government decision-makers accurately identify people and determine whether they pose a risk to the United States. OBIM supplies the technology for collecting and storing biometric data, provides analysis, updates its watchlist, and ensures data integrity.

DHS created OBIM in March 2013. More information is available at <https://www.dhs.gov/obim>.

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## **10. ABIL Global: Applying to Naturalize as a British Citizen - Are You of Good Character?**

Those applying to naturalize as British citizens need to be aware that criminal convictions and non-custodial offences can be taken into account when their applications are assessed. On December 13, 2012, the Home Office announced changes to the way it assesses criminal convictions, affecting how it will assess the "good character" requirement for naturalization applications. Criminal convictions will no longer be considered "spent" but instead will be evaluated according to a "sentence-based threshold."

Where an individual has been convicted of an offense, the length of time he or she must wait before applying to naturalize as a British citizen is now dictated under the "sentence-based threshold" approach, as follows:

- A sentence of 4 years or more of imprisonment: the application will be refused, regardless of when the conviction occurred
- A sentence between 12 months and 4 years of imprisonment: the application will be refused unless 15 years have passed since the end of the sentence
- A sentence of up to 12 months of imprisonment in the last 7 years: the application will be refused unless 7 years have passed since the end of the sentence
- A non-custodial offense: the application will be refused if the conviction occurred in the last 3 years

The majority of people affected by this change likely will fall under the non-custodial offense category.

Most commonly, unpaid fines and notices that have been referred to a court due to non-payment, where the court orders the fine to be paid, can be treated as a non-custodial offense. Similarly, where an individual has been issued a police caution (warning), this too can be assessed against the non-custodial sentencing threshold.

These changes make it mandatory for individuals to declare any offenses or

convictions ever received either in the United Kingdom or abroad. Where an offense occurred abroad, it will be considered in line with the equivalent UK offense and the relevant sentencing threshold applied.

If you are concerned about a future application to naturalize as a British citizen, speak to your ABIL Global legal representative.

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## 11. Firm In The News

**Cyrus Mehta** spoke at the Federal Bar Association's Immigration Seminar held on May 17-18, 2013, in Memphis, Tennessee, on "CSPA & Child Citizenship Act of 2000."

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