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Senate Judiciary Committee Passes DREAM Act with Weakening Provisions

By a 16-3 vote, the Senate Judiciary Committee on October 23 passed S.1545, the bipartisan DREAM Act (Development, Relief, and Education for Alien Minors Act of 2003), with restrictionists on and off the Hill failing to stop the bill's movement. However, the bill passed only after the committee by an 18-1 vote accepted a weakening amendment. The amendment, sponsored by Senators Feinstein (D-CA) and Grassley (R-IA), would change the DREAM Act in the following ways. It would:

- Eliminate community service as an option to lift the conditional residency status. The remaining options that would lift the status are two years in the military or two years in college;
- Make DREAM Act beneficiaries ineligible for federal financial aid grants, including Pell Grants and Federal Special Education Opportunity Grants. Students would still be eligible for federal loans and work study programs.
- Require DREAM Act beneficiaries to register in SEVIS, the system to track foreign students;
- Modify the "retroactivity" provision so that DREAM beneficiaries who already have satisfied the education or military service options before the date of enactment of the Act would be required to wait an additional 3 years in conditional status before qualifying for full LPR status;
- Clarify that the bill's high school graduation requirement must be satisfied by graduation from a U.S. high school;

- Add new language requiring DREAM beneficiaries to list on the petition to remove conditional status all secondary education institutions attended in the U.S.

During committee debate, only Senator Durbin spoke passionately against the provision that would eliminate access to Federal Grants. While AILA is pleased that this important legislation has moved out of the committee on such a strong vote, we are disappointed with the provisions amended to the bill and will work to strengthen the bill as it moves to the Senate floor for a vote.

Special Immigrant Religious Worker Program Extended Until 2008

President Bush, on October 15, signed into law legislation that would reauthorize for an additional five years the special immigrant religious worker program (H.R. 2152, Pub. L. No. 108-99). Existing authority for the program expired on September 30. The program, created by the Immigration Act of 1990 and extended several times already, allows religious organizations in the United States to hire on a permanent basis religious workers from abroad who have been members of the denomination for at least two years and meet certain other criteria. Spouses and children of religious workers are also eligible for visas under the program.

While the law provides for up to 5,000 visas a year under the program, the number has remained far below that cap. In fiscal year 2002, for example, 1,413 religious workers became permanent residents through the special immigrant category, as did 1,714 spouses and children. (see H. Rpt. 108-271 at p. 2). Of that number, only 389 individuals arrived from abroad, while 87.6 percent adjusted status in the United States. In the broader picture, religious workers comprise a very small portion of total legal immigration to the United States—0.3 percent of the 1,063,732 immigrants in fiscal year 2002. (see CRS Report for Congress, “Immigration of Religious Workers: Background and Legislation” (Sept. 30, 2003) at p. 3).

House Bill Introduced to Address the Needs of Unaccompanied Immigrant Children

Representative Zoe Lofgren (D-CA) on October 21 introduced the Unaccompanied Alien Child Protection Act of 2003 (H.R. 3361). This legislation would require federal authorities to recognize the difficult circumstances of unaccompanied immigrant children when making decisions regarding their care and placement. H.R. 3361 would address many of the problems facing the more than 5,000 immigrant children found in the U.S. each year who are unaccompanied by a parent or legal guardian. These children include asylum seekers as well as children who have been smuggled into the country and who may be forced into sweatshop labor or sexual servitude. These children are often unable to understand the proceedings against them and are without a legal guardian to guide them through the process.

The new legislation would build upon § 462 of the Homeland Security Act, which transferred the care, custody and placement of unaccompanied alien children from the Department of Justice to the Department of Health and Human Service’s Office of Refugee Resettlement (ORR). H.R. 3361 would ensure that the transfer of responsibilities from the DHS to the ORR occurs in an orderly manner, and that the children have access to counsel during immigration proceedings. The bill also would provide the ORR with the authority to appoint guardians ad litem where appropriate. In addition, the legislation would establish minimum standards for the care and custody of unaccompanied alien children and reform procedures for abused, abandoned, or neglected children to access permanent protection when such protection is warranted. Congress ultimately failed to include these provisions in the final version of the Homeland Security Act.

Upon introducing the bill, Representative Lofgren commended the Department of Health and Human Services for taking important steps to improve the care and custody of these children, but pointed out that the ORR inherited a system that relied upon a variety of punitive facilities to house children and was given little legislative direction to implement its new responsibilities. “Now is the time to complete the positive steps we have already taken to ensure that unaccompanied immigrant minors are not locked up in jail without legal help, especially after the trauma they have been through,” emphasized Representative Lofgren.

The bipartisan legislation is cosponsored by Representatives Melissa Hart (R-PA), Chris Cannon (R-UT), Kendrick Meek (D-FL), Jan Schakowsky (D-IL), and all of the co-chairs of the Bipartisan Congressional Refugee Caucus, Chris Smith (R-NJ), Ileana Ros-Lehtinen (R-FL), and John Conyers (D-MI). H.R. 3361 is companion legislation to S. 1129, introduced on May 22 by Senator Dianne Feinstein (D-CA).

House Immigration Subcommittee Examines Visa Overstay Issue

The House Judiciary Committee’s Subcommittee on Immigration, Border Security and Claims convened an oversight hearing on October 16 to examine the topic of visa overstays, and more specifically, to assess how many visa overstays are currently residing in the United States and the effect of this population on national security. Testifying were: Dr. Nancy Kingsbury, Managing Director of Applied Research and Methods at the General Accounting Office (GAO); Kevin Tanner, Director of the FBI’s Foreign Terrorist Tracking Task Force; Theresa Papademetriou, Senior Legal Specialist at the Library of Congress; and Dr. Susan Forbes Martin, Director of Georgetown University’s Institute for the Study of International Migration.

Subcommittee Chairman John Hostettler (R-IN), in his opening statement, cited estimates that up to three million individuals currently residing in the U.S. without proper documentation may have initially arrived in the U.S. with valid visas. This number, he continued, is reportedly being added to at the rate of about 300,000 new overstays per year. Several Democrats on the subcommittee, however, disputed the methodology used in deriving the overstay estimates, and also emphasized that not everyone within the overstay population had arrived their intentionally. Some, said Representative Linda Sanchez (D-CA), have simply been caught up in bureaucratic red tape. Others may have pending applications for immigration benefits, but because of egregious processing backlogs, have since fallen out of status. And some individuals simply do not understand the difference between a visa validity period versus a period of authorized stay.

Several of the witnesses, most notably, Dr. Martin and Mr. Tanner, also cautioned lawmakers to keep the overstay problem in perspective, noting that those who come to this country with the intent to do us harm can certainly do so within their authorized period of stay, and need not fall into the overstay category to be considered a threat. Hence, they said, simply threatening to crack down on visa overstays should not be viewed as a panacea for managing the threat of terrorism.

In responding to questions from subcommittee members as to what, if any, impact the US Visit entry/exit control system will have on the overstay problem, Dr. Martin opined that it is unrealistic to expect that the system will allow us to locate and remove the overstay population. What US Visit can do, she stressed, is provide us with useful data for deducing overstay trends. For example she said, the data may indicate that certain populations are more likely than others to overstay.

Dr. Martin also questioned both the effectiveness and efficacy of the new visa policy under which greater numbers of visa applicants are now being interviewed. She stated that interviewing

everyone for a visa probably means that consular officers will not be spending enough time on those individuals on whom they should be focusing, and too much time on those who pose no risk and should be moved through the system more quickly.

House Subcommittee Hears Testimony on Merging Inspections Functions at the Border

Commissioner Robert C. Bonner of the Bureau of Customs and Border Patrol (CBP) on October 16 testified before the House Select Committee on Homeland Security's Subcommittee on Infrastructure and Border Security about the status of the program, "One Face at the Border." Mr. Bonner stated that, beginning in October, the CBP will no longer be training legacy immigration or customs inspectors; rather the agency will be training "CBP Officers" to handle customs and immigration functions. Under the One Face at the Border program, the new CBP officers will take a 71-day basic training course that will touch briefly upon a broad range of subjects, including immigration, customs and agriculture. Currently, immigration inspectors are required to take a 57-day training course that is focused solely on immigration. Such a drastic reduction in the amount of immigration training creates concerns, especially in light of the fact that there will not be an Immigration Expert at the ports of entry. However, CBP plans to deploy Agriculture Specialists to perform agricultural inspection functions.

Critics of the program have expressed uncertainty as to how the One Face at the Border program will increase our national security. In his testimony at the hearing, Thomas Kuhn, President of Local 2580 of the National Immigration and Naturalization Services Council, expressed his grave reservations about the program, stating, "If the management of Customs and Border Protection, which has limited immigration experience, plans on making CBP officers "Jacks of all trades," they will be "Masters of none" and it will be a grave disservice to the security of the country."

Many questions remain regarding how the One Face at the Border Program will function. Such questions include: How will CBP transition from the current port procedures to the new One Face at the Border program? Why did CBP fail to provide for an immigration specialist at the ports of entry? To whom do CBP officers refer questions regarding the interpretation of immigration law and will this consultation occur in a timely manner? What mechanisms are/will be in place to ensure that the ports act uniformly in their inspections and adjudications? With respect to the adjudications that occur at the border, how will CBP coordinate with USCIS to ensure that CBP staff obtain and implement guidance regarding changes in adjudications procedures? Who will adjudicate visas, such as TNs, Ls or Es and what will happen to the Free Trade Examiners? The only certainty among the many unanswered questions seems to be this—by July 31, 2004, CBP officers will be wearing new uniforms. This uniform, looking very much like those worn by law enforcement officers, is navy blue and has a new CBP patch.

In addition to the implementation of One Face at the Border, Mr. Bonner stated that the CBP has increased the number of inspectors along the northern border to 2,900, an increase of about 1,600. In addition, there are currently 4,900 inspectors on the southern border.

In response to a question from Representative Loretta Sanchez (D-CA), Mr. Bonner briefly addressed the implementation of the first phase of US VISIT by stating that it was expected to be completed "sometime in the coming year." US VISIT is the administration's entry-exit system that would record the entry and exit of nonimmigrant visa holders who enter the U.S. The system is scheduled to be implemented in phases with the first deadline requiring DHS to install US VISIT in our nation's air and seaports by December 31, 2003. Reportedly, only select air and seaports will be equipped with US VISIT by that deadline. In addition, the administration has

indicated that the exit- function will consist of an automated self-service kiosk where foreign nationals will voluntarily register their departure from the U.S.

ABA Commissions Report on BIA Procedural Reforms

The American Bar Association's Commission on Immigration Policy, Practice, and Pro Bono (ABA Commission) asked Dorsey & Whitney, LLP to study the effects of a Department of Justice (DOJ) February 2002 proposed rulemaking called "Board of Immigration Appeals: Procedural Reforms to Improve Case Management" (Procedural Reforms). The final rule, which became effective September 25, 2002, revised the structure and procedures of the Board of Immigration Appeals (BIA) in an effort to reduce case backlogs. These reforms have had serious negative consequences for the due process rights of immigrants.

Among other measures, the Procedural Reforms included: (1) virtually eliminating three-judge appeal panels; (2) encouraging routine "affirmances without opinion" of immigration judge orders; (3) forbidding de novo review on appeal of factual findings; and (4) eliminating half of the BIA member positions. The report issued by the ABA Commission concludes that these changes have had the following adverse and counterproductive effects:

- While 1 in 4 appeals were granted before the procedural changes, just 1 in 10 are now;
- The rate at which BIA decisions are being appealed to the federal courts tripled from 5 percent in 2001 to 15 percent in 2002. The 2nd, 9th, 5th and 3rd circuits have been particularly hard hit by higher rates of appeals;
- Reducing the number of BIA members who must review each case and imposing strict time periods for decision-making—measures purportedly aimed at eliminating the backlog—have backfired. Overworked board members have insufficient time to carefully consider the facts and legal arguments of each case;
- Allowing affirmance without written decision creates a clear incentive for board members to meet case processing guidelines by affirming removal orders without regard to the merits of the appeal. Board members are not required to articulate the basis for their decisions. The lack of written decisions gives courts of appeal less guidance in reviewing decisions; and
- Massive changes in immigration law, not lack of diligence or efficiency by individual board members, played a large part in the increased backlogs between 1996 and 2002. Thus, the rationale underlying the procedural reforms is questionable.

The ABA Commission recommends revoking the Procedural Reforms, or at a minimum, taking the following measures to restore fairness and transparency to the appellate process:

- Require that each case have a written decision that addresses errors raised by the appellant, the basis for determining that the case was correctly decided below, specific legal precedents on which the decision is based, and the reason that the case was assigned to a single board member;
- Prohibit single-member review in cases where judicial review would be foreclosed;
- Prohibit single-member review for reversing an order of an immigration judge to terminate proceedings or grant relief to a noncitizen;

- Make available reconsideration of whether or not a case was appropriately decided whenever a removal order is affirmed by a single member;
- Allow *de novo* review, which allows the board to re-examine the facts, clear up any factual errors, mistakes or confusion, and decide a case on its true facts. *De novo* review also would reduce the pressures on the federal courts;
- Ensure that time frames sufficiently accommodate the practical impediments many respondents face in preparing briefs or finding counsel;
- Expand board membership, rather than reduce it;
- Ensure decisional independence of board; and
- Preserve access to judicial review of immigration decisions, as the federal courts provide important oversight.

AILA strongly opposes the DOJ's Procedural Reforms and supports the ABA Commission's recommendations to ameliorate the harm created by this rulemaking. In both testimony before the House Judiciary Committee's Subcommittee on Immigration and Claims (see AILA InfoNet Doc. No. 02020633) and in its regulatory comments to the proposed rule (see AILA InfoNet Doc. No. 02032031), AILA expressed its grave concerns with the BIA Procedural Reforms, noting that they would lead to a serious diminution of due process—a view that is confirmed by the ABA study.

AILA believes that only the creation of an independent immigration court system can provide comprehensive solutions to these problems. Until Congress acts to eliminate the Attorney General's discretion to reconstitute this system in whatever way he sees fit, fundamental rights of immigrants will remain unprotected and exposed to the views of the Attorney General and the shifting political winds.

IRS Letter Addresses Penalty Waiver in SSN No-Match Situation

The IRS has the regulatory authority to fine employers \$50 for each incorrect Social Security Number (SSN) reported on a W-2 form. The maximum limit of the penalty per employer is \$250,000 per year. Although the IRS has never in the past levied fines, the agency has signaled its intent to fine employers for infractions that took place in 2002. However, penalty waivers are available on the basis of reasonable cause.

In a September 23 letter, the IRS outlined how employers may obtain waivers on the basis of reasonable cause. According to the letter, “[a]n employer may rely on the SSN that an employee provides in response to a solicitation, and the employer may use that SSN in filing a Form W-2 for that employee.” Employers may document that the employee provided the SSN to the employer and the employer subsequently relied on that SSN in good faith and used it on the W-2 form. Once the IRS notifies the employer that the employee's SSN is incorrect, the employer may have to document solicitation of the correct SSN for an additional two years.

The IRS obtains its information on incorrect W-2 forms from the Social Security Administration (SSA). Each year, the SSA processes W-2 forms and credits social security earnings to workers. If a name or SSN on a W-2 form does not match SSA records, the agency issues a no-match letter to the employer and employee in an attempt to obtain corrected information. However, unlike the IRS fines, there is no penalty associated with the SSA no-match letters. The no-match letter

informs employers that the SSA has noticed a discrepancy between its records and the names and numbers reported on the employer's W-2 forms and requests that the employer correct the discrepancy. Although it is important to respond to the SSA, the agency does not compel compliance, and it is imperative that employers make sure they do not inadvertently violate any laws while trying to comply with the request.

The IRS fines and the Social Security no-match letters are a symptom of an immigration system that is out of whack with reality. Comprehensive immigration reform would create a legal channel that would bring hardworking foreign workers out of the shadows and provide employers with the legitimate labor they need.

Recently Introduced Legislation

The following is a brief description of newly introduced, immigration-related legislation, in reverse chronological order. AILA will report further on these bills as they move through the legislative process.

H.R. 3361, the Unaccompanied Alien Child Protection Act of 2003, introduced on October 21 by Representative Zoe Lofgren (D-CA), would build upon § 462 of the Homeland Security Act, which transferred the care, custody and placement of unaccompanied alien children from the Department of Justice to the Department of Health and Human Service's Office of Refugee Resettlement (ORR). H.R. 3361 would ensure that the transfer of responsibilities from the DHS to the ORR occurs in an orderly manner, that the children have access to counsel during immigration proceedings, and would provide the ORR with the authority to appoint guardians ad litem where appropriate. The legislation would also establish minimum standards for the care and custody of unaccompanied alien children and reform procedures for abused, abandoned, or neglected children to access permanent protection when such protection is warranted. For further details on this bill, see article # 3 in this *Update*.

H.R. 3360, the Amerasian Naturalization Act of 2003, introduced on October 21 by Representative Zoe Lofgren (D-CA), would amend the INA to provide for the automatic acquisition of citizenship by certain Amerasians. Specifically, the measure would add a new § 321 which would provide that a person automatically becomes a citizen of the United States when he or she is residing in the United States pursuant to a lawful admission as an immigrant under § 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, if the person was considered a principal alien pursuant to subsection (b)(1)(A) of § 584.

H.R. 3345, the Inadmissibility of National Security Aliens Act, introduced on October 20 by Representative Jeff Flake (R-AZ), would render inadmissible any alien whose entry or proposed activities in the United States the Secretary of State or the Secretary of Homeland Security has reason to believe would pose a danger to the national security, as defined in INA §219(c)(2). The amendments made by this bill seem somewhat redundant, as the government already has broad authority to render aliens inadmissible on security-related grounds.

H.R. 3309, the Keeping Families Together Act of 2003, introduced on October 16 by Representative Bob Filner (D-CA), would amend the INA to restore certain provisions as they were before the enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRAIRA). Among its changes, the bill would: restore the pre-IIRAIRA definition of aggravated felony, restore the pre-IIRAIRA detention policy, repeal the stop time provisions, restore § 212(c), and restore the pre-IIRAIRA judicial review provisions.

H.R. 3306, the Compassionate Visitor Visa Act, introduced on October 16 by Representative Ed Case (D-HI), would amend the INA to remove from an alien the initial burden of establishing that he or she is entitled to nonimmigrant status under INA § 101(a)(15)(B), in the case of certain aliens seeking to enter the United States for a temporary stay occasioned by the serious illness or death of their U.S. citizen or legal permanent resident relative (grandchild, grandparent, parent, sibling, spouse, or child).

H.R. 3179, the Anti-Terrorism Intelligence Tools Improvement Act of 2003, introduced on September 25 by Representative James Sensenbrenner (R-WI), while not an immigration bill per se, contains a provision dealing with the use of information gathered under the Foreign Intelligence Surveillance Act of 1978, in immigration proceedings.

MEDIA SPOTLIGHT: Members and Staff in the News

Carl Shusterman (Southern California) wrote an article on immigration strategies for employing foreign workers for the October 24 edition of *Health Lawyers Weekly*. **José Pertierra** (Washington, DC), **John Estrella** (National) and **Julia Hendrix** (National) were quoted in an October 24 *Univision.com* article about the recent mark-up of the DREAM Act.

Jeff Van Doren (Washington, DC) was quoted in an October 22 *Blue Ridge Business Journal* article about H-1B visas. **Leslie Holman** (New England) was quoted in an October 21 *Times Argus* article featuring her clients, who are civil partners and are moving to Canada after trying to fight to remain in the U.S.

Alan Lubiner (New Jersey) and **Regis Fernandez** (New Jersey) were quoted in an October 20 *New Jersey Law Journal* article about accepting credit cards for payment of fees. The *New York Post* featured **Richard Alvoid** (Central Florida) in an October 20 article about his Iraqi client who is married to an American GI who is under orders not to see or even speak to her. **Jack Pinnix** (Carolinas) was quoted in an October 20 *News and Observer* article about local anti-immigrant groups.

Mark Koestler (New York) was featured in an October 19 *Newsday* question and answer article about immigration. *Buffalo News* quoted **Anne Doebler** (Upstate New York) in an October 18 article about the Buffalo immigration court's low approval for asylum requests. **José Pertierra** (Washington, DC) and **Ted Ruthizer** (New York) were quoted in an article in the October 18 edition of *The Economist* about the Bush Administration's policy on immigration. **Nora Milner** (San Diego) and **Tiffany Markee** (San Diego) were featured in an October 18 *Pawtucket Times* article about their client, Danny Sigui, who served as a key witness in a murder trial, was subsequently reported to the DHS by the prosecutor, and now faces deportation.

Jonathan Rose (Southern Florida) was quoted in an October 17 *Miami Herald* article about participating in **poetry readings**. **Howard Eisburg** (Missouri/Kansas) was featured in an October 17 *Kansas City Star* article about participating in the Rolling Thunder Down Home Democracy Tour which aims to promote a progressive way of turning democracy into reality. **William Joyce** (New England) was featured in an October 17 broadcast on Channel 10 News in Providence about his clients who face deportation after sailing from Russia to the United States. **Michael Said** (Iowa) was quoted in an October 17 *Des Moines Register* article about his client who is facing deportation.

Matt Hirsh (Philadelphia) was quoted in an October 16 *Philadelphia Inquirer* article about Philadelphia's policy of not reporting undocumented immigrants or denying them benefits based on their status. *The Chicago Tribune* quoted **Julia Hendrix** (National) in an October 16 article about the DREAM Act. **Doug Keegan** (Santa Clara) and **Grace Do** (Santa Clara) were quoted in an October 15 *San Jose Mercury News* question and answer article about immigration.

Luis Pérez-Eguiarte (Atlanta) was featured in an October 14 *Atlanta Journal-Constitution* article about his new immigration magazine, *Boletín Migratorio*, that will address immigration and other issues for local immigrants. The *Philadelphia Inquirer* quoted **Judith Bernstein-Baker** (Philadelphia) in an October 14 article about Pennsylvania's policy not to issue driver's licenses to immigrants who do not have a visa valid for longer than one year.

Robert Webber (Minnesota/Dakotas), **Michele Garnett-McKenzie** (Minnesota/Dakotas), **Phil Fishman** (Minnesota/Dakotas) and **Amy Schroeder Ireland** (Minnesota/Dakotas) were featured in an October 13 *Minnesota Lawyer* article about training lawyers to provide pro bono assistance to asylum seekers. **Daniel Weiss** (New Jersey) was featured in an October 13 *New Jersey Law Journal* article about founding the New Jersey State Bar Association's Gay and Lesbian Committee.

Kathleen Walker (Texas) was featured in an October 12 *El Paso Inc.* article about the contributions she and her husband have made to the El Paso community. **Margaret Wong** (Ohio) was featured in an October 11 *Cleveland Plain Dealer* article about a fundraising effort by the Prince and Princess of Serbia. *The Seattle Times* quoted **Glenn Prior** (Washington) in an October 9 article on his clients who face deportation while their son, who is serving in Iraq, has been granted legal permanent residency after he enlisted as an undocumented immigrant. **Thomas Sung** (New York) was quoted in an October 8 *New York Sun* article about the effect the PATRIOT Act will have on neighborhood banks and undocumented Chinese immigrants.

Daryl Buffenstein (Atlanta), **Carl Shusterman** (Southern California), and **Mitch Wexler** (Southern California) were quoted in an October 1 *Wall Street Journal* article entitled "Foreign Workers Will Soon Get Fewer Visas."

Note: Please submit all articles, letters-to-the-editor, etc. for inclusion in "Members in the News" to Julia Hendrix of the AILA Advocacy Department (jhendrix@aila.org).

Immigration Works! From the Grassroots

Matt Hirsh (Philadelphia) recently led a group of immigration advocates to petition the city of Philadelphia to clarify its policy on providing benefits to undocumented immigrants. Hirsh stated that the goal was getting services for eligible residents and making the shrinking city more welcoming to immigrants. As a result of their efforts, the city of Philadelphia joined the ranks of other cities including New York, which do not ask the legal status of a person before providing benefits. "It doesn't make any service available that wasn't available before," Hirsh stated to the *Philadelphia Inquirer*. "It's just...telling people that if you have a problem with a landlord, if you're a victim of a crime, if you have a problem with your water bill, that you can walk into a city office and get services regardless of your immigration status." Well done!

Did You Know?

“And immigration is an important issue. I had hoped we could have made more progress in the first two and a half years, but 9/11, the events of 9/11 caused a slowdown in our ability to deal with some of these issues. And I hope we can get back on track. I hope to share with my Mexican colleague some ideas we have of how to move forward, some principles that the President believes in, and so I hope we can move the ball forward.”

--Secretary of State Colin L. Powell, during an October 15, 2003, interview with *Univision's* Lourdes Meluza

CONTRIBUTORS

Judith Golub, Senior Director of Advocacy and Public Affairs
Marshall Fitz, Associate Director of Advocacy
Danielle Polen, Legislative and Regulatory Affairs Associate
Joanna Carson, Business Immigration Associate
John Estrella, Advocacy Associate
Julia Roane Hendrix, Media Relations Associate
Rossana Lo, Advocacy Assistant

American Immigration Lawyers Association

918 F Street, N.W.
Washington, D.C. 20004
202-216-2403

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