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Basic Immigration Law 2021: Business, Family, Naturalization and Related Areas

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LITIGATION AND ADMINISTRATIVE PRACTICE SERIES
Litigation
Course Handbook Series
Number H-1204

Basic Immigration Law 2021:

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 978-1-4024-3819-6

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Prepared for distribution at the
BASIC IMMIGRATION LAW 2021: BUSINESS, FAMILY, NATURALIZATION AND RELATED AREAS
Program
Live Webcast, February 4, 2021

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Senior Pro Bono Program Attorney: Ilizabeth Hempstead

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Basic Immigration Law 2021: Business, Family, Naturalization and Related Areas
February 4, 2021
Live Webcast

AGENDA

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Opening Remarks
Cyrus D. Mehta

9:10
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- Non-immigrants and immigrants; immigrant intent
- Quotas and priority dates
- Understanding the morass of agencies
- Legislative/administrative/litigation update
- Update and new developments regarding COVID-19, presidential proclamations, public charge rule, and other key topics

Cyrus D. Mehta

10:15
Nonimmigrant (Temporary) Visa Categories
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- Strategies in selecting and obtaining a nonimmigrant visa: new risk factors
- B visas for tourists and business visitors, the visa waiver program, and the Electronic System for Travel Authorization (ESTA)
- F and J categories for foreign students and exchange visitors
- H-1B, E, L, O, P and TN work visa categories
- Consular processing vs. change of status

Rosanna M. Fox, Avram E. Morell

11:15 Break

11:30

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- Diversity lottery visa program
- The petition process; adjustment of status; consular processing; section 245(i)
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Alexis S. Axelrad, Cora-Ann V. Pestaina

12:30 Lunch

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1:30

Ethical Issues in Immigration Practice and How Best to Handle Complaints to Disciplinary Counsel

- Key ethical issues arising in immigration matters
  - Conflicts of interest
  - Candor to the tribunal
  - Ineffective assistance motions
- What conduct often arises in complaints to disciplinary counsel
- Best practices for responding to investigations by disciplinary counsel

Kenneth Craig Dobson, Jun H. Lee, Paul A. Rodrigues

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Inadmissibility and Removability: Grounds, Consequences, Custody and Immigration Court Proceedings

- Nuts and bolts of a removal proceeding
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- Judicial review

Linda Kenepaske, Thomas E. Moseley

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3:45

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A. Updates from U.S. Citizenship and Immigration Services (USCIS) New York District Office and from U.S. Customs and Border Protection, John F. Kennedy (JFK) International Airport

B. Naturalization and Employer Issues
- Naturalization
- Preparing your client for a benefits interview at USCIS
- Interacting with CBP at JFK on behalf of your client
- Employer sanctions and compliance
  - Employment eligibility verification procedures, E-Verify
  - Antidiscrimination provisions in hiring
  - Responding to I-9 audits

Gregory L. Eddy, David Grunblatt, Timothy Houghton, Patrick Shen

5:15 Adjourn

Faculty:

Chair:

Cyrus D. Mehta
Cyrus D. Mehta & Partners PLLC
New York City

Alexis S. Axelrad
Barst Mukamal & Kleiner LLP
New York City

Kenneth Craig Dobson
Dobson Law LLC
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Gregory L. Eddy
Chief, Passenger Operations, John F. Kennedy International Airport
U.S. Customs and Border Protection (CBP), New York Field Office
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Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Partner of Cyrus D. Mehta & Partners PLLC in New York City. Mr. Mehta is a member of AILA's Administrative Litigation Task Force; AILA's EB-5 Committee; former chair of AILA's Ethics Committee; special counsel on immigration matters to the Departmental Disciplinary Committee, Appellate Division, First Department, New York; board member of Volunteers for Legal Services and board member of New York Immigration Coalition. Mr. Mehta is the former chair of the Board of Trustees of the American Immigration Council and former chair of the Committee on Immigration and Nationality Law of the New York City Bar Association. He is a frequent speaker and writer on various immigration-related issues, including on ethics, and is also an adjunct professor of law at Brooklyn Law School, where he teaches a course entitled Immigration and Work. Mr. Mehta received the AILA 2018 Edith Lowenstein Memorial Award for advancing the practice of immigration law and the AILA 2011 Michael Maggio Memorial Award for his outstanding efforts in providing pro bono representation in the immigration field. He has also received two AILA Presidential Commendations in 2010 and 2016. Mr. Mehta is ranked among the most highly regarded lawyers in North America by Who's Who Legal – Corporate Immigration Law 2020 and is also ranked in Chambers USA and Chambers Global 2020 in immigration law, among other rankings.

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Born in New York City, Alexis S. Axelrad has over two decades of experience in immigration and nationality law. Ms. Axelrad received her B.A. from the University of Maryland at College Park (1994.) After earning her J.D. from New York Law School (1997), Ms. Axelrad was admitted to practice in New York in 1998.

Ms. Axelrad has been active in the American Immigration Lawyers Association (AILA) – the preeminent bar association for US immigration lawyers - since she began practicing law. Ms. Axelrad currently serves as an elected as a director of AILA National's Board of Governors (BOG) and as the Chair of AILA National's Customs and Border Patrol (CBP). Ms. Axelrad is a past Chair of the New York Chapter of AILA and served in every capacity on the NY chapter's executive committee. She is currently the chair of the New York Chapter of AILA's Customs and Border Protection (CBP) Committee and a member of the District Director Committee for over ten years. Ms. Axelrad is also an elected member of the Board of Directors of the Executives Association of New York. Ms. Axelrad was also the recipient of the distinguished 2020 AILA Susan Quarles Service Award and a past recipient of AILA President's Commendation Award for Outstanding Service on the USCIS HQ liaison committee, June 2008-2010 & 2014, 2019. *New York Super Lawyers* has listed her in the 'rising stars' section of top immigration attorneys in New York in 2011 and 2012, and as a Super Lawyer from 2013 to present. She is recognized by *Chambers & Partners USA: America's Leading Lawyers for Business*.

Ms. Axelrad was the author of quarterly column on immigration matters published in the New York Law Journal and the researcher and writer of *US Immigration Laws: Working, Living and Studying in America* (1999). She is a frequent writer for periodicals and speaker on immigration and nationality law and is honored to be a source of information and guidance for her colleagues in and outside of the immigration bar and for the NYC SHRM community.

Ms. Axelrad maintains a busy corporate and family-based immigration practice with a particular emphasis on interaction with the various offices of Department of Homeland Security and the Justice Department including USCIS, Department of State, and Customs and Border Protection.

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Craig Dobson provides ethics advice to lawyers, represents lawyers in disciplinary matters, and practices immigration and nationality law at Dobson Law LLC. He has a Bachelor of Arts in philosophy from Furman University and a Juris Doctor, cum laude, from New England School of Law. During law school, he received CALI awards in both the Law and Ethics of Lawyering and International Business Transactions and served as Editor-in-Chief of the New England Journal of International and Comparative Law. He previously served as Georgia UPL Liaison for the American Immigration Lawyers Association's (AILA) Georgia-Alabama Chapter and was appointed by the Supreme Court of Georgia to serve as Chairperson of the District 1 UPL Committee for the State Bar of Georgia from 2014 to 2017. He is currently Chair of AILA's National Ethics Committee and is Co-chair AILA New York's Ethics Committee. He is also a member of the Association of Professional Responsibility's (APRL) Cross-Border Practice Subcommittee, which is working on proposed amendments to current ABA multi-jurisdictional practice rules. Additionally, he is a member of the New York City Bar Association's Mindfulness & Wellbeing in Law Committee and AILA's new lawyer well-being committee. In October 2017, he became one of the first National Board-Certified Health & Wellness Coaches.

Gregory L. Eddy
Chief, Passenger Operations
U.S. Customs and Border Protection
JFK Airport/New York Field Office

Mr. Eddy has been a Chief in the Passenger Operations Division of U.S. Customs and Border Protection (CBP) at John F. Kennedy International (JFK) Airport in New York since 2006. He is primarily responsible for the processing of arriving international passengers and their baggage. Currently, this division has over 800 CBP Officers and an operating budget of $20 million. In Fiscal Year 2019 CBP at JFK processed in excess of 17.2 million arriving passengers at its five international arrival terminals.

Mr. Eddy started his career with the Immigration and Naturalization Service (INS) in 1989 as an immigration inspector assigned to JFK. He conducted primary as well as secondary admissibility inspections and was often assigned to the Deferred Inspection Unit. As an inspector he held many collateral positions including member of the Inspections Response Team (IRT), Firearms Range Officer, and Fines Officer.

In October of 1992 Mr. Eddy was promoted to Supervisory Immigration Inspector (SII). As an SII he oversaw the Senior Inspector program responsible for passenger analysis, fraud detection, adverse action casework, and statistics. This group also encompassed the Criminal Enforcement Unit responsible for identifying, removing, and when appropriate, prosecuting criminal aliens; most commonly aggravated felons who had attempted to illegally re-enter the United States after being formally removed. The methods developed within this unit became the national standard for identifying inadmissible criminal aliens.

In 1996 Mr. Eddy was promoted to the level of a second line manager, first as an Assistant Area Port Director under the legacy INS, then in 2003 as a Deputy Chief within CBP under the newly created Department of Homeland Security. His primary responsibility in this position was the oversight of the application of the Immigration and Nationality Act to all arriving aliens in order to determine admissibility. He also oversaw the Passenger Analysis Unit responsible for not only identifying traditional INA violators, but then, in light of the new mandate under CBP, to aid in developing strategies to identify previously unknown terrorists as well.

From February of 2012 through August of 2015 Mr. Eddy served as the Chief of the Anti-Terrorism Contraband Enforcement Team (A-TCET). This unit, under the Tactical Operations Division at JFK, was responsible for enforcement efforts in the outbound passenger, inbound and outbound cargo, aircraft and express consignment arenas. A-TCET included the Aircraft Search Team and Canine Units as well. Areas of particular focus for this team included outbound currency smuggling and narcotics interdiction in all environments.

In April of 2018 Mr. Eddy was assigned as Chief of the Resource Planning, Strategies, and Logistics office in the Executive Division where he had oversight of CBP budgets and assignment of the more than 800 uniformed Officers and Agriculture Specialists. Finally, in August of 2019 Mr. Eddy returned as Chief in the Passenger Operations Division.

Rosanna M. Fox

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Rosanna is the Co-Founding Partner of Lepore Taylor Fox LLP headquartered in Paramus, New Jersey. She has extensive experience advising domestic and multinational companies, including Fortune 500 companies, with respect to short- and long-term immigration strategies and programs. She advises clients with respect to the full range of worksite compliance issues including Form I-9 compliance, E-Verify registration and compliance, Public Access Files, and government site visits. Rosanna also serves as Head of the Firm's Entrepreneur and Start-up Practice, advising foreign entrepreneurs and investors in all aspects of starting a business in the United States with a focus on immigration strategy and planning. Over her many years of practice, Rosanna has successfully advised start-up companies in a range of industries with respect to temporary work visas as well as green card strategies. Ranked by Chambers USA 2020 as a top immigration attorney in New Jersey, listed in the Best Lawyers in America, Immigration Law, in 2018 and 2019 and voted a Rising Star by the New York Metro Super Lawyers magazine since 2016, Rosanna is a frequent speaker and author on a range of immigration-related topics. As an active member of the New York and New Jersey Chapters of the American Immigration Lawyers Association (AILA), she presently serves on the Executive Committee of the New York AILA Chapter. Prior to founding LTF, Rosanna was a Shareholder in the New York and New Jersey offices of a large international law firm. Prior to that, she was a Partner in the immigration practice group of a prominent Manhattan law firm.

Rosanna loves practicing immigration law because it allows her to help others materialize their professional and personal dreams. When she is not practicing law, Rosanna loves to run and has completed a number of races including six half-marathons. She has also coached a local Girls on the Run team. Rosanna lives in New Jersey with her husband, two daughters, and their cockapoo Benji.

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David Grunblatt is a Partner at Proskauer Rose LLP, heading its Immigration Practice Group and is an authority on employer immigration compliance and employment-based immigration benefits. He served as Chair of the New York Chapter of the American Immigration Lawyers Association and of its Vermont Service Center Liaison Committee. He was formerly Chair of the New York State Bar Association's Committee on Immigration and Nationality Law and was Chair of the Committee on Immigration and Nationality Law at the New York County Lawyers Association. He lectures and writes extensively on the subject of Immigration and Nationality Law.

Timothy Houghton
District Director, District N-13
US Citizenship and Immigration Services

Timothy J. Houghton entered on duty as District Director for District N-13 in March of 2020. He previously served as the Deputy District Director for District N-13 from December 2015 - March 2020.

Background Experience

Mr. Houghton has over 21 years of government service which began with legacy Immigration and Naturalization Service (INS) at the Garden City Office of the New York District in 1998. He has his held a variety of positions In United States Citizenship and Immigration Services.

He began his federal service as a District Adjudications Officer at the Garden City Office of the New York District. In 2004, Mr. Houghton became a Supervisory District Adjudication Officer in the Naturalization Unit. In 2007, he was assigned to the Adjustment of Status Unit where he served as supervisor until May 2009. In 2008, Mr. Houghton received the Federal Executive Board Award as Supervisor of the year for his work in the Naturalization Unit by organizing a more efficient manner to receive documents from customers. In May 2009, he became a Supervisor for the Newark District Office in the Adjustment of Status Unit where he served in that position until March 2010. In March 2010, Mr. Houghton was selected by New York District to serve as Section Manager for Adjudications 2. The Adjudication 2 Unit adjudicated multiple immigration applications and adhered to the Stokes Agreement. In January of 2011, he was assigned as Section Manager for the Naturalization Unit. Mr. Houghton received the United States Citizenship and Immigration Services; Distinguished Government Service Award on May 11, 2012. In May 2012, Mr. Houghton was selected as Field Office Director for the New York Queens Field office. In May 2014, Mr. Houghton was selected as the Field Office Director of New York Field office where he served until appointment as the Deputy District Director in December 2015. Mr. Houghton received the Manager/Supervisor of the Year in 2017.

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Linda Kenepaske has been representing private and corporate clients in all aspects of immigration law in her New York City based practice for more than 25 years. Linda has served as chair and member of many local and national AILA committees, was previously Chair of the Immigration and Nationality Law Committee of the New York City Bar, is currently Co-Chair of the Association of Deportation Defense Attorneys (ADDA) in New York City, and serves on the Federal Bar Association Immigration Law Section Advisory Board. She lectures frequently on a variety of immigration topics. She is AV rated and has been selected as a “Super Lawyer” since 2009.

Jun H. Lee

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Department Disciplinary Committee
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I graduated with a B.A. from Cornell University majoring in Government with concentration in International Relations. Graduated with a J.D. from Syracuse University School of Law. I am admitted in the State if New York, Appellate Division, First Judicial Department.

I have been a Staff Attorney with the Attorney Grievance Committee since 2001. I am presently a Principal Staff Attorney investigating and prosecuting professional misconduct by attorneys in the First Department where allegations vary from neglect of legal matters to escrow violations. In addition, I have been designated to oversee the investigation of complaints filed against attorneys practicing in the area of immigration law. I am a member of the Katzman Study Group as well as a member of the Protecting Immigrants New York Task Force.

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Avram Morell is a member of Pryor Cashman's Immigration Law Group. His experience includes a wide range of areas of immigration and nationality law, including counseling employers in the hiring of foreign employees, representing entrepreneurs and investors seeking permission to live and work in the United States, obtaining immigrant and non-immigrant visas for professionals in a variety of industries, advising employers on all areas of immigration compliance, guiding individuals through the permanent residence and naturalization application processes, developing corporate immigration policies, and creating global mobility guidelines and procedures.

Mr. Morell is ranked among the leading immigration lawyers by Chambers USA and US Legal 500 and lectures regularly on immigration law to professional associations, educational institutes, and private businesses. He is the author of articles on areas of immigration law in state-wide, national and international publications and has contributed to Immigration Law and Procedure, the leading treatise on immigration law.

Mr. Morell has also served in key capacities for the American Immigration Lawyers Association on the national Department of State Liaison Committee, the national Verification and Worksite Enforcement Liaison Committee, the Liaison Committee to the New York District Office of USCIS, and the Liaison Committee to Customs and Border Protection in New York and New Jersey.

Mr. Morell is a 1993 graduate of Benjamin N. Cardozo School of Law, where he was a Samuel Belkin Scholar.

Thomas E. Moseley
Attorney at Law

Thomas E. Moseley practices immigration law in Newark, New Jersey concentrating in federal court litigation and removal defense. He received his A.B. from Harvard College and his J.D. from Harvard Law School and previously served as Chief of the Immigration Unit in the United States Attorney's Office for the Southern District of New York. He is a past chair of the Immigration Section of the Federal Bar Association and has lectured on immigration before the Federal Bar Association, New Jersey ICLE, the Practicing Law Institute, and the American Immigration Lawyers Association ("AILA"). He is the recipient of AILA's 2016 Jack Wasserman award for excellence in immigration litigation.

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Cora-Ann V. Pestaina is a Partner at Cyrus D. Mehta and Partners, PLLC where she practices primarily in the area of business immigration law. She represents large global corporate clients, emerging growth companies and individuals in a wide range of industries including Information Technology, Finance, Healthcare, Pharmaceutical, Management Consulting and Design. Ms. Pestaina has extensive experience in PERM labor certifications and she regularly counsels clients regarding temporary employment-based nonimmigrant visas and permanent residence sponsorship for their foreign national employees. She also represents artists and investors including EB-5 investors. Ms. Pestaina also represents individuals in family-based applications and naturalization.

Ms. Pestaina received her J.D. from Benjamin N. Cardozo School of Law/Yeshiva University where she served as an Editor for the Cardozo Women's Law Journal. She earned her B.A. in Political Science from Marymount Manhattan College.

Ms. Pestaina is admitted to practice in New York and is a member of the American Immigration Lawyers Association (AILA) where she served several terms as co-chair of the New York Chapter's Department of Labor Committee and the Corporate Practice Committee. Ms. Pestaina is also the author of articles that have appeared in professional publications such as Bender's Immigration Bulletin and on the firm's website, http://www.cyrusmehta.com, and the firm's blog, The Insightful Immigration Blog. She has been a featured speaker on various business immigration panels including at AILA meetings and conferences both locally and nationally. She was a speaker on PERM labor certifications at the AILA New York Chapter Immigration Law Symposium in 2011 and 2014; at the AILA National Immigration Conference in 2016 and 2017; and at the 2017 AILA PERM/H-2B Practice Conference.

She is included in Chambers USA, which identifies the world's leading lawyers and law firms and she has also been included in various editions of The Best Lawyers in America. She is also ranked by Super Lawyers and listed in Who's Who Legal Corporate Immigration.

Paul A. Rodrigues

Disciplinary Counsel, Executive Office for Immigration Review, U.S. Department of Justice

Paul Rodrigues graduated from Loyola University Chicago School of Law in 2006, and he is a member of the Illinois State Bar. Following his graduation, he worked as a Law Clerk/Staff Attorney for the Illinois Appellate Court, Third District, for over two years. At the Illinois Appellate Court, he drafted orders and opinions for both civil and criminal cases. Paul then worked as Assistant Legal Counsel for the Illinois State Senate, Office of the Senate President, for the 2010 legislative session. In that role, he negotiated with stakeholders and advocates and drafted legislation on criminal and judiciary-related issues. Paul began working for the United States Department of Justice, Executive Office for Immigration Review (EOIR) in June 2010, as an Attorney-Advisor at the Board of Immigration Appeals. In August 2011, he moved to the EOIR Office of the General Counsel as an Associate General Counsel. There, Paul worked for the Attorney Discipline Unit, the Fraud and Abuse Prevention Program, and the Freedom of Information Act Service Center. He drafted the comprehensive update to the agency's regulations regarding non-attorney representation. In October 2016, Paul shifted to working solely for the Attorney Discipline Unit as the Assistant Disciplinary Counsel. In November 2018, Paul became the EOIR Disciplinary Counsel.

Patrick Shen
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Patrick is a partner in Fragomen's Government Strategies and Corporate Compliance Group. In this capacity, he works with U.S. and multinational clients to maintain compliant immigration programs.

Prior to rejoining Fragomen, Patrick was appointed by the President and confirmed unanimously by the United States Senate as Special Counsel for Immigration-related Unfair Employment Practices in the U.S. Department of Justice's Civil Rights Division. He also served as Policy and Planning Director of U.S. Immigration and Customs Enforcement in the Department of Homeland Security, and Chief Immigration Counsel of the Senate Judiciary Committee. Earlier in his career, Patrick spent several years as an immigration litigator for the Justice Department, having served as Assistant District Counsel of the former Immigration and Naturalization Service (INS) and a trial lawyer in the United States Attorney's Office in Brooklyn, NY and the Justice Department in Washington, DC, representing INS and other agencies in federal courts. He also had a stint in private practice as Director of Government Relations for Fragomen prior to his presidential appointment.

Patrick is a volunteer with his local fire department in Maryland. He was an adjunct professor at American University's Washington College of Law, and a sports reporter in Taiwan before returning to the United States to attend law school.
Patrick speaks English and Mandarin Chinese.

1

Immigration FAQ

Cyrus D. Mehta

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Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Partner of Cyrus D. Mehta & Partners PLLC in New York City. Mr. Mehta is a member of the American Immigration Lawyer's (AILA) Administrative Litigation Task Force; AILA's FOIA Strategy Committee; former chair and member of AILA's Ethics Committee; special counsel on immigration matters to the Departmental Disciplinary Committee, Appellate Division, First Department, New York; board member of Volunteers for Legal Services and board member of The New York Immigration Coalition. Mr. Mehta is the former chair of the Board of Trustees of the American Immigration Council and former chair of the Committee on Immigration and Nationality Law of the New York City Bar Association. He is a frequent speaker and writer on various immigration-related issues, including on ethics, and is also an adjunct professor of law at Brooklyn Law School, where he teaches a course entitled Immigration and Work. Mr. Mehta received the AILA 2018 Edith Lowenstein Memorial Award for advancing the practice of immigration law and the AILA 2011 Michael Maggio Memorial Award for his outstanding efforts in providing pro bono representation in the immigration field. He has also received three AILA Presidential Commendations in 2010, 2016 and 2020. Mr. Mehta is ranked highly by Who's Who Legal – Corporate Immigration Law 2020 and also by Chambers USA and Chambers Global 2020 in immigration law, among other rankings.

The author thanks Sophia Genovese, a former Associate at Cyrus D. Mehta & Partners PLLC, for her invaluable assistance in editing the article and providing many helpful suggestions.

WHO IS AN ALIEN?

An alien is any person who is not a citizen of the United States.[2]

WHAT IS THE DIFFERENCE BETWEEN A NONIMMIGRANT AND AN IMMIGRANT?

The INA defines an immigrant as any alien, except for an alien who is within the classes of nonimmigrants.[3] Nonimmigrants may enter the United States for temporary purposes. The nonimmigrant visa categories comprise a veritable alphabet soup - from the A visa all the way to V visa. Some of the most commonly utilized visas are the B-2 visa for tourism, the B-1 visa for business, the H-1B visa for employment in a specialty occupation that requires a bachelor's degree in a specialized field, the L-1 visa for intracompany transferees, and the R-1 visa for religious workers.[4] (**See Appendix A**).

An immigrant is one who is authorized to remain in the United States indefinitely, and who is a lawful permanent resident (LPR) or popularly known as a green card holder. Immigrants also comprise other categories of people who can remain in the United States indefinitely such as asylees and refugees.

HOW DOES SOMEONE COME TO THE U.S. AS AN IMMIGRANT?

A foreign-born individual can become a lawful permanent resident in one of the four main ways:

Through family-based immigration, a U.S. citizen or LPR can sponsor his or her close family members for permanent residence.[5] A U.S. citizen can sponsor his or her spouse, parent (if the sponsor is over 21), minor and adult children, and brothers and sisters. An LPR can sponsor his or her spouse, minor children, and adult unmarried children. In most cases, citizens or LPRs wishing to petition for a family member must earn at least 125% of the poverty level and sign a legally enforceable affidavit of support to that effect.[6] If the primary sponsor is unable to demonstrate this income level, a joint sponsor, who is either a U.S. citizen or LPR, may also submit an affidavit of support.[7] Under a new rule, a public charge is defined as an alien who has received one or more public benefits, as defined in the rule, for more than 12 months within any 36-month period. [8]

Through employment-based immigration, a U.S. employer can sponsor a foreign-born employee for permanent residence.[9] Typically, the employer must first demonstrate to the Department of Labor that there is no qualified

U.S. worker available for the job, but labor certification is not required for all employment-based categories, and even if required, can be waived.

Through humanitarian-based immigration, a person located outside the United States who seeks protection in the U.S. on the grounds that he or she faces persecution in his or her homeland can enter this country as a refugee.[10] In order to be admitted to the U.S. as a refugee, a person must prove that he or she has a "well-founded fear of persecution" on the basis of at least one of the following internationally recognized grounds: race, religion, membership in a social group, political opinion, or national origin.[11] Refugees generally apply for admission to the United States in refugee camps or at designated processing sites outside their home countries. In some instances, refugees may apply for protection from within their home countries (e.g. Cuba, Vietnam, former Soviet Union). If accepted as a refugee, the person is sent to the U.S. and receives assistance through the "refugee resettlement program."

A person who is already in the United States and fears persecution if sent back to his or her home country may apply for asylum in the U.S.[12] Once granted asylum, the person is called an **"**asylee.**"** like a refugee, an asylee must prove that he or she has a "well-founded" fear or persecution based on one of the five enumerated grounds listed above.

To qualify for the diversity visa lottery, individuals must have a high school education or its equivalent, or within five years preceding the application, have had at least two years of experience in an occupation requiring at least two years of training or experience.[13] Applicants for the lottery can electronically file only one application every year during a designated period.

HOW MANY IMMIGRANTS ARE ADMITTED TO THE UNITED STATES EVERY YEAR?

Legal immigration to the United States is a tightly controlled, highly regulated system. There is a limit on the number of foreign-born individuals who are admitted to the United States annually as family-based or employment-based immigrants or as refugees.

Family-based immigration is limited by statute to 480,000 persons per year**.**[14] Family-based immigration is governed by a formula that imposes a cap on every family-based immigration category, with the exception of *"immediate relatives"* (spouses, minor unmarried children, and parents of U.S. citizens). (**See Appendix B**). The formula allows unused employment-based immigration visas in one year to be dedicated to family-based immigration the following year, and unused family-based immigration visas in one year to be added to the cap the next year. This formula means

that there are slight variations from year to year in family-based immigration. Because of the numerical cap as well as per country limits,[15] there are long waiting periods to obtain a visa in most of the family-based immigration categories.

Employment-based immigration is limited by statute to 140,000 persons per year.[16] (**See Appendix C**). In most cases, before the United States Citizenship and Immigration Service (USCIS) will issue an employment-based immigrant visa to a foreign-born individual, the employer first must obtain a "labor certification" from the U.S. Department of Labor confirming that there are an insufficient number of U.S. workers able, qualified and willing to perform the work for which the foreign-born individual is being hired.[17] The Department of Labor also must confirm that employment of the foreign-born individual will not adversely affect the wages and working conditions of the U.S. workers. Under certain circumstances, the job offer requirement as well as the labor certification can be waived if the foreign-born individual can demonstrate that he or she is working in the national interest of the United States. There are other categories that do not require labor certification, such as persons of extraordinary ability, outstanding professors/researchers and multinational executives or managers.[18] Also, certain investors who invest $1.8 million (this amount is relaxed to $900,000 in either rural or high unemployment areas, known as Targeted Employment Areas (TEA)) and create 10 jobs can also obtain permanent residence.[19] As in the family-based preferences, there are also backlogs in some of the employment-based preferences due to the numerical caps and the per country limits.[20]

The United States accepts only a limited number of refugees from around the world each year.[21] This number is determined every year by the President in consultation with Congress. The total number of annual "refugee slots" are divided among different regions of the world.

No more than 50,000 diversity visas can be issued each year.[22]

Although these are the main categories, there are many other provisions that allow an individual to obtain lawful permanent residence. For example, a person who is in removal proceedings can seek cancellation of removal upon demonstrating, among other things, 10 years of physical presence prior to the notice to appear before an Immigration Judge, good moral character for this period, and that his or her removal would result in exceptional and extremely unusual hardship to the individual's citizen or permanent resident child, spouse or parent.[23] Victims of certain crimes, including trafficking crimes, who have received visas, can ultimately apply for permanent residence in the US.[24]

WHAT IS THE DIFFERENCE BETWEEN A VISA AND STATUS?

A visa is issued by a U.S. consulate overseas that authorizes the foreign national to be admitted to the United States in a nonimmigrant classification for an authorized period.[25] The nonimmigrant is admitted in a status that conforms to the visa classification. Hence, one who receives an H-1B visa at a U.S. consulate is admitted into the United States in H-1B status. The foreign national can remain in H-1B status so long as he or she meets the conditions of the H-1B classification. Even if the underlying visa expires, it is the individual's length of admission in that visa status that is controlling. One can apply for an extension of nonimmigrant status within the United States[26] or can also apply for a change of status.[27]

WHO IS AN ILLEGAL ALIEN?

Non-citizens who are not authorized to be in the United States are referred to as illegal aliens,[28] although the preferred term is to call them undocumented or unauthorized immigrants. Examples include a non-citizen who has fallen out of status by staying beyond the date authorized under the terms of the visa admission. Another example includes one who came across the border without inspection. A person who was previously lawfully in the United States but who has received a final order of removal and has not departed would also fall under this category. On the other hand, an individual who is out of status but is the recipient of deferred action is authorized to remain in the United States and can even seek employment authorization, such as beneficiaries of the Deferred Action for Child Arrival (DACA) program.[29] Even an individual who has an outstanding removal order can seek a stay of removal[30] or supervised release,[31] and is then authorized to remain in the United States.

WHAT IS THE OBLIGATION OF AN EMPLOYER REGARDING EMPLOYING UNDOCUMENTED WORKERS?

An employer must verify every new employee's eligibility to work in the U.S. and attest under penalty of perjury on Form I-9 that the employee submitted to the employer documents that establish both employment authorization and identity.[32] While it is unlawful for an employer to knowingly hire an unauthorized noncitizen,[33] it is also unlawful for an employer to discriminate against someone based both on national origin and on alienage.[34] An employer also cannot ask for more or different documents or refuse to accept documents that are on their face genuine.[35] An employer, however,

can be charged with constructive knowledge for knowingly hiring an unauthorized worker.[36] An employer is subject to civil and criminal penalties for violating the provisions relating to employer verification or knowingly hiring or continuing to hire unauthorized workers.

WHAT ARE THE CONSEQUENCES OF REMAINING IN THE UNITED STATES ILLEGALLY?

Apart from being removable,[37] a person who has been unlawfully present for 180 days more and then departs the United States is barred from being admitted for three years.[38] A person who has been unlawfully present for 1 year or more and departed the United States is barred from being admitted for 10 years.[39] A person who has been unlawfully present for one year, or who has been removed, and who leaves the United States and seeks to enter without being admitted is permanently barred.[40]

These bars have contributed to a buildup of the undocumented population in the United States, which is estimated to be about 12 million. Even if a person is eligible to receive permanent residence, he or she cannot receive it in the United States and will need to leave the U.S. to process for an immigrant visa overseas. Departure from the United States can result in the triggering of the 3 year, 10 year, or permanent bars.

A person may be able to seek a waiver of the 3 or 10-year bar by demonstrating hardship to a limited category of qualifying relatives, which include U.S. citizen or permanent resident spouses or U.S. citizen or permanent resident parents.[41]

WHEN CAN A PERSON ELIGIBLE FOR PERMANENT RESIDENCE APPLY FOR SUCH STATUS IN THE UNITED STATES?

Upon fulfilling conditions for permanent residency, a non-citizen can adjust status to permanent residence in the United States by demonstrating that he or she was inspected and admitted or paroled into the United States.[42] Additionally, the individual must not have been in unlawful status or worked without authorization.[43] There are exceptions, however. An immediate relative, such as the spouse, child or parent of a U.S. citizen, is not required to maintain lawful status, for instance. Still, this person must have been inspected and admitted or paroled. Thus, an individual who entered without inspection would still not be able to adjust status to permanent residence in the United States. This is true even if such an individual is the spouse of a U.S. citizen. If this individual departs the United States to process the

visa a consular post overseas, he or she will be subject to the 3 or 10-year bar, and will need to apply for the waiver.

Certain exceptions should be noted. If a foreign national is adjusting through an employment-based petition under the first, second, third or fourth preference (religious worker), then he or she should not have failed to maintain lawful status or engaged in unauthorized employment for more than 180 days.[44] Also, an individual who is grandfathered under §245(i) can adjust status even though he or she is in violation of status. This means that the individual should have been the direct or indirect beneficiary of a family-based I-130 petition, or an employment-based labor certification or I-140 petition filed on or before April 30, 2001.[45] Finally, battered spouse petitioners can adjust status regardless of whether they were admitted and inspected or paroled or whether they maintained status or not.[46]

WHAT IS THE DIFFERENCE BETWEEN INADMISSIBILITY AND REMOVABILITY?

Inadmissible and deportable noncitizens are two subcategories of removable noncitizens. Inadmissibility grounds[47] apply to a noncitizen who has not been admitted.[48] Deportability or removability grounds[49] apply only after the noncitizen has been admitted. While many of the grounds of inadmissibility and deportability overlap, the inadmissibility grounds are broader than the deportable grounds. For example, the crime related grounds of inadmissibility require only the admission to committing acts constituting the essential elements of a crime involving moral turpitude or a controlled substance offense.[50] The deportable ground requires a conviction of a crime involving moral turpitude committed within five years from the date of admission for which a sentence of one or more years may be imposed.[51] A noncitizen already admitted into the United States who is convicted for a controlled substances offense is deportable, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.[52] Yet, when this same citizen departs the United States and seeks admission, he or she will be rendered inadmissible for the same marijuana conviction.[53] Similarly, a conviction characterized as an aggravated felony[54] is deportable,[55] but it may not render the noncitizen inadmissible unless the offense is also a crime involving moral turpitude.

WHO ARE LAWFUL PERMANENT RESIDENTS?

A lawful permanent resident (LPR) is one who has the status of being lawfully accorded the privilege of permanently residing in the United States

as an immigrant.[56] An LPR may lose such status if there is an absence of intent to live in the United States, supported by other objective circumstances. In analyzing whether one has abandoned LPR status, the court will look to the LPR's intent rather than specific timeframes. An LPR who returns to the United States is considered "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad."[57] The term "temporary visit abroad" has recently been subject to interpretation by the Circuit Courts. The Ninth Circuit's interpretation is generally followed with some variation in other circuits:

> A trip is a 'temporary visit abroad' if (a) it is for a relatively short period, fixed by some early event; or (b) the trip will terminate upon the occurrence of an event that has a reasonable possibility of occurring within a relatively short period of time. If as in (b) the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a 'temporary visit abroad' only if the alien has a continuous, uninterrupted intention to return to the United States during the visit.[58]

The Ninth Circuit has added:

> Some of the factors that could be used to determine whether an alien harbored a continuous, uninterrupted intention to return in addition to the alien's testimony include the alien's family ties, property holdings, and business affiliations within the United States, the duration of the alien's residence in the United States, and the alien's family, property and business ties in the foreign country.[59]

LPRs are generally not regarded as seeking admission upon return from a trip abroad except under certain circumstances, such as if they have abandoned status or have committed certain offenses.[60] They are accorded full constitutional rights to due process relating to their admission.[61] Once the LPR has made a colorable claim to status, the burden is on the government to prove abandonment by clear, convincing and unequivocal evidence.[62] LPRs are, however, subject to the grounds of inadmissibility[63] and deportability.[64]

WHEN MAY A LAWFUL PERMANENT RESIDENT NATURALIZE?

An LPR is eligible for naturalization after residing continuously for a period of five years since obtaining lawful permanent residence.[65] The applicant must demonstrate that he or she has been physically present in the United States for at least half of the time and has resided in the state in which the application was filed for at least three months.[66] The applicant must also reside continuously after filing the application up until the time of admission to citizenship.[67] The applicant must also demonstrate good moral character during this five-year period.[68] Any absence of more than

six months but less than one year will break the continuity of residence unless the applicant can demonstrate that he or she did not abandon his residence in the United States.[69] An absence of more than one year breaks the continuity of such residence, unless the applicant can satisfy certain exceptions.[70] An LPR who is the spouse of U.S. citizen can apply for citizenship after residing continuously for three years instead of five years, and then needs to demonstrate that he or she was physically present in the United States for half of three years.[71] Some applicants, such as spouses of U.S. citizens working overseas on behalf of a U.S. corporation or subsidiary are exempted from the residency requirements altogether.[72] After demonstrating knowledge of the English language, U.S. history and government,[73] the applicant must take the oath of allegiance to the United States as a final step to naturalization.[74]

APPENDIX A

NONIMMIGRANT VISA CATEGORIES

A	Diplomats
B	Visitors (business/pleasure)
C	Transit
D	Crew members
E	Treaty traders/investors
F	Academic students
G	Representatives or employees at International Organizations
H-1B	Temporary professional workers
H-2A/H-2B	Agricultural or non-agricultural temporary workers
H-3	Trainees
I	Journalists/media
J	Exchange visitors
K-1/K-3	Fiancés/fiancées of US citizens or spouses of US Citizens waiting for the green card
L-1A	Intra-company transferees who are executives or managers
L-1B	Intra-company transferees who are specialized knowledge workers
N	Parents or children of special immigrants
O	Persons of extraordinary ability
P	Athletes, artists or entertainers
Q	International Cultural exchange visitors
R	Religious workers
S	Federal witnesses
T	Trafficking victims
TN	NAFTA professionals (Mexico and Canada)
U	Certain crime victims
V	Certain spouses/children of green card holders waiting for green cards

APPENDIX B

FAMILY-BASED IMMIGRATION

Family-based immigrants are admitted to the U.S. either as *immediate relatives* of U.S. citizens or through the *family preference* system.

Immediate relatives are:

- spouses of U.S. citizens;
- unmarried minor children of U.S. citizens; and
- parents of U.S. citizens.

There is no cap on the number of visas available every year for immediate relatives.

The ***family preference system*** allows into the U.S.:

- adult children (unmarried and married) and brothers and sisters of U.S. citizens; and
- spouses and unmarried children (minor and adult) of LPRs.

There are a limited number of visas available every year under the family preference system. Under current immigration law, visas are allocated as follows:

THE FAMILY PREFERENCE SYSTEM

U.S. SPONSOR	RELATIONSHIP	PREFERENCE #	VISA ALLOCATED
U.S. Citizen	unmarried adult children (21 years or older)	1st Preference	23,400 visas/ year, plus any visas left from the 4th preference
LPR	spouses and minor children	2nd Preference	87,900 visas/year
LPR	unmarried adult children (21 years or older)	2nd Preference	26,300 visas/year
U.S. Citizen	married adult children	3rd Preference	23,400 visas/year,plus any left over from the 1st and 2nd preferences
U.S. Citizen	brothers and sisters	4th Preference	65,000 visas/year, plus any left over from the previous preferences

APPENDIX C
EMPLOYMENT-BASED IMMIGRATION

THE EMPLOYMENT PREFERENCE SYSTEM allows immigrants who have skills and talents in the United States to be admitted to work. Currently, immigration law allots **140,000** employment-based visas to immigrants. These employment-based visas are divided into the following categories:

FIRST PREFERENCE:

Up to **40,000** visas a year may be issued to *priority workers*. People who have "extraordinary ability" or who are "outstanding professors and researchers" or "certain multinational executives and managers" fall into this category. In addition, any visas left over from the fourth and fifth preferences (see below) are added to this category.

SECOND PREFERENCE:

Up to **40,000** visas (plus any visas left over from the first preference) may be issued to persons who are "members of the professions holding advanced degrees or aliens of exceptional ability." This category usually requires "labor certification" unless the individual can establish that he or she is going to work in the national interest of the United States.

THIRD PREFERENCE:

Up to **40,000** visas a year (plus any visas left over from the first and second preferences) may be issued to *skilled workers, professionals, and other workers*. The *other workers* category covers workers who are "capable of performing unskilled labor," and who are not temporary or seasonal. Workers in this category are limited to **5,000** visas per year. *Skilled workers* must be capable of performing skilled labor requiring at least two years training or experience. These categories always require a "labor certification."

FOURTH PREFERENCE:

Up to **10,000** visas a year may be issued to certain special immigrants, including ministers, religious workers and others.

FIFTH PREFERENCE:

Up to **10,000** visas a year may be issued to persons who have between $500,000 and $3 million to invest in a job-creating enterprise in the U.S. At least 10 U.S. workers must be employed by each investor. The amount of money can vary depending on which area of the country will benefit from

the investment. If the investor alien fails to meet the conditions specified, he or she can lose permanent resident status.

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2. Immigration and Nationality Act ("INA") § 101(a)(3); 8 U.S.C. § 1101(a)(3). Although "alien" is used throughout the INA, many view the "alien" as a pejorative term, and thus prefer to use the terms foreign national or non-citizen.
3. INA § 101(a)(15); 8 U.S.C. § 1101(a)(15).
4. *See* INA § 101(a)(15)(A) - (V). The alphabet within § 101(a)(15) represents the visa. For example, the A visa under § 101(a)(15)(A) is issued to diplomats and other officers and employees of foreign consulates in the United States.
5. INA § 204(a); 8 U.S.C. § 1154(a).
6. INA § 213A; 8 U.S.C. § 1183a.
7. INA §213a(f)(2); 8 U.S.C. §1183a(f)(2).
8. See 84 FR 41292 (August 14, 2019). The prohibited benefits include Supplemental Security Income; Temporary Assistance for Needy Families; any federal, state, local, or tribal cash benefit programs for income maintenance (often called general assistance in the state context, but which may exist under other names); Supplemental Nutrition Assistance Program (formerly called food stamps); Section 8 Housing Assistance under the Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation); Public Housing (under the Housing Act of 1937, 42 U.S.C. 1437 et seq.); and Federally funded Medicaid (with certain exclusions). The rule includes a number of subjective factors to for the government to determine self sufficiency such as family size, family history, proficiency in the English language, access to health insurance, educational attainments, among other things.
9. INA § 203(b); 8 U.S.C. § 1153(b).
10. INA § 101(a)(42); 8 U.S.C. §1101(42).
11. Matter of Acosta, 19 I.& N. Dec. 211 (BIA 1985) (to establish eligibility for refugee status, one must have a fear of persecution; the fear must be "well-founded"; the persecution feared must be on account of race, religion, nationality, membership in a particular social group, or political opinion; and the alien must be unable or unwilling to return to his country of nationality because of persecution or his well-founded fear of persecution); *see also* Mirisawo v. Holder, 599 F.3d 391 (4th Cir. 2010) (to establish eligibility for asylum, one must show past persecution or a well-founded fear of future persecution); Matter of S-E-G-, 24 I & N Dec. 579 (BIA 2008) (membership in a particular social group requires that the group have particular and well-defined boundaries and are social visible).
12. INA § 208; 8 U.S.C. § 1158.
13. INA § 203(c); 8 U.S.C. §1153(c).
14. INA § 201(c); 8 U.S.C. § 1151(c).
15. INA § 202; 8 U.S.C. §1152.
16. INA §201(d); 8 U.S.C. 1151(d).
17. INA § 212(a)(5); 8 U.S.C. 1182(a)(5); INA 203(b)(2); 8 US.C.1153(b)(2); INA 203(b)(3); 8 U.S.C. 1153(b)(3).
18. INA §203(b)(1); 8 U.S.C. § 1153(b)(1).
19. INA §203(b)(5); 8 U.S.C. §1153(b)(5).
20. *See* INA § 202; 8 U.S.C. § 1152.
21. INA § 207; 8 U.S.C. § 1157.
22. INA § 201(e); 8 U.S.C. § 1151(e).

23. INA § 240A(b); 8 U.S.C. 1229b.
24. *See, e.g.,* INA § 101(a)(15)(T); 8 U.S.C. § 101(a)(15)(T); *see also* INA § 245(l); 8 U.S.C. § 1255(l).
25. *See generally* INA § 221; 8 U.S.C. § 1201.
26. INA § 221(c)(2); 8 U.S.C. § 1201(c)(2); *see also* 8 C.F.R. § 214.1(c).
27. INA § 248; 8 U.S.C. § 1258*; see also* 8 C.F.R. § 248.
28. 8 U.S.C. § 1621(a), (d).
29. *See generally*, "Consideration of Deferred Action for Childhood Arrivals (DACA)," USCIS.gov, available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca.
30. INA § 241(c)(2); 8 U.S.C. § 1231(c)(2).
31. INA § 241(a)(3); 8 U.S.C. § 1231(a)(3).
32. INA § 274A(b); 8 U.S.C. § 1324a(b); *see also* 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).
33. INA § 274A(a)(1)(A); 8 U.S.C. § 1324a(a)(1)(A).
34. INA § 274B(a); 8 U.S.C. § 1324b.
35. INA § 274B(a)(6); 8 U.S.C. § 1324b(6).
36. 8 C.F.R. § 274a.1(l)(1). *See also, e.g.*, Mester Mfg. Co. v. INS, 879 F.2d 561 (9thCir. 1989) (employer was found to have constructive knowledge when it failed to take action after being notified by former INS that certain employees were unauthorized); Cf. Collins Foods International, Inc. v. INS, 948 F.2d 549 (9th Cir. 1991) (when social security card reasonably appeared to be genuine on its face even when it was actually a fake card, employer did not possess constructive knowledge that employee was unauthorized).
37. INA § 237(a)(1)(B)&(C); 8 U.S.C. § 1227(a)(1)(B)&(C).
38. INA § 212(a)(9)(B)(i)(I); 8 U.S.C. § 1182(a)(9)(B)(i)(I); *see also* Donald Neufeld, Associate Director, Service Center Operations, et al., Memorandum , *Consolidation of Guidance Concerning Unlawful Presence*, (May 6, 2009).
39. INA § 212(a)(9)(B)(i)(II); 8 U.S.C. § 1182(a)(9)(B)(i)(II).
40. INA § 212(a)(9)(C); 8 U.S.C. § 1182(a)(9)(C). A person implicated under this provision will have to wait outside the United States for 10 years before seeking permission to reenter the United States.
41. *See* INA § 212(a)(9)(B)(v); 8 U.S.C. § 1182(a)(9)(B)(v). Under 8 CFR § 212.7, it may be possible to apply for a waiver of the 3 and 10 year bars in advance prior to departure.
42. INA § 245(a); 8 U.S.C. § 1255(a).
43. *See generally* INA § 245(c); 8 U.S.C. § 1255(c).
44. INA § 245(k)(2); 8 U.S.C. § 1255(k)(2).
45. INA § 245(i); 8 U.S.C. § 1255(i). Note that if the petition or labor certification was filed after January 14, 1998, the foreign national should have been present in the United States on December 21, 2000 to qualify under §245(i).
46. *See* INA § 245(a) & (c); 8 U.S.C. § 1255 (a) & (c).
47. *See generally* INA § 212 for inadmissibility grounds; 8 U.S.C. § 1182.
48. INA § 101(a)(13)(A) defines an admission as a lawful entry "after inspection and authorization by an immigration officer."
49. *See generally* INA § 237 for deportability grounds; 8 U.S.C. § 1227.
50. INA § 212(a)(2)(A)(i); 8 U.S.C. § 1182(a)(2)(A)(i).
51. INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i).
52. INA § 237(a)(2)(B)(i); 8 U.S.C. § 1127 (a)(2)(B)(i).
53. INA § 212(a)(2)(i)(II); 8 U.S.C. § 1182(a)(2)(i)(II).
54. INA § 101(a)(43); 8 U.S.C. § 1101(a)(43).

55. INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1127(a)(2)(A)(iii).
56. INA § 101(a)(20); 8 U.S.C. § 1101(a)(20).
57. INA § 101(A)(27)(A); 8 U.S.C. § 1101(A)(27)(A).
58. Singh v. Reno, 113 F.3d 1512, 1514 (9th Cir. 1997); *see also* Chavez- Ramirez v. INS, 792 F.2d 932 (9th Cir. 1985); Ahmed v. Ashcroft, 286 F.3d 611, 613 (2d Cir. 2002); Hanna v. Gonzales, 335 F.3d 1003 (6th Cir. 2005); Matter of Huang, 19 I&N Dec. 749 (BIA 1988).
59. *Chavez-Ramirez,* 792 F.2d at 937.
60. INA § 101(a)(13)(C); 8 U.S.C. § 1101(a)(13)(C).
61. *See* Landon v. Plasencia, 459 U.S. 21 (1982).
62. *See* Woodby v. INS, 385 U.S. 276 (1966); Ward v. Holder, 733 F.3d 601 (6th Cir. 2013).
63. See, e.g., In re Collado-Munoz, 21 I&N Dec. 1061 (BIA 1998) (finding that an LPR who has committed an offense identified in INA § 212(a)(2), and then who departs the U.S. and returns, shall be regarded as seeking an admission into the US despite his LPR status); *but see also* Vartelas v. Holder, 566 U.S. 257 (2012) (finding that an LPR with a pre-IIRIRA conviction was not seeking admission into the U.S. upon return from a brief departure).
64. See generally INA § 237 for deportability grounds.
65. INA § 316(a)(1); 8 U.S.C. § 1427(a)(1).
66. *Id*.
67. INA § 316(a)(2); 8 U.S.C. § 1427(a)(2).
68. INA § 316(a)(3); 8 U.S.C. § 1427(a)(3).
69. INA § 316(b); 8 § U.S.C. 1427(b); *see also* 8 C.F.R. § 316(a)(2).
70. *Id*.
71. INA § 319(a); 8 U.S.C. § 1430(a).
72. INA § 319(b); 8 U.S.C. § 1430(b).
73. INA § 312(a); 8 U.S.C. § 1423(a). Applicants can qualify for exceptions to these requirements as set forth in INA § 312(b); 8 U.S.C. § 1423(b).
74. INA § 337, 8 U.S.C. § 1448.

NOTES

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Overview of Employment-Based Immigration in the United States (Updated November 12, 2020)

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I. INTRODUCTION

Foreign nationals who are skilled or educated and who have job offers have the possibility of immigrating to the United States. Employment-based (EB) immigration is limited by the Immigration and Nationality Act (INA) to 140,000 persons per year.

INA § 203(b) sets forth five EB preferences. They use up the 140,000 visas annually in the following proportions:

> EB-1 provides 40,000 numbers for persons of extraordinary ability, outstanding researchers and professors, and multinational managers and executives;
>
> EB-2 provides 40,000 numbers for persons with advanced degrees or with exceptional ability plus any unused EB-1 numbers;
>
> EB-3 provides 40,000 numbers for professionals having baccalaureate degrees, skilled and unskilled workers plus any unused EB-1 and EB-2 numbers;
>
> EB-4 provides 10,000 numbers to special immigrants, which includes religious workers; and

EB-5 provides 10,000 numbers for investors who create 10 jobs and invest up to $1 million (although the amount may be higher or lower depending on whether it is a rural area or a low or high unemployment area (TEA)).

In addition, no country can use more than 7% of the worldwide numbers in any of the above categories. Therefore, nationals of a particular country are limited to no more than 9,800 EB numbers per year. Due to greater demand for EB visas from countries with large populations like China and India, the EB-2 and EB-3 backlogs often tend to be far greater for persons born in these countries.

This overview focuses on the first three preferences – EB-1, EB-2, and EB-3. The process is generally three-fold: a) The employer must first obtain a "labor certification" from the U.S. Department of Labor (DOL) (although, as discussed below, labor certification is not required in some cases);[1] b) the employer applies for immigrant visa classification by filing Form I-140 under the EB-1, EB-2 or EB-3[2] and c) the foreign national applies for lawful permanent residency or the "green card" through adjustment of status[3] in the United States or consular processing overseas.

1. INA §212(a)(5)(A).
2. INA §203(b)(1), 203(b)(2) & §203(b)(3).
3. INA §245(a).

II. LABOR CERTIFICATION

In most cases under the EB-2 and in all cases under the EB-3, the employer must obtain "labor certification" from the DOL confirming that there are an insufficient number of U.S. workers able, qualified and willing to perform the work for which the foreign-born individual is being hired.[4] To establish this, the employer must advertise and perform other recruitment efforts to try to find someone who is already a U.S. citizen or permanent resident qualified to take up the position. The employer should have also offered the position at the normal or prevailing wage.

The key to the labor certification process is for the employer to decide true minimum requirements for the position. The requirements must be normal to the occupation and not more than the worker possessed when hired for the position. Nor can the requirements be tailored to the foreign worker's specific skills and qualifications. A test of the labor market is done through newspaper advertisements and other forms of recruitment, along with an internal posting and a job order on a DOL job site. Any responses to the recruitment must be evaluated carefully and in good faith. The employer can reject applicants only for lawful, job-related reasons.

A labor certification is only a first step in the permanent resident process to obtain the "green card." Filing the labor certification in itself does not give authorization for a foreign national to remain or work in the United States unless he or she is in another nonimmigrant visa status that authorizes work, such as an H-1B visa.

a. Describe the Labor Certification Programs?

On March 28, 2005, the DOL streamlined the labor certification process under a system called Program Electronic Review Management (PERM).[5] An employer is required to place two Sunday advertisements for the position. For professional positions, the employer has to conduct three further recruitment steps. The employer also needs to place a 30-day job order on a website authorized by the State Workforce Agency (SWA), as well as obtain a prevailing wage determination from the National Prevailing Wage Center. Furthermore, the employer has to internally post a job notice for 10 days. After the employer has completed the mandated recruitment steps, it may electronically file a PERM application attesting that it has undertaken the necessary recruitment under PERM as well as attesting to various other requirements within

4. 20 CFR §656, 69 Fed. Reg. 77325-77421 (Dec. 27, 2004).
5. Id.

180 days from the earliest recruitment step. If the application is not audited, it generally gets approved in about 2 months from its submission. The DOL, however, may select an application for an audit or for supervised recruitment and it would exercise this scrutiny for both problematic and random applications. Many applications have been selected for an audit resulting in delays of several months. In some cases, the DOL will conduct a supervised recruitment. Furthermore, previously qualified laid off workers by the employer must be considered if the application is being filed within 6 months of the lay off of a qualified worker in the same or related occupation.

b. Are There Any Ways To Expedite The Labor Certification Process?

Physical therapists and professional nurses have been exempted from most of the labor certification requirements, although the employer still has to obtain a prevailing wage and post the 10 day internal notice.[6] Labor certifications for college and university teachers and performing artists can also be expedited through a process known as a "Special Handling."[7] Also, certain persons of exceptional ability are exempted from labor certification. [8]

c. Can Labor Certification Be Avoided Altogether?

Labor Certification is only required for individuals applying under the EB-2 and EB-3.

Individuals who qualify under the EB-1 do not require a labor certification. The three categories under the first preference are: (I) Persons of Extraordinary Ability, (ii) Outstanding Professors and Researchers; and (iii) Multinational Executives or Managers. Applications requesting a waiver of the job offer requirement in the national interest under the employment-based second preference also do not require labor certification.

(i) Persons of Extraordinary Ability

An individual can establish extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated

6. 20 CFR §656.15(c)(1) & §656.15(c)(2).
7. 20 CFR §656.18(b); INA §212(a)(5)(A)(ii).
8. 20 CFR §656.15(d).

by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. [9] Furthermore, the individual seeks entry to continue work in the area of extraordinary ability and his or her entry will substantially benefit prospectively the U.S. No job offer is required. The legislative history indicates that this category is intended to be "for the small percentage of individuals who have risen to the very top of their field of endeavor."

Evidence to demonstrate "sustained national or international acclaim" could be a one-time achievement such as a major international award (for example, a Nobel Prize, Oscar or Grammy). If the applicant is not the recipient of such an award then documentation of any three of the following is sufficient:

1. Receipt of lesser nationally or internationally recognized prizes or awards.
2. Membership in an association in the field for which classification is sought, which requires outstanding achievement of its members, as judged by recognized national or international experts.
3. Published material about the person in professional or major trade publications or other major media.
4. Participation as a judge of the work of others.
5. Evidence of original scientific, scholastic, artistic, athletic or business-related contributions of major significance.
6. Authorship of scholarly articles in the field.
7. Artistic exhibitions or showcases.
8. Performance in a leading or critical role for organizations or establishments that have a distinguished reputation.
9. High salary or remuneration in relation to others in the field.
10. Commercial success in the performing arts. [10]

An applicant may also submit comparable evidence if the above standards do not readily apply. Comparable evidence may include expert opinion letters attesting to the applicant's abilities.

9. INA §203(b)(1).
10. 8 CFR §204.5(h)(3).

A recent decision has clarified that the USCIS cannot require additional requirements beyond those set forth in the ten criteria. Thus, in *Kazarian v. USCIS*, 596 F.3d 1115, the 9th Circuit held, "Nothing in that provision requires a petitioner to demonstrate the research community's reaction to his published articles before those articles can be considered as evidence, and neither USCIS nor the AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 CFR § 204.5." *Id.* at 1121. *See also Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994)(criticizing the government's circular argument requiring that "plaintiff must prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability"); *Gülen v. Chertoff*, Civil Action No. 07-2148, 2008 WL 2779001 (E.D. Pa. July 16, 2008), at *4 ("Because Gülen has met the requirements of three of the subcategories of 8 C.F.R. § 204.5(h)(3), the AAO's determination that he has not demonstrated extraordinary ability is contrary to applicable law and must be reversed"). However, despite meeting the regulatory criteria, the USCIS still insists on a "final merits determination" where it can judge the quality of the evidence even though the petitioner has met 3 out of 10 of the regulatory criteria.[11]

(ii) Outstanding Professors and Researchers

An individual must establish that he or she is an outstanding professor/researcher by demonstrating that he or she is recognized internationally as outstanding in a specific area and has three years of prior experience in teaching or research in the academic field.[12]

This individual must be sponsored by an institution for a tenure (or tenure track) teaching position or a comparable position at a university or institute of higher education to conduct research. The individual may also be sponsored by a private employer to conduct research if it employs at least three persons full-time in research activities and the department, division or institution has achieved documented accomplishments in an academic field. An offer of

11. USCIS, Office of the Director, Policy Memorandum, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14, No. PM-602-0005.1 (Dec. 22, 2010).
12. INA §203(b)(1)(B).

employment is required from the sponsoring employer in the form of a letter. [13]

Evidence that the professor/researcher is recognized internationally as outstanding in the academic field must include at least two of the following:

1. Receipt of major prizes or awards for outstanding achievements.
2. Membership in an association which requires outstanding achievement.
3. Published material in professional publications written by others about the applicant's work.
4. Evidence of the person's participation as a judge of the work of others.
5. Evidence of original scientific research.
6. Authorship of scholarly books or articles in the field.[14]

USICS will also apply the "final merits determination" of the evidence submitted in satisfaction of 2 out of the 6 regulatory criteria.

(iii) Multinationals Executives and Managers

An individual may be able to classify as an executive or manager if he or she is to be employed in an executive or managerial capacity by a U.S. parent, subsidiary, branch or affiliate of a foreign corporation.[15] The individual must further establish that he or she worked in a managerial or executive capacity for at least one year in the past three years immediately prior to his or her entry into the U.S. in the parent, subsidiary, branch or affiliate of the U.S. entity.

(iv) National Interest Waivers

The labor certification procedure may also be avoided altogether even under the EB-2 if the foreign national can establish that the "job offer" requirement should be waived in the national interest.[16] The individual must demonstrate that he or she would be doing something so significant as to benefit the U.S. national interest.

13. 8 CFR §204.5(i)(3)(iii).
14. 8 CFR §204.5(h)(3).
15. INA §203(b)(1)(C).
16. INA §203(b)(2)(B).

In a recent precedent decision, *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016), it was held that after eligibility for EB-2 classification has been established, USCIS may grant a NIW if the petitioner demonstrates, by a preponderance of the evidence, that:

- The foreign national's proposed endeavor has both substantial merit and national importance.
- The foreign national is well positioned to advance the proposed endeavor.
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

III. IMMIGRANT VISA PETITION

The EB immigrant visa petition (Form I-140) is filed with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security along with the approved labor certification. The I-140 petition must be filed within 180 days of the approval of the labor certification; otherwise the labor certification will no longer be valid.[17] If the labor certification is not required, the I-140 petition becomes the initial filing. The priority date determines the availability of an immigrant visa.[18] For EB petitions, the priority date is either the date the labor certification is filed or the EB petition, where no labor certification is required. The I-140 petition is filed to classify a foreign national under EB-1, EB-2 and EB-3.

Some EB categories are backlogged. This means that the cut-off date for that EB category is not current, and one has to wait for the official cut-off date to coincide with the individual's priority date before being able to file either the final adjustment of status application, if in the US, or the immigrant visa application, if overseas (see below). Since October 2015, the State Department has created a dual date system in the visa bulletin – the filing date and the final action date. If the filing date is current, an applicant may file an adjustment of status application or an immigrant visa petition, if overseas. While the filing date only allows the applicant to file, it is the final action date that determines whether the applicant will be granted permanent residence. Note that under the new visa bulletin system, the USCIS will determine whether the filing date is applicable each month for purposes of filing adjustment of status applications. In the event that the USCIS determines that the filing date is not applicable, applicants

17. 20 CFR §656.30(b).
18. 22 CFR §42.53(a).

will need to rely on the final action date in order to file an adjustment of status application within the US.

If there is a backlog, it usually takes many more years to immigrate under the particular preference category. Note that India and China are more backlogged than other countries in the first, second and third EB preferences. China has been backlogged in the EB-5 preference, and recently Vietnam too has gotten backlogged. The general rule is that a person is charged to his/her country of birth, and not the country of citizenship, although there are exceptions under which an individual can cross-charge to another country.[19] The main exception is the ability for one to cross-charge to the spouse's country of birth.[20]

The Department of Homeland Security issued final regulations on November 17, 2016 entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers" ("High Skilled Worker Rule")[21] to provide relief to high skilled workers born mainly in India and China who are caught in the backlogs in the EB preferences. I-140 petitions that have been approved for at least 180 days would not be subject to automatic revocation due to a business closure or withdrawal by the employer.[22] DHS has invoked its discretion under INA §205 to retain an approved I-140 even if an employer withdraws it or the business closes. This assurance would allow workers who have pending I-485 applications for 180 days or more to safely exercise job portability under INA §204(j), *infra*, although this dispensation is not possible if USCIS revokes the I-140 based on a prior error or fraud.[23] Even those without pending I-485 applications could take advantage of this provision to obtain H-1B extensions beyond six years under the American Competitiveness in the 21st Century Act (AC 21) so long as the I-140 petition has been approved for 180 days or more before it is revoked due to withdrawal by the employer or through business closure. They would also be able to keep their priority dates if a new employer files another I-140 petition. The retention of the priority date for a future I-140 petition is available even if the I-140 petition was not approved for 180 days or more before it was revoked through an employer withdrawal or business closure. The ability to retain the original priority date is important

19. INA §202(b); 22 CFR §42.12.
20. 22 CFR §42.12(c).
21. Available at https://www.federalregister.gov/documents/2016/11/18/2016-27540/retention-of-eb-1-eb-2-and-eb-3-immigrant-workers-and-program-improvements-affecting-high-skilled.
22. 8 CFR §205.1(iii)(C).
23. 8 CFR §204.5(e)(2).

for those in the EB queues, as they do not lose their place even if they move jobs and again get sponsored for green cards through new employers.

IV. APPLYING FOR ADJUSTMENT OF STATUS OR CONSULAR PROCESSING

a. Adjustment of Status

If the foreign worker is within the United States, he or she may apply for adjustment of status by filing an application with the USCIS in the U.S. Under a 2002 rule, the adjustment of status application may be filed concurrently with the Form I-140, discussed in the previous section.[24]

As noted, the individual's filing date under the new visa bulletin should be current at the time of filing this application. Thus, if the foreign worker is in an EB preference that is backlogged, he or she can only file the I-485 application upon the filing date becoming current and only if the USCIS has authorized it.[25] If the USCIS has not authorized it, then applicants can only file the I-485 application when the final action date has become current. The I-485 application can remain pending for several months before the USCIS issues lawful permanent residence to the foreign national. An adjustment applicant may apply for a temporary work permit during the pendency of the application.[26] If the foreign national needs to travel abroad during this time, he or she must seek special travel permission known as "advance parole."[27] However, "advance parole" is not required for people on H-1B or L status with the corresponding visas stamped on their passports. Upon approval of the application for adjustment of status and if the final action date in the visa bulletin coincides with the priority date of the individual applicant, the individual is granted the "green card."[28] But if one who is maintaining H-1B or L status and reenters on an advance parole, this person can still apply for an extension of that H or L status, and may continue his/her H-1B or L employment after entering on

24. 8 CFR §245.2(a)(2)(i).
25. If the filing date in the visa bulletin advances, as was the case for the India EB-3 in the October 2020 and November 2020 Visa Bulletins, a backlogged beneficiary of an approved I-140 petition under EB-2 can file a "downgrade" I-140 petition under EB-3 and a concurrent I-485 application.
26. 8 CFR §274a.12(c)(9).
27. 8 CFR §245.2(a)(4)(ii).
28. 8 CFR §245.2(a)(4)(ii)(C).

advance parole. [29] If an applicant travels before the advance parole application is adjudicated, the advance parole application will get denied.

b. Who Are Eligible For Adjustment Of Status?

Adjustment of status is only available to individuals who have always maintained lawful status in the United States.[30] However, those whose labor certifications or immigrant visa petitions were filed prior to April 30, 2001, could adjust their status even if they have violated U.S. immigration laws by not complying with the terms of their non-immigrant visas, and pay a penalty fee of $1000.[31] Also, certain EB visa applicants could adjust status if they had not been out of status for more than an aggregate of 180 days since their last admission, even if the labor certification was filed after April 30, 2001.[32]

Effective October 1, 2017, the USCIS has introduced in-person interviews for EB adjustment applicants, although since the Covid-19 pandemic we have been noticing a waiving of these interviews. [33]

c. Portability

An adjustment of status applicant based on an EB first, second or third preference petition that is pending for more than 180 days "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in a same or similar occupational classification as the job for which the petition was filed."[34] The High Skilled Worker Rule requires the applicant to complete Form I-485 Supplement J, with supporting material and credible documentary evidence to demonstrate that either the employment offer by the petitioning employer is continuing or "the applicant has a new offer of employment from the petitioning employer or a different employer, or a new offer based on self-employment in the same or similar occupational classification as the employment offered under the qualifying petition." [35]

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29. Memo, Cronin, Acting Assoc. Comm., Office or Programs HQADJ 70/2.8.6, 2.8.12, 10.18 (May 16, 2000).
30. INA §245(a) & (c).
31. INA §245(i).
32. INA §245(k).
33. **USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants** https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.
34. INA §204(j).
35. 8 CFR §245.25(a).

d. Consular Processing

Foreign nationals based overseas can process their immigrant visas at consular posts in their home countries. Individuals who violated their status in any way and are not eligible for adjustment of status under any of the enumerated exemptions must also return to their home country for consular processing. Many opt for consular processing as adjustment of status is more time consuming. On the other hand, adjustment allows for benefits such as portability and employment authorization, even for the accompanying family members. Individuals who have been unlawfully present by more than 180 days would be barred from reentering the United States for three years.[36] Individuals who overstayed their nonimmigrant visas for more than one year would be barred from reentering the United States for ten years.[37] There are very limited exemptions for overcoming these bars, and those who are able may apply for a waiver by demonstrating extreme hardship to a spouse or parent, who is a US citizen or permanent resident.[38]

e. H-1B Extensions Beyond 6 Years

Individuals who cannot process their green cards timely should ensure that they can remain in H-1B status even beyond the maximum allotted time of six years. §106(a) of the American Competitiveness in the 21st Century Act (AC21) allows one to apply for a 7th-year H-1B extension if a labor certification or an I-140 petition was filed 365 days prior to the end of the 6th-year.

§104(c) of AC21 also provides a one-time protection for an H-1B visa holder by allowing him or her to extend the 6th-year period for three years at a time if he or she is the beneficiary of a first, second or third preference employment-based approved petition, but due to backlogs in the employment preferences, is unable to file for adjustment of status. Such H-1B extensions will be granted in three-year increments.

Under the High Skilled Worker Rule, extensions under §106(a) of AC 21 cannot be sought if the beneficiary fails to file for adjustment of status or apply for an immigrant visa within 1 year upon the visa becoming available, i.e, when the priority date becomes current with respect to the final action date in the visa bulletin. In the event that

36. INA §212(a)(9)(B)(i)(I).
37. INA §212(a)(9)(B)(i)(II).
38. INA §212(a)(9)(B)(v). It is possible to file an advance provisional waiver prior to departure from the United States.

the 1-year period is interrupted by the unavailability of visas, a new 1 year period shall start to run when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file if the alien establishes that the failure to apply was due to circumstances beyond his or her control.[39]

39. 8 CFR §214.2(13)(iii)(D)(10);.

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Frequently Asked Questions on Ethics During the Pandemic (September 18, 2020)

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Reprinted from the PLI Course Handbook, 53rd Annual Immigration and Naturalization Institute (Item #278277)

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Frequently Asked Questions on Ethics During the Pandemic

AILA Doc. No. 20091802 | Dated September 18, 2020

Lawyers are bound to ethical rules even during disasters. This new FAQ from AILA's National Ethics Committee and Cyrus Mehta addresses ethics issues such as confidentiality in detention centers and court; remote work; managing original signatures/e-signatures; and missed deadlines due to COVID-19-related reasons.

1. Are lawyers bound by ethical rules even during disasters?

Yes. Ethical rules are in full effect and have not been relaxed or suspended for lawyers. Lawyers have been through other disasters, such as 9/11, Hurricane Katrina, and Hurricane Sandy, and lawyers have been essential during each crisis in helping clients with their changing legal needs. As part of competent representation under ABA Model Rule 1.1, lawyers must stay abreast of all changes in immigration policy relating to COVID-19 that may impact their clients.[1] Lawyers must still provide diligent representation under MR 1.3, notwithstanding the hardships and challenges they might face. Under MR 1.4, the lawyer must also communicate with the client, even if both lawyer and client are remote, and must keep the client reasonably informed about the status of the matter. Lawyers are also required to have disaster preparedness plans and may be limited in what they can do if displaced in a state in which they are not admitted to practice law. See **ABA Formal Ethics Opinion 482** and **Keeping Up with Competence**. **Also see the Michigan Bar Ethics Guidance during COVID-19**, an overview of ethical considerations during the pandemic.

2. What are common confidentiality concerns in court and in detention facilities due to COVID-19?

During the pandemic, it is more difficult to be in physical proximity with the client by either visiting the detention center or being physically present in court at a hearing. Communicating with the client by phone may not be the ideal alternative as there may be confidentiality concerns.[2] Depending on the facility, it is not always readily feasible to set up a proper private lawyer-client phone call, especially on short notice. At times, there are either other inmates or guards who can hear the client when they are calling from the regular phones, or there is a warning that the call is being recorded. In such a case, the lawyer should make sure to mention that he or she is the client's attorney and give an attorney ID number and phone number, or both. During the pandemic, unfortunately, the lawyer may not be able to simply avoid some of these issues by visiting the client in person. Similarly, at an in-person court hearing, the attorney could try to talk to the client at key moments without the court or government attorneys listening in, though the guard will probably be present. The lawyer should signify to the client to speak quietly and acknowledge to the client that even if the

guard is far away from the table, he or she may still hear. We have also had reports from immigration lawyers in some jurisdictions that guards are acting as a go-between in some settings, taking documents that need to be signed to the client, or back to the lawyer. At a video hearing, a one-on-one private conversation with the client is even more difficult.

It behooves the attorney to discuss the possible breach of confidentiality under these circumstances. While MR 1.6(a) precludes the attorney from knowingly revealing information relating to the representation of the client, in the case of representing a client in court and detention facilities, the attorney is aware that his or her communications are being revealed to others, although the attorney is not revealing this information himself or herself. Hence, it would still be prudent to obtain the client's informed consent that private communications would inevitably be breached in a detention setting, after discussing the material risks of and reasonably available alternatives to such a breach with the client. The attorney would need to evaluate with the client whether the benefits of providing representation to the client in a detained setting outweigh the negative consequences, if any, of such a breach. The Rules of Professional Conduct do give leeway to a lawyer to proceed in representing a client in non-optimal situations, but it is always a best practice to note the lack of confidentiality in client-lawyer communications in the proceeding, wherever it is an issue, to preserve the issue for the record.

For more information, see **Practical and Ethical Considerations in Detention Cases**, which has a COVID-19 update in it.

3. How are immigration lawyers working remotely during COVID-19?

Immigration lawyers have learned how to work from home since the pandemic began. Many forms, supporting letters, and briefs can be prepared remotely. Some work performed by administrative staff may still have to be performed at the office, such as collecting mail and printing and dispatching voluminous paper submissions to USCIS. Client communications can mostly take place over video or the telephone. Staff meetings and supervision may also take place remotely. **EOIR is permitting digital signatures and electronic signatures** during the pandemic. **USCIS is allowing for scanned signatures**, so long as the wet signature exists and can be produced when required. For more information, see **Ethical Obligations For Lawyers Working Remotely** from The Pennsylvania Bar Association Committee on Legal Ethics And Professional Responsibility and the AILA **Practice Management Resources on the COVID-19 Pandemic**.

4. What is the USCIS Wet Signature Policy and how do I adhere to the requirements?

USCIS has announced that for forms requiring an original "wet" signature, per form instructions, USCIS will accept electronically reproduced original signatures for the duration of the national emergency. This temporary change only applies to signatures. All other form instructions should be followed when completing a form.

Individuals or entities that submit documents bearing an electronically reproduced original signature must also retain copies of the original documents containing the "wet" signature. USCIS may, at any time, request the original documents, which if not produced, could negatively impact the adjudication of the immigration benefit.

It is advisable for lawyers to instruct their clients to preserve the wet signature, or alternatively, to send the form containing the wet signature to their offices even after the application has been

submitted. These wet signatures must be preserved in case USCIS requests the original document in an FDNS visit, and thus the attorney must develop a protocol for requiring them from the client and then preserving them.

Further details on the **USCIS signature policy**, the contrasting **USCIS wet signature policy**, and other ethics signature issues can be found in **Bite-Sized Ethics: Who Can Sign on the Dotted Line?**.

5. What are the ethical considerations of going paperless in my office?

If a physical file is destroyed, the lawyer must ensure that the client's property, such as passports or birth certificates, are not destroyed. Under MR 1.15(a), a lawyer is obligated to safeguard the property of clients. Even if the representation has been terminated, a lawyer must surrender papers and property to which the client is entitled. See Rule 1.16(d). Therefore, a client must always be notified before the lawyer plans to destroy a physical file which has the client's property. On the other hand, existing paper copies can readily be electronically stored, although in the process of scanning such documents, care should also be taken that the documents are reproduced legibly before they are destroyed. Moreover, consistent with USCIS's wet signature policy, original wet signatures must also be preserved.

Another safeguard is to ensure that the electronic storage of client files and records are secure and not vulnerable to breaches or the erasure of electronic records due to technological malfunction, as lawyers are required to guard against unauthorized disclosure under MR 1.6. Under Comment 6 to MR 1.1, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." See California **Formal Opinion No. 2010-179: Competence and Confidentiality When Using Technology** for more information.

6. Are there any confidentiality concerns while working from home during COVID-19?

MR 1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted under one of the exceptions under 1.6(b). The lawyer must be vigilant regarding protecting client confidentiality when working from home. Here are some pointers:

- Ensure that client communications remain private, especially when family members are around or when Amazon's Alexa may listen in.
- Client-related work paper product should be shredded, rather than placed in the recycling basket with newspapers.
- Use a password-protected Wi-Fi connection and Virtual Private Networks, rather than open, free Wi-Fi connections and unprotected access to electronic work product.
- Use strong passwords and two-factor authentication on all software platforms and devices.
- Ensure that videoconference platforms are secure. Record and store them with caution.

For recent guidance regarding working from home, see **Pennsylvania Bar Association Formal Op. 2020-300**.

7. What are some of the ethical considerations regarding supervision of non-lawyers during the pandemic?

Under MR 5.3, lawyers are required to supervise non-lawyers to ensure that the latter's conduct is compatible with the professional obligations of the lawyer. Non-lawyers who print out and dispatch submissions at the office must be carefully supervised, whether onsite or remote, as documents and exhibits can get left out or not be collated in the intended format. Printers can stop printing during the middle of big print jobs. Moreover, mail from USCIS and other agencies must be carefully reviewed and accounted for, and deadlines recorded, all of which much be done under the supervision of the lawyer.

Given the nature of remote work, it may be more challenging for a lawyer to supervise a non-lawyer who may be communicating with a client. Thus, a lawyer must be careful in not aiding a nonlawyer paralegal in the unauthorized practice of law, which is precluded under MR 5.5.

New York Rules of Professional Conduct 5.3 provides useful guidance regarding the level of supervision required by a lawyer over a nonlawyer:

A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

For more information see **How to Ethically Supervise a Remote Paralegal** and **Remote Management Tips: How to Supervise and Maintain Team Productivity in a WFH Environment**.

8. File for continuances or hold telephonic hearings due to health concerns related to COVID-19: What is the best choice?

The lawyer's foremost duty is to provide competent representation to the client under MR 1.1. If a lawyer has health concerns about going to court during the pandemic, the lawyer must consider whether filing for a continuance or requesting a telephonic hearing, over a live hearing, would hinder the lawyer's competent representation. Moreover, Model Rule 1.4 requires the lawyer to keep clients reasonably informed about the status of the matter and also to explain matters to the extent reasonably necessary to allow the clients to make informed decisions about their representation. Ultimately, the client would have the final say to opt for a live hearing over a telephonic hearing even if the lawyer expresses health concerns.

AILA members who practice in New Jersey Immigration Court faced this very dilemma. The Immigration Court in New Jersey does not conduct video hearings. Lawyers must opt for either a telephonic or live hearing. If the client chooses a live hearing, the lawyer must abide by the client's wishes. Although the lawyer may withdraw from representation under MR 1.16, it is often difficult to seek permission for the lawyer to withdraw just prior to a hearing, and the lawyer's withdrawal may adversely impact the client's interest. When a lawyer is confronted with this dilemma, a lawyer should try to find alternative approaches without compromising competent representation. One possible approach is to arrange to have another competent lawyer within the lawyer's firm attend the

hearing. A solo practitioner may arrange for a competent colleague to appear at the hearing. These arrangements should only be undertaken after obtaining the client's informed consent and ensuring that the client will still be competently represented.

USCIS has also begun to schedule adjustment and naturalization interviews. A lawyer would face a similar dilemma in deciding to attend an adjustment of status or naturalization interview on behalf of a client. The current USCIS policy is to allow the lawyer to represent the client via telephone while the client appears in person for the interview. In this case too, the lawyer must ensure that representing the client via telephone will not compromise the representation.

Finally, a lawyer must make efforts to change the system, which is precisely what the AILA New Jersey Chapter has done by filing a lawsuit against the EOIR to force it to conduct video hearings rather than just live or telephonic hearings.[3]

9. What if I missed a deadline to file an extension of status for a client for a COVID-19-related reason?

A lawyer is required to remain competent under MR 1.1, and Diligent, under MR 1.3. If a lawyer has missed a deadline to file an extension of status, even for a COVID-19 related reason, it is incumbent upon the lawyer to keep the client informed under MR 1.4 and to find ways to ameliorate the situation for the client. The client should also provide informed consent to the lawyer to proceed with the ameliorative strategy.

USCIS has indicated that it will excuse untimely filings for extension of status pursuant to **8 CFR 214.1(c)(4)** and change of status pursuant to **8 CFR 248.1(c)** for COVID-19-related reasons. In order to successfully invoke USCIS's discretion to excuse a late filing, one must demonstrate that the delay was due to extraordinary circumstances beyond the control of the client and the delay was commensurate to the circumstances. If the attorney or the client contracted COVID-19 or were required to quarantine because they were in close contact with someone who contracted the virus, this could potentially constitute an extraordinary circumstance for failing to file timely. A lawyer's inability to file timely due to a shutdown order that prevented the lawyer from accessing files or mail may also constitute an extraordinary circumstance.

8 CFR 214.1(c)(4) is reproduced below:

Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

(i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
(ii) The alien has not otherwise violated his or her nonimmigrant status;
(iii) The alien remains a bona fide nonimmigrant;
(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

8 CFR 248.1(c) provides similar grounds for excusing a late filing for a request for change of status.

10. What sort of conflicts of interest should I be concerned about between employer-employee clients when there is a salary reduction and/or working conditions change?

Immigration practice often involves representing two or more clients such as the employer and employee. When a lawyer represents more than one client, there is always a potential for a conflict of interest between the employer and employee client, especially during harsh economic times. Under MR Rule 1.7(b), the lawyer may still represent the clients, notwithstanding any potential conflict, so long as the lawyer can provide competent and diligent representation to each affected client. The lawyer should also not counsel a client to engage in criminal or fraudulent conduct. See MR 1.2(d). If the employer wishes to reduce the salary of an H-1B worker as the business has been economically impacted due to the pandemic, care should be taken that the employer is still complying with H-1B rules regarding meeting the required wage, and that the advice given to the employer will not adversely impact the employee client, unless both clients give informed consent. If the only way the employer can preserve the position is to reduce the wage below the prevailing wage, the employer may only be able to do so if the position become part-time. The employer will need to obtain a new Labor Condition Application reflecting the part-time wage and reduced hours, and then the employer must file an amended H-1B petition. Since the H-1B worker will be adversely impacted as a result of a reduced wage, the lawyer who represents the employer and H-1B worker must get the informed consent of both clients under MR 1.7(b) before undertaking the amendment from full-time to part-time employment.

For further scenarios regarding changes in working conditions, see **FAQ on Changes in Salary and Other Working Conditions During Covid-19**.

11. What if I fall sick or die upon contracting COVID-19?

Part of providing competent representation includes thinking about what would happen to clients if the lawyer is unable to continue representation due to contracting COVID-19. A lawyer ought to create a plan for how to protect client interests should the lawyer become ill or have to self-isolate. A good succession plan ought to account for both temporary inability to practice and long-term or permanent inability to practice.

If the lawyer is part of a firm with other lawyers, a good plan would include how other lawyers would handle cases if the lawyer becomes sick or is required to self-isolate. If a lawyer can still continue working, even after contracting COVID-19, consideration should be given whether the lawyer will be able to practice remotely, whether clients' matters can be continued or postponed temporarily, whether the firm will need to bring in an outside lawyer to help with client matters (if that lawyer is in a different firm, the affected clients must consent), and whether the firm may have to withdraw from representation of some clients.

If the lawyer is a solo practitioner, the plan should consider whether clients can be served remotely, whether clients' matters can be continued or postponed temporarily, whether an outside lawyer would need to be brought in to help with client matters, and whether the lawyer may have to withdraw from representation of some clients. If an outside lawyer is brought in to assist on specific client matters, the affected clients will need to give consent. Finally, the lawyer may also want to

reach out to a trusted colleague who will be willing to serve as an inventory attorney in the event of that lawyer's severe illness or death.

For more information on succession planning, see **The Down and Dirty Disaster Plan in One Hour: Do It Today If You Don't Have One Now**, **Succession Planning for Solos: How to Prepare Your Practice for Death or Disability**, and **Succession Planning for Solos: Backup Attorneys for Vacations and Emergencies**. Also see **Ethical Concerns Regarding COVID-19 from the Florida Bar**.

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1. We apply the ABA Model Rules here, but AILA members should review the applicable state ethics rules that apply to them, as there are often variations from the model rules in each state. See **AILA State Ethics Resources**.

2. A lawsuit has been filed by detainees asserting that ICE telephone access policies have impeded all confidential communication with counsel, among other things. See ***Carranza v. Immigration and Customs Enforcement***.

3. See *AILA NJ Chapter v. EOIR*, available on AILA InfoNet at **AILA Doc. No. 20080301**.

Cite as AILA Doc. No. 20091802.

NOTES

4

United States Citizenship and Immigration Services, Public Charge Fact Sheet (Updated September 22, 2020)

Submitted by:
Cyrus D. Mehta
Cyrus D. Mehta & Partners PLLC

U.S. Citizenship and Immigration Services

Public Charge Fact Sheet

Alert: On Sept. 11, 2020, the U.S. Court of Appeals for the Second Circuit issued a decision that allows DHS to resume implementing the Public Charge Ground of Inadmissibility final rule nationwide, including in New York, Connecticut and Vermont. The decision stays the July 29, 2020, injunction, issued during the coronavirus (COVID-19) pandemic, that prevented DHS from enforcing the public charge final rule during a national health emergency.

Therefore, we will apply the public charge final rule and related guidance in the USCIS Policy Manual, Volumes 2, 8 and 12, to all applications and petitions postmarked (or submitted electronically) on or after Feb. 24, 2020. If you send your application or petition by commercial courier (for example, UPS, FedEx, or DHL), we will use the date on the courier receipt as the postmark date.

For information about the relevant court decisions, please see the public charge injunction webpage.

Final Rule Implementation

DHS implemented the Inadmissibility on Public Charge Grounds final rule beginning on Feb. 24, 2020, including in Illinois. DHS published the rule on Aug. 14, 2019, but, shortly before the final rule was scheduled to go into effect on Oct. 15, 2019, several federal courts enjoined the rule (that is, legally prohibited DHS from implementing it at that time). The U.S. Supreme Court stayed the last remaining injunction on Feb. 21, 2020, and therefore DHS is no longer prevented from implementing the final rule.

USCIS will apply the final rule to all applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. For applications and petitions sent by commercial courier (for example, UPS, FedEx, or DHL), the postmark date is the date reflected on the courier receipt. USCIS will reject any affected application or petition that does not adhere to the final rule, including those submitted by or on behalf of aliens living in Illinois, if postmarked on or after Feb. 24, 2020.

The final rule requires applicants for adjustment of status who are subject to the public charge ground of inadmissibility and certain applicants and petitioners seeking extension of stay and change of status to report certain information related to public benefits. Due to litigation-related delays in the final rule's implementation, USCIS is applying this requirement as though it refers to Feb. 24, 2020, rather than Oct. 15, 2019. Please read all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020.

Applicants for adjustment of status need not report the application for, certification or approval to receive, or receipt of certain previously excluded non-cash public benefits (for example, the Supplemental Nutrition Assistance Program, Medicaid, and public housing) before Feb. 24, 2020. USCIS will also not weigh heavily in the totality of the alien's circumstances the receipt of certain previously included public benefits (for example, Temporary Assistance for Needy Families, Supplemental Security Income, and General Assistance) if received before Feb. 24, 2020. USCIS will not consider, and applicants and petitioners seeking to extend nonimmigrant stay or change nonimmigrant status need not report, an alien's receipt of public benefits before Feb. 24, 2020.

Introduction

The public charge ground of inadmissibility has been a part of the U.S. immigration law for more than 100 years.

An alien who is likely at any time to become a public charge is generally inadmissible to the United States and ineligible to become a lawful permanent resident. Under the final rule, a public charge is defined as an alien who has received one or more public benefits, as defined in the rule, for more than 12 months within any 36-month period.

However, receiving public benefits does not automatically make an individual likely at any time in the future to become a public charge. This fact sheet provides information about public charge and public benefits to help noncitizens make informed choices about whether to apply for certain public benefits. You may also find information about the rule on our public charge webpage.

The final rule addresses the public charge ground of inadmissibility, the public benefit condition application, classifications exempt from the public charge ground of inadmissibility, and public charge bonds.

Background

Under section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(4), an alien seeking admission to the United States or seeking to adjust status to that of a lawful permanent resident (obtaining a Green Card) is inadmissible if the alien, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." If an alien is inadmissible, we will not grant admission to the United States or adjustment of status.

Applicability and Exemptions

The final rule applies to two types of applicants:

- Applicants for admission or adjustment of status to that of a lawful permanent resident (such applicants are subject to the rule's public charge ground of inadmissibility unless Congress has exempted them from this ground)
- Applicants for extension of nonimmigrant stay or change of nonimmigrant status (such applicants are subject to the rule's public benefit condition unless the nonimmigrant classification is exempted by law or regulation from the public charge ground of inadmissibility)

Congress has carved out certain exemptions to the public charge ground of inadmissibility, including:

- Refugees;
- Asylees;
- Certain T and U nonimmigrant visa applicants (human trafficking and certain crime victims, respectively); and
- Certain self-petitioners under the Violence Against Women Act.

For a full list of exempt classes of aliens, see 8 CFR 212.23 and the USCIS Policy Manual, Volume 8 – Admissibility, Part G - Public Charge Ground of Inadmissibility [8 USCIS-PM G].

Definition of Public Charge

The final rule defines public charge as an alien who receives one or more public benefits (as defined in the final rule) for more than 12 months, in total, within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).

Under the final rule, "likely at any time to become a public charge" means more likely than not at any time in the future to become a public charge (in other words, more likely than not at any time in the future to receive one or more of the public benefits (as defined in the final rule) for more than 12 months, in total, within any 36-month period, such that, for instance, receipt of two benefits in one month counts as two months).

We determine inadmissibility based on the public charge ground by looking at the factors outlined in 8 CFR 212.22. Our adjudicating officers review the totality of an alien's circumstances when deciding whether an applicant is likely at any time to become a public charge. This means that the adjudicating officer must weigh both the positive and negative factors. As required by section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and by this final rule, when making a public charge inadmissibility determination, a USCIS officer must consider the applicant's:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status;
- Education and skills;
- Prospective immigration status;
- Expected period of admission; and
- Sufficient Affidavit of Support Under Section 213A of the INA, Form I-864 or Form I-864EZ, when required under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

No single factor makes an alien inadmissible based on the public charge ground, except not filing a sufficient Form I-864 or Form I-864EZ, when required. The determination of an alien's likelihood of

becoming a public charge at any time in the future is a prospective determination that is based on the totality of the alien's circumstances and by weighing all of the factors that are relevant to the alien's case.

Benefits Considered

DHS will only consider public benefits as listed in the rule, including:

- Supplemental Security Income;
- Temporary Assistance for Needy Families;
- Any federal, state, local, or tribal cash benefit programs for income maintenance (often called general assistance in the state context, but which may exist under other names);
- Supplemental Nutrition Assistance Program (formerly called food stamps);
- Section 8 Housing Assistance under the Housing Choice Voucher Program;
- Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation);
- Public Housing (under the Housing Act of 1937, 42 U.S.C. 1437 et seq.); and
- Federally funded Medicaid (with certain exclusions).

Benefits Not Considered

DHS will not consider:

- Emergency medical assistance;
- Disaster relief;
- National school lunch programs;
- The Special Supplemental Nutrition Program for Women, Infants, and Children ;
- The Children's Health Insurance Program;
- Subsidies for foster care and adoption;
- Government-subsidized student and mortgage loans;
- Energy assistance;
- Food pantries and homeless shelters; and
- Head Start.

Benefits received by U.S. service members. Under the final rule, DHS will not consider the receipt of public benefits (as defined in the final rule) received by an alien who, at the time of receipt, or at the time of filing or adjudication of the application for admission, adjustment of status, extension of stay, or change of

status, is enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces.

Benefits received by the spouse and children of U.S. service members. DHS will also not consider the receipt of public benefits by the spouse and children of anyone enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces.

Benefits received by children born to, or adopted by, U.S. citizens living outside the United States. The rule further provides that DHS will not consider public benefits received by children, including adopted children, who will acquire U.S. citizenship under section 320 of the INA, 8 U.S.C. 1431, or children, residing outside the United States, of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the INA, 8 U.S.C. 1433.

Certain Medicaid benefits. DHS will not consider the Medicaid benefits received:

- For the treatment of an “emergency medical condition;”
- As services or benefits provided in connection with the Individuals with Disabilities Education Act;
- As school-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under state or local law;
- By aliens under the age of 21; and
- By pregnant women and by women within the 60-day period beginning on the last day of the pregnancy.

Last Reviewed/Updated: 09/22/2020

NOTES

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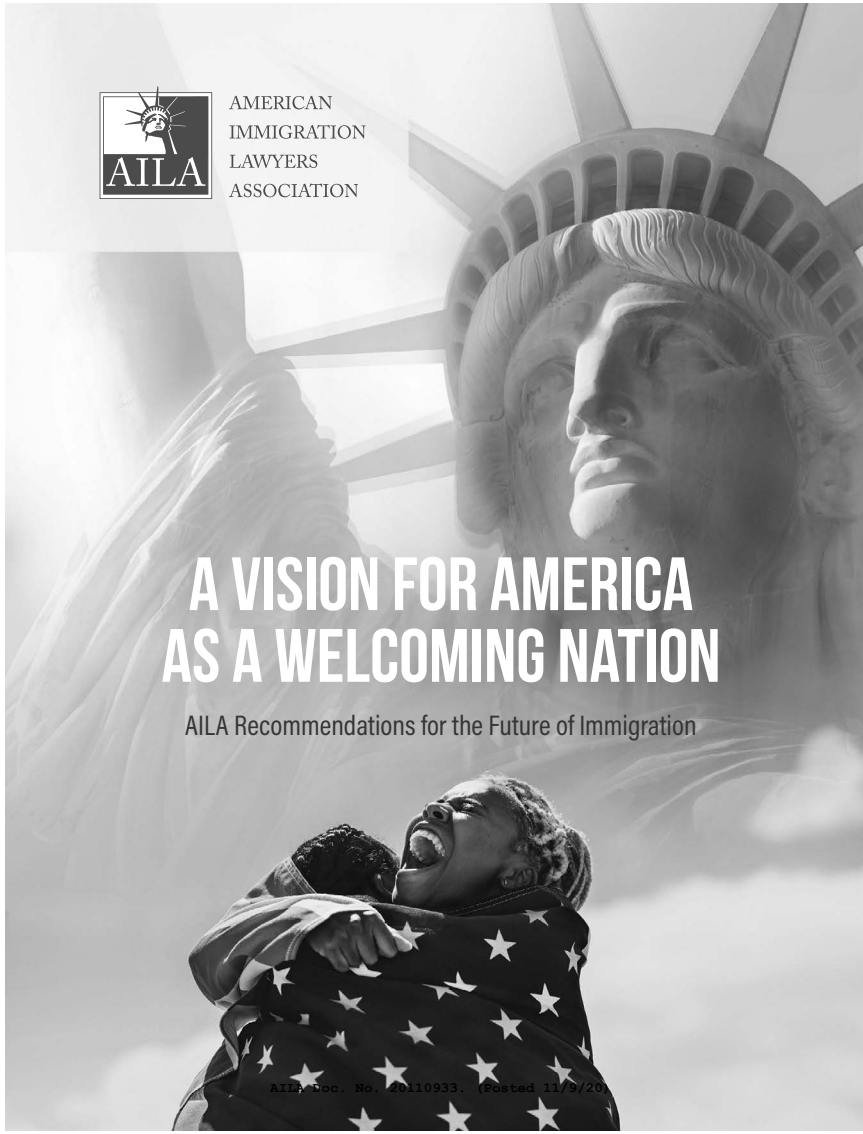
A Vision for America as a Welcoming Nation: AILA Recommendations for the Future of Immigration (November 9, 2020)

Submitted by:
Cyrus D. Mehta

Cyrus D. Mehta & Partners PLLC


AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION
AILA
A VISION FOR AMERICA
AS A WELCOMING NATION
AILA Recommendations for the Future of Immigration
AILA Doc. No. 20110933. (Posted 11/9/20)

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President Elect Joe Biden's campaign website proclaims: "Immigration is essential to who we are as a nation, our core values, and our aspirations for our future … The United States deserves an immigration policy that reflects our highest values as a nation." The American Immigration Lawyers Association, the national voluntary bar association comprised of 15,000 practicing immigration lawyers and law teachers, calls upon the incoming Biden-Harris administration to marshal the resources and political will to implement this vision. After four years of hostile and xenophobic immigration policies, the new administration has the opportunity and the moral responsibility to restore those values and reestablish America as a welcoming nation that embraces immigrants, protects those fleeing persecution, and promotes immigrant participation in our shared prosperity.

Ultimately, Congress must pass legislation to ensure that lasting, structural changes are made to the immigration system. President Biden should fight for legislation that builds upon the contributions of immigrants, reunites families, strengthens America's economy, expands humanitarian protection programs, and provides legal status and ultimately citizenship for all aspiring new Americans who still live in legal limbo.

Until Congress delivers him a bill to sign, the new president has the executive power to implement the following set of urgently needed recommendations, which will significantly ameliorate the harms caused by the previous administration and revitalize our nation's immigration system. These recommendations were developed in consultation with AILA's national policy committees and its network of pro bono volunteer lawyers who represent people in U.S. detention centers. AILA stands ready to work with the president and his team to get the job done.

1. PROCLAIM A MESSAGE OF WELCOME

In his first week in office, President Biden should issue a proclamation declaring that America welcomes all people no matter their faith, color, or nationality, and that we, as a country, renounce the many baseless and discriminatory policies implemented by the previous administration to exclude or expel foreign nationals. The president should declare that hate crimes, violence, or scapegoating that targets immigrants or any particular group of people will not be tolerated. In particular, the proclamation should immediately terminate or announce plans to rescind the Muslim ban,[1] the refugee ban,[2] the asylum bans,[3] the pregnancy ban,[4] the health insurance ban,[5] the public charge regulation,[6] and the COVID-19 bans.[7] All people—be they asylum seekers, refugees, entrepreneurs, workers, students, or family members with relatives in the United States—must know they will be treated with dignity and respect at our borders and throughout our nation. The president's vision must be implemented through all agencies that administer the immigration system.

- **Appoint personnel to get the job done.** The new administration should prioritize the appointment of leadership committed to the implementation of its vision, including a high-level White House position on immigration policy empowered to coordinate and restructure immigration agencies. At all levels, the president's personnel choices should be inclusive and reflect the diversity of our nation. New leadership should conduct a full review of hiring practices and improprieties to remedy any politicized and ideologically driven personnel decisions.

- **Foster professionalism and integrity.** After four years of leadership determined to implement an anti-immigrant agenda, it is imperative that the new administration move immediately to foster a culture in all immigration agencies that values professionalism and high-quality customer service. All immigration agencies should overhaul training protocols to ensure personnel understand their roles and responsibilities to protect due process and the dignity of human life. Training should be designed to rectify the improper biases set by the previous administration and be developed with robust stakeholder and civil society participation. Until rigorous training and standards are implemented, the hiring of CBP and Immigration and Customs Enforcement (ICE) officers and agents should be suspended.

- **Reengage with stakeholders.** The administration should reestablish the long-standing practice of engaging with diverse community-based organizations and state and local bar associations as well as ethnic bar associations to ensure that all voices are heard in setting agency policies. Agencies should resume regular meetings with AILA members and staff to share mutually beneficial information about agency policy and practice.

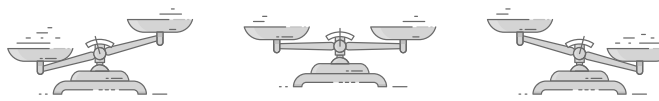
- **Ensure COVID-19 is not used as a pretext against immigrants.** Safeguarding our nation's health during the pandemic is an imperative. However, the now indefinite order[8] issued by the Centers for Disease Control and Prevention (CDC) was not based on science but instead part of President Trump's anti-immigrant agenda.[9] It has led to the expulsion of over 150,000 unaccompanied children and adults who were unlawfully denied the chance to seek asylum.[10] Moreover, the presidential proclamations banning the lawful entry of foreign nationals to protect the labor market have separated thousands of families under the guise of COVID-19 safety measures.[11] These and all related policies should be immediately rescinded.[12]

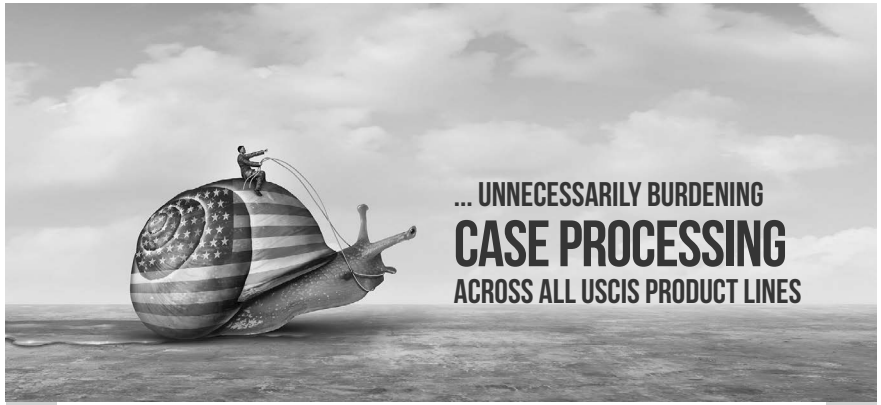
Read the American Immigration Council Special Report: "The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System"

2. ENSURE FAIRNESS, EFFICIENCY, AND ACCOUNTABILITY IN THE LEGAL IMMIGRATION SYSTEM

U.S. Citizenship and Immigration Services (USCIS), the agency charged with administering the legal immigration system, must be reformed to make it accountable to the public and true to its congressionally defined mission to provide prompt, consistent, and fair adjudications to its customers. During the Trump administration, USCIS implemented policies that have negatively impacted its revenue and efficiency, resulting in skyrocketing processing times.[13] Drawing upon USCIS data, AILA has documented that the average processing time for petitions and applications filed with the agency increased by 101 percent during fiscal years 2014 through 2019, while the agency's net backlog of delayed cases grew from about 544,000 to over 2.4 million as of February 2020.[14] The Trump administration added bureaucratic "red tape" without evidence that the additional measures, such as extreme vetting, would result in more lawful findings of ineligibility or fraud. Finally, the Trump administration has transformed USCIS to operate more like an enforcement agency rather than a benefit adjudications agency, draining its resources and harming American families and businesses that rely upon it.

See AILA Resources on USCIS.





- **Get the system back on track and on time.** The new administration should rescind all policies that have harmed Americans in all walks of life by significantly and unnecessarily burdening case processing across all USCIS product lines. These are the top priorities:
  - **Reinstate the "deference" policy.** Within the first three months, USCIS should restore an adjudicator's ability to rely on findings in previously approved cases involving the same parties and facts, beginning with the revocation of a 2017 memo[15] which requires officers to needlessly duplicate past findings.
  - **Eliminate mandatory interview requirements.** Within the first month, USCIS must restore adjudicator discretion to require in-person interviews only when eligibility of an applicant is in question. The Trump administration mandated that adjudicators conduct interviews even when they deemed it unnecessary.[16]
  - **Ensure consistency in adjudications.** USCIS must ensure that requests for evidence and denials, as well as the exercise of discretion, are consistent with all legal standards, by retraining adjudicators on standards of proof and issuing updated guidance.
  - **Stop the "blank space" rejection policy.**[17] USCIS should immediately stop wasting resources to reject applications and petitions that leave non-material spaces blank or use terminology other than "N/A," a practice that places many categories of applicants, including highly vulnerable people, at a grave risk of denial.
  - **Increase transparency on case processing times and the backlog.** USCIS should devise clear case processing goals that inform the public on how cases are being adjudicated and the case backlog.
- **Ensure that USCIS honors its statutory mission** and undo policies that have improperly shifted USCIS toward enforcement.
  - **Forbid transfers of funds and personnel from USCIS to CBP or ICE.** Fees paid by customers to have their immigration benefits applications adjudicated should not be transferred to enforcement agencies, particularly when processing times and backlogs are at unprecedented levels.
  - **Conduct a full review of the fraud unit** (FDNS) and extreme vetting initiatives[18] and rescind initiatives that reduce efficiency and fairness without significant, demonstrable impact on the identification of fraud.

- **Rescind the July 2018 Notice to Appear (NTA) guidance**[19] that expanded the grounds upon which USCIS adjudicators issue NTAs and that sweeps far more people into removal proceedings, including victims of violence and crime.

- **Restore opportunities for people to integrate and naturalize** by increasing efforts to welcome new citizens and eliminating extraordinary barriers created over the past four years, including aggressive efforts to strip people of their citizenship.

- **Strengthen naturalization, parole, and other programs to assist members of the armed forces, veterans, and their families**. Many experience obstacles in the immigration system as observed by the lawyers in AILA's Military Assistance Program.

• **Restore USCIS's commitment to customer service and public engagement.**

- **Reopen liaison channels and improve the InfoMod program** to resolve complex cases.

- **Restructure and empower the Customer Service Division** to ensure that the public has robust opportunities for engagement on agency matters.

• **Make the immigration system accessible to all.** The Trump administration has made accessing immigration benefits more costly and difficult for the customers it serves.

- **Halt the USCIS fee rule**[20] that was enjoined in September 2020 **and issue a new rule** that reinstates fee waivers and maintains reasonable fees for naturalization and adjustment of status. Humanitarian benefits should be provided for no or low cost.

- **Rescind the new public charge regulations** and take immediate steps to ensure the public charge inadmissibility grounds is not transformed into an overly burdensome and complicated wealth test.

See AILA Resources on Immigration Courts.

3. RESTORE INTEGRITY, FAIRNESS, AND EFFICIENCY TO THE IMMIGRATION COURTS

In just four years, the Trump administration has implemented radical changes that fundamentally compromise the integrity of the immigration courts and their ability to ensure fairness and impartiality.[21] In addition, ineffective management of the courts has impaired the quality and quantity of judicial decisions, and the court backlog has skyrocketed to over 1.2 million cases.[22] America needs a just and efficient immigration judicial system. Legislatively, the Biden administration should urge Congress to create an Article I immigration court that is independent from the Department of Justice.[23] In the meantime, the new administration should take concrete steps within its executive authority to ameliorate the damage done by its predecessor and implement the following measures to increase judicial independence, fairness, and consistency in decision making.

- **Lead on judicial independence and fairness in the courts.** The president should immediately issue an Executive Order stating a commitment to reform immigration courts to ensure independence, integrity, and due process. The new administration should quickly install new leadership in all key posts and review all recent personnel decisions to address concerns that the Trump administration politicized hiring to stack the immigration courts and appeals board with ideologically-driven appointees. The Biden administration should also rescind or undo the attorney general's opinions, regulations, and other policies that stripped immigration judges of fundamental authorities to manage their dockets and provide due process, such as continuances, administrative closure, termination of proceedings, and change of venue.

- **Restore due process.** The new administration should undo and rewrite several policies that "streamline" case decisions or pressure judges to rush through cases at the expense of due process and judicial independence, including case completion quotas for judges,[24] unrealistic deadlines, and other performance metrics imposed on trial and appellate level judges such as the regulations finalized on July 2, 2019;[25] the Board of Immigration Appeals (BIA) rule published on August 26, 2020;[26] the proposed Executive Office for Immigration Review (EOIR) rule on asylum published on September 23, 2020;[27] and the "no dark courtrooms" policy.[28]

- **Reform notice procedures** to provide the correct date, time, and location of hearings in compliance with the Supreme Court's decision in *Pereira v. Sessions*.[29] Improper notice has led to chaos when people received incorrect "dummy" dates and showed up on the wrong dates. An immediate review of all *in absentia* removal orders should be conducted to correct those issued due to government error.[30]

- **Halt or reverse the EOIR fee rule.** On February 28, 2020, EOIR issued a notice of proposed rulemaking[31] that would significantly increase the fees for important forms of relief and procedural protections. No immigrant or refugee should be priced out of due process or accessing the court system.

- **End the use of Immigration Adjudication Centers that deny a fair day in court.** The new administration should stop the use of Immigration Adjudication Centers,[32] the "black-box" facilities where judges appear by video with little transparency or public oversight and the right to representation is severely handicapped.

4. ENSURE THE FAIR AND HUMANE TREATMENT OF MIGRANTS AT THE BORDER

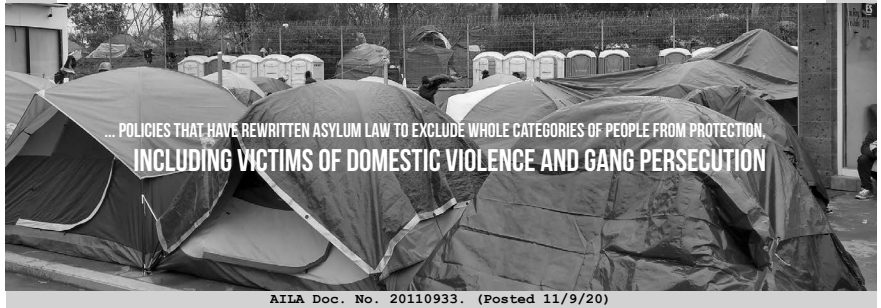
The Trump Administration has waged an all-out assault on migrants at the southern border, imposing severe restrictions or outright bans on asylum and measures to detain recent arrivals and short-circuit due process. Mr. Biden has pledged to "secure our border, while ensuring the dignity of migrants and upholding their legal right to seek asylum." These twin aims can be accomplished by surging humanitarian personnel and resources to the border and implementing a fair, orderly, and efficient screening process for legal relief.

- **Restore protection for asylum seekers at the border.** In the first week, President Biden should rescind or announce plans to terminate the following policies: the November 2018 asylum ban (currently enjoined),[33] the July 2019 third country transit ban,[34] the Migrant Protection Protocols (MPP),[35] the Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador (2019),[36] and the PACR and HARP procedures that block people from seeking relief.[37]
- **Surge border reception capacity to ensure protection.** Within days of taking office, the Biden administration should establish an Office of Migrant Protection to coordinate with other agencies the rapid scale-up of screening and protection capacity at high-volume ports of entry. Asylum officers, medical and mental health professionals, legal and social service resources should be surged to ports of entry. To increase the efficiency of asylum adjudications while still ensuring thorough review, asylum officers should be authorized to grant asylum as part of the credible fear interview process rather than requiring them to wait several months for immigration judges to conduct a hearing. The new administration should grant humanitarian parole temporarily to asylum seekers subject to MPP and others who would be forced to wait for their hearings.[38] Urgent measures should be taken to pilot legal counsel programs for asylum seekers and other vulnerable border arrivals.

- **Halt unfair, inhumane border enforcement.** The Biden administration should rescind Trump administration policies that have subjected people arriving at the border to inhumane practices and stripped them of a meaningful opportunity to seek protection and relief. Harsh deterrence tactics, such as those prescribed by the Department of Homeland Security's (DHS) Consequence Delivery System that have caused or exacerbated the denial of due process, separation of families,[39] excessive detention, and imposition of severe punitive measures should be halted.
    - **Suspend prosecutions for illegal entry and reentry** until a full review of their use is conducted. The review should consider the harms of the Zero Tolerance policy and the disproportionate use of federal prosecutorial resources for illegal entry and reentry (as compared to narcotics and weapons offenses) that has criminalized large numbers of people who come to the United States primarily for family unity and humanitarian reasons.
    - **Halt the practice of turning back asylum seekers** and rescind the April 2018 memo[40] that authorized "metering" and "queue management" at the border. DHS should provide adequate screening and humanitarian resources at the border to reduce the wait times for those needing screening for asylum or other relief.
    - **Halt the use of the fast-track expedited removal and reinstatement of removal procedures** that enable CBP and ICE officers to serve as both prosecutor and judge and singlehandedly deport people frequently in error and with little oversight or due process.[41] Court removal proceedings should be the norm to afford people the opportunity to consult with legal counsel and obtain a fair hearing.
    - **Restore the long-established practice of releasing recent border arrivals** while their immigration court proceedings are pending as set forth in the detention recommendations.
- **Halt wall and barrier construction.** President Biden should rescind Executive Order 13767[42] and halt all plans for wall and barrier construction at the southern border.

5. RESTORE ASYLUM LAW AND PROTECTION FOR VICTIMS OF CRIME AND REFUGEES

- **Remove barriers to asylum.**[43] Through bans, regulations, and international agreements—many of which are unlawful—the Trump administration has all but eviscerated asylum. In addition to those mentioned above, the Biden administration should undo or halt policies that have rewritten asylum

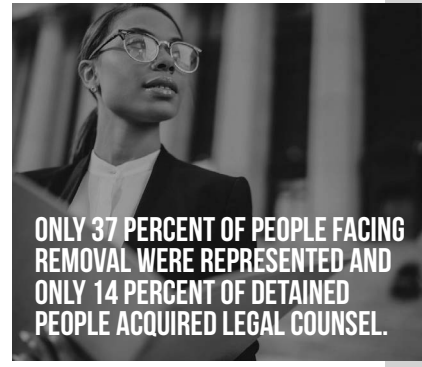


law to exclude whole categories of people from protection, including victims of domestic violence and gang persecution, which comprise many Central American claims. The new administration should also halt regulations that attack the procedural aspects of asylum law by truncating due process and making it far more difficult for asylum seekers to meet deadlines, find legal counsel, or obtain work authorization.[44]

- **Revoke barriers for crime victims.** The new administration should revoke barriers erected during the Trump administration making it harder for victims of crime to obtain protection.
  - **Revoke the August 2019 ICE fact sheet[45] permitting deportation of U visa applicants** before USCIS determines whether they have established prima facie eligibility. Before pursuing enforcement action, ICE should request a prima facie determination of any pending U visa application as set forth under a 2009 policy.[46]
  - **Dramatically reduce the U visa backlog** by hiring an additional 60 to 80 adjudicators and exploring methods to recapture the statutorily authorized 80,000 U-1 visas for fiscal years 2001 to 2009 that were not assigned due to administrative delays.
  - **Implement the statutorily authorized plan to issue work authorization** to people who have filed U visa applications under INA §214(p)(6).
  - **Create and implement a parole program for U visa applicants** abroad as required by 8 CFR §214.14(d)(2).
- **Recommit America to the protection of refugees.** With 80 million people forcibly displaced globally, President Biden must commit to restoring American leadership in international refugee protection and rebuilding all humanitarian programs, including the U.S. Refugee Program. The United States should resettle no less than 125,000 refugees in FY2021. It should recognize that Central and South American nations are facing humanitarian and refugee crises, and greatly increase resettlement from the region.

6. GUARANTEE LEGAL ASSISTANCE AND COUNSEL

While immigrants have long had the right to legal counsel in removal proceedings, the government does not provide counsel if the person is unable to afford one. According to a 2016 study[47] by the American Immigration Council, only 37 percent of people facing removal were represented and only 14 percent of detained people acquired legal counsel. The difference in outcomes for those represented as compared to the unrepresented is staggering: people in detention are twice as likely to win their cases if they have legal counsel. People who were never detained were five times more likely to obtain legal relief. Studies have also shown that attorneys and legal education programs make court proceedings more efficient and reduce government costs.[48]



- **Guarantee legal counsel.** Within the first 30 days, the president should announce a commitment to provide every person facing immigration removal with legal counsel paid for by the government if they cannot afford it. The Office of Access to Justice created under the Obama-Biden administration should be reestablished to facilitate legal counsel and education programs.

- **Ensure people in custody have access to legal representatives.** People in immigration detention face tremendous barriers to meaningful and confidential legal representation. The new administration should ensure detainees have expanded access to their legal counsel, interpreters, mental health professionals, and other members of their legal team. This includes but is not limited to expanded visitation policies, better provision of private and confidential meeting space, and free video and telephonic services.

- **Expand legal orientation programs.** The Biden administration should expand and improve EOIR's legal orientation programs (LOP), which the previous administration attempted to defund.[49] The programs not only facilitate due process by ensuring respondents have at least a rudimentary understanding of the legal process but also improve court efficiency. LOP currently reaches only a fraction of those facing removal. It should be expanded to reach all courts and all ICE and CBP facilities and stations.

7. END INHUMANE DETENTION

In the past two decades, detention has been grossly overused for immigration purposes resulting in skyrocketing detention rates at great cost to taxpayers—over $2 billion annually—and at great profit to private prison companies. Immigration detention is part of our nation's epidemic of mass incarceration, born out of the same "tough on crime" policies of the 1990s that doubled the U.S. prison population and criminalized communities of color. Even more important, detention has been wrongfully applied as an instrument of punishment and deterrence, aims which are inappropriate for immigration purposes. Trapped in detention, adults, children, and families are unable to communicate meaningfully with their legal counsel and, as a result, do not have a fair chance at obtaining asylum or other legal relief. Even worse, they are subjected to unsanitary and unsafe conditions, poor medical treatment, and horrendous abuses—including harassment, threats, and involuntary medical procedures such as hysterectomies[50]—that are abhorrent to American values and simply cannot continue.

Read Immigrant Justice Campaign's Reports on ICE Detention Abuse and Failure to Protect During COVID-19.

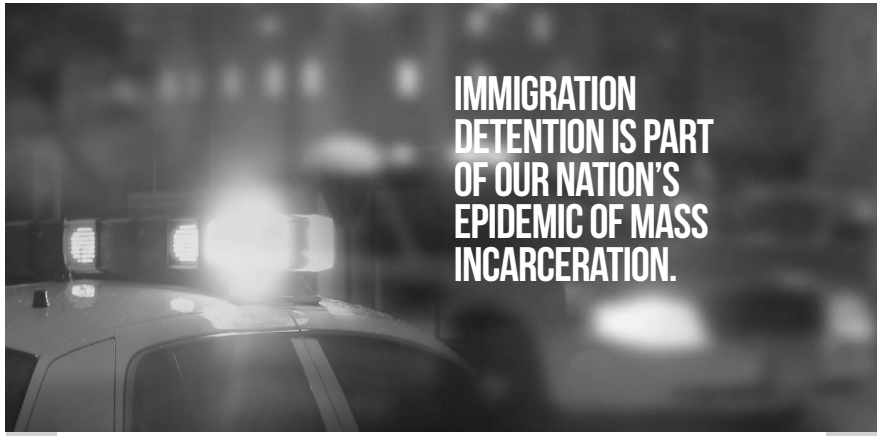
The system's failure to protect people in custody has been laid bare during the COVID-19 pandemic which has claimed the lives of many detainees and facility personnel—fatalities that could have been avoided.

- **Reduce detention dramatically.** To reduce immigration detention, the Biden administration should apply a standard in immigration cases that presumes release. Immediate action should be taken to scale up community-based release programs that are highly effective at ensuring appearance at court, far less costly than detention, and more humane. The administration should scale-up such programs nationwide with the ultimate goal of ending detention for immigration purposes.

- **Review all people's cases for release.** Within the first 100 days, the new administration should review all detention cases with the goal of releasing people and requiring the least onerous method of supervision to ensure appearance. Bonds should be set at far lower rates based on ability to pay at reasonable amounts.

- **End family detention and the separation of families immediately**.

- **Stop subsidizing prisons at taxpayer expense**. DHS should terminate all existing contracts with private prisons and county jails within one year and place a moratorium on future contracts or expansion of detention.



8. SET A VISION FOR IMMIGRATION ENFORCEMENT THAT IS FAIR, HUMANE, AND EFFECTIVE

The Trump administration has erected an inhumane enforcement system characterized by the excessive use of detention, removals that violate the law, and the unwarranted use of police power. These practices, and the array of policies used to justify them, are unjust, ineffective, and impose costly burdens on American taxpayers. President Biden should send a forceful message denouncing these practices.

Now is the time to establish a new vision for enforcement based on the principle that all people subjected to immigration enforcement action must be treated fairly and respectfully as human beings. At a time when our nation is grappling with its history of racial injustice, America must change how we view undocumented immigrants. The nation can no longer treat undocumented people who have long been part of this country as unwanted and inferior second-class citizens. Enforcement decisions should take into account the compelling equities that bind people to this country, such as their length of stay in the United States, their contributions, and their family and community ties. President Biden has the opportunity to define a vision of enforcement that is based on clear priorities and achieves the rule of law through just and compassionate means.

- **Impose a moratorium on deportations**, as President Biden has already pledged, until DHS can review pending cases and establish new enforcement priorities.

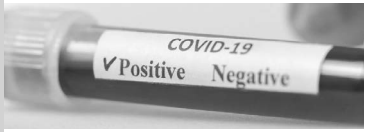
- **Implement new enforcement priorities.** The administration should establish clear enforcement priorities that give weight to the favorable equities in each person's case and balance them carefully against the enforcement interests. For people with criminal histories, consideration should be given to the severity of any offense, how long ago it occurred, and whether the person has shown rehabilitation. The consequences of immigration violations should be proportionate to the circumstances of the case and a range of options should be evaluated instead of pursuing deportation in every case.

Read the American Immigration Council's July 2020 report "The Cost of Immigration Enforcement and Border Security."

- **Conduct an immediate review of pending cases.** All pending cases should be reviewed to determine whether continued enforcement action is justified and consistent with the Biden administration's enforcement priorities. People who are eligible for DACA or TPS should have their cases terminated.

- **Apply the principle of prosecutorial discretion.** The administration should implement a robust procedure for enforcement personnel to exercise prosecutorial discretion building upon the foundation established by the Obama administration and its predecessors. Enforcement personnel should be accountable for metrics that are based on the furtherance of enforcement priorities and the conservation of finite law enforcement and judicial resources.

- **Prevent the spread of COVID-19 in all enforcement activities.** Detention, transfer, and deportation practices should be reviewed to ensure proper protocols are followed to prevent the spread of COVID-19—including testing and medical treatment, the provision of health supplies and protective equipment, and quarantine practices. The Trump administration's disregard for safe practices jeopardized the health of detained individuals, people working in and living near facilities, and nations receiving individuals who were deported.



- **Halt collaborations of ICE and CBP with local police** for non-immigration purposes.

- **End 287(g), detainer practices, and other policies** that pressure local law enforcement to violate the Constitution or federal law and compromise their mission to ensure public safety.

- **Require enforcement officers to wear body-worn cameras** consistent with law enforcement standards that protect the privacy of the public and officers.

9. IMPROVE CUSTOMS AND BORDER PROTECTION (CBP) ADJUDICATIONS AND PROCESSING AT PORTS OF ENTRY

- **Ensure consistency and transparency in adjudications.** CBP should promote uniformity in adjudications at all ports of entry by publishing non-classified Adjudication Guidance Musters on its website. The administration should also implement rigorous oversight and "guardrails" to ensure the work of the National Vetting Center and the use of biometrics is consistent with CBP's mission. CBP should publish all policy changes.

- **Provide uniform redress methods**. CBP should create a centralized national email system where travelers can request I-94 corrections, along with user-friendly FAQs that clearly describe the I-94 correction parameters. Currently, each port of entry establishes its own procedures with different standards and adjudication priorities.

- **Resume adjudications of L nonimmigrant petitions.** CBP should reestablish the practice of adjudicating reentry applications for L status at the northern border. After two decades of exercising this authority, CBP unexpectedly suspended it without notice.

- **Modernize and improve port of entry infrastructure** to support efficient and timely processing of vehicular and pedestrian traffic for local residents, visitors, merchants, and migrants. CBP should be resourced to maintain sufficient well-trained staff and provide more lanes at ports and increased hours of operation.

10. PROTECT UNDOCUMENTED PEOPLE AND OTHERS WITH DEEP TIES TO AMERICA

- **Reinstate Deferred Action for Childhood Arrivals.** President Biden should fully reinstate the DACA program and make it fairer and more accessible by modifying criteria based on age, residency, education, and past criminal activity.

- **Grant Temporary Protected Status and Deferred Enforced Departure to nationals of countries experiencing crises.** The Biden administration would have the authority to protect foreign nationals from several countries still experiencing conflict, environmental disaster, and other temporary crises through TPS and DED authority. Within the first six months in office, President Biden should conduct a full review of these programs and reissue, redesignate, or initiate new TPS designations for the following countries: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Sudan, Sierra Leone, Guinea, Syria, Yemen, South Sudan, Somalia, Venezuela, the Bahamas, Guatemala, and Lebanon.

- **Establish robust policies on humanitarian parole and deferred action.** The new administration should apply deferred action and humanitarian parole under INA 212(d)(5), as President Obama and his predecessors did, to protect military families, people with severe medical needs, victims of serious crime waiting for U visas, and others experiencing hardship in need of legal relief.

11. REFORM EMPLOYMENT-BASED AND FAMILY-BASED VISA PROGRAMS

- **Ensure efficient processing of work permits and employment authorization verification.** USCIS should ensure faster processing of employment authorization documents as significant detrimental consequences result from not having a work permit or when a gap is created between periods of authorization. Moreover, DHS should modernize and simplify the employment verification process to reflect technological advancements and the realities of today's business operations, particularly in light of COVID-19, to more efficiently onboard all workers.

- **Provide relief to individuals stuck in the immigrant visa backlogs.** To assist individuals who have approved immigrant visa applications but who often wait years or decades to adjust their status because of caps on immigrant visas, USCIS should revise the regulatory definition of "immediately available" at 8 CFR 245.1(g) to allow for earlier filing of adjustment of status applications. Additionally, USCIS should protect children from aging out of immigrant visa eligibility by issuing regulations on the Child Status Protection Action to ensure the greatest relief.

- **Recapture visas previously available but not allocated, as authorized in the INA**. The agencies should implement this through administrative means not requiring legislation.

- **Exempt derivatives of principal immigrant visa applicants from the total annual immigrant visa allocation (the "visa cap")** through administrative means.

- **Promote fair wages for U.S. and foreign workers**. The new administration should ensure that the required wages in our prevailing wage system reflect real-world norms by leaving in place the 2009 prevailing wage guidance and its leveling system. This means that wages should continue to be collected and scientifically calculated using statistical norms which the Department of Labor can level without political interference.

- **Promote immigrant entrepreneurship, business growth, investment, and job creation to revive the U.S. economy.** The administration should replace the Buy American, Hire American Executive Order with a new Executive Order that recognizes that foreign nationals help grow the U.S. economy and will contribute to the nation's economic recovery. The Executive Order should outline policy that would:

  - **Spur innovation and job growth.** USCIS should expand the International Entrepreneur rule, admit L-1A managers and executives opening a new office for an initial period of two years, and expand use of the National Interest Waiver for entrepreneurs who will bolster the U.S. economy.

  - **Improve the H-1B program.** The administration must ensure that H-1B adjudications are consistent with USCIS statute and regulations, such that it is a viable and flexible option for U.S. employers of all sizes and across all industries while exploring opportunities to address the needs of U.S. employers through alternative mechanisms. The administration should halt or rescind regulations published in the fall of 2020 on the H-1B program.

  - **Improve the H-2B program.** The H-2B program should have sufficient numbers based on economic need for workers as well as consistent and predictable returning worker provisions.

  - **Improve the EB-5 investor program.** Eliminate the requirement to redeploy investor capital if the petitioner has already completed the business plan in the approved I-526 and created all required jobs. EB-5 policies should be revised to allow flexibility to accommodate fluctuations in business operations and the economy.

12. ENSURE THE STATE DEPARTMENT (DOS) IS PROPERLY RESOURCED TO PROVIDE FAIR AND EFFICIENT CONSULAR PROCESSING

- **Elevate the Deputy Assistant Secretary (DAS) for Consular Affairs** to be co-equal with the other DAS positions in the State Department and provide the necessary resources, including a significant increase in funding, to operate effectively and without undue political influence**.**

- **Employ innovative strategies to minimize bureaucracy and prepare consular posts to respond quickly to the inevitable surge in demand for consular services once the pandemic subsides**. Individuals with expired immigrant visas (IV) who were unable to travel within their visa's six-month validity period should have their IV validity automatically granted to avoid burdening the posts. Similarly, the prior practice of permitting visa revalidation from within the United States should be reinstated to ease the burden on consulates and aid individuals who are unable to travel abroad. Additionally, lawful permanent residents who were afraid to return to the United States at the height of the pandemic who would apply for Returning Resident Visas should be given blanket protection against abandonment to allow CBP to admit them without having to burden the posts with unnecessary Returning Resident Visa applications.

- **Restore and expand the Visa Interview Waiver program and reform visa processing at consulates.** Immediately reinstate authority for consular officers to waive interviews for low-risk nonimmigrants to ensure efficiency in visa processing.

- **Restore transparency and institutionalize accountability in consular affairs**. To improve the consistency and quality in visa adjudications, consular officers should articulate the reasons for denying a visa beyond citing a section of law or applying a "catchall" ground for denial. This will facilitate review of the decision and enable the applicant, if eligible, to apply for a waiver.

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Published November 10, 2020.

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AILA is grateful to the members of the following committees for their contributions:
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VAWA, Ts, & Us Committee
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AILA Doc. No. 20110933. (Posted 11/9/20)

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Overview of Key Concepts in Nonimmigrant Visa Practice (December 2020)

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WHAT IS A "VISA"?

The U.S. immigration system is complex and navigating even the basic concepts can be tricky. Before assessing visa options for a client, it is necessary to first understand the distinction between three key concepts: visa foil, visa status, and visa classification. While these three concepts are closely connected, they fall within the purview of different government agencies, are subject to different procedural and substantive requirements, and have a different effect on the applicant. A visa foil is a stamp placed in the foreign national's passport by the U.S. Department of State through a consular post abroad. Visa status is conferred by the U.S. Customs and Border Protection (CBP) upon the foreign national's entry to the U.S., or by U.S. Citizenship & Immigration Services (USCIS), an agency within the Department of Homeland Security, via a change of status. Visa classification (i.e. visa category) determines the scope of permissible activities of the foreign national while she is in the United States. There is also an important distinction between an immigrant visa (relating to permanent resident status, also known colloquially as green card) and nonimmigrant visa (relating to temporary classifications). This article will deal primarily with nonimmigrant (temporary) visas.

As a threshold matter, a person who is not physically in the U.S. does not have any particular status in the U.S. In other words, the concept of visa status only applies to those individuals who are physically present on U.S. soil. A visa foil (visa stamp) is a travel document issued by a U.S. consular post abroad. It enables the applicant to travel to the U.S. to apply for admission in a particular category. It does not guarantee admission to the U.S., and it does not confer any status to the visa holder. Rather, it is a key which enables the visa holder to request admission to the United States. Visa foil issuance falls solely within the purview of the U.S. Department of State. [1]Consular officers have broad discretion to determine whether the applicant is eligible for a visa, assessing both eligibility for the category in which visa is sought and also general admissibility of the applicant. Eligibility for certain visa categories requires prior approval by USCIS. Common examples are H-1B and O visa categories. Prior petition approval from USCIS is both required and serves as *prima facie* evidence of eligibility for the category. In addition, an applicant may be denied a visa if they are

1. In the past, it was possible to apply for a visa stamp through the U.S. Department of State office in Washington D.C. However, in the wake of 9/11, this option has been eliminated.

found to be inadmissible due to a prior immigration violation, criminal record, or failure to establish requisite intent.

Visa status is generally conferred by CBP upon the foreign national's application for admission at the port of entry. In simple terms, this occurs when the foreign national arrives at the airport or a land border and goes through customs. The applicant is required to present a passport containing a valid visa foil (unless the applicant is a Canadian citizen or is traveling on ESTA), and demonstrate to the satisfaction of the border patrol officer both the eligibility for the visa category sought and general admissibility to the U.S. Admissibility is assessed by the CBP officer irrespective of prior determination by the State Department. Upon the determination of applicant's eligibility to enter, the CBP officer issued an I-94 entry/departure record specifying the classification and period of admission. The expiration date on the I-94 record controls the foreign national's period of stay regardless of the expiration date on the petition approval notice or visa stamp.

For applicants who are already in the United States, visa status can also be conferred by USCIS as a result of a request for a change of status or an extension of stay. USCIS, too, undertakes a *de novo* review of the foreign national's eligibility for the visa category as well as eligibility for a change of status based on admissibility. If a change of status or an extension of stay request is granted by USCIS, the foreign national is not required to travel abroad and apply for a visa foil. They can remain in the U.S. for the duration of approval. However, leaving the U.S. subsequent to the grant may necessitate applying for a visa in order to return. Upon the issuance of the approval of the change of status or an extension of stay request, USCIS issues a Form I-797 Notice of Action attaching an updated I-94 record which supersedes the I-94 issued by CBP upon the previous entry to the U.S.

Having been previously granted a visa classification, visa stamp and admission to the United States does not guarantee future visa issuance. All applications are reviewed *de novo.* Most temporary visa classifications require the applicant (whether the application is for a visa stamp at the consulate, application for admission at the border, or application for classification through USCIS) to demonstrate an intent to return to the home country upon completion of stay in the U.S. The presumption is always that the applicant intends to remain in the U.S. indefinitely and seek permanent resident status. It is, therefore, incumbent on the applicant to rebut this presumption by showing compelling evidence of their ties to the home country. The only clear exceptions to this rule are H-1B, H-4, L-1 and L-2 visa applicants, where temporary intent is not required, and the applicant may simultaneously pursue permanent residence in the U.S.

DEEPER DIVE: CONSULAR PROCESSING vs. CHANGE OF STATUS

When a foreign national seeks to travel to the United States, they first must apply for a visa foil at a United States consulate. However, if an individual is already in the United States in a specific nonimmigrant status and would like to change to another nonimmigrant status, there are two options: 1) Consular Processing: The individual leaves the United States, applies for the new type of visa foil at a United States consulate, and then re-enters the United States with the new visa. 2) Change of Status: The individual (or, in some cases, an employer) applies to change the nonimmigrant status to that of a different visa category. The change of status application can be made by mail within the United States to USCIS.

From a technical legal perspective, both these routes achieve the same result – changing the I-94 admission record to reflect a different status. When consular processing, the individual abandons the initial status and admission period by departing the United States. They then return and are issued a new I-94 record with a new status and admission period. Conversely, when changing status, the very same I-94 record and admission number that the individual received upon arrival in the United States is changed to reflect a different nonimmigrant status category.

The decision of which route to take can be complex and should involve an in-depth evaluation of the legal and factual circumstances. Thus, one has to be both knowledgeable and careful when advising on this area. But here are some basic points to consider. The change of status route allows the applicant to remain in the United States during the process. This route avoids separation from friends and family in the United States. In addition, this route is advantageous for people for whom international travel is difficult or risky. Some people have nonimmigrant status situations where an application at a consulate abroad could result in additional security checks or subject the applicant to an unreasonable level of scrutiny. On the other hand, consular processing can be quite convenient for people who have a professional or personal need to go abroad. Also, in many cases, the change of status process is very lengthy – months, as opposed to weeks – for consular processing. And, while waiting for the change of status process to complete, the foreign national cannot engage in the very activity for which they need a change of status.

A good example of this last point is a situation where an individual is in the United States in B-2 visitor for pleasure status and wishes to change to F-1 student status in order to attend a university. An application to change to student status can make many months, and the individual may not enroll in classes until the process is complete. In the meantime, they

also cannot work or leave the United States. However, if they leave the United States and apply for an F-1 student visa at a consulate, they may be able to re-enter the United States and begin courses within weeks.

COVID: WHEN A PANDEMIC HALTS TRAVEL

Even when the consular processing route is preferred by the applicant, there are situations in which the individual must apply for a change of status because consular processing is not an option. This became very clear when the COVID-19 pandemic spread across the world in 2020. Travel became dangerous and consulates, where one would apply for a visa, were either closed or heavily restricted.

In addition, a series of Presidential Proclamations prohibited consulates from issuing certain work visas and banned most nonimmigrant travel from countries that were deemed to be COVID-19 hotspots. As a result, even if an applicant was able to leave the United States and secure an appointment at a US consulate to apply for visa, they may not be able to actually obtain the visa or return to the United States.

Nonetheless, even for targeted countries and visa categories, consular processing continues to be an option for some during COVID. Interestingly, since the Presidential Proclamations contained exceptions for people whose travel to the United States would be in the *national interest*, an entire sub-area of immigration law and practice developed surrounding the legal requirements and process to obtain a National Interest Exception ("NIE"). In order to obtain an NIE, the individual applies to a consulate, or sometimes to the US Customs and Border Protection ("CBP") office at the airport, for permission to be issued a visa and/or travel to the United States for a significant economic or humanitarian need.

A great many NIEs have been granted under this exception, even in highly meritorious cases, the path to an NIE remains unclear. The precise rules and process keep shifting, and each consulate and CBP office seems to have its own procedure and adjudication standards. Therefore, before applying for an NIE, it is important to check the latest information from the Department of State and the relevant consulate or CBP office. It is also advisable to manage the expectations of the applicant. Many NIEs are not granted, and the applicants can be left stranded abroad.

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Matter of Dhanasar: The National Interest Waiver Standard

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Reprinted from the PLI Course Handbook,
Basic Immigration Law 2020: Business, Family, Naturalization and Related Areas (Item #275712)

Overturning nearly two decades of precedent on how an individual qualifies for the National Interest Waiver (NIW), the Administrative Appeals Office (AAO) of the U.S. Citizenship and Immigration Services (USCIS) issued a precedent decision, *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) which vacated *Matter of New York State Dep't of Transp. [NYSDOT]*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998) on which USCIS routinely relied when adjudicating NIW petitions.

As background, the NIW is an immigrant petition for lawful permanent residence under the employment-based second preference ("EB-2") category. In the ordinary course, a valid, permanent offer of employment in the U.S. and a labor certification application certified by the Department of Labor (DOL) are mandatory prerequisites to the filing of such an employment-based immigrant petition. However, the Immigration Act of 1990 (IMMACT90) provided that the labor certification requirement in the employment-based second category may be waived and foreign nationals may qualify for the NIW in the sciences, arts, professions or business if they are: (1) members of the professions holding advanced degrees; or (2) foreign nationals of "exceptional ability" who will "substantially benefit prospectively the national economy, cultural or educational interest, or welfare" of the United States, i.e. where the foreign national's employment is deemed to be in the "national interest." Yet, neither Congress nor USCIS have defined the "national interest." Rather, it has been left intentionally undefined in an effort to leave the application of this test as flexible as possible.

In 1998, the threshold qualifications for a NIW were articulated in NYSDOT. NYSDOT restricted the use of the NIW as a way to bypass the labor certification process for foreign nationals qualifying for placement in the EB-2 category. In NYSDOT, the AAO defined a three-prong test as the legal standard for adjudicating NIW petitions. Under this test, the foreign national had to demonstrate that (1) the area in which the foreign national seeks employment is of substantial intrinsic merit; (2) the prospective benefit of the foreign national's services is national in scope; and (3) the national interest would be adversely affected if a labor certification were required. That is, the foreign national will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The NYSDOT standard resulted in inconsistent adjudications, confusion and general frustration. It was impossible to devise a sure fire plan of attack or to predict the success of a NIW petition. Even if a petitioner could meet the first two prongs of the NYSDOT test, the third prong proved the most difficult to establish and was the sole subject of many USCIS Requests for Evidence. Under this prong, although a NIW is granted based on

prospective national benefit, the foreign national's past record had to justify projections of future benefit to the national interest. In other words, a NIW petitioner had to demonstrate that the prospective national interest was not entirely speculative, but based on demonstrable prior achievements.

Acknowledging the existing confusion, in *Matter of Dhanasar*, the AAO stated that based on the agency's experience with NYSDOT "we believe it is now time for a reassessment." *Matter of Dhanasar* articulates a new NIW standard that the AAO believes provides greater clarity, applies more flexibly to circumstances of both petitioning employers and self-petitioning individuals and better advances the purpose of the broad discretionary waiver provision to benefit the United States.

Matter of Dhanasar provides that after eligibility for EB-2 classification has been established, USCIS may grant a NIW if the petitioner demonstrates, by a preponderance of the evidence, that:

- The foreign national's proposed endeavor has both substantial merit and national importance.
- The foreign national is well positioned to advance the proposed endeavor.
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The decision noted that *Dhanasar's* prong #1 – requiring substantial merit and national importance – focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's substantial merit may be demonstrated in a range of areas including business, entrepreneurialism, science, technology, culture, health, or education. It is possible to establish an endeavor's substantial merit without a demonstration of immediate or quantifiable economic impact, although such evidence would be favorable. The AAO provided the examples of endeavors related to research, pure science, and the furtherance of human knowledge which may qualify whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

To determine whether the proposed endeavor has national importance, the AAO stated that it considers its potential prospective impact. An endeavor may have national importance, for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. "But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly

be considered to have national importance," the AAO noted. "In modifying this prong to assess 'national importance' rather than 'national in scope,' as used in NYSDOT, we seek to avoid overemphasis on the geographic breadth of the endeavor. An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance."

Dhanasar's prong #2 – requiring that the foreign national demonstrate that he or she is well positioned to advance the proposed endeavor – shifts the focus away from the proposed endeavor and onto the foreign national. The AAO stated that it will consider factors including, but not limited to, the petitioner's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. In recognition of the challenges presented in attempting to forecast feasibility or future success, the AAO stated that petitioners will not be required to demonstrate that their endeavors are more likely than not to ultimately succeed. Nevertheless, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

Dhanasar's prong #3 requires a demonstration that, on balance, it would be beneficial to the US to waive the requirements of a job offer and thus of a labor certification. The AAO recognized the intent of Congress to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. But, on the other hand, Congress also created the NIW in recognition of the fact that in certain cases the benefits afforded by the labor certification process can be outweighed by other factors that are also in the national interest. These two interests need be balanced within the context of individual NIW adjudications.

The AAO stated that this analysis requires an evaluation of factors such as whether, in light of the nature of the foreign national's qualifications or proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the U.S. would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. The AAO emphasized that, in each case, the factors considered "must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification." The AAO noted that this new prong in *Dhanasar*, unlike the third prong

in NYSDOT, "does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field." Under NYSDOT, the petitioner had to demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the foreign national by making the position sought by the foreign national available to U.S. workers. The petitioner, whether the U.S. employer or the foreign national, had to establish that the foreign national will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

Matter of Dhanasar indeed provided much needed flexibility and a clearer understanding of the evidence required in order to qualify for a NIW. In particular, this decision more widely opened the door for entrepreneurs to qualify for NIW. Under *Dhanasar's* prong #1, the entrepreneur no longer has to provide evidence that the proposed benefit will be national in scope as it has always been difficult for an entrepreneur to show that localized employment through his or her enterprise would be national in scope. Instead, the entrepreneur could demonstrate that the proposed endeavor has significant potential to employ U.S. workers.

The AAO acknowledged that the third prong of NYSDOT was always especially problematic for entrepreneurs and other self-employed individuals. A self-employed consultant would never be able to sponsor oneself through a labor certification as there is no distinct employer. In fact, the DOL regulations prohibit one who is the owner of the corporation from filing a labor certification on his or her own behalf as this person might negatively influence the good faith effort to recruit US workers. Also, certain governmental agencies do not have a policy of filing labor certifications on behalf of foreign nationals even though they may be critically needed. Under the more flexible *Matter of Dhanasar* standard, getting rid of the comparison requirement and focusing on the foreign national's own background, the entrepreneur can demonstrate that even assuming that other qualified U.S. workers are available, the U.S. would still benefit from the foreign national's contributions.

Matter of Dhanasar still requires the subjective determinations of USCIS adjudicators and accordingly, great care still needs to go into assembling a NIW petition. But this precedent decision opened the door to lawful permanent residence for individuals involved in a wider range of endeavors who would have failed to qualify under the NYSDOT standard.

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7 Points to Remember Regarding Resume Review in the PERM Process

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Reprinted from the PLI Course Handbook,
Basic Immigration Law 2020: Business, Family, Naturalization and Related Areas (Item #275712)

The employer's review of resumes received from applicants continues to be one of the trickiest issues in the PERM labor certification process. The process might seem straightforward enough because, after all, employers filing PERM applications are likely quite used to evaluating resumes from applicants. But such thinking is probably where the first wrong step is taken. Improper resume review continues to be one of the Department of Labor's (DOL) most popular reasons for PERM denials.

By way of background, under the Immigration and Nationality Act, the DOL has a statutory responsibility to ensure that no foreign worker is admitted for permanent residence based upon an offer of employment absent a finding that there are not sufficient U.S. workers who are able, willing, qualified and available for the work to be undertaken and that the admission of such worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. INA §212(a)(5)(A)(i). The DOL fulfills this responsibility by determining the availability of qualified U.S. workers before approving a permanent labor certification application and by ensuring that U.S. workers are fairly considered for all job opportunities that are the subject of a permanent labor certification application. Accordingly, the DOL relies on employers who file labor certification applications to recruit and consider U.S. workers in good faith. Under 20 C.F.R. §656.10(c), the employer must certify that U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons. While the DOL has indicated that good faith recruitment requires that an employer's process for considering U.S. workers who respond to certification-related recruitment closely resemble the employer's normal consideration process, operating under this belief will most likely lead to problems. This author has always found that it is infinitely more effective to counsel the employer ***not*** to consider PERM as resembling any type of real world recruitment process whatsoever.

Review of the Board of Alien Labor Certification Appeals (BALCA) is a good place to stay up to date on the DOL's reasoning on any PERM issue. Based on various BALCA decisions, here are **7** points regarding resume review that are worth discussing with the employer at the outset of the PERM process, even before the job duties and requirements are finalized and the advertisement is drafted.

1. BE CERTAIN THAT USE OF THE KELLOGG LANGUAGE IS WARRANTED AND REFLECTIVE OF THE ACTUAL MINIMUM REQUIREMENTS FOR THE OFFERED POSITION

2. AN APPLICANT CANNOT BE REJECTED SIMPLY BECAUSE THEIR COVER LETTER OR RESUME CLEARLY STATES THAT THEY ARE SEEKING A COMPLETELY DIFFERENT POSITION

In *Global Teachers Research and Resources, Inc.* 2015-PER-00396 (March 30, 2017), the employer's job requirements for the position of Elementary Teacher were a Bachelor's degree in Elementary Education and 60 months of experience in the job offered. In addition, the qualified applicant also had to demonstrate eligibility for a Georgia Teaching Certificate. In section H.14 of the ETA Form 9089, the employer had also listed, "Employer will Accept any Combination of Experience, Training or Education." This is commonly referred to as the Kellogg language based on *Matter of Francis Kellogg,* 1994-INA-465 (Feb. 2, 1998) (*en banc*).

After reviewing the employer's response to an audit, the DOL denied the PERM application finding that the employer failed to properly consider one applicant who possessed a Master's degree in Education/Special Education, 60 months of experience and a GA teaching license. The Certifying Officer (CO) reasoned that since the employer had indicated "Employer will Accept any Combination of Experience, Training or Education" then the employer had to consider the applicant even if she did not have a degree in Elementary Education. Oftentimes, an employer will insert the Kellogg language on the ETA Form 9089 when it is totally unnecessary. It is important to remember that this is specific language that is only required on the ETA Form 9089 when the foreign national qualifies for the offered position only on the basis of the employer's alternative requirements. In addition, *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009) held that the failure to include this language was not fatal as there is no space on the form for such language. Some employers recall receiving PERM denials due to lack of this language prior to the decision in *Federal Insurance* and, not fully comprehending the issue, they feel better to just include it. It is therefore very important to discuss the meaning of the Kellogg language with the employer and whether the insertion of this language would reflect the employer's true minimum requirements for the offered position.

The employer in *Global Teachers Research and Resources* filed a request for reconsideration and argued that the applicant had clearly indicated on her resume that she was seeking employment as Special Education

Teacher and that this information prevented them from actually considering the applicant for the offered position. However, BALCA held that since the applicant had applied for the Elementary Teacher position and since it would be illogical for a person to apply for a position in which they were not interested, the employer was obligated to give the application due consideration. Citing a long list of precedent decisions which would make for required reading, BALCA held that an applicant is presumed to be interested in a job for which he or she applies.

3. BE CAREFUL OF REJECTION FOR LACK OF AN UNSTATED, "INHERENT" REQUIREMENT

4. EVEN IF AN APPLICANT MAY LAWFULLY BE REJECTED FOR VARIOUS REASONS, ALWAYS LIST ALL REASONS FOR REJECTION IN THE RECRUITMENT REPORT

In *Matter of Los Angeles Unified School District*, 2012-PER-03153 (Jan. 23, 2017) the employer recruited for the position of "Teacher, Special Education" for which it required a Bachelor's degree in any field, a valid California Education Specialist teaching credential, and no training or experience. After two audits, the PERM application was denied because the employer rejected an applicant finding that the applicant failed to meet the minimum requirements for the offered position because the applicant had a below satisfactory performance evaluation on her most recent student-teaching assignment.

The employer requested reconsideration and, listing several pre-PERM administrative law decisions, argued that some qualifications are simply inherent and need not be expressly stated in the job description. The employer argued that the ability to "teach special education classes competently" is one such inherent requirement that need not be expressly stated. The employer also pointed to a negative confidential reference from the applicant's most recent teaching assignment.

BALCA dismissed all of the administrative law decisions as non-binding and stated that the PERM program demands strict compliance with the regulations which require that the job requirements described on the ETA Form 9089 represent the employer's actual minimum requirements for the offered position. BALCA found it debatable whether one negative performance evaluation over the course of a career could demonstrate a lack of competency. But ultimately, since nothing in the employer's stated minimum requirements indicated that an applicant cannot have a negative performance evaluation or a negative reference of any kind, BALCA

found the rejection of the applicant to be unlawful. Basically, any qualification that can form the basis of a rejection ought to be listed in the advertisement. If it is not, then it cannot be used as the basis for a rejection.

However, this decision does not make sense as every inherent skill cannot be listed in the advertisement, the ability to speak English, being the prime example. There are a line of cases to support this proposition. *See Ashbrook-Simon-Hartley v. McLaughlin*, 863 F.2d 410 (5th Cir 1989), *Matter of Ron Hartgrove*, 1989 BALCA Lexis 6 (BALCA May 31, 1989), *Matter of La Dye & Print Works*, 1995 BALCA LEXIS 59 (BALCA April 13, 1995).

In its appellate brief the employer had also tried to insert a new argument that the applicant was also not qualified because she did not have the required teacher credential. The employer stated that it did not initially consider this but that is nevertheless a basis for rejection. BALCA dismissed this evidence finding that its review is restricted to timely submitted evidence that was part of the record when the CO made his decision. It is therefore very important that an employer conduct a complete review of each applicant's qualifications and list each and every lawful reason for rejection of any applicant. In the instant case, despite the employer's rejection for lack of what it considered to be an inherent requirement, if the employer had also lawfully rejected the applicant for lack of the teaching credential and demonstrated that the applicant indeed lacked the credential, the PERM might not have been denied.

5. NEVER PLACE THE DUTY TO FOLLOW UP ON THE APPLICANT

Matter of Unisoft International, Inc. 2015-PER-00045 (Dec. 29, 2016) is a supervised recruitment case. The offered position was that of Network Administrator. The employer's PERM application was eventually denied for four reasons but only reason number 4 regards resume review. Essentially, the CO found that the employer did not conduct a good-faith recruitment effort because the employer sent out a form letter to each of 20 applicants. This letter stated, "After a preliminary review of your resume, we have determined that you do not have a few of the desired skills we are looking for including experience with MCP and SPO for OS2200." Putting the onus of additional communication on the applicant, the letter then stated, "Please contact us immediately to schedule an interview if you do have these qualifications." The CO found that the employer had failed to

"intensively" recruit and had not sufficiently established that there were no US applicants who were able, willing, qualified and available to perform the work.

BALCA pointed to case law which held that an employer may lawfully reject an applicant when the resume is silent on whether he or she meets a *major* requirement such as a college degree. However, when the qualification is something a candidate may not indicate explicitly on his or her resume though he or she possesses it, the employer carries the obligation to inquire further whether the applicant meets the requirements. BALCA found that the employer had rejected these 20 candidates because they did not list a subsidiary requirement on their resumes and the employer had an obligation to inquire further. The employer's letter to these 20 applications did not fulfill this obligation because it placed the responsibility of following up and requesting an interview on the shoulders of the applicants. Moreover, BALCA found that the employer failed to inquire whether there were any available training options for these candidates especially for two candidates who the CO identified as already possessing networking experience. BALCA found that the employer's letters to the candidates were perfunctory and not made in good faith.

This case displays another strong example of how resume review in the PERM process does not resemble resume review in the real world. In the real world, an applicant is expected to demonstrate his or her actual interest in the offered position. In the real world, putting the onus of additional communication on the applicant could very well be a test of the applicant's dedication and interest. No so under PERM. In the PERM process, the employer has to understand that it must bend over backwards to ensure that it has done everything in its power to fully determine whether an applicant is qualified for the offered position notwithstanding that applicant's failure to respond to a telephone call (the employer must email and then send a certified letter!); that applicant's lack of awareness of who the employer is or of the offered position (the employer must now inform them again!); or that applicant's request to be contacted at a later time (the employer must comply!).

6. OVER QUALIFICATION IS NEVER A LAWFUL REASON FOR REJECTION

7. AN APPLICANT MAY BE REJECTED BASED ON THEIR UNWILLINGNESS TO ACCEPT THE SALARY ONLY IF THE EMPLOYER CAN SHOW THAT THE EMPLOYER OFFERED THE POSITION TO THE APPLICANT AT THE LISTED SALARY AND THE APPLICANT THEN REFUSED TO ACCEPT THE POSITION

BALCA has long held that an employer may not reject a US worker applicant based on a belief that the applicant is over qualified for the position. This is still one rejection reason that almost all employers instinctively want to use. And again, this is where the PERM process breaks away from the real world. It is hard for most employers to comprehend why the DOL would require that they classify as qualified, an applicant who clearly would be taking a "step down" because their qualifications indicate that they are qualified for a higher level position. Employers feel that such applicants use lower level positions as a stepping stone. However, BALCA has always held that such applicants are qualified to perform the core job duties. *See Bronx Medical and Dental Clinic,* 1990-INA-00479 (Oct, 30, 1992) (*en banc*) and most recently, *Kohn Pedersen Fox Associates PC,* 212-PER-02772 (Nov. 25, 2016).

Also in *Kohn Pederson Fox Associates*, the employer, having advertised listing the offered salary, then rejected applicants who applied for the position requesting a higher salary. While the employer's reasoning here makes real world sense, BALCA held that an employer may reject a qualified US applicant as unwilling to accept the position at the offered wages only if the position was actually offered to the applicant and the applicant refused to accept the position at the offered wages. The employer must have documentation of the offer and refusal.

Overall, employers must always bear in mind that the DOL serves to protect the interests of the US worker. Accordingly, while the real world may be a dog eat dog world where one typo can cause an applicant's resume to quickly hit the trash, in the PERM world, applicants must almost be cuddled. The employer must set aside all normal reasoning; all normal industry expectations; and all expectations that a US worker applicant can understand basic requirements such as understanding that 2-3 years of experience means that 2 years or 3 years would be acceptable. The employer must consider what is in the best interest of the US worker applicant and ensure that it has sufficiently described the offered position and all its requirements to fully apprise the US worker of all he or she needs to know in order to determine whether to apply for the position. Once that

application has been received, the employer is obligated to examine every aspect of that applicant's qualification; to reach out to that applicant using multiple forms of communication if the most convenient form fails; to verify that the applicant, though lacking in a certain requirement cannot be trained within a reasonable time; and to remember, above all else, that the employer is never supposed to seek the "best" candidate for the position, but rather, must consider a candidate qualified if he or she even barely meets the stated minimum requirements.

NOTES

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Reprinted from the PLI Course Handbook,
Basic Immigration Law 2020: Business, Family, Naturalization and Related Areas (Item #275712)

INTRODUCTION TO LABOR CERTIFICATION

A labor certification from the United States Department of Labor is a prerequisite to most employer-sponsored immigrant petitions. In 1965, Congress introduced the labor certification requirement into the immigration law in an attempt to protect U.S. citizens and permanent residents from competition from foreign workers in the U.S. labor market. Under the Immigration and Nationality Act, with certain exceptions, any foreign individual entering the U.S. to obtain employment on a permanent basis is inadmissible unless the Secretary of Labor has certified that there are not sufficient U.S. workers who are "able, willing, qualified and available" for the position and that the employment of this individual "will not adversely affect the wages and working conditions" of similarly employed U.S. workers.[1]

From 1978 to 2005, the process of applying for a labor certification was governed by detailed regulations and a legacy of inconsistent administrative law decisions and conflicting regional practices. The process was extensively criticized over the years as cumbersome for employers and applicants, ineffective at protecting the jobs of U.S. citizens and permanent residents, inefficient, and the cause of extremely long adjudication backlogs.

In response to many of these criticisms, the U.S. Department of Labor ("DOL") overhauled the labor certification application process. It published a new set of regulations governing the application process, which it called Program Electronic Review Management (commonly known as "PERM").[2] The PERM regulations, which became effective on March 28, 2005, preserve the traditional purpose and principles of the labor certification process, but attempt to increase the efficiency and effectiveness of the process by simplifying and shortening the adjudication procedure while raising the standard for approval. In addition, the PERM regulations seek to clarify some previously ambiguous areas within labor certification practice.

This Article will summarize the key steps and issues in the PERM labor certification process.

DESCRIBING THE JOB AND DEFINING THE MINIMUM REQUIREMENTS

The first step in preparing for an application for a labor certification is obtaining a clear description of the job and its duties from the employer. At this stage, it is also important for the employer to identify the minimum requirements that an employee would need to perform the job. These minimum requirements must be listed on the application form and also guide the employer in the recruitment process. The minimum requirements

may include education, training, experience and any special skills. However, these requirements may not include items that are not essential prerequisites for the position. The requirements also may not include skills that the employer can teach a new employee within a reasonable period of time.[3]

In preparing to apply for a labor certification, the employer or its attorney must review the O*NET (Occupational Information Network at http://www.onetonline.org), the DOL's directory of occupations, to determine which listed occupation most closely resembles the position offered by the employer. Each occupational category in O*NET describes the occupation and lists the relevant tasks, knowledge, skills, abilities, work activities, work contacts, work interests, and work values. O*NET also assigns a "job zone" to each occupation. The job zone, which is derived from DOL's Specific Vocational Preparation ("SVP") level calculation, defines the amount of preparation normally needed to perform a job in the occupation in a normal matter and at an average level of skill.

In addition, O*NET delineates the educational level normally required to perform the job.

In the event that the employer's requirements for the position exceed or differ from those articulated by O*NET as normal for the occupation, the employer must be prepared to justify its requirements by demonstrating the "business necessity" for its requirements. Thus, for example, education or experience requirements that are greater than those listed in O*NET require a business necessary justification.[4] Another classic example is an employer that requires candidates for the position to speak a foreign language. Unless knowledge of the foreign language is clearly integral to the position (as in the case of a translator), the employer must be prepared to explain in detail, and document, why knowledge of that foreign language is absolutely necessary to perform the duties of that position.

In addition to its standard minimum requirements for a position, an employer may also articulate alternative acceptable requirements for a position.[5] However, if the employee who is the subject of the application qualifies only by virtue of the alternate requirements, and is already employed by the employer, the application must state that any suitable combination of education, training, or experience is acceptable. [6]

An important restriction on the employer's minimum requirements is that the employee who is the subject of the application, must have met those requirements before becoming an employee of the employer. [7] Thus, for example, an employer may not require applicants to have three years of software development experience if the employee on whose behalf the application is filed did not herself have three years of software development

experience before joining the employer. The DOL's reasoning for this restriction is that this employee was essentially trained by the employer, and the employer could similarly have trained a U.S. citizen or permanent resident with no software development experience to play this role. Thus, the "actual" minimum requirements for the position do not include software development experience.

The PERM regulations allow a few exceptions to this restriction on experience earned "on the job." An important exception to this rule is where the employee gained the experience at a company with a different Federal Employer Identification Number. [8]

Exceptions are also made where the employee gained the on-the-job experience in a position that is not "substantially comparable" to the position offered in the application. A job is not "substantially comparable" if it requires performance of different job duties at least 50% of the time. [9] A valid, but rarely used, additional exception to the restriction to experience gained "on the job," is where the employer can clearly establish that it is no longer feasible to train a U.S. worker to perform the duties of the position. [10]

In addition to the restriction on experience gained "on the job," the DOL will also not allow an employer to consider certain education or training as part of the minimum requirements if it was obtained by the employee at the employer's expense. An exception is made where the employer offered similar training to U.S. worker applicants. [11]

PREVAILING WAGE DETERMINATION

In order to ensure that the offered wage for a position meets or exceeds the prevailing wage for the position in the specific geographic location, the DOL must "determine" the prevailing wage for the position in advance of an application for a labor certification. The employer, or its attorney, requests this determination through a formal "Application for Prevailing Wage Determination" (ETA Form 9141). [12] Once the DOL receives an application for a prevailing wage determination, it normally turns to its standard wage survey, the Occupational Employment Statistics Survey ("OES") — a survey of average wages for occupations that correlate with those listed in the O*NET — to determine the appropriate wage for the position. Typically, in advance of submitting an application for a prevailing wage determination, the employer will research the offered position in the OES (which is accessible on the Internet at www.flcdatacenter.com/OesWizardStart.aspx) to ensure that the wage that it is offering equals or exceeds the wages which the DOL is likely to determine as appropriate.

The survey lists prevailing wages for each of four levels within each position. The DOL utilizes established criteria, which focus on the education and experience required for the position, special skills required, and supervisory duties, to determine the appropriate level. Part of this process also includes comparing the employer's requirements for the position against those listed in O*NET. When appropriate, the DOL will also look to the Davis Bacon Act wage databank, which covers jobs in federal and state construction projects, the McNamara-O'Hara Service Contract Act, which applies to employers of contractors and subcontractors of service contracts with the federal government, and a collective bargaining agreement, which establishes rates of compensation for unionized workers.

In situations where the employer feels that the standard government surveys are not appropriate for the position, the PERM regulations allow the employer to present alternative wage surveys to the DOL as part of the application for a prevailing wage determination. The PERM regulations delineate a number of guidelines to determine whether alternative wage surveys are acceptable to the U.S. Department of Labor. [13]

The DOL will issue a prevailing wage determination with a specific period validity, at least 90 days but not more than one year from the date of determination. The regulations require that either the beginning of the recruitment process or the filing of the application for labor certification occur during the validity period of the prevailing wage determination. [14]

If the employer believes that the prevailing wage determination is in error, the employer may challenge the determination with a Request for Redetermination or a Request for Review. The employer may also appeal the prevailing wage determination to the Board of Alien Labor Certification Appeals ("BALCA"). [15]

RECRUITMENT FOR THE POSITION

Once the job and its requirements have been defined, the employer can begin recruiting for the position. (Some practitioners prefer to complete the full PERM application form in draft before beginning the recruitment; the order here is a matter of strategy and style.) The purpose of the recruitment is to test the labor market to determine whether there are any "able, willing, qualified, and available" U.S. workers for the job. In order to obtain a labor certification, the employer must demonstrate to the DOL that it has conducted the prescribed recruitment and that no U.S. workers applied for the position, other than those who were rejected for "lawful job-related reasons." The required recruitments steps are detailed below:

State Job Order

The employer must place a job order with the State Workforce Agency ("SWA") in the state in which the position will be located.[16] The job order must run for 30 consecutive days in the period between 30 and 180 days before the application is filed. Each state has its own form and procedure for placing the job order.[17]

Newspaper Advertisements

The employer must advertise the position on two Sundays in the newspaper of general circulation in the area of intended employment.[18] [19] As with the job order, the advertisements must appear in the period between 30 and 180 days before the application for a labor certification is filed.

At minimum, the advertisements must:

- name the employer;
- direct applicants to respond to the employer;
- provide a description of the vacancy specific enough to apprise U.S. workers of a job opportunity;
- indicate the geographical area of employment, including any travel requirements[20]; and
- not contain wages or terms and conditions of employment that are less favorable than those offered to the employee who is the subject of application.[21]

The advertisement does not need to specify a salary being offered for the position, but if a salary is listed, it must meet or exceed the actual wage being offered to the employee (which, in turn, must meet or exceed the prevailing wage rate.) The advertisement may include requirements or duties, but it must not contain any requirements or duties which exceed the job requirements listed on the application form, ETA Form 9089.[22] [23]

For positions which require an advanced degree and experience, where a professional journal normally would be used to advertise the job opportunity, the employer may place one of the Sunday advertisements in an appropriate professional journal, rather than a newspaper.[24]

Additional Recruitment Steps for Professional Positions

For "professional" positions – generally, positions that require at least a Bachelor's degree – the employer must select three additional recruitment steps out of the ten options offered by the PERM regulations.[25] In a special appendix, the PERM regulations list the professions considered by the Department of Labor to be professional.[26]

Following is a list of 10 recruitment venues provided by the Department of Labor to satisfy the additional recruitment requirements:[27]

- job fairs;
- advertising on the employer's website;[28]
- advertising on job search websites, this includes advertising in web postings generated in conjunction with the newspaper advertisements required by PERM;
- on-campus recruiting;
- advertising through trade or professional organizations;[29]
- private employment firms[30];
- employee referral programs with incentives[31];
- advertising through campus placement offices; local and ethnic newspapers; and
- radio and television advertisements.

Two of the three additional forms of recruitment must take place in the period between 30 and 180 days prior to filing the application. The third form may be conducted in the 30 day period prior to filing the application, but may not be conducted more than 180 days prior to filing the application.

Notice To Employees

In addition to advertising the position to the general public, PERM requires that the employer give notice of the filing of the application to its employees.[32] If a position is subject to a collective bargaining agreement, notice must be given to the appropriate bargaining representative. If the position does not fall under a collective bargaining agreement, notice must be given by posting a printed notice at the location of employment for at least 10 consecutive business days.[33] The regulations suggest appropriate locations for posting the notice,

including locations in the immediate vicinity of wage and hour notices or occupational safety and health (OSHA) notices.

In addition to the printed notice, the employer must publish the notice in all printed or electronic in-house media, in accordance with the employer's normal procedures for recruitment of similar positions. The duration of the notice through in-house media is either ten consecutive business days or in accordance with the employer's normal procedures for recruitment of similar positions, whichever is longer.[34]

The notice must contain a salary, which meets or exceeds both the prevailing wage and the actual wage being offered to the employee,[35] and all of the items required of advertisements in the newspaper. The notice must also state that notice is being provided as the result of the filing of an application for a labor certification for the job opportunity and state that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor. The notice must also provide the address of the Certifying Officer. As with most of the required recruitment process, notice must be provided between 30 and 180 days before filing the application.

Consideration of Applicants

The employer must consider each US worker who applies for the position and determine whether s/he is able, willing, qualified and available for the position.[36] Under the regulations, neither the attorney (or agent) nor the employee on whose behalf the application is filed may participate in interviewing or considering US workers for the job.[37] The DOL interprets the restriction on attorneys to include any preliminary screening of applications before the employer does so, unless the attorney is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. However, the DOL does respect the right of employers to consult with their attorneys(s) or agent(s) during the process to ensure that they are complying with all applicable legal requirements of the process.[38]

Layoffs

If, within six months prior to the filing an application for a labor certification, the employer had a layoff in the area of intended employment and in the occupation that is the subject of the application (or a related occupation), the employer must document that it notified and considered all potentially qualified laid off U.S. workers for the position and the results of the notification and consideration.[39]

Documentation of the Recruitment

The employer must prepare a recruitment report that describes the steps taken in the recruitment and the results of the recruitment, including the number of hires and the number of U.S. workers rejected, categorized by the lawful job-related reasons for the rejection.[40] For a period of five years from the date of filing the application for a labor certification, the employer must retain the recruitment report and the applicants' resumes, together with documentation of the Notice to employees, the public recruitment steps, and the state job order.[41] This documentation should include copies of the actual advertisements and clear evidence that demonstrates the beginning and ending dates of each form of recruitment.[42]

OPTIONAL SPECIAL RECRUITMENT PROCEDURES FOR COLLEGE AND UNIVERSITY TEACHERS

Employers that are filing applications for labor certifications for college and university teachers may conduct the standard recruitment process, as described earlier. Alternatively, these employers may document that the college or university teacher who is the subjection of the application was selected for the job opportunity in a competitive recruitment and selection process through which he or she was found to be more qualified than any of the United States workers who applied for the job.[43]

The employer that utilizes this optional alternative must demonstrate that it engaged in a competitive recruitment and selection process by preparing the following documentation:

- a statement signed by an official with hiring authority outlining the recruitment procedures undertaken, including the total number of applicants for the job and a specific job-related reasons why the individual in question is more qualified than each U.S. worker that applied for the job;
- a final report of the faculty, student or administrative body making the recommendation or selection of the alien;
- a copy of at least one advertisement for the job opportunity in a national professional journal, including the name and the dates of publication. The advertisement must include the job title, duties, and requirements of the position;
- Evidence of all other recruitment sources utilized in the search; and

- a written statement attesting to the degree of the individual's educational and professional qualifications and academic achievements.

Applications filed under this alternative must be filed within 18 months after a selection is made through a competitive recruitment and selection process.

FILING THE APPLICATION

If, after completing the recruitment, the employer can document that no able, willing, qualified, and available U.S. workers applied for the position, the PERM application may be filed. The application form, ETA Form 9089, is typically completed and filed online by the employer or its attorney. In order to access the online system, the employer must register itself as a user at the PERM website, www.plc.doleta.gov. Once the employer registration process is complete, the employer will receive a username, password and PIN number that can be used to access the system and file and monitor applications. The employer can then also assign user rights to other individuals at the employer or to outside attorneys. Each user of the system obtains his/her own username, password and PIN number.[44]

As the form is completed and submitted online and part of the adjudication process is conducted electronically by software, there have been many instances of applications that have been denied due to typographical errors in the data entry or ambiguities in the form itself. The DOL has worked to fine-tune the electronic system, but, nonetheless, has been unable to avoid issuing many automatic denials.

The first decision handed-down by the Board of Alien Labor Certification Appeals on a PERM application addressed this issue of denials based on harmless error. In *Matter of HealthAmerica*, No. 2006-PER-1 (BALCA Jul. 18, 2006), the Board held that the Certifying Officer improperly denied a request for reconsideration of a PERM application where the employer fulfilled all the PERM requirements, but submitted an application with a typographical error regarding the date of an advertisement. The evidence indisputably demonstrated that the employer ran two Sunday publications as required by the regulations, but the employer failed to provide the correct date of the advertisement on the ETA Form 9089. The Board found that the Certifying Officer's decision to deny the request for reconsideration was "arbitrary and capricious and not supported by any regulatory language, regulatory history or decisional law."[45] The Board further held that when adjudicating a Motion for Reconsideration, the CO must consider not only the information on Form ETA 9089 itself, but

also the documents contained in the employer's audit file, which support the application even though they are not submitted with the application.

The second of these holdings was later codified in a new DOL regulation, 20 C.F.R. §656.24. However, the continuing application of *HealthAmerica's* first holding is questionable. A 2013 BALCA decision held that the first holding was effectively overruled by 20.C.F.R. §656.11(b), which instituted zero-tolerance for modifications to a submitted application.[46]

The Department of Labor also allows applications to be filed by mail to the Atlanta National Processing Center.[47] However, unlike the electronic system, the National Processing Center will not issue confirmations of receipt for mail-in applications.[48]

Generally, applications filed online are processed more quickly than the applications filed by hand. In addition, the applications filed by hand can contain an even greater margin for error as the data must be manually entered by the DOL personnel into the electronic system, allowing additional opportunities for errors in the data entry.

ADJUDICATIONS AND AUDITS

If an application is approved, the application will be printed and returned to the employer, or its attorney, for signatures of the employer, the individual who is the subject of the application, and the attorney. (Applications filed by mail must be signed before they are filed.[49]) That signed application can then serve as the underlying document in the employer's immigrant petition to USCIS on behalf of the individual. However, the approved labor certification is only valid for 180 days.[50]

If the application is denied, the employer is given an opportunity to, within 30 days, request a review of the decision before BALCA or, under limited circumstances, request the Certifying Officer of the processing center to reconsider the decision.[51] In many cases, particularly if the denial results from a DOL error or an easily correctable error on the application form and the recruitment is still within its 180-day validity period, it may be easier and faster to file a new application.

In many instances, before deciding to approve or deny an application, the DOL will choose to "audit" an application.[52] The DOL can initiate an audit on a random basis or as a result of an issue arising out of the application. In such cases, the DOL will send the employer an "audit letter" identifying certain documentation that must be submitted.

Among other items, the requested documentation will usually include the recruitment documentation that the employer has retained and documentation justifying the "business necessity" of requirements that exceed or differ from that which is "normal" for the occupation.[53] The Department of Labor will give the employer 30 days to respond with the supporting documentation and any other requested items. Once the requested information is submitted, the Department of Labor may adjudicate the application on the basis of the information it received.

The DOL may also request supplemental documentation or conduct "supervised recruitment," an extensive and exacting process in which the Certifying Officer oversees and directs the contents, location and timing of the recruitment steps.[54] Generally, DOL requires supervised recruitment when it suspects — due to concerns about the employer's good faith or general knowledge of the industry — that there are more available U.S. workers in the market than the employer's standard PERM recruitment yields. In the supervised recruitment process, resumes are sent to the Certifying Officer before referral to the employer, and the employer must prepare an extensive recruitment report.[55]

FEES FOR PREPARING THE APPLICATION FOR LABOR CERTIFICATION

Traditionally, attorney fees, advertising fees, and other costs incurred in the preparation of an application for a labor certification could be paid by either the employer, the employee, or a third party. However, under a regulation published in May 2007, with very limited exceptions, all the costs associated with the preparation of an application for a labor certification must be borne by the employer.[56] In addition, according to the regulation, evidence that the employer has sought or received an impermissible payment in this regard shall be grounds for an investigation and possibly denial of the application, revocation of the application, or debarment of the employer or its representative from the program.

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1. INA §212(a)(5)(A).
2. 20 C.F.R. §656.
3. 20 C.F.R. §656.17(g)(2).
4. It can be difficult to determine the maximum requirements permitted under O*NET, beyond which a "business necessity" justification would be required. While the O*NET job zones are based upon the SVP levels, there are many situations in which the O*NET and SVP level determinations, as interpreted by DOL, are inconsistent. An important area affected by this inconsistency is the determination of

"normal" requirements for positions classified by O*NET as belonging to job zone 4. A plain reading of O*NET suggests that a job zone 4 position would normally require 2-4 years of experience in the field beyond formal university education. Yet, as of the writing of this article, DOL has taken the position that requirements that go beyond a Bachelor's degree and two years of experience in the field (or a Master's degree with no experience) must have a business necessity justification.

5. The alternative requirements must be "substantially equivalent to the primary requirements of the job opportunity for which certification is sought." 20 C.F.R. §656.17(h)(f)(i). *See also Matter of Telcordia Technologies Inc.*, 2011-PER-02631 (BALCA Feb. 6, 2013).
6. This requirement has its genesis in the Board of Alien Labor Certification Appeals decision in *Matter of Francis Kellogg* 94- INA-465 (BALCA February 2, 1998), and has been codified in the PERM regulations at 20 C.F.R. §656.17(h)(4)(ii). There has been considerable confusion among immigration practitioners regarding the appropriate place on the application form to include this language. Some have suggested Item H.l1, others H.14, and others place it in both locations. At a conference of the American Immigration Lawyers Association in New York City on December 13, 2006, William Carlson, Chief of the U.S. Department of Labor's Division of Foreign Labor Certification, stated that Item H.14 was the correct location. Due to the lack of clear guidance as to where the "*Kellogg* language" should be stated on the application form, the Board of Alien Labor Certification Appeals (BALCA) has held that DOL may not deny an application for omission of the *Kellogg* language. *See Federal Insurance Co.*, 2008-PER-0037 (BALCA February 20, 2009). It is not clear whether DOL has adjusted its adjudication practices in accordance with this decision.
7. 20 C.F.R. §656.17(i)(3).
8. 20 C.F.R. §656.17(i)(5).
9. Prior to PERM, the subject of dissimilar job duties was a very complicated one defined in regulations and in various decisions by BALCA. PERM attempted to simplify the determination of the dissimilarity by reducing it to a simple percentage determination. *See* 20 C.F.R. §656.17(i)(5)(ii).
10. 20 C.F.R. §656.17(i)(3)(ii). In *Matter of Rooted & Grounded Nursery, L.L.C.*, 2010-PER-00253 (BALCA March 11, 2011), BALCA held that the employer relying on the "feasibility" argument must be able to demonstrate not only that it is no longer feasible for the employer to train, but that, in general, it is no longer feasible to train a worker to qualify for the position.
11. 20 C.F.R. §656.17(i)(4).
12. Until January 2010, prevailing wage determinations were made by the State Workforce Agency ("SWA") of the state in which the position was located. This responsibility was transferred to a centralized unit at the U.S. Department of Labor in Washington, D.C. as of January 1, 2010.
13. 20 C.F.R. §656.40(g). *See also*, "Employment and Training Administration Prevailing Wage Determination Policy Guidance, Nonagricultural Programs", Revised November 2009.
14. 20 C.F.R. §656.40(c). *See Matter of Karl Storz Endoscopy - America*, 201 l-PER-00040 (BALCA Dec. 1, 2011), an *en banc* decision that confirms the plain language of the regulation.
15. 20 C.F.R. §656.40(h); §656.41.
16. 20 C.F.R. §656.17(e)(l)(i)(A).

17. There are conflicting BALCA decisions on whether the SWA Job Order is subject to the content requirements of Newspaper advertisements. *See Matter of Chabad Lubavitch Center*, 2011-PER-02614 (BALCA July 29, 2013) and *Matter of IBM Corporation*, 2011-PER-00465 (BALCA Aug. 27, 2013).
18. 20 C.F.R. §656.17(e)(l)(i)(B).
19. The DOL has yet to publish formal guidance on the appropriate PERM advertising venue for roving employees. However, the DOL appears to continue to rely on its 1994 DOL Memorandum, "Policy Guidance on Alien Labor Cert. Issues," No. 48-94, (May 16, 1994).
20. BALCA emphasized the need to include travel requirements in the advertisement in *Matter of M-I, LLC*, 2011 PER-01256 (BALCA Aug. 23, 2012) and *Matter of Deloitte FAS*, 2011 PER-00342 (BALCA Mar. 29, 2012).
21. The DOL has taken the position that, where applicable, telecommuting benefits must be noted in the advertisement. *See Matter of Siemens Water Technologies Corp.*, 2011-PER-00955 (BALCA July 23, 2013) for a discussion of the way in which a telecommuting benefit can impact the geographic area described in the advertisement.
22. 20 C.F.R. §656.17(f).
23. In *Noll Pallet & Lumber*, 2009-PER-00082 (BALCA Dec. 16, 2009), BALCA held that a case should be denied where the advertisement, but not the Form 9089, noted the requirement of a "criminal and background check."
24. The term "professional journal" has been interpreted narrowly. Two April 2011 decisions held that *The Wall Street Journal* and *Computer* magazine, respectively, were not "professional journals" within the meaning of the regulation. See *Matter of HSBC Bank U.S.A., N.A*., 2010-PER-00655 (BALCA April 18, 2011) and *Matter of iFuturistics, Inc.*, 2010-PER-00631 (BALCA April 21, 2011).
25. 20 C.F.R. §656.17(e)(l)(ii).
26. Two 2009 BALCA decisions clarify that the additional recruitment steps are required for occupations listed in Appendix A, regardless of whether the employer requires a bachelor's degree. *See Matter of Skin Cancer and Cosmetic Dermatology Center, P.C.*, 2009- PER-00072 (BALCA June 23,2009); *Matter of The Good Shepherd of the Little Ones*, 2009-PER 00105 (BALCA June 23, 2009).
27. The plain language of the regulation implies that the three additional recruitment steps are not bound by the special requirements noted above for the Sunday newspaper advertisements. However, in *Credit Suisse Securities*, 2010-PER-00103 (BALCA Oct. 19, 2010), BALCA held that advertisements that run as part of the additional recruitment steps must also comply with those special requirements. A more recent case, *Matter of Globalnet Services, Inc.*, appears to disagree with *Credit Suisse*. See 2015-PER-00478 (BALCA February 17, 2017).
28. In *Matter of EZChip, Inc.*, 2010-PER-00120 (BALCA Jan. 12, 2011), BALCA discussed acceptable methods of documenting website postings. *See also* Office of Foreign Labor Certification Frequently Asked Questions and *Matter of DGN Technologies, Inc.*, 2011-PER-02935 (BALCA April 29, 2013).
29. *See Matter of Prithui Information Solutions, L.L.C.*, 2011-PER-01112 (BALCA Nov. 1, 2013) for a discussion of the definition of a "professional organization.".
30. For discussion of acceptable documentation of recruitment through a private employment firm, *see Matter of Unica Corporation*, 2010- PER-00006 (BALCA Feb. 9, 2011), *Matter of HSB Solomon Associates LLC*, 201 l-PER-02599 (BALCA Oct. 25,

2011), and *Matter of World Agape Mission Church*, 2010-PER-01117 (BALCA Mar. 23,2012).

31. The appropriate method of documenting an employee referral program has been the subject of extensive discussion and guidance. See Office of Foreign Labor Certification (OFLC), Frequently Asked Questions (FAQ), under Professional/Non-Professional No. 5 available at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm, *Matter of Sanmina-SCI Corporation*, 2010-PER-00697 (BALCA Jan. 19, 2011), and *Clearstream Banking*, 2009-PER-00015 (BALCA Mar. 30, 2010).
32. 20 C.F.R. §656.10(d).
33. Business days may include weekends if the employer is open for business on the weekends. *See II Cortile Restaurant*, 2010-PER- 00683 (BALCA Oct. 12, 2010).
34. *See* PERM FAQ at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm.
35. *See Matter of Thomas L. Brown, Associates, P.C.*, 2009-PER- 00347 (BALCA September 1, 2009). A salary range is also acceptable, however, it is important to note that the DOL currently takes the position that the lowest point of the range must meet or exceed the prevailing wage and the actual wage being offered. In practice, if a salary range is listed on the notice of filing, the same salary range should be offered on ETA Form 9089.
36. BALCA has rejected employer assertions that candidates were unqualified where the candidates met all of the requirements listed on ETA Form 9089. *See Matter of Petrobras America Inc.*, 2015-PER-00060 (BALCA January 26, 2017). In addition, if the resume suggests that the candidate may be qualified, the employer should interview the candidate. *See Matter of Xerox Business Services, LLC,* 2013-PER-00092 (BALCA January 27, 2017).
37. 20 C.F.R. §656.10(b)(2)(i).
38. *See* "Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR §656.10(b)(2)", U.S. Department of Labor Employment and Training Administration, Office of Foreign Labor Certification (August 29, 2008).
39. 20 C.F.R. §656.17(k). Employers who have had a recent layoff in the relevant occupation can expect DOL to carefully scrutinize the way in which they considered laid off U.S. workers for the position. *See Matter of Oracle America, Inc.*, 2015-PER-00308 (May 4, 2017).

    In addition, while the regulation only speaks of layoffs by the employer, some expect DOL to also look to industry-wide layoffs as it reviews the sufficiency and thoroughness of employers' recruitment efforts.
40. 20 C.F.R. §656.17 (g).
41. 20 C.F.R. §656.10(f).
42. In *Matter of A Cut Above Ceramic Tile*, 2010 PER-00224, (BALCA March 8, 2012) (en banc), BALCA held that no documentary evidence of the SWA posting was required, beyond the dates of posting listed on Form ETA 9089.
43. This standard is different than that of the basic recruitment process, in which the employer must demonstrate that it was not able to find applicants who met the minimum qualifications for the position. The fact that this particular candidate was more qualified than others is not normally a factor in the basic recruitment process under PERM. *See* 20 C.F.R. §656.18(b). *See also, Matter of East Tennessee State University*, 2010-PER-00030 (BALCA April 18, 2011), which held that a college or university recruiting for a teaching position may use the "more qualified" standard, even if it is conducting the basic PERM recruitment process.

44. DOL is planning to shift the online labor certification application process to its new web portal, icert, after which attorneys will be able to create accounts, without first being assigned user rights by an employer. However, as of this writing, the original system is still in place.
45. While this decision specifically revolved around the PERM regulations' rules on requests for reconsideration, it highlighted the problems inherent in the electronic system.
46. *See Matter of Sushi Shogun*, 2011-PER-02677 (BALCA May 28, 2013).
47. Initially, depending on the location of the position, PERM applications were processed at either the Atlanta National Processing Center or the Chicago National Processing Center. In June 2008, DOL centralized the processing of PERM applications in the Atlanta National Processing Center.
48. OFLC, FAQ.
49. OFLC, FAQ.
50. 20 C.F.R. §656.30.
51. 20 C.F.R. §656.24(e),(g).
52. 20 C.F.R. §656.20.
53. In cases where the beneficiary of the application has an ownership interest in the employer, has a familial relationship with the owners or management of the employer, or is one of a small number of employees, the Certifying Officer may request specific documentation in an audio in order to ensure that the job opportunity is, indeed, available to all U.S. workers. *See* 20 C.F.R. §656.17(1).
54. 20 C.F.R. §656.21. *See* PERM FAQS on Supervised Recruitment at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm. The DOL expects the Supervised Recruitment steps to be followed precisely. *See Matter of V & V Paint and Body, LLC,* 2013-PER-00682 (BALCA April 14, 2017).
55. DOL has made it known at professional conferences and stakeholders meetings that it has begun requiring supervised recruitment more frequently. Supervised recruitment is more time-intensive and expensive than standard PERM recruitment.
56. 20 C.F.R. §656.12.

NOTES

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The Law of Outlaws: Rules and Jurisdiction When Establishing an Out-Of-State Practice under Rule 5.5(D)(2) (March 27, 2017)

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THE LAW OF OUTLAWS:

RULES AND JURISDICTION WHEN ESTABLISHING AN OUT-OF-STATE PRACTICE UNDER RULE 5.5(D)(2)

By Kenneth Craig Dobson

Establishing an out-of-state practice in a jurisdiction where a lawyer is not admitted to practice is per se uncommon in the legal world—some might even say "outlaw"—before considering a federal area like immigration where multiple states and jurisdictions are at play regardless of the location of one's office.[1] ABA Model Rule 5.5(d)(2) specifically addresses this unusual issue, and it has been adopted in some form in many states[2]. The current version of ABA Model Rule 5.5(d)(2) states the following:

> (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that…(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.[3]

With any specific ethical requirement, one must determine which state has jurisdiction over the lawyer and which state's ethics rules apply. The applicable jurisdiction and rules may seem obvious, but making this determination is deceptively complex and significant—particularly so with respect to Rule 5.5(d)(2). A common assumption is that one who is licensed in only one state is subject to jurisdiction of the disciplinary authorities and must follow the ethics rules only of that state; however, ethics authorities in the jurisdiction where an out-of-state lawyer practices will likely look to their own rules when determining whether an office may be established there. But the analysis certainly doesn't end here. What follows is detailed analysis of how an out-of-state lawyer establishing an office in a state in which she is not licensed under Rule 5.5(d)(2) can determine jurisdiction for her practice as well as which rules to apply. It is not intended to provide precise answers to any particular situation, but rather to elucidate the level of analysis that must go into any such determination. It will also provide practical advice on how to proceed with the lack of clarity under the current system.

The author will also refer back to this brief hypothetical throughout this article: An out-of-state lawyer moves to a state that has adopted the current version of the model rules (The author will call this fictional U.S. state Yorkshire.) and establishes a federal immigration practice. She is licensed only in the state of New York. She represents clients on federal immigration matters throughout the United States. She strictly limits her practice[4] to that which is authorized[5] by federal law and regulations.

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[1] Though this article will focus on the rules that apply when an out-of-state immigration lawyer establishes an office, all immigration lawyers should be aware of these issues for three reasons: First, virtually all immigration lawyers engage in multijurisdictional practice to some degree and may be subject to the rules and jurisdiction of states other than where their offices are located. Second, all lawyers need to know the rules so that they can recognize when lawyers are engaging in unethical conduct or even the unauthorized practice of law (UPL). And third, the immigration bar should be aware of the rules so that they do not unfairly harass lawyers practicing lawfully, hurting noble efforts to combat true UPL.

[2] For more on this, see State Implementation of ABA MJP Policies (October 7, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

[3] MODEL RULES OF PROF'L CONDUCT R. 5.5 (2013). With respect to the ABA Model Rules, the author is referring to the rules as currently adopted by the ABA at the time of writing.

[4] Practicing in a state in which one is not licensed should only be considered by a lawyer willing to carefully research the applicable law, regulations, and state ethics rules and opinions. There is perhaps no area of legal ethics where so much is assumed while so little is known. Accordingly, a lawyer considering this practice must make sure that she is aware of the rules while at the same time considering the possibility that even state authorities may not fully understand or accept federal preemption.

AILA Doc. No 15051403. (Posted 3/27/17)

Federal Preemption and the Co-evolution of Rules 5.5 and 8.5[6]

The lawyer's practice in our hypothetical is strictly limited to that which is permitted under federal authority unless the specific conduct is authorized under some other provision of Rule 5.5[7]. Rule 5.5(d)(2) is essentially a state's acknowledgement of federal preemption as set forth in Sperry v. Florida, 373 U.S. 379 (1963). The court makes it clear that a lawyer (or even a nonlawyer) may practice law anywhere in the United States when federally authorized to do so. While the Court acknowledged that this authority is limited, it clearly did not intend for it to be so dissected as to prevent the practitioner from carrying out his or her authorized duties. In the Sperry case, there were no regulations defining the scope of practice for a Patent agent. But Footnote 47 states that "a practitioner authorized to prepare patent applications must, of course, render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license."[8] With regard to USCIS, both practice and preparation are defined in the regulations at 8 CFR 1.2. Whether or not such detail is outlined for practice before a particular agency or court, the bottom line is that lawyers are permitted to practice throughout the United States according to the their federal authorizations—no more, no less.

The lawyer in our hypothetical is authorized by federal law, not limited to work that involves knowledge of federal law only. For example, she may opine on Yorkshire laws in a brief submitted to the immigration court in that state.[9] However, preemption—and the specific section of Rule 5.5 acknowledging it, 5.5(d)(2)—would not even authorize something as simple as advising a client on how to get a Yorkshire driver's license after receiving her green card if that were to fall within the definition of practicing law in that state. Further, the lawyer in our hypothetical is not free to opine on any law simply because it is federal. This is just one example of the complexity of the rule and how it can lead to misunderstanding. This complexity can also be exploited by lawyers wishing to drive out competition, the apparent motivation in the seminal case itself, Sperry v. Florida.[10]

Model Rule 5.5(d)(2) provides clarity and a safe harbor[11] for an out-of-state lawyer who practices law in that state when federally authorized to do so. Comment 15 further clarifies that a lawyer may even establish an office in the state. Ironically, in what is almost a quid pro quo for acknowledging federal authority that already exists, Rule 8.5 allows a state to exercise jurisdiction over an out-of-state lawyer and may even require the lawyer to follow its rules. This article focuses on those corresponding aspects of Rule 8.5 and how they affect a lawyer practicing under Rule 5.5(d)(2).

Jurisdiction

There is no scenario in which a lawyer in the United States practicing federal immigration law is beyond the jurisdiction of state bar authorities.[12] Far from being beyond regulation, lawyers who practice in states where they are not licensed are often subject to the

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[5] With respect to practice before USCIS, 8 CFR 292.1 authorizes any U.S. attorney to practice immigration law. A U.S. attorney is defined as "any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law." Also, the Adjudicators Field Manual states at Section 12.1 that "[a]n attorney need not be admitted to practice in the state in which his or her office is located or where the applicant or petitioner resides…" There are specific provisions setting forth qualifications to practice before other government agencies, but it should suffice to say that 5 USCS § 500(b) sets the maximum qualifications required by all but one federal agency at bar membership in at least one state.

[6] This brief discussion on Rule 5.5(d)(2) is not intended to be a comprehensive analysis. Rather, it is intended to pique the reader's interest in the nuances of this multijurisdictional immigration practice and, more importantly for this article, to demonstrate how Rules 5.5 and 8.5 are connected and have evolved together.

[7] A careful review the applicable version of Rule 5.5 may reveal that a lawyer may practice beyond that which is federally authorized, a subject beyond the scope of this paper.

[8] Sperry v. Florida, 373 U.S. 379 (1963).

[9] See Philadelphia Bar Association Opinion 2005-14: "The Committee notes that oftentimes state law issues, for example domestic relations law, will have an impact on representation in an immigration matter. The inquirer is required by Rule 1.1 (Competence), if dealing with any of these questions to have sufficient knowledge of such law in order to provide competent advice. However, the inquirers involvement in such areas must be limited to advice and discussion on such matters as they impact the clients [sic] immigration matter and nothing further. Should the client request that the inquirer become more involved, to do so would place the inquirer in violation of Rule 5.5."

[10] See also Rittenhouse v. Delta Home Improvement (in Re Desilets), 291 F.3d 925 at 930 (6th Cir. Mich. 2002), stating that the "motivating force behind the controversy in Sperry," driving out competition, was the same as in Rittenhouse.

[11] As the Sperry v. Florida ruling made it obvious that a lawyer may practice anywhere in the United States when authorized by federal law to do so, the ABA considered omitting Rule 5.5(d)(2) altogether, but lawyers facing realities under the status quo needed more: "Because it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified, because at times they have been threatened with sanction for violating state UPL laws." American Bar Association Interim Report of the Commission on Multijurisdictional Practice, 28-29 (November 2001).

[12] But see Charles H. Kuck & Olesia Gorenshteyn, Immigration Law: Unauthorized Practice of Immigration Law In The Context of Supreme Court's Decision in Sperry v. Florida, 35 Wm. Mitchell L. Rev. 340 (2008). The article states that "[a]n attorney whose practice is not regulated becomes no better than a notario. Rules are set

authority of multiple jurisdictions and sometimes must follow the rules of different states on different cases. In order to demonstrate how this works, a comparison of Rule 8.5 of at least two different states—the licensing state and the state where the office is located—is required. It is sometimes necessary to evaluate the rules of other states as well. In this case, we will use the New York rules in addition to the ABA Model rules for demonstrative purposes.

The common assumption is that the out-of-state lawyer must follow the rules only of the state (or states) in which she is licensed. The argument is that since a lawyer's licensing state always retains jurisdiction over her and no other states can take away a license they have not issued, she is obviously only required to follow the licensing state's rules. However, care must be taken to separate the issues of choice of law and jurisdiction. Model Rule 8.5 addresses both, requiring a more complex analysis to determine which rules apply and also stating that a lawyer may fall under the jurisdiction of multiple states:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.[13]

The rules of Yorkshire, where her office is located, state that "a lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[14] Therefore, the lawyer in our hypothetical will clearly be subject to the jurisdiction of the state of Yorkshire.

The Yorkshire rules also allow for the possibility that she may be subject to the laws of another state: "A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct."[15] We must look to the rules in her licensing state of New York to determine whether she will also be subject to their jurisdiction, and New York Rule 8.5 makes it clear that she will:

> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

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for the legal profession not just to set minimum standards of conduct, but to protect the clients, who become the victims of unauthorized practitioners." Id at 358. This author respectfully disagrees with his esteemed colleagues because this conclusion fails to take into account that out-of-state lawyers are always subject to the jurisdiction and rules of at least one state. It never mentions that many states had formally acknowledged that out-of-state lawyers could establish federal practices within their borders as of its writing in 2008. There is no mention of the then-current ABA Model Rules 5.5 and 8.5. The article cites to the lower court's case (Rittenhouse v. Delta Home Improvement, Inc., 255 B.R. 294 (W.D. Mich. 2000)), which was overturned on appeal in 2002. (Rittenhouse v. Delta Home Improvement (in Re Desilets), 291 F.3d 925 (6th Cir. Mich. 2002). Additionally, it fails to mention that, with the exception of practicing before the U.S. Patent and Trademark office, lawyers licensed in at least one state are expressly permitted by federal law, not just regulations specific to certain agencies, to represent clients before federal agencies: "An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." 5 USCS § 500(b).

[13] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[14] Id.

[15] Id.

(2) For any other conduct: (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.[16]

New York Rule 8.5 states that a "lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs."[17] The New York rule, somewhat antiquated, does not even recognize the disciplinary authority of any other jurisdiction unless the lawyer is actually licensed there: "A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct."[18] The implication is that a New York lawyer admitted in no other jurisdictions would be subject to New York's jurisdiction alone. However, the New York rule does not expressly state that a lawyer admitted only in New York would not be subject disciplinary authority in other jurisdictions, and there is no express conflict between the rules. There is also a New York State Bar Association opinion on point:

A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct.[19]

While this opinion is on choice of law, it acknowledges that lawyers practicing as authorized under foreign law (and presumably under Model Rule 5.5(d)(2) in a different state) are "licensed to practice" for purposes of New York Rule 8.5. This further clarifies that the rules of Yorkshire apply, and the fictional state's rules clearly indicate that the lawyer would be subject to its jurisdiction. Therefore, from New York's perspective, the lawyer will likely be subject to the jurisdiction of both New York and Yorkshire.

From the perspective of the state of Yorkshire, the lawyer is clearly subject to the jurisdiction of both New York and Yorkshire, and it is possible she is subject to a host of other jurisdictions. Model Rule 8.5(a) states that a "lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[20] This lawyer provides legal services to clients who live in all 50 states. If, for example, she assists clients in Alabama with respect to a family-based adjustment of status, she might be subject to the jurisdiction of ethics authorities there. On the one hand, the actual work is being done at her office in Yorkshire. On the other hand, the clients who receive legal services live in Alabama and may never set foot in the state of Yorkshire, and the predominant effect of the lawyer's conduct may be in Alabama. It is possible that she may be deemed to practice in Alabama in such a scenario and therefore subject to Alabama's jurisdiction. There is little guidance on this point at present. However, certain states such as South Carolina, have adopted rules asserting jurisdiction over out-of-state lawyers who advertise there.[21]

Lawyers with nationwide federal immigration practices will certainly be subject to the ethics authorities in states in which they are licensed, probably subject to the jurisdiction of ethics authorities where their offices are located, and might even be subject to the jurisdiction of ethics authorities in any and all states where they represent clients (e.g. in immigration court), where their clients reside, or where they advertise. As a practical matter, the states most likely to exercise jurisdiction over the attorney would be the licensing states, those where offices are located, and those from which the lawyer accepts clients. The question is often raised as to how a state that has not formally licensed a lawyer may discipline her. Rather than formal disbarment, at least one state has "debarred" an out-of-state lawyer, preventing her from seeking admission to the bar of that state in the future and prohibiting advertising, solicitation, etc. in the future until certain conditions are met.[22] In addition, if a state where the lawyer is not admitted administers some form of discipline, it will report the matter to the lawyer's home state which can take further action.

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[16] N.Y. RULES OF PROF'L CONDUCT 8.5 (2010).

[17] Id.

[18] Id.

[19] NYSBA Opinion 815.

[20] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[21] Advertising and Solicitation by Unlicensed Lawyers, SCACR 418. Note that this is just one example of an additional set of rules outside the state's Rules of Professional Conduct governing lawyers' conduct. When researching rules and jurisdiction, your analysis should not end with the applicable Rules of Professional Conduct.

[22] SC Supreme Court Appellate Case No. 2014-001077 (2014).

If ethics authorities were to proceed against the lawyer in our example, it is important to know which rules would apply. While jurisdiction may vest in a number of different states, lawyers should ideally only be subject to one state's ethics rules for the same conduct.[23] Though only one state's rules should apply for the same conduct, it is not always clear which state's rules apply. Because Rule 8.5 is not uniform in every state, the very rules that determine which rules apply sometimes conflict. According to Model Rule 8.5, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."[24]

If the lawyer were to practice only within the borders of the fictional state of Yorkshire representing clients who reside in that state in transactional immigration matters, then the rules of the state of Yorkshire would apply. This is contradicted by New York's 8.5(b)(2)(i) which says that, other than in court proceedings, lawyers licensed only in New York will be subject only to New York's rules. Model Rule 8.5 states that the rules of the jurisdiction where the lawyer's conduct occurred shall apply unless the predominant effect is in another state. Though the rules conflict, the New York State Bar Association has opined that the law of the foreign jurisdiction applies when the lawyer principally practices there, unless the predominant effect is in New York:

> A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct. [25]

The opinion appears to refer to foreign jurisdictions, meaning foreign countries, but it is this author's opinion that the same policy would apply for New York lawyers practicing in other states as well. And it should be noted that a lawyer practicing out-of-state will still be expected to follow New York rules when the predominant effect is in New York. In most cases, this would mean following New York rules when immigration clients on non-court matters reside in New York. Furthermore, there are certain New York rules that its lawyers must follow no matter where they are in the world, such as those involving "honesty, trustworthiness or fitness as a lawyer."[26]

If the lawyer in our example never leaves the state of Yorkshire while representing clients outside the state (for example, in Georgia), then her conduct would likely be deemed only to occur in the state of Yorkshire. However, ethics authorities may consider the predominant effect of her representation to be in Georgia. Assuming Georgia has also adopted Model Rule 8.5, the Georgia rules may apply. This is true despite the fact that she has no office in Georgia, is not licensed there, and did not set foot in Georgia while representing the Georgia client.

What is more, determining the predominant effect may prove elusive. Fortunately, the New York State Bar Association (NYSBA) recently issued an opinion listing factors to determine predominant effect. They list four factors, which are apparently nonexclusive: "(a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate."[27] Reading this opinion and the New York Rules of Professional Conduct alone, one might come to the conclusion that New York lawyers could only be subject to the rules of states where the New York lawyer is formally licensed. However, reading the ABA Model Rules (applicable in the fictional state of Yorkshire) in conjunction with NYSBA Opinion 815, it is clear that one can be deemed "licensed" for purposes of determining which state's rules apply.

Our hypothetical lawyer may not only be subject to the jurisdiction of all 50 states with a nationwide practice, but also she might need to know the ethics rules in all 50 states! As a practical matter, I am not aware of any lawyers who maintain familiarity with the ethics rules in all 50 states so that they can change their conduct according to where their clients are located. Such practice would likely have a paralyzing effect on lawyers who can legally practice throughout the United States under federal preemption. Comment 14 in the Preamble to the Model Rules states that the "Rules of Professional Conduct are rules of reason."[28] Under this basic premise, it is this author's opinion that the drafters never intended to impose such an unreasonable burden on those who engage in nationwide federal practice. The Model Rules acknowledge federally authorized practice, providing safe harbors for practitioners who once relied

[23] Comment 6 of ABA Rule 8.5 states that: "[i]f two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."

[24] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[25] NYSBA Opinion 815.

[26] NYSBA Opinion 815.

[27] NYSBA Opinion 1027.

[28] ABA Model Rules Preamble, Comment 14.

only upon court rulings such as Sperry v. Florida[29], but they are a work in progress and need to evolve further to accommodate this reality.

Possible Approaches to the Choice-of-law Problem

There is no simple solution to this complex issue, but the two part approach outlined here provides protection for lawyers as the rules lag behind the realities of modern immigration practice. Almost all immigration lawyers have some form of multijurisdictional practice, though they might not be aware of the extent of it. For this reason, it is wise to follow what I will call the "conservative consensus" with respect to ethics decisions. Following the conservative consensus would mean taking actions that are in conformity will all states' ethics rules, thereby avoiding running afoul of the rules of any state in particular. For example, nonrefundable retainers are allowed in some jurisdictions, but are expressly prohibited in others.[30] Whether or not they are allowed, they are becoming increasingly frowned upon throughout the United States.[31] The conservative consensus would require that nonrefundable retainers be avoided so that a lawyer following this rule would not break the rules of any state. A possible problem with this is that one state's rules may require a certain action while another's may specifically prohibit it, making it impossible to act in a manner that would be permissible under any states rules. Another problem with this approach is that it is hard enough to follow the rules in just a few states (including ethics opinions, etc.), much less the rules of all 50 states. Though this approach may seem altogether outlandish, it is quite clear that many multistate firms apply this approach with regard to their websites, for example, with a long list of disclaimers, etc. required by various jurisdictions. If one hits the pause button on the DVR during national law firm TV advertisements (and one's TV is large enough), it is possible to read the lengthy fine print attempting to comply with the rules of multiple jurisdictions at once. At a minimum, lawyers with national practices should seek to find this conservative consensus whenever possible to minimize risk. Avoiding clearly controversial actions like nonrefundable legal fees is advisable. A possible long range solution would be for the creation of a written "conservative consensus," similar to the Restatement of the Law Governing Lawyers, but different in that it would rewrite the rules in such a way as to allow a lawyer to conform with all rules nationwide, with special notations where it is impossible to conform with all rules at once.

The second part of the solution is to stipulate which rules will apply in the engagement letter. Comment 5 to Rule 8.5 of the Model Rules provides this as a possible solution in certain circumstances:

> When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.[32]

Simply following the rules of the only state in which one is licensed or where one's office sits may not meet the standard of reasonable belief of where the predominant effect is. However, Comment 5 allows for a lawyer to stipulate in writing the rules that shall apply to the representation to clarify the lawyer's reasonable belief under paragraph (b)(2) of Rule 8.5.

It is likely that New York would maintain that its rules apply when immigration matters are handled for clients in New York[33], regardless of where the New York lawyer does the work. It should be noted that New York's predominant effect clause only allows for the application of rules in states where the effect is clearly in another state. It does not contain the reasonableness standard[34]. Since many other states, including our fictional state of Yorkshire, have adopted the Model Rule's "reasonable belief" standard, it may be advisable for the lawyer in our hypothetical to apply the New York rules when it is arguable that New York's rules apply. And clearly, it

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[29] Sperry v. Florida, 373 U.S. 379 (1963).

[30] Nonrefundable fees are expressly prohibited under New York rules. See N.Y. RULES OF PROF'L CONDUCT 1.5(d)(4) (2010). Apparently, one may continue to classify a fee as nonrefundable under the South Carolina rules. See S.C. RULES OF PROF'L CONDUCT 1.5 (current version as of the date of publication of this article).

[31] While South Carolina rules do not prohibit nonrefundable fees, fees classified as such are nonetheless refundable when reasonableness requires it. See S.C. RULES OF PROF'L CONDUCT 1.16, Comment 9. In 2012 the Supreme Court of South Carolina added very specific requirements for advanced fees, including nonrefundable retainers, deposited directly into ones operating account. See SC Supreme Court Appellate Case No. 2011-198067 (2012) and S.C. RULES OF PROF'L CONDUCT 1.5(f). This is both an example of the growing disfavor of nonrefundable fees and the need to know which rules apply when rules are unusually specific with their requirements.

[32] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[33] See NYSBA Opinion 815.

[34] See NYSBA Opinion 1027.

would be inadvisable for a lawyer to try to stipulate that the rules of a state that has no nexus to the representation (whether it be the client, lawyer, adjudicative body, etc.) apply simply because he perceives those rules to be permissive.

For the hypothetical in this article, the lawyer might include the following language in her engagement letters: "The parties (lawyer and client) agree that the Yorkshire Rules of Professional Conduct shall apply to this case."[35] Given the less forgiving language in the New York rule, the lawyer should probably err on the side of stipulating that the New York rules should apply to the representation. It should be noted that lawyers apparently cannot stipulate which rules apply when it involves representation before a tribunal under the ABA Model Rules or a court under the New York rules.

Representing Clients Before Tribunals

The above analysis only covers the scenario in which the lawyer represents clients on transactional matters from within the borders of the fictional state of Yorkshire as authorized by Rule 5.5(d)(2). The Model Rule says that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits [apply], unless the rules of the tribunal provide otherwise."[36] The definition of tribunal is technical and requires careful reading of the applicable rule(s). The Model Rules define a tribunal as:

> a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.[37]

An immigration court is clearly a tribunal under the definition in the Model Rules. This means that under the Model Rules a lawyer licensed in one state, with an office in another, must follow the ethics rules of a third state if the immigration court she is appearing in is located there. This means that our New York lawyer must follow the Massachusetts Rules of Professional Conduct[38] when she represents clients in immigration court there. The New York rules, using the word "court" instead of "tribunal," might ordinarily provide otherwise, but Yorkshire rules would generally apply as this is where the lawyer has her sole office and likely deemed "licensed" there for any authorized practice for choice of law purposes.[39] And if the case were to be appealed to the Board of Immigration Appeals in Falls Church, VA, then she would be subject to Virginia's rules.[40] If the case were then appealed to a federal circuit court, it is likely that that court would specify which rules apply.[41] While all this might seem counterintuitive at first, it does make sense that lawyers on each side of a case have to follow the same rules.

It is the author's opinion that immigration service centers or field offices are not tribunals.[42] This is because the officers are not neutral, among other reasons.[43] Rather, they act as both judge and prosecutor in any given case. This should come as a relief to immigration lawyers who file cases with USCIS throughout the United States. To continue with our example of the New York lawyer

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[35] While immigration lawyers who have offices only in states in which they are licensed might only occasionally use such agreements when the predominant effect is unclear, out-of-state lawyers with offices under Model Rule 5.5(d)(2) might use them on a regular basis to increase the likelihood that the rules they have chosen to follow would be applied by ethics authorities. On the other hand, even in-state lawyers with clients nationwide (or even worldwide) might consider whether it would be wise to use such an agreement routinely.

[36] MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013).

[37] MODEL RULES OF PROF'L CONDUCT R. 1.0 (2013).

[38] Assuming Massachusetts follows Model Rule 8.5. Rules 8.5 of the various jurisdictions involved must be consulted and compared in order to determine which rules apply.

[39] See NYSBA Opinion 815.

[40] Assuming Virginia follows Model Rule 8.5. See also comment 17.

[41] For example, Southern District of Georgia Local Rule 83.5(d) states that the "standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Bar Rules of Professional Conduct shall control. A violation of any of these rules in connection with any matter pending before this Court may subject the attorney to appropriate disciplinary action." This is a rare example where the ABA Model Rules actually do apply; however, they must give way to Georgia rules where there is a conflict.

[42] It should, however, be noted that there is disagreement on the issue. Beyond the clarity provided by the plain meaning of the definition of tribunal in the ABA Model Rules, the NYSBA makes a strong argument in Opinion 1011 that service centers and field offices are not tribunals. However, the opinion cites several court opinions that have reached contrary conclusions. The opinion points out that, in each case cited, either the lawyer did not dispute the issue or the court provided no explanation as to why it reached its conclusion. Even Hazard & Hodes state, "without citing authority, 'Rule 3.3(d) applies to such matters as applications before the Patent Office and other ex parte presentations')." NYSBA Opinion 1011 (quoting Hazard & Hodes, The Law of Lawyering § 29.3, at 29-7 (2007 Supp.)).

[43] See NYSBA Opinion 1011. The opinion addresses practice before immigration agencies specifically and concludes that "visa and work permit proceedings" do not constitute tribunals.

practicing in Yorkshire, the Yorkshire rules would generally apply if she is representing Yorkshire clients on a case filed at a USCIS service center. If she were to represent a client who lives outside the state of Yorkshire, then the predominant effect analysis would be required.

Long Term Solution

Sometimes knowing which rules apply is about as clear as mud. But this does not absolve lawyers from making reasonable efforts to identify which rules apply and following them. The complexity and lack of clarity revealed in this article of which rules apply in federal immigration practice demonstrates the need for a long term solution to this problem. For this reason, this author suggests the following answer: Government agencies such as USCIS and EOIR should state that any immigration practice before those agencies should be governed by the current version of the ABA Model Rules. Immigration practice is already governed by some basic rules[44]. But these rules alone are not complete and this author is not aware of any states having considered them to be so comprehensive as to occupy the field of ethics rules governing practitioners. Federal regulations should be changed to clearly state that they are intended to "occupy the field" and preempt state ethics rules. State authorities would still retain jurisdiction[45], but they would be required to consistently use the Model Rules as the law to be applied for federal immigration cases. Rather than each agency having to rewrite its own set of rules, this would provide a full set of rules and clarity to lawyers. With all the complexity faced by lawyers brave enough to practice in this esoteric field, at least having clarity on the rules to be followed would provide welcome relief.

But for now, lawyers must review all the various choice of law rules to determine which state's rules apply. And whenever possible, the parties should stipulate which state's rules will apply in the engagement letter. One otherwise risks being an "outlaw" with potentially hazardous consequences.

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This ethics article is written by Kenneth Craig Dobson as part of the 2014-15 AILA National Ethics Committee and published by the AILA Practice & Professionalism Center.

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[44] See 8 CFR 292.3 and 8 CFR 1003.101 – 1003.109.

[45] See 5 USCS 500(d).

AILA Doc. No 15051403. (Posted 3/27/17)

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Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval (September 29, 2017)

Kenneth Craig Dobson

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AMERICAN
IMMIGRATION
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Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval

By K. Craig Dobson

A few years ago, a friend asked me to represent her on a DUI charge. I had never handled a criminal case, and I really didn't know where to begin. I asked some experienced colleagues for help, and they emphatically recommended a book by Bubba Head, one of the best DUI attorneys in the state of Georgia and possibly the United States. I bought the book and read it, and then asked follow-up questions of my colleagues. I asked one lawyer about the procedure that he used to test the equipment at the police station that measures blood alcohol content. The colleague laughed and said that nobody really did everything that Bubba recommended in his book. In what seemed to be his way of justifying the fact that he had never tested the electrical systems, etc. at the police station, he said that this would likely just make some people mad, namely the judge and the prosecutor, and ultimately hurt not only this client, but also my reputation and thus future clients. And further, local lawyers could not charge the fees that Bubba was rumored to have charged so it was not economical to put in this level of time and effort. Though the book was universally recommended by colleagues, they apparently did not intend for me to follow Bubba's advice *that* closely.

This raises a number of issues that are also applicable in the immigration context, particularly in immigration court. In this era of immigration upheaval, lawyers need to know how far they *can* go and how far they *should* go in representing their

clients. In this writing, I will argue that the answer lies not only in the applicable ethics rules and laws, but also resides within each individual lawyer.

The ethics rules require that we diligently and competently represent our clients, relegating the "zealousness" language to the comments and the preamble.[1] (The preamble to the federal rules does, however, state that nothing in those rules is intended to relieve the lawyer of her duty to zealously represent her client.[2]) Without the express requirement of zealousness, perhaps the first question we should ask is whether an immigration lawyer *should* represent her client with zeal. Professor Elizabeth Keyes, in her salient article, *Zealous Advocacy: Pushing the Borders in Immigration Litigation*,[3] answers the question with a resounding "yes" when it comes to clients in immigration court proceedings. She argues that the odds are stacked against the immigrant, and zealous representation is one of the few things we can do to make sure that justice is done. But other lawyers may disagree with this "client-centered" approach, espousing a different "philosophy of lawyering," or more specifically, "philosophy of practice."[4] Professor Nathan Crystal, in his groundbreaking work, *Developing a Philosophy of Lawyering*,[5] delineates several different philosophies of practice that a lawyer may adopt. Professor Keyes' philosophy of practice would clearly fall within the category of what I believe Professor Crystal would call "client-centered."[6] While it is doubtful that most lawyers practice in a "client-centered" way[7], I firmly believe that that is the aim for most of us in the profession. I would also guess that most lawyers feel that this is in fact the *only* way there is to practice—as a "client-centered," "hired gun." With this as the only acceptable goal, lawyers can become overwrought with guilt and dissatisfaction for falling short. But in fact, the ethics rules give us a lot of latitude. By developing a philosophy of lawyering, lawyers can—within the scope of applicable laws and ethics rules—define for themselves a way of practicing law that is consistent with their long-term vision for their lives and their values. This will lead to increased contentment among lawyers within the profession, with the ensuing benefits passed along to clients. And clients will benefit as well by receiving clear articulations of lawyers' philosophy of practice so that they can make informed decisions about which lawyer to hire. In fact, Professor Crystal argues that such disclosure should be required.[8] The goal of this writing is to briefly introduce lawyers to the concept of a philosophy of practice, to illustrate by way of example how various philosophies might play out in immigration practice, and to demonstrate the benefit to both lawyers and clients of such an organized approach to discretionary decisions within the practice of law.

Professor Crystal delineates philosophy of practice into four main categories: a self-interested philosophy of lawyering, a morality-based philosophy of lawyering, a philosophy of lawyering centered around institutional values, and a philosophy of lawyering that is client-centered.[9] The range of various philosophies of practice is broad and the subject of a great deal of legal scholarship.[10] Additionally, one's philosophy of practice need not fit neatly into one of the categories, but may instead be

1 See generally ABA Model Rules of Professional Conduct. The word "zealous" does not appear in the text of the rules.
2 "Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law." 8 CFR 1003.102.
3 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3. Available at: http://scholarship.shu.edu/shlr/vol45/iss2/3.
4 The concept of "philosophy of lawyering" is broad and encompasses a lawyer's work/life balance, involvement in the development of the profession, and the practice of law itself. See generally Nathan M. Crystal, *Using the Concept of a "Philosophy of Lawyering" in Teaching Professional Responsibility* (2007) 51 St. Louis U.L.J. 1235 (2007). This article focuses on the latter, what Professor Crystal calls "philosophy of practice," defining it as "that part of a lawyer's overall 'philosophy of lawyering' that focuses on a lawyer's philosophy in making discretionary decisions in the practice dimension." *Id* at 1241.
5 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75 (2000).
6 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 St. Louis U.L.J. 1235 at 1245.
7 Professor Crystal notes that "[s]ome empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the conduct of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 88 (2000).
8 Professor Crystal states that "[c]lients…are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 94 (2000).
9 Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245 (Chart 3).
10 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1251.

a complex combination of various aspects of each.[11] This brief hypothetical will help illustrate how a philosophy of practice may influence a lawyer's decisions in real life.

Hypothetical

In order to show contrast among various philosophies of practice, including the client-centered approach advocated by Professor Keyes, I will use a question she addresses in her article: "Have you EVER committed a crime or offense for which you have not been arrested?".[12] Assume that, while completing Form I-918 for a client who is in removal proceedings, he reveals to a lawyer that he has committed several crimes. He admits to stealing a watch on his 18th birthday and he tells the lawyer that he frequently jaywalks. He further states that his lawyer must, of course, keep these facts a secret. The I-918 petition for U status is the only defense the client has in removal proceedings. With this brief example, I will begin by analyzing how a self-interested philosophy of practice might look in the immigration context.

A Self-Interested Philosophy of Lawyering

After careful consideration, lawyers might decide that they will generally exercise any discretion they may have in favor of themselves.[13] To avoid potential ethical entanglements, the lawyer follows a self-interested approach to discretionary decision-making. He tells the client that he cannot proceed without disclosing these offenses on the I-918. He further tells the client that he must conduct research to determine whether stealing the watch was in fact a crime involving moral turpitude and whether it is subject to the petty offense exception under INA § 212(a)(2)(A)(ii)(II). The self-interested lawyer charges a high, but reasonable, hourly rate and tells that client that this will cause the legal fee to increase substantially. If the petty offense exception applies, then the client will then have to disclose the shoplifting offense on his I-918 and the lawyer will draft a brief to USCIS explaining how the petty offense exception applies, again adding to the already substantial legal fee. The self-interested lawyer might then explain that other lawyers disagree with the duty to disclose prior offenses and that the client is free to seek the opinions of other lawyers.[14]

While such an approach may seem absurd and extremely prejudicial to the client at first, a closer look may reveal that this actually benefits the client in the long run. If the petty offense exception does apply, then the client could disclose the shoplifting (and perhaps include some general statement that says he jaywalks on a regular basis and cannot recall every offense). If the petty offense exception does not apply, then a waiver could be filed. Perhaps there is a small chance that someone witnessed him shoplifting or that he bragged to his friends about doing so. If the client is successful with his petition, he would never again have to worry about his failure to disclose. If one of these people contacted USCIS to report the shoplifting or perhaps turned the client in to local authorities, this would not give rise to his losing his status and once again facing proceedings.[15]

11 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245.

12 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2, Article 3 at 532 quoting I-918, Petition for U Nonimmigrant Status, at 3, U.S. Citizenship and Immigration Services, available at http://www.uscis.gov/i-918 (last visited Feb. 28, 2015).

13 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1244, 1245.

14 ABA Model Rule 1.3 requires the lawyer to act with "reasonable diligence and promptness," and Comment 1 says the "lawyer must…act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." But the comment further states that a "lawyer is not bound, however, to press for every advantage that might be realized for a client."

15 The disclosure per se may lead to criminal charges being initiated. As this is a serious consequence under criminal law, it may be wise to insist that the client consult with criminal defense counsel if this is beyond the scope of the lawyer's engagement.

If the client insisted on not revealing the shoplifting on his application, the immigration lawyer might seek leave to withdraw from the case, citing a breakdown in the lawyer/client relationship. In the event that the judge were to deny the motion, the lawyer would have no choice but to continue with the representation pursuant to ABA Model Rule 1.16 and applicable federal rules. As the I-918 is filed with USCIS, it might be possible for the lawyer to limit the scope of his representation and insist that the client hire separate counsel for the U petition, but this would nonetheless require substantial cooperation of the client.

The self-interested lawyer would be unlikely to propose checking the "no" box on Form I-918 as this may increase the risk of violating ABA Rule 4.1 or 3.3.[16] Furthermore, an "overzealous" prosecutor might even seek criminal charges against a lawyer pursuing this option, making this an even more unlikely choice for the lawyer who has adopted this philosophy of practice.[17]

A Morality-Based Philosophy of Lawyering

Under a morality-based philosophy of lawyering, "lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do."[18] Under this philosophy, lawyers cannot claim that they are merely a "hired gun" and that they are not morally responsible for their actions so long as they comply with laws and ethics rules. Of course, one problem with a morality-based philosophy of lawyering is that moral values are subjective.[19] This problem also makes it more difficult to demonstrate how this rule might apply. Honesty would be a moral value that presumably all lawyers would consider important, but their interpretation of the technical aspects of the I-918 question under discussion may vary. In our example involving the I-918, one lawyer may interpret their duty of honesty, based upon religious or moral values, to require him to either withdraw from the case or convince the client to proceed checking the "yes" box. Another might value honesty as much as the first, but interpret this differently within the context of his overall obligation to serve his client and the technical interpretation of the question. Assume that his client is from Honduras. The lawyer might consider his obligation to interpret any gray area in favor of his client, given the risk that his client might otherwise face returning to Honduras—a small country where he would face grave danger—in the future. The lawyer may be concerned that his client stole an expensive watch and committed a crime that is not covered under the petty offense exception, is punishable by at least a year in jail, and therefore is subject to a waiver for which there is no guarantee of approval. The lawyer might consider the Judeo-Christian value of welcoming the stranger to compel him to interpret the gray area in favor of helping his client remain here and avoid the suffering he would face in Honduras. As justification for his action, he might interpret the question on the I-918 as overly broad, unfair, and decide that honesty does not require checking the "yes" box. (A detailed discussion to follow under the "client-centered" section.)

16 The lack of clarity as to whether Rule 3.3 or 4.1 applies in this situation provides another good example for analysis of philosophy of practice. Beyond the clarity provided by the plain meaning of the definition of tribunal in the ABA Model Rules, the NYSBA makes a strong argument in Opinion 1011 that service centers and field offices are not tribunals. However, the opinion cites several court opinions that have reached contrary conclusions. The opinion points out that, in each case cited, either the lawyer did not dispute the issue or the court provided no explanation as to why it reached its conclusion. Even Hazard & Hodes state, "without citing authority, 'Rule 3.3(d) applies to such matters as applications before the Patent Office and other ex parte presentations')." NYSBA Opinion 1011 (quoting Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.). It is likely that the client-centered lawyer would consider Rule 4.1 to apply when there is a lack of clarity as to whether a previous statement need be corrected. The self-interested lawyer would be more likely to err on the side of considering service centers "tribunals" for purposes of Rule 3.3.

17 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf.

18 Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242.

19 Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 90 (2000).

An Institutional Values-Based Philosophy of Lawyering

Those concerned about the subjective nature of a "philosophy of morality" might instead choose a "philosophy of institutional value." There are many complex theories espoused by ethics scholars, and a detailed analysis of each is beyond the scope of this writing.[20] For illustrative purposes, I will use Professor Crystal's more general definition of a "philosophy of institutional values" as "approaches based on social or professional values or norms rather than principles of morality."[21] In this case, a lawyer might argue that, after long and deliberate consideration, the law has been drafted to take crimes involving moral turpitude seriously. Federal regulations give form instructions great weight, and this would presumably extend to answering every question on the forms.[22] Though regulations are not passed by elected officials, they are promulgated after notice to and comment by the public. He might then decide that it makes sense that the lawyer's own moral views are subjugated to those of the state.[23] He might decide that the question should be answered in the affirmative in our example because the shoplifting offense is clearly the kind of thing the drafters were looking for.[24] In Professor Keyes' words, "[p]erhaps answering yes shows respect or even some awe for the legal system, the same system that drew the lawyer into the profession in the first place."[25]

A lawyer who follows an institutional values-based philosophy would likely have faith in "the system," believing that the laws and courts are essentially fair and just. A lawyer who finds our current laws and court system to be deeply flawed and in need of dramatic change would be less likely to choose such a philosophy. On the other hand, a lawyer might express his views that the system needs change (and even work toward making the change happen) while at the same time believing that in gray areas his personal code of ethics must give way to institutional values until such change occurs. To give an analogous political example to illustrate the point more clearly, it is widely known that John McCain has sometimes voted to confirm certain Presidential nominees who he would not have chosen personally and who might work against some of the laws and policies he believes to be important. Citing the maxim that "Elections have consequences," he might vote to confirm such a candidate so long as he or she is competent.

A Client-Centered Philosophy of Practice

Using a client-centered philosophy of practice, the lawyer would "take any action that will advance the client's interest so long as the action does not clearly violate a rule of ethics or other law (the principle of professionalism)."[26] Professor Keyes argues forcefully that such a philosophy be adopted by all immigration court lawyers, given the gravity of the matters before the tribunal and the unfairness under current regulations and laws.[27] With regard to answering in the affirmative on the broad question posed on the I-918, she argues that "the defensible path of saying 'no' even when possibly the truth is 'yes,' is

20 For an overview of some important philosophies of institutional values, see Nathan M. Crystal, " *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242-1244.
21 Professor Crystal notes that "philosophies of morality and institutional values are not inconsistent because institutional values often embody moral principles." Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1242, 1243.
22 See 8 CFR 103.2(a).
23 Perhaps this line of thinking most closely aligns with Professor Brad Wendell's philosophy of lawyering briefly outlined by Professor Crystal. Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1243, 1244.
24 The drafters of the form are apparently fishing for an admission under INA § 212(a)(2)(A)(i), though certain responses may lead an officer to believe the client is a "drug abuser or addict" under INA §212(a)(1)(A) or give them "reason to believe" that the client "is or has been an illicit trafficker in any controlled substance…" under INA §212(a)(2)(C)(i).
25 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
26 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 *St. Louis U.L.J.* 1241.
27 See generally Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532, FN 268.

a choice made by the zealous advocate."[28] But she admits that "for the risk-averse among us, this choice comes dangerously close to a collision with duties to the legal system."[29] As immigration lawyer and ethicist Cyrus Mehta points out in his article on the subject in the negative could lead to problems with "an overzealous prosecutor or bar investigator," but he also provides an in-depth illustration of just how complicated and unclear the matter really is.[30] The Board of Immigration Appeals (BIA) has held that "a valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms."[31] The argument that some make is unless the client has been presented with the law under these terms, he or she cannot possibly answer the question in the affirmative. This might then lead one to the conclusion that in practice only a criminal defense lawyer might be required to check "yes," as only they would know all the essential elements of the crime. But there might exist the rare circumstance in which an individual might have officially made a previous admission before a government official, thereby satisfying these requirements and necessitating an affirmative answer. And a lawyer might further argue that if this question were to be interpreted as a broad "catch all," then virtually everyone would have to check the "yes" box. The lawyer could argue that the government must be aware that most lawyers and foreign nationals who prepare these forms do not interpret the forms in this broad manner. Otherwise, nearly everyone—almost certainly those who drive automobiles—would be answering "yes" to the question and explaining that they have broken traffic laws (often misdemeanors under state law) countless times and have possibly committed other crimes that they were not even aware of. Perhaps the most compelling argument of all in the context is that "guilt" with respect to a particular crime is a legal term. Checking the "yes" box when a client has not been convicted according to INA Section 101(a)(48)(A) essentially involves the client's own lawyer assuming the role of both judge and jury with respect to the conduct in question.[32] Furthermore, checking the "yes" box could lead to fundamentally unfair results for those who were never charged with a crime. Assume the client checks the "yes" box, though his conduct was never called into question by authorities. This might then lead to further inquiry by immigration officials and an official admission under INA 212(a)(2), ultimately resulting in a finding that he is "inadmissible" under immigration law. Another client who has done the same thing is charged with shoplifting, which ultimately results in "pre-trial intervention" (PTI). The client makes no formal admission, completes a program under state law that allows him to avoid jail time, and avoids a final disposition that qualifies as a conviction under INA 212(a)(2). He checks the "no" box to the "Have you ever committed a crime or offense…" question and provides a copy of the certified original disposition showing successful completion of PTI in response to another question on the form, asking whether he has ever been arrested or charged with a crime. No further questions are asked of this client, and he is not found inadmissible. This provides strong support for the lawyer who checks the "no" box in our hypothetical situation, but serious risks remain, which is why this option would likely only be selected by the client-centered lawyer.

The self-interested lawyer works to minimize his personal risk and prioritizes himself when representing his client. The morality-based lawyer prioritizes her personal ethical system. The lawyer who adopts an institutional values approach prioritizes the broader ethical system of the whole over that of the individual. But the truly client-centered lawyer prioritizes the client above all else.

28 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
29 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.
30 Cyrus Mehta, *Crime Without Punishment: Have You Ever Committed A Crime For Which You Have Not Been Arrested?*, at http://blog.cyrusmehta.com/CyrusMehta/wp-content/uploads/wp-post-to-pdf-enhanced-cache/2/crime-without-punishment-have-you-ever-committed-a-crime-for-which-you-have-not-been-arrested.pdf (last accessed July 5, 2017).
31 Matter of K, 7 I&N Dec. 594 (BIA 1957).
32 See Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532.

Developing Your Own Philosophy of Practice

Every lawyer should formally draft her or his own philosophy of practice.[33] You have a philosophy of lawyering whether you are aware of it or not.[34] If you are not aware of it, then your clients probably do not know what it is either. Develop a written philosophy and hone it through time. This allows you to clarify your thoughts and can be an invaluable guide when making difficult decisions. Professor Crystal makes several suggestions as to how lawyers might provide their philosophy of lawyering to clients. I strongly support lawyers providing a philosophy of practice (or better yet, their more comprehensive philosophy of lawyering) to their clients because this allows the client to make an informed decision about who to hire, but I stop short of suggesting this as a requirement. A lawyer's website would be the ideal place to post this and reference to it in the engagement letter would be a good idea.[35] While it would seem likely that a client would only choose a lawyer with a client-centered practice, there are plenty of examples in which a client might prefer a different kind of lawyer. An evangelical Christian might choose a lawyer who makes her discretionary decisions based upon the guiding principles of her religion. A lawyer who espouses a philosophy of practice based in institutional values might, out of respect for the rule of law, develop a deep understanding of her field of practice and thus provide outstanding legal representation to her clients. And a client might choose to hire a lawyer despite her having a more of a self-interested philosophy of practice, provided she has stellar track record of success.

Lawyers also benefit from having a philosophy of practice. It is this lawyer's opinion that many lawyers are unhappy with their work because they are not living in a manner that is consistent with their vision and values. Developing a written philosophy of lawyering can help the lawyer along the path to greater career satisfaction. Those who work as employees may decide to quit their job and work someplace else or start their own firms. Others might decide to change the way they practice. And as immigration lawyers face increasingly more difficult ethical decisions, a formal, written philosophy of practice can serve as the bedrock upon which these decisions are made. The hypothetical in this article provides one such example.

Immigration lawyers should not only know the immigration laws, but also the criminal statutes that could possibly affect their clients and them.[36] And to effectively represent our clients, we must know the ethics rules inside and out. Put another way, every lawyer should be an expert in the Rules of Professional Conduct, including the comments thereto. Lawyers must be keenly aware of the rules that do not allow for discretion,[37] and they must exercise clear and sound judgment as to the boundaries of discretion.[38] Now more than ever, lawyers need a set policy to guide them in discretionary matters, and clients deserve to know how their lawyers will handle these issues before hiring the lawyer. Developing a formal philosophy of practice is a way to achieve this.

33 See Nathan Crystal's articles on the subject.
34 "Because discretion is so pervasive in the practice of law, lawyers develop, either thoughtfully or haphazardly, a general approach for making these decisions." *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 75 (2000).
35 See *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 97 (2000).
36 Cyrus D. Mehta and Alan Goldfarb, *Up Against a Wall: Post-Election Ethical Challenges for Immigration Lawyers*, Jan. 11, 2017, (AILA Doc. No. 17011200).
37 For example, a lawyer may not charge a contingency fee in a criminal case or certain family law matters. See Rule 1.5(d).
38 See, for example, the reasonableness requirements of ABA Model Rule 1.7.

NOTES

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Craig Dobson, Susan Church and Byron M. Large, Practical and Ethical Considerations in Detention Cases (November 16, 2020)

Submitted by:
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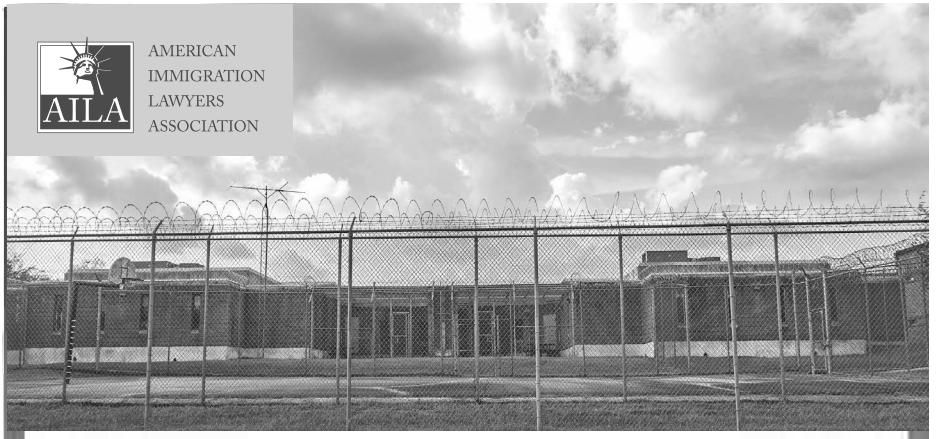

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practical and Ethical Considerations in Detention Cases

By Craig Dobson[1], Susan Church[2], and Bryon M. Large[3]

Working with detained clients in removal defense cases can present unique ethical concerns and dilemmas. Among those concerns are appropriate communication with clients in detention, identifying when a client's capacity may be diminished, and maintaining confidentiality. Navigating these issues is important for adhering to disciplinary rules, maintaining high standards of professionalism, and avoiding allegations of malpractice. This article addresses some of the practical and ethical concerns in representing detained clients, including updated information related to the COVID-19 pandemic.

Ethical Considerations Relating to COVID-19

While the bulk of this article was originally written prior to the COVID-19 crisis, there was a clear need for adding a section to address COVID-19 because of the widely varying ways detention facilities have been addressing COVID-19 and the impact those changes have on the ethical obligations of immigration lawyers. The rules remain the same, but the current situation is a moving target and there is no doubt that as the pandemic persists, new challenges will arise that are not addressed here specifically.

Therefore, keep in mind part 19 of the Preamble to the ABA Model Rules of Professional Conduct during this difficult time, which says, in part, that the "Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." Accordingly, lawyers

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3 **Bryon M. Large** is an Assistant Regulation Counsel with the Colorado Supreme Court Office of Attorney Regulation Counsel. Bryon previously worked in private practice as an immigration attorney for over nine years. Bryon serves on AILA's national Ethics Committee, and is a former member of the AILA Board of Governors. Bryon is also a past Chapter Chair of the Colorado Chapter of AILA, a past Chair of the Immigration Law Section of the Colorado Bar Association, and a Past President of the Colorado LGBT Bar Association, where, in 2014, he was honored as the Attorney of the Year.

should document the conditions—both specific to the individual case and the broader issues that affect their ability to perform their jobs properly—as well as the reasoning they used to make difficult decisions in their cases.

Practicing in immigration courts has long been challenging, but this is especially true during the COVID-19 pandemic. Many courts have rightly decided that non-urgent matters can wait, closing their doors except for emergencies and tolling deadlines. But some immigration courts continue to operate to some degree. In any event, whether a detained client gets released can be a matter of life or death.

Communication with clients during the current crisis has never been more important, but it has perhaps never been more difficult. The same rules apply today as before, but it might be impossible for lawyers to follow all the rules in certain circumstances. On March 23, 2020, AILA joined a host of organizations in an emailed letter[4] pleading with EOIR to allow both hearings and confidential lawyer/client communications to be conducted via videoconference. However, as of this writing, many immigration courts remain open, and the only method of confidential communication that lawyers have with their clients remains through in-person meetings.[5]

Some lawyers have reported that in-person meetings are now being held in rooms with other lawyer/client meetings at the same time. Also, some report being prohibited from providing documents directly to clients for review and signature. Instead, these documents must be handed to a detention officer who might then read them before delivering them to the client. This creates a circumstance in which it might be impossible to comply with all applicable ethics rules. In such circumstances, the lawyer must prioritize what is most important and act accordingly. It would be advisable to document the conditions at the time and the lawyer's reasons for choosing a particular course of action. Providing competent and diligent representation remains foundational to the practice of law. Lawyers must decide what is absolutely essential, making every effort to comply with all the rules, but prioritizing when necessary. For example, if a lawyer is instructed to meet with her client in a room where confidential communication is not possible, she should firmly and professionally object to these conditions. If no accommodation is made, she may proceed with the meeting with the informed consent of the client, doing her best to keep as much of her conversation as possible confidential. If there is no alternative but to pass documents to the client through an officer, she should do what she can to make sure that the officer does not read them.[6]

Some lawyers might be concerned about attending these in-person meetings, afraid that they might contract COVID-19 or pass the disease to others. This is a difficult situation, but lawyers must weigh their professional obligations with the knowledge that remaining in detention might be a matter of life or death for their clients. There is no easy answer, but lawyers must be diligent in their efforts: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[7] However, a "lawyer is not bound…to press for every advantage that might be realized for a client."[8] This might mean that—while in-person meetings with detained clients remain the gold standard—an encrypted videoconference (if such an option were to be provided) with a client prior to a bond hearing and appearing during the hearing telephonically or by video might be a reasonable alternative during the ongoing pandemic.[9]

Communicating with Your Detained Client

Communicating with a client who is detained can be more difficult, but the lawyer's duty to maintain proper communication with her detained client is the same as in any other matter. ABA Model Rule 1.4 governs attorney-client communications and includes several obligations. And in addition to following the applicable state's rule[10], immigration lawyers must also abide by the obligations found at 8 C.F.R. § 1003.102(r). Under ABA Model Rule 1.4, there are five main duties imposed upon the lawyer:

1. Let the client know about decisions or circumstances that require his or her informed consent[11]
2. "[R]easonably consult with the client about the means by which the client's objectives are to be accomplished"
3. Make sure that the client remains "reasonably informed" about case status and "promptly comply with reasonable requests for information."

4 Letter from Adelante Alabama Work Center et al to James McHenry, Director, EOIR (March 23, 2020) (on file with author).
5 See section *Communicating with Your Detained Client for further ethical guidance on this point.*
6 See section *Confidentiality Concerns for further ethical guidance on this point.*
7 ABA Model Rule 1.3, Comment 5.
8 Id.
9 Lawyers should also be aware that diminished capacity issues are probably more likely to arise during the current crisis and should be prepared to act in accordance with Rule 1.14.
10 Under the ABA Model Rule 8.5, this would be the rules of state where the tribunal sits, unless the tribunal's rules specify otherwise.
11 Note that the detailed definition of informed consent is found in ABA Model Rule 1.0(e) and has specific requirements.

4. "[C]onsult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law"

5. Explain the case to the "extent reasonably necessary" to allow the client to make "informed decisions" on the case.

Both the time constraints and the content of the matter at hand affect whether and how much consultation the lawyer must have with her client. A lawyer would certainly have to explain the consequences of a certain course of action to her client. For example, she would have to explain the immigration court consequences of a guilty verdict to a shoplifting charge when a final plea deal is offered prior to the criminal case going to the jury.[12] And the immigration court lawyer must explain the "general strategy and prospects of success" for the case, but she would not ordinarily have to delve into great detail as one might in a law school classroom.[13] This obligation remains with detained clients and is only excused in circumstances, such as a lawyer in the midst of a trial, when it is not possible to consult with the client due to the urgency of the decision that has to be made.[14]

Federal regulations requiring adequate communication with the client are similar to ABA Model Rules but are tailored more specifically to immigration matters. First, they specifically require that the lawyer "communicate with the client in a language that the client understands."[15] A lawyer who is not fluent in a language the client understands might have to bring an interpreter (when permitted by the detention facility) or a dial into an interpretation service. When addressing the lawyer's obligations to consult with her client about how to achieve the client's goals in the case, they specify that this "includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines."[16] The rules do not expressly state that lawyers have to meet with their clients in person, but telephone or (rarely available) video conferencing may not be secure. There is often no substitute for meeting with a client in person to thoroughly prepare for a case, just as a lawyer would in any other matter. This would of course include thorough preparation of a client before an individual hearing, but it would also equally apply to master calendar and bond hearings.

In fact, the bond hearing is, in some respects, the most important part of the representation, given the challenges that representing a detained client can present. If the client is able to pay a bond and be released from detention, he or she is often able to assist in the case to a much greater extent. Accordingly, a poorly prepared bond motion could ultimately affect the outcome of the case. It should also be noted that some clients may not wish to pursue bond, opting instead for the quickest possible exit from the United States. This critical decision is too important to be decided by a family member or friend, and it is the lawyer's responsibility to ensure that the client makes an informed decision, considering how long he or she might have to spend in detention to fight the case. With respect to keeping the client "reasonably informed" as to case status, the federal rules state that this includes "significant developments affecting the timing or the substance of the representation."[17]

There are two rare instances in which the court-centered federal rules at 8 C.F.R. § 1003.102 expressly provide the lawyer some leeway in honoring their obligations to clients. First, the rules state that the lawyer[18] "is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner."[19] This may obviate the lawyer's duties to take additional measures to track down a missing client who is no longer detained, but state rules may require more. Additionally, lawyers have to respond to "reasonable requests for information, except that when a prompt response is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a response may be expected."[20] Though not expressly stated in the ABA Model Rules, compliance with this federal rule would almost invariably satisfy state requirements. And the federal rules at 8 C.F.R. § 1003.102(q)(3) also require the lawyer who is not yet engaged to handle an appeal after an adverse decision to "consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal."

Ordinarily, the lawyer must explain matters such that "a client who is a comprehending and responsible adult" can understand it.[21] In other circumstances, more may be required.

12 *See* ABA Model Rule 1.4, Comment 5.
13 *See* ABA Model Rule 1.4, Comment 5.
14 *See* ABA Model Rule 1.4, Comment 3.
15 8 C.F.R. § 1003.102(r).
16 8 C.F.R. § 1003.102(r)(2).
17 8 C.F.R. § 1003.102(r)(3).
18 In federal immigration practice, there are narrow exceptions that allow non-lawyers to represent immigrants before certain agencies.
19 8 C.F.R. § 1003.102(r).
20 8 C.F.R. § 1003.102(r)(4).
21 *See* ABA Model Rule 1.4, Comment 6.

Diminished Capacity Issues

The Model Rules of Professional Conduct provide guidance to Attorneys when handling clients with diminished capacity.[22] ABA Model Rule 1.14(b) allows for independent decision-making by the Attorney, including "taking protective action" or "seeking appointment of a guardian ad litem."[23] In extreme cases, even in Immigration Court, seeking appointment of a Guardian may be required, but should not be done without serious consideration for the consequences for the client.[24]

Prior to seeking guardianship, counsel must first address what, if anything, he or she can do on behalf of a non-responsive or non-cooperative respondent.[25] Consider, in the criminal context, the rule that guilt cannot be conceded over a defendant's objection.[26] Conversely, where a defendant does not indicate guilt one way or another, the defense attorney can concede guilt for strategic reasons.[27] When representing a recalcitrant or non-cooperative respondent, immigration attorneys must determine whether or not they can enter pleadings on the individual's behalf. Pleadings in Immigration Court require admissions of facts when conceding removability.[28] The burden also rests on the respondent to show eligibility for relief.[29] When pleadings involve conceding removability or a response from the client as to alienage, a truly incompetent or non-cooperative client should not be required to make such statements. An attorney representing a respondent may not be authorized under the ethical rules to then make the concession on the respondent's behalf.

Finally, counsel should consider seeking administrative closure for truly compromised clients, rather than guardianship. Administrative closure is a procedural device used to remove a case temporarily from the immigration court's calendar or from the Board's docket. However, the AG's decision in *Matter of Castro-Tum*[30] may affect this strategy as it appears to bar administrative closure for an indefinite period.[31]

Confidentiality Concerns

ABA Model Rule 1.6(a) provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is otherwise permitted by MR 1.6(b). In fact, Comment [2] describes a client's confidentiality to be the hallmark of the client-lawyer relationship. Maintaining confidentiality in the detention setting can carry its own set of challenges.

The ethical duty to maintain a client's confidences and the evidence privilege between an attorney and her client have many parallels, and both can easily be breached in a detention setting. The attorney will need to do her best to maintain her client's confidences while working in the challenging setting of a detention facility.

The detention setting can create obstacles to a safe and confidential working environment between the attorney and her client. The attorney should always go out of her way to make sure that in-person meetings are confidential, including utilizing a private room or unmonitored telephone

22 ABA Model Rule 1.14.

23 "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

24 *See* Formal Opinion of the American Bar Association on the appointment of a Guardian. https://www.americanbar.org/products/ecd/chapter/219967/ ("The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available.").

25 Communicating with clients remains a cornerstone of ethical, competent representation. However, with diminished capacity clients, such communication can prove challenging. This challenge increases in the detained immigrant context, where communication can only occur through collect phone calls or with an interpreter in the jail. Counsel should consider the difficulties in communicating with clients with diminished capacity, detained clients, non-English speaking clients, and take extra steps to fulfill the duty to communicate. *See In re the Okla. Bar Ass'n to Amend the Rules of Prof'l Conduct*, 2007 OK 22, ¶ 4, 171 P.3d 780, 792.

26 *McCoy v. Louisiana*, 584 U.S. ___ (2018), ("Once [the defendant] communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of English's admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment.").

27 *Florida v. Nixon*, 543 U.S. 175 (2004), 857 So. 2d 172, reversed and remanded ("When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent.")

28 8 CFR § 1240.10(c).

29 Admissions may establish removability as long as the IJ is "satisfied that no issues of law or fact remain." 8 CFR § 1240.10(c). An applicant for admission to the United States bears the burden of proving that he or she is not inadmissible. INA § 240(c)(2).

30 27 I&N Dec. 271 (A.G. 2018).

31 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK 116 (AILA 2010) ("the Immigration Judge may wish to inquire of counsel whether issues of competency make this an appropriate case for administrative closure until the respondent can receive proper psychiatric care") .

line. Attorneys should not meet with multiple clients at one time where confidential discussions will take place, such as a large meeting room at a detention facility or in the hallway outside of a courtroom where other detainees are present. Doing so could result in both a violation of MR 1.6(a), as well as breach the attorney-client evidentiary privilege.

Further complicating confidentiality issues in the detention setting are the client's families or loved ones. It is not uncommon for a detained respondent's friends or family to hire the lawyer outside of the detention setting. Those family members may even be paying the attorney's fees. The attorney would be wise to have a conversation at the outset with the family where she carefully articulates who the client is and who the client is not. This conversation should also include that the attorney will not be able to give information that is confidential in nature to the family once the representation begins. Setting expectations early on will help the attorney avoid problems with her client and the family moving forward.

Also, at the outset of the representation, the attorney should have a similar conversation with her new detained client. If the client desires to waive confidentiality, Model Rule 1.6(a) allows for disclosure when the client gives informed consent. Although the Model Rule does not require the informed consent to be confirmed in writing, best practices dictate that a waiver of confidentiality when given by informed consent should be in writing and in a language in which the client is fluent.

It is also important to note that confidential information is not only the "secrets" that a client tells to the lawyer. The Model Rules take a broad approach, explaining that the rule applies to "all information relating to the representation, whatever its source." Although Model Rule 1.6(a) anticipates that some information is impliedly authorized to be disclosed in the course of representation, such as when entering pleadings, the attorney should take due care to maintain her client's confidences and only sharing information with loved ones that she is specifically authorized to share.

Conclusion

Working in the detention setting with immigration clients presents a number of issues. Communicating with a client is more limited and the attorney will have to be cognizant of her responsibilities to her client under the rules. Further, identifying limitations due to diminished capacity and working to resolve the related communication issues is a learned skill. Seeking advice from colleagues, utilizing available published resources such as the AILA Ethics Compendium,[32] and reviewing relevant case law will continue to improve the attorney's detention practice.

32 AILA Doc. No. 13100890.

NOTES

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Michele Carney, Craig Dobson and Meghan Moore, Mastering the Myriad Challenges of Immigration Court (November 16, 2020)

Submitted by:
Kenneth Craig Dobson

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Mastering the Myriad Challenges of Immigration Court

By Michele Carney, Craig Dobson, and Meghan Moore[1]

If you appear in immigration court on a regular basis, or even sporadically, you may have witnessed or personally experienced the disorder and questionable conduct of an immigration judge or other court personnel. Immigration law in today's political climate can be fraught with new obstacles. Media coverage has labeled immigration courts as "chaotic." Removal proceedings often cause life-changing results, where clients are removed from the United States, sometimes separating families and/or putting clients in danger. Lawyers report both new and old challenges in court and high rates of anxiety and burnout in practice. Immigration judges and their staff face unmanageable workloads, never before seen quotas for case completions and denials, and often have double– or triple-booked dockets. It is not surprising that tensions can run high and challenging situations often arise in immigration court. COVID-19 has also presented a new set of challenges, as court and attorneys alike are being forced to navigate a new, ever-shifting landscape.

Despite all this, it is important for lawyers to zealously defend their clients while maintaining composure and professionalism and adhere to applicable rules of professional conduct while responding to these situations. This article will explore common "difficult" situations in court and provide practical suggestions on how to deal with them ethically and professionally.

New Lawyer in Town

The Facts. Liza has been practicing immigration law for one year and is now navigating a new local immigration court after she moved across state. To prepare herself for her upcoming court cases, Liza sat in court and observed a certain immigration judge several times in both master hearings and individual hearings. As a result, she expects that her upcoming master hearing will proceed a certain way. However, when Liza's case is up, the immigration judge asks her to brief a relatively common legal issue for her client's case. Liza thinks the immigration judge was rude and short with her. After her hearing, she stays in the courtroom to continue observing. In one case, the immigration judge treats a big-firm lawyer like his best friend and does not ask him to brief that exact same issue. Liza is angry at the apparent disparate treatment. What should she do?

1 Michele Carney is an immigration attorney, Co-Vice-Chair of the AILA National Ethics Committee, and member of the Washington Supreme Court Practice of Law Board. Craig Dobson practices ethics and professional responsibility law, as well as immigration law, at Dobson Law LLC and is presently Chair of the AILA National Ethics Committee. Meghan Moore is an immigration attorney, Co-Vice-Chair of the AILA National Ethics Committee, and member of the State Bar of Michigan Immigration Law Section.

AILA Doc. No. 20100137. (Posted 11/16/20)

How to Handle It. Liza is new to the court and can expect the immigration judge to feel the need to gauge her work product and practice style. She should take the opportunity to write an excellent brief and impress the immigration judge with her attitude and work product. She can reach out to colleagues for tips on how to deal with this immigration judge in the future. Liza should guard against jumping to conclusions. If the negative, disparate treatment by this immigration judge becomes a pattern, Liza can consider filing a complaint. But filing a complaint should not be a decision made lightly. It can color the judge's view of an attorney and mar their growing relationship. Not all judges are created equal—that is a certainty—but it takes time to see if this is a pattern or a single incident.

Prosecutor or Judge?

The Facts. Laurel represents Juan in removal proceedings. During the individual hearing, the immigration judge aggressively questions the client during Laurel's direct examination. In fact, the immigration judge takes up almost the entire two hours allotted for the case with his own questions. Laurel thinks the immigration judge is acting more like a prosecutor than a judge every second. Meanwhile, the ICE trial attorney seems content to sit back and let the immigration judge do her job for her. What options does Laurel have?

How to Handle It. An immigration judge should act as a neutral, unbiased fact finder, so that the respondent is afforded due process and a fair hearing. At the same time, under ABA Model Rule 3.5(d), Impartiality and Decorum of the Tribunal, a lawyer is not allowed to engage in conduct that would disrupt the tribunal.[2] Yet under MR 1.3, Diligence, a lawyer must provide diligent representation. Comment 1 to MR 1.3 says "[A] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

Laurel must figure out what to do in the heat of the moment. First, Laurel should politely request to speak to the judge off the record and express her concern. If the immigration judge refuses to go off the record or responds that he has the right to ask as many questions as he needs to, Laurel must think about how to preserve the objection for the record. She should respectfully note on the record as an objection that the judge is acting as a prosecutor and is therefore not acting in an impartial role. This objection preserves the issue for appeal.

In doing this, Laurel would be satisfying her diligence requirement of zealous representation under Rule 1.3 while also keeping calm and cool-headed. It would be inappropriate for Laurel to engage in threatening or highly disrespectful conduct toward the immigration judge. In addition to damaging her reputation, it could escalate an already hostile environment that could negatively affect her client's case. This may result in a Rule 3.5(d) violation or an accusation of engaging in "contumelious or otherwise obnoxious conduct" under 8 CFR 1003.102(g). [3]

Delay Blame Game

The Facts. Lanie, the lawyer, is hired by Chandani, the client, one day before the initial master calendar hearing. At the time of the hearing, Lanie requests a short continuance in order to file the applications for relief. Lanie also makes a request for a Punjabi interpreter since the client cannot speak English. The immigration judge grants the continuance and schedules an individual hearing in one month, saying it is the only way he can secure a Punjabi interpreter in person, which the immigration judge prefers. The immigration judge writes on the hearing notice that the individual hearing is for the purpose of accepting the applications for relief and was made to secure the interpreter but will be treated as a master calendar hearing. The immigration judge then re-calendars the case for the next two years for such things as the immigration judge's absence due to illness, a judicial conference, and the government shutdown, but never at the request of Lanie or her client. After two years, Lanie gets a new hearing notice for an individual hearing with a long ranting memo from the immigration judge, calling Lanie incompetent for delaying the case and not submitting the applications, and making personal comments about Lanie and her staff. How should Lanie respond?

How to Handle It. Many immigration attorneys believe their primary concern should be their client's rights, not their own reputations. While Lanie cares immensely about her clients, her reputation is also important to her. Chandani's case should not be prejudiced by the judge's poor memory either. Lanie has several possible courses of action. Lanie could write a letter to the clerk's office to clarify the court's misunderstanding of the case's procedural history. She could formally respond to the immigration judge's memo, to ensure it is in the record that delays in the case were not due to her or her client. Lanie could also clarify the court's misunderstanding on the record at the individual hearing. In any response, Lanie should pay attention to MR 3.1, Meritorious Claims, ensuring statements and requests to the court are not frivolous and are made in good faith on the "basis in law and fact…[including] argument for an extension, modification or reversal of existing law."[4]

2 This article uses the American Bar Association Model Rules of Professional Conduct in its analysis. Readers should refer to the applicable state ethics rules as they can vary significantly.

3 Immigration lawyers are held to the standards of applicable state Rules of Professional Conduct and the Federal Professional Conduct for Practitioners—Rules and Procedures found at 8 CFR 1003, subpart G.

4 In addition to Rule 3.1, see 8 CFR 1003.102(j)(1).

Sticky Client/Issues with Withdrawal

The Facts. Larry is hired by Claudius to represent him in removal proceedings. Claudius neither cooperates on his case nor pays his bill. Larry files a motion to withdraw, which is denied. Claudius then commits a serious felony in another state across the country and is placed in custody. ICE moves to change venue. Larry objects and files a second motion to withdraw because Claudius still has not paid and travel expenses will likely come out of Larry's own pocket. The immigration judge denies the second motion to withdraw and notes for the record that Larry should not be allowed any telephonic appearances. What should Larry do?

How to Handle It. It has been a longstanding issue and point of difficulty that immigration judges do not let immigration lawyers withdraw from certain types of cases, even for nonpayment and for legal services that are clearly outside the scope of representation agreed to by the client and lawyer in the representation agreement or even when the client is in breach of the agreement.[5]

In this case, Larry needs to be familiar with the Rules of Professional Conduct pertaining to terminating representation and confidentiality. MR 1.16(b) provides circumstances under which an attorney may seek withdrawal, including when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." [6]

Larry would need to make sure that he is providing sufficient information for the immigration judge to rule on the motion fairly. In this case, the standard "the attorney-client relationship has broken down" line will not suffice. The more pertinent the information Larry provides, the more information the immigration judge must use in his decision. However, in providing the information, Larry must take care that he does not violate his duties pertaining to confidentiality under Rule 1.6[7] When Larry does this, he must only reveal information necessary "to accomplish one of the purposes specified [in MR 1.16(b)]."[8]

In this case, it is more than simple nonpayment of fees prompting Larry to move for withdrawal. In failing to cooperate in his case, Claudius has presumably failed to fulfill his responsibilities to Larry necessary to effectively represent him. Larry should thoroughly document his attempts to contact the client through mail, email, and/or phone as examples of the client's failure to uphold his end of the representation agreement.[9]

Additionally, Larry can cite to his applicable professional rule of conduct pertaining to competence. MR 1.1, Competence, requires the "legal knowledge, skill, thoroughness and preparation" necessary to complete the representation. In his case, the attorney can question whether he has the capacity or ability to prepare the client's case from across the country. If not, staying on the case could potentially cause more prejudice to the client than withdrawing.

Practically, Larry should consider an interlocutory appeal, understanding that it may not be decided prior to the individual hearing. If the Board of Immigration Appeals denies the motion, Larry can consider appealing to the circuit court, again with the understanding that it may be considered moot if Claudius has been deported.

Additionally, Larry should find counsel local to where the client is detained. Hiring someone to appear on his behalf locally may be more prudent (financially and ethically) than attempting to continue to represent the client from across the country. Finally, Larry can consider a formal complaint against the immigration judge, recognizing it would likely not be resolved prior to the client's hearing.

Irate Immigration Judge

The Facts. Laila is in a master calendar hearing. Despite being told ahead of time that family members would not be allowed at court due to the COVID-19 pandemic, Laila's client has brought her two-year old daughter because she could not locate reliable, safe childcare. The immigration judge allows the child into the courtroom but is in a bad mood. Unfortunately, the toddler is restless and loud. The immigration judge starts yelling at Laila, making personal remarks about her and her client, then throws his files down and storms out of the courtroom. What should Laila do?

How to Handle It. There is no easy solution here for Laila. She must decide how to address the immigration judge's behavior while balancing her clients' interests and managing her reputation. Despite the fact that a complaint should

5 The AILA Ethics Committee submitted comments for a considered rules change that would permit unbundling legal services in immigration, a situation which could have benefited Larry and Claudius here, and we await word on where that is going.

6 See ABA Formal Opinion 476, Confidentiality Issues When Moving to Withdraw for Nonpayment of Fees in Civil Litigation, December 19, 2016.

7 Larry could arguably claim he may reveal information under MR 1.6(b)(5) used "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" but the dispute may not be viewed as between the client and lawyer by the court when it only involves withdrawal. He cannot get client consent because, on these facts, he couldn't find Claudius. He could look to the terms of the fee agreement and argue he is beyond the scope, if he excluded client criminal charges, and he could argue the client is on notice if the agreement lists several grounds for withdrawal including criminal charges, change in circumstance that changes the case, or nonpayment of fees.

8 MR 1.16, Comment 16. Note there is wide variation from state to state in rules 1.6, Confidentiality of information, and rules 1.16, Declining or Terminating Representation.

9 See Bite-Sized Ethics: Withdrawing When a Client Goes MIA.

not impact the relationship between the immigration judge and Laila or influence her future cases, it may very well. No matter her ultimate decision about next steps, Laila must maintain her composure and take adequate time to consider all options. It can only behoove her to act professionally, maturely, and in the best interest of her clients.

Practically, Laila should maintain her composure and remain in the courtroom to see whether the judge will return to proceed with the matter. Of course, she may consult with the clerk to inquire as to whether the judge will return to resume proceedings. She cannot leave the court until she has confirmed that the judge will not proceed with the case that day.

If the immigration judge returns to the hearing in the same mood, Laila should maintain her calm and refrain from engaging with the judge while he is yelling or upset. Comment 4 to MR 3.5, Impartiality and Decorum of the Tribunal, says:

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Laila can consider filing a formal complaint against the immigration judge, keeping in mind that MR 8.3 requires her to file a complaint (with limited exceptions) when she "knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office."[10] Keep in mind that, unless one of the exceptions in the rule applies, attorneys may be required to file a complaint under MR 8.3(b), Reporting Professional Misconduct. A motion to recuse, motion to change venue, or other action may be appropriate, but Laila must consider whether this will ultimately hurt or help her client. Lawyers often disagree over when to use such measures. Laila must consider the consequences of her next actions, her duties under MR 8.3 to report misconduct of a judge; potential future prejudice against her clients in their hearings if she files an ethics complaint about the judge and how that balances against her duty of confidentiality to client; and issues with a motion to change venue or other formal action that may upset the immigration judge.

Sometimes empathy is the best course. Remember that immigration judges are human beings and suffer from stress just like everyone else. Laila must use her judgment to decide whether the best course of action is to take no formal action other than making a note to preserve the record for appeal. If the judge returns to the courtroom after taking some time to compose himself, her best course of action might be to request to speak with him off the record. If the immigration judge is regretful of his actions, Laila might calmly express understanding for the challenges they are facing. She could then ask for the opportunity to make a note for the record using carefully chosen language once the parties return to the courtroom. This might then serve to further deescalate the situation by avoiding a surprised immigration judge when Laila makes those comments on the record.

Can You Hear Me Now?

The Facts. Attorney Abigail lives with a medically vulnerable adult and needs to make sure she does not take any risks with potential COVID-19 infection. With the immigration court's permission, Abigail has appeared at her hearings via telephone. Abigail has noticed recently that a particular immigration judge does not seem to hear what she is saying. The immigration judge asks the same questions that Abigail has already asked and ignores comments Abigail makes. Abigail suspects the immigration judge has turned down his volume so he cannot hear her or her client during some of the testimony. What should Abigail do?

How to Handle It. Although Abigail has suspicions about the immigration judge's behavior, she should not assume he is purposefully ignoring testimony. Abigail could request a "technology check" because of the immigration judge's repeated questions, and then note for the record what has been going on. If the immigration judge is actually turning down the volume on testimony, this may put him on notice that his lack of attention is obvious. Additionally, Abigail can make it clear on the record that those questions have already been asked by her and answered by the client. Interjecting at each question that has been asked and answered will present a good record for a subsequent appeal.

Travel Not Advised

The Facts. Attorney Leslie has a client, Ana, whose court proceedings are in a city that has a high rate of COVID-19. She does not want to fly across country to the immigration court for hearings, as she has a chronic disease that makes her more susceptible to illness. She has filed a motion for a telephonic hearing, but the immigration judge has not ruled on the motion. Leslie has called the court several times to check on the motion. The response is that unless and until the immigration judge grants the motion, she should be prepared to be in court in person. What can she do?

10 It seems that immigration judges remain subject to the jurisdiction of state bar authorities and rules while working in their official capacity. See 28 USC §530B.

How to Handle It. Leslie must balance her duty of loyalty to her client with her own health and safety. This is likely a conflict of interest under MR 1.7, which addresses personal conflicts with a client. A conflict of interest with a current client exists if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. "Unforeseeable developments" may create conflicts that require withdrawal.[11] A global health pandemic with serious adverse health consequences, including death, would likely fall into the "unforeseeable development" category.

If Leslie feels that putting her health at risk is a personal conflict that will limit her representation of Ana, she can try to withdraw. Before she does so, she may want to consider other options, such as hiring local counsel to appear for Ana, reaching out to DHS attorneys to request they join in her motions for telephonic hearings or for a continuance (assuming her client consents), or writing the court clerk a letter outlining her health issues and the reasons she continues to make her motions to appear telephonically.

In seeking to withdraw from the case, Leslie must follow her state's rules pertaining to withdrawal. MR 1.16 allows withdrawal if there is no material adverse impact on the client's interests or if other good cause exists (among other allowable circumstances). Of course, the status of Ana's case will be important. If her individual hearing is upcoming, withdrawing may indeed be materially adverse. Leslie should have a frank and honest discussion with Ana about her concerns. If Ana does not consent to the withdrawal and Leslie is still unwilling to travel due to health concerns, Leslie may have to attempt withdrawal for good cause, should it be necessary, though she should not assume the judge will allow it.

Conclusion

Representing clients in immigration court can be challenging, and the pandemic has not made it less so. Ultimately, there is no substitute for preparation, which will center you and help you keep your eye on the primary purpose of furthering your client's goals. In a situation where you can only truly control yourself, use this practical guidance to become court-ready and remain your most professional self throughout any court experience:

- Practice some form of silent controlled breath work on a regular basis when you have quiet time at home. For example, breathe in for a count of three and breathe out for a count of three. Once you have done this for a while, you can do this while you are waiting for your case to be called.
- Overprepare. There is no substitute for putting in the time and effort to competently and diligently represent your client. Know your case inside and out. Learn about the judge and her preferences from colleagues beforehand (e.g., what language resonates with the judge, successful arguments). If you know certain triggers for the judge, you can avoid problems more readily.
- Develop a network of fellow immigration lawyers who can co-counsel you when practicing outside your normal jurisdiction. This allows you to know and understand the judges better and avoid disadvantages caused by unfamiliarity with the local court customs and lack of reputation with particular judges.
- Have very specific responses practiced and memorized for very specific issues likely to arise in the current courtroom environment. In today's busy world, we sometimes underutilize the exercise of practicing. Do it before a mirror so you can work on exuding confidence and both hear and see what you are putting forth. Do it before a colleague or family member for honest feedback.
- Have one sentence prepared for when a judge says something outrageous. Use wording that allows you to stand firm where it matters (to preserve a matter for appeal, for example) and let it go where it doesn't matter that much. Aim to deescalate the situation when possible.
- Write any notes you may have on thicker stock paper (ex. a manilla folder) if your hands shake when you are nervous. This will make you look (and perhaps feel) stronger.
- Pick a fixed moment where you choose to switch into lawyer mode, setting your personal interests aside—your Clark Kent changing into Superman moment. For example, right before going through security at the courthouse, take a moment to yourself to put your game face on and pledge to not take any potential attacks personally.

Preparation extends beyond knowing the applicable law and the facts of your case. It is important to know the local court rules, individual preferences of the immigration judge, and procedural remedies. Above all, it is critical that you stay mentally prepared for the challenges you will face and be able to present a calm respectful demeanor to the court. Learn from each experience, reach out to other lawyers to discuss your last approach or what you plan to do in the future, and take advantage of the ethics resources available at AILA, including the Ethics Compendium, ethics articles, and one-on-one confidential ethics consultations. State bar associations often have ethics resources as well. Finally, do not feel defeated by bad experiences in immigration court. Instead, always look for ways to improve your abilities and your client's experiences in the future.

11 MR 1.7, Comment 5.

NOTES

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Basics of Removal Proceedings in Immigration Law (December 2020)

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In 2003 the Immigration and Naturalization Service (INS) was abolished and all of its functions were placed within the newly formed Department of Homeland Security (DHS). There are now three components of DHS that cover the functions of the former INS:

- United States Citizenship and Immigration Services (USCIS): responsible for adjudication of visa petitions, naturalization petitions, asylum and refugee applications. The USCIS website at www.uscis.gov contains a complete set of the Immigration and Nationality Act (INA) regulations, filing procedures, forms (some fillable online), filing fees, etc.
- Immigration and Customs Enforcement (ICE): responsible for detention, removal, and the Litigation Unit, which represents ICE before the Immigration Courts. The ICE website is located at www.ice.gov. ICE now has a detainee locator system, which may accessed at www.ice.gov/locator.
- Customs and Border Protection (CBP): responsible for border inspections. The CBP website is located at www.cbp.gov.

The Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA) are under the Department of Justice (DOJ). For more information about EOIR, go to www.usdoj.gov/eoir. The website contains a wealth of information, including BIA precedent decisions, regulations, federal court cases, and the EOIR and BIA Practice Manuals. It also contains information about each individual immigration court, such as standing orders, closures, filing requirements and procedures, and instructions for appearing telephonically before the court. EOIR has a computerized system accessible by telephone that allows respondents, attorneys, and any other interested parties to check on hearing dates, case history, etc. by entering the alien number of the individual and following the instructions. The number is **1-800-898-7180**. Recently EOIR added an on line system that allows an individual to enter an alien number to find out when/where a hearing is scheduled. The results can be also be printed out, and can be used as written proof of a hearing date. See https://portal.eoir.justice.gov/InfoSystem/Form?Language=EN.

The Immigration and Nationality Act (INA) is found at 8 U.S.C. § 1101 et seq. The regulations for the INA are found at 8 C.F.R.

Some useful publications and websites:

- *Immigration Law Sourcebook*, 17th Edition, Ira J. Kurzban (American Law Foundation);

- *Representing Immigrant Defendants in New York*, 6th Edition, Manuel D. Vargas (New York State Defenders Association, Inc.), available at www.immdefense.org/manual;
- *Immigration Law and Procedure*, Gordon, Mailman, Yale-Loehr, (Lexis-Nexis);
- *Interpreter Releases, Report and Analysis of Immigration and Nationality Law* (a weekly periodical) (West Group);
- *Bender's Immigration Bulletin* (a biweekly periodical) (Lexis-Nexis) www.bibdaily.com;
- New York State Defenders Organization website: www.nysda.org/html/nysda_resources.html#IDP
- Defending Immigrants Partnership/National Legal Aid and Defender Association: www.NLADA.org contains immigration consequences of multiple state and federal offenses;
- *Aggravated Felonies*, Norton Tooby and Joseph Justin Rollin, Law Offices of Norton Tooby;
- *Crimes of Moral Turpitude, The Complete Guide*, Norton Tooby, Joseph Justin Rollin, and Jennifer N. Foster, Law Offices of Norton Tooby;
- *Immigration and Crimes*, 2015, Dan Kesselbrenner, Lory Rosenberg, Maria Baldini-Potermin, West Publishing;
- *Immigration Consequences of Criminal Activity*, *A Guide to Representing Foreign-Born Defendants*, Mary Kramer, 8th Edition, American Immigration Lawyers Association.
- *AILA's Asylum Primer*, Dree K. Collopy, 8th Edition, American Immigration Lawyers Association
- *Immigration Trial Handbook*, 2014, Maria Baldini-Potermin, Thomas West

GROUNDS OF INADMISSIBILITY AND REMOVABILITY

Anybody who is not a citizen or national of the United States is subject to the grounds of inadmissibility and/or removability.

I. Inadmissibility. INA § 212 covers the grounds of inadmissibility (8 U.S.C. § 1181).

a. A non-citizen who is seeking to enter the U.S. physically at an airport or a border crossing, for example, is covered by the grounds of inadmissibility under INA § 212.

b. A non-citizen who is seeking to gain lawful status in the U.S., such as permanent residence, asylum, a non-immigrant visa, etc., is also covered by the grounds of inadmissibility under INA § 212. The non-citizen may be in or outside the U.S.

c. The grounds of inadmissibility include (not all inclusive list):

    i. Health related grounds (INA § 212(a) (1). HIV infection is no longer a ground of inadmissibility.

    ii. Economic grounds INA § 212(a) (4).

    iii. Security and related grounds INA § 212(a) (3).

    iv. Illegal Entrants and Immigration Violators INA § 212(a) (6).

    v. Documentation Requirements INA § 212(a) (7).

    vi. Aliens Previously Removed INA § 212(a) (9).

    vii. Criminal Grounds:

        1. Crimes of Moral Turpitude INA § 212(a)(2)(A)(i)(1)

            (a) A crime of moral turpitude (CIMT) refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. The offender's evil intent or corruption of the mind is important. Under case law, CIMTs include:

                (i) Crimes in which either an intent to steal or to defraud is an element (such as NY theft offenses, burglary to commit theft, kidnapping, and forgery offenses);

                (ii) Crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by a reckless act (such as NY murder, rape, and certain manslaughter and assault offenses). Under the precedent *Matter of Solon*, 24 I&N Dec. 239 (BIA,

2007), assault in the third degree under NYPL § 120.00(1) is a CIMT;

(iii) Most sex offenses (such as NY prostitution);

(b) The following are **not** generally considered to be a CIMT:

(i) Possession of a firearm;

(ii) Violation of regulatory offenses, such as failure to maintain a business license;

(iii) Simple assault (NYPL § 120.00(2) - no "evil intent") is probably not a CIMT. See *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992);

(iv) Simple DUI (not aggravated);

2. Drug offenses INA § 212(a) (2) (A) (i) (H). Persons who have been convicted or who admit having committed, or who admit committing acts which constitute the essential elements of a violation of or conspiracy to violate any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance as defined in 21 U.S.C. § 802. This includes an attempt or conspiracy;

3. Money Laundering INA § 212(a)(2)(1);

4. Two or more offenses, whether or not moral turpitude, and whether or not it was a conviction in a single trial or whether the convictions form a single scheme, if the aggregate sentence of confinement actually imposed is five years or more.

viii. A non-citizen may be inadmissible by virtue of having been convicted, admitting having committed, or admitting committing acts which constitute the essential elements of a CIMT or a controlled substance crime. A conviction is not necessary.

d. There is a "**petty offense**" exception for inadmissibility because of commission of one CIMT if the crime was committed when the non-citizen was under eighteen, **and** the crime was committed (and the non-citizen released from any confinement imposed for the crime) more than 5 years before the date of application for a visa or admission, **OR** the maximum penalty possible for a crime rendering a non-citizen inadmissible did not exceed imprisonment for more than one year, **and**, if the non-citizen was convicted of the crime, he was not sentenced to a term of imprisonment in excess of 6 months. INA § 212(a)(2)(A)(ii).

e. Waivers of inadmissibility are available to waive some grounds of inadmissibility. INA §§ 212(h) (crimes); 212(i) (fraud or willful misrepresentation of a fact); 212(a)(9)(B)(v) (aliens previously removed); former 212 (c) (convictions for criminal offenses generally before 4/24/1996) and 212(d)(3) (all-purpose waiver for non-immigrant visas).

II. Removability. INA § 237 covers the grounds of removability and applies to non-citizens physically in the United States.

a. Some of the grounds of removability are:

i. Status violations (tourist overstay, a student working without authorization, etc.) INA § 237(a)(1)(B);

ii. Smuggling of aliens (special rule in case of family reunification – alien's spouse, parents, son, or daughter) INA § 237(a)(1)(E);

iii. Marriage fraud INA § 237(a)(1)(G);

iv. Security/Political Related Grounds INA § 237(a)(4);

v. False claim to citizenship;

vi. Criminal Grounds:

1. Conviction of a crime of moral turpitude (CIMT) committed within five years of admission **and** the conviction must be for a crime for which a sentence of 1 year or longer may be imposed (INA § 237(a)(2)(A)(i));

2. Conviction at any time after admission of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct;

3. Conviction of a crime designated an aggravated felony INA § 237(a) (2) (A) (iii). The definition of aggravated felony is contained in INA § 101(a) (43). Congress has been adding crimes to the aggravated felony definition since it first came into existence in the immigration context in 1988. This section of the law that has given rise to much federal court litigation. Be aware that decisions with regard to whether a crime falls under the definition of aggravated felony vary from federal district to federal district. In analyzing whether a crime falls under the aggravated felony definition, it is necessary to look at the state statute, any corresponding federal law, and the relevant Federal Court precedents. The definition includes (list not complete):

   (a) Murder;

   (b) Rape;

   (c) Sexual abuse of a minor;

   (d) Illicit trafficking in a controlled substance. (Note the 12/05/2006 Supreme Court decision in *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006), 2006 WL 3487031 (U.S.), in which the Court found that a controlled substance violation will fall under the definition of an aggravated felony, only if it proscribes conduct punishable as a felony under the Federal Controlled Substances Act.);

   (e) Illicit trafficking in firearms;

   (f) Any offense relating to money laundering;

   (g) Crime of violence for which the term of imprisonment **imposed** is at least 1 year;

   (h) Theft (including receipt of stolen property) or burglary offense for which the term of imprisonment **imposed** is at least 1 year;

   (i) Ransom offenses;

   (j) RICO offenses for which a sentence of 1 year imprisonment *may be imposed*;

(k) National defense offenses;

(l) Fraud or deceit crimes in which the loss to the victim exceeds $10,000;

(m) Alien smuggling;

(n) Offense related to a failure to appear by a defendant for service of a sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(o) Any attempt or conspiracy to commit a crime designated an aggravated felony.

(p) There is a very large body of case precedents regarding what crimes fall under the definition. For an excellent discussion, see *Kurzban's Immigration Law Sourcebook*, 15th Edition, Ira Kurzban, American Law Foundation, pp.301-373).

4. Drug related offenses INA § 237(a) (2) (B). **Note that it is not a deportable offense to be convicted of "a single offense involving possession for one's own use of 30 grams or less of marijuana. INA § 237 (a) (2) (B) (i).**

5. Firearms violations INA § 237(a)(2)(C);

6. Domestic violence, stalking, and protective order violations (INA § 237(a)(2)(E);

III. Analysis of criminal convictions under the categorical and modified categorical approaches for a CIMT

a. The designation of a crime as a CIMT depends on whether moral turpitude is one of the elements of the crime, as set forth in the relevant criminal statute. For years until the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&M Dec. 687 (A.G. 11/7/2008), IJs, the BIA, and federal courts used a categorical approach that focused on the elements of a crime, rather than the actions of the non-citizen to determine whether the crime was a CIMT. In "How to Use the Categorical Approach Now, "© Immigrant Legal Resource Center, www.ilrc.org November 2014", available at http://www.ilrc.org/files/documents/how_to_use_the_categorical_approach_template_1.

pdf, Katherine Brady explains the five steps used in the categorical approach:

i. Identify the federal generic definition of the crime listed in the ground of removal

ii. Identify the minimum prosecuted conduct that violates the criminal statute

iii. Does this minimum conduct necessarily come within the generic definition?

If the minimum conduct necessary to commit the offense (Step ii) comes within the generic definition, there is a categorical match, and the offense is a CIMT. Another way to describe this test is, has anyone ever been convicted of the criminal statute who could not have been convicted of the generic federal statute? If so, there is not a categorical match and the offense is not a CIMT.

iv. Is the statute divisible?

1. In order to be truly divisible, a statute must:

(a) Set out multiple discrete alternatives for conduct, separated by OR

(b) At least one of the alternatives for conduct must be a categorical match to the generic federal definition

(c) A jury must decide between these alternatives in order to find the defendant guilty of the offense If the statute is not divisible, because it does not meet all of these criteria, the offense is not a CIMT. A statute that is not divisible is analyzed under the minimum conduct step (Step ii). If the statute is divisible because it meets all of the three criteria set forth above, go to Step v, the modified categorical approach. .

v. If the statute is divisible, do documents in the reviewable record of conviction establish which crime the defendant was convicted of under the modified categorical approach?

The modified categorical approach applies only if a statute is divisible under Step iv. Under this approach, the IJ or BIA may consider certain documents from the non-citizen's

record of conviction, with the sole purpose of identifying which offense the non-citizen was convicted of.

The first four steps—the categorical approach—do not allow the IJ or BIA to look beyond the conviction record itself. For example, the IJ or BIA may not consider the police report, the pre-sentence report, plea minutes, etc., in determining whether a crime is a CIMT. The IJ or BIA may consider additional materials only if the statute is divisible and only to identify which offense the non-citizen was convicted of.

b. In 2008 in *Matter of Silva-Trevino*, 24 I&M Dec. 687 (A.G. 11/7/2008) the Attorney General added an additional step to the categorical approach which permitted the IJ or BIA to look beyond the record of conviction and take into account "any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question." Under this approach the IJ was free to look at virtually anything having to do with the conviction, greatly increasing the burden on the non-citizen. Fortunately, after years of litigation, Attorney General Holder vacated the *Silva-Trevino* decision on 9/14/2015.

IV. Analysis of criminal convictions under the categorical and modified categorical approaches for an aggravated felony crime

a. In general, the Supreme Court requires an IJ or the BIA to use the categorical approach in determining whether an offense fits into the definition of an aggravated felony INA § 101 (a) 43). See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), in which the Supreme Court used the categorical approach to find that a state conviction for a marijuana distribution offense that did not involve either remuneration or more than a small amount of marijuana is not an aggravated felony, because it is not a trafficking offense under federal law.

If the statute is not divisible and the minimum criminal conduct does not fit under the definition of an aggravated felony, the statute is not categorically an aggravated felony and the inquiry should end. See *Descamps v. U.S.*, 133 S. Ct 2276 (2013), in which the Supreme Court reiterated that sentencing courts may only consult outside documents to ascertain the basis of the defendant's conviction ("modified categorical approach") when the statute defines elements in the alternative—for example, "breaking and entering a building [generic] or automobile

[non-generic]." California's burglary statute does not require "unlawful entry" as an element, or an alternative element, of the offense, so courts may not use the modified categorical approach.

b. If the statute is divisible, in that if defines multiple offenses with alternative elements (or), at least one of which comes within the definition of an aggravated felony and one of which does not, the IJ may look to additional documents-the modified categorical approach.

V. Recent example of the revived categorical approach at work

a. **In *Mellouli v. Lynch*, 575 U.S. 798 (2015) the Supreme Court made absolutely clear that a state drug conviction can trigger removability only if it can be shown by the government that the "controlled substance" at issue is located on the federal and not just the state controlled substance schedules. This is because under the INA individuals convicted of only those offenses "relating to a controlled substance (*as defined in section 802 of Title 21*)" (*i.e.*, the federal controlled substance schedules-- *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)) are removable under the controlled substances ground of removability.**

b. In *Harbin v. Sessions*, 860 F. 3rd 58 (2d Cir. 2017), the Second Circuit Court of Appeals issued a stunning precedent decision affecting the analysis of whether at least six New York controlled substance offenses are aggravated felonies or controlled substances. While the decision itself involved only NYPL Section 220.31, the following offenses: NYPL 220.03; 220.06(1); 220.34 (7) and (8); 220.45; and 220.65 will also most likely no longer be categorically deemed drug trafficking offenses or controlled substance offenses.

Using the categorical approach, the Second Circuit found that the New York definition of "controlled substance" consists of substances listed in the five schedules of Section 3306 of the New York Public Health Law, including chorionic gonadotropin, a substance not included in the federal schedules at 21 USC Section 802. The definition of illicit trafficking in controlled substances in INA Section 101 (a) (43) (B) and the controlled substance removal ground in INA Sections 212 (a) (2) (A) (i) (II) and 237 (a) (2) (B) all refer to 21 USC Section 802 for the definition of controlled substance.

The Second Circuit found that it is not necessary to identify the specific controlled substance as an element of the offense under NYPL 220.31, and that NYPL Section 220.31 is not a divisible statute. Because NYPL 220.31 can punish conduct that is not criminal under the federal Controlled Substances Act (i.e. sale of chorionic gonadotropin), it is not categorically an aggravated felony controlled substance trafficking offense.

It is important to understand that the *Harbin* decision applies only in the Second Circuit, which includes New York, Connecticut and Vermont. It will not be binding on courts if the non-citizen has a New York conviction under the NYPL sections of law listed above and is later placed in removal proceedings outside the Second Circuit.

Jurisdictions outside the Second Circuit have used reasoning similar to that in *Harbin* to find that what appears to be a drug trafficking crime (delivery, possession with intent to deliver, sale, etc.) does not fall under the aggravated felony definition or may not even be a controlled substance offense under the INA. See *Villavicencio v. Session*s, 879 F. 3d 941 (9th Cir. 2018); Singh *v. U.S. Attorney General*, 839 F. 3d 273 (3d Cir. 2016); Matter *of Sanchez-Cornejo*, 2 I&N Dec. 273 (BIA 2010).

Recent New York legislation

On 4/12/2019 the "One Day to Protect New Yorkers" amendment of NYPL §170.15 became law. Under the law, the top sentence for a Class A or unclassified misdemeanor was changed from one year to 364 days. See NYPL § 70.15(1) and (3), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a) (a), as added by the Budget Bill, Part OO, § The 364 maximum sentence applies both to persons sentenced both before and after the enactment of the legislation. Past misdemeanor one year sentences are reduced to 364 days by operation of law, – The legislation provides that any sentence imposed for a past New York Class A or unclassified misdemeanor conviction that is a definite sentence of imprisonment of one year shall, by operation of law, and the defendant is entitled to obtain a certificate of conviction form the criminal court, setting forth the reduced sentence. In addition, past misdemeanor sentences of less than one year may be set aside to allow resentencing under NYCPL§ 440.20. The new legislation was intended to and will affect a non-citizen's removability, inadmissibility, eligibility for relief from removal, and detention. For an excellent discussion of the "One Day to Protect New Yorkers"

legislation and its ramifications for non-citizens, please see: https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-to-Protect-New-Yorkers-Feb.-2020-Thomas-Thompson-update.pdf .

On July 29, 2019 New York Governor Andrew Cuomo signed into law two bills that decriminalize marijuana possession and provide relief to New Yorkers with some prior marijuana convictions. The new law, which went into effect in August, 2019, changes the way marijuana possession is punished under NYPL §§ 221.05 and 221.10. Notably, the law includes an expungement provision, for both past and future convictions and a vacatur provision. See https://www.immigrantdefenseproject.org/wp-content/uploads/Practice-Advisory-2019-MJ-Decrim.pdf for an excellent discussion about New York's 2019 decriminalization, vacatur and expungement provisions for marijuana offenses and how the new provisions may affect non-citizens.

VI. What are the main differences between inadmissibility and removability?

a. The grounds of inadmissibility apply to non-citizens, who are in or outside the United States who applying for admission, and the grounds of removability apply to non-citizens already physically in the United States. The grounds of inadmissibility apply to a non-citizen in the U.S. who is applying for certain benefits, such as adjustment of status (green card), for example. It is possible for a non-citizen to be subject to both grounds of removability and inadmissibility at the same time.

b. The grounds of inadmissibility and the grounds of removability are not identical. The best example is that there is no ground of inadmissibility in INA § 212 for possession of firearms or for conviction of a crime designated an aggravated felony, both of which are grounds of removability under INA § 237.

c. A non-citizen may be inadmissible, but not removable or vice versa. It is very important to look at both INA §§ 212 and 237, when advising a non-citizen. For example, a non-citizen who is a lawful permanent resident may not be removable, but if he leaves the U.S. and tries to reenter he may be inadmissible and subject to being placed under proceedings before EOIR. Upon his attempted reentry he may be taken into custody by ICE, and, in many circumstances, he will be ineligible for release from custody upon posting a bond. See INA § 236(c) – mandatory detention. As pointed out above, state laws and interpretations

of what crime fits under the definition of a CIMT or an aggravated felony vary from state to state and from federal district to federal district, because of the constant federal court litigation surrounding criminal/immigration issues. Also, as a result of litigation, this area of law is always in flux. Be careful!

d. In order to be removable under the criminal grounds contained in INA § 237, the non-citizen must have been convicted of a crime, whereas the non-citizen may be charged with inadmissibility if he has only committed the crime, or admitted to committing the essential elements of the crime under INA § 212.

VII. Removal Proceedings**.**

a. Notice to Appear (NTA), the Charging Document.

i. Contents;

1. Statement of nature of the proceedings;

2. Legal authority under which proceedings are conducted;

3. Factual allegations, such as country of origin, immigration status, criminal conviction;

4. Designation of provisions in the INA that have been violated;

ii. Initiation and filing of NTA is a matter of DHS/ICE prosecutorial discretion;

iii. Hearing initiated by the DHS/ICE's filing the NTA with EOIR;

VIII. Removal Hearing.

a. Administrative Proceedings.

b. The respondent has a right to counsel; however, no right to government appointed counsel. Crucial to have attorney.

c. The respondent must plead to the charges contained in the NTA and the charge of removability.

d. Burden is on the DHS/ICE to establish removability by "clear, unequivocal and convincing evidence" (8 C.F.R. § 240.8(a)); *Woodby v. INS*, 385 U.S. 276 (1966). Under 8 C.F.R. § 1240.8(a), however, the standard is "clear and convincing."

e. The respondent has a right to request relief from removal.

f. Rules of evidence relaxed.

g. Hearsay admissible if probative.

h. The Respondent has a right to present evidence and cross-examine witnesses.

i. The respondent has the right to appeal the Immigration Judge's decision to the BIA within 30 days. While the appeal is pending, the respondent may remain in the United States, as removal is automatically stayed.

j. Judicial Review.

k. In 2008, EOIR published the Immigration Court Practice Manual, which contains a comprehensive set of rules and guidelines. The manual is intended to be a uniform guide for practice before all Immigration Courts in the United States, and as of 07/01/2008, it replaced all local court rules. It is available online at www.usdoj.gov/eoir and is constantly being updated. Anybody practicing before the EOIR should be very familiar with the manual, as some of the rules and guidelines, particularly those related to filings before the immigration court, have changed. The EOIR website is excellent, and contains, among other things, EOIR's Virtual Law Library, BIA precedents, federal court precedents, the complete INA, and regulations.

IX. Forms of relief from removal.

a. Is your client a citizen? If so, your client may not be placed under removal proceedings. Your client may be a citizen through one of the following sections of the INA:

i. Acquisition at birth (INA §§ 301 and 309). A child born outside the United States to one or two United States citizen parents may acquire United States citizenship at birth.

ii. Derivation through the naturalization of parent or parents (INA § 320 and former INA § 321). Current law as of 2/27/2001 – a LPR child under 18 years old may become a derivative United States citizen when one or both parents naturalize. Pre 2/27/2001, the law required that both parents naturalize before the LPR child turned 18 in order for the child to derive citizenship. Under certain circumstances the previous law allowed a child to derive

citizenship from only one parent (child born out of wedlock, divorce of the parents, etc.)

b. Cancellation of Removal.

i. Cancellation of removal for Lawful Permanent Residents INA § 240A(a);

1. LPR for five years;

2. Resided in the U.S. continuously after having been admitted in any status for seven years;

(a) Cannot accrue the seven years after crime committed INA § 240A (d). Exception for firearms offense. Under § 240A(d)(1) any period of continuous residence shall be deemed to end when the alien is served a notice to appear or when he or she has committed an offense referred to in INA § 212(a)(2) that renders him inadmissible to the U.S. under INA § 212(a)(2) or removable from the U.S. under INA §§ 237(a)(2) or 237(a)(4), whichever is earlier ("cut off" provision). Note that the crime that "cuts off" the accrual of the seven years must be referred to in INA § 212(a)(2). Conviction of a possessory firearms offense is not a ground of inadmissibility and it will not "cut" accrual of time. See *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2007) which holds that the "stop time" rule will not stop the accrual of time where the first conviction was a" petty offense" under INA § 212(a)(2)(A)(ii)(II), and the second crime occurred after the respondent had accrued more than seven years of continuous residence.

3. Has not been convicted of an aggravated felony.

ii. Criteria Used to Establish Eligibility for Grant of Cancellation;

1. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), weigh positive factors against negative factors;

(a) Positive Factors:

(i) Family ties within the U.S.

(ii) Residency of long duration in the U.S.

(iii) Evidence of hardship to the respondent and family if deportation occurs.

(iv) Service in armed forces.

(v) History of employment.

(vi) Existence of property or business ties.

(vii) Existence of value and service to the community.

(viii) Proof of genuine rehabilitation.

(ix) Evidence relating to good character.

(b) Negative Factors:

(i) Nature and underlying circumstances of the grounds of removability;

(ii) Significant violations of INA;

(iii) Criminal Record;

(iv) Other evidence of bad character.

2. The IJ, in considering all of the equities, should weigh the favorable and negative factors to determine on balance whether on the "the totality of the evidence" the respondent has adequately demonstrated that she warrants a favorable exercise of discretion. The BIA has rejected the use of an "outstanding and unusual equities" requirement for cancellation of removal applications for permanent residents. See *Matter of Sotelo*, 23 I&N Dec. 201, 204 (BIA, 2001).

c. Cancellation of Removal for Non-Permanent Residents under INA § 240A (b) (1) (only available in removal proceedings).

i. The applicant must demonstrate physical presence in the United States for a continuous period of not less than 10 years immediately preceding the date of the application.

1. Under Section INA § 240A(d)(1) any period of continuous residence shall be deemed to end when the alien is served a NTA, or when he has committed

an offense referred to in INA § 212(a)(2) that renders him inadmissible to the U.S under INA § 212 (a)(2) or removable from the U.S. under INA §§ 237(a)(2) or 237(a)(4), whichever is earlier ("cut-off provision).

(a) There is an exception for cancellation of removal for a battered spouse.

2. The physical presence requirement is not applicable to a person who has served at least 24 months in active duty status in the Armed Forces, and, who, if separated, received an honorable discharge and was in the U.S. at the time of her enlistment or induction.

ii. The applicant must have been a person of good moral character for ten years**. Please note a recent change. In *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), the BIA ruled that evidence of two or more convictions for DUI during the relevant period establishes a presumption that an alien lacks good moral character under INA Section 101 (f). https://www.justice.gov/eoir/page/file/1213196/download**

iii. The applicant cannot have been convicted of an offense under INA §§ 212(a), 237(a) (2) or 237(a) (3).

iv. The applicant must demonstrate that removal would result in exceptional and extremely unusual hardship to his/her spouse, parent, or child who is a USC or LPR. The standard is very high and very difficult to achieve.

1. Criteria for establishing extreme hardship include age of the subject; conditions of health; political and economic conditions in the country to which the alien will be returning; emotional effect of separation from family. See *Matter of Anderson*, 16 I&N Dec. 296 (BIA 1978); *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

v. If the Immigration Judge grants the application, the applicant becomes a lawful permanent resident of the U.S. Only 4,000 applicants per year may have their removal canceled under this provision.

vi. A person (applies to both men and women) who has been battered or subjected to extreme cruelty in the U.S. by a spouse or parent who is a USC or LPR (or is the parent of a child of a USC or LPR and the child has been battered or subjected to extreme cruelty by a USC or LPR) may apply for cancellation of removal under INA § 240A (b) (2) (A), the Violence Against Women Act (VAWA) provisions.

1. The applicant must have been physically present in the U.S. not less than 3 years immediately preceding the date of the application;

2. The applicant must have been a person of good moral character during those three years;

3. The applicant is not inadmissible under INA §§ 212(a)(2) or (3), is not removable under INA §§ 237(a)(1)(G)(2), (3), or (4); and has not been convicted of an aggravated felony;

4. The applicant must establish that her removal would result in extreme hardship to herself, her child, or, in the case of a child, her parents.

d. Political Asylum.

i. Applicant must establish that he is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. (INA § 1010(a) (42) (A)).

1. Some applicants are statutorily ineligible for asylum under INA § 208:

(a) Applicant ordered, incited or participated in the persecution of others;

(b) Applicant has been convicted by a final judgment of a particularly serious crime in the U.S. An aggravated felony is considered a particularly serious crime. One conviction for simple possession of narcotics is generally not considered an aggravated felony.

(c) The applicant previously applied for and was denied asylum or the applicant did not file his asylum claim within one year after his arrival in the U.S. unless he can demonstrate changed circumstances in his country. There are exceptions to this rule. For example, a person who has maintained lawful status, such as a lawful permanent resident, or a person who is incapable of filing because of serious illness or mental or physical disability, does not fall under this rule.

(d) The applicant committed a serious, non-political crime outside the U.S. before coming to the U.S.

2. A grant of political asylum leads to permanent residence status.

3. An LPR may apply for political asylum in removal proceedings.

e. Withholding of Removal, INA § 241(b) (3).

i. Absolute prohibition against removal of a person found to meet the standard, as opposed to asylum, which is discretionary.

ii. Applicant must show that it is more likely that not that his life or freedom would be threatened if he were returned to his country on account of race, religion, nationality, membership in a particular social group of political opinion. The threat can be by the government or by an entity that the government is unwilling or unable to control.

iii. Some applicants are statutorily ineligible under INA § 241(b)(3):

1. The applicant ordered, assisted or otherwise participated in the persecution of others;

2. The applicant, having been convicted of a particularly serious crime, constitutes a danger to the community. A person convicted of an aggravated felony for which the person has been sentenced to an aggregate term of imprisonment of 5 years is considered to have committed a particularly serious

crime. If the person was not sentenced to 5 years, the Judge may determine that the crime was not a particularly serious crime and he may be eligible for withholding.

3. The applicant committed a serious, non-political crime outside the U.S. before coming to the U.S.

iv. A grant of withholding does not lead to permanent residence. It only keeps the DHS/ICE from removing the person to his country.

v. A lawful permanent resident may apply for withholding in removal proceedings.

f. Convention against Torture/Deferral of Removal (8 C.F.R. § 208.17).

i. Similar to withholding; however certain important differences:

1. Categories of mandatory ineligibility do not apply;

2. It is not limited to one's life or freedom being threatened on account of one of the five enumerated grounds;

3. It is limited to the definition of torture, which does not encompass all harm. The torture must come from a public official or another acting in an official capacity.

4. Protection under the Convention against Torture does not lead to permanent residency. It prevents the DHS/ICE from removing the person to his country.

g. Adjustment of Status (INA Section 245).

i. If an alien in a non-LPR and has a family member to sponsor him for an immigrant visa (USC spouse, parent, or child over 21, or in some cases a LPR spouse, parent or an approved immigrant visa based on a labor related case) he may be able to apply for permanent residency before the Immigration Judge.

ii. If he has been convicted of a CIMT, he may be eligible for a waiver of inadmissibility under INA § 212(h). If the crime occurred more than 15 years before the date of

the application for adjustment or an immigrant visa, the standard for granting the waiver is rehabilitation and admission of the applicant would not be contrary to the national welfare, safety or security of the U.S. If the crime occurred less than 15 years before the application, the standard is extreme hardship to a qualifying relative – LPR or USC spouse, parent, son or daughter. If the alien has been convicted of a crime that fits only under the definition of an aggravated felony and is not a CIMT, he will not need a waiver.

iii. If an alien is an LPR, he may "reapply" to adjust his status if he is eligible (see above); however, if he has been convicted of a CIMT, he will need a waiver under INA § 212(h). He will be ineligible for the waiver if he has been convicted of an aggravated felony, as well as a CIMT or of one crime that fits under both definitions. If he has been convicted of a crime that fits only under the definition of an aggravated felony and is not a CIMT, he will not need a waiver. This is one part of the law that does not make sense and favors non-LPR over LPR.

h. Voluntary Departure (INA § 240B).

i. Voluntary Departure (VD) not generally available for those convicted of a crime and sentenced to prison. A person who has been convicted of an aggravated felony in not eligible for VD. A person who has not been convicted of an aggravated felony may be eligible for voluntary departure if he applies at the outset of his hearing. In some circumstances it may not be advisable to apply for voluntary departure for tactical reasons, because of the limitations on future relief or applications for adjustment of status, if the person fails to depart pursuant to the grant of voluntary departure, and possible civil penalties. See INA § 240B (d).

ii. There are special rules relating to voluntary departure for individuals filing a motion to reopen during their voluntary departure period. There is no automatic stay of voluntary departure if the individual timely files a motion to reopen during the departure period, and the filing of the motion to reopen automatically terminates voluntary departure. See 8 C.F.R. §§ 1240.26(b) (3) (iii), (e) (1).

i. INA § 212(c) relief still available in some limited circumstances. See *St. Cyr v. INS*, 533 U.S. 289, 121 S. Ct. 2271 (2001) and the *St. Cyr* regulations at 8 C.F.R. §§ 1003, 1212, and 1240 (69 Fed. Reg. 57826 (9/28/04)).

j. Naturalization is available in some limited circumstances. For example, if an LPR served in the U.S. Armed Forces during times of hostilities and was honorably discharged, the physical presence and residency requirements are inapplicable. See INA § 239. Generally, however, it will be difficult for a respondent in removal proceedings to naturalize, as the case law requires DHS to affirmatively communicate that the respondent is *prima facie* eligible for naturalization before the IJ can terminate removal proceedings to allow the respondent to proceed on his naturalization application before the USCIS. This rarely happens. See 8 C.F.R. § 1239.2(f), *Matter of Acosta*, 24 I&N Dec. 103 (BIA 2007).

k. There are now various alternative deferred action programs for which your client may qualify, such as DACA (Deferred Action for Childhood Arrivals) and the DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) a program which will be available beginning in May, 2015.

X. Prosecutorial Discretion.

a. If your client has no relief available to him and has strong equities, or has an exceptionally weak or strong case, contact the DHS/ICE counsel to see whether they might be willing to exercise prosecutorial discretion and terminate or administratively close the removal proceedings, or agree to other forms of relief. Generally, it is best to make such a request in writing and to include strong supporting documentation.

b. While prosecutorial discretion has always been available to non-citizens, for a relatively short time between 2012 and 1/2017, DHS/ICE was very responsive to such requests. On June 17, 2011, ICE Director John Morton issued a memorandum ("Morton Memo") in which he set forth guidelines for ICE to executive prosecutorial discretion at all stages of the removal process. The Morton Memo was superseded by a 11/20/2014 Memo from DHS Secretary Jeh Johnson; however on February 20, 2017, former DHS Secretary John Kelly issued

a memorandum outlining an implementation plan for the presidential Executive Order titled "Enforcement of the Immigration Laws to Serve the National Interest" See https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf. In the Memorandum, former DHS Secretary Kelly states that all "existing conflicting directives, memoranda, or field guidance" regarding immigration enforcement and priorities for removal are immediately rescinded, to the extent of the conflict, and names specifically the November 20, 2014 DHS memoranda "Policies for the Apprehension, Detention and Removal of undocumented Immigrants" and "Secure Communities." The use of prosecutorial discretion has been greatly curtailed, pursuant to the Memorandum; however, it is still an option, albeit limited.

NOTES

15

Termination of Charge under 8 U.S.C. §1101(a)(43)(M)(i) (December 2020)

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TERMINATION OF CHARGE UNDER
8 U.S.C. §1101(a)(43)(M)(i)

A. Introduction

A charge under 8 U.S.C. §1101(a)(43)(M)(i) has two components and failure upon either one will doom the charge. First, the crime must involve fraud or deceit. Second, the loss to the victim or victim must exceed $10,000. In determining whether an offense constitutes once involving fraud or deceit the familiar categorical approach applies. See Kawashima v. Holder, 565 U.S. 478, 483 (2012) ("To determine whether the Kawashimas' offenses "involv[e] fraud or deceit" within the meaning of Clause (i), we employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime"). In determining loss, what has come to be known as the circumstance specific approach applies. See Nijhawan v. Holder, 557 U.S. 29 (2009).

B. The Categorical Approach And Fraud Or Deceit

Under the categorical approach, analysis looks to the necessary elements of an offense and not the facts. See, e.g., Wang v. Attorney General, 898 F.3d 341 (3d Cir. 2018). In other words, a statute that allows for conviction of conduct that may constitute fraud or deceit, however defined, may nevertheless fail to be a categorical match for (M)(i) if the statue reaches conduct that does not fall within

either of those components. See, e.g., [redacted], A038-665-355 (BIA Oct. 16, 2018)(while defendant's conduct in violating 26 U.S.C. §7212 may have involved fraud or deceit, there was no categorical match because conduct not amounting to fraud or deceit, such as bribery, would also sustain a conviction under the criminal statute). Moreover, in applying the categorical approach, it is important to determine the necessary elements for conviction as opposed to the means by which the offense can be committed since this analysis may or may not bring the offense within (M)(i) by permitting application of the modified categorical approach if the statute of conviction is determined to be divisible. See Mathis v. United States, 136 S.Ct. 2243(2016), which distinguishes between elements for conviction and means.

C. Defining Fraud Or Deceit

While Kawashima defined "deceit" under (M)(i), there has been no such definition of fraud. Nevertheless certain basic principles can be applied in seeking termination. First, resist the likely effort by the Department of Homeland Security ("DHS") to urge that falsity alone satisfies (M)(i) because Kawashima provides strong arguments to the contrary. In sustaining removability under the deceit prong of M(i), Kawashima, 565 U.S at 482-486, took care to set out the necessary elements of the two tax offenses at issue, both of which required materiality: "Mr. Kawashima does not dispute that the *elements* of a violation of §7206(1) include, *inter alia*, that the document in question was false *as to a material matter*, that the

defendant did not believe the document to be true and correct *as to every material matter*, and that he acted wilfully with the specific intent to violate the law." (Emphasis supplied.) Likewise with respect to Mrs. Kawashima, the Supreme Court emphasized that she "does not dispute that the elements of an offense of a violation of §7206(2) include *inter alia* that the document was false *as to a material matter* and that the defendant acted wilfully." (Emphasis supplied.). 565 U.S. at 482-486.

Given these elements, the Supreme Court concluded as to Mr. Kawashima that "his conviction under §7206(1) establishes that he knowingly and willfully submitted a tax return that was false as to a *material* matter. He therefore committed a felony that involved 'deceit." 565 U.S. at 482-486. (Emphasis supplied). Likewise with Mrs. Kawashima, the Supreme Court held that her "conviction establishes that, by knowingly and willfully assisting her husband's filing of a *materially* false tax return, [she] also committed a felony that involved 'deceit.'" 565 U.S. 478, 482-486.

Such all inclusive analysis of the elements for conviction and express reliance on materiality would have been unnecessary if Kawashima did not require materiality and relied instead upon the false statement alone. See also [redacted] A088152814 (BIA 2019)(non-precedential) on [redacted], a three member decision which

holds that a false statement alone does not meet either the deceit or the fraud prong of (M)(i). Furthermore, resist any attempt by DHS to argue that materiality is a necessary element for conviction under the criminal statute when materiality is not in the statute or when a common law term denoting materiality is not used. See, e.g., United States v. Wells, 519 U.S. 482 (1997)(rejecting implied materiality). Indeed, Wang, 898 F.3d at 348n.13 noted the government's position before the Supreme Court in Maslenjak v. United States, 137 S.Ct. 1918, 1920-21 that materiality was not to be implied in he absence of a common law term.

Second, similar arguments can be made against invocation of the fraud prong. At the outset review the intent requirement for the criminal statute, for there is persuasive authority that the absence of intent to defraud as a necessary element for conviction may take the conviction outside the fraud prong. See, e.g., Bobb v. Attorney General, 458 F.3d 213 (3d Cir. 2006)(where intent to defraud is necessary element conviction falls within the fraud prong); Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002)(intent to injure takes statute outside fraud prong). Moreover, as the Supreme Court held in Neder v. United States, 527 U.S. 1, 23(1999) most federal fraud statutes require at least misrepresentation and materiality and the absence of these elements can be urged for termination. See also United States v. Alvarez, 567 U.S. 709, 734 (2012) (Breyer, J., concurring)

("[f]raud statutes. . .typically require proof of misrepresentation that is material, upon which the victim relied, and which caused actual injury.").

Earlier the Board defined fraud in Matter of GG, 7 I & N Dec. 161 (BIA 1955)(fraud requires 1) false representation, 2) of a material fact, 3) made with knowledge of its falsity and with intent to deceive the other party, who 4) believes the representation, and who 5) who acts to his detriment in reliance upon the representation). See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd. 566 U.S. 560, 571 (2012)(same words in a statute should be given the same meaning). Yet all four of these elements are rarely required for conviction under a federal criminal statue so that arguments that all must be satisfied to come within the fraud prong are probably an uphill climb. At the same time, two older Supreme Court decisions actually construing the term "involving fraud" may be helpful. In both Bridges v. United States, 346 U.S. 209, 220 (1953) and United States v. Scharton, 285 U.S. 518 (1932) the Supreme Court was called upon to construe the meaning of "involving fraud" as that precise term appeared in statutes of limitation. In Bridges the defendant had been charged with an offense whose legal elements were (1) knowingly making a false statement and (2) that is material in a naturalization application. 346 U.S. at 220. If the offense was one involving fraud, then the prosecution of Bridges would have been timely under the Wartime Suspension of Limitations for offenses involving fraud. Yet the Supreme Court expressly held

that this was not an offense involving fraud concluding: "In that offense as in the comparable offense of perjury, fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it." 346 U.S. at .202. Likewise in United States v. Scharton, 285 U.S. 518 (1932), cited with approval in Kawashima, a similar limitations statute for offenses involving fraud was held inapplicable to a prosecution for tax evasion, where intent to defraud was not a necessary element of the offense. At the very least, Bridges and Scharton, can be considered relevant background against which Congress enacted M(i).

D. Termination On Loss

Under Nijhawan, loss is determined by the circumstance specific approach which is not limited to the conviction record. Indeed in Matter of Babaiskov, 24 I & N Dec. 306, 321 (BIA 2007) the Board has gone so far as to hold that the Immigration Court may consider any otherwise admissible evidence on issue of loss. At the same time, a non-citizen defendant has two opportunities to contest loss, first at sentencing and then in removal proceedings, where DHS has the burden to establish loss by clear and convincing evidence. Furthermore, the loss must be tethered to the actual count of conviction. See Nijhawan, 557 U.S. at 442, citing with approval Alaka v. Attorney General, 456 F.3d 88,107-08 (3d Cir. 2006), overruled in part on other grounds, Bastardo-Vale v. Attorney General, 934 F.3d 255 (3d Cir. 2019) for the proposition that the loss amount must be tethered

to offense of conviction; amount cannot be based on acquitted or dismissed counts *or general conduct*." (Emphasis supplied).

This means that the best case for termination on loss will be in those instances where the client has been convicted of a single substantive offense with a loss not more than $10,000 in that specific count as in Alaka itself. Likewise termination might be possible under the circumstances of the case if the client never actually had control of the funds allegedly obtained by fraud as, for example, in Singh v, Attorney General, 677 F.3d 503, 512 (3d Cir. 2012), where the respondent had concealed funds from his bankruptcy filing but those funds had been entrusted, unbeknownst to the respondent, to a person cooperating with the government. Similarly, termination might be possible if what the defendant received was considered gain and not loss. See, e.g., Matter [redacted] A088414342 (York Immigration Court, Feb. 21, 2012)(money defendant received from insider trading does not equate to loss under (M)(i)). Likewise, loss can be challenged when based upon a restitution order that encompasses not only loss from fraud crimes but also from crimes not involving fraud or deceit, without determining the amount attributable to the fraud offenses. See, e.g., Rampersaud v. Barr, 972 F.3d 55 (2d Cir. Aug. 19, 2020)

At the same time, arguments that there was no loss because a lender forgave the amount obtained by fraud prior to the defendant's prosecution have been

rejected, Giudice v. Attorney General, 811 F.App'x 133(3d Cir. April 29, 2020), because loss was deemed to have occurred when the defendant first obtained the loan proceeds. Likewise, arguments that the defendant's conduct did not cause the loss have also been rejected as in Wang where the petitioner had argued that his false entries about commodity trades did not cause a loss to his commodity trading employer since the loss occurred when the positions were liquidated.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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Law Offices of Thomas E. Moseley
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DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: [redacted]

A 038-665-355

Date of this notice: 10/16/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A038-665-355 – York, PA

Date: OCT 16 2019

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas E. Moseley, Esquire

ON BEHALF OF DHS: Maureen C. Gaffney
Assistant Chief Counsel

APPLICATION: Termination

The respondent appeals from the Immigration Judge's May 4, 2018, decision ordering his removal from the United States to South Korea. On appeal, the respondent challenges the Immigration Judge's determination that he is removable from the United States pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) as defined by section 101(a)(43)(M)(i) of the Act.[1] The Department of Homeland Security (DHS) opposes the appeal. The record will be remanded for further proceedings.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The sole issue in this appeal is whether the respondent is removable from the United States by virtue of having been convicted of an aggravated felony as that term is defined under section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *See* section 237(a)(2)(A)(iii) of the Act. This relates to the respondent's 2016 conviction for obstructing the administration of internal revenue laws in violation of 26 U.S.C. § 7212(a). The respondent contends that the Immigration Judge erred in classifying his conviction under section 101(a)(43)(M)(i) of the Act as one that "involves fraud or deceit" (Respondent's Br. at 7-20).[2]

[1] The Immigration Judge sustained the charge of removability in a decision that was issued on March 13, 2018. The respondent filed a motion to reconsider this determination while the case was still pending before the Immigration Court. In his May 4, 2018, decision, the Immigration Judge incorporated his March 13, 2018, decision and rejected the respondent's request for reconsideration. *See* 8 C.F.R. § 1003.23(b)(1).

[2] There is no dispute that the $10,000-loss threshold is satisfied.

The respondent was convicted under the "Omnibus Clause" of 26 U.S.C. § 7212(a), which makes it unlawful to "corruptly or by force or threats of force . . . obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of [the internal revenue laws]."[3] We assume for sake of this decision that the Immigration Judge properly found the statute to be divisible with regard to the listed alternatives—corrupt conduct, force, or threats of force —and that the conviction documents adequately demonstrate that the respondent was convicted under the portion of the statute pertaining to "corrupt conduct" (IJ at 2-3, Mar. 12, 2018; *cf.* Respondent's Br. at 6-7). We likewise agree with the Immigration Judge that an offense is properly classified under section 101(a)(43)(M)(i) of the Act as one that "involves fraud or deceit," even if the statute does not explicitly require such conduct, so long as the "elements . . . necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 484 (2012).

As the respondent correctly notes on appeal, however, a conviction under the "corrupt conduct" portion of 26 U.S.C. § 7212(a) does not necessarily involve fraudulent or deceitful conduct (Respondent's Br. at 9-17). As the Supreme Court has recognized, the cornerstone of fraudulent or deceitful conduct is an act of misrepresentation, whether an affirmative false statement or the concealment of truthful information. *See Kawashima v. Holder*, 565 U.S. at 484, 488 (explaining that a related Federal offense would not be classified as one that involves fraud or deceit because it does not require a misrepresentation). The "corrupt conduct" portion of 26 U.S.C. § 7212(a) covers *any act* done with "intent to secure an unlawful advantage or benefit or financial gain either for oneself or for another." *Marinello v. United States*, 138 S. Ct. at 1101, 1108; *see also United States v. Kelly*, 147 F.3d 172, 175-76 (2d Cir. 1998) (providing that the Omnibus Clause of 26 U.S.C. § 7212(a) is expansive and "renders criminal 'any other' action which serves to obstruct or impede the due administration of the revenue laws"). As the Immigration Judge observed, while this could include conduct involving a misrepresentation, it could also entail acts such as bribery or subornation (IJ at 3). *See United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985). Bribery and subornation, while undoubtedly crimes involving dishonesty, do not involve a misrepresentation on the part of the accused.

For these reasons, we conclude that the full range of behavior proscribed by the "corrupt conduct" portion of 26 U.S.C. § 7212(a) does not necessarily entail fraudulent or deceitful conduct within the meaning of section 101(a)(43)(M)(i) of the Act. The DHS does not contend on appeal, nor did it before the Immigration Judge, that the "corrupt conduct" prong of the statute is divisible vis-à-vis those acts involving a misrepresentation and those that does not. And we find no basis for so concluding. Because the respondent was convicted under a portion of 26 U.S.C. § 7212(a) that is overbroad and indivisible with regard to conduct that necessarily entails fraud or deceit, this conviction does not subject the respondent to removability for having been convicted of an offense under section 101(a)(43)(M)(i) of the Act. *See* section 237(a)(2)(A)(iii) of the Act.

In conclusion, we note that the DHS also alleged that the respondent has been convicted of an offense under section 101(a)(43)(M)(i) of the Act on the basis of a separate conviction, which the

[3] The statute also contains an "Officers Clause" prohibiting similar acts aimed at officers or employees of the United States enforcing the internal revenue laws. *See generally Marinello v. United States*, 138 S. Ct. 1101, 1104-05 (2018). The respondent concedes that it was proper for the Immigration Judge to limit his analysis to the "Omnibus Clause" (Respondent's Br. at 7).

Immigration Judge declined to reach in light of his conclusion regarding the conviction under 26 U.S.C. § 7212(a). (*See* IJ at 4, Mar. 12, 2018). The record will be remanded for the Immigration Judge to address this issue and any other issues regarding removability in the first instance. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We express no opinion regarding whether the respondent is removable.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted]

A 088-152-814

Date of this notice: 7/12/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Donovan, Teresa L.
Greer, Anne J.
Noferi, Mark

Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A088-152-814 – York, PA

Date: JUL 12 2019

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas E. Moseley, Esquire

APPLICATION: Termination

On August 1, 2018, the United States Court of Appeals for the Third Circuit granted the alien's petition for review and remanded the case to us for further proceedings. [redacted] These proceedings will be terminated.

Previously, we affirmed the Immigration Judge's June 4, 2015, decision finding that the respondent's conviction for the offense of making a false report in connection with commodities transactions in violation of 7 U.S.C. §§ 6b(a)(1)(B) and 13(a)(2) constitutes an aggravated felony within the meaning of section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i) (BIA at 3).[1] Accordingly, we affirmed the Immigration Judge's decision denying the respondent's motion to terminate these proceedings.

The Third Circuit found that the term "false report or statement" in § 6b(a)(1)(B) did not import the common law meaning of deceit or fraud because simply making a false statement did not necessarily involve either fraud or deceit (in contrast to the other provisions of section 6b(a)(1), which specifically included terms such as "defraud" or "deceive"). [redacted] In light of the Third Circuit's determination that § 6b(a)(1)(B) is a mere "offense of falsehood" and not a crime of "deceit," we now conclude that § 6b(a)(1)(B) is not an aggravated felony within the meaning of section 101(a)(43)(M)(i) of the Act because it does not involve fraud or deceit. Accordingly, we will sustain the respondent's appeal and terminate these removal proceedings.

ORDER: The appeal is sustained, and removal proceedings terminated.

FOR THE BOARD

[1] 7 U.S.C. § 6b(a)(1)(B) states that "[i]t shall be unlawful for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record."

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

MOSELEY, THOMAS E.
ONE GATEWAY CENTER, STE 2600
NEWARK, NJ 07102

IN THE MATTER OF [redacted] FILE A 088-414-342 DATE: Feb 21, 2012

22910-424

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

_X_ OTHER: Interlocutory Ruling on Motion

BLS
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL
3400 CONCORD ROAD
YORK, PA, 17402

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
[redacted]	)	File # A 088-414-342
Respondent	)	

ON BEHALF OF RESPONDENT:
Thomas Moseley, Esq.

ON BEHALF OF THE DHS
Alice Song-Hartye
Assistant Chief Counsel

Grounds of Removability: INA §§ 237(a)(2)(A)(iii); (a)(2)(A)(i): Aggravated Felony; Moral Turpitude

Motion: Termination by Respondent

Interlocutory Ruling on Motion

This respondent is a 38-year-old married male alien, a citizen of Russia. He was admitted as a non-immigrant intracompany transferee on January 5, 2008, and adjusted status to lawful permanent resident on April 21, 2008. He was placed into these removal proceedings by service upon him of a Notice to Appear, Form I-862, on October 17, 2011, due to his May 24, 2011, federal conviction for one count (count 1) of Conspiracy to Commit Securities Fraud, in violation of 18 USC § 371, and three counts (counts 2-4) of Securities Fraud, in violation of 15 USC § 78j(b) and 78ff. He was sentenced to imprisonment for 26 months,[1] and ordered forfeiture in the amount of $1, 414, 290.

The government has charged respondent with an aggravated felony fraud-related offense as defined in INA § 101(a)(43)(M)(i), and INA § 237(a)(2)(A)(i) for a crime involving moral turpitude (CIMT). The parties submitted pre-trial briefs, which have been considered.

Aggravated Felony

a. Standards of Review.

INA § 101(a)(43)(M)(i) provides that an offense involving fraud or deceit in which the loss

[1] Respondent's projected prison release date is June 2012.

to the victim or victims exceeds $10,000 is an aggravated felony. When calculating the amount of a loss, the Supreme Court has held that INA § 101(a)(43)(M)(i) "calls for a 'circumstance-specific,' and not a 'categorical,' interpretation." Nijhawan v. Holder, 557 U.S. 29; 129 S.Ct. 2294, 2300 (2009). Nijhawan reasoned that the $10,000 threshold "applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." *Id.* at 2302. The court is not limited to "a jury verdict, or a judge-approved equivalent ... [such as] charging documents, jury instructions, and any special jury finding .... [or] written plea documents or the plea colloquy." Kaplun v. Att'y Gen., 602 F.3d 260, 265 (3d Cir. 2010). When determining *loss*, the record of conviction consisting of the indictment, the plea, the verdict and the sentence has generally been examined. Matter of Madrigal, 21 I&N 323, 325-26 (BIA 1996); *See also* Shepard v. U.S., 544 U.S. 13, 16 (2005) (endorsing the consideration of "any explicit factual findings by the trial judge").

However, in reviewing the evidence to determine whether the government has met its burden to establish the ground of removal, the Third Circuit requires a loss calculation must be determined only by the charges of which a respondent has been convicted. Alaka v. Att'y Gen., 456 F.3d 88, 108 (3d Cir. 2006); *see also* Bobb v. Att'y Gen., 458 F.3d 213, 227 (3d Cir. 2006) (determining that a respondent's loss was greater than $10,000 based on an indictment to which the respondent had pled guilty). In Kaplun v. Att'y Gen, *supra*, a securities fraud conviction, the Third Circuit found an aggravated felony since the *loss* to a victim exceeded $10,000. 602 F.3d at 263. In that case, the pre-sentence investigation report listed the total loss for the offense as between $700,000 and $1,000,0000. *Id.*

2. Forfeiture and Amount of Loss

The published case law regarding loss focuses on either the amount of loss found by the convicting court or the amount of restitution ordered by the court. Neither the BIA nor the Third Circuit has issued a published decision regarding whether the amount of forfeiture can be used to determine loss.[2]

In the unpublished decision in Woldiger v. Ashcroft, 77 Fed. Appx. 586 (3d Cir. 2003), the Third Circuit looked at a $900,000 payment made in the settlement of a forfeiture case. The court concluded that since the settlement agreement did not indicate what losses were attributable to the alien's conviction, what losses were caused by the scheme generally; or what part of the $900,000 was attributable to each, the government did not meet its burden in establishing that the alien's conviction involved a loss of $10,000. Woldiger v. Ashcroft, 77 Fed. Appx. at 592. In that case, the amended judgment included a statement from the trial judge that he made no findings of actual loss because the offense of conviction did not involve loss. *Id.* at 589.

b. Restitution and Amount of Loss.

[2] In an unpublished decision, the First Circuit noted that reliance on a forfeiture order for an aggravated felony determination was permissible. *See* Jimenez v. Gonzales, 215 Fed. Appx. 8 (1st Cir. 2007).

Given the dearth of published case law on *forfeiture* and loss under INA § 101(a)(43)(M)(i), the court looks to Board and Third Circuit decisions for general guidance regarding *restitution* as a measure of loss. Restitution can be used to calculate loss for purposes of INA § 101(a)(43)(M)(i) only insofar as the restitution ordered reflects the actual loss resulting from the offense. In Matter of Babaisakov, 24 I&N Dec. 306, 307 (BIA 2007), where the alien was convicted of a scheme to defraud insurance companies and ordered to pay restitution in excess of $10,000, the BIA explained that restitution is helpful when calculating loss because it is "frequently included" in criminal judgments. *See also* Munroe v. Ashcroft, 353 F.3d 225, 227 (3d Cir. 2003) (explaining that restitution "may be helpful" in determining loss when the plea agreement or indictment are unclear). The Board explained that for restitution to be taken into account, it must have been assessed with "an eye" to the actual losses in a case. Matter of Babaisakov, 24 I&N Dec. at 319. Other assessments of loss, such as a defendant's admission during a criminal trial, would also suffice to meet the clear and convincing showing if the admission "pertained to losses arising from the conduct." *Id.* at 320.

Similar to Alaka v. Att'y Gen., *supra*, the Eleventh Circuit found that the amount of a restitution order is insufficient for the calculation of loss under INA § 101(a)(43)(M) where it was based on losses for which the respondent was not charged or convicted. *See* Obasohan v. Att'y Gen., 479 F.3d 785 (11th Cir. 2007). So, too, the Eighth Circuit, emphasizing that the amount of loss for purposes of INA § 101(a)(43)(M) must be the loss of which a defendant was convicted, not the amount of restitution or other losses. *See* Tian v. Holder, 576 F.3d 890, 894-96 (8th Cir. 2009).

c. Gain as an Alternative Measure of Loss

In an unpublished decision, the Board noted that since Congress did not define "loss" for purposes of INA § 101(a)(43)(M), it is reasonable to presume that Congress would expect the language of that section to be interpreted in a manner consistent with federal criminal law standards.[3] *See* Matter of In Shig Ahn, 2004 WL 1398677 (BIA 2007). Consequently, the Board, in a case involving restitution, relied on the definition of "loss" in section 2B1.1 of the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines").

But even applying the Sentencing Guidelines won't get us any closer to determining the amount of loss in this case simple because, as respondent stresses, there is no loss, *per se*. U.S.S.G. § 2B1.1(3)(B) explains that a sentencing court must use "gain that resulted from the offense as an alternative measure of loss *only if there is a loss but it reasonably cannot be determined*." U.S.S.G. § 2B1.1(3)(B)(*emphasis added*). Government counsel points to criminal court cases in support of her argument that forfeiture equates to loss. In United States v. Mooney, 425 F.3d 1093 (8th Cir. 2005), the Eighth Circuit applied the forfeiture calculation suggested in the Sentencing Guidelines, citing the official commentary to U.S.S.G. § 2B1.4, which defines gains from insider trading:

[3] Specifically, the Board reasoned that as the tribunal vested in the first instance with the Attorney General's authority to administer the Immigration and Nationality Act, it must arrive at a reasonable interpretation of Congress' language, and in the interest of uniformity the INA should be interpreted in accordance with generally-accepted principles of federal law. Matter of In Shig Ahn, 2004 WL 1398677 (BIA 2007).

> Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

U.S. v. Mooney, 425 F.3d at 1099. Similarly, in United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009), the Tenth Circuit followed on, explaining that for convictions of insider trading, the "gain resulting from the offense" is the gain resulting from the deception. U.S. v. Nacchio, 573 F.3d at 1071. However, the court is not persuaded that these cases provide any guidance to the issue of loss under the INA.

The term "forfeiture," is defined, *inter alia*, as follows:

- *civil forfeiture*: An in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.
- *criminal forfeiture*: A governmental proceeding brought against a person as punishment for the person's criminal behavior.

Blacks Law Dictionary, p. 661 (7th Ed.1999).

Applying either definition, however, it is clear that assessing a *forfeiture* is not the equivalent of assessing a *loss*. Or in this case, calculating respondent's *gain* from his fraudulent conduct, a monetary amount reflected, not as part of the facts underlying his conviction, but used as punishment for his ill-gotten gains, does not reflect a *loss* for purposes of INA § 101(a)(43)(M)(i). Simply put, his conviction does not result in any *loss* to any victims.

Moreover, if Congress had intended for a gain to be the equivalent of a loss, it could easily have said so in the statute. This court should not stretch the reach of a statute beyond what Congress likely meant for the statute to cover. Matter of In Shig Ahn, *supra*. The federal sentencing guidelines make it clear that forfeiture orders against an individual are due to the fact that victims usually cannot be identified and the amount of loss cannot be ascertained. In short, government counsel has failed to explain how this court can assess any amount of loss from the forfeiture order of the federal district court. The court concurs with respondent that the aggravated felony ground of removal, INA § 237(a)(2)(A)(iii), cannot be sustained and will be dismissed.

Crime Involving Moral Turpitude

Respondent is also charged under INA § 237(a)(2)(A)(i) for a crime involving moral turpitude committed within five years after admission to the United States for which a sentence of one year or longer may be imposed. First, the court concurs with government counsel that

respondent's parole on January 5, 2008,[4] establishes the date for calculating the five-year timeframe in INA § 237(a)(2)(A)(i). Matter of Alyazi, 25 I&N Dec. 397, 399 (BIA 2011).

The second issue is whether respondent's federal constitutes a CIMT. In this regard, respondent argues that his conviction is a violation of a regulation, pointing to several notable commentators expressing doubt whether "insider trading" ought to be deemed a criminal act at all. Government counsel counters that fraud underlies respondent's conviction even where the statutory element of fraud is absent, *citing* Matter of Kochlani, 24 I&N Dec. 128, 129-131 (BIA 1980), and Matter of Tejwani, 24 I&N Dec. 97, 98 (BIA 2007). The court concurs.

What underlies respondent's conviction was his use of proprietary information to gain advantage in the stock market to ensure a gain on his original investments. While his actions did not outright manipulate the open market as was the case in Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978), the end result is the same; in both cases individuals used their positions of advantage to unfairly profit thereby undermining a well-regulated open market. In McNaughton, the Board concluded that the alien had intended to defraud the Canadian stock market against the investing public as a whole. Much the same can be said here. Whether respondent engaged in statutory "fraud" is neither here nor there. Assuring public confidence in the stock market by protecting its integrity "violates the customary rule of right and duty owed between man and man...or society in general." *Id.* at 574 (internal citation omitted). The ground of crime involving moral turpitude, INA § 237(a)(2)(A)(i), will be sustained.

Order: The aggravated felony, INA § 237(a)(2)(A)(iii), is dismissed.
Further Order: The crime involving moral turpitude, INA § 237(a)(2)(A)(i), is sustained, and the motion to terminate is therefore denied.

Walter A. Durling
Immigration Judge

February 21, 2012

[4] Allegation 3 on the NTA alleges that respondent was admitted on or about January 5, 2008. Respondent denied being admitted but conceded he was paroled at that time. The Form I-213, exhibit 2-A, states that respondent "entered" the United States on that date as a non-immigrant Intacompany transferee. However, given Board precedent, and the fact that respondent does not claim any earlier date of admission or parole, it matters not whether respondent was admitted or paroled on that date.

RE: [redacted]

File: A088-414-342

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [M] ALIEN's ATT/REP [M] DHS
DATE: 02/21/2012 BY: COURT STAFF BLS
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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An IRCA (Immigration Reform and Control Act) Primer: Employer Obligations (2021 Edition)

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The enclosed provides some general guidance regarding hiring and employment practices which may have consequences under U.S. immigration law. It is not intended to address all circumstances or individual fact patterns, for which it is suggested that counsel be consulted. Furthermore, although it touches on various issues arising under labor, tax or employment law, these areas are the scope of this article, the authors encourage readers to seek counsel from experts in these fields when addressing specific cases.

OVERVIEW

Prior to Congress passing the Immigration Reform and Control Act of 1986 (IRCA), amending the Immigration and Nationality Act (INA), few provisions of immigration law dictated what an employer could or could not do. The employment of an "illegal" (undocumented) worker was essentially a violation of law on the employee's part, for which he or she faced possible deportation. However, apart from a few state laws, no sanctions applied to employers who hired undocumented workers. In 1986, in response to public sentiment that the United States had lost control of its borders, Congress passed IRCA which addressed this perceived problem in three ways: 1) it created a general amnesty for foreign nationals in the United States in violation of law since January 1, 1982; 2) it made it a violation of federal law, with specific civil and criminal penalties, to employ undocumented workers; and 3) it created certain anti-discrimination safeguards to ensure that employers, fearing the new sanctions, would not simply refuse to hire anyone who appeared or sounded "foreign."

The following discussion addresses issues which arise under the sanctions and anti-discrimination provisions of IRCA. It is important to keep in mind that, in addition to IRCA, an entire panoply of federal statutes impact the law respecting employees' rights. These include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), The American with Disabilities Act of 1990 (ADA), The Equal Pay Act of 1963 (EPA), and the Civil Rights Act of 1866. Moreover, various state and local anti-discrimination laws affect the workplace, and sometimes impose more stringent requirements than federal law. For example, in New York, the New York State Human Rights Law and the New York City Human Rights Law provide additional protection for workers based on marital status or sexual orientation. In view of the foregoing, it is critically important to consult with employment law counsel when particular questions arise.

I. IRCA COVERAGE

The provisions of IRCA apply to the hiring, recruiting or referring for a fee, individuals for employment in the United States subsequent to November 6, 1986. Accordingly, the requirements discussed below will pertain only to the employment of workers by a business in the United States and *not* to employment, whether for a U.S. enterprise or a foreign affiliate, if such employment occurs abroad. IRCA sanctions also do not apply to "grandfathered" employees (hired before November 7, 1986) or when a worker is not "employed" by an entity.

Who is an Employee?

The threshold determination to be made in any case where services will be rendered in the United States is whether or not an individual worker will be employed by the entity. Immigration regulations define "employee" as an individual who provides services or labor for an employer for wages or other remuneration.[1] The definition specifically excludes independent contractors and certain persons engaged in casual domestic employment.

Independent Contractors

An employee may not be called an "independent contractor" merely to circumvent the requirements of IRCA. Accordingly, whether or not an individual or an entity is an independent contractor will be determined on a case-by-case basis, regardless of what the individual or entity calls itself.

Independent contractors carry on an independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Some indicia of whether or not an individual, or entity, is an independent contractor are whether the worker:

- supplies the tools or materials
- makes services available to the general public
- works for a number of clients at the same time

1. 8 CFR 274a.1(f).

- has an opportunity for profit or loss as a result of labor or services provided
- invests in the facilities for work
- directs the order or sequence in which the work is to be done
- determines the hours during which the work is to be done

When an entity utilizes the services of an independent contractor such entity is relieved of the requirement (further discussed *infra*) of verifying that the worker is authorized to be employed in the United States. However, federal law makes it clear that an entity may not use a contract or subcontract in order to obtain the labor or services of undocumented workers *knowing* that these workers are unauthorized with respect to performing such labor or services.[2] In as much as the Department of Homeland Security (DHS) will make a case-by-case determination of whether an individual or entity is an independent contractor, *whenever an entity engages the services of an independent contractor it is recommended that such entity have a contract and keep well documented records with respect to the factors described above which would be given consideration by the DHS*

In most instances, entities in the information technology field which function as independent contractors will require a consulting agreement. Most agreements will contain a clause that designates the independent contractor as such. It is recommended that this clause reflect the consultant/contractor's obligations with respect to tax liabilities for its employees. It may be advisable to consider including additional language in the consulting agreement which provides that: 1) the independent contractor bears responsibility for verification of the employment eligibility for its workers pursuant to INA 274A (relating to completion of Form I-9); 2) the independent contractor warrants that its workers are legally authorized to render the services described in the contract and; 3) that if a visa is required, the necessary approval and documentation will be secured by the independent contractor, covering services at the location indicated in the agreement, prior to commencement of services under the agreement.

2. INA 274A (a)(4).

Volunteers

A cautionary note is warranted with respect to the use of volunteers within an organization. Extensive volunteer work may be construed as unauthorized employment, if the volunteer receives perquisites for that work. Thus, volunteer work for which traditional fringe benefits (housing, medical expenses, etc.), but no salary, is received, may be deemed "employment." Further, volunteer services for a prospective employer where the noncitizen will ultimately derive a benefit may be construed as employment. In addition, in many instances, taking on a volunteer or unpaid intern, particularly, if not associated with an academic program, may be in violation of employment and labor laws.

II. AVOIDING DISCRIMINATORY HIRING PRACTICES

IRCA prohibits national origin or citizenship status discrimination against "protected individuals" by employers of four or more workers when they hire, fire, or recruit for a fee. It is not unlawful under IRCA to prefer a U.S. citizen worker over an equally qualified undocumented worker.

"Protected individuals" under IRCA include: U.S. citizens or nationals, noncitizens who are lawful permanent residents ("green card" holders), refugees, asylees, or temporary residents under IRCA's legalization program. However, as previously indicated above, other federal and state employment laws may offer even broader protection to workers. In fact, the Equal Employment Opportunity Commission (EEOC), which administers Title VII, the ADA, the ADEA and the EPA advises that although the Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002) prohibits the award of back pay to undocumented aliens the decision "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work" www.eeoc.gov/policy/docs/undoc-rescind.html, (June 28, 2002)

In view of the foregoing, employers must tread a very thin line in attempting to ensure that no unauthorized worker is hired in violation of federal law, while simultaneously steering clear of potentially discriminatory questions in ascertaining the work authorized status of a prospective new hire. *The best protection against a claim of a discriminatory employment practice is to ensure that all workers and candidates for employment are treated the same regardless of citizenship, national origin,*

race, color, religion, gender, age, marital status, pregnancy, disability, sexual orientation or any other unlawful basis for distinguishing workers.

Pre-Hiring Questions – Non-U.S. Persons

Often individuals who apply for positions are not U.S. citizens or permanent residents and have employment authorization which is limited in time and/or may require the company's sponsorship in order to qualify to work. This poses a dilemma to employers who may not be interested in being involved in immigration processes and therefore look to establish policies relating to the hiring of foreign nationals. This requires them to identify those individuals who would fit within those parameters.

All candidates for employment should be asked the same questions in determining their eligibility to work. The Office of Special Counsel for Immigration—Related Unfair Employment Practices (OSC), part of the Civil Rights Division of the U.S. Department of Justice, which has recently changed its name to the Immigrant and Employee Rights Section (IER), has on several occasions addressed the issue of what inquiry is appropriate for an employer to make concerning an applicant's authorization to be employed. In April 1993 letter, the OSC stated that it was permissible to ask the following question:

"Are you presently legally authorized to work in the United States on a full time basis?"

The OSC recommended against asking whether an applicant is authorized for *permanent* employment since IRCA provides protection to some workers (such as refugees or asylees) whose employment authorization may not be permanent.

In June 1993, the OSC responded to an inquiry regarding permissible questions in the labor certification interview process. Applications for a foreign nation's labor certification (a preliminary step in applying for a "green card" for a worker) requires that employers recruit for U.S. workers (U.S. citizens, nationals, foreign nationals admitted for permanent residence, temporary residents under the amnesty program, refugees & asylees) before the application for the foreign national worker can be approved. In this context, an employer may wish to ask:

"Are you currently authorized to work for all employers in the United States on a full-time basis or only for your current employer?"

In August 1998, the OSC "approved" the following questions for use in employment interviews or employment applications:

"Are you legally authorized to work in the United States?"

"Will you now or in the future require sponsorship for employment visa status (*e.g.*, H-1B visa status)?"

In June 2010, the OSC advised that an employer could amplify on this question by adding "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status, and 'job flexibility benefits' (also known as I-140 portability, or adjustment of status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer."

Although the IER now cautions that it cannot opine on particular cases of alleged discrimination, the foregoing questions would appear to comport with the requirements of IRCA. While the conservative approach would be, in pre-hiring, to limit to either the first or second set of "approved" questions, others which identify problematic immigration scenarios might be permissible, although you may want to seek guidance from IER or private counsel before implementing changes.

Employers should also be aware that although the IER appears to have outlined understandable parameters for how an employer may pre-screen and make hiring decisions based upon non-immigrant status of individuals not protected under IRCA, employers must keep a careful eye on what the courts might do and say in response to claims brought under alternative theories of discrimination, e.g., 42 U.S.C. §1981.

Litigants have challenged companies that have sought not to hire individuals whose employment authorization is contingent, such as the DACA kids, those who were granted authorization to work under the program instituted by President Obama, Deferred Action for Childhood Arrivals, which program was terminated by Executive Order by President Trump and the termination stayed pursuant to pending litigation. States, such as California are getting into the discussion of instituting regulations to protect such vulnerable groups and accordingly, local statutes and regulations must be carefully reviewed.

Completing & Documenting Form I-9

As discussed at length below, IRCA requires that employers verify (and reverify when necessary) that the worker has permission to accept employment in the United States through the proper and timely completion of Form I-9. The documents which a worker may present to prove identity and work authorization are specifically enumerated in the federal regulations.

It is not unlawful to request applicants for employment to complete Form I-9 prior to the commencement of employment as long as

all applicants are requested to do so. However, the information provided on Form I-9 could be used to discriminate on a prohibited basis. Accordingly, it is recommended not to complete the Form I-9 prior to placing the individual into service, unless the process in place occurs after there has been an offer and acceptance of employment and the policy is applied in a consistent non-discriminatory manner.

As noted above, a worker's identity and eligibility to accept employment in the United States will be demonstrated by showing documentation which is specifically described in the INA or as may be further designated by the Department of Homeland Security. *An employer may not request more or different documents than those designated.* The DHS takes the position, supported by a recent administrative decision, that an employer could be found liable for discrimination by requiring certain documents, even if its intent was not to discriminate. However, to avoid a potential claim of discriminatory hiring practices, it is recommended that the employ *not request specific documents, but accept any proof of identity and authorization to work presented by a worker, so long as it meets the requirements listed in Form I-9.*

III. COMPLYING WITH IRCA REQUIREMENTS WHEN EMPLOYING WORKERS

Completion of Form I-9 upon Hire

1. Completion of Section 1 by the Worker

   When services will be rendered by an "employee" (*see* discussion above) *the worker must complete Section 1 of the Form I-9 at the time of hire.* As previously noted, it is not recommended that the worker be requested to complete Form I-9 before a decision to hire the worker has been made.

   In Section 1 of Form I-9, the worker provides basic information regarding name and address, and attests under penalty of perjury that he or she is a U.S. citizen, lawful permanent resident or an foreign national authorized to work in the United States for a limited duration. The services of a translator or preparer acting on behalf of the worker may be used. The worker (and translator or preparer, if applicable) must sign Part 1 of Form I-9. Part 1 must be completed and executed no later than the first day of entering into service.

2. Completion of Section 2 by the employer

Within three business days of being placed into service, the employer must physically examine the required documents establishing identity and permission to work in the United States, complete Section 2 of Form I-9, and sign the form.

United States Citizenship and Immigration Services (USCIS) has advised that the three business days be counted after the actual date of hire. Thus, if an individual is hired and commences work on a Monday, the third day would be Thursday.

The employer is required to examine original documents to ensure that they appear to be genuine on their face and relate to the worker who produces them. The employer is not expected to be a document expert, but must exercise the care a "reasonable person" would use in reviewing these documents.

I-9 Documents

Presently, the documents which are acceptable for Form I-9 verification are listed as part of Form I-9.

Since 1987, when the first version of the I-9 form was promulgated, there have been significant changes in the form and in some instances, the list of eligible documents, specifically in 1991, 2005, 2007, and 2009, and thereafter. The current edition of the form which was issued on July 17, 2017 comes in a paper version, which must be printed for completion manually, and also in a PDF "fillable" version which includes dropdown lists and calendars for filling in dates, on-screen instructions for each field, and is able to generate a QR response. The Handbook for Employers, Form M-274 provides instructions and guidance completing Form I-9.

An employee may present <u>either</u> an original document for establishing both employment authorization and identity (List A) <u>OR</u> an original document which establishes employment authorization <u>and</u> a separate original document which establishes identity. (List B & C). The USCIS Handbook for Employers (Document M-274, available on www.USCIS.gov) includes photographs of sample documents.

1. Form I-9 List A

The following documents establish *both* identity and work authorization:

a. United States passport (unexpired) or passport card;

b. Alien Registration Receipt Card or Permanent Resident Card (Form I-551);

c. An unexpired foreign passport with a temporary I-551 stamp;

d. An unexpired Employment Authorization Document (EAD) that contains a photograph (Form I-766) or

e. In the case of a nonimmigrant foreign national authorized to work for a specific employer incident to status, an unexpired foreign passport with Form I-94 (Arrival/Departure record) bearing the same name as on the passport and containing the endorsement of the foreign national's nonimmigrant status, as long as the endorsement has not expired and the employment is not in conflict with any restrictions or limitations identified on Form I-94.

f. Passport from the Federated States of Micronesia or the Republic of the Marshal Islands with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association between the United States and the FSM or RMI.

2. Form I-9 List B

The following documents establish identity *only* (for individuals 16 years of age or older):

a. Driver's license or identification card issued by a state or outlying United States possession, so long as the document contains a photograph or identification information such as name, date of birth, gender, height, eye color, and address;

b. School identification card with photograph;

c. A voter's registration card;

d. United States military or draft record;

e. Identification card issued by federal, state or local government agencies or entities, so long as the card contains a photograph or information such as name, date of birth, gender, height, eye color, and address;

f. Military dependent's identification card;

g. Native American Tribal document;

h. United States Coast Guard Merchant Mariner Card;

i. A driver's license issued by the Canadian government;

j. For persons under the age of eighteen who are unable to produce one of the documents listed above:

- A school record or report card;
- A clinic doctor or hospital record; or
- A daycare or nursery school record.

For persons under the age of eighteen who can produce none of the above documents, the minor may be exempt so long as:

a. The minor's parent or legal guardian completes on the Form I-9 Section 1—in the space for the minor's signature, the words, "minor under age 18."

b. The minor's parent or legal guardian completes on the Form I-9 the "Preparer/Translator certification."

c. The employer or the recruiter or referrer for a fee writes in Section 2—in the space after the words "Document Identification #" the words, "minor under the age 18."

Individuals with handicaps, who are unable to produce one of the identity documents listed above who are being placed into employment by a nonprofit organization, association or as part of a rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term "special placement" for "minor under age 18."

3. Form I-9 List C

The following documents establish work authorization *only*:

a. United States social security card, so long as the card does not state that it is invalid for employment;

b. A Certification of Birth Abroad (Forms FS-545 or DS-1350) issued by the U.S. Department of State;

c. A birth certificate issued by a state, county, municipal authority, or outlying possession of the United States bearing an official seal;

d. A Native American tribal document;

e. A United States citizen or resident citizen Identification Card (Forms I-197 or I-179); or

f. An unexpired EAD (issued by USCIS).

4. When the Employer Must Accept "Receipts" for Documents

Unless the employment is for a period of less than three business days, *the employer must accept the following documents, which are treated as "receipts" under the regulations.*

a. Lost, Stolen or Damaged Documents

Unless the employer has actual or constructive knowledge that a worker is not authorized to work, the employer must accept a receipt for a replacement document where the individual is unable to produce the required document because it was lost, stolen or damaged, so long as the replacement document is presented within 90 days of hire or reverification.

b. Temporary evidence of permanent resident status

If the worker has indicated in Form I-9, Part 1 that he or she is a lawful permanent resident, the employer must accept a Form I-94 containing an unexpired "temporary form I-551" stamp and a photograph of the individual so long as Form I-551 is presented before the expiration date of the temporary stamp (or if it has no expiration date, within one year of the issuance date of the arrival portion of Form I-94).

c. Form I-94 indicating Refugee Status

If the worker indicates in Section 1 of Form I-9 that he or she is an foreign national authorized to work, the employer must accept Form I-94 with an unexpired refugee admission stamp if the individual presents within 90 days of hire or reverification an unexpired EAD (Form I-766 or I-688B) or an unrestricted social security account number card and proof of identity.

Photocopying Documents

The employer is not required to photocopy the documents that have been shown to it. However, the employer may choose to do so (and it is probably preferable). *If the employer wishes to retain copies of employee-submitted documents for its records, the employer should do so for all employees hired.*

Reverification of Employment Eligibility

Where the employee has indicated in Section 1 of Form I-9 that he or she is temporarily authorized to work in the United States, the employer must reverify eligibility for employment by the time his or her limited authorization is expiring. The employer may do so by noting the new document's identification number and expiration date on Form I-9. The revised I-9 form, when it is issued, will likely have a separate (Form I-9A) section to facilitate reverification.

It is recommended that a "tickler system" be established for the employer's staff to ensure that the employer complies with the reverification requirement. The employer may also wish to establish a procedure for providing advance notice to employees whose documents will need to be reverified. As with all employment policies, employers should apply any such system uniformly to all workers who have temporary authorization. *Note that if the worker is unable to reverify employment eligibility by the time his or her temporary authorization expires, the employer is required to discharge the employee. The employer may no longer allow the individual to perform services until such time as the matter is resolved. Although many assume that the employee must be "terminated" at that time, this is not clearly the case, and you may want to consult IER or private counsel.*

Retention of Records

The employer must retain Form I-9 for each employee for a period of three years from the date of hire or one year after the services are terminated whichever is later. It is advisable to keep I-9 forms separate from other personnel files so that they are readily available in the event of an audit. Additionally, this is also advisable as the forms contain information relating to age, citizenship, place of birth, etc. which may not be considered when making personnel decisions.

I-9 forms may be retained electronically. An electronic system used for I-9 retention must be constructed so as to retain an audit trail, not for each time a Form I-9 is electronically reviewed, but rather only for when the Form I-9 is created, completed, updated, modified, altered or corrected.

Re-Hires

If an employee is rehired within three years after the completion of the original Form I-9, the employer may use the original form to reverify employment eligibility.

Certain employees will be considered to be "continuing in employment" rather than being hired or rehired, where the individual at all times had a reasonable expectation of employment. These include an individual who:

- Takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;
- Is promoted, demoted, or gets a pay raise;
- Is temporarily laid-off for lack of work;
- Is on strike on in a labor dispute;
- Is reinstated after a disciplinary suspension for wrongful termination found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;
- Transfers from one distinct unit of an employer to another distinct unit of the same employer (the employer may transfer to the receiving unit the records and Forms I-9 relating to the worker);
- Is engaged in seasonal employment; or
- Continues employment with a related, successor or reorganized employer, provided that the employer obtains and maintains from the previous employer the records and Forms I-9 relating to the worker. (Any employer which encounters this should consult legal counsel regarding specific requirements pertaining to "successor-in-interest".)

Whether or not the employee's expectation of resumption of employment was reasonable will be assessed on a case-by-case basis, considering factors such as the employer's past history and financial condition, whether the worker had been employed on a regular and substantial basis, has acted in accordance with employer's established policy regarding absences, has taken action or sought benefits which are inconsistent with resumption of employment (such as severance or retirement pay) and various other factors.

Prohibition Against "Knowingly" Hiring an Unauthorized Foreign National

Even if the worker provided a facially valid work authorization document when Form I-9 was completed, if the employer acquires

"knowledge"—either actual or constructive—that the worker lacks authorization to be employed in the United States, the employer is required to terminate the employment. Under the regulations the employer may be charged with "constructive" knowledge if it fails to or improperly completes Form I-9, has information available to it that would indicate that the worker is unauthorized (such as Labor Certification or Application for Prospective Employer), or if the employer acts with reckless and wanton disregard in allowing another individual to introduce an unauthorized worker into the workforce.

Penalties

There are civil monetary penalties for violations pertaining to failure to correctly or timely complete Form I-9, ranging from $230 to $2,292 per worker. Where there has been a good faith attempt to comply with the requirements, violations which are purely "procedural or technical" may be forgiven, unless the employer has failed to correct a violation within 10 days after being notified of the violation by USCIS or another enforcement agency, or where the employer has engaged in a "pattern or practice" of hiring unauthorized workers.

There are civil monetary fines, for knowingly hiring or continuing to employ a worker not authorized to be employed in the United States as follows: for a 1st offense, $5738-$4,586 per worker; for a 2nd offense, $4,586-$11,463 per worker; for a 3rd offense, $6,878- 22,972 per worker. All fines indicated are for offenses occurring after February 3, 2017, when the penalties were increased to adjust for inflation.)

Penalties may also include issuance of a cease and desist order and, for certain employers who engage in a practice of hiring unlawful workers or who knowingly hire 10 or more unauthorized workers, criminal sanctions. Criminal penalties under 8 USC 1324a(f) include fines for each worker or imprisonment for up to six months, or both. Criminal penalties under 8 USC 1324(a)(3) include fines assessed under Title 18 of the U.S. Code, or imprisonment of up to five years, or both.

Finally, federal contractors who knowingly hire unauthorized workers may be barred from federal contracts for one year pursuant to Executive Order 12989 (February 13, 1996).

Employer Rights in an DHS Visit to Inspect Records

DHS, the U.S. Department of Labor (DOL) and the Special Counsel for Immigration—Related Unfair Employment Practices (OSC) may

conduct inspections of the employer's I-9 forms. These agencies are required to provide the employer with at least three days notice of an inspection. Neither a subpoena nor a warrant is required for an I-9 inspection.

In the event of an unannounced work site visit by the DHS seeking to question the employer's employees, the employer has the right to deny entry in the absence of a warrant, although frequently cooperation is to the employer's advantage.

In a proceeding to assess administrative penalties, the DHS issues a Notice of Intent to Fine. The respondent has 30 days from service of the Notice of Intent to request a hearing before an Administrative Law Judge.

Covid-19 Accommodations: Completing Form I-9 Remotely – Permissible During Office Closures and Teleworking

Demonstrating that rapid pace of change during these uncertain times, the Department of Homeland Security (DHS), announced "flexibility" in completing I-9 Forms remotely during the Covid Pandemic. As a result, during this pandemic if an office is working remotely, DHS is permitting employers to review identity and work authorization documentation via webcam to complete the Form I-9. Once the office resumes normal operations, the employer must physically inspect the documents and update the I-9 Form.

Specifically, DHS is exercising its discretion to defer the requirement to physically inspect the documents in order to properly complete the Form I-9 for a 60 day period OR within 3 business days after the termination of the National Emergency, whichever comes first. As of the date of this update, the 60 day period has been subject to renewal on an ongoing basis.

While employers and their employees are working remotely to ensure social distancing due to COVID-19, they are not required to review employee's identity and employment authorization documents in person. They will be permitted to inspect the documents remotely. The guidance is broad, allowing inspection via "video link, fax or email, etc." Employers must obtain, inspect, and retain copies of the documents, within three business days and enter "COVID-19" in Section 2's "Additional Information" field. Once normal operations resume, physical inspection of the documents must be performed within 3 business days and Section 2 of the I-9 Form must be updated with "documents physically examined" and the date of inspection.

Further, employers that use the remote inspection option must maintain evidence of their remote onboarding and telework policy in

case of Audit. This exception is only permitted for workplaces that are operating remotely. If employees are onsite, there is no ability to use remote verification, unless newly hired or existing employees are in quarantine or lockdown due to COVID-19. Again, evidence of such quarantine or lockdown should be maintained in case of Audit.

I-9's and the E-Verify Program

E-Verify is an electronic Internet-based system operated by USCIS that verifies employment eligibility based upon information provided by the employee on his or her I-9 form. The information provided is checked against records of DHS, the Social Security Administration and other available databases to confirm that the identified individual is in fact authorized to work in the United States.

It is largely a volunteer program, but certain federal contractors are obligated to participate in E-Verify and several states have mandated that certain employers and contractors within their states participate.

There are certain additional obligations when completing an I-9 form for participants in the E-Verify program. They must obtain a social security number (voluntary for non-E-Verify participants); they may only accept documents from List B that have a photograph; and even if it is not their policy to maintain copies of the documents, they must take copies of U.S. passport, U.S. passport cards, Form I-551 or Form I-766 if presented, as these documents will be compared (the photographs) to records on file with DHS as part of the E-Verify process.

CONCLUSION—WHAT DOES THE FUTURE HOLD?

It is hard to predict what additional obligations will be imposed on employers in the future, but the trend clearly will be to focus on enhancing compliance. It can be anticipated that there will be a significant push to expand use of the E-Verify program and the possibility to make it mandatory for all employers. To counter the problem of identity theft, additional security as to documents such as social security cards and drivers' licenses may be mandated. One thing that can safely be predicted is that the burden on employers will increase.

EXHIBIT I—SUPPLEMENTAL MATERIALS

ENROLLMENT IN THE USCIS E-VERIFY PROGRAM—AN EXECUTIVE SUMMARY

OVERVIEW

The E-Verify program is an electronic internet-based system of employment verification operated by United States Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration (SSA). Participating employers record all relevant information of a new employee by completing the I-9 form and enter the data into the Internet-based E-Verify system for verification by the Department of Homeland Security (DHS) and the SSA.

The system responds, in most cases, nearly instantaneously indicating either that:

- Employment is authorized;
- SSA Tentative Non-Confirmation (the SSA cannot immediately confirm employment authorization)
- DHS verification in process (application pending)
- DHS Tentative Non-Confirmation (DHS cannot confirm employment authorization)

The E-Verify program provides a procedure so that the new hire can contest a non-confirmation with the appropriate agency, while continuing to work, on payroll until resolution.

Registration

To participate in the E-Verify program, an employer registers online and signs a Memorandum of Understanding with DHS and the SSA. Designated employees or agents of the company are then obligated to read a user manual and complete an online tutorial using the system.

An employer can choose to register for E-Verify at one or more sites of employment and can terminate participation in the E-Verify program at any time, with 30 days notice.

Obligations

An employer participant in E-Verify must verify employment eligibility of new employees only. It must post notices of the employer's

participation in E-Verify and an anti-discrimination notice issued by the Office of Special Counsel for Immigration—Related Unfair Employment Practices. It cannot use the program to verify current employees (except for certain federal contractors) and the system cannot be used to pre-screen employment applicants.

E-Verify Advantages

The system may effectively screen out undocumented workers at the time of hire. It may result in better treatment if the company is subject to investigation. In addition, some states have already made E-Verify mandatory and E-Verify for certain federal contractors is obligatory, effective September 8, 2009, per regulation. In addition, some prognosticate that E-Verify in one form or another will eventually become mandatory for all employers across the country.

E-Verify Disadvantages

Employers under this program must establish and maintain a process and system for maintaining records, following up and monitoring resolution of "tentative non-confirmations." It must commit resources to the system. It must be willing to permit DHS and the SSA to make visits on-site to review E-Verify records, and it is going "on the record" by using the E-Verify system as it inputs its I-9 information for new hires into the E-Verify database.

SYNOPSIS OFTHE E-VERIFY PROGRAM FOR EMPLOYMENT VERIFICATION—MEMORANDUM OF UNDERSTANDING

The Memorandum of Understanding, which must be executed in order to participate in the E-Verify program, outlines the duties, responsibilities and obligations of each of the participating parties, which are the SSA, DHS (USCIS, which administers the program is a division within DHS) and the employer. Additional, and to some extent different, terms are provided for those employers who are federal contractors which are not applicable to employers generally.

The Memorandum states that the SSA and DHS will undertake to verify the records of potential hires and describes the procedural obligations of the employer.

The Memorandum of Understanding (and Manual) provide for certain amendments to the "normal" I-9 process. It provides that an employer participating in E-Verify, can only accept a List B Document which contains a photo. It also obligates the employer to collect and

list the individual's social security number and delay running an E-Verify query for an employee who has not yet been issued a social security number until such time as the number is actually issued. It further obligates the employer to allow for onsite visits to inspect E-Verify records.

E-VERIFY—VOLUNTARY OR NOT

Although the basic E-Verify program is, at this point in time, a voluntary program, there are certain situations under which it could be obligatory to an employer. Specifically, a company which enters into qualifying contracts, or amends certain contracts after September 8, 2009 to provide goods and services to the federal government, might be obligated.

In addition, a company that contracts with states which have imposed their own obligations, there are currently 13 of them, or hires in the three states which require use of E-Verify for employees hired within the state may find themselves under the obligation, to at least, in a limited way, register in the E-Verify program.

Federal Contractors

Not all federal contracts are subject to the E-Verify mandate. Solicitations issued and contracts awarded after September 8, 2009 and existing indefinite-delivery/indefinite-quantity contracts that are substantial and extend at least six months beyond September 8, 2009, are potentially subject.

New prime contracts valued above the simplified acquisition threshold of $100,000 with a period of performance longer than 120 days are subject. However, the commitment to participate in this program is not initiated by the contractor, but rather, the contracting officer for the federal government entity is responsible to include an E-Verify clause in any qualifying new contract.

Subcontracts that flow from the prime contracts that are for services or for construction with a value over $3,000 are also subject to mandatory E-Verify, and the primary contractor is required to include clauses in its contracts mandating E-Verify participation.

Within 30 days from the contract award, the employer is required to enroll in E-Verify, take the tutorial and prepare for actual implementation. Within 90 days after enrollment, the company must commence use of E-Verify for new hires and current employees assigned to the contract. If the company chooses to E-Verify all of

its current employees rather than just those assigned to the contract, it has 180 days from enrollment to do so.

One of the most difficult and perhaps most important determinations that a company must make is whether any of the contracts it anticipates engaging in are in fact subject to the Federal Acquisition Regulation (FAR). As the FAR is the government-wide regulation that prescribes regulations for federal government entities acquiring goods and services, the first principle is that the FAR is only applicable to contracts where a federal government entity is *acquiring* goods or services from a private contractor.

An "acquisition" is defined as "the acquiring by contract with appropriated funds of supply or services including construction by and for use of the federal government for purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated or evaluated."

E-VERIFY IN THE STATES

As noted by the National Conference of State Legislatures, seventeen states currently require the use of E-Verify for public and/or private employers (fifteen through legislation and two, Florida and Idaho, through Executive Orders). Minnesota and Rhode Island previously enacted Executive Orders requiring state agencies and contractors to use E-Verify, but those orders were rescinded. States currently requiring E-Verify are: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Virginia. Alabama, Arizona, Georgia, Mississippi, South Carolina, and Utah, currently require the use of E-Verify for all employers in their states. Louisiana does not make it obligatory, but use of E-Verify is a safe harbor. North Carolina will make it obligatory on all employers with more than 500 employees, as of October 1.

As these state laws require use of the original, voluntary version of the E-Verify program, only E-verification of *new* hires is mandated by these laws.

CONCLUSION

In conclusion, if the employer receives a new federal contract or is asked to amend one, the government agent will notify the employer and advise if the federal government is of the opinion that registration in the E-Verify

program is necessary. In addition, if the employer is doing business in any of the seventeen states listed above, it may need to contact legal counsel to investigate whether it must, in fact, make use of the E-Verify program.

NOTES

17

Noemi Masliah, Naturalization: An Overview of the Requirements, Benefits and Potential Pitfalls (October 18, 2019)

Submitted by:
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Reprinted from the PLI Course Handbook,
Basic Immigration Law 2020: Business, Family, Naturalization and Related Areas (Item #275712)

"Naturalization refers to the process by which US citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act (INA)."[1] Becoming a U.S. citizen is an important decision for an immigrant and their family. Naturalization is a process and it requires not only a demonstrated commitment to the ideals of American society, but also a lot of paperwork and fees. This article is intended to provide readers with an overview of the process, including a discussion of the requirements to apply, how the process moves forward, as well as the benefits and potential downsides of naturalizing.

Among the many benefits[2] of becoming a U.S. citizen are the right to vote in U.S. elections; eligibility to file immigrant visa petitions on behalf of some relatives; eligibility to apply for certain Federal government jobs; eligibility to run for public office; as well as the ability to change your legal name by completing the proper information on the N-400, Application for Naturalization; and to apply for certain public benefits, including, but not limited to, financial aid options for college or graduate school.[3]

There are a number of eligibility requirements before one can submit an application for naturalization.[4] General eligibility requirements for naturalization include that the applicant be at least 18 years of age,[5] be a lawful permanent resident for at least the last 5 years (or the last 3 years if married to and living with a U.S. citizen),[6] have been physically present in the U.S. for at least 30 months and one day (or 18 months and one day if married to a U.S. citizen);[7] have been a resident of the state for at least 3 months;[8] be a person of "good moral character";[9] be able to speak, read,

1. *See Citizenship Through Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 22, 2013), https://www.uscis.gov/us-citizenship/citizenship-through-naturalization.
2. *See id*; *see also What Are the Benefits and Responsibilities of Citizenship?*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/sites/default/files/files/article/chapter2.pdf.
3. *See id*; *see also* Susan E. Reed, *Eight Lesser-Known Benefits of U.S. Citizenship*, NEW AMERICA MEDIA: IMMIGRATION (Mar. 6, 2014), newamericamedia.org/2014/03/the-lesser-known-benefits-of-us-citizenship.php.
4. 8 C.F.R. § 316.
5. 8 C.F.R. § 316.2.
6. 8 C.F.R. § 319.1.
7. 8 C.F.R. § 316.2.
8. 8 C.F.R. § 316.5.
9. 8 C.F.R. § 316.10.

write and understand the English language;[10] be willing and able to take the Oath of Allegiance;[11] and have knowledge of U.S. government and history.[12]

Additionally, a potential applicant should be aware that periods of travel outside the U.S. can affect their ability to meet the continuous residence requirement.[13] If an applicant for naturalization has ever taken a trip outside of the U.S. that lasted longer than 6 months but less than 1 year,[14] they will need to prove that they did not then and do not currently intend to abandon their legal permanent resident (hereinafter "LPR") status. Evidence of ownership or lease of property in the U.S., pay stubs from a U.S. employer, or evidence of involvement in a particular community in the U.S., usually is sufficient to satisfy this burden of proof for these trips.[15] However, if an applicant plans to take a trip outside the U.S. that will last for longer than 1 year,[16] they will need to have applied and have been issued a re-entry permit before they are able to re-enter the U.S. in valid status. Application for the re-entry permit can be made by filing Form, I-131, Application for Travel Document,[17] with the United States Citizenship and Immigration Services (hereinafter "USCIS") and should be done *prior* to departing the country.[18] Additionally, as processing times[19] can be significant,

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10. 8 U.S.C. § 1423.
11. 8 C.F.R. § 337.8; *see also Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (June 25, 2014), http://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america.
12. 8 C.F.R. § 312.2; *see also Civic (History and Government) Questions for the Naturalization Test,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (02/16), https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/100q.pdf (last visited Dec 19, 2016).
13. 8 C.F.R. § 316.
14. *See* 8 C.F.R. § 316.5; *see also Chapter 3 – Continuous Residence,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES: POLICY MANUAL (Dec. 21, 2016), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter3.html.
15. *See* 8 C.F.R. § 316.2(b); *see also Chapter 3 – Continuous Residence,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES: POLICY MANUAL (Dec. 21, 2016), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter3.html.
16. *See* 8 C.F.R. § 316.5; *see also Chapter 3 – Continuous Residence,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES: POLICY MANUAL (Dec. 21, 2016), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter3.html.
17. *See I-131, Application for Travel Document*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (06/08/2016), https://www.uscis.gov/i-131.
18. *See I am a Permanent Resident: How Do I Get a Re-Entry Permit?,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Oct. 2013), https://www.uscis.gov/sites/default/files/USCIS/Resources/B5en.pdf.
19. *See USCIS Processing Time Information*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://egov.uscis.gov/cris/processTimesDisplayInit.do.

applicants should file the Form I-131 well in advance of their expected travel dates. Applicants who plan to be absent from the U.S. for one year or more in order to engage in certain qualifying employment abroad,[20] will also need to file Form N-470, Application to Preserve Residence for Naturalization Purposes,[21] in addition to Form I-131.

The application for citizenship is filed with the USCIS via the Form N-400, Application for Citizenship.[22] Presently all applicants must use only the 09/17/2019 edition of the Form N-400, Application for Naturalization.[23] With the N-400, the applicant must submit a copy of their Permanent Resident Card. The application requires a list of the applicant's home addresses for the past five years and the dates during which they resided at these addresses; a list of the employers with whom they have worked in the last five years as well as the dates they worked there and their addresses; a list of the dates that they have been outside the U.S. for the last five years and the countries where they have traveled.[24] If the applicant has children, they will need to complete information in the N-400 about them, including their full names, dates of birth, and their Alien Registration Numbers (referred to on the form as their A#).[25] Provided that the applicant is not residing overseas, the USCIS will capture the applicant's photograph[26] at the time of the biometrics appointment at the Application Support Center which takes place soon after filing.

If the applicant is applying on the basis of marriage to a U.S. citizen (hereinafter "USC"), they will need to demonstrate that their spouse has been a citizen for the past 3 years (i.e., through the spouse's birth certificate, naturalization certificate, certificate of citizenship, U.S. passport, or Form

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20. *See Chapter 5 – Modifications and Exceptions to Continuous Residence and Physical Presence*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Dec. 21, 2016), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter5.html.
21. *See N-470, Application to Preserve Residence for Naturalization Purposes*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jul. 14, 2016), https://www.uscis.gov/n-470.
22. *See N-400, Application for Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Nov. 23, 2016), https://www.uscis.gov/n-400.
23. *See Practice Alert: New Mandatory N-400 to Be Released 12/22/16,* AMERICAN IMMIGRATION LAWYERS ASSOCIATION (Dec. 14, 2016), http://www.aila.org/infonet/practice-alert-mandatory-n-400-released-12-22-16?utm_source=AILA+Mailing&utm_campaign=5209710b29-AILA8_12_15_16&utm_medium=email&utm_term=0_3c0e619096-5209710b29-291816501.
24. *See* N-400, *supra* note 22.
25. *See Glossary*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Sept. 23, 2013), https://www.uscis.gov/e-verify/customer-support/glossary.
26. *See* 8 C.F.R. § 333.1.

FS-240, Consular Report of Birth Abroad[27]). This evidence can be either submitted with the N-400 application or at the time of the interview. Additionally, marriage-based applicants will also need to submit, either at the time of application or at the interview, evidence that they are married (i.e., current marriage certificate), proof of termination of all prior marriages if applicable (i.e., divorce decrees, annulments, or death certificates), and evidence to show that the applicant and their spouse live together. This can be shown through jointly-filed tax returns (IRS-certified copies or transcripts) for the past three years, bank statements, leases, mortgages, birth certificates for their children, or similar evidence.[28] It is not a requirement that permanent resident had to have been acquired by marriage to the USC.

While the number of benefits is great, there are also a number of potential pitfalls that every applicant should consider before applying. One of the primary concerns that should be assessed is whether submitting an application for naturalization will trigger an inadmissibility bar or a ground for removal[29] for the applicant based on any false information that they may have submitted to the government in the past. This could be uncovered while the USCIS adjudicates the application. Some common examples include, if the applicant has ever falsely claimed to be a USC or provided a false birth certificate; been arrested, even under an alias; misrepresented any information on a previous application or as submitted by a current or previous employer on a Form I-9; or been admitted to the U.S. under a false identity.

Other potential circumstances to take into account include, failure to pay taxes (i.e., applicants should be sure before applying that they do not owe any back taxes and are current on all of the tax filings);[30] failure to register for selective service if they are male and were residing in permanent resident status in the U.S. between the ages of 18 and 26;[31] as well as, membership in the Communist party or certain other totalitarian regimes.[32]

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27. *See Birth of U.S. Citizens Abroad*, U.S. DEPARTMENT OF STATE: BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/passports/en/abroad/events-and-records/birth.html.
28. *See Document Checklist for Form N-400, Application for Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jan. 12, 2011), https://www.uscis.gov/forms/citizenship-and-naturalization-based-forms/document-checklist-form-n-400-application-naturalization.
29. 8 C.F.R. § 318.
30. *See* DOCUMENT CHECKLIST, *supra* note 28.
31. *See Chapter 7 – Attachment to the Constitution,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Dec, 21, 2011), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD-Chapter7.html; *see also* 8 C.F.R. § 315.
32. 8 C.F.R. § 313.

These circumstances can lead to heightened scrutiny by the USCIS in the adjudication of their case and, in some cases, result in a denial.

Effective December 23, 2016,[33] the filing fee for the N-400 is $640 and, where applicable, you must also submit an additional $85 for the biometrics fee.[34] If the applicant is 75 or older, then they are not required to pay a biometrics fee. Another exception to the filing fees applies if the applicant is a military applicant filing under Section 328 and 329 of the INA.[35] Checks must be made payable to the Department of Homeland Security,[36] and only fees paid in the form of money order, personal check, cashier's check or credit card payment using Form G-1450, Authorization for Credit Card Transactions, [37] are accepted.

Filing address is based on the location that the applicant resides.[38] Be sure to confirm the correct filing address by reviewing the N-400 filing address information on the USCIS website.[39] Processing times vary for adjudication of N-400 applications. As of the writing of this article, the processing time for N-400 applications processed at the New York City Field Office is estimated at between 13.5 and 25.5 months.[40] Applicants who wish to retain citizenship in their home country simultaneously with U.S. citizenship (known as dual citizenship), should be sure to check with the appropriate consulate or an attorney licensed to practice in the applicant's home country, to confirm that dual-citizenship is permitted under the laws of the applicant's home country before proceeding.

33. PRACTICE ALERT, *supra* note 23.
34. *See* N-400, *supra* note 22.
35. *See* 8 U.S.C. §§ 1439, 1440.
36. N-400, *supra* note 22.
37. *See G-1450, Authorization for Credit Card* Transactions, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jul. 13, 2016), https://www.uscis.gov/g-1450.
38. *See* N-400, *supra* note 22.
39. *See* N-400, *supra* note 22.
40. *See USCIS Processing Time Information, U.S. Citizenship and Immigration Services*, https://egov.uscis.gov//processingtimes/.

NOTES

18

Immigration Enforcement at the Worksite

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I. DUTY TO VERIFY EMPLOYMENT ELIGIBILITY

A. Employers' regulatory obligations

Prior to 1986, interior enforcement consisted of "area sweeps" – operations where immigration officials targeted worksites that were likely to have high concentrations of unauthorized workers. The consequence of a raid was deportation for the unauthorized worker but without any penalty against the employer.

In 1978, the Select Commission on Immigration and Refugee Policy, led by Notre Dame University president Theodore Hesburgh, examined the question of interior immigration enforcement and the effect of cutting off demand for unauthorized labor by punishing the employer.[1] In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). IRCA introduced, for the first time, civil and criminal penalties against *employers* who hire unauthorized workers.[2] IRCA requires employers to verify the employment eligibility of each of their employees in the United States. This is commonly called the "Form I-9 process" as employers must record the verification on Form I-9.[3]

The employee must provide information about herself/himself in section 1 of the Form I-9 after an offer of employment has been accepted and no later than the employee's *first* day of work. Although only the employee may complete section 1, the employer can be penalized if section 1 is not completed properly. Section 2 of the Form I-9, which contains the employer's attestation that the employer verified the employee's identity and eligibility to work in the United States, must be completed by the employer within three business days after the date of hire. Reverification of expiring temporary employment authorization must be completed in section 3 no later than the expiration of the current employment authorization.[4]

Employees are required to appear *in person* to present original documents that prove their identity and authorization to work in the United States. Data from the documents presented must be recorded

1. Tamar Jacoby, *An Idea Whose Time Has Finally Come? The Case for Employment Verification*, Migration Policy Institute, Nov. 2005, at 3.
2. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, 3361-63 (Nov. 6, 1986), codified at 8 U.S.C. § 1324a.
3. 8 C.F.R. § 274a(a)(2).
4. 8 C.F.R § 274a(b)(1).

in section 2 of the Form I-9 by an authorized representative of the employer who can *attest under penalty of perjury* that he or she examined the documents, and determined in good faith using a reasonableness standard that the documents are legitimate and in fact related to the employee. The government has always interpreted this to mean that the employee appears in person and that the documents presented are originals. I-9 forms must be retained by the employer for three years from the date of hire or one year from the date of termination, whichever is later.[5]

B. The enforcement trends

In the three decades following the enactment of IRCA, enforcement efforts varied in intensity, scope and direction depending on the political trend at any given time. Immediately after IRCA became law, immigrant rights advocates alleged that worksite raids unnecessarily instilled fear in and "traumatized" lawful immigrant workers. Organized labor, which had supported worksite enforcement, reversed its position in 2000, claiming that employers used worksite enforcement as leverage in exploiting workers.[6] Employers complained that raids and inspections caused disruptions even when they did not employ illegal workers.[7] The combination of political pressure and a lack of resources resulted in immigration authorities redirecting their priority from worksite raids to examining paperwork, which ironically punishes employers who at least attempted to comply with the Form I-9 requirements while the unscrupulous who hire "off the books" have no forms for the immigration agents to scrutinize.

Immigration enforcement under the George W. Bush administration was shaped mainly by the tragedy of September 11, 2001. For several years following the creation of the Department of Homeland Security (DHS) in 2003, U.S. Immigration and Customs Enforcement (ICE), DHS's enforcement arm, focused its attention almost exclusively on "critical infrastructure protection." Initiatives such as Operation Tarmac and Operation Glow Worm, which involved immigration inspections at airports and power plants respectively, reflected the agency's national

5. *Id.* at § 274a(b)(2).
6. Peter Brownell, *The Declining Enforcement of Employer Sanctions,* Migration Info. Source, Sept. 2005.
7. *Interior Enforcement: Strategies Contradict American Values*, Nat'l Immigr. Forum, Dec. 2001.

security priority.[8] This shift away from purely immigration enforcement unrelated to national security and infrastructure led to a decline in overall enforcement statistics. For example, the amount of administrative fine collected fell from $3,337,472 in 2000 to zero (0) in 2006. By 2008, there was a rise in that figure to $675,209 along with 6,287 immigration-related worksite arrests (civil and criminal), up from 517 arrests in 2003. The rise in arrests was due to the Bush Administration's focus on arresting unauthorized workers, especially those who were suspected of committing document or identity fraud, not increased enforcement against employers. [9]

On April 30, 2009, Homeland Security Secretary Janet Napolitano announced that ICE would redirect enforcement of immigration law away from the unauthorized workers and toward *employers.* This shift in enforcement priority resulted in a sharp increase in civil monetary penalties for employers (reaching an all-time high of $16,275,821 in 2014) while the number of arrests of unauthorized workers decreased substantially (903 in 2014).[10]

The Trump Administration continued the same policy, and in fact intensified the focus on employers as part of the "Buy American, Hire American" ("BAHA") Executive Order of April 18, 2017. An integral aspect of the BAHA Executive Order is "to create higher wages and employment rates for workers in the United States, and to protect their economic interests[.]" To achieve this objective, "it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad . . . ." U.S. ICE Acting Director Thomas Homan also announced on October 24, 2017, that his agency would increase audits of employers on their employment eligibility verification compliance by "four or five times" in fiscal year 2018.[11] This is consistent with the Administration's prior budget request to hire an additional 10,000 immigration enforcement agents.[12]

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8. Brownell, *The Declining Enforcement of Employer Sanctions.*
9. Immigration-Related Worksite Enforcement: Performance Measures, Congressional Research Service, Jun. 23, 2015, *available at* https://fas.org/sgp/crs/homesec/R40002.pdf.
10. *Id.*
11. ICE Announces up to Five-Fold Increase in Form I-9 Worksite Inspections, LawLogix, Oct. 20, 2017, *available at* https://www.lawlogix.com/ice-announces-up-to-five-fold-increase-in-form-i-9-worksite-inspections/.
12. *See* Immigration Principles and Policies, at § D(i).

C. Consequences of noncompliance

Depending on the nature and extent of the violation, employers who do not comply with the employment eligibility verification requirements or who hire unauthorized workers may face civil or criminal sanctions and may be barred from receiving federal contracts. Civil monetary penalties are divided generally into two categories: penalties for paperwork errors (on the Form I-9) and for knowingly hiring unauthorized workers.

Figure 1 below illustrates ICE's inspection process.
Figure 2 below diagrams the possible consequences.

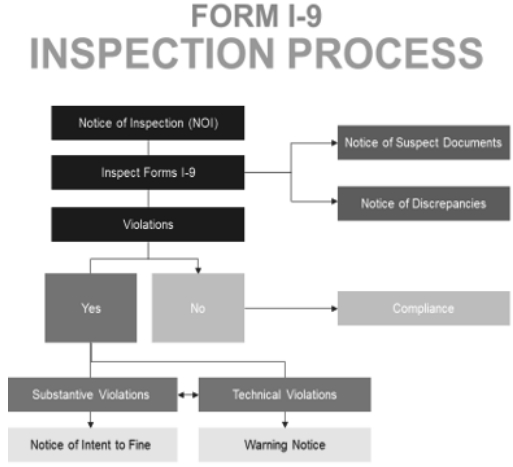

Figure 1: ICE inspection process

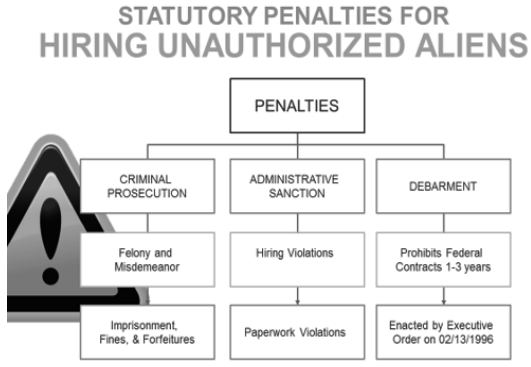

Figure 2: Possible consequences of immigration violation at the worksite

The most common type of penalty is the "paperwork" error on the Form I-9 itself. Employers can be penalized even absent any evidence of unauthorized employment. Paperwork errors fall into two categories: technical or substantive. A substantive error is defined as one which could lead to the hiring of an unauthorized worker. A technical violation is one that is procedural in nature.[13] According to a 1996 amendment introduced by the late U.S. Representative Sonny Bono (R-CA), the employer has a 10-day window to correct technical errors after an ICE audit without penalty, [14]

The regulatory penalty schedule for Form I-9 paperwork errors can range from $230 to $2,292 *per form*. According to ICE's internal guidance, first offenders may be fined between $230 to $1,948 for each form containing one or more errors, and that penalty can reach as high as $2,292 for subsequent offenses.[15] *See* Figure 3 below.

Substantive / Uncorrected Technical Violation Fine Schedule
(Effective for penalties assessed after April 5, 2019 whose associated violations occurred after November 2, 2015)

Substantive Verification Violations	Standard Fine Amount		
	1st Offense $230 - $2,292	2nd Offense $230 - $2,292	3rd Offense + $230 - $2,292
0% – 9%	$230	$1,146	$2,292
10% – 19%	$573	$1,375	$2,292
20% – 29%	$917	$1,604	$2,292
30% – 39%	$1,261	$1,834	$2,292
40% – 49%	$1,604	$2,063	$2,292
50% or more	$1,948	$2,292	$2,292

Figure 3 Fine Schedule for Paperwork Violations

ICE may decrease or increase the total amount of fines by as much as 25%, taking into consideration: (i) the size of the business of the employer being charged; (ii) the good faith of the employer; (iii) the seriousness of the violation; (iv) whether or not the individual was an unauthorized worker; and, (v) the history of previous violations of the employer. Figure 4 *infra* illustrates how these factors fit into the matrix.

13. Paul W. Virtue, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996*, March 1997, *available at* https://www.lawlogix.com/wp-content/themes/LawLogix-Nova/resources/PDF/files/virtue-memo-and-appendices-03061997.pdf.
14. 8 U.S.C. § 1324a(b)(6).
15. 85 Fed. Reg. 36469, 36472 (Jun. 17, 2020).

Factor	Aggravating	Mitigating	Neutral
Business Size	+ 5%	- 5%	+/- 0%
Good Faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Workers	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative adjustment	+ 25%	- 25%	+/- 0%

Figure 4: Mitigating and Aggravating Factors

Another area where ICE and federal prosecutors have focused is Social Security number mismatch. On August 15, 2007, DHS issued a final rule setting forth an employer's obligations to follow up upon being notified that the Social Security information pertaining to an employee or employees in its records did not match the records of the Social Security Administration (SSA).[16] The new rule was relatively short-lived as the Obama Administration rescinded the regulation on October 7, 2009, at the behest of organized labor and immigrant rights advocates.[17]

While the Obama Administration rescinded the guidance for employers on how to resolve Social Security data discrepancies, it continued to use an employer's failure to resolve a discrepancy as basis for imputing knowledge of violation. Employers may discover Social Security mismatches through a variety of means, including notices from the SSA, federal or state revenue agencies, and retirement fund and benefits managers. In fact, many employers became aware of mismatches because of the Affordable Care Act's reporting requirements.[18] At the same time, employers who do try to take adverse employment action because of a Social Security mismatch have been prevented from doing so by the courts and federal agencies.[19]

Federal law also includes criminal sanctions for hiring unauthorized workers. An employer who engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers "shall be fined

16. 72 Fed. Reg. 45611 (Aug. 15, 2007).
17. 74 Fed. Reg. 51447 (Oct. 7, 2009).
18. *See Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TIN.* IRS Publication 1586 (Rev. Feb. 2016) at 12.
19. See., e.g., *Aramark Facility Services v. SEIU,* 530 F.3d 817 (9th Cir. 2008); *Matter of Aramark Educational Services and United Here Local 26*, 355 NLRB No. 11, 2010 WL 768841 (NLRB 2010).

not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels."[20]

Additionally, the government has prosecuted employers and responsible individuals under the alien smuggling and harboring law, which carries significantly greater penalties.[21] For harboring, the maximum term of imprisonment is five years. However, if the harboring offense was committed for commercial advantage or private financial gain, the statutory maximum increases to 10 years. The statutory maximum for smuggling is also 10 years as is the penalty for conspiring to violate these laws.[22]

D. Incorporating Technology

The Hesburgh Commission examined the use of an electronic verification system to enhance an employee's ability to verify eligibility to work, but Congress did not authorize a pilot program for such a system until 1996. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) created the "basic pilot,"[23] which the U.S. Citizenship and Immigration Services (USCIS) rebranded as "E-Verify." E-Verify confirms employment eligibility by cross-checking information with the SSA and DHS databases. Participation is voluntary unless otherwise required by law or by agreement with the government, though as discussed below, various federal and state laws make participation effectively mandatory for many employers today.

The program has experienced tremendous improvement in recent years. According to a 2005 GAO study, about 15% of all queries were later to be determined unreliable.[24] Today, USCIS reports that 0.25% of queries resulted in an inaccurate result.[25] E-Verify participation also has undergone substantial growth in the last decade. GAO reported in

20. 8 USC§ 1324a(f).
21. 8 USC § 1324(a).
22. 8 U.S.C. § 1324(a). This statute includes other offenses related to aliens, including domestic transportation of unauthorized aliens, encouraging or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts.
23. Pub. L. 104-208 (Sept. 30, 1996).
24. U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts* (Aug. 2005).
25. Date retrieved from www.uscis.gov/e-verify/about-program/performance.

2005 that only 2,300 employers in the United States enrolled in E-Verify. The latest available USCIS figures show over 967,000 participants.[26]

This growth in participation is due in part to the employer community's confidence in the system, but also to federal and state laws that require employers to enroll in an otherwise "voluntary" system. In September of 2009, after a lengthy review, the Obama Administration implemented a regulation promulgated during the Bush Administration that requires most federal contractors and their subcontractors to use E-Verify.[27] Moreover, employers who use E-Verify may extend the period of "optional practical training," the period after graduating from a U.S. institution of higher education during which a foreign student may work in the United States without a visa, from 12 months to 24 months.[28] Furthermore, an increasing number of states are implementing their own E-Verify-related laws,[29] with additional states considering similar legislation.

At the federal level, in nearly every legislative session, there have been bills introduced to mandate E-Verify participation nationwide. In light of considerable discussions since Trump's inauguration regarding possible immigration legislative reform, employers should prepare for a possible E-Verify mandate in 2018.[30]

II. IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION

When Congress imposed the employment eligibility verification requirements in IRCA, there was concern among some members that the I-9 obligations would cause employers to become overzealous and not hire applicants who may look or sound foreign, or who are not U.S. citizens but otherwise eligible to work in the United States.[31] IRCA therefore included an enforcement scheme for the so-called "immigration-related

26. *See* USCIS E-Verify Homepage, available at https://www.e-verify.gov/about-e-verify/what-is-e-erify#:~:text=Today%2C%20E%2DVerify%3A,than%202.4%20million%20hiring%20sites.
27. Federal Acquisition Regulation for Employment Eligibility Verification, 73 Fed. Reg. 67651 (Nov. 14 2008) (to be codified at 48 C.F.R. parts. 2, 22, and 52).
28. 82 Fed Reg. 13040, 13117 (Mar. 11, 2016).
29. *See, e.g.,* Fragomen, Shannon and Montalvo, State Immigration Employment Compliance Handbook, 2017 Edition, Appendix I, State Employment Verification and Employer Sanction Laws (Thomson Reuters, 2017).
30. Immigration Principles and Policies at § F(i).
31. 8 U.S.C. § 1324b.

unfair employment practices" cases, and established an Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to enforce these statutes.[32] OSC was later renamed Department of Justice Civil Rights Division's Immigrant and Employee Rights (IER) Section on January 18, 2017, two days before President Trump's inauguration.[33]

The Trump Administration leveraged IER to further BAHA. In February 2017, at the start of the first H-1B visa filing season under the Trump Administration,[34] it launched the "Protect American Workers Initiative" which " focuses on combating employment discrimination against U.S. workers. ... The [Civil Rights] Division uses traditional tools of investigation, lawsuits, outreach, and interagency coordination to fight employer preferences for temporary visa holders, while educating U.S. workers on their rights."[35]

In April of the same year, IER "cautioned employers petitioning for H-1B visas not to discriminate against U.S. workers." IER further said that "U.S. workers should not be placed in a disfavored status, and the department is wholeheartedly committed to investigating and vigorously prosecuting these claims."[36]

A. Prohibited Practices and Protected Persons

1. National origin discrimination

The statute prohibits employment discrimination based on place of birth, country of origin, ancestry, native language, accent, or because individuals are perceived to be "foreign."[37] It applies only to employers with four to 14 employees. The intent was to complement the jurisdiction of the Equal Opportunity Employment

32. *Id.* at § 1324b(2)(c), (d).
33. 81 Fed Reg. 91768, 91789 (Dec. 19, 2016). For convenience, the term IER is used throughout this article to describe the office that enforces IRCA's anti-discrimination provisions for all points in history.
34. Employers may begin the H-1B visa petition process as early as April 1 of each year for the purpose of bringing a foreign professional onboard by October 1 (start of the federal government's following fiscal year) of the same year.
35. *See, e.g.,* Testimony of Assistant A.G. Eric Dreiband before the House Committee on Appropriations (Mar. 12, 2019).
36. Justice Department Cautions Employers Seeking H-1B Visas Not to Discriminate against U.S. Workers. Department of Justice, Department of Justice, Apr. 3, 2017, *available at* https://www.justice.gov/opa/pr/justice-department-cautions-employers-seeking-h-1b-visas-not-discriminate-against-us-workers.
37. *Id. at* § 1324b(a)(1)(A).

Commission (EEOC) over larger employers.[38] EEOC and IER have a memorandum of understanding and refer cases to each other and treat a timely filed charge with one agency as timely for the other.[39]

2. Citizenship status discrimination

Only specifically protected persons have standing to allege citizenship (immigration) status discrimination. They are U.S. citizens, lawful permanent residents who applied for naturalization within six months of eligibility, asylees and refugees, and beneficiaries of IRCA's legalization programs.[40] Unless mandated by law, employers may not limit hiring to applicants of certain immigration status (e.g., "U.S. citizen only") to the exclusion of other protected workers. Employers also cannot prefer to hire, *inter alia*, temporary visa holders or unauthorized workers over another worker in a protected class.

3. Document abuse

During the employment eligibility verification (Form I-9 completion) process, an employer may not demand more or different documents from the employee so long as the employee presents documents that are accepted by law. The Lists of Acceptable Documents are attached to the Form I-9 itself. The employee may present one document from List A, which demonstrates identity and work authorization (e.g., U.S. passport or a green card), or a combination of a List B (identity only such as a driver's license) plus a List C (work authorization such as U.S. birth certificate or unrestricted Social Security card) documents.[41] Demanding a DHS-issued document because the employee is not a citizen is an example of document abuse.

A 1996 amendment added "intent" as an element to document abuse. As such, when an employer asks for additional documents,

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38. Title VII of the Civil Rights Act of 1964, 78 Stat. 252, *Pub. L. 88-352 (Jul. 2, 1964), codified in 42 U.S.C.* § 2000e. *See also Curuta v. U.S. Water Conservation Lab.,* 3 OCAHO 459 (OCAHO 1992) (legislative history makes clear that IRCA's national original discrimination bar is intended to complement Title VII).
39. 8 U.S.C. § 1324b(b)(2). *See also* 63 Fed. Reg. 5518, 5519 (Feb. 3, 1998) (describing procedures for referring charges for the purpose of allowing charging parties to satisfy statutory deadlines).
40. 8 USC § 1324b(a)(3).
41. 8 USC § 1324b(a)(1), (6).

there is no liability if there is no intent to discriminate.[42] However, the 2017 regulation amended the definition of "discriminate" to mean "act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility." In fact, the preamble to the new regulations even states that "the definition of "discriminate" would "actually apply to employers who intentionally treat individuals differently even if [the employers] want to help [the employees] through the employment eligibility process."[43] Effectively, the new regulations have created a "strict liability" standard for "discrimination" notwithstanding a lack of intent to discriminate.

Finally, the question of who has standing to assert a document abuse charge is not yet a settled issue. IER's position has been that *all* work authorized persons are protected against document abuse.[44] However, a 2017 administrative decision, *U.S. v. Mar-Jac*, held to the contrary that only those protected against "citizenship status discrimination" – namely U.S. citizens, most permanent residents, refugees and asylees, have standing to raise document abuse.[45] The Justice Department has not said whether *Mar-Jac* will be designated an agency precedent.

4. Retaliation and intimidation

IRCA prohibits retaliation, intimidation, coercion or threat against a person who asserts his or her rights under IRCA's anti-discrimination provisions. This protection extends to "any individual," not only employees and not only protected persons. [46]

42. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, 142 Cong. Rec. S4401-01, S4411 (1996).
43. 81 Fed Reg. at 91772, 91789.
44. *See* IER Frequently Asked Questions (FAQ), *available at* https://www.justice.gov/crt/frequently-asked-questions-faqs.
45. *United States v. Mar-Jac Poultry, Inc*., 12 OCAHO 1298 (OCAHO Marc. 16, 2017).
46. Id. at § 1324b(a)(5).

B. Key areas of recent IER enforcement focus

1. Improper citizenship requirement (including "reverse" discrimination against U.S. workers)

Historically, IER has enforced IRCA's prohibition against citizenship status discrimination against employers who unnecessarily restrict hiring to U.S. citizens to the exclusion of other protected persons. This situation arises often in the "export control" context where the employer believes in error that the International Traffic in Arms Regulations (ITAR)[47] limits hiring to U.S. citizens only, but in fact "U.S. worker" as defined for, *inter alia*, purposes of ITAR is the same as IRCA's definition for "protected individual."[48]

Conversely, IER has made "citizenship status discrimination" claims against employers, during the past several administrations, for improperly favoring temporary visa holders.[49] Enforcement of such reverse discrimination claim can come from a charge filed by an individual aggrieved U.S. worker. Often, IER would identify a series of job postings with language suggesting a preference for visa holders to support an "independent investigation" for pattern or practice. IER also has investigated several companies that outsource certain information and technology (IT) functions to a consulting firm that hires nonimmigrant workers. In the latter scenario, IER has alleged that the companies are using a third party – the contractor - to do what it may not do by itself. On this basis, the current Justice Department is leveraging IRCA to support the BAHA agenda.

2. Over-documentation at the time of initial verification

Over-documentation at the time of initial verification occurs most often when the employer mistakenly believes that a non-citizen employee must produce a DHS-issued immigration document, such

47. 22 C.F.R § 120 et seq.
48. 20 C.F.R. § 655.715. *See, e.g.*, Press Release. Justice Department Reaches Settlement with New York Manufacturer to Resolve Immigration-Related Unfair Employment Practices (Dec. 19, 2012), available at https://www.justice.gov/opa/pr/justice-department-reaches-settlement-new-york-manufacturer-resolve-immigration-related.
49. *See, e.g.,* Press Release. iGate Mastech, Inc. to Pay $45,000 to Settle Discrimination Claim (May 1, 2008), *available at* https://www.justice.gov/archive/opa/pr/2008/May/08-crt-369.html; *U.S. v. Estopy*, 11 OCAHO no. 1252 (OCAHO 2015).

as a green card or an employment authorization document. IER often looks at a disproportionately high percentage of noncitizens producing DHS-issued documents to complete the Form I-9 as evidence of a discriminatory pattern. Indeed, recent precedent held that discriminatory intent may be inferred by statistics.[50]

3. Pre-employment screening

IER has initiated some investigations based on employers' screening of job applicants' need for visa sponsorship. IER has done so notwithstanding its longstanding position that the law cannot compel employers to sponsor job applicants for visas,[51] and, by definition, individuals who need visa sponsorship are not protected by IRCA's prohibition against citizenship status discrimination.[52]

IER acknowledges that employers may ask job applicants about their need for visa sponsorship. In 1998, it provided public guidance on how to ask the questions. These questions are: 1) Are you legally authorized to work in the United States, and 2) will you now or in the future require sponsorship for employment visa status.[53]

However, employers discovered over time that these questions are insufficient. Many have expanded these questions to inquire about whether the applicants have indefinite work authorization by enumerating the classes of protected persons under IRCA. Such questions became the standard industry practice until 2016, when IER, without any legal explanation, said that the expanded questions "implicate[s] several parts of the anti-discrimination provision," and that IER "discourage[d] asking the proposed questions . . . to

50. *United States v. Life Generations Healthcare, LLC.,* 11 OCAHO no. 1227 (OCAHO 2014).
51. *See, e.g.,* Technical Assistance Letter from Deputy Special Counsel Alberto Ruisanchez to Angelo Paparelli (April 30, 2014) ("communicating to an unsuccessful applicant that the employer's unwillingness to sponsor the applicant was the basis for the non-hire decision is not likely to lead to a determination by [IER] that an employer has committed unlawful citizenship status discrimination"), available at https://www.justice.gov/ sites/default/files/crt/legacy/2014/05/06/180.pdf.
52. 8 U.S.C. § 1324b(a)(3).
53. *See* Technical Assistance Letter from Special Counsel John Trasviña to the American Council on Int'l Personnel (Aug. 6, 1998), available at https://www.ilw.com/seminars/march2003_citation3a.pdf.

avoid generating confusion among applicants or human resources personnel about the need for this information."[54]

Because the applicants who need sponsorship – and who lack indefinite right to work – are not covered by the citizenship status discrimination provisions, IER's only theory for enforcement against the employers who ask the expanded questions is "document abuse," meaning that the employer is being investigated for rejecting current, valid work authorization, and not for refusing to sponsor for a visa in the future.

4. Unnecessary reverification

Some employers confuse the concept of expiring document with expiring work authorization and ask permanent residents to update their I-9 forms when a green card expires - even though they are authorized to work indefinitely. IER considers this to be intentional discrimination or disparate treatment based on citizenship status if U.S. citizens are not also asked to update the I-9 when their passports expire.[55]

IER often receives data of such improper (or unnecessary) reverification from E-Verify data and uses this information to conduct independent investigations. The basis or the discrimination charge can be either document abuse because the employer is unnecessarily examining documents, or citizenship status discrimination because the employer is creating hurdles to employment for noncitizens but not for citizens.

III. CONCLUSION AND RECOMMENDATIONS

The key to avoiding liability for either eligibility verification noncompliance or discrimination is to create a robust compliance program, conduct a thorough review of the company's records and policies, take remedial

54. *See* Technical Assistance Letter from Deputy Special Counsel Alberto Ruisanchez to Eric S. Bord (Mar. 31, 2016), *available at* https://www.justice.gov/crt/file/837281/download.

55. *See, e.g.,* Press Release. Justice Department Reaches Settlement with National Retailer to Resolve Immigration-Related Unfair Employment Practices (Jun. 27, 2013), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-national-retailer-resolve-immigration-related-unfair.

steps where necessary, and train the appropriate staff to ensure future compliance. Specifically, employers should do the following:

1. Employment eligibility verification compliance

a. Conduct an internal Form I-9 audit

Form I-9 enforcement is "form over substance," and it is critical to follow the regulations and agency guidance strictly. Even without a single unauthorized employee, given the civil penalties for paperwork violations provided above, an employer can accumulate a sizable penalty. Moreover, many of the purely paperwork violations can be remedied before ICE finds them through an audit. However, its practice is to not give credit for any corrections made after an audit commences.

b. Create a comprehensive verification and reverification policy along with a training plan for the human resources staff

A robust and legally sound employment eligibility verification policy is important for two reasons. First, it provides adequate guidance to the human resources staff who are responsible for completing the Form I-9 properly and for ensuring that each employee's work authorization information is up-to-date. The second reason is that having a solid policy demonstrates the company's good faith commitment to compliance, and that will play a significant role where ICE has discretionary authority when assessing a penalty. Part of having a sound policy includes having a strong training regimen for the staff responsible for verifying and updating employment eligibility. The training regimen should account for turnover of staff in human resources positions.

c. Hold contractors to a high standard of compliance

The general rule is that a company is not responsible for verifying the employees of its contractors, even if the contractors' employees work on the company's premises. However, there is precedent for law enforcement piercing the veil and impute knowledge of illegal employment to the customer. Moreover, even if the company is not liable ultimately under immigration law, there is still the risk of major disruption to productivity and reputation if a significant number of contract employees are arrested and removed.

d. Beware of State Law

As more and more states have enacted their own employment verification laws, it is not enough to be compliant with only federal requirements. It is especially critical for employers to understand the requirements in each state. Many states require E-Verify enrollment as a condition to receiving a business license. The exposure to employers, therefore, can be much more severe than simply paying federal civil monetary penalties.

2. Avoiding immigration-related employment discrimination

a. Document nondiscriminatory reasons for employment and outsourcing decision

Employers may have many legitimate reasons for making personnel decisions that are unrelated to immigration status. A well-documented memorandum for the employer's action may be sufficient to rebut an allegation of discrimination. At a minimum, it will shift the burden back to IER to prove discriminatory intent.[56]

Given IER's focus on the use of H-1B visas by consulting firms and the scrutiny of outsourcing agreements, it is critical to document clearly that citizenship (visa) status of a service provider's workforce is not among criteria for selecting that service provider. A related concern is that the service agreement and any internal guidance must clearly reflect that the agreement with the service provider is to outsource a function, and not to obtain individual employees to replace the company's laid-off workers.

b. Have a clear policy and training protocol in place to refute allegation of company-wide discriminatory policy or practice

The penalty for a singular violation may not be significant, but IER always looks deeper into a company's practices to identify a broader pattern of practice which would result in much more costly penalties. If the employer has a clear policy of nondiscrimination and keeps records on staff training, IER will find it more difficult to establish an institutional intent to discriminate.

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56. *McDonnell Douglas Corporation v. Green*, 411 U.S.792, 807 (1973).

c. Establish a protocol to review job opening announcements

In recent years, several American companies with workforces that consist overwhelmingly of U.S. workers settled charges of preferential hiring in favor of foreign visa holders over protected workers. Quite often, an investigation into the circumstances showed that the problem was not discriminatory hiring, but poor choice of words in the recruitment process. Employers must draft their job opening announcements carefully and avoid language that could be misconstrued as such improper preference. Any advertisement to fill open positions should be reviewed by the employer's in-house or external counsel to avoid such costly misunderstanding.

d. Understand Form I-9 verification and reverification rules

Though IER has broadened the application of IRCA's anti-discrimination provisions in recent years, the majority of discrimination claims still arise from an employer's alleged improper actions during the employment eligibility verification (Form I-9) process. As such, employers can minimize the risk of an IRCA discrimination charge by becoming familiar and complying with IRCA's verification requirements.

Specifically, employers should be familiar with what documents are acceptable for Form I-9 purposes, which employees have indefinite right to work and which need reverification. Do not reject documents that appear genuine and valid on their face, and do not deviate from these rules because of the actual or perceived immigration status of the employees.

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