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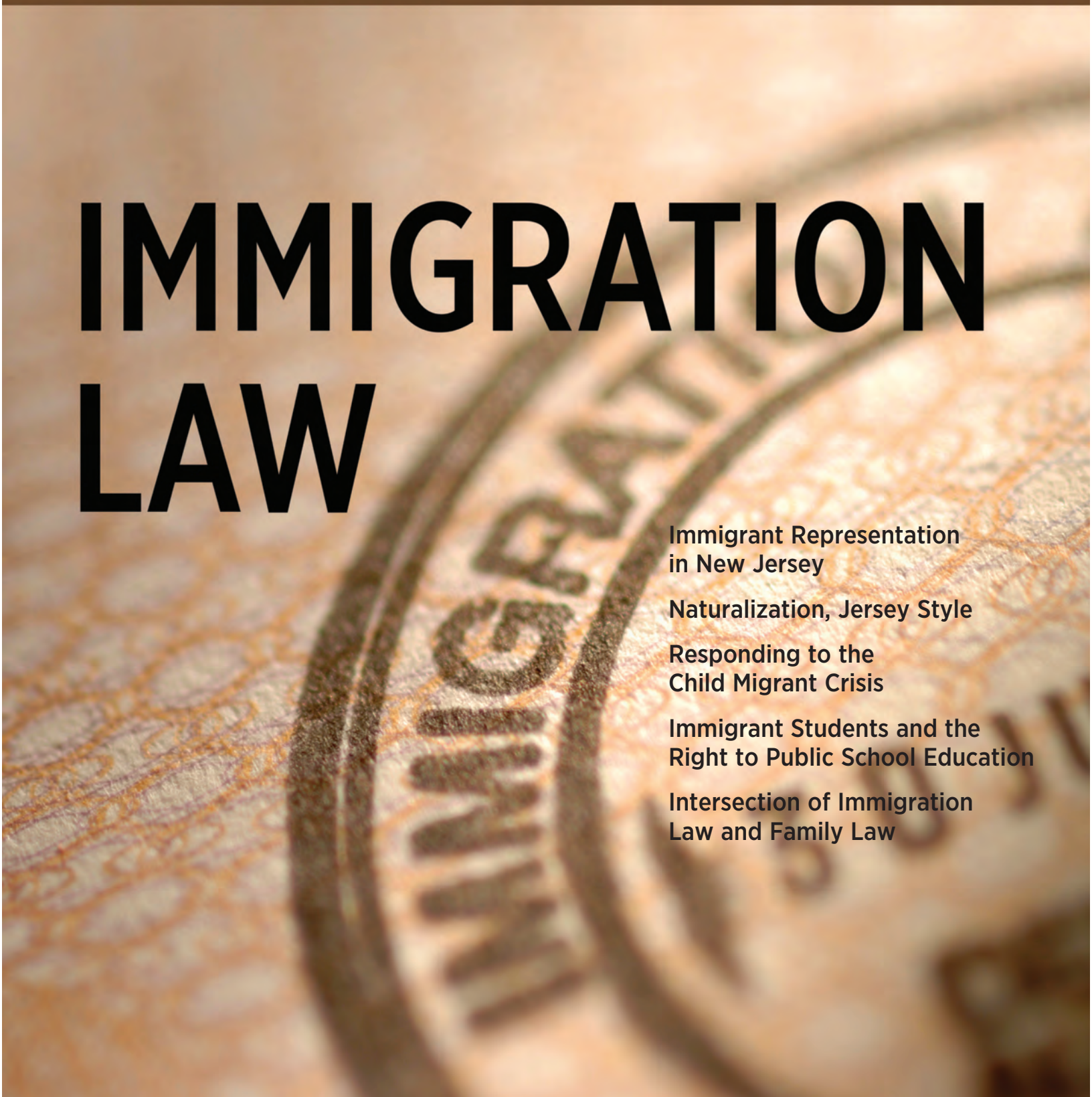

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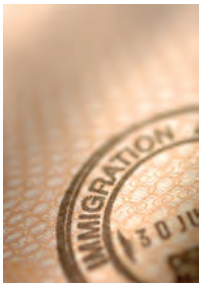

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President's Perspective

Thomas H. Prol

Offering Information and Guidance for all Attorneys on Immigration Law Issues

As I pass the midway mark of my tenure as president of the New Jersey State Bar Association (NJSBA), I take a moment to reflect on the association's commitment to diversity through a better understanding of immigration law.

The NJSBA remains committed to improving the profession in every arena. One of the most compelling areas of law for the NJSBA, and for me, is the evolution of the unauthorized practice of law (UPL), which impacts many practitioners beyond immigration attorneys.

The association's Immigration Law Section has taken several steps to examine ways to enhance the penalties against those who conduct the unauthorized practice of law, subject to approval by the Board of Trustees. One path it is examining is possible legislative amendments to N.J.S.A 2C:21-22. The proposal would address *notarios* and unlicensed persons acting as attorneys who do great harm to New Jersey residents through fraudulent application and petitions, or with filings that do not meet basic standards.

During the past year, the section has also hosted two important panels addressing the unauthorized practice of law. It recently brought together a panel of representatives from the Administrative Office of the Courts, the U.S. Attorney's Office in Newark, the Fraud Detection and National Security Unit from U.S. Citizenship and Immigration Services, and the New Jersey Department of Consumer Affairs.

While we shine a light here on the efforts of the Immigration Law Section, it is critical to keep in mind that these issues are not constrained to immigration law attorneys. Practitioners besides immigration lawyers should become more sensitized to immigration issues and the ramifications they pose to their clients' legal rights.

As a sandwich jurisdiction that is geographically situated between two of the largest cities in our country, New Jersey has become a sophisticated and sometimes challenging environment for immigrants and their legal rights. The interplay of state and federal laws are often in conflict, and these conflicts in law can lead to complaints, malpractice claims, attorney discipline, and a plethora of other concerns for lawyers.

Family lawyers—are you aware of the impact that a divorce may have on a person who is not yet a U.S. citizen, and the burdens divorce may place on the non-citizen spouse? Can an undocumented parent be a custodial parent? What if that custodial parent is at risk of being ordered removed from the United States or is at risk of removal proceedings? Why is it that financial affidavits of support requirements for foreign nationals continue after a divorce? What about the cause of action for a divorce in a complaint for divorce?

The wrong cause of action can have profound implications and unintended detrimental consequences for your client. Furthermore, we've all heard of sham marriages for purposes of immigration benefits, but what about sham divorces? What are the warning signs for either a sham marriage or a sham divorce, and what risks are presented by your (hopefully unwitting) participation in your client's efforts in that regard? Could there be a malevolent basis for the filing of a temporary restraining order by a non-citizen spouse, and how could the defense attorney cross examine the complainant in such a case?

Similar warnings are true for criminal law practitioners. There is a minefield in pre-trial interventions (PTI) that let your client walk free because they are fraught with traps for non-citizens. A plea colloquy is tantamount to a conviction for purposes of immigration court and immigration agencies, *despite* a future criminal dismissal. The very failure to consult with an immigration attorney can and has led to thousands of deportations due to collateral consequences with immigration law, even with PTI. A great deal for a U.S. citizen

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Message From the Special Editors

James J. Ferrelli

Mary Frances Palisano

With the 2016 presidential race, the topic of immigration law was catapulted to the forefront of the news and continues to be one of the most hotly debated issues moving forward in 2017. Immigration issues take many forms, and the articles in this edition offer a comprehensive review of some of the most timely topics in immigration law today, including removal proceedings and lack of access to counsel, naturalization, birthright citizenship, federal investigations, foreign worker employment, the child migrant crisis, immigrant right to education, immigration issues in criminal law and domestic violence cases, bail reform effects on immigrants, marriage and permanent residency, and executive orders and immigration reform.

Like many topics we cover in the *New Jersey Lawyer*, immigration generates strong feelings among advocates for immigrants, especially asylum seekers. As several of the authors in this edition discuss, despite important steps that have been taken in this area to help those in need, many feel more needs to be done to help immigrants. Other authors share their insights in immigration law, from tips and tools for practitioners to commentary on emerging legal issues.

To start the edition, Farrin Anello, a visiting assistant clinical professor with the Immigrants' Rights/International Human Rights Clinic at Seton Hall University School of Law, and Lori A. Nessel, a professor of law and director of the Center for Social Justice at the Seton Hall University School of Law, review the impact of having legal counsel in removal proceedings and examine ways to increase immigrant representation in New Jersey. Amy Gottlieb, the associate regional director of the American Friends Service Committee's (AFSC) Northeast Region, and Nicole Polley Miller, the legal services director of AFSC's Immigrant Rights Program, further discuss the immigration process in New Jersey and the state's failure to provide court-appointed attorneys, even if an immigrant is facing removal proceedings.

Angie Garasia focuses her article on the naturalization process and the many pitfalls to avoid as a practitioner. Cesar Martin Estela discusses the history of birthright citizenship in the American legal system and its possible demise. The Honorable Dorothy Harbeck provides an insightful view from the bench on effective direct and cross examination testimony in immigration proceedings. Lauren Anselowitz and Daniel Weiss consider collaborative efforts between attorneys and mental health professionals in the context of immigration applications and success in those proceedings.

Valentine Brown provides practical advice for immigration-related federal investigations. Scott R. Malyk and Anthony F. Silialo offer tips to effectively recruit, retain and terminate foreign workers.

Joanne Gottesman, Anju Gupta, and Randi Mandelbaum explain the need for attorneys to represent children in immigration cases and what is

being done in New Jersey to meet this need. Alexander Shalom discusses the right to a public school education for immigrant students. Alan J. Pollack focuses his article on recent developments in the treatment of crimes of domestic violence under the new immigration law.

Jillian Stein offers considerations for criminal practitioners in cases involving noncitizens and possible alternatives to avoid unwanted immigration consequences. Michael Noriega offers a commentary piece that discusses bail reform and its effects on immigration law.

Edward Shulman considers the consequences of marital separation on conditional permanent residency. Susan Roy discusses issues that can arise in birthright citizenship cases and the current state of the law in this area.

Finally, George Tenreiro reviews executive action and immigration reform moving forward in 2017.

We are grateful to each of the authors for sharing their knowledge and time in making this edition diverse and topical. We would also like to thank Cheryl Baisden, our managing editor, for her dedication, unwavering commitment and helpful insights.

Undeniably, immigration issues are a very hot topic in New Jersey as well as the country and throughout the world. There is no shortage of ideas on how to fix the system. It will be interesting to see what changes the future brings as 2017 progresses. ⚖

James J. Ferrelli *is a partner in the trial practice group of Duane Morris, and focuses his practice on complex business and commercial litigation, healthcare litigation, and product liability, mass torts and class actions. He has represented public and private companies and their owners, officers, and directors, governmental entities, and individual clients in a broad range of proceedings, including business torts, contracts, acquisitions or sales of businesses, restrictive covenants, trade secrets, franchises and distributorships, Lanham Act, unfair competition, antitrust, real estate, employment, copyright and trademark, consumer fraud, corporate governance, and fiduciary duties. He is a member and past chair of the* New Jersey Lawyer *Editorial Board, chair of NJSBA Continuing Legal Education (CLE) Advisory Committee, a trustee of the New Jersey State Bar Foundation, a past trustee of the New Jersey State Bar Association, and a past president of the Burlington County Bar Association.* ***Mary Frances Palisano*** *is a director and member of the criminal defense practice group at Gibbons, P.C., and also handles education law cases and is the firm's* pro bono *chair and coordinator. She is a member of the* New Jersey Lawyer *Editorial Board, the NJSBA Continuing Legal Education (CLE) Advisory Committee, the NJSBA* Pro Bono *Committee, the NJSBA School Law Committee, and the vice chair of the NJSBA Criminal Law Section. She focuses her practice on litigating and counseling clients in all phases of federal and state criminal proceedings and quasi-criminal matters, including state charges, white-collar crimes, internal and government investigations, subpoenas, juvenile proceedings, municipal matters, and handling special education matters.*

President's Perspective

Continued from page 7

is often a disaster for foreign nationals. And that expungement that helps many Americans obtain a clean slate has little to no impact for foreign nationals, other than destroying critical police records that may be necessary for your clients in immigration agencies and courts.

As you study the articles included in this edition of *New Jersey Lawyer*, please keep in mind that this is but a start to help you understand the important interplay of practice areas with immigration law. The NJSBA is committed to informing and guiding its members about how to best represent clients in the most proactive ways possible, and I hope this offers a meaningful contribution to that education. ⚖

Raising the Bar for Immigrant Representation in New Jersey

by Farrin Anello and Lori A. Nessel

Following the outbreak of civil war in Syria, militant jihadist groups began to massacre members of religious minorities in Syria. A young man from one of the targeted groups, desperate to escape the country, managed to travel to the United States with help from his employer, but he arrived without a visa to enter the country, so immigration authorities quickly arrested him and locked him in a New Jersey jail. Although he had not committed a crime, he became one of the approximately 34,000 people across the country detained on any given day while fighting their removal from the United States. Like the vast majority of detained immigrants, he had no access to a lawyer and awaited an immigration judge's decision on whether he would receive asylum.

The immigration judge, sitting in a courtroom beside an immigration prosecutor and speaking with the young man via videoconference, pressed him to explain quickly why he would be targeted for persecution on a ground covered by the asylum statute, such as religion or political opinion. The young man was terrified of the judge's power and of speaking on video camera, because the government of Syria often conducts surveillance of people it perceives as disloyal. To make matters worse, the telephonic translator spoke a different dialect of Arabic from his and made several inadvertent errors, so the judge could not understand key parts of his answers. The judge, who was rushing to get through a crushing docket of cases, denied asylum, reasoning that the young man feared civil war in Syria but had not proven that he qualified as a refugee.

Although being ordered removed by the immigration judge is the end of the road for the great majority of *pro se* asylum seekers, this young man was represented *pro bono* on appeal by the Immigrants' Rights/International Human Rights Clinic at the Center for Social Justice at Seton Hall University School of Law. With legal representation, the case proceeded very differently. The law students and attorney representing him documented the errors by the court interpreter, and the Board of Immigration Appeals remanded the case to immigration court. Back in court, his attorney and law student representatives submitted detailed evidence and expert testimony establishing his religious identity and the persecution of members of his sect in Syria. The same immigration judge who denied his claim when he was unrepresented granted him asylum when he *was* represented because counsel was able to develop the record and bring material facts to the judge's attention.

Of course, most people who are ordered deported without counsel will never have the chance to set the record straight. Erroneous removal decisions can result in serious threats to the lives of refugees and the permanent separation of families. As aptly described by the president of the National Association of Immigration Judges, removal proceedings "amount to death penalty cases heard in traffic court settings."[1] Yet with the exception of people with serious mental disabilities, the courts have not yet recognized a right to counsel in these proceedings.

Adults are not the only ones who appear in court without counsel. As immigration law is currently applied, even children as young as one or two years of age are frequently placed in removal proceedings—and ordered removed—without representation. The Ninth Circuit, ruling on jurisdictional grounds, recently dismissed a class action lawsuit arguing that children in removal proceedings have a right to counsel.[2]

As documented in its recent report, *Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families*, the Immigrants' Rights/International Human Rights Clinic at the Center for Social Justice, Seton Hall University School of Law found that approximately 66 percent of those detained in New Jersey throughout their immigration court proceedings never secured legal representation, in contrast with about 20 percent of those who were not detained at

any point during proceedings.[3]

Moreover, the Seton Hall Law Center for Social Justice report finds that legal representation correlates with a dramatically higher rate of success in avoiding removal from the United States. Immigrants with representation, detained or otherwise, were at least three times as likely to obtain a successful outcome as those who were not represented. Among those who were detained throughout and unrepresented, only 14 percent avoided removal, whereas detained individuals who secured representation prevailed in 49 percent of the cases. Individuals with counsel who were never detained were successful in avoiding removal in 92 percent of cases, as compared with 31 percent of persons who were never detained but never had counsel. These findings mirror nationwide trends reviewed in a new study by the American Immigration Council.[4]

In addition to its findings regarding the lack of counsel and the impact having counsel has on avoiding removal for New Jersey immigrants, the report also provides empirical data on the availability of not-for-profit and low-cost immigration legal services in New Jersey. The proportion of New Jersey residents who are immigrants is much higher than the national average, and immigrants are major drivers of New Jersey's economy. Yet this report shows that New Jersey's immigration legal providers are notably under-resourced, and that New Jersey lacks sufficient free and low-cost legal services to address the huge numbers of cases filed in the immigration courts in the state.

The report grew out of a working group aimed at increasing immigrant representation in New Jersey, spearheaded by Judge Michael Chagares of the United States Court of Appeals for the Third Circuit. The Working Group on Immigrant Representation in New Jersey brings together judges, legal service providers, law school clinics, law firms, and bar association representatives to increase access to quality free and low-cost immigration legal services in the state of New Jersey. Under Judge Chagares' leadership, the working group meets quarterly to discuss efforts by private attorneys, nonprofit organizations, law schools, and the courts to increase access to free and low-cost immigration representation.

Local efforts to address this problem have gained some momentum. Following the launch of a universal representation project for detained New York City residents, funded by the New York City Council, American Friends Service Committee has begun piloting a representation project for individuals detained at the Elizabeth Detention Center. Several members of the working group have also increased their representation capacity through new legal fellows, many funded by the Immigrant Justice Corps. Additionally, private firms have donated countless hours and funds to *pro bono* representation.

Despite these important steps, many men, women, and children are still appearing in immigration court proceedings alone, simply because they cannot afford an attorney. As discussed above, those who lack counsel are less likely to apply for protections against removal and more likely to be deported. The effects of deportations conducted without representation continue to burden the state economy, New Jersey families, and social services, even leaving children in foster care.[5] Building upon the framework created by the working group, New Jersey firms, foundations, local governments, nonprofits, and law schools can all be part of the solution. ⚖

Lori A. Nessel *is a professor of law and director of the Center for Social Justice at Seton Hall University School of Law. She has taught immigration classes and supervised students in the Immigrants' Rights/International Human Rights Clinic at Seton Hall Law for over 20 years.* ***Farrin Anello*** *is a visiting assistant clinical professor at Seton Hall University School of Law, where she teaches in the Immigrants' Rights/International Human Rights Clinic.*

ENDNOTES

1. Dana Leigh Marks, Immigration judge: Death penalty cases in a traffic court setting, CNN.com, June 26, 2014, http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/; *see* Oversight Hearing on the Executive Office for Immigration Review: Hearing before Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary 111th Cong. 55 (2010) (written statement of Hon. Dana Leigh Marks, Pres. Nat'l Ass'n of Immigration Judges).
2. *JEFM v. Holder*, ___ F.3d ___, No. 15-35738, 15-35739, 2016 WL 5030344 (9th Cir. Sept. 20, 2016).
3. *See* Lori A. Nessel, Farrin R. Anello, *et al.*, Deportation Without Representation: The Access-to-Justice Crisis Facing New Jersey's Immigrant Families (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2805525. Seton Hall law students Branca Banic '16, Justin Condit '15, Holly Coppens '16, Amy Cuzzolino '16, Jaime DeBartolo '15, Anthony D'Elia '16, Danielle King '16, Victoria Leblein '16, and Vani Parti '15 worked on the report, on behalf of the Working Group on Immigrant Representation in New Jersey.
4. Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court (2016), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf (finding that nationwide, from 2007 to 2012, 14 percent of detained non-citizens in removal proceedings had counsel, whereas about two-thirds did not, and that overall, those with counsel were far more likely to be released from detention, to apply for relief, and to avoid removal than those who were unrepresented).
5. *See* Deportation Without Representation at 4-6 (reviewing costs of deportations of New Jersey residents and citing a study projecting that between 2011 and 2016, 15,000 additional children will end up in foster care due to parents' deportation or detention).

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A Step Toward Justice

Universal Representation and Access to Counsel for New Jersey Immigrants

by Amy Gottlieb and Nicole Polley Miller

"The Immigration and Nationality Act, passed in 1952 and amended many times since, is a hideous creature. Its hundreds of pages contain excruciating technical provisions that are often hopelessly intertwined."[1] These are the opening lines of an immigration law textbook frequently used to teach basic immigration law to law students. The statement often frightens law students, who may then spend a full semester struggling to understand even the most basic provisions of the Immigration and Nationality Act. Once in practice, lawyers are discouraged from taking on immigration cases *pro bono* without an experienced immigration lawyer to mentor them, given the possible pitfalls and potentially devastating consequence of deportation if a case is not approved. The layers of complexity in immigration cases exist at the benefits stage, where applicants are filing applications for some kind of status with U.S. Citizenship and Immigration Services, and become even more complex at the immigration court stage where, if a case is denied, the outcome for the immigrant will be return to his or her native country.

Lack of Access to Counsel

Given all of this, why are thousands of immigrants facing their immigration court hearings without a lawyer by their side? The answer is that immigration law is considered civil, not criminal law, and the due process protections that exist in criminal court, including the right to counsel for indigent defendants, do not apply in civil proceedings. The Immigration and Nationality Act itself states that an "alien shall have the privilege of being represented, *at no expense to the Government*, by counsel of the alien's choosing who is authorized to practice in such proceedings."[2]

It is important to note that even immigrants who are

detained while in immigration, or removal, proceedings have no right to a court-appointed attorney if they cannot afford one. This is troubling on its face but even more egregious given that aggressive immigration enforcement has led to the increased detention of asylum seekers who are facing persecution in their home countries, with over 44,000 asylum seekers detained nationwide in immigration detention facilities, and over 2,400 in New Jersey alone.[3]

The Immigration Court System in New Jersey

New Jersey is home to two immigration courts, with a total of 11 judges reaching final decisions in more than 5,135 cases annually.[4] One of those courts is located in the Peter Rodino Federal Building in downtown Newark, and has eight judges who preside over the removal proceedings of immigrants who are facing deportation. A portion of those hearings are held via video teleconference, while the immigrant is detained at a county jail that has a contract with Immigration and Customs Enforcement to jail immigrants during their court proceedings. The second immigration court in New Jersey is housed at the Elizabeth Detention Center, a privately run jail owned by Corrections Corporation of America that is used to detain immigrants who are facing removal (deportation) from the United States. The Elizabeth court currently has three judges who preside over the removal proceedings of detained immigrants both in person and via video teleconference.

As a state with one of the highest populations of immigrants in the country, New Jersey is fortunate to have a thriving and experienced private immigration bar, as well as a few nonprofit legal service providers who accept immigration cases either for no fees or low fees. But many immigrants, especially those in detention, do not have the resources to pay for immigration lawyers and end up appearing *pro se* in these very complex matters. Immigration judges may be generous in allowing time for the respondent to find an attorney, but because free legal services are so limited and the private bar is often out of financial reach, they may end up returning time and time again before the immigration judge is forced to move forward with the case.

Representation Increases Likelihood of Success

The few nonprofit legal service providers that offer free legal representation to immigrants in detention are underfunded and under-resourced, and are unable to meet the growing need for free lawyers as more and more immigrants are detained and ineligible for bond or parole because of the way they entered the U.S. or because they are subject to mandatory detention due to criminal convictions. These individuals are often potentially eligible for relief under the immigration laws, yet they have the hardest time finding lawyers because of their limited financial resources and the scarcity of free or low-cost attorneys. As a consequence, hundreds of detained individuals appear before immigration judges in New Jersey on a weekly basis, 67 percent of whom are unrepresented.[5] Nationally, the situation is even more dire, with 86 percent of detained immigrants appearing before immigration judges without counsel.[6]

Immigration courts nationwide are overwhelmed by the staggering number of cases on their dockets, and New Jersey is no exception. As of Aug. 2016, 512,190 cases were pending nationwide and 27,391 were pending in New Jersey.[7] While representation alone will not cure the backlog of pending immigration court cases, 92 percent of immigration judges surveyed indicated they were able to adjudicate cases more efficiently when immigrants appeared in their courtroom with competent counsel.[8] Not surprisingly, a recent nationwide study found that "involvement of counsel was associated with certain gains in court efficiency: represented respondents brought fewer unmeritorious claims, were more likely to be released from custody and, once released, were more likely to appear at their future deportation hearings."[9]

Detained immigrants who are unable to obtain representation experience increased time in detention, as they request continuances while they seek legal representation and then struggle to navigate the complex immigration court proceedings by themselves if they are unable to secure counsel. It is often impossible for individuals who are detained and not represented by an attorney to adequately prepare their cases. Detained immigrants face practical hurdles, such as language barriers and limited access to telephones, making it hard for them to obtain even the most basic information or documentation in support of their cases. In many instances, their family members are unable to visit, either because they live far from where their loved ones are detained or because they lack immigration status themselves. In addition to not having the necessary legal training to navigate the complicated and confusing immigration laws, detainees often lack access to the necessary legal resources, such as law books or online legal tools, to adequately prepare their legal arguments. In the face of these insurmountable obstacles, and the prospect of prolonged detention, many unrepresented detainees with otherwise strong and viable forms of immigration relief feel they have no choice but to accept a removal order, even when they have a very real fear of returning to their home countries.

This crisis in immigrant representation has led to a growing national move-

ment of immigration legal services providers, academics, judges, and other experts committed to working toward a right to counsel and the promotion of due process through the provision of high-quality legal services. There have been several notable efforts in New York and New Jersey.

New York Immigrant Family Unity Project

In New York, the Honorable Robert A. Katzmann, chief judge of the U.S. Court of Appeals for the Second Circuit, convened a Study Group on Immigrant Representation, which was comprised of members of the private bar; law firms; nonprofits; immigration legal service providers; community organizations; bar associations; law schools and federal, state and local government agencies. The group published a groundbreaking study in 2011 that found that 60 percent of detained New York immigrants did not have legal representation.[10] Only three percent of those *pro se* detained immigrants had a successful outcome in their cases, as opposed to 18 percent of detained immigrants with counsel and 74 percent of non-detained immigrants with legal representation.

The report was the impetus for the creation, in 2013, of the New York Immigrant Family Unity Project (NYIFUP), the first public defender model for indigent detainees in the nation. NYIFUP is funded by the New York City Council and provides a free attorney from one of three well-established nonprofit legal service providers to every detained New York City resident who meets income eligibility requirements and who wishes to be represented in their removal proceedings.[11] NYIFUP has more recently developed two smaller-scale universal representation projects in upstate New York, at the Buffalo Federal Detention Center in Batavia, New York, and at the Ulster, New York, immigration court.[12]

Immigrant Justice Corps

Judge Katzmann was also the driving force behind the creation of the Immigrant Justice Corps (IJC), the country's first fellowship program wholly dedicated to meeting immigrant needs for high-quality legal assistance. IJC recruits recent law school and college graduates from around the nation and partners them with leading nonprofit legal services providers and community-based organizations in New York City and in New Jersey. It is a two-year fellowship, with an optional third year, and IJC fellows receive extensive training, professional development, and mentorship to prepare them for careers as immigration practitioners. The IJC fellows provide a broad range of immigration assistance, including the representation of detained and non-detained immigrants in removal proceedings.

The IJC hopes to expand to communities and nonprofit organizations across the country. There are currently three IJC fellows in New Jersey.

New Jersey Access to Counsel

In New Jersey, the Honorable Michael A. Chagares of the Court of Appeals for the Third Circuit convened a Working Group on Immigration Representation in New Jersey, with the same goal as the Katzmann study group in New York, to increase access to immigration legal services. The Chagares working group assembled leading nonprofit legal services providers, members of the private immigration bar, law firms, local law school clinics, New Jersey immigration judges[13] and bar association representatives, all committed to increasing free and low-cost legal representation for indigent immigrants residing in New Jersey.

The Seton Hall University School of Law Immigrants' Rights/International Human Rights Clinic, which is a member of the working group, recently published a report that found that New Jersey immigrants were facing an access-to-justice crisis that mirrors the crisis faced by immigrants nationwide. Of particular importance, the Seton Hall study found that detained New Jersey residents with legal representation avoided removal 49 percent of the time while those without legal representation avoided removal only 14 percent of the time. Those who were released from detention to fight their immigration cases avoided removal 80 percent of the time when they were represented but only 20 percent of the time if they did not have counsel. And lastly, immigrants in removal proceedings who were never detained avoided removal 92 percent of the time when they had an attorney but only 31 percent of the time when they were unrepresented.[14]

There is currently one universal representation program in New Jersey. Through a grant the American Friends Service Committee's Immigrant Rights Program (AFSC) received from the David Tepper Charitable Foundation in 2015, AFSC launched a new initiative, the Friends Representation Initiative of New Jersey (FRINJ), which uses a universal representation model in its legal services work at the Elizabeth Detention Center. Instead of selecting cases based on the merit of the claims, as it had in the past, AFSC has adopted the NYIFUP model, which created a public defender system for detained immigrants in their removal proceedings who meet income eligibility requirements. To that end, AFSC provides representation to indigent individuals, regardless of the merits of their claim, until attorney capacity is reached. The new model allows AFSC to represent a higher number of cases than it had previously, and to demonstrate the positive impact of legal representation for those in detention, even where the client is ineligible for any relief in the U.S. and is accepting an order of deportation.

AFSC attorneys have represented 428 detained individuals since the inception of the project in March 2015. FRINJ has periodically come close to providing 100

percent representation of indigent detainees at the Elizabeth Detention Center, although it is difficult to sustain those levels of representation with its limited staff and resources. Members of the Chagares Working Group on Immigration Representation have supported the FRINJ universal representation project, stating that it is "revolutionary. It has completely changed how cases are managed in Elizabeth and its success is a very important illustration of the effective use of full time public lawyers in immigration."

Conclusion

There is growing consensus around the country and in New Jersey that indigent immigrants in removal proceedings should be provided legal counsel at government expense. Recent studies have shown that legal representation greatly improves outcomes for immigrants, particularly those in detention, and saves the government money in detention expenses, as well as other outlays such as transportation and foster care costs.[15] The New York Immigrant Representation Study and the Seton Hall report both found that the two most important variables affecting case outcomes are having legal representation and being free from detention.

The authors believe a successful government-funded right to counsel program in New Jersey would accomplish a number of goals. First, it would build the capacity to provide legal services to low-income immigrants across the state. Second, it would promote due process by providing legal representation and access to legal information to indigent New Jersey residents. Third, it would lead to improved efficiency in the immigration system itself. Lastly, it would promote the economic and social stability and integration of immigrants, as well as the civic participation of immigrant families and communities.

In the powerful words of a formerly detained FRINJ client who was granted asylum:

Once I had a lawyer, she helped me understand what I had to do. That gave me courage. I had the faith and courage she would do everything to help me. Those who didn't have a lawyer were afraid, they didn't know what to do; they were lost. I know detainees who tried to get a lawyer but couldn't. People spend months in detention without a lawyer. If everybody could have a free lawyer, that would be good. Having a lawyer gives you courage and hope. ⚖

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ENDNOTES

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11. NILC Report, *supra,* at 14-17.
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13. The Judge Chagares working group has greatly benefitted from the regular participation of several of the New Jersey immigration judges, including Judges Leo A. Finston and Annie S. Garcy, who hear cases at the Newark immigration court, and especially Judge Dorothy A. Harbeck, given her many years of experience as an immigration judge at the Elizabeth Detention Center.
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NJ Medical Malpractice Law 2017

DESCRIPTION

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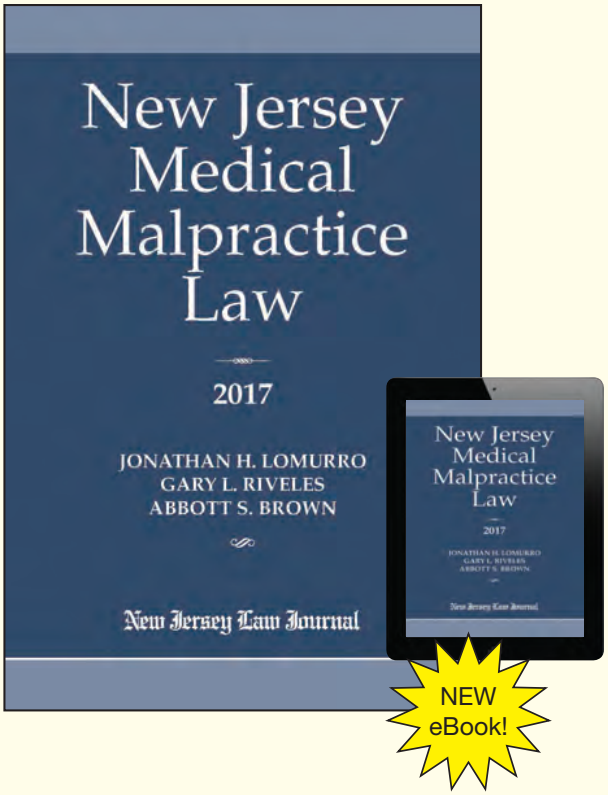

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Naturalization, Jersey Style

The Process, the Perks, and the Pitfalls

by Angie Garasia

U.S. naturalization, as established by the Immigration and Nationality Act (INA), is simply the process by which a foreign citizen or national, who is a lawful permanent resident of the United States, is granted U.S. citizenship.[1] The process is initiated on Form N-400 and requires the applicant to appear before an Immigration Services officer (ISO) to demonstrate, among other things, good moral character, a steadfast attachment to the principles of the U.S. Constitution,[2] and knowledge of basic English, U.S. history and government.[3]

One might wonder whether naturalization is worth pursuing, given that permanent residents (or green card holders) already enjoy the legal right to reside in the U.S. indefinitely. The fact is that, for many, citizenship extends far beyond a person's immigration status. It is something meaningful that resonates deeper, as it reflects an individual's values and loyalties, and invokes a spirit of nationalism and patriotism.

Naturalization is a voluntary act wherein an individual willingly renounces allegiance to his or her native country of birth or nationality and plants deeper roots in another nation.

In 2016, amid a heated, polarizing presidential election, a resurgence of nativist rhetoric, and a proposed application fee hike, the stakes to apply were especially high. The United States Citizenship and Immigration Services (USCIS) reported a surge in N-400 applications filed nationwide. From June 2015, when Donald Trump first announced his candidacy, until June 30, 2016, the number of N-400 applications exceeded a staggering one million.[4] In New Jersey, the spike was proportionately equal. The state experienced a tremendous uptick, compared to the same 12-month period in the previous year.[5] With such a significant spurt in the filing of naturalization applications, now is a good time to briefly examine the history, procedures, and policy behind the USCIS adjudications process.

USCIS's Authority to Naturalize

Traditionally, Congress has held the exclusive authority under its constitutional power to establish a uniform rule of naturalization and to enact legislation that confers citizenship upon individuals.[6] However, in 1991, Congress delegated the authority to naturalize to the attorney general (now the secretary of the Department of Homeland Security (DHS)).[7] In furtherance of that power, the DHS secretary has commissioned USCIS to perform such acts as are necessary to properly carry out the naturalization authority.[8]

USCIS's role is to preserve the United States' long-revered history and tradition of being a nation of immigrants by administering and conferring immigration and naturalization benefits with fairness and integrity.[9] Clearly, it is critical that the system by which these benefits are granted remains streamlined, simple, and efficient.

The N-400 Process

The initial step is the mailing of the N-400 application to a USCIS Service Center in Dallas, TX or Phoenix, AZ. Once the 20-page application for naturalization is filed, the service center acknowledges receipt of the application, processes the filing fee, performs a cursory review of the application and schedules a biometrics appointment. USCIS then conducts a criminal background and security check on the applicant.[10] Once the biometrics and preliminary processes are concluded, USCIS schedules the applicant for an interview, which entails administering the U.S. history and government exam as well as determining whether the applicant has demonstrated the requisite level of English proficiency.[11]

The field office assigned to handle an applicant's scheduled interview is determined by his or her place of residence.[12] In New Jersey, there are two field offices: Newark and Mount Laurel. The Newark field office handles all counties north of and including Middlesex County, while the Mount Laurel office handles all southern counties.

Upon filing, and during the interview, an applicant for naturalization must demonstrate that he or she meets all the statutory criteria. To be eligible, an applicant must:

- be at least 18 years old;
- have lawful permanent resident (LPR) status for at least five continuous years (three continuous years if married to a U.S. citizen and spouse-based eligibility requirements are met);
- meet the requisite physical presence in the United States;
- satisfy the continuous residence requirement in the United States;[13]
- demonstrate basic proficiency in speaking and understanding English;
- demonstrate the ability to read and write English;
- demonstrate knowledge of U.S. history and government;[14]
- substantiate 'good moral character' for the statutory period;
- be attached to the principles of the U.S. Constitution and be willing to take the Oath of Allegiance to the United States.[15]

More Than Just a Form

Generally speaking, most applicants satisfy the criteria requirements to become naturalized citizens. This is not to say, however, that applying is a mere formality. For many, demonstrating basic English proficiency can be challenging, especially for those with no formal schooling and those who do not routinely take tests. Many candidates for citizenship may struggle with terms found in the application itself, such as *communism, totalitarian dictatorship, genocide, guerilla group, vigilante group, paramilitary group, exclusion proceedings*, etc. An applicant's failure to understand such terms and unequivocally state they have no connection to or affiliation with those groups, may result in a denial.

Moreover, it is not uncommon for applicants to pass the English and civics test, but nevertheless be denied. Problems may arise, for instance, when an applicant has taken extensive trips abroad. Even a single trip of six months or more will trigger scrutiny and possibly disrupt continuity of residence. In such cases, the applicant bears the burden of proof of establishing that he or she maintained his or her residence and domicile in the United States despite being physically absent.[16]

If the applicant is approved for naturalization, he or she will be extended the same privileges, rights and responsibilities a natural-born citizen possesses (with the exception of attaining the office of president). Whether natural-born or naturalized, a citizen enjoys an enviable panoply of rights and protections under the Constitution and laws of the United States, including but not limited to the

right to vote; petition for family members; apply for federal jobs; run for elected office; travel with a U.S. passport; seek protection under the aegis of the U.S. government; and insulation from deportation.[17]

Perks of Living and Applying in New Jersey

In New Jersey, the applicant is ordinarily apprised at the conclusion of the interview whether his or her application for naturalization is being recommended for approval. New Jersey is one of only a handful of jurisdictions that offer same-day oath ceremonies. During the oath ceremony, the applicant takes the Oath of Allegiance and pledges to support the Constitution and laws of the United States, to renounce any foreign allegiances, and to bear arms on behalf of the United States when required to do so by law.[18] The certificate of naturalization is issued at the conclusion of the ceremony.

The Pitfalls

As desirable as the benefits of citizenship may be, the process must still be approached with a degree of circumspection. An individual should never file an application for naturalization in haste. There are a number of pitfalls that one needs to be mindful of.

When an applicant is scheduled to appear for his or her naturalization interview, the Immigration Service officer (ISO) will have the applicant's entire A-file at hand.[19] This A-file embodies the applicant's entire immigration history. In addition to any previously filed applications with USCIS, it may possess any and all encounters with Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE) and any applications filed abroad with the Department of State (DOS). Any false or misleading information, misrepresentations, or fraudulent documentation submitted in the past is fair game for scrutiny (unless it was already satisfactorily 'waived' by USCIS). In essence, any 'sins' of the past that may have remained buried for years can potentially surface and decimate any chances of acquiring U.S. citizenship. In some cases, the applicant may be referred to removal proceedings as a result of this newly discovered information.

In New Jersey, a Third Circuit decision, *Garcia v. Attorney General of the United States,*[20] may offer some safeguard to those in the aforementioned predicament. In fact, the Third Circuit remains the only circuit where immigrants can rely on the statute of limitations for protection from USCIS where a green card may have been issued in error five or more years earlier. In *Garcia*, the court ruled that a five-year statute of limitation applies with regard to both rescission and removal proceedings if USCIS seeks to rescind a green card that was obtained questionably.[21] However, in a subsequent decision, *Matter of Paula Cruz de Ortiz,*[22] the Board of Immigration Appeals limited the contours of that protection to those who adjusted their status in the U.S. The five-year statute of limitations does not apply to individuals who obtained their immigrant visas abroad.

Omission of criminal history and previous immigration court proceedings are other common snares that may jeopardize an applicant's status. Today, USCIS officials are mandated to check the fingerprint records of all applicants for naturalization against several databases. Those who slipped through the cracks many years ago, perhaps due to neglect or outdated technology, should not presume these issues will go unnoticed. The Department of Homeland Security and the Federal Bureau of Investigation (FBI) have and continue to allocate a significant amount of resources, manpower and time to prevent fingerprint oversights that may have plagued the agencies in the past.

In light of this, every arrest, court sentence, and conviction should be thoroughly reviewed before lodging an application for naturalization. Even in instances where criminal charges are dismissed either through pre-trial intervention (PTI), conditional discharge, or conditional dismissal, immigration officers conduct an exacting review of the record to ensure that no guilty plea or admission of culpability was previously entered. Under certain conditions, a plea of guilt may survive a dismissal of the underlying charge and constitute a conviction for immigration purposes. There have been many unsuspecting applicants who unwittingly exposed themselves to removal proceedings by failing to appreciate the nuances and interplay between criminal and immigration law.

Some other issues that may decelerate or imperil a naturalization application are unlawful voting, failure to file taxes, willfully failing to support dependent children, and failure to register for the selective service.

The Role of the Advocate

Given the plethora of potential issues that can arise from a single naturalization filing, the role of the attorney is extremely critical. Even before the application is filed, the attorney plays an indispensable role in evaluating the viability of an application both legally and practically. The client's immigration, criminal and personal history must all be thoroughly assessed. If there are complications, the attorney needs to formulate an ethical strategy that addresses those taxing issues if necessary. Other times, the attorney needs to exercise restraint and counsel forbearance if filing is improvident.

When an applicant is represented by an attorney, a signed G-28 form must be submitted to the government. Whenever an examination is required before USCIS, an applicant has the right to be represented by an attorney.[23] During the interview or examination, the attorney's role is to ensure that the rights of the

applicant are zealously protected. This requires an intricate knowledge of federal law, regulations, and administrative and circuit case law, as well as local practice and procedure. ⚖

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2. INA § 316.
3. INA § 312(a)(1)(2).
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5. *Id.*
6. *See Chirac v Chirac*, 15 U.S. 259 (1817).
7. INA § 310(a).
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9. *See* United States and Immigration Services, USCIS Policy Manual, Volume 12, Part B-Chapter 1 available at www.uscis.gov/policy-manual/HTML
10. INA § 335.
11. *See* USCIS Policy Manual, *supra*, Chapter 3.
12. *See* USCIS Policy Manual, *supra*, Part D, Chapter 6.
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14. INA § 312.
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17. *See* USCIS Policy Manual, *supra,* Part A, Chapter 1.
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21. *Id.*
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Born as Equals and Subject to Lady Liberty

by Cesar Martin Estela

As a young nation, the United States, comprised of former colonies, abided by the citizenship laws imposed by the king. English common law maintained the principle of *jus soli*, that a person acquires citizenship in a nation by virtue of his or her birth in that nation or its territorial possessions.[1] Following the signing of the Declaration of Independence, each state's residency laws adopted the principle when deciding if an individual was considered a citizen of the United States.[2] The Constitution did not define citizenship of the United States, yet it required residency of seven and nine years for a representative or senator, respectively.[3] Beginning with the Declaration of Independence in 1776, citizenship incorporated the common law doctrine of *jus soli*.[4] United States' naturalization laws enacted after the Declaration of Independence (the Naturalization Act of 1790 and the Civil Rights Act of 1866) up until the ratification of the 14th Amendment in 1868, did not define citizenship by birth within the United States.[5]

Section 1 of the 14th Amendment states the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.[6]

As former-colonies-now-nation-state, *jus soli* established an unequivocal rule for obtaining citizenship in the United States. In the seminal case of *U.S. v. Wong Kim Ark*, the Supreme Court decided the meaning of the 14th Amendment's birthright citizenship. The Court held that the 14th Amendment affirmed the traditional *jus soli* rule; affirmed the exceptions of children born to foreign diplomats, hostile occupying forces or on foreign public ships; and added a new exception of children of Indians owing direct allegiance to their tribes.[7]

The Court further held that the 14th Amendment "...has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship," and that it is "throughout affirmative and declaratory, intended to allay doubts and settle controversies which had arisen, and not to impose any new restrictions upon citizenship."[8]

The enactment of the 14th Amendment, and a predecessor statute, the Civil Rights Act of 1866, provided for a constitutional guarantee

of civil rights and equal protection.[9] The congressional debate centered on including children born to German parents, not yet citizens; and children of Chinese, Indians and African-Americans.[10] The debates against the amendment's enactment raised the fears of a takeover of California by the Chinese empire and Pennsylvania overrun by Gypsies, for the people of different races and cultures could not mingle.[11] Until the Civil Rights Act of 1866 and the 14th Amendment, African-Americans were not considered citizens of the United States.

The Supreme Court, in *Dred Scott v. Sandford*, held that free African-Americans could not be citizens of the United States because they were descended from persons who entered the United States as slaves.[12] The Court ruled that the Constitution did not consider slaves a class of persons included in the political community as citizens; various state laws did not consider African-Americans state citizens, and treated slaves as property at the time of the adoption of the federal Constitution.[13]

The primary argument against birthright citizenship for children of undocumented aliens hinges on the meaning of the phrase "and subject to the jurisdiction thereof."[14] Section 1 requires that the child's birth happen within the United States and that the child be subject to the jurisdiction of the United States.[15] Children of undocumented aliens, whose parents entered without permission, are rendered incapable of fulfilling the second requirement because their parents, "breaking America's laws, by definition, certainly did not meet that requirement," and are thus not subject to the United States "political" jurisdiction.[16] Another argument posits that birth tourism cannot satisfy the "jurisdictional" requirement. Certain websites advertise maternity hotels in the United States for Chinese women and economic migrants from Mexico and Central America, if pregnant while travelling, to inevitably give birth in the United States.[17] Children born to undocumented parents are believed to give unauthorized aliens a foot in the door because immigration benefits may be conferred on the parents of U.S. citizens upon reaching 21 years of age.[18]

Conversely, the original public meaning of the 14th Amendment affirms birthright citizenship.[19] In 1898, the Supreme Court traced the history of the statutory and common law regarding *jus soli* in England and America.[20] The Court explicitly rejected the argument that aliens, because they owed allegiance to a foreign nation, were not within the jurisdiction of the United States.[21] In 1844, 20 years before the Civil Rights Act and the 14th Amendment, the Court affirmed the citizenship of a U.S.-born child of an Irish resident of the United States who returned to Ireland after the child's birth and died without declaring intent to be a naturalized U.S. citizen.[22] The Court affirmed the traditional English common law doctrine of *jus soli*. The silence of the Constitution and federal statutes indicated congressional approval of the traditional common law position.[23] Significantly, it held that the national law defined any person born within the dominions and allegiance of the United States as a citizen, regardless of the status of the parents.[24] Additionally, in *Plyler v. Doe*, the Supreme Court held that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[25]

By seeking to inject an 'illegal alien' exception into the jurisdiction requirement of the 14th Amendment, arguments contrary to birthright citizenship do not address the fact that legal and illegal alien distinctions were non-existent at the time the amendment was ratified.[26] The term "illegal aliens" did not exist at the time the Court decided *Wong Kim Ark*. The McCarran-Walter Act of 1952—the original Immigration and Nationality Act—established the system of immigrant and non-immigrant visas and created a numerical restriction for immigration from the Western Hemisphere.[27] These limits weighed more heavily on Mexicans than on migrants from any other country; thus, Mexican entrants were rendered unauthorized and created the problem of 'illegal aliens' in the United States.[28]

A 1997 amendment to the INA also weighs more heavily on Mexican parents of U.S. citizens because aliens who entered without authorization, and whose children petition for immigration benefits on their behalf, must wait 10 years *outside* the United States before becoming lawful permanent residents.[29] Yet, three decisions—*Lynch*, *Wong*, and *Plyler*—two of which were contemporaneous to the enactment of the Civil Rights Act of 1866 and the 14th Amendment, unequivocally held that the status of the parents is not determinative of birthright citizenship status of the child.

A present-day challenge to a free American society, not faced previously by legislators or the populace, is whether children born to enemy combatants or transient parents, who later harm the United States, should have citizenship conferred upon them by accident of birth. In *Hamdi v. Rumsfeld*, the court afforded a U.S. citizen due process while affirming the government's right to detain enemy combatants.[30] The dissent argued that Hamdi's birth should not confer United States citizenship because his father was on a temporary work visa at the time Hamdi was born.[31] However, birthright citizenship addresses these concerns by placing *all* its citizens before the nation's courts, affording criminals due process as guaranteed by the Constitution. Affirming birthright citizenship affirms the society's full faith in the American legal system. The Constitution

does not permit one to ignore those guarantees for political expediency.

Only a constitutional amendment would end birthright citizenship. Article V of the Constitution prescribes two methods for an amendment to become a part of the Constitution.[32] Congress must pass the amendment with 2/3 of the vote (292 votes) and, with the Senate's approval, send the amendment for 3/4 of the states to ratify. Congress is comprised of 55 percent Republican legislators (240 members).[33] The Senate majority is controlled by Republican legislators (51 members).[34] Republicans now control the governor's house or the state legislative chamber in 44 states—88 percent of all states—with full control in 25 states; they hold 31 governorships.[35] The author believes a constitutional amendment to abolish birthright citizenship is a serious possibility, and that ending birthright citizenships would raise questions of national identity and belonging for the populace. Moreover, it could create humanitarian crises, as potentially millions of Americans could become stateless.

In the words of Irish-American playwright Eugene O'Neill: "There is no present or future—only the past, happening over and over again—now."[36] Various immigrant groups crested, crashed and engrained themselves into the fabric of America: the African slaves, Irish, German, Chinese, Scandinavian, Italian, Eastern Europeans, Jewish refugees,[37] Cuban refugees, and, most recently, Latin Americans. By definition, they arrive as outsiders to a great society; they are unequivocally newcomers.[38]

In the words of one Founding Father: "The bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment."[39] ⚖

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A View from the Bench

The Commonsense of Direct and Cross-Examinations in Immigration Court

by Hon. Dorothy Harbeck

PHOTO COURTESY HON. DOROTHY HARBECK

Recently, I heard this question in court: "Why are you afraid to return to your homeland because of the religious persecution you suffered at the hands of the government?" It was the very first question a respondent's attorney asked his client after the asylum application was certified, and was asked just as the respondent's testimony was to begin. Needless to say, the attorney for the Department of Homeland Security (DHS) objected to the question as leading,[1] and the respondent's attorney countered that the Federal Rules of Evidence do not apply in immigration proceedings.[2] Commonsense does apply, however, and the best evidence is really the evidence that comes straight from the proverbial horse's mouth.[3]

In Terms So Plain and Firm—Direct Examination[4]

Direct examination of the respondent gives his or her lawyers the chance to share the respondent's story; however, to make that testimony believable and ensure it resonates, attorneys should keep the spotlight on the witness, use documents to guide the story and deal with any bad facts upfront.

The purpose of this article is to provide a brief overview of what direct testimony is and what cross-examination is, in order to provide a context to understand what immigration judges are faced with when they consider courtroom objections regard-

ing leading questions. It also provides a basic framework for understanding the issues facing immigration judges in developing the record in an unbiased manner with respect to an unrepresented respondent.[5]

Evidence is divided generally into four main categories: 1) oral evidence (the testimony given in court by witnesses); 2) documentary evidence (documents produced for inspection by the court); 3) 'real evidence' (things other than documents, such as a knife allegedly used in committing a crime); and 4) demonstrative evidence (representation of an object). Examples of demonstrative evidence include photos, x-rays, videotapes, movies, sound recordings, diagrams, forensic animation, maps, drawings, graphs, animation, simulations, and models. It is useful for establishing context among the facts presented in a case. To be admissible, a demonstrative exhibit must "fairly and accurately" represent the real object at the relevant time.[6]

The respondent bears the evidentiary burden of proof and persuasion in connection with any applications.[7] Leading questions affect the ability to meet this burden because they actually compromise the evidence. Since a leading question is one that suggests the desired answer, it prevents the witness from telling the story in his or her own words. Direct oral testimony is the best way for the respondent to put before the immigration judge the commonsense of his or her application for relief and explain his or her fear of return.[8]

In trial skills classes, I recall being taught: "If you have the facts on your side, hammer them into your jury. If you have the law on your side, hammer it into the judge. If you have neither, hammer on the table."[9] The respondent's lawyer's greatest opportunity to 'hammer' the facts to the court comes during direct examination. This is when the respondent's lawyer has the greatest control of the organization and pace of the case, and should be confident of what the answers will be.

For the immigration court to understand the claim, a coherent, logical statement of the facts is essential. A respondent's carefully crafted story must be developed through his or her written application and through the artificial device of questions and answers. In addition to the direct and cross-examination of a respondent by counsel, the immigration judge may ask questions. Also, critically, there are many times where a respondent is unrepresented by counsel before the immigration court. In those instances, the immigration judge will ask direct questions.[10]

Leading questions are defined as those that suggest the answer, contain within them the answer or call for a yes or no answer. Aside from asking questions that begin with who, what, where, when, how and why, direct examination questioners stay away from prefacing questions with words that will always call for a yes or no answer. Any question beginning with words like "did," "didn't," "does," "doesn't," "is," "isn't," "aren't," "will," "won't," "can," "can't," "could," "couldn't," "would, " or "wouldn't," will always call for a yes or no answer.

Sometimes leading questions are unavoidable during direct testimony. There are times when the witness freezes up, has a complete failure of recollection, and attempts to refresh the witness's recollection are unsuccessful. In those instances, it is permissible to ask a brief leading question or two, but the questioner should revert back to non-leading form very quickly.

That said, nothing is more overlooked in immigration trial practice than a good direct examination. Testimony that is relevant[11] and reliable[12] should be presented. The basic tools of direct examination are open-ended, non-leading questions that call for a narrative response. The lawyer should effectively blend into the background and allow the respondent to be the featured act.

To determine if testimony is relevant, the immigration judge should determine whether or not the testimony has any tendency to make a fact that is of consequence to the case more or less probable. If the testimony proves or disproves something in a case, it is relevant.[13] Reliability in immigration court is extremely important, since hearsay testimony is allowed.[14]

To elicit narrative responses, the most effective direct questions begin with any of the following words: "who," "what," "where," "when," "how" and "why." In trial practice, these are referred to as the five wh questions. Using these basic five wh questions, the heart of the respondent's claim can be reached quickly and without any leading.[15] Following are some examples of basic five wh questions that can present the basics of an asylum claim without leading:

What is your name?
What is your birthdate?
Where were your born?
Of what country are you a citizen?
When did you come to the United States?
How did you enter the United States?
Why did you file this asylum application?

Although a respondent's attorney could technically conduct an entire direct using the five wh questions, the occasional use of transitional phrases is critical. For example, once getting through the witnesses' background information, the easiest way to the facts of the case could be with a transitional type of question, for example, "I direct your attention to Jan. 7, 2016. What happened on that day?"

Although these types of questions are technically leading, they are considered transitional questions, making very limited leading permissible during a direct examination. After using this type of

transitional question, the respondent's attorney should revert back to open-ended, non-leading questions (who, what, where, when, why and how), following up with questions in the nature of "what happened next?" Words like "describe" and "explain" are very helpful. Another useful transitional question is "Did there come a time when ...?"

There are moments when a respondent may want to highlight certain testimony that was already given during the direct testimony. Repetition wins cases. The problem is that the attorney cannot blatantly be repetitive, repeat questions or characterize past testimony. What the attorney cannot do is simply repeat the direct testimony by asking, "You just testified that the defendant thrust a machete deep into the chest of the victim." Nor can he or she ask the same question the same way to elicit that dramatic testimony again. What the attorney can do is utilize a technique known as looping. Using the five wh questions and likely answers, here is an example of looping.[16] As can be seen, looping incorporates the witness's answer into the next question.

Q: Why did you file this asylum application?
A: Because I am afraid to return to Liberia.

Q: Why are you afraid to return to Liberia?
A: Because they chased me with a gun.

Q: Who chased you with a gun?
A: Political people chased me with a gun.

Conceptually, there are two forms of direct examination: an open narrative method and a specific question method. In the broadest terms, the open narrative method places the witness on the stand, establishes the setting, and then asks the witness, "What happened?" The specific question method gives the witness no leeway in answering questions; each answer is followed with a specific question. Initially, the determination regarding which of the two forms of examination to use is up to the direct examiner. Unless a terrible mistake in judgment is made, the court will ordinarily not interfere with that discretion.

Pre-trial preparation is key. It is usually a good idea for the examiner to have a written checklist of the facts to be established or the legal theories to be foreclosed. Commonsense dictates this checklist should include: 1) specific claims regarding the nature of the case; 2) facts developed so far; 3) material facts; and 4) disputed facts. For each witness, the examiner should think about how the witness fits the theory of the case and what facts the witness will bring out. Also, critically, there are many times where a respondent is unrepresented by counsel before the immigration court. In those instances, the immigration judge will ask direct questions.

The Funnel Technique[17]

The examiner must stay organized and effective during testimony. Testimony should be presented in a logical format, generally either chronologically or by subject matter. The National Institute of Trial Advocacy (NITA) espouses a questioning method known as the funnel, for organizing and eliciting direct testimony. This ensures all relevant testimony is evoked.

The funnel functions as follows:

Start at the top: Begin at the top of the funnel, asking broad, open-ended five wh questions.

Get the list: This is the scope and breadth of the witness's knowledge about a particular topic.

Follow up: What do you mean? Give me details.

Drill down: Continue to travel down the questioning funnel by drilling down. Ask more questions to flesh out the details. The questions will generally still be open-ended, but are becoming more focused.

Exhaust: What else? Is that it? Always? Never?

Fill in gaps: What about _____? Did you? Was there? Have you? Is it?

Close the funnel: Lock the witness into his or her testimony. Close off by asking something like, "Is there anything else?" "Is that all you recall about…?" or "Have you told me everything you did?"

Recap/lock testimony: As I understand it? Is that right? Nothing more?

Objections[18]

Objections can be made in immigration court, even though the Federal Rules of Evidence are not strictly applied. That said, the objector should be able to succinctly state his or her objection and why the objection is being made.

Good Objections[19]

Calls for an opinion. Opinion testimony muddies the record and steers the focus away from the facts of the case. Unless the witness is specifically designated as an expert, he or she should not be testifying as opinions.

Form of the question. These can be leading, argumentative, confusing and unintelligible. This objection is usually asserted to make a clear record.

Compound. This is likely the most common form of the question objection. If the question is compound and the person answers yes, what portion of the question are they agreeing with?

Calls for speculation. A form objection should also be made to a question that calls for the witness to speculate.

Mischaracterizes earlier testimony. This is also to make sure there is a clear record.

Asked and answered. This is a useful objection to make sure the witness doesn't give a different answer than he or she gave earlier.

Calls for a legal conclusion. Witnesses are there to testify about facts, not legal conclusions.

Harassment. If the witness is being harassed or bullied, object. If that behavior continues, make sure the specific conduct is adequately described on the record.

Bad Objections

Irrelevant. If the question may lead to admissible evidence, it is proper. If the question is too far afield, though, a relevance objection may be warranted. The line is hard to draw here. It boils down to a judgment call on whether the question is likely to lead to admissible evidence.

Hearsay. Hearsay is admissible in immigration proceedings.

When asking a witness to describe an incident, the open narrative method of questioning is usually better. When taking a witness through a series of incidents and conversations, the specific question method is called for. Commonsense makes clear that one cannot ask a witness "what happened" if that question is designed to trigger dozens of conversations and incidents.

Effective questions use simple words. The structure of the direct should be clear, simple, and logical. They should generally elicit one fact per question or explore one subject. A good bit of advice comes from what is known as the Sal's Tavern rule.

New Jersey Supreme Court Justice Daniel O'Hern liked to apply this test to judicial opinions. If the opinion would not make sense to the gang at Sal's, a bar in Red Bank, he said, it should be redone because it is too lawyerly and convoluted. Justice O'Hern was a lawyer and judge for 50 years. He was a Harvard graduate and a law clerk at the U.S. Supreme Court, and his advice contains great wisdom and should be applied to direct questioning.[20]

When You Stand Well, Stand Still—Cross-Examination

After the respondent has completed his or her direct testimony, the DHS lawyer may then cross-examine the witness.[21] Both parties have the right to cross-examine or otherwise test the credibility of the witness presented by the other party. The respondent has a right to cross-examine any witnesses produced by DHS.[22] The purpose of this article is to define the general parameters of cross-examination for asylum hearings. Cross-examination should be generally limited to questioning only on matters that were raised during direct examination.[23] Because the Federal Rules of Evidence are not strictly applied in immigration proceedings, often the

DHS cross of a respondent is a bit like a discovery deposition. It should not be. The immigration judge clearly has the discretion to limit scope of cross-examination and curtail aimless meandering cross-examinations because this facilitates the orderly conduct of the trial.[24] However, the immigration judge must never take over the cross-examination.[25]

The purpose of cross-examination before the immigration court is to test the credibility of statements made during direct examination. Cross-examination is, in part, the art of establishing a point through several sequential questions, rather than jumping to the end right away. Cross-examination is the opportunity to elicit favorable information and expose weaknesses in a witness's testimony. It can bring out mistakes, limitations, and omissions in the testimony. It can impeach by demonstrating the witness's bias, interest, or motive; revealing background details that attack the witness's truthfulness; and raising prior inconsistent statements. The information being brought out on cross-examination must be relevant, and determining relevance involves a two-step analysis: first, the information must be generally relevant,[26] and second, the information must not be more prejudicial than probative.[27]

The cross-examiner should not intimidate a witness by shouting, gesturing, or using other means to unfairly badger. Likewise, the cross-examiner should not mischaracterize evidence or the witness's previous answers. Cross-examination must be "within the scope" of the direct examination. Leading questions may be asked during cross-examination.[28] A leading question is where a questioner makes a statement with affirmation suggesting the answer or containing the information the examiner is looking to have confirmed.[29]

An example of this is the question: "You were born in Poland, correct?"

In cross, the questioner needs to control the witness. In contrast to the direct examination where the respondent is the focus, in the cross-examination the questions themselves are the focus. The questioner should keep his or her questions simple and use one fact per question. There should be no "why" questions that allow quibbling or explanations. This is not a discovery deposition. The questions should state facts and use tags like "isn't it true?" For example, "You entered the United States in 1992, right?"

In trial skills classes, I recall being taught the Irving Younger 10 commandments of cross-examination.[30] The commandments were the first systematic approach to cross-examination, and remain the primer in this area of advocacy. Younger's 10 commandments are:

1. Be brief.
2. Ask short questions; use plain words.
3. Ask only leading questions.
4. Ask no question to which you don't know the answer.
5. Listen to the answers.
6. Don't quarrel with the witness.
7. Don't let the witness explain.
8. Don't go over direct examination.
9. Don't ask one question too many.
10. Save the explanation for final argument.

On cross-examination, the cross-examiner might try to question the witness's ability to identify or recollect or try to impeach the witness or the evidence. Impeach in this sense means to question or reduce the credibility of the witness or evidence. Impeachment, which is bringing out matters that attack the witness's credibility, is always proper. The cross-examiner must have a good-faith basis for raising any impeachment matter. Impeaching matters generally should be raised during the cross-examination of the witness. It gives the witness an opportunity to admit, deny, or explain the impeaching matter. Effective impeachment follows the three "c"s: confirm, credit and confront.[31]

The following is an example of impeachment cross-examination in an asylum context:

Q: Is it correct that you entered the United States in 1992?
A: Yes.

Q: And you told us during your lawyer's questioning that this was the first time you ever came to the United States, correct?
A: Yes.

Q: And your name is Yaakov Bunkowsky, right?
A: Yes.

Q: And you told us you have never used any other names, right?
A: Yes.

Q: Your birthday is Sept. 19, 1962, correct?
A: Yes.

Q: You never entered the United States before 1992, right?
A: Right.
Q: You filed for immigration benefits before this asylum application we are discussing today, isn't that right?
A: Yes, my sister-in-law told me to.

Q: This is your signature here on this document I asked the judge to mark as Exhibit Seven, correct?
A: Yes.

Q: And you told us you read English fluently, right?
A: Yes I do.

Q: And above your signature it says you certify all the statements in here are truthful, right?
A: Yes.

Q: And here on page two of Exhibit Seven,

you write you came into the United States in 1981, correct?

A: Yes.

"When you stand well, stand still."[32] Put another way, the examiner should always ask: 1) whether cross-examining a witness really helps; and 2) if the witness hurts, can the witness's impact be minimized? Unless the answer is yes to one of these questions, there's little benefit in cross-examining, and it should be avoided. The immigration judge can certainly control the hearing and ask the cross-examiner the purpose of cross-examining questions, if it appears the cross is merely a rehash of the direct with no apparent point. Asking for a proffer on the point of questioning is clearly within the ambit of a fair hearing. The way a case is presented may be the key to assuring the outcome is fair and just. By using appropriate questioning during direct and cross-examination, a lawyer can assure the case is presented to the judge in a way so plain and firm that it rings true and makes sense, and satisfies the applicant's burden of proof. ⚖

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ENDNOTES

1. *See Jarbough v. Att'y Gen'l*., 483 F.3d 184 (3d Cir. 2007). Writing for the court in an immigration context, upholding the denial of both asylum and withholding of removal relief, Judge Chagares instructed: "[w]hen an attorney poses questions to a friendly witness during a direct examination, it is generally improper for the attorney to employ leading questions. *Cf.* FRE 611(c). Leading questions are undesirable in this context because of their suggestive power. The "search for the truth," *Nix v. Whiteside*, 475 U.S. 157, 171, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986), in our adjudicatory system is best served when the finder of fact considers the testimony of the friendly witness based upon his or her recollection, not the testimony of counsel calling the witness. Suggesting answers to the friendly witness may "supply a false memory for the witness—that is, to suggest desired answers not in truth based upon real recollection." 3 John Henry Wigmore, *Evidence* § 769, at 154 (Chadbourne Rev.1970). *See Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D.Pa. 1993) ("It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.").
2. Immigration judges are not required to abide by the Federal Rules of Evidence. 8 C.F.R. § 1240.7(a)(2010); *Matter of Grijalva*, 19 I.& N. Dec. 713, 721 (BIA 1988); *Matter of Velasquez*, 19 I.& N. Dec. 377, 380 (BIA 1986) (noting that evidence, including hearsay, is admissible in immigration proceedings so long as it is relevant, probative, and its use fundamentally fair); *Matter of Interiano-Rosa*, 25 I.& N. Dec. 264, 265 (BIA 2010) ("Immigration Judges have broad discretion to conduct and control immigration proceedings and to admit and consider relevant and probative evidence."). Since the rules of evidence are not applicable and admissibility is favored, the pertinent question regarding most evidence in immigration proceedings is not whether or not it is admissible, but what weight an immigration judge should accord it in adjudicating the issues on which the evidence has been submitted. *Matter of H-L-H & Z-Y-Z*, 25 I.&N. Dec. 209 (BIA 2010).; *See also, Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015).
3. When one hears something straight from the horse's mouth, one hears it from the person who has direct personal knowledge of it. *See*, generally, the definition of (straight) from the horse's mouth from the *Cambridge Advanced Learners Dictionary & Thesaurus* © Cambridge University Press. This phrase came into common American idiom usage through a horseracing context, as noted in *The Syracuse Herald*, May 1913: "I got a tip yesterday, and if it wasn't straight from the horse's mouth it was jolly well the next thing to it."
4. Thomas Jefferson described his reason for writing the Declaration of Independence as follows: "...to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent." He explained this is a letter to his cousin, Henry Lee IV, also known as Black Horse Harry due to a social scandal involving the misappropriation of a real estate trust. He had a very successful second act to his life and became well regarded as a historian, and his *Observations on the Writings of Thomas Jefferson*, published in 1832, is still an often-cited source.
5. Although the immigration judge may ask questions, the immigration judge nevertheless has a "responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party." *See Abulashvili v. Att'y Gen*., 663 F.3d 197 (3d Cir. 2011) *quoting Elias v. Gonzales,* 490 F.3d 444, 451 (6th Cir. 2007).
6. *See* FRE 901, 902, and 1001-1004. *See also*, Ho, Hock Lai, The Legal Concept of Evidence, *The Stanford Encyclopedia of Philosophy* (Winter 2015 Edition), Edward N. Zalta (ed.), URL=<http://plato.stanford.edu/archives/win2015/entries/evidence-legal/>.
7. 8 C.F.R. § 1208.13(a).
8. *See* endnote 2, above.
9. Somerset Maugham, *A Writer's Notebook*, cites this adage.
10. Section 240(b) (1) of the INA provides that the IJ "shall administer oaths, receive evidence, and investigate, examine and cross examine the alien and any witnesses." "[T]he Immigration Judge (IJ)... s not merely the fact finder and adjudicator but also has an obligation to establish the record." *See Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002); *Tabaku v. Gonzales*, 425 F.3d 417, 422 (7th Cir. 2005).
11. *See*, generally, Federal Rules of Evidence (FRE) 401 to 415.
12. *See*, generally, FRE 801 to 807.
13. *See* endnote 11 above on relevance.
14. *See* endnote 3 above regarding the admissibility of hearsay evidence in immigration court.

15. Sara E. Kropf, Learning to Love Direct Examination, *ABA Online Journal* (Trial Practice Articles, Dec. 14, 2012).

16. D. Shane Read, *Winning at Trial* (NITA, 2015).

17. David Malone and Peter Hoffman, *Effective Deposition Techniques and Strategies that Work*, pp.135-143 (NITA, 4th Edition, 2012).

18. *See, e.g.*, http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/Handout_1_Trial_Objections_List.authcheckdam.pdf.

19. *See* endnote 18 above, Chapter 14.

20. Martin, Douglas, Daniel J. O'Hern, Longtime New Jersey Supreme Court Justice, Dies at 78, *New York Times,* April 2, 2009.

21. *See* INA § 240, 8 U.S.C.A. § 1229a(b)(1), (b)(4)(B); see also 8 C.F.R.§ 1240.10(a)(4).

22. 8 U.S.C. § 1229a (b) (2) (B) affords aliens a "reasonable opportunity" to, inter alia, cross-examine witnesses presented by the government. *Barry v. Gonzales*, 224 Fed. Appx. 32 (non-precedential, 2d Cir. 2007).

23. FRE 611(b) provides: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

24. Rule 611(a) of the Federal Rules of Evidence provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment...." FRE 611(b) advisory committee's note (*citing Resurrection Gold Mining Co. v. Fortune Gold Mining Co*., 129 F. 668, 675 (8th Cir. 1904)); FRE 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

25. Although the immigration judge may ask questions, the immigration judge nevertheless has a "responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party." *See Abulashvili v. Att'y Gen*., 663 F.3d 197 (3d Cir. 2011) *quoting Elias v. Gonzales*, 490 F.3d 444, 451 (6th Cir. 2007).

26. FRE 401, 402.

27. FRE 403.

28. Won Kidane, Revisiting the Rules of Evidence and Procedure in Adversarial Immigration Proceedings, 57 *Cath. U. L. Rev.* 93(2008). http://digitalcommons.law.seattleu.edu/faculty/319.

29. John Bouvier (1856), Suggestive interrogation, *A Law Dictionary, Adapted to the Constitution and Laws of the United States*, Legal-dictionary.thefreedictionary.com. Retrieved Jan. 29, 2016.

30. Irving Younger, *The Advocates' Deskbook: The Essentials of Trying a Case* (Prentiss-Hall, 1988). Younger was a professor at the University of Minnesota Law School.

31. Thomas A. Mauet, *Trial Techniques*, Ninth Edition (Aspen Coursebooks) 9th Edition (2015).

32. The courthouse in Jersey City, which currently houses part of the New Jersey Superior Court, Hudson County, was designed by Jersey City native Hugh Roberts, twice a president of the New Jersey Chapter of the American Institute of Architects. The front of the building is visually dominated by four Corinthian columns and a frieze above the main entrance bearing the inscription "Precedent Makes Law; If You Stand Well, Stand Still."

Immigration and Mental Health Forensics

An Unexpected Interdisciplinary Connection

by Lauren Anselowitz and Daniel L. Weiss

Immigration attorneys and mental health professionals need to be cognizant of the myriad forms of relief available with affirmative applications as well as in defensive proceedings. The standards are similar but the nuances for each of the forms of relief are significant and usually discretionary. As such, they are scrutinized under very subjective standards. When immigrants or their families walk into a practitioner's office, generally their immediate focus is on their foreign national loved ones, their jobs and simple concerns like putting food on the table. The practitioner's job, as an advocate, is to analyze, scrutinize, and dig for information that is often elusive and clandestine for many reasons. This information will yield successful advocacy on the client's behalf.

The purpose of this article is to explain the collaborative requirements between two seemingly diverse professions. Ostensibly, most attorneys and psychologists and other mental health professionals understand the need for forensic mental health evaluations and testimony for a plethora of litigated matters. This is not readily apparent, however, to many in the mental health field in the context of immigration law.

New Jersey, a sandwich jurisdiction located between two of the largest metropolitan areas in the United States, has a significantly high number of people who were born abroad. The U.S. Census shows that in New Jersey 13.1 percent of the population was born abroad,[1] although it is possible the U.S. Census Bureau may not have captured an accurate statistic. Other resources have reported that as many as one in five residents of New Jersey is foreign born.[2] This makes New Jersey an extraordinarily sophisticated and complex geographic area for a clash between cultural, criminal and other legal challenges impacting these immigrants and their families. Often, the mental health forensic expert witness can and will establish *prima facie* eligibility for both affirmative and defensive forms of relief, greatly impacting the outcome of an immigrant's case.

Immigration attorneys who practice before the immigration courts and agencies in New Jersey face a dearth of forensic experts that may not exist in surrounding jurisdictions. Many of the experts who practice in New Jersey and who are multilingual can be found at the New Jersey Psychological Association website (http://www.psychologynj.org) and the New Jersey Psychiatric Association website (http://www.njpsychiatry.org/).

Attorneys, psychologists and other mental health professionals can collaborate in a wide array of immigration matters. The following will outline several immigration applications and procedures where the collaboration between attorneys and mental health professionals can be vital to the success of a case.

Immigration Applications that Require Mental Health Forensic Analysis and Reports

Waivers Requiring 'Extreme Hardship' as Contrasted with Those Requiring 'Exceptional and Extremely Unusual Hardship'

There are circumstances under which an immigrant may only qualify for a green card or immigrant visa if he or she can establish that there will be 'extreme hardship' to the qualifying family member(s). These family member(s) may include spouses, children, stepchildren, parents and stepparents who are United States citizens or lawful permanent residents.

> The Board of Immigration Appeals ("BIA") has not set forth a bright line test for determining "extreme hardship," finding that "extreme hardship" within the meaning of section 244(a)(1) of the Act "is not a definable term of fixed and inflexible content or meaning. It necessarily depends upon the facts and circumstances peculiar to each case."[3] Over time, however, precedent decisions issued by the Board and federal courts have created a body of case law that has provided

> a framework for analyzing claims of extreme hardship.[4] In these decisions and others, the Board has enumerated a series of factors that is relevant to a determination of extreme hardship. These precedent decisions are binding on the Service [USCIS] and EOIR.[5]

Conversely, there are circumstances under which an immigrant may be required to establish 'exceptional and extremely unusual hardship' to at least one of those qualifying relatives. This is a higher and more elusive standard, as a statutory number of 4,000 visas per fiscal year for this latter category has been established by the United States Congress. According to INA 240A(e)(1):

> To establish "exceptional and extremely unusual hardship," an applicant for cancellation of removal… "must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.'"[6]

A mental health evaluation, as well as evidence of any ongoing mental health treatment received by the qualifying relative family member, is often key to establishing hardship.

Each client or qualifying relative must have a uniquely tailored theory upon which to base a case. An attorney can rely upon a mental health diagnosis or disorder, if one is determined to exist, to establish a theory. In addition, a diagnosed physical disorder that may also create or exacerbate a mental health diagnosis will be relevant.

Proving Harm to Victims of Persecution or Certain Crimes

There are three types of immigration relief that can yield benefits that may ultimately lead to permanent residency in the context of being a victim of persecution or certain crimes:

A. U visas, are petitions for nonimmigrant status for immigrant victims of crime. One necessary element to prove *prima facie* eligibility for a U visa is to "have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity."[7] Substantial physical and/or mental abuse is defined as "injury or harm to the victim's physical person or harm to or impairment of the emotional or psychological soundness of the person."[8]
B. Violence Against Women Act of 1994 (VAWA)[9] relief is a self-petition for an immigrant who has been battered or subjected to extreme cruelty by a certain abusive U.S. citizen or lawful permanent resident relatives.

> Battery or Extreme Cruelty defined—"includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser."[10]

For both U nonimmigrant visas and VAWA self-petitions, the mental health professional is often instrumental in establishing harm to the victim. Individual victims may not have been physically assaulted or may not have sought professional medical attention for their physical wounds. In such cases, a forensic analysis can be especially poignant in detailing the emotional and psychological scars of victimization.

C. Asylum and withholding of removal relief involves individuals seeking protection based on their classification as a refugee.

> Credibility Determination defined—"Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions) and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." [11]

Credibility of the applicant or respondent is perhaps one of the most important factors in influencing the adjudication of matters involving past persecution or fear of future persecution. The burden to establish these claims must be proven by the foreign national; however, the Rules of Evidence are broad. Here, the mental health expert may be able to explain how an appli-

cant/respondent's testimony should be found to be credible despite problematic testimony, inability to recall some facts, inconsistencies and inaccuracies. These are common issues that occur in *bona fide* cases of past persecution and fear of future persecution. Therefore, the mental health expert may be able to provide a full explanation of the applicant/respondent's demeanor and candor before a tribunal.

'M-A-M': Competency to Participate in Immigration Proceedings

> (1) Aliens in immigration proceedings are presumed to be competent and, if there are no indicia of incompetency in a case, no further inquiry regarding competency is required. (2) The test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses. (3) If there are indicia of incompetency, the Immigration Judge *must make further inquiry* to determine whether the alien is competent for purposes of immigration proceedings. (4) If the alien lacks sufficient competency to proceed, the Immigration Judge will evaluate appropriate safeguards. (5) Immigration Judges must articulate the rationale for their decisions regarding competency issues. [emphasis added][12]

As a practice pointer, attorneys and their forensic expert witnesses who speak with detainees at detention facilities should take every step to inquire about mental health capacity. A Health Insurance Portability and Accountability Act of 1996 (HIPAA) form, which can be signed by the detained individual and then delivered to the internal medical units, can often yield immediate information for forensic experts. Clients often manifest significant decompensation and other pathologies at the time of incarceration that may have been previously under-diagnosed, and sometimes undiagnosed altogether due to a myriad of cultural and financial circumstances.

The congressional standards under which immediate medical and mental health evaluations are required upon intake into detention facilities can be found at the U.S. Immigration and Customs Enforcement website.[13] The standard operating procedure for medical and mental health intake in immigration detention can also be found there. These evaluations must occur within 12 hours of arrival at the facility.[14] A link to fiscal year 2015 statistics from the Department of Homeland Security, Immigration and Customs Enforcement, relating medical and mental health issues of detainees, is available at the U.S. Immigration and Customs Enforcement website.[15]

Naturalization: Developmental Disability and Mental Impairment INA Section 312(b)(1)

> Persons who have a "medically determinable physical or mental impairment, or combination of impairments which has lasted or is expected to last more than at least 12 months" may be exempt from certain requirements of naturalization.[16]

A person applying for naturalization and seeking a disability exception "[m]ust submit form N-648 Medical certification for disability exceptions to be completed by a medical or osteopathic doctor licensed to practice medicine in the United States or a clinical psychologist licensed to practice psychology in the United States."[17] Form N-648 can be found at the United States Citizenship and Immigration Services website.[18]

The prior forms of relief set forth above have suggested medical or mental health forensic analysis could be persuasive to many applications and cases. In contrast, in the context of naturalization applications, the evaluation may be required for filing in cases of mental incapacity or mental compromise. Examples may include individuals who have suffered a stroke; are suffering from dementia, Alzheimer's, traumatic brain injury, or Parkinson's; and individuals with an undiagnosed developmental disability or other diagnoses that prevent the applicant from being able to complete the naturalization examination.

The importance of a collaborative relationship between immigration attorneys and mental health professionals at this juncture should not be overlooked. Often, individuals will manifest symptoms or pathology that appear to their family members as impediments to acquiring citizenship. As the immigration attorney evaluating a case for an individual in these circumstances, the mental health forensic analysis may be critical in providing the client with the benefits that come with naturalization.

Conclusion

The role of the mental health forensic expert is one that has continued to evolve in many immigration venues. Reports by psychologists and psychiatrists will often prove key elements of various forms of relief. Reports can be utilized by State Department officers abroad, district adjudication officers at U.S. Citizenship and Immigration Services (USCIS) agencies, at asylum offices, service centers throughout the United States and before immigration courts. These reports put a face on the faceless, specifically for those who do not even have the statutory opportunity to be seen or heard by an officer. More often, these reports can provide the adjudicator, immigration judge and even adversaries with the *prima facie* evidence required to substantiate the claim being pursued.

Clients often find themselves in the

most unenviable position of not having the ability to communicate with forensic experts due to language barriers. Additionally, cultural and economic obstacles may prevent many immigrants from seeking mental health services, even at the insistence of an immigration attorney. Remarkably, many mental health forensic experts have not been exposed to immigration proceedings or petitions of any nature. By partnering with New Jersey psychologists and psychiatrists, New Jersey immigration attorneys can help foreign nationals overcome these obstacles.[19] As demonstrated in this article, the benefit of a mental health forensic analysis to an immigrant's case cannot be overstated. ⚖

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ENDNOTES

1. http://www.census.gov/quickfacts/table/POP645214/00.
2. http://www.immigrationpolicy.org/sites/default/files/docs/new_americans_in_new_jersey_2013_2.pdf.
3. *Matter of Hwang*, 10 I & N Dec. 448, 451 (BIA 1964).
4. *See Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994); *Matter of O-J-O*, Int. Dec. #3280 (BIA 1996); *Matter of L-O-G*, Int. Dec. #3281 (BIA 1996); *Matter of Pilch*, Int. Dec. #3298 (BIA 1996).
5. https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-42380/0-0-0-44857/0-0-0-47481/0-0-0-47683.html.
6. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
7. 8 C.F.R. 214.14(b).
8. 8 C.F.R. 214.14(a)(8).
9. PL 103-322, 108 Stat. 1902-55, 8 U.S.C. Sections 1151, 1154, 1186a, 1186a note, 1254, 2245 (1994).
10. 8 C.F.R. 204.2(c) (vi).
11. Pub. L. 109-13 REAL ID ACT OF 2005).
12. *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011).
13. https://www.ice.gov/doclib/news/library/speeches/final_hayes_testimony.doc.
14. *Id.*
15. https://www.ice.gov/factsheets/dhc-fy15.
16. 8 C.F.R. 312.1(b)(3).
17. 8 C.F.R. 312.2(b)(2).
18. https://www.uscis.gov/sites/default/files/files/form/n-648.pdf.
19. There are several nonprofit programs in New York that work exceptionally well in analyzing claims and petitions by engaging in mental health testing and treatment of foreign nationals. For example, the Bellevue Program for Survivors of Torture (http://www.survivorsoftorture.org/) and the Weill Cornell Center for Human Rights (http://www.wcchr.com/) have created their own templates for their respective patient populations. New Jersey does not have these resources or anything remotely like them.

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Lessons Learned from the Trenches

Best Practices for Immigration-related Federal Investigations

by Valentine Brown

Federal agencies have become increasingly aggressive during immigration-related corporate investigations, including H visa program compliance, I-9 audits, immigration-related employment discrimination, public company paperwork violations and B-1 visa fraud and misuse. Fines, penalties and settlements have steadily grown as federal agency investigators and prosecutors have become more knowledgeable about the nuances of immigration law and more sophisticated in their litigation tactics. This article will review the various types of investigations and provide suggested best practices for employers and their counsel during investigations.

Department of Labor Investigations

The H visa program is administered by the Department of Labor (DOL) and includes several different programs, each with their own compliance requirements. The H-1B program permits "specialty workers," those with a bachelor's degree or higher, to work in the United States for six years if they are sponsored by a U.S. employer. H-2A visas are given to farmworkers by the thousands each year, and H-2B visas, for non-agricultural workers, are given to seasonal workers such as landscapers, horse trainers, and lumberjacks.

Employers who participate in any of the H visa programs have significant civil legal obligations to pay prevailing wages, maintain living and working conditions, maintain compliance documentation called a public access file, publicly post wage information at worksites and third-party worksites, as well as provide the same benefits they provide to U.S. workers. Failure to comply with these requirements may result in fines, back wages and interest, debarment from H visa programs and debarment from federal contracting.

In a 30-page, Aug. 2016 decision, an administrative law judge upheld a $1.1 million back wage and overtime finding, as well as civil money penalty in the amount of $1.2 million for H-2A program violations at a strawberry farm in California.[1] The employer failed to comply with many program requirements, including: free housing, bearing the cost of visa processing, recordkeeping, paying overtime, providing detailed earning statements, *et.al*. Unfortunately, the employer also coerced and retaliated against workers before and during the DOL investigation, a fact that exponentially increased the penalty portion of its fine.

Homeland Security Investigations

I-9 compliance has become a way of life for human resource departments around the United States. Since 2009, Homeland Security Investigations (HSI), a division of the

Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE), has been conducting more than 300 enforcement actions per year. These actions may involve 'desk' or on-site audits of I-9 forms and supporting documentation. Fines for mistakes or missing forms range from $216 to $2,160 per form. HSI often seeks to maximize penalties against employers, even when they have acted in good faith by completing I-9s but have made technical errors in form completion.

Often, I-9 audits will uncover other violations, such as the hiring of undocumented workers. Fines for this violation range from $375 to $16,000. Once other violations are uncovered, the I-9 audit will become only the tip of the iceberg for an employer, with many potential investigations to come. I-9 audits may also uncover immigration-related employment discrimination (to be discussed below), as well as IRS issues, Fair Labor Standards Act (FLSA) classification issues, and independent contractor treatment issues. Company leadership may also be criminally charged and civilly fined for any complicit behavior that contributed to any uncovered I-9 fraud or the hiring of undocumented workers. Company fines often range from thousands to hundreds of thousands of dollars. Jail time is a real possibility for the most egregious employers.

Immigration-related Discrimination Investigations

As a counterweight to I-9 requirements, immigration law contains numerous immigration-related discrimination prohibitions for employers, including I-9 document abuse (requesting more or different documents than are minimally required for I-9 compliance), national origin and citizenship status discrimination violations. In Oct. 2016, a janitorial company was fined $195,000 by the Department of Justice Office of Special Counsel for Unfair Immigration-Related Employment Discrimination for a company I-9 practice of requiring employees to present green cards for I-9 completion when they appeared to be foreign.[2] Other discriminatory actions include treating employees differently during the I-9 process based upon their national origin or perceived citizenship status. Like I-9 compliance investigations, these DOJ audits also often lead to other federal agency compliance investigations.

SEC Investigations

The Securities and Exchange Commission (SEC) has joined the immigration compliance bandwagon, in recent years, by conducting secondary investigations for paperwork and other violations of public companies that have been found to violate immigration compliance regulations. The most famous of these was a 2012 SEC investigation of Chipotle after it was found to be engaged in a pattern of hiring undocumented workers in numerous stores in Minnesota.[3] There is no public information available on how the investigation was concluded, but it lasted several years, involved the production of over 300,000 documents to the SEC, and required Chipotle to disclose the investigation on its SEC investor filings. These disclosures led to a stock price drop and had significant negative impact on the company's brand reputation.[4]

Visa Fraud Investigations

Perhaps the most famous DOJ investigation of a company for immigration violations was the Infosys B-1 visa fraud and H-1B compliance investigation, which lasted for more than four years and resulted in payment of a $34 million fine.[5] The investigation was launched on information provided by a whistleblower who alleged the company was misusing the B-1 and L-1 visa programs and failing to meet its H visa compliance requirements. The investigation was led by the U.S. Attorney's Office in Texas, and it is reported the IRS and SEC investigations launched as a result of information learned during the visa investigation are still ongoing.

The government charged Infosys with B-1 visa fraud and abuse of process, for having Infosys employees from India come to the United States on business visitor visas to engage in productive employment for U.S.-based clients of the company. Infosys responded to the DOJ action in several ways: First, it issued denials. Second, it discontinued several of the disfavored processes. Third, it put into place a robust B-1 monitoring program. In denying the allegations that it misused the B-1 visa, Infosys stated its use of the B-1 visa was legitimate, and not intended to circumvent H-1B program requirements. One of the practices it discontinued during the first year of the investigation was the use of a dos and don'ts memo it provided to each worker who would be attending a visa interview in India. This memo provided detailed information on how employees should answer consular officer questions during the visa interview process.

The centerpiece of Infosys' response to the allegations was a new B-1 compliance policy for the company. The basic elements of the B-1 policy included strict limits on the duration of any one B-1 trip; strict limits on the total number of days any one employee may spend in the U.S. on a B-1 visa in a given year; restrictions on which employees may travel on B-1; training of employees and managers on the B-1 travel policy; and certification requirements for managers requesting B-1 travel of employees regarding the nature of the travel.

The terms of the settlement agreement also included an agreement by Infosys to allow any materials obtained by the government during the investigation to be used by federal agencies for training purposes. These materials have

since been put to good use by the Department to Justice, as they have been used to train a special team of U.S. attorneys who now specialize in visa fraud investigations against multinational companies.

Lessons Learned and Best Practices

1. When the government decides to investigate, don't wait, implement a diverse legal team to develop a strategic plan to respond to and cooperate with the investigation. Depending upon which agency is investigating, the team should include attorneys with federal agency litigation, white-collar crime, e-discovery, immigration, employment, labor and securities law expertise. Having a diverse team early on will help companies craft long-term strategies that show good faith with compliance issues and the investigation itself, while still protecting the company and leadership from criminal and civil liability.
2. Respond quickly to practices perceived as problematic by the government. Be proactive about correcting I-9s with mistakes and terminating undocumented employees. Doing so will be looked upon favorably by the government and not as a confirmation of guilt. Review any public access files and correct them before turning them over to the government. Infosys made many of the changes to its processes in 2011, during the first year of the investigation. It did not wait until the government made its final determination, and it continued responding to the government throughout the investigation. The length of time the changes had been in place at the time of the settlement was also considered as part of Infosys' compliance. A company's demonstrated effort to comply with immigration and other regulations, as well as to change company policies when necessary, is always a helpful factor when entering into settlement negotiations with the government and when litigating the amount of potential fines and penalties in administrative and federal court.
3. Internal corporate communications matter. Having an immigration compliance policy is imperative. As one of the author's colleagues likes to say, "the e in email stands for evidence." Making improvements to the policy and communicating them to employees is even more imperative during an investigation. The Infosys dos and don'ts memo was a golden ticket for the government, seeming to provide it with evidence that the entire company was in a conspiracy to defraud the B-1 process. The memo was so detrimental that Infosys stopped using it early on in the investigation.

   In other enforcement actions, company emails have been used as evidence of criminal conspiracies to hire and provide I-9 documentation to undocumented workers; to show a company's complete disregard and lack of understanding of the need for immigration compliance; and to show a pattern and practice of document abuse and citizenship status discrimination in the I-9 context.
4. An I-9 investigation is sometimes only the tip of the iceberg. The Infosys investigation for the government began with a whistleblower complaint, but for Infosys it began with an I-9 audit and snowballed into something much larger. Companies under I-9 investigation should be on notice that other, much larger and more treacherous investigations may be looming. This leads to several recommendations: Cooperate during the I-9 audit. Admit and correct mistakes early. Review all other internal immigration processes before the government does. Assess I-9 and other immigration liability at the outset, so a sound legal strategy can be developed with the appropriate level of defense and cooperation. When problems are identified, be proactive in developing strategies to ameliorate the damage and prevent them in the future.
5. Conduct regular, independent I-9 and H program audits. Independent I-9 audits are respected by the government and especially helpful for large companies. Hiring an independent I-9 auditor to do an annual random sample audit will be a significant piece of a company's good faith compliance affirmative defense. If following this recommendation, companies must affirmatively respond to any findings in the audit, and quickly implement any recommended changes, including required training and process changes. Be sure to document everything.

   H visa program compliance monitoring is more difficult, but more important than ever. H visa violations are now within the sights of the Department of Justice, as well as the Department of Labor. Neither the fast pace of business, nor the size of the company, will immunize it from liability from H program violations. Set up internal H visa program compliance monitoring programs that require manager certifications, and hold them accountable for failures.
6. A worldwide business travel monitoring system is now a required component of a comprehensive immigration compliance program. The increase in global business travel, combined with the cost and time for visa applications, leads companies and their managers to take shortcuts when visas are required for employment. Business visa travel violations have become a worldwide phenomenon for employers in and out of the United States, as other countries have also increased enforcement against abuse of business visitor status privi-

leges. Company programs should have the flexibility to meet business needs, but sufficient controls to discourage and punish illegal usage of the visa, as well as mechanisms to alert the company when problems are in the nascent stage.

Encourage Compliance, Not Avoidance

Encourage a corporate culture of compliance rather than avoidance. Attorneys can be of great assistance to company clients before any investigation has begun by helping them put into place the pieces of a robust immigration compliance program. This program starts with hiring practices and ends with ensuring that all immigration program requirements are met upon employee termination, and that the required document retention timeframes are met. The basic components are: a comprehensive policy, a compliance manual, annual training from the board room to the front-desk receptionist; and internal and independent audits; as well as ongoing monitoring of changes and updates in the law and required forms.

A comprehensive policy should cover at the minimum interviewing; I-9 completion and maintenance; visa program compliance, including business travel, H, and L visas; required document storage and retention and employee exit protocols. By having full-dress compliance programs in place, employers will not only be better prepared for investigations, but will significantly reduce the likelihood of one ever occurring. ⚖

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ENDNOTES

1. *In re DOL Wage and Hour Division v. Fernandez Farms*; Case no. 2014-TAE-0008, decided Aug. 25, 2016.
2. *In re American Cleaning Co., Inc*. Settlement Agreement Available at http://justice.gov/opa/file/903241/downlaod; Department of Justice Press Release available at https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-american-cleaning.
3. Chipotle immigration woes resurface with SEC Probe, May 12, 2012, Reuters
4. Chipotle: Immigration status probe to last 2 years, Annie Gasparro, *Market Watch*, May 23, 2012.
5. Indian Corporation Pays record Amount to Settle Allegations of Systemic Visa Fraud and Abuse of Immigration Processes, US Attorney's Office Eastern District of Texas Press Release, Oct. 30, 2013, available at https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-american-cleaning.

Tips to Effectively Recruit, Retain and Terminate Foreign Workers

by Scott R. Malyk and Anthony F. Siliato

In today's global economy, U.S. employers (and human resource leaders, as the case may be) are faced with the task of not only finding sufficiently qualified workers, but also having to deal with the maze of U.S. immigration issues when they arise in the employment context, including caps and quotas, limitations of stay, delays in processing, security clearance delays at U.S. consulates abroad and interruptions of employment that are often inherent in the process of hiring foreign national employees.

Successful employers should be equipped with not only the know-how to drive their business but also the functional knowledge and expertise to navigate the employment-based U.S. immigration system to recruit and retain top talent for a particular job opportunity when necessary.

In that regard, while there are any number of best practices that can turn a good recruiter/human resources professional into a great one, a common trait among successful hiring professionals, as it relates to the U.S. immigration laws, hiring rules, benefits and compensation requirements, is the ability to stay ahead of the U.S. immigration process to better anticipate challenges or bumps in the road. In this way, they are able to maintain control over hiring, retention and termination situations, as they apply to their foreign national workers. The building blocks of developing such control are good habits, as developed through effective training and utilizing experienced, sophisticated immigration law partners. Good habits are typically supported by clear, well-designed internal policies and goals—they are never reactionary. As such, having the foresight and training to understand how each step serves to get an organization to achieve those goals is more than half the battle.

Following are some tips on how to effectively recruit, retain and, when necessary, terminate foreign workers, to help take an organization from yesterday to tomorrow.

Recruiting Tips

1. **Establish uniform hiring guidelines, including pre-hire questions.** During the initial screening assessment conducted by the recruiter, there are two recommended questions[1] a recruiter should ask of every job applicant (applied evenly across the board to every candidate) so the employ-

er is on notice of any required visa sponsorship requirements now, or at any point in the future.

a. Are you authorized to work in the U.S.?
b. Will you require visa sponsorship now or at any time in the future for employment with our company?

If a candidate states that he or she will require visa sponsorship, an employer is under no obligation to consider the candidate for employment. If, however, the employer will consider hiring a foreign national who will require immigration sponsorship, the recruiter should aim to collect more data to assist in the employer's decision-making process. The business reason for such additional inquiry is, *inter alia,* a practical one: There are maximum periods of stay associated with most work visas in the United States, which will be discussed in greater detail in tip three, below. On that basis, the candidate should be further vetted to determine whether immigration sponsorship makes business sense for the employer.

The recruiter may ask the following additional questions:

c. Have you ever applied for a U.S. work visa before? If yes, what category of visa classification was it?
d. Has an H-1B[2] petition ever been approved on your behalf? If yes, provide the period of time that you have been in H-1B status.
e. Are you currently in the green card process? If yes, at what stage of the green card process?
f. Do you have an approved I-140 petition?

Equipped with this information, the employer will now have some key facts upon which it can make an informed decision on whether to hire the individual and formulate both a short-term and a long-term strategy regarding the retention of the employee.

2. **Make job descriptions uniform throughout the organization.** Properly defining roles not only align employees with an organization's drivers and goals, but can also greatly assist with recruiting, onboarding, and managing the green card-related goals and expectations of foreign national employees.

In the employment-based green card context, when a case is based on the program electronic review management (PERM) labor certification process,[3] there are two employment-based (EB) preference options available to foreign national employees: the EB-2 (employment-based second preference) and EB-3 (employment-based third preference) categories. For those foreign national employees who are natives of heavily backlogged countries (India, Mainland China or Philippines), the difference between these two preference categories can be fairly significant in terms of overall green card eligibility/processing times. Simply stated, the preference category directly impacts the timing of eligibility for filing the final step of the green card process, the application for adjustment of status (Form I-485) or the immigrant visa application abroad, either of which ultimately results in the grant of U.S. permanent residence.

The analysis in determining which preference category a foreign national employee will qualify for ultimately turns on the requirements for the position offered to the foreign national upon approval of his or her green card (*i.e.,* the green card application is prospective in nature). In order for any given position within an organization to be classified as EB-2 (*i.e.,* an advanced-level position), the job offered to the foreign national must require a minimum of a master's degree or a bachelor's degree plus five years of experience. An EB-3 position is generally a professional-level position that requires anything less than that of an EB-2 advanced-level position. Thus, the requirements of the job are the driver of this analysis; it is not the educational credentials or experience possessed by the foreign national.

The backlog differences between the EB-2 and EB-3 categories can present a significant difference in wait times for foreign national employees. Making job descriptions (and their attendant education and experience requirements) uniform throughout the organization will, in effect, eliminate the discretion (or a tendency for the foreign national and/or his or her supervisor) to want to bend or tailor the job requirements to the qualifications of the employee.

Another reason to make job descriptions and requirements uniform throughout an organization is to allow for the opportunity to combine the mandatory pre-filing recruitment for multiple foreign national employees in connection with the PERM process. Department of Labor PERM regulations require the employer to undergo a fairly extensive, nuanced round of pre-filing recruitment that is not only time consuming but can be very costly for the employer. In the case of a larger organization that employs multiple foreign nationals in the same roles and at the same work location, the regulations allow for the combination of the recruitment effort—one set of recruitment for multiple cases, provided the requirements for the position are substantially the same. By exercising long-term planning around the PERM process for

similarly employed foreign national employees, an employer can not only consolidate the cumbersome recruitment process but also substantially cut down on recruitment costs, which must be borne by the employer.

On the basis of the foregoing, for immigration purposes, a well-written job description should include the following:

a. Job title;
b. Salary range;
c. Work location;
d. Travel required, if any;
e. Organizational chart or description of reporting structure;
f. Tasks, duties and functions of the position;
g. Education requirement, if any, including specific degrees, professional certifications, and/or licenses required to perform the job and whether the employer is willing to accept: 1) alternate combinations of education and work experience (*e.g.,* a master's degree plus three years of experience or a bachelor's degree plus five years of experience) or 2) a degree equivalence (provided by a credential evaluator) based on a combination of education and experience; and
h. Specific qualifications and special skills required, including the number of years of experience or proficiency/knowledge with any specific technologies, tools, or instrumentalities.

Employee Retention Tips

3. **Understand the limitations on temporary nonimmigrant work visa categories.** The employer/human resources professional must take into consideration that some work visa classifications are limited by annual quotas (*e.g.,* H-1B professionals, E-3 professionals and H-2B temporary or seasonal workers), while others are limited to citizens of certain countries (TN-1 [Canada], TN-2 [Mexico], H-1B1 [Singapore and Chile] and E-3 [Australia]). And the most commonly used are limited in duration (H-1B [six years], H-3 [two years], L-1A [seven years], and L-1B [five years]).

   While the H-1B and H-2B quotas have been reached in recent years, the H-1B1 [Singapore and Chile] and E-3 [Australia] have never been met.

4. **Plan short- and long-term strategies for foreign nationals to maximize outcome (and possibly minimize spend)**. While many employers are willing to sponsor foreign national employees (many of whom are recent graduates from U.S. universities) for temporary, nonimmigrant work visa classifications, historically the question remained for many employers whether this would be a temporary benefit offered to the foreign national employee or, alternatively, whether the employer would be willing to make a longer-term investment in the foreign national employee, which would include the pursuit of the green card process (permanent residence) for the employee.

   More often than not, foreign national employees are interested in negotiating, even before they are hired, the where, when and how a sponsoring employer will agree to assist them with the green card process. The conventional wisdom and advice to employers in this regard has been to establish a bright-line policy that sets specific timelines for the employer to consider sponsorship for the green card process on behalf of its foreign national employees and to apply the policy evenly across the board (*e.g.,* commencing the green card process after the foreign national has been employed in good standing for at least one full year, unless, of course, the foreign national is approaching the end of his or her authorized period of stay).

   Presently, with the confluence of two recent factors, namely: 1) the significant reduction in Department of Labor processing times of the PERM application (ETA Form 9089), together with 2) the new rule extending the period of post-graduate F-1 optional practical training (OPT) to 36 months for qualifying science, technology, engineering and mathematics (STEM) graduates, it may now make sense for certain employers to turn the traditional employment-based immigration process on its head and pursue the green card process for certain foreign nationals at the outset, while they are working pursuant to post-graduate F-1 OPT. That is, start the green card process for certain foreign nationals even before applying for an H-1B visa classification, given the challenges presented to employers by the current lack of H-1B visa numbers under the antiquated H-1B quota.[4]

   Of course, testing the U.S. labor market for entry-level positions presents its own set of unique challenges, so this would not be a reasonable option for all foreign national new hires. Moreover, such a strategy would not be equally effective for all foreign national employees across the board, given the extensive green card backlogs for foreign nationals from India and Mainland China. However, for foreign nationals of countries other than the significantly backlogged India and China, the total processing time for obtaining a green card through the PERM process could take as little as 14–18 months.

5. **Be proactive in tracking your foreign national employees' periods of authorized stay.** Except for U.S. citizens and green card holders, all individuals who enter the U.S. (by air or sea) are issued a Form I-94

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arrival/departure record (I-94). As of May 2013, U.S. Customs and Border Protection (CBP) automated the I-94 process and abandoned the old method of issuing the I-94 in the form of a small white card stapled in the passport.[5] With the automated system a foreign national must affirmatively obtain his or her most recent I-94 by way of the following link post-entry: www.cbp.gov/I94.

Why is this important? While foreign national employees are physically present in the United States, the I-94 (not the visa nor the most recent approval notice) dictates the foreign national's nonimmigrant status and how long he or she is entitled to remain in the United States in that status. In this regard, employees must remember (and should be reminded) to check their respective I-94s upon return from travel abroad to be sure they do not make the mistake of remaining in the U.S. beyond the "admit until" date set forth in the I-94 record.

The I-94 is, by far, the most overlooked immigration document among foreign national employees in the United States. It is also the most harmful document to overlook, with the potential for grave consequences for the employee. Simply put, it should not be assumed that the I-94 will be issued for the full period of authorized stay granted by U.S. Citizenship and Immigration Services (USCIS) (as set forth in an approval notice) or by the U.S. consulate abroad (as set forth in the endorsed Form I-129S in the case of a blanket L visa). Often, an I-94 will be issued for a shorter validity period than the period of stay authorized by a previously approved visa classification. This discrepancy can occur for a multitude of reasons, including a passport expiration date or even a mistake by a CBP officer at the U.S. port of entry. If it goes undetected, and the foreign national remains in the U.S. beyond the period of stay authorized by the I-94, the foreign national employee will be deemed 'out of status,' meaning he or she would be engaging in unauthorized employment for the organization. More importantly, he or she will also accrue unlawful presence that could have very serious repercussions for the employee, including a three- or 10-year bar to re-entry into the United States.

To correct a deficiency with the I-94, a foreign national may be required to leave the U.S. abruptly or file an extension of stay, before the admit until date indicated on the Form I-94. Either of these options are a burden monetarily and logistically for the employer. If detected early, however, there are broader avenues for relief with a much greater chance of having these issues rectified without needing to send the employee abroad and/or filing an extension of stay with the USCIS.

Be proactive and try to get foreign national workers into a habit of providing the human resources designee with a copy of their most recent I-94 records by circulating a recurring email reminder or posting a physical reminder in a conspicuous location at the place of employment. Additionally, the employer should follow through with those reminders by having foreign national employees follow these steps to avoid any nightmarish situations:

1. Go online and check the admit until date on the I-94 of the principal beneficiary and each accompanying dependent;
2. If the admit until date is earlier than that expected because of a passport expiration, apply for and obtain a new passport, travel abroad before the admit until date, re-enter the U.S. with the new passport (together with the old passport if the visa stamp is in it, and the current approval notice) and re-check the I-94 to make sure it is now corrected.
3. If the admit until date is earlier than that expected due to an error by the CBP, contact, by phone or email, the CBP Deferred Inspection Office at the airport in where the employee entered and request a correction.

Termination Tips

6. **When terminating an H-1B worker is necessary, follow these steps to effect a *bona fide* termination under the regulations.** Like most employees in the United States, H-1B workers are typically at-will employ-

ees. However, if an H-1B worker is terminated prior to the conclusion of his or her "authorized period of stay," the sponsoring employer has an affirmative duty under the regulations to effectuate a *bona fide* termination of the H-1B worker.

To effect a "*bona fide* termination of the employment relationship" under the Immigration and Nationality Act (INA), there must be: 1) written notice provided to the employee that the employment relationship has ended; 2) written notice provided to USCIS that the employment relationship has ended; and 3) an offer of payment for reasonable costs of transportation of the H-1B worker back to his or her last place of foreign residence.[6] If, however, the H-1B worker voluntarily resigns, transfers his or her employment to another H-1B employer, or changes his or her status to another lawful visa classification, the travel reimbursement requirement is nullified.

In the wake of some seemingly harsh, anti-employer Department of Labor wage and hour rulings, it behooves employers to be mindful of the regulatory obligations placed on them as an H-1B sponsoring employer. Not only willful violations, but even careless mistakes (*e.g.*, failing to notify USCIS of an H-1B worker's termination), can result in the award of back pay to the H-1B worker, along with substantial fines to a sponsoring employer.

During the separation/termination process of an H-1B worker, the H-1B employee should be provided a written acknowledgment of termination, effective on the date of termination. The written acknowledgment should offer to reimburse the terminated worker (but not his or her dependents, if any) for reasonable, one-way travel back to his or her home country or last country of residence. In doing so, the acknowledgment should also provide that the trip must occur within a reasonable period of time after termination (*e.g.*, 30 days). To claim reimbursement, the acknowledgment should require the foreign national to submit proof of payment for the airfare to human resources. The acknowledgment should be duly executed by the foreign national and the employer's representative, and maintained in the employee's personnel file.

Conclusion

By being proactive in establishing and following a well-defined set of guidelines regarding the hiring, retention and termination of foreign nationals, an employer, in partnership with competent immigration counsel, should be in the best position to attract and retain the best and the brightest workforce available in the marketplace, given the constraints of the current immigration system. ⚖

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ENDNOTES

1. *See* June 29, 2010, Technical Assistance Letter of Katherine A. Baldwin, deputy special counsel of U.S. Department of Justice, Civil Rights Division, wherein these questions were deemed appropriate by Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), responsible for enforcing the antidiscrimination provision of INA §274B [8 USCA § 1324b].
2. The H-1B visa classification is, by far, the most sought-after temporary work visa in the United States for foreign-born, professional workers. The H-1B category requires sponsorship by a U.S. employer and is limited to specialty occupations, which generally require the candidates hold at least a bachelor's degree or the equivalent in a relevant discipline. A major limitation of the H-1B visa classification is the aggregate six-year period of stay placed on H-1B status, which can only be extended beyond six years if a permanent resident (green card) application has been timely commenced on behalf of the H-1B employee.
3. Program electronic review management (PERM) process is the first step of the employment-based green card process applicable to most H-1B workers. In connection with the PERM process, the employer is required to test the U.S. labor market in the area of intended employment of the foreign national being offered the employment opportunity.
4. Perhaps the most critical limitation of the H-1B visa category is the annual cap, or quota, for new H-1B visas, which is arbitrarily set (without consideration of market conditions) by Congress. Indeed, every year on Oct. 1, the U.S. government makes available a quota of 85,000 new H-1B visas, with 20,000 of those set aside for advanced-degree graduates (with a master's degree or higher) of colleges and universities from within the United States. In recent years, employers filed so many H-1B petitions during the first days of the filing period that the United States Citizenship and Immigration Services (USCIS) is forced to create a "random lottery selection" system to establish some fairness among applicants. This past April, over 250,000 petitions were filed for 85,000 visas, allowing foreign national graduates and their sponsoring employers less than a 33 percent chance of having their petition selected in the H-1B lottery.
5. Those who enter the U.S. by way of land border are typically still issued a paper Form I-94 stapled in the passport.
6. *See* 8 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. §214.2(h)(4)(iii)(E).

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Responding to the Child Migrant Crisis

by Joanne Gottesman, Anju Gupta, and Randi Mandelbaum

Since Oct. 2013, over 162,000 children have escaped to the United States, many of them arriving alone, traumatized and injured after spending weeks or months on a life-threatening journey.[1] The federal government has placed more than 6,500 of these children, often referred to as "unaccompanied minors,"[2] with relatives in New Jersey while their immigration cases wind their way through the judicial system and they await word on whether they will be deported.[3] New Jersey has the seventh-largest population of unaccompanied minors in the United States.

The vast majority of these recently arrived children are from the Northern Triangle countries of El Salvador, Guatemala, and Honduras,[4] and are fleeing dangerous gang violence, horrific poverty, child abuse and neglect, and sexual assaults by family and/or community members.[5] Many also have been trafficked. In fact, the U.N. high commissioner for refugees estimates that almost 60 percent of these children require international protection because they are fleeing from dangerous situations, such as violence or abuse.[6]

Yet, once these children arrive in the United States, the judicial and social service systems do not treat them like other abused and neglected children. Since 1974, children brought before the juvenile and family courts, due to child abuse and neglect, have had the right to a representative.[7] In 39 U.S. jurisdictions, including New Jersey, this representative is an attorney, and is provided by the state at no cost to the child or family.[8] They are afforded counsel because there is a recognition that children, especially children who have lived through trauma, need to be protected and, therefore, should have a representative by their side to ensure their "interests are protected" and they have a "voice" in the proceedings that will result in important decisions about their lives.[9] Children in removal (deportation) proceedings do not have this same right to free legal counsel. This means that many children appear in immigration court without an adult, let alone a

lawyer, by their side.

Handling a case alone in immigration court is nearly impossible for a child. These hearings are adversarial and legally complex. Additionally, many cases also involve a necessary and separate proceeding in state family court. Accordingly, whether an unaccompanied child has an attorney is the single most important factor impacting the case's outcome. The American Bar Association's Commission on Immigration recently reported that "represented children have a 73% success rate in immigration court, as compared to only 15% of unrepresented children… and that children who are represented have a much higher appearance rate in immigration court, 92.5%, versus 27.5% for unrepresented children."[10]

In an effort to address this lack of representation, on July 9, 2014, the American Immigration Council, with co-counsel the American Civil Liberties Union, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP, filed a lawsuit seeking recognition of a right to appointed counsel for unrepresented children in immigration proceedings nationwide. The lawsuit, initially filed in the U.S. District Court for the Western District of Washington, sought to require the government to provide unrepresented children who are unable to pay for attorneys with legal representation in their immigration proceedings.[11]

During the course of the litigation, an immigration judge, in a deposition, was quoted as saying that he had conducted fair hearings for three- and four-year-old children appearing in court on their own by teaching them immigration law.[12] At an age when the appropriate milestones are learning to speak in complete sentences and following three-part commands, it is hard for the authors to imagine that children are able to comprehend the significant immigration consequences and decisions they may face in court.

On Sept. 20, 2016, the Ninth Circuit Court of Appeals, responding to an interlocutory appeal, held that migrant children plaintiffs did not have jurisdiction, without exhausting administrative remedies, to ask for government-appointed counsel in their removal proceedings.[13] Nonetheless, the circuit judges clearly seemed troubled by the situation. While concurring with the dismissal of petitioners' claims on jurisdictional grounds, Judge Mary Margaret McKeown made a point of addressing the situation, stating:

> The border crisis created what has been called a 'perfect storm' in immigration courts, as children wend their way from border crossings to immigration proceedings. The storm has battered immigration 'courtrooms crowded with young defendants but lacking lawyers and judges to handle the sheer volume of cases.'…The net result is that thousands of children are left to thread their way alone through the labyrinthine maze of immigration laws which, without hyperbole, 'have been termed second only to the Internal Revenue Code in complexity'[14]

In the midst of this 'perfect storm,' the Rutgers' clinical program has entered to provide advocacy and legal representation. Specifically, three different Rutgers' clinics (the Child Advocacy Clinic/Newark; the Immigrant Justice Clinic/Camden; and the Immigrant Rights Clinic/Newark), working together and independently, obtained funds from multiple sources to work with these children. The outcome is three, and soon to be four, new attorneys devoted exclusively to the legal needs of undocumented immigrant children in New Jersey.

First, the Immigrant Justice and Child Advocacy clinics were asked by the New Jersey Department of Children and Families (NJDCF) to represent foster children throughout the state in immigration matters. These clinics now have a contract with the state of New Jersey to support this targeted legal representation. Only four months into the contract, the number of children receiving immigration assistance from NJDCF surpassed capacity. Responding quickly to the need, the NJDCF agreed to increase funding and provide support for an additional attorney, to be based in Newark.

Additionally, in Newark a grant from the Community Foundation of New Jersey is enabling the Child Advocacy Clinic to provide statewide support for *pro bono* attorneys representing clients who seek a form of immigration relief for abused and neglected children. In Camden, a grant from the New Jersey Office of Victim Witness Advocacy is allowing the Immigrant Justice Clinic to represent child crime and trafficking victims in immigration matters. Combining these grants, along with the state contract, has enabled the Rutgers clinical program to hire two new staff attorneys.

Rounding out this legal team is a new fellowship in Newark's Immigrant Rights Clinic, devoted to the legal representation of immigrant children seeking asylum or special immigrant juvenile status, as well as immigrant adults with children. This new grant also funds the hiring of four student fellows per year for three years, to work both on legal services and policy issues affecting immigrants in Newark.

Notably, all of these grants build upon and enhance the existing work these three clinics do every day on behalf of immigrants, and especially immigrant children, in New Jersey. The Immigrant Justice Clinic in Camden and the Immigrant Rights Clinic in Newark are focused exclusively on the legal representation of immigrants. In Camden, the vast majority of the clinic's work is focused on children. In addition, in Newark, the Child Advocacy Clinic represents immigrant children who are seeking immigration relief, but who also require the protection of the state's family courts.

The addition of four new attorneys to provide free legal services to immigrant children in New Jersey will not solve the representation crisis; however, until that time, Rutgers Law School is encouraging and supporting *pro bono* attorneys, and training future lawyers, to chip away at the need. ⚖

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ENDNOTES

1. https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.
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Immigrant Students and the Right to Public School Education

by Alexander Shalom

In 1982, the United States Supreme Court held that a state law allowing school districts to deny enrollment to school-age undocumented immigrants violated the equal protection clause. Justice William Brennan, writing for a majority of the Court, explained that the 14th Amendment's guarantee of equal protection was designed to ensure "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[1]

For the last three and a half decades, one principle has been clear in the context of education for immigrant children: The undocumented status of a child (or parent or guardian) is irrelevant to that student's enrollment in elementary and secondary schools. Consistent with that precedent, the New Jersey Administrative Code provides that immigration status does not have any bearing on eligibility to attend school,[2] and state code prohibits conditioning enrollment on the receipt of documents "pertaining to criteria that are not a legitimate basis for determining eligibility to attend school."[3] The legitimate basis for determining whether a child can enroll in school involves only age, residency and immunization status.[4]

The executive branch of the federal government recognizes the clear rule that undocumented immigrant children have a right to a free public education in the districts where they live. In a jointly written "Dear Colleague" letter, the Department of Education and the Department of Justice explained that "districts should review the list of documents that can be used to establish residency and ensure that any required document would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school."[5]

New Jersey's Track Record

2006–2008

The American Civil Liberties Union of New Jersey (ACLU-NJ) has conducted four surveys of school districts throughout the state to determine how well they observe the laws guaran-

teeing public education to students of any immigration status. First, in 2006, the ACLU-NJ found that one in four New Jersey public schools surveyed were illegally requesting Social Security numbers or asking other questions to reveal the immigration status of children seeking to enroll in school.[6] After conducting the survey, the ACLU-NJ wrote to the districts whose policies violated *Plyler,* requesting they change their policies. The ACLU-NJ also wrote to the state Department of Education, requesting the department issue a formal, written directive to all school superintendents in New Jersey reminding them of the law and the need to monitor compliance.[7]

Two years later, when the ACLU-NJ conducted a similar survey, the results remained largely the same. A total of 20 percent of districts surveyed broke the law by asking, as a prerequisite for enrollment, for information that would reveal a parent or child's Social Security number or immigration status.[8] Again the ACLU-NJ wrote to the non-compliant districts and to the state Department of Education, seeking a formal directive and compliance monitoring.[9]

2009–2014

In the years that followed the second survey, the state Department of Education sent memoranda to districts[10] but did not issue a formal directive or monitor districts' compliance. Still, most districts abandoned the practice of formally requiring Social Security numbers in order to register children for school. Where districts did impose illegal barriers to the registration of immigrant children, they tended to remove those barriers after learning that the restrictions violated clearly established law.[11]

2014–2016

In 2014, it became clear the Butler Public School District, in Morris County, had developed a new registration requirement that—intentionally or not—prevented undocumented immigrants from registering their children for school. While Butler did not directly require a Social Security number, it required parents to present one of three forms of identification, all of which require a Social Security number to obtain. Butler required that parents produce either a driver's license, a non-driver's state identification, or a county identification card, which at the time Morris County was not issuing. The ACLU-NJ sued Butler, and the case immediately settled, with the district agreeing to change its policy and remove the restrictive identification requirement from the list of items needed to enroll children in school.[12]

After settling the Butler lawsuit, the ACLU-NJ undertook its third survey of school districts, in 2014. This survey evaluated online registration forms to determine whether schools were requiring parents to produce identification to register their children. As a result, the ACLU-NJ sent letters to the state Department of Education and 136 school districts with problematic policies, reminding them that age, residency and immunizations were the only valid criteria in determining registration eligibility. More than 100 districts changed their policies in the months that followed.

Among several districts that failed to remedy their improper requests for parents' or guardians' photographic identification, six districts mandated forms of identification that required a Social Security number, such as driver's licenses. The ACLU-NJ sued each district, filing lawsuits in Atlantic, Camden and Middlesex counties. Within a week, each district had settled by agreeing to change its policy.

What Does the Future Hold?

What lessons has New Jersey learned from a decade of surveys, lawsuits, and communications with the Department of Education? Despite all of the legal protections securing the right to an education of all students, with any immigration status—United States Supreme Court precedent that has remained good law for more than three decades, clear state educational regulations, and at least a half dozen lawsuits filed to enforce the right of children to attend public school regardless of their parents' immigration status—students with immigrant parents have continued to face discrimination from school districts.

In 2016, the ACLU again surveyed publicly available school registration forms for the year and found that many schools and districts continued to impose illegal barriers to educational access for children whose parents lack Social Security numbers. The ACLU sued districts in several counties, this time in Atlantic, Bergen, Hudson, and Middlesex. All five lawsuits were settled on the same terms as the 2014 settlements.

The Supreme Court ruling in *Plyler* stated: "Education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[13] As the Court found, when a school district requires parents to produce driver's licenses, it denies an education to wide swaths of New Jerseyans. To be sure, not every district that posts on its website a requirement that parents produce state identification will actually deny access to children whose parents cannot provide such identification (as happened in Butler in 2014). But there remains a risk that immigrant parents will be chilled from seeking to register children in districts that advertise discriminatory registration policies. This is what led the United States Departments of Justice and Education to warn against "student enrollment practices that may chill or discourage the participation, or lead to

the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status" and to conclude that "[t]hese practices contravene Federal law."[14]

Districts that fail to remedy discriminatory policies risk exposure to lawsuits under the New Jersey Civil Rights Act's fee-shifting provision. That risk may move individual districts to issue new policies. In an effort to protect districts from costly litigation—and to protect the rights of all children to a free, public education—the author believes the state Department of Education could create a model enrollment form and check up on districts to confirm whether any are unlawfully depriving the children of immigrants of the education the Constitution promises them. ⚖

Alexander Shalom *is senior staff attorney at the American Civil Liberties Union of New Jersey. He was counsel of record on the 2014 and 2016 lawsuits discussed above.*

ENDNOTES

1. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).
2. N.J.A.C. 6A:22-3.4(c).
3. N.J.A.C. 6A:22-3.4(d).
4. N.J.A.C. 6A:22-3.1 -3.4.
5. Dear Colleague Letter dated May 8, 2014 (https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerletter.pdf).
6. https://www.aclu-nj.org/news/2006/08/29/survey-immigrants-risk-exclusion-in-1-of-4-nj-schools.
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9. https://www.aclu-nj.org/files/4713/1540/4575/091508letterdavy.pdf.
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12. Peggy McGlone, *The Star Ledger*, Facing lawsuit, Butler schools agree to stop discriminating against immigrant parents, March 11, 2014, available at: http://www.nj.com/education/2014/03/facing_lawsuit_butler_schools_agree_to_stop_discriminating_against_immigrant_parents.html?utm_source=twitterfeed&utm_medium=twitter.
13. *Plyler*, 457 U.S. at 222.
14. Dear Colleague Letter dated May 8, 2014 (https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerletter.pdf).

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Recent Developments in the Treatment of Crimes of Domestic Violence under Immigration Law

by Alan J. Pollack

When criminal and immigration attorneys are faced with potential domestic violence-related crimes and situations, it is important they are aware of the underlying grounds of deportation relating specifically to domestic violence, as there are several recent cases that affect the interpretation of what constitutes a 'crime of domestic violence' (CODV) as defined under the Immigration and Nationality Act (INA). This is an area that has not received a lot of attention until recently.

The term 'crime of domestic violence' in Section 237(a)(2)(E)(i) of the INA means any "crime of violence" (as defined in Section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or who has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any state, Indian tribal government, or unit of local government.

A determination whether a conviction is for a crime of domestic violence necessarily begins with an elements-based approach, because a statute that lacks an element corresponding to a 'crime of violence,' (COV) as defined in 18 U.S.C. § 16 (2012), cannot, by definition, be a crime of domestic violence.[1]

In order, therefore, to determine whether an offense is a CODV under the INA, one must first determine whether it is a COV, which requires, "an offense that has as an element the use, attempted use, or threatened use of physical force."[2] Once it is determined that a particular offense is a COV, one would then move on to determine whether the qualifying relationship to the victim is also established and meets the second part of the definition of crime of domestic violence. It is important to note that this has also been interpreted to mean that violent force must be an element of the offense.[3]

It has been solidly established that in analyzing a statute to determine whether it is a COV, only the elements of the offense, and not the underlying facts of the offense, can be looked at, utilizing what is referred to as the strict categorical approach, as delineated by the Supreme Court of the United States in *Deschamps v. U.S.*,[4] and recently clarified in *Mathis v. U.S.*[5] So, for example, the Court held that a misdemeanor assault conviction was not a "crime involving moral turpitude" because the statute involved applied to acts that could be non-intentional, or reckless.[6] The Board of Immigration Appeals also just published *Matter of Chairez*,[7] on Sept. 28, 2016, stating that in the wake of the *Mathis* decision it is clear that to be a crime of violence under 18 USC §16, there must be the intentional use of force and, therefore, any statute for which there could be a conviction based upon reckless conduct or negligent conduct would not, under the strict categorical approach, be a COV.[8]

In New Jersey, unlike some other states, there are no separate laws specific to domestic violence, so they are prosecuted under the same general statutes that typically include the following:

- Homicide, N.J.S.A. 2C:11-1;
- Assault, N.J.S.A. 2C:12-1;
- Terroristic Threats, N.J.S.A. 2C:12-3;
- Kidnapping, N.J.S.A. 2C:13-1;
- Criminal Restraint, N.J.S.A. 2C:13-2;
- False Imprisonment, N.J.S.A. 2C:13-3;
- Sexual Assault, N.J.S.A. 2C:14-2;
- Sexual Contact, N.J.S.A. 2C:14-3;
- Lewdness, N.J.S.A. 2C:14-4;
- Criminal Mischief, N.J.S.A. 2C:17-3;
- Burglary, N.J.S.A. 2C:18-2;
- Criminal Trespass, N.J.S.A. 2C:18-3;
- Harassment, N.J.S.A. 2C:33-4; and
- Stalking, N.J.S.A. 2C:12-10.

Under New Jersey law, in most cases the typical crimes for domestic violence, such as assault and battery, are not going to meet the definition of crime of violence, and, therefore, will

not meet the definition of crime of domestic violence under the Immigration and Nationality Act. However, in those instances where there is no recklessness or negligence as part of the statute, and there is a showing of the use of violent force, in order to meet the definition of CODV there is still the second element that requires a showing of the proper relationship as defined in Section 237(a)(2)(E)(i) of the INA. Criminal attorneys should make sure that, where possible alternatives exist, the conviction is for a crime that does not absolutely require the use of violent force.

However, there are complications to this issue where COV has been established. Once a COV has been established, to be defined as a crime of domestic violence, the nature of the relationship under the full definition cited above in 237(a)(2)(E)(i) of the Immigration and Nationality Act must also be determined. In this regard, in May 2016, the Board of Immigration Appeals recently issued a decision in *Matter of H Estrada*[9] that states the strict categorical approach does not apply to that aspect (*i.e.*, a determination of the underlying domestic relationship). Therefore, extraneous evidence demonstrating the facts of the case, such as police reports, indictments, etc., may be used for the limited purpose of determining, as the Board of Immigration Appeals puts it, the "objective" fact of the victim's relationship to the perpetrator. As practitioners know too well, unless there is a marriage, determining the nature of a particular relationship is not so straightforward.

It is important to note that *Estrada* was decided before the Supreme Court issued its decision in *Mathis, supra*, which more clearly defined the scope of the strict categorical approach. Under *Mathis*, it could be argued that *Estrada* is incorrect; that the nature of the relationship must be an element of the criminal statute itself, and that if it is not, there cannot be a finding of a crime of domestic violence. Since, in New Jersey, the victim is not specifically identified in the statutes at issue, it is important to argue that these statutes could never lend themselves to a finding of a crime of domestic violence. It is also important to note that the strict categorical approach espoused in *Mathis* was set in place to avoid the kind of laborious and challenging fact finding that would be required to determine things such as the nature of the relationship in the immigration court setting.

Immigration and criminal practitioners should be aware of *Estrada,* since the government may try to cite the decision in order to bring in information related to the underlying facts of their clients' criminal conviction to demonstrate the nature of the relationship. Practitioners, therefore, should at least preserve the argument that under *Mathis* this information should not be allowed into the record, and that a strict reading of the statute is all that is allowed.

Criminal attorneys should also be sure to make certain, where possible, that the relationship of the victim is not clearly established by statute or by the record. If the relationship is not part of the elements for conviction, then it would not be a CODV. However, as *Estrada* has yet to been challenged either at the Board of Immigration Appeals or in federal court, it may still be viewed as binding by some immigration judges. So, for example, if there was a conviction for aggravated assault but the statute (in New Jersey) does not mention the nature of any relationship as part of the requirements for conviction, under *Mathis*' strict categorical approach it would not be a crime of domestic violence as defined by the INA. That is the argument that would need to be made in immigration court.

The circuit case law, reviewed by the Supreme Court in *U.S. v. Castleman*,[10] shows a consistency within the circuits that both the immigration definition of aggravated felony and crime of domestic violence are not met where the conviction could rely on reckless conduct.[6] This is also consistent with longer standing precedent of both the Board of Immigration Appeals and the federal courts in *Johnson v. U.S.*, and *Matter of Velasquez*, cited earlier. Therefore, it is important for those facing potential criminal domestic violence-related charges to plead guilty only to crimes where there is an element of recklessness, in order to avoid a finding of a crime of violence or a crime of domestic violence under the Immigration and Nationality Act. ⚖

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ENDNOTES

1. *See United States v. Castleman*, 134 S. Ct. 1405, 1413 (2014).
2. 18 USC §16.
3. *See Johnson v. U.S.*, 559 U.S. 133 (2010) *as cited by Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010) (Virginia misdemeanor assault and battery against a family or household member deemed not a COV because it does not include "violent force" and, therefore, is not a crime of domestic violence under INA s237(a)(2)(E)(i)).
4. 133 S. Ct. 2276 (2013).
5. 136 S. Ct. 2243 (2016).
6. *Gomes v Lynch*, No. 14-60661 (5th Cir. 2016) (July 11, 2016), *citing to Mathis, Id.*
7. 26 I&N Dec. 819 (BIA 2016).
8. *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016).
9. 134 S. Ct. 1405, 1414 n.8 (2014).
10. *See Oyekanji v. Gonzales*, 418 F.3d 260 (3rd Cir. 2006).

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Immigration Considerations for Noncitizens in Criminal Cases

by Jillian T. Stein

It is well established that noncitizens who have been convicted of criminal charges may face adverse immigration consequences as a result. Recent opinions by both the United States Supreme Court and the New Jersey Supreme Court have emphasized the necessity for defense counsel to be aware of and advise noncitizen clients of severe immigration consequences, specifically deportation (now known as removal) in advance of a guilty plea. New Jersey practitioners, therefore, must consider the potential immigration consequences that flow from a guilty plea, of which there are many, and should be able to propose alternatives to avoid them.

Counsel's Responsibility

Following the United States Supreme Court's and New Jersey Supreme Court's recent decisions in *Padilla v. Kentucky* and *State v. Gaitan*, respectively, defense counsel now have an affirmative duty to advise noncitizen clients on the deportation consequences of a guilty plea.[1] It is also well established that counsel cannot affirmatively mislead or provide wrong advice to noncitizen clients regarding the deportation consequences of a guilty plea.[2] Counsel, therefore, must be knowledgeable of the possible adverse immigration consequences of various plea options.

Possible Adverse Immigration Consequences

Potential consequences of a guilty plea for a noncitizen include removal by U.S. Immigration and Customs Enforcement, or findings of inadmissibility, ineligibility for adjustment of status, and ineligibility for U.S. citizenship. Counsel should consider that where a noncitizen will ultimately serve his or her sentence is also a consequence of a defendant's immigration status. The discussion below explores two very different examples demonstrating the varied immigration consequences of a criminal conviction under New Jersey and federal law.

First Example: Drug Charges

It may be obvious that a conviction for a drug offense will have adverse immigration consequences for a noncitizen. More specifically, however, defense counsel should be aware that a guilty plea to possession of even small amounts (*i.e.*, less than 50 grams) of marijuana[3] has immigration consequences because the threshold, for immigration purposes, is 30 grams for personal use.[4]

Specifically, with regard to a controlled dangerous substance (CDS) offense, a plea of guilty or *nolo contendere*; an admission of guilt[5] or of facts sufficient to warrant a finding of guilt; or any other "form of punishment, penalty, or restraint on the alien's liberty," including probation,[6] could render a noncitizen removable.[7] In a criminal defense attorney's toolbox, one should, therefore, consider other options, such as conditional discharge or pretrial intervention (PTI).

Conditional Discharge

A conditional discharge is available to first-time drug offenders who have not previously received a conditional dismissal pursuant to N.J.S.A. 2C:43-13.1 or PTI under N.J.S.A. 2C:43-12.[8] Under the conditional discharge provisions, the charge against a defendant will be dropped upon the defendant's having fulfilled the terms and conditions of the supervisory treatment imposed.[9] A conditional discharge is attractive because dismissal of the proceedings against a defendant under this statute "shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense...."[10] This includes immigration consequences so long as, as stated above, there is no conviction, guilty plea, admission of guilt or of facts sufficient to warrant a finding of guilt.[11]

Pretrial Intervention

Similarly, New Jersey's PTI Program permits criminal proceedings to be postponed while a defendant completes a rehabilitation program, after the completion of which the charges are dismissed.[12] PTI admission also does not require an admission of guilt,[13] and counsel should take care to assure that, though this is contrary to the convention in some counties, no admission of guilt, in fact, occurs. Thus, like the conditional discharge, PTI is a way of resolving criminal charges without adverse immigration consequences.[14]

It is important to be aware, however, that immigration courts have considered, for example, a defendant's *admission* to possession of cocaine in his or her PTI documents as relevant and admissible evidence sufficient to demonstrate the defendant's removability under 8 U.S.C. § 1182(a)(2)(A)(i)(II).[15] To avoid adverse immigration consequences, therefore, PTI, or a conditional discharge, without a guilty plea or admission of facts that would warrant a finding of guilt, should be insisted upon.

Disorderly Persons Offense, a Possibility

If neither a conditional discharge nor PTI is an option, a noncitizen may be able to avoid removal by pleading guilty to a disorderly persons offense. The factual basis stated on the record should not include any mention of drugs, however, because even their mere mention may have immigration consequences. This is because the Immigration and Naturalization Act's (INA's) language regarding being "convicted of a violation of...any law or regulation of a State...relating to a controlled substance" might come into play.[16]

Loitering Statute is a No-Go

Not all disorderly persons offenses, however, will avoid *all* adverse immigration consequences. For example, the disorderly persons charge of loitering, N.J.S.A. 2C:33-2.1(b), which expressly refers to CDS,[17] will prevent a noncitizen from later being able to adjust his or her status to become a permanent resident. Specifically, the U.S. Customs and Immigration Service (USCIS) has denied a noncitizen's application for an adjustment of status based on a guilty plea to the loitering statute.[18] The USCIS found that an immigrant is ineligible for permanent residence following a guilty plea to the disorderly persons offense of loitering, concluding that "there was reason to believe that [the applicant] had been an illicit trafficker in a controlled substance[.]"[19] Consequently, even a conviction under the loitering statute may render a noncitizen ineligible to file for an adjustment of status. Likewise, the Board of Immigration Appeals (BIA) has concluded that a conviction under the loitering statute will also render a defendant inadmissible under the INA § 212(a)(2)(A)(i)(II)[20] if he or she leaves the country and later attempts to reenter.

That section of the INA provides:

> [A]ny alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of—...a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country *relating to a controlled substance*...is inadmissible.[21]

Because the loitering statute "specifically includes a controlled substance element," it constitutes a law that relates to a controlled substance.[22]

Thus, although a conviction under the loitering statute is often the most advantageous option for noncitizens charged with drug offenses, such as possession of 50 grams or less of marijuana in violation of N.J.S.A. 2C:35-10a(4) or possession of drug paraphernalia in violation of N.J.S.A. 2C:36-2, counsel must be aware that a conviction under either of these two latter statutes would not only render the noncitizen inadmissible when seeking admission or reentry to the United States, but would also render him or her removable once admitted—so long as the drug at issue is a substance that is "defined in" or controlled under federal law.[23]

Municipal Ordinance Not Related to Drugs

In lieu of a disorderly persons offense, counsel should, if at all possible, seek a resolution of a matter that involves a guilty plea to a municipal ordinance.[24] That said, even this resolution is far from ideal, depending, of course, upon what the plea involves. That is because, with the BIA's decision in *In re Roberto Cuellar-Gomez*,[25] even convictions of municipal ordinances may fall within the strictures of the removability statute pertaining to drug offenses. That case involved the violation of a marijuana-related municipal ordinance in Wichita, Kansas; the conviction was, therefore, clearly drug-related.[26] As a result, the INA's language about being "convicted of a violation of…any law or regulation of a State…relating to a controlled substance" became relevant, rendering the defendant removable. The BIA concluded that "the ambiguous reference in [the INA] to 'any law or regulation of a State' most naturally encompasses laws promulgated by a State through its political subdivisions," and that the city ordinance was "'a law or regulation of a State' under section 237(a)(2)(B)(i) of the [INA] because it is an expression of the organic sovereign power of the State of Kansas."[27] A municipal ordinance, however, that does not relate to controlled substances and would not be treated as a crime involving moral turpitude under 8 U.S.C.S. § 1227(a)(2)(A)(ii) may not have immigration consequences and should be explored by counsel.

At the end of the day, the example of drug offenses demonstrates that it is difficult, though not impossible, to avoid removal consequences through conditional discharge, PTI, certain disorderly persons convictions or municipal ordinance dispositions so long as the disorderly persons statute and ordinance do not relate to a controlled substance. As always, familiarity with the law and the ingenuity of counsel are required in order to provide high-quality representation to noncitizen clients and for defense counsel to fulfill their responsibility to provide the effective assistance of counsel.

Second Example: Kickbacks

With other offenses, counsel should consider whether the conviction may otherwise constitute an "aggravated felony" or "crime of moral turpitude" for immigration purposes, which would render a noncitizen removable.[28] Notably, an offense does not need to be either aggravated or even a felony under state law to be considered an aggravated felony for immigration purposes under federal law. Indeed, nonviolent and fairly minor offenses can fit the bill. Likewise, many offenses qualify as crimes of moral turpitude, even though they may not seem to be. Thus, here too, immigration law is a trap for the unwary defendant and his or her counsel. For example, even turnstile jumping qualifies as a crime of moral turpitude and can subject a noncitizen to removal.[29]

An interesting and complex example that arises with some regularity is a conviction for receipt (or offer) of kickbacks under 42 U.S.C. § 1320a-7b(b)(1)(A), which prohibits the exchange (or offer to exchange) of anything of value in an effort to induce or reward the referral of federal healthcare program business. Because more than one-quarter of physicians and surgeons in the United States are foreign born, and foreign-born professionals account for 16 percent of all civilians employed in healthcare occupations overall,[30] criminal statutes like this one frequently portend immigration consequences. Though a non-violent, and in many respects technical, regulatory offense, such a conviction may constitute an aggravated felony or a crime of moral turpitude for immigration purposes, subjecting a noncitizen to removal. Thus, counsel should consider plea options and advise his or her client accordingly.

Determining Whether an Offense Constitutes an Aggravated Felony

In assessing whether a person has been convicted of an aggravated felony, the Third Circuit Court of Appeals has determined that the formal categorical approach set forth in the United States Supreme Court decision in *Taylor v. United States*[31]—looking only to the statutory definitions of the prior offenses and not the facts underlying the convictions—"presumptively applies," but that "in some cases the language of the particular subsection of 8 U.S.C. § 1101(a)(43) at issue will invite inquiry into the underlying facts of the case; for example, the disjunctive phrasing of the statute of conviction may invite inquiry into the specifics of the conviction."[32] As a general matter, the categorical approach does not "apply when either the terms of 'the federal statute enumerating categories of crimes…[or] the criminal statute of conviction…' invite further inquiry into the facts."[33] That fact-specific approach is called the "modified categorical approach," and entails "looking beyond the statutory definition, but only for the purpose of determining the elements necessarily found by a jury, or admitted by a defendant in pleading guilty."[34] The Supreme Court held, in *Shepard v. United States*,[35] that appropriate records to consider in a case resolved by looking to the facts of a guilty plea are "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[36]

A Conviction Under the Kickback Statute May Constitute an Aggravated Felony

The term "aggravated felony" includes many offenses, including those that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000,"[37] as well as offenses "relating to commercial bribery…for which the term of imprisonment is at least one

year[.]"[38] In the example, the kickback statute, at 42 U.S.C. § 1320a-7b(b)(1)(A), prohibits the solicitation and receipt of remuneration (kickbacks, bribes or rebates) in return for referrals for services for which payment may be made, in whole or in part, under a federal healthcare program (*e.g.*, Medicare).[39]

While there is no case law directly concluding that the receipt of kickbacks in violation of § 1320a-7b(b)(1)(A) is an aggravated felony,[40] the Third Circuit held, in the unpublished decision *Nyakatura v. Attorney General of the United States*, that a kickback may be a bribe, the receipt of which "constitutes a crime relating to commercial bribery pursuant to INA § 101(a)(43)(R)."[41] Because 'commercial bribery' is undefined in the INA and the legislative history provides no guidance on its meaning,[42] the court applied the common law definition of commercial bribery: "the offense of bribing an employee, servant, or agent with the intent to influence him in his relation to his employer, master or principal."[43] The court concluded that the defendant's "receipt of kickbacks constitutes a crime relating to commercial bribery" because the kickbacks "were a form of bribery falling within the purview of both [18 U.S.C. §] 666(a)(1)(B) and the common law definition of commercial bribery."[44] It reasoned that "because INA § 101(a)(43)(R) includes the phrase 'relating to' to broaden the scope of the statute beyond a strict construction of commercial bribery, it is no stretch to conclude that bribery under section 666(a)(1)(B) falls within 'the wide sweep of offenses described in [INA § 101(a)(43)(R)].'"[45]

Based on this reasoning, even if a noncitizen is not convicted of bribery under Section 666(a)(1)(B), which is bribery involving programs receiving federal funds, but for accepting kickbacks under 42 U.S.C. § 1320a-7b(b)(1)(A), such a conviction may constitute an offense relating to commercial bribery, and, thus, an aggravated felony. Further, the kickback statute speaks in terms of remuneration in the form of bribes as well as kickbacks.[46] The kickback statute, therefore, "define[s] an offense that is sufficiently related to commercial bribery."[47]

Furthermore, the BIA has "agree[d] that the phrase 'relating to,' as it is used in section 101(a)(43)(R) of the [INA], encompasses a broad range of conduct."[48] Also of note, Appendix A to United States Sentencing Guidelines cross-references the kickback statute to the guideline for commercial bribery and kickbacks.[49] This, too, implies that the receipt of kickbacks under 42 U.S.C. § 1320a-7b(b)(1)(A) constitutes an offense relating to commercial bribery—an aggravated felony rendering a noncitizen removable if sentenced to one year or more of imprisonment.[50] But that does not mean that all is lost in these common healthcare fraud cases. If the noncitizen is sentenced to a term of imprisonment of less than one year, subsection (a)(43)(R) will not apply, and the offense will not constitute an aggravated felony under that subsection.[51] Thus, a noncitizen may be able to avoid the removal consequences of an aggravated felony for receipt of kickbacks (or payment of bribes), so long as the kickbacks or bribes did not involve any fraud or deceit, or loss exceeding $10,000 (which would implicate a separate aggravated felony provision, subsection (a)(43)(M)), discussed further below.[52]

Receipt of Kickbacks May Also Constitute a Crime of Moral Turpitude

Furthermore, although there is no case law to date that specifically has held that the receipt of kickbacks in violation of the kickback statute, at 42 U.S.C. § 1320a-7b(b)(1)(A), constitutes a crime of moral turpitude, such a conviction may indeed constitute such a crime,[53] which provides a separate basis for removal—if the crime is committed within five years after the date of admission (or within 10 years after obtaining lawful permanent resident status) and for which a sentence of one year or longer *may* be imposed—as well as inadmissibility.[54] 42 U.S.C. § 1320a-7b(b)(1) provides that someone convicted under this statute may receive a sentence of up to five years imprisonment. Counsel should, therefore, research alternatives, if possible, to a guilty plea to the kickback statute for a noncitizen client facing such charges, as set forth below.

Possible Alternative to Avoid Removal

A noncitizen may be able to plead guilty to a conspiracy under 18 U.S.C. § 371 and avoid removal consequences by stipulating to a loss in an amount less than $10,000, or no loss at all. If the noncitizen also receives a sentence of less than 12 months, he or she should be able to thwart the possibility of the conviction being considered an *aggravated felony* under 8 U.S.C. § 1101(a)(43)(R), as well.

In *Nijhawan*, the Third Circuit evaluated the underlying facts to determine whether a fraud conviction constituted an aggravated felony.[55] The defendant was convicted of conspiracy to commit fraud in violation of Section 371. A conviction under this statute implicates the removability provision that includes in the term aggravated felony those offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000[.]"[56] On appeal, the Supreme Court concluded that the $10,000 loss provision at issue required a "circumstance-specific" interpretation, and not a categorical approach, because the statutes of conviction were silent regarding loss amounts and, therefore, the Court agreed with the Third Circuit that the determination of loss amounts for "aggravated felony" purposes "require[d] an inquiry into the underlying facts of the case."[57]

If, however, no loss resulted from the commission of the crime, or the loss was less than $10,000, then the removal consequences of an aggravated felony

may be avoided. In the Third Circuit, in order to avoid being considered an aggravated felony, the defendant should not admit to any loss of $10,000 or greater as part of a guilty plea, because that is the threshold under § 1101(a)(43)(M)(i). Similarly, the total loss averred in the indictment or a restitution order may be considered.[58] Thus, to avoid confusion on this issue, beyond what is set forth in any stipulations or in a plea colloquy, one should not concede that he or she owes restitution in an amount of $10,000 or more, because restitution is based on the amount of loss actually caused.[59]

If, however, the crime is committed within five years after the date of admission (or 10 years after obtaining lawful permanent resident status), even a conviction under 18 U.S.C. § 371, which allows for imprisonment for up to five years, would be considered a crime of moral turpitude, subjecting a noncitizen to removal on that basis.[60] Further, conspiring to act fraudulently under Section 371, that is, conspiring to commit a crime of moral turpitude, also renders a noncitizen inadmissible, except if the noncitizen "committed only one crime" and "the maximum penalty possible for the crime of which the alien was convicted…did not exceed imprisonment for one year and…the alien was not sentenced to a term of imprisonment in excess of 6 months…."[61]

Consequently, a noncitizen client can avoid removal for a crime involving moral turpitude by either pleading to an offense with a maximum possible sentence of one year or less or an actual sentence of six months or less. Unfortunately, this does not appear to be applicable to a kickback or bribery offense, if that offense was committed within five years of admission (or within 10 years of obtaining lawful permanent resident status). Thus, in such circumstances and where the client seeks to resolve the charge by guilty plea, counsel could negotiate a sentence of less than six months imprisonment for the client and then, if necessary, the client will have to seek relief from removal with assistance from immigration counsel.

A Noncitizen May Not Be Able to Serve His or Her Sentence in a Minimum Security Camp

Finally, counsel should be aware that a noncitizen may face restriction on where he or she is likely to serve his or her sentence. Thus, though it may not constitute ineffective assistance of counsel not to do so, counsel should make this reality clear to the client.[62] Specifically, when a noncitizen is subject to removal, he or she may not be housed in a minimum-security camp like citizen inmates convicted of similar offenses.[63] This is because the Bureau of Prison's "alien public safety factor" is applied to deportable aliens to house such inmates "in at least a low security level institution."[64]

Practice Tip

In all cases, counsel should thoroughly research all of the possible immigration consequences before advising his or her client how to proceed, as the law in this area, while in constant flux, has long provided for myriad and severe immigration consequences for a criminal conviction. This article points to but a few examples that demonstrate the complexity of this area of the law. Defense counsel should master all the necessary aspects of immigration law, as they apply to his or her case, and work closely with immigration counsel to best serve a noncitizen client facing criminal charges. ⚖

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ENDNOTES

1. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010); *State v. Gaitan*, 209 N.J. 339, 371 (2012), *cert. denied*, 133 S. Ct. 1454 (2013). *See also Chaidez v. United States*, 133 S. Ct. 1103, 1106 (2013) (ruling that *Padilla* is not retroactively applicable to convictions beyond direct review).
2. *Gaitan*, 209 N.J. at 351; *State v. Nunez-Valdez*, 200 N.J. 129, 131 (2009).
3. N.J.S.A. 2C:355-10(a)(4).
4. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), *other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable*." (emphasis added)). In addition, "[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable." 8 U.S.C. § 1227(a)(2)(B)(ii).
5. *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3d Cir. 2003); *see also Martinez v. United States Attorney Gen.*, 577 F. App'x 969, 971 (11th Cir. 2014) ("To be removable under this statute, an alien need not have been convicted of a controlled substance offense, but only needs to have *admitted* to committing a controlled substance offense.").
6. *See In re: [redacted]*, 2014 Immig. Rptr. LEXIS 4868, *9 (AAO, Sept. 8, 2014) ("With regard to the second prong of the definition of conviction under section 101(a)(48)(A) of the [INA], we find that the applicant's 12-month probation is a restraint on his liberty that satisfies this prong. As the applicant's controlled substance offense falls within the definition of conviction within section 101(a)(48)(A) of the [INA], we find that the applicant is inadmissible under 212(a)(2)(A)(i)(II) of the [INA]."); *see also Gonzalez v. O'Connell*, 355 F.3d 1010, 1020 (7th Cir. 2004) (although probationary dispositions may not be convictions under Illinois law, a probationary disposition following a plea of guilty qualifies as a conviction under 8 U.S.C. § 1101(a)(48)(A)).
7. *See* 8 U.S.C. § 1101(a)(48)(A) ("The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has

found the alien guilty or the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.").

8. N.J.S.A. 2C:36A-1(a).

9. N.J.S.A. 2C:36A-1(b).

10. *Id.*

11. *See, e.g.*, *State v. Contreras*, No. 32,252, 2015 N.M. App. Unpub. LEXIS 376, *3-4 (N.M. Ct. App. Sept. 3, 2015) (deportation would be triggered even with a conditional discharge if there is a guilty plea).

12. N.J. Ct. R. 3:28; *Cruz v. Attorney Gen.*, 452 F.3d 240, 243 (3d Cir. 2006).

13. R. 3:28, Guideline 4 ("Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilt.").

14. *See Cruz v. Attorney Gen. of the U.S.*, 452 F.3d 240, 243 (3d Cir. 2006) ("PTI provided [defendant] with a way of resolving the criminal charges against him without the adverse immigration consequences of a guilty plea").

15. *Martinez*, 577 F. App'x at 972.

16. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

17. *See* N.J.S.A. 2C:33-2.1(b).

18. N.J.S.A. 2C:33-2.1(b).

19. *Gul v. Attorney Gen. of the U.S.*, 385 F. App'x 241, 241 (3d Cir. 2010).

20. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

21. *Id.* (emphasis added).

22. *Gul*, 385 F. App'x at 243-44.

23. *See* note 4, *supra*; *see also Rojas v. Attorney Gen. of the U.S.*, 728 F.3d 203, 220 (3d Cir. 2013) (*en banc*) ("Most drug convictions will qualify as removable offenses...."); *see also, generally*, 21 U.S.C. § 812 (schedules of controlled substances under federal law).

24. Notably, there are attorney general guidelines that limit a prosecutor's discretion in negotiating pleas to resolve certain drug charges. *See Brimage* Guidelines 2: Revised Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 (2004 Revisions), available at http://www.nj.gov/lps/dcj/agguide/directives/section_1.pdf.

25. Interim Decision No. 3760, 25 I&N Dec. 850 (BIA 2012).

26. *Id.* at 851.

27. *Id.* at 856.

28. 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(i).

29. *See Johnson v. Holder*, 413 F. App'x 435, 436 (3d Cir. 2010); *Santos-Gonzalez v. Reno*, 93 F. Supp. 2d 286, 288 n.2 (E.D.N.Y. 2000); *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

30. Nicole Fisher, 25% Of Physicians Are Born Outside the U.S.: Can Immigration Reform Fix The Shortage? *Forbes* (July 12, 2016), http://www.forbes.com/sites/nicolefisher/2016/07/12/25-of-docs-are-born-outside-of-the-u-s-can-immigration-reform-solve-our-doc-shortage/#34ee5d7a702b.

31. 495 U.S. 575 (1990).

32. *Singh v. Ashcroft*, 383 F.3d 144, 147-48 (3d Cir. 2004).

33. *Stubbs v. Attorney Gen. of the U.S.*, 452 F.3d 251, 254 (3d Cir. 2006) (*quoting Singh*, 383 F.3d at 161).

34. *Evanson v. Attorney Gen. of the U.S.*, 550 F.3d 284, 291 n.4 (3d Cir. 2008).

35. 544 U.S. 13 (2005).

36. *Id.* at 16.

37. 8 U.S.C. § 1101(a)(43)(M)(i).

38. 8 U.S.C. § 1101(a)(43)(R).

39. 42 U.S.C. § 1320a-7b(b) provides:
(b) Illegal remunerations.
(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—
(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or....

40. *See, e.g.*, *Chhabra v. United States*, No. 09-cv-1028, 2010 U.S. Dist. LEXIS 118167, *1-3 (S.D.N.Y. 2010) (although petitioner pleaded guilty to unlawful receipt of kickbacks in return for referral of Medicare patients in violation of 42 U.S.C. § 1320a-7b(b)(1), it was the petitioner's conviction for tax evasion in excess of $10,000 that made him removable from the United States).

41. *Nyakatura v. Attorney Gen. of the U.S.*, 256 F. App'x 461, 467 (3d Cir. 2007).

42. *Id.* at 465; *In re Gruenangerl*, 25 I. & N. 351, 353, 356 n.6 (BIA 2010).

43. *Nyakatura*, 256 F. App'x at 465-66.

44. *Id.* at 466.

45. *Id.* (alteration in original) (citation omitted).

46. *See* note 39, *supra*.

47. *In re Gruenangerl*, 25 I. & N. at 357.

48. *Id.* at 356.

49. *See* U.S.S.G. § 2B4.1.

50. *See* 8 U.S.C. § 1101(a)(43)(R).

51. *In re Gruenangerl*, 25 I. & N. at 353; *see also Singh*, 383 F.3d at 162.

52. *See Petrov v. Gonzales*, 464 F.3d 800, 801 (7th Cir. 2006) (where defendant was convicted of conspiracy to bribe federal officials as part of an immigration fraud, and accepted more than $10,000 for helping others obtain bogus green cards, defendant's "crime thus qualifies [as aggravated felony] under subsection (M)").

53. *See, e.g.*, *United States v. Friedland*, 502 F. Supp. 611, 619-20 (D.N.J. 1980) (discussing crimes of moral turpitude in legal ethics context and concluding, albeit not in immigration context, that defendants' receipt of kickbacks and fraud constituted crimes of moral turpitude), *aff'd*, 672 F.2d 905 (3d Cir. 1981); *Sasonov v. United States*, 575 F. Supp. 2d 626, 636 n.8 (D.N.J. 2008) (offering bribe under 18 U.S.C. § 201 is a crime involving moral turpitude, such that alien convicted of such crime and sentenced to a term of imprisonment of one year or more is subject to automatic deportation); *In re Johnson*, 48 A.3d 170, 173 (D.C. 2012) (in attorney disbarment case, the crime of acceptance by public official of a bribe, 18 U.S.C. § 201(b)(2), "involves a public official wrongfully using his position in order to receive something of value," and thus "involves moral turpitude *per se*"); *In re Roberts*, 331 S.C. 325, 327 (S.C. 1998) (noting, in attorney disciplinary action and not immigration context, that acceptance of a *bribe* for the dismissal of criminal charges is a crime of moral turpitude). *But see, Chhabra v. United States*, 720 F.3d 395, 397 (2d Cir. 2013) (where lawful permanent resident was convicted of receiving Medicare kickbacks in violation of 42 U.S.C. § 1320a-7b(b)(1) and tax evasion in violation of 26 U.S.C. § 7201, and defendant received a notice to appear for removal proceedings for having been convicted of a crime involving moral turpitude, court did not hold specifically that kickback offense constituted

a crime involving moral turpitude, instead focusing on the immigration effects of the tax evasion count as an aggravated felony).

54. 8 U.S.C. § 1182(a)(2)(A)(i) ("Any alien who…is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) [8 USCS § 1255(j)]) after the date of admission, and…is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."); 8 U.S.C. § 1227(a)(2)(A)(i).

55. *Nijhawan*, 523 F.3d at 393.

56. 8 U.S.C. § 1101(a)(43)(M)(i). *See Nijhawan*, 523 F.3d at 391.

57. *Nijhawan v. Holder*, 557 U.S. 29, 33, 36 (U.S. 2009) (*quoting Nijhawan*, 523 F.3d at 396).

58. *See Nijhawan*, 523 F.3d at 394-95, 397; *Alaka v. Attorney Gen. of the U.S.*, 456 F.3d 88, 92, 105-07 (3d Cir. 2006).

59. *See United States v. Rothwell*, 387 F.3d 579, 585 (6th Cir. 2004); *United States v. Liss*, 265 F.3d 1220, 1231-32 (11th Cir. 2001).

60. *See supra* note 54.

61. 8 U.S.C. § 1182(a)(2)(A)(i)(I), (ii)(II).

62. *See Valenzuela-Lizarraga v. United States*, 2011 U.S. Dist. LEXIS 96857, *8-9 (M.D.N.C. Aug. 26, 2011); *Franco v. United States*, 2011 U.S. Dist. LEXIS 46143, *3 (D. Mass. April 29, 2011); *Sonni v. United States*, 2010 U.S. Dist. LEXIS 123570, *3 (D.N.J. Nov. 22, 2010); *Mojica-Caro v. United States*, 2010 U.S. Dist. LEXIS 144176, *15-16 (D.P.R. March 31, 2010); *United States v. Rodriguez*, 2010 U.S. Dist. LEXIS 238, *5 (D. Kan. Jan. 4, 2010); *United States v. Nonbello*, 2009 U.S. Dist. LEXIS 3819, *7-8 (D. Minn. Jan. 20, 2009).

63. *See, e.g.*, *United States v. Alarcon-Acosta*, 2015 U.S. Dist. LEXIS 81425, *8-9 (S.D. Tex. June 23, 2015); *Balbuena v. United States*, 2013 U.S. App. LEXIS 14027, *18 (11th Cir. July 11, 2013); *Herrera v. United States*, 2011 U.S. Dist. LEXIS 143504, *4-5 (N.D. Ill. Dec. 12, 2011); *Edwards v. United States*, 2011 U.S. Dist. LEXIS 123957, *5 (D. Me. Oct. 25, 2011); *Valenzuela-Lizarraga v. United States*, 2011 U.S. Dist. LEXIS 96857, *8; *Gavilanes v. United States*, 2011 U.S. Dist. LEXIS 955, *13 (S.D. Tex. Jan. 4, 2011); *Sonni v. United States*, 2010 U.S. Dist. LEXIS 123570, *3; *Mojica-Caro*, 2010 U.S. Dist. LEXIS 144176, *15; *Rodriguez*, 2010 U.S. Dist. LEXIS 238, *5; *Velo-Perez v. United States*, 2008 U.S. Dist. LEXIS 120592, *6 (N.D. Cal. May 21, 2008).

64. U.S. Bureau of Prisons Program Statement 5100.08, Inmate Security Designation and Custody Classification, Ch. 5, at 9 (9/12/2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

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Bail Reform and the Immigration Dilemma—The First Unknown Hurdle

by Michael Noriega

SWEEPING CHANGES ARE OFTEN TOUTED AS A REMEDY to some deficiency or harm that has purposefully or systematically corrupted a process, and the recent revisions to New Jersey's money bail system are no exception. Defendants have been spending inordinate amounts of time in custody awaiting trial or court appearances, solely because they could not afford to pay nominal bail amounts. The state undertook the behemoth effort of overhauling the bail system by choosing to focus on a defendant's danger to the community rather than on his or her financial resources when determining bail. But like so many sea changes, it is likely to have unintended consequences. One unexpected pitfall is faced by non-citizen defendants, and it will require substantial attention once its adverse effects on the criminal justice system are fully recognized.

Criminal Justice Reform

Criminal justice reform went into effect on Jan. 1, 2017. A monumental shift in the criminal justice system, it has its roots in an attempt to address a disparity between the economic means of low-risk defendants and their success in achieving pre-trial release. Signed into law on Aug. 11, 2014, the new legislation redefined the pretrial release process. With it, judges wield authority to order the release of an 'eligible' defendant subject to defined conditions after the individual is screened via a risk-assessment scheme.[1] Such release will be ordered in lieu of monetary bail. In addition to the new rules, departments, and procedures following implementation of criminal justice reform, new complexities have now come to light. The author believes the intersection of immigration and criminal justice reform is creating a new host of problems that must now be addressed as the new system takes hold.

Under Existing Law

It is common knowledge that today criminal defendants who are not United States citizens can face dire immigration consequences as the result of their charges. As of March 2010, criminal defense attorneys are responsible for properly informing their non-citizen clients of the immigration ramifications of criminal charges.[2] In the six years since the Supreme Court mandated that criminal defense attorneys take on the added work of understanding and advising on immigration law, the exact process of what happens to the criminal defendant after sentencing has still remained a somewhat mysterious process. Currently, the precise moment when an open criminal charge begins to impact the immigration status of a non-citizen is not easily identifiable. Clearly, once a disposition is reached and the charges are resolved, immigration issues will surface, but in reality, the analysis regarding these issues should begin much sooner, potentially at the time of arrest.

At present, the moments in which a police officer is authorized to issue a summons or warrant may change the entire outcome for someone's path through the immigration system, as a warrant may lead to an Immigration and Customs Enforcement (ICE) detainer being issued, while a summons may not, since the defendant will never reach the jail in those circumstances.[3] Once the ICE detainer exists, the person will have to face immigration authorities before his or her ability to post a bond can be determined.[4]

Therefore, under the previous bail system, a criminal defendant faces a difficult choice: bail out and confront the immigration authorities for a chance to receive a bond or face time in the county jail while his or her criminal case winds its way through the criminal justice system. In most instances, there is no real choice, as the only defense to their removal may hinge entirely on the proper resolution of their criminal charge. For some, who unwittingly or hastily posted their criminal bail without investigating the consequences, they would have to enter the gauntlet of removal proceedings from custody, while simultaneously attempting to accelerate and positively resolve a pending criminal matter if they were to have any chance of remaining in the country.

The outcome in these cases can be bleak. Under the Immigration and Nationality Act (INA), immigration judges wield greater authority to deny a bond than their state court counterparts. Under the provisions of mandatory detention, the immigration judge need only determine that an individual is a danger to the community to decide that no bail is appropriate. Such a determination can come from a variety of offenses in the state system, from petty theft to non-violent drug offenses.[5][6]

Once an individual is deemed subject to mandatory deten-

tion, he or she must face the removal process from within custody. This is problematic, because most remedies to removal require proof that any conviction record does not disqualify the individual from the relief sought. If a defendant in a criminal case was released during the preliminary stages of the criminal process, and the somewhat more expeditious removal process has begun while the person is mandatorily detained, there is little chance of a positive outcome on the criminal case that would favor the removal proceedings. Defendants will either accept removal for lack of any other available options, or will plead guilty prematurely in the hopes of favoring their removal case. Either way, critical decisions were being made for the wrong reasons.

Instead, the author believes criminal defendants were better served investigating the immigration impact of their criminal charges and their chances of success. Otherwise, defendants who may have otherwise qualified for relief and a life in the United States were unceremoniously removed, leaving behind a pending criminal charge lodged as an active bench warrant, with little hope of it ever being addressed.

Under Criminal Justice Reform

Now the question becomes: What can a criminal defendant do when he or she is being unwillingly evicted from the county jail on a third-degree criminal charge and forced into removal proceedings? Non-U.S. citizen defendants will now have to wait a minimum of 24 hours for a decision to be made about their pre-trial release. In that time, ICE detainers will be issued, and if they are deemed eligible defendants and released, they will be taken into immigration custody, where an entirely new process will take hold. A new problem then arises because defendants facing removal proceedings with open criminal charges may find themselves ineligible for bond. Thereafter, they may be found ineligible for relief from removal without the disposition for their criminal charge.

For those with particularly serious offenses, in the first- or second-degree range, the reform will have secured their custody and assured they face prosecution for their offenses. Upon conviction, they will likely face a limited menu of options to overcome removal, and they will eventually be deported. However, the distinction between offenders that the criminal justice reform act considers low-level offenders and those the immigration court considers a danger to the community are drastically different. Therefore, the system now includes an inordinately large number of defendants who face merely third- and fourth-degree charges and are being released from county jails, detained by ICE, and removed before the prosecution of their case is underway. This unexpected consequence will find defendants and their attorneys in the position of advocating for mandatory detention in criminal courts, where it would not otherwise be required, if only to avoid initiating removal proceedings.

Jan. 1, 2017, marked a red-letter day in furtherance of an effort to correct the longstanding bias against economically disadvantaged defendants. A new and unexpected consequence of this reform is the sudden transfer of criminal aliens to ICE custody earlier than previously seen. The net effect has been the removal from the United States of low-level, nonviolent offenders, a new backlog of open criminal matters, and victims unable to achieve closure. Attorneys need to be vigilant in these matters, as their unsuspecting clients, thrilled at the prospect of being released after 48 hours or less in detention, are now demanding answers from counsel regarding why their detention persists, but now under ICE custody.

Stemming from the decision in *Padilla,* and its New Jersey progeny, counsel will be responsible for making clients aware of the consequences, or at least advising clients to secure the appropriate advice.[7] The author sees distressed families becoming wary of the additional custodial maze, frustrated by the lack of answers as their family members are suddenly missing for hours or days, as they are transferred to one of the numerous ICE detention facilities throughout the state.

State criminal courts should now be fully familiar with the process of securing a criminal defendant who happens to be in ICE custody. Perhaps, the author suggests, defense counsel, prosecutors and the courts should take up the task of identifying these matters to deal with them outside of the path the criminal justice reform has carved out for them. Fair, just, and final conclusions benefit everyone involved in the process, and the author believes awareness of the problem and direct action on it will go a long way toward achieving that goal. ⚖

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ENDNOTES

1. *See* New Jersey, Judiciary, Joint Committee on Criminal Justice Reform: *Report to the Legislature on Criminal Justice Reform*, Dec. 2015.
2. *Kentucky v. Padilla*, 559 U.S. 356 (2010); *State v. Nunez-Valdez*, 200 N.J. 129 (2009).
3. *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014)(holding that the "ICE detainer" triggering the commencement of removal proceedings was not a command, but a request).
4. *See Id.*
5. *See Matter of Melo*, 21 I&N Dec. 883, 886 (BIA 1997) (holding that distribution of drugs is a danger to the safety of persons).
6. Immigration and Nationality Act § 236.
7. *State v. Gaitan*, 209 N.J. 339, 37 A.3d 1089 (2012) (holding that *Padilla v. Kentucky* is not a new rule and denying retroactive application in New Jersey).

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Consequences of Marital Separation on Conditional Permanent Residency

The Intersection of Immigration Law and Family Law

by Edward Shulman

There exists a common error of assumption that once an immigrant is granted lawful residence (*i.e.*, obtains a 'green card') based upon marriage to a United States citizen or lawful permanent resident spouse, all probative inquiry ceases. In an effort to decrease the incidence of immigration-related marriage fraud, a systematic double-check review of marriage validity has been implemented in order to re-assess the *bona fides* of the relationship by initially making the new immigrant a conditional resident. Under Section 216 of the Immigration and Nationality Act (INA), immigrants who obtain their lawful permanent residence based on marriages are granted conditional resident status for only two years. Once the two-year period expires, the United States Department of Homeland Security (DHS) requires the conditional resident petition to remove the conditional status by proving the marriage is ongoing and supplying additional documentary evidence that the couple has established a veritable conjugal existence together. It also serves as an opportunity for DHS to re-confirm that their initial assessment of a 'good-faith' marriage and grant of a green card were rendered accurately.

To remove the conditional basis of the alien's permanent residence, the alien and the alien's spouse must file, within 90 days before the two-year anniversary of the grant of conditional residence, a joint petition, with DHS. If DHS deems the marriage was entered into in good faith, the conditions on the alien spouse's residency are removed.[1] There are also several ways that conditional resident status may be terminated. First, DHS may terminate an alien's conditional resident status before the expiration of the two-year conditional period if it determines the qualifying marriage is fraudulent, it was judicially annulled or terminated, or a fee or other consideration was arranged for the filing of the marriage petition.[2] Second, there may be a termination if the joint petition is not timely filed or the parties fail to appear for a scheduled interview before a DHS officer.[3] Finally, DHS may terminate the conditional status if, after adjudicating the joint petition, it is determined that the facts and information submitted are untrue.[4]

Proving a *Bona Fide* Marriage for Permanent Residency

The commitment of both parties to the marital relationship is to be considered when analyzing whether an alien entered into a qualifying marriage in good faith.[5] Most importantly,

for immigration purposes, a marriage is considered valid at inception if based on the following acceptable reasons: mutual love and affection, shared religious beliefs, a need for lifetime companionship, and/or a desire to raise children together. The parties must have intended at the time of the marriage to live together, and may not have entered into the relationship for the purposes of evading immigration laws or to falsely acquire immigration benefits.

In order to remove the conditions on a green card obtained through marriage, an I-751 petition must be filed with accompanying evidence of the validity of the marriage. Specifically, the evidentiary documentation should include, but not be limited to, the financial assets and liabilities of the parties; evidence of expenditures during the marriage; length of time the parties cohabited after the wedding; birth certificates of children born to the marriage; adoption paperwork as applicable; properly crafted affidavits from friends, family members, clergy, co-workers, employers, neighbors, landlords, and the like; pictures/photographs; joint credit card statements; titles to property showing joint ownership; utility bills in both names; driver's licenses showing the same address; and legal records (*e.g.*, copies of pre-nuptial agreements, wills, and powers of attorney).[6]

According to the Adjudicators Field Manual (AFM), a guide utilized by United States Citizenship and Immigration Services (USCIS) officers to make determinations on immigration cases, there are several factors that could flag a case for potential marriage fraud.[7] Some of these factors include: the inability of the spouses to speak each other's language, a large disparity in age, friends and/or family unaware of the marriage, if the beneficiary is a friend of the family, if the petitioner has filed previous petitions on behalf of other aliens, and if there has been no co-habitation between the spouses. The skill of an effective immigration lawyer is to analyze potential red flags and assist the clients in providing evidence and affidavits to explain mitigating circumstances, as long as the marriage was indeed entered into in good faith and for appropriate conjugal reasons.

Challenges for Same-Sex Marriage Cases

It is important for practitioners to be sensitive to the fact that same-sex couples are often unable to provide certain probative evidence that is commonly included in I-751 petitions submitted by opposite-sex couples. In particular, certain lesbian, gay, bisexual and transgender (LGBT) individuals choose not to disclose their sexual orientation and/or same-sex marriages to friends, family, landlords, colleagues, and/or employers for a number of reasons, including, but not limited to, fears of social, economic, familial, and personal repercussions. Similarly, out of a fear of potential discrimination or provocation, some couples avoid listing their same-sex spouse on a lease or mortgage, or wittingly refrain from adding a same-sex spouse to an employer-sponsored benefits package, insurance policy, or retirement plan. As such, it may not be possible to obtain affidavits and proofs that are traditionally submitted by heterosexual couples in the I-751 petition. In these situations, it is critically important that the same-sex marital couple be advised of alternative types of documentation that may be utilized to demonstrate the *bona fide* nature of their marriage. This would include such evidence as: communication between the couple (*e.g.*, emails, text messages and greeting cards), evidence of the couple belonging to the same gym and/or social organization, and documentation of shared experiences (*e.g.*, travel receipts, airline tickets, hotel reservations and passports stamps).

Another equally challenging issue that arises when trying to prove the validity of a same-sex marriage, for the purposes of removing the conditions on a green card, is the conduct after the marriage. The credibility and *bona fides* of a gay marriage have been called into question when, following the termination of the marriage, either or both of the spouses subsequently engages in a heterosexual relationship. Once again, these circumstances necessitate sensitivity on the part of the practitioner, in addition to the adoption of a pro-active advocacy approach in which adjudicators are made to understand the complexity of sexual orientation wherein there is tremendous diversity among individuals who may be bisexual, sexually fluid, or sexually questioning. This includes educating immigration officers that if individuals engaged in heterosexual relationships before and/or after their same-sex marriage, it should not automatically invalidate the marriage's legitimacy and initial good faith intent.

What Happens When a Couple Separates During the Conditional Period?

It is not uncommon for practitioners to encounter conditional permanent residents who separate from their spouses during the two-year period. If the marriage has not terminated and no abuse has been alleged, the parties, even though not living together, are still required to file a joint petition to remove the conditions. When a couple separates, there is a tendency to discard bills, correspondence, pictures and other documentation that would prove to DHS that the marriage was entered into in good faith. In the absence of providing compelling proofs, the substitution of a descriptive affidavit, preferably written by both spouses, is deemed acceptable. Importantly, the corresponding affidavits should explicate in historical temporal detail the nature and course of

the marital relationship, beginning with the courtship period and concluding with specific explanations of how and why the marital relationship dissolved.

Immigration officers understand that *bona fide* marriages can collapse, that there are multiple reasons for marital breakdown, and that separation is a common result of ongoing matrimonial issues. Problems occur when couples try to conceal the fact that they have experienced relational discord and/or have been separated. Should DHS request a formal interview, and if both parties attend, as long as the spouses tell the truth about their courtship, marriage and reasons for separation, bolstered by documentary evidence, the conditions most likely will be removed and the petitioner will be granted permanent residency.

Collaboration Between the Immigration Lawyer and the Family Law Practitioner

The parting of couples is usually not amicable, and that is the time when the immigration lawyer and the family law practitioner should necessarily confer. As is commonplace, numerous issues may be alleged by either party in divorce proceedings that may adversely impact a client's immigration status.

In New Jersey, when drafting a complaint for divorce, the party can state a no-fault divorce ground or a fault divorce ground. The no-fault ground requires that either the parties have been living separate and apart for 18 consecutive months, indicating there is no reasonable prospect of reconciliation,[8] or irreconcilable differences exist that have caused a breakdown of the marriage for six or more months. There is no separation requirement for irreconcilable differences, meaning that two people can file for divorce under this cause of action if they still live together.[9]

The fault ground must show any of the following:[10]

- Extreme mental or physical cruelty
- Adultery
- Desertion
- Constructive desertion
- Habitual drunkenness or drug habituation
- Imprisonment
- Institutionalism
- Deviant sexual behavior
- Divorce from bed and board

Immigration and family law practitioners need to work closely together when either drafting or answering the divorce complaint. For example, if conditional residents file a no-fault divorce ground indicating they have been living apart from their spouse for 18 months preceding the filing of the divorce complaint, and a review of their status shows they were granted their conditional residence 12 months earlier, then DHS will allege marriage fraud.

Aside from divorces, conditional permanent residents may have their marriage ended by an annulment in New Jersey under any of the following grounds:[11]

- Both parties were under age 18 at the time of marriage and since turning 18 both parties did not have sexual relations; or
- Due to a mental condition or intoxication, both parties were unable to comprehend that they were marrying; or
- Fraud, or lies, by either party that induced the other to marry; or
- Either party only married because of severe threats; or
- Incurable impotence by either party at the time of the marriage; or
- The marriage was illegal because either party are too closely related; or
- Bigamy

Also compelling are the cases where the dissolution of the relationship has been met with vitriol and contention. It is not uncommon for a jilted United States citizen, in an act of revenge, to allege that his or her immigrant spouse only entered into the marriage for the purposes of obtaining permanent residence. The United States citizen will often file for an annulment and allege fraud. Once again, the collegial collaboration with the family law practitioner will be critical. The family law practitioner would need to contest this charge by proving the marriage was entered into in good faith. Should a judge render a finding in superior court that the marriage was entered into in bad faith, and order that the marriage be annulled, then DHS will give that decision full faith and credit. Obviously, the opposite also holds true. Should the superior court judge find that the marriage was not entered into for nefarious reasons, then that holding may be utilized by the conditional resident as part of his or her proofs when presenting the case to DHS.

Discretionary Waivers

If an alien fails to meet the joint petition requirements, the alien may file a petition that includes a discretionary waiver.[12] An alien applying for a discretionary waiver must demonstrate that: 1) 'extreme hardship' will result if the alien were deported; 2) the qualifying marriage was entered into in good faith, but the marriage has been terminated, other than by death, and the alien was not at fault in failing to meet the joint petition and interview requirements; or 3) the qualifying marriage was entered into in good faith by the alien spouse, during the marriage the alien spouse was battered or subjected to extreme cruelty, and the alien was not at fault in failing to meet the joint petition and interview requirements.[13]

In cases where the conditional resident has experienced physical abuse or mental cruelty at the hands of their spouse, they are protected under the law and, as long as they can affirmatively

prove that abuse was endured during the course of their otherwise good-faith marriage, their petition for permanent residency will be granted. Here again, the intersection of immigration law and family law will be critically important. For example, where a client may be advised for expediency or psychological purposes to petition for a no-fault divorce or to cite benign factors such as irreconcilable differences, it will be important for the family law practitioner to encourage his or her immigrant client to instead file for an affirmative fault divorce, citing cruelty or domestic violence in the grounds for divorce. With a superior court judgment highlighting abuse/cruelty in the divorce decree, it will add another layer of critically important probative data to be utilized in the plethora of proofs needed by the immigration lawyer to assist the conditional resident with his or her discretionary waiver to remove the conditions of their green card.

Notably, the information procured from the client, in terms of affidavits, photographs, testimonial/witness information, psychological evaluations, and police reports may be shared by both the immigration lawyer and the family law practitioner, in order to bolster both the case for divorce and the petition to remove the conditions on the green card.

Conclusion

One of the most common ways an immigrant may obtain a green card is through marriage to a United States citizen or a lawful permanent resident. Due to a prevalence of immigration-related fraud, these marriages are scrutinized by USCIS to ensure they are genuine. Indeed, a systematic double-check review of marriage validity has been implemented wherein the new immigrant will first receive a conditional green card for two years. When the two-year period expires, the conditional resident must petition, via an I-751 application for permanent residency, by proving that the marriage is ongoing and by supplying additional documentary evidence that the couple has established a veritable conjugal existence together.

Immigration law practitioners must be sensitive to the fact that same-sex couples are often unable to provide certain probative evidence that is commonly included in I-751 petitions submitted by opposite-sex couples, necessitating that they: 1) explore alternative types of documentation with their same-sex couples; and 2) ensure that government adjudicators do not engage in any discriminatory practices while scrutinizing the *bona fides* of the same-sex marriage case (*i.e.*, invalidating a marriage's legitimacy due to bisexuality or pre- or post-marriage heterosexual relationships).

It is not uncommon for immigration practitioners to confront situations where, during the conditional period, the couple's marriage dissolves. When the separation is amicable, as long as the couple can prove they entered into the marriage in good faith and for valid reasons, agrees to file a joint petition to remove the conditions, and is truthful about the issues they confronted in their marriage, there is a high probability that the I-751 petition will be approved and the conditional resident will receive permanent residency status. Issues arise when the separation is emotionally charged and contentious. In these cases, collegial collaboration between the immigration lawyer and the family law practitioner is critically important. In particular, they will need to work closely together when either drafting or answering the divorce or annulment complaint to ensure there are no negative immigration consequences to the conditional resident. ⚖

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ENDNOTES

1. INA 216(c)(1); 8 C.F.R. 1216.4.
2. INA 216(b)(1); 8 C.F.R. 1216.3(a); *see also Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991).
3. INA 216(c)(2)(A); 8 C.F.R. 1216.4(a)(6).
4. INA 216(c)(3)(C); 8 C.F.R. 1216.4(c).
5. 8 C.F.R. 1216.5(e)(2).
6. *See id.; Matter of Patel*, 19 I&N Dec. 774, 784 (BIA 1988); *Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975).
7. Adjudicators Field Manual, Section 21.3.
8. N.J.S.A. 2A:34-2(d).
9. N.J.S.A. 2A:34-2(i).
10. N.J.S.A. 2A:34-2.
11. N.J.S.A. §2A:34-1.
12. INA 216(c)(4); 8 C.F.R. 1216.5; *see also Matter of Tee*, 20 I&N Dec. 949, 951-952 (BIA 1995); *Matter of Anderson*, 20 I&N Dec. 888 (BIA 1994); *Matter of Balsillie*, 20 I&N Dec. 486 (BIA 1992).
13. INA 216(c)(4); 8 C.F.R. 1216.5(a)(i)-(iii).

How the Sins of the Father Can Affect a Child's Claim to U.S. Citizenship

by Susan Roy

According to William Shakespeare, "the sins of the father" (but apparently not necessarily the mother) "are to be laid upon the children."[1] Nowhere in the law is this more evident than when considering whether the child of unwed parents is or is not a U.S. citizen. Under the current law, for the child of unwed parents the requirements for acquiring citizenship through a U.S. citizen mother are significantly less stringent than if the father is the U.S. citizen. And the U.S. Supreme Court is set to decide whether, in this day and age, this discrepancy is still constitutional.

Determining whether or not someone is a U.S. citizen can be complex—and extremely controversial. For years people have debated whether or not President Barack Obama is a U.S. citizen—as recently as during the 2016 presidential debates. Such questions have also been raised about John McCain, Ted Cruz, Barry Goldwater, and thousands of people less famous who have equally convoluted claims to U.S. citizenship.

Birthright Citizenship—Location, Location, Location

The citizenship clause of the 14th Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[2] Although this language appears clear enough on its face, the meaning behind the amendment is one of the most litigated provisions of the Constitution.

Most people are U.S. citizens through what is known as birthright citizenship: They are born in one of the 50 states, after statehood has been established.[3] Thus, with rare exception, someone born in New Jersey (which became a state in 1787), who has a valid birth certificate, can easily establish that he or she is a U.S. citizen, regardless of whether his or her

parents are U.S. citizens themselves. Birthright citizenship is based on the person's physical location when born, not who the parents are. The issue becomes more complicated when the location where the person was born has not yet become a state. For instance, one of the reasons behind the claim that President Obama was not a citizen was because it was questioned whether, when he was born, Hawaii was a state. In fact, Hawaii was granted statehood on Aug. 21, 1959, and President Obama was born on Aug. 4, 1961, so he was born in the *state* of Hawaii, and, thus, in the United States.

The issue becomes even more complicated if the person was born in a U.S. territory or protectorate. By law, those born in Puerto Rico, the Virgin Islands, Guam and the Northern Marianas are entitled to birthright citizenship.[4] No such luck for those born in American Samoa, despite its also being a U.S. territory. This obvious discrepancy has been validated by the U.S. Supreme Court, which, in June 2016, denied *certiorari* on a case that sought to challenge this difference.[5]

But the citizenship inquiry does not end with the question of whether or not an individual was born in the United States, because many people who are deemed to be citizens are clearly born outside the U.S. If the person's parents are U.S. citizens, then it is often the case that their child is a U.S. citizen as well, depending on where the U.S. parent(s) lived before and after the child's birth.

The Parents' Location Matters Too—Especially if They are Not Married

Even if a child is born outside the U.S., citizenship can be *acquired* at birth through one's parents, so long as one parent is a U.S. citizen and resides in the United States or one of its possessions. Under the current incarnation of the Immigration and Nationality Act, if a U.S. citizen parent and an alien parent are married at the time of the child's birth, the child may acquire citizenship provided the U.S. citizen parent was physically present in the United States (or a possession) for at least five years prior to the child's birth. However, two of those years' presence in the United States must have been after the citizen *parent's* 14th birthday.[6]

Somewhat ironically, it is often easier for a child to acquire U.S. citizenship through a U.S. citizen parent if she is not married to the alien father. In order to acquire citizenship as the child of an unwed U.S. citizen mother, three requirements need to be met: The child was born after Dec. 23, 1952; the child's mother was a U.S. citizen at the time of the child's birth; and the child's U.S. citizen mother was physically present in the United States or an outlying possession for one continuous year (at any age) prior to the child's birth.[7]

Not so if the individual's parents are not married and the father is the U.S. citizen. A myriad of requirements must be met before that U.S. citizen father can confer citizenship on his child. The father must have been physically present in the United States for at least five consecutive years before his child's birth, and two of those years must have occurred after the father's 14th birthday. For children born before Nov. 14, 1986, the physical location requirements for the U.S. citizen father are even more stringent: An unwed citizen father can transmit citizenship at birth only if he was present in the United States or one of its outlying possessions for at least 10 years, before his child's birth, with at least five of those years occurring after the father's 14th birthday.[8]

In addition to the above, the following requirements must also be met: A blood relationship must be established between the father and child; the father must consent in writing to financially supporting the child until his or her 18th birthday; and before that same birthday, the father must have legitimated his child, acknowledged paternity, or paternity must have been established by a court.[9]

Why are the Rules Different for Mothers and Fathers?

The statutory distinction between those persons born out of wedlock to citizen mothers and those born to citizen fathers has long withstood constitutional scrutiny. In 1998, the Supreme Court, in considering the situation of a child born to a Filipino mother and a U.S. citizen father who was in the military and had been stationed in the Philippines, who never married the mother, was not present in the Philippines when his daughter was born, and never returned to the Philippines, found that the different treatment of unwed citizen mothers and unwed citizen fathers was "eminently reasonable" and "justified by important Government interests."[10] The Court reasoned that fathers and mothers are differently situated, because a child's biological relationship to the mother is "obvious," she is aware of the child's existence from birth, and normally has immediate custody of the child. Conversely, a father may not be aware of the child's existence, much less have any sort of relationship with the child.

The Court noted the U.S. government has legitimate interests in ensuring that the purported child of a U.S. citizen actually shares a blood relationship with the parent; that the parent and child share a healthy emotional relationship while the child is still a minor; and that the child has adequate ties to the U.S. The Court also noted that to ensure these legitimate governmental interests are met, it is constitutional to require additional safeguards when the unwed father is transferring U.S. citizenship to his child. Because, reasoned the Court, biological differences between men and women, rather than gender-

based stereotyping, are behind the disparate treatment of citizen fathers and mothers, the Court applied the rational basis standard, rather than heightened scrutiny usually employed by the courts when considering gender-discrimination constitutional claims.[11]

In 2001, the Supreme Court again upheld distinctions between unwed mothers and fathers, this time regarding the proof of paternity provisions that are applicable to the unwed father.[12] The Court found the paternity obligations were "minimal," whereas the governmental interests remained "important objectives." The discrepancy was related to the significant difference between mothers' and fathers' respective relationships to the child at the time of birth. The Court found the governmental interests of assuring the existence of both a biological parent-child relationship and an emotional, day-to-day connection—which would theoretically lead to a connection to the U.S.—were valid. The Court found the father may choose the least onerous of three options: legitimation under the laws of the child's domicile; a written acknowledgment of paternity under oath; or obtaining a court order of paternity. Assuming, without actually holding, that the heightened scrutiny standard should apply, the Court nonetheless found the governmental interests were important enough to justify the disparate treatment between unwed fathers and mothers, and did not violate the equal protection clause of the Fifth Amendment of the Constitution.[13]

Finally, in 2011, the specific issue of whether the more stringent residency requirements for unwed fathers was also justified reached the Supreme Court. The Ninth Circuit had applied the heightened scrutiny test, and upheld the more stringent U.S. residency requirements placed on the father. The government added an additional interest—the importance of avoiding statelessness for the child of unwed mothers who reside in countries that determine citizenship based solely on the citizenship of the mother, rather than the physical location of the child's birth. This point, argued the government, justified relaxing the residency requirements for unwed U.S. citizen mothers. The Ninth Circuit found this to be a valid, important governmental interest.[14] The Supreme Court upheld this finding in a short, unsigned, *per curiam* opinion, which was also a 4-4 split, with Justice Elena Kagan recusing herself from the case.[15]

Circuit Split on Issue of Parental Residency Requirements

In 2015, in a case where the citizen father lacked the requisite U.S. residency requirement by 20 days, the Second Circuit considered the same issue and arrived at the opposite result. Because the child was born in 1962, the statute in effect required that his father have 10 years of physical presence in the U.S., five years of which had to be after the father's 14th birthday.

Applying the heightened scrutiny standard, the Second Circuit held that this disparate treatment based on gender violated the equal protection clause.

According to the court:

> Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives....The justification for the challenged classification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[16]

The Second Circuit ruled that the one-year U.S. residency requirement should apply to both women and men. While the court recognized there is a legitimate difference between the way men and women establish a biological parent-child relationship, it found the more onerous physical presence requirement placed on unwed fathers did not guarantee such a relationship, nor did the increased residency requirement ensure that the father and child have developed such a relationship that stronger ties to the U.S. would necessarily result.

The Supreme Court accepted *certiorari*, and heard oral arguments in this matter on Nov. 9, 2016.[17] The central question presented was whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children violates the equal protection clause. The government stressed two issues: ensuring that U.S. citizens have sufficient ties to the U.S. and, to a lesser extent, avoiding a situation whereby children of U.S. citizen mothers are rendered stateless.[18] Several justices questioned the premise behind the government's position, and Justice Kagan queried why the government's objectives couldn't be met just as well by gender-neutral language.[19] Justice Stephen Breyer echoed the language of several of the *amicus curiae* briefs by asking why the issue of statelessness is potentially more of a problem for children of unwed mothers than unwed fathers.[20] Assuming the statute does violate the equal protection clause, many of the justices also expressed concern over what the remedy should be, with Justice Samuel Alito pointing out that if the requirements are "leveled up" for children of both unwed U.S. citizen mothers and fathers, then the requirements would be more stringent for children of married parents than unmarried parents.[21]

As of the date that this article went to press, the Court has not yet issued a

decision. The current eight-member, divided Court may decide to continue to follow precedent, or simply issue a short *per curiam* decision that does not resolve the circuit split. Or, as Justice Kagan suggested, the Court may hold the decision in abeyance to give Congress the opportunity to amend the statute, if it wishes.[22] In the alternative, the Court may decide that the governmental interests no longer justify the gender-disparate treatment of fathers and mothers and, therefore, the requirement for both should be the same. In doing so, they may decide to relax, the requirements for unwed fathers—or increase them for unwed mothers. Regardless, the decision will have far-reaching implications for those whose claim to citizenship rests on the actions of their parents, made years before they themselves were ever born. ⚖

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ENDNOTES

1. William Shakespeare, *The Merchant of Venice.*
2. U.S. Const. amend. XIV, § 1.
3. 8 U.S.C. § 1401(a)(c).
4. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (persons born in territories "incorporated into" the United States are U.S. citizens at birth).
5. *Tuaua v. United States*, 951 F. Supp. 2d 88, 94 (D.D.C. 2013), *cert. denied,* Feb. 1, 2016 (No. 15-981).
6. 8 U.S.C. § 1401(g).
7. 8 U.S.C. § 1409(c).
8. 8 U.S.C. §§ 1401, 1409 (1952).
9. 8 U.S.C. 1409(a).
10. *Miller v. Albright*, 523 U.S. 420 (1998).
11. *Id.*
12. *Nguyen v. INS*, 533 U.S. 53 (2001), 8 U.S.C. § 1409(a)(4).
13. U.S. Const. amend. XIV, V; *Nguyen v. INS*, *supra*.
14. *U.S. v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008).
15. *Flores-Villar v. United States*, 564 U.S. 210 (2011).
16. *Morales-Santana v. Lynch*, 804 F.3d 520 (2015).
17. *Lynch v. Morales-Santana*, Docket No. 15-1191.
18. Transcript of oral argument, www.SupremeCourt.gov/oral_arguments/argument_transcripts/2016/15-1191_6k47.pdf.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

What the DACA2 and DAPA Programs Say About Executive Immigration Reforms Moving Forward

by George Tenreiro

Consistent with previous executive actions, President Barack Obama used or tried to use his executive power in several ways to afford undocumented individuals temporary deportation relief through deferred action (*i.e.*, a well-established discretionary policy used by many presidents to forgo deportation of a removable individual without legalizing that individual). President Obama's most robust use of executive power in the immigration context involved his expansion of deferred action for childhood arrivals (DACA2) and the introduction of deferred action for parents of Americans and lawful permanent residents (DAPA).[1] But the foregoing DACA2 and DAPA programs never materialized; they were immediately met with resistance and embroiled in litigation, culminating with one prominent legal battle in the U.S. Supreme Court. Now, Donald Trump's presidency may signal the end for the DACA2 and DAPA programs since, in the same way President Obama implemented immigration reform through executive action without Congress his successor can just as easily reverse those executive directives without Congress.[2] And he can do this while using the very same executive power to implement his own brand of immigration reform.[3]

It appears the remaining lesson to be gleaned from the battle-worn and now seemingly doomed DACA2 and DAPA programs, therefore, is to conclude that immigration reforms by executive action—once accorded broad discretion and even almost unfettered deference—now can be blocked through effective legal challenges.

What is Executive Action?

Presidents exercise executive power by issuing executive orders or directives that are legally binding to facilitate the management of the executive branch, as well as operations of the federal government. There are two sources of support for executive power. First, although the Constitution does not address executive orders, it does refer to "executive power,"[4] and this reference is generally understood to grant presidents "the general administrative control of those executing the [federal] laws...."[5] Second, executive power is delegated to presidents by Congress through implied or express statutory authority.[6]

Presidents have exercised executive power in diverse and wide-ranging ways. For example, President George Washington is credited with a form of executive action when he issued a proclamation on Oct. 3, 1789, encouraging individuals "to recognize Thursday, November 26, 1789, as the day of thanksgiving."[7] Most, if not all, presidents have issued some form of directive regarding foreign policy, including military orders. And Congress has explicitly delegated executive power by statute to the president "to establish national immigration enforcement policies and priorities."[8] Although executive power is subject to judicial review, the president generally has broad discretion to exercise his or her executive role pursuant to constitutional or statutorily delegated powers.

In sum, executive power is the very operation of the federal government and all of its express, implied, or delegated duties and responsibilities, which includes, among many other things, the implementation of complicated immigration and other legislation passed by Congress.

Prior Presidents' Use of Executive Action in an Immigration Context

Immigration law is a byzantine patchwork of many separate but inter-connected statutes that span the nation's long history, which address different immigration needs and issues. Congress has extended the executive branch broad authority to ensure that the executive can reasonably, efficiently, and fairly implement the many moving pieces of the immigration system. This authority extends by statute to "national immigra-

tion enforcement policies and priorities" with respect to the millions of undocumented immigrants in the country.[9] This is why presidents have a long history of using executive power to implement programs that apply 'deferred action' to law-abiding individuals, while devoting limited resources to target criminals for removal, especially if the policies furthered family unification.

"Since at least 1956, every U.S. president has granted temporary immigration relief to one or more groups in need of assistance" based upon the historical political contexts of their time.[10] For example, President Dwight D. Eisenhower used his executive power to afford immigration relief to eligible Hungarians, Cubans, and Chinese individuals. President Gerald Ford used the same executive power to temporarily defer deportation and provide eligibility for employment authorization to Lebanese individuals meeting certain criteria. President Ronald Reagan followed President Jimmy Carter by extending the same type of temporary protection to eligible Ethiopians, and later extended a form of deferred action with access to employment authorization to qualifying Poles and Nicaraguans. President George H. W. Bush applied a slightly different version of deferred action, but also with access to employment authorization, to qualifying Chinese nationals.

Perhaps the best parallel to DACA2 and DAPA occurred in Oct. 1987, when President Reagan used deferred action to protect minor children of newly legalized immigrants under the Immigration Reform and Control Act (IRCA).[11] More specifically, President Reagan protected these minor children from being deported under the "family fairness" executive action, despite acknowledging the "clear" congressional intent not to protect these minor children under IRCA.[12] On Feb. 2, 1990, President George H. W. Bush expanded President Reagan's family fairness policy by extending deferred action to eligible *spouses* and minors of legalized immigrants under IRCA.[13] These spouses also were eligible for employment authorization based upon a statute that indicated the executive could "authorize" employment.[14]

The family fairness actions by Reagan and Bush were taken expressly to provide temporary immigration relief, because Congress had failed to act to protect particular individuals.[15] And these executive actions did, in fact, later result in legislative immigration reform.[16]

The Origins of DACA2 and DAPA, and How They Were Blocked

On Nov. 20, 2014, President Obama, building off of an earlier (and never challenged) DACA initiative in 2012, announced a series of administrative reforms by executive action pursuant to his immigration accountability executive action (IAEA).[17] The IAEA used executive power to "crack down on illegal immigration at the border, prioritize deporting felons not families," and, by way of DACA2 and DAPA, "*require certain undocumented immigrants to pass a criminal background check and pay their fair share of taxes as they register to temporarily stay in the U.S. without fear of deportation.*"[18] President Obama argued that the IAEA, like earlier reforms, allowed the executive branch to best use limited financial and other resources to manage the "immigration enforcement policies and priorities" in an effort to minimize security threats through deportation and bolster family unification of individuals who posed no such security threats.[19]

Through DACA2 and DAPA, President Obama sought to provide temporary deferred action relief for three years to an estimated 3,900,000 undocumented individuals who arrived in the U.S. before turning 16 (DACA2), or were parents of U.S. citizens or lawful permanent residents living in the United States for at least five years (DAPA).[20] Because DACA2 and DAPA provided temporary deferred action, they also provided employment eligibility based upon a distinct and never before challenged regulation that afforded employment eligibility to any individual "who has been granted deferred action."[21] Like the successful family fairness action, President Obama saw DACA2 and DAPA as temporary measures until the advent of legislative immigration reform. It was hoped that DACA2 and DAPA, together with earlier executive immigration reforms, would persuade deserving undocumented immigrants "to come out of the shadows so they can pay their taxes and play by the same rules as everyone else."[22]

Notwithstanding the precedent discussed above, almost immediately DACA2 and DAPA faced strong opposition in several ways. Foremost, Texas and 16 other states filed suit in federal court arguing that President Obama had acted unlawfully, because DACA2 and DAPA were effectively new laws as opposed to measures that implemented existing laws enacted by Congress, and, thus, violated the separation of powers between the legislative and executive branches.[23]

Without getting mired in the many details of the procedural and substantive legal issues that followed, President Obama's administration lost at the trial level on procedural grounds, when a federal district judge in Texas granted preliminary injunctive relief to block DACA2 and DAPA from moving forward.[24] DACA2 and DAPA then languished awaiting legal resolution, which never came. The Fifth Circuit ultimately upheld the lower court's ruling in a two-to-one decision.[25] Then, on June 23, 2016, the current eight-member U.S. Supreme Court deadlocked without opinion,[26] establishing no precedent but

leaving DACA2 and DAPA on life support, but nonetheless alive.[27]

Conclusion

Any subsequent measures to save DACA2 and DAPA, however, are likely to be rendered moot as a result of the Nov. 2016 election. All signs indicate the Trump administration will be quick to dispose of DACA2 and DAPA. Like President Obama and his many predecessors, President Trump is also likely to rely upon executive action to advance his own programs in the immigration context. Of course, the protracted and mired litigation that defined DACA2 and DAPA from their very beginnings shows, if nothing else, that any future use of executive power also can be blocked, if not altogether doomed. This is because opponents of executive immigration reforms—once hampered by longstanding precedent and practice—now have a judicial roadmap to make their voices heard. ⚖

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ENDNOTES

1. Jeh Charles Johnson, Sec., U.S. Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (the "Memorandum"), at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.
2. To be clear, the Trump administration can only unilaterally undo prior executive orders, and, of course, this does not mean altering pre-existing legislation unless joined by Congress.
3. For example, reports have emerged that President Trump intends to use executive power to create a registry of Muslim immigrants.
4. "The executive power shall be vested in a President of the United States of America." U.S. Constitution, Art. II, § 1, cl. 1.
5. *E.g.*, *Myers v. United States*, 272 U.S. 52, 163-64 (1926).
6. John Contrubis, Executive Orders and Proclamations, CRS Report for Congress #95-722A, March 9, 1999, pp. 1-2.
7. Todd F. Gaziano, Heritage Foundation, The Use and Abuse of Executive Orders and Other Presidential Directives (Feb. 21, 2001), at p. 3.
8. 6 U.S.C. § 1103(a)(3).
9. *See* Press Release, The White House, Office of the Press Secretary, FACT SHEET: Immigration Accountability Executive Action (Nov. 20, 2014), at https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.
10. American Immigration Council, Executive Grants of Temporary Immigration Relief, 1956-Present (Oct. 2014), at p. 1, at http://www.americanimmigrationcouncil.org/sites/default/files/research/executive_grants_of_temporary_immigration_relief_1956-present_final_0.pdf.
11. IRCA, Pub. L. 99-603, 100 Stat. 3445 (Nov. 6, 1986).
12. Alan C. Nelson, Comm'r, U.S. Immigration and Naturalization Service, Legalization and Family Fairness—An Analysis (Oct. 21, 1987), *reprinted as* 64 No. 41 Interpreter Releases 1191, at 1200.
13. Gene McNary, Comm'r, U.S. Immigration and Naturalization Service, Family Fairness: Guidelines for Voluntary Departure under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990), *reprinted as* 67 No. 6 Interpreter Releases 153.
14. *See* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to employment as an individual who is not a lawful permanent resident or "authorized to be…employed by" the Executive Branch). The scope of the Executive's authority to extend employment eligibility became a hotly debated issue regarding DACA2 and DAPA notwithstanding that earlier Fifth Circuit precedent indicated that authority pursuant to § 1324a(h)(3) was "permissive" and largely "unfettered." *See Perales v. Casillas*, 903 F.2d 1043, 1048-50 (5th Cir. 1990).
15. *See* American Immigration Council, Reagan-Bush Family Fairness: A Chronological History (Dec. 2014), at p. 1.
16. *Id*. at p. 6 ("Congress' 'Family Unity' provisions supersede the executive 'Family Fairness' policy, as of Oct. 1, 1991.") (citation omitted).
17. Press Release, The White House, Office of the Press Secretary, FACT SHEET: Immigration Accountability Executive Action (Nov. 20, 2014), at https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.
18. *Id*. at 1 (emphasis added).
19. *Id*.
20. *See supra* Memorandum at n.1; *see also* Drew Desilver, Pew Research Center, Executive actions on immigration have long history (Nov. 21, 2014), at http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/.
21. C.F.R. § 274a.12(c)(14). This regulation is rooted in 8 U.S.C. § 1324a(h)(3). *See supra* note 14 and accompanying text.
22. *See* Press Release, The White House, Office of the Press Secretary, FACT SHEET: Fixing Our Broken Immigration System So Everyone Plays by the Rules (Jan. 29, 2013), at https://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules.
23. *Texas et al. v. United States, et al*., No. 14-cv-254, 86 F. Supp. 3d 591, 607-08 (S.D. Tex. Feb. 16, 2015).
24. *Id*.
25. *Texas et al. v. United States, et al*., No. 15-40238, 809 F.3d 134 (5th Cir. 2015).
26. *United States v. Texas*, No. 15-674, 136 S. Ct. 2271 (2016).
27. For example, new legal challenges recently surfaced that sought to limit the Fifth Circuit's decision to the states within its jurisdiction as opposed to having it extend to all states.

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