The 2018 Annual AILA New England Chapter Advanced Immigration Law Conference is designed to provide accurate and authoritative information with regard to U.S. immigration law. It is distributed with the understanding that this publication, these presentation materials, and any related information are not a substitute for legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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PREFACE

Welcome to the 15th Annual AILA New England Immigration Law Conference entitled, Keeping America a Nation of Immigrants: Advanced Strategies in the Age of Trump. We hope you will enjoy the presentations and material and come away from the conference with a lot of useful information and insights.

With the Trump presidential administration well underway and immigration continuing to be a topic in the news daily, now more than ever, immigration practitioners need to utilize collective energy, experience, and expertise to navigate the future of U.S. immigration law and practice.

Through the AILA NE Annual Conference series, we are able to present some of the finest local and national speakers on topics that are both relevant and timely as well as original practice pointer articles by our esteemed presenters. As in the past years, we have continued several panels which cover topics that are important to all immigration practitioners, including interagency government updates via the panels entitled: "Perspectives in a Changing Landscape" and "It's Just Another Brick in the Wall— Current Admission Issues at Ports."

We have been honored to work with a wonderful group of fellow practitioners who took significant time out of their lives and practices to write and present valuable material. And this conference, as always, would never happen without the great efforts of an extremely dedicated group of conference organizers and committee members. Thank you to Leslie DiTrani and Annelise Araujo, who led and spearheaded the efforts to continue to improve our AILA NE annual conference, and to the wonderful committee who made sure all the myriad details of such a large conference appear so seamless.

Thank you all.

And thank you to all readers; without your interest and support for this conference, none of this would happen. We welcome you to listen, to question, to network, and to enjoy.

Sara M. Mailander and Robin Nice
Editors
March 2018

ACKNOWLEDGMENTS

AILA New England Chapter would like to thank the following individuals, without whom this Conference would not have been possible:

Conference Co-Chairs

Leslie Ditrani and Annelise Araujo

Conference Committee

Emily Barron

Alex Peredo Carroll

John Cayer

Ashley Edens

Emily Amara Gordon

Rebecca Leavitt

Sara Mailander

Robin Nice

Elena Noureddine

Aubrey Robert-Ramirez

Kristina Rost

Sara Ward

Zoe Zhang-Louie

15th Annual AILA New England Immigration Law Conference

Friday, March 2, 2018

AILA Members, Conference Biographies

Early Morning Ethics Forum

Julio Cortes del Olmo

Attorney Julio Cortes del Olmo is a Boston immigration attorney and the principal immigration attorney at Del Olmo law. Attorney del Olmo is a naturalized U.S. citizen who earned a Master of Law from Boston College Law School. A native Spanish speaker, he holds a dual degree in law and business administration from Carlos III University in Madrid, Spain. Attorney del Olmo gained extensive international experience working for over 5 years as a Senior Legal Advisor for the European Commission in Spain. He was also a law clerk to the Honorable William G. Young, one of the most respected federal judges at the Boston Federal Court in Massachusetts. After his clerkship, Attorney del Olmo started practicing immigration law as Of Counsel to the Law Office of Erinna D. Brodsky, where he acquired experience working in a range of complex family, naturalization, and business immigration cases. Attorney del Olmo is fully committed to offering pro bono legal representation to deserving individuals. He currently provides legal services and support to several public legal services organizations, including the PAIR Project, KIND, and Immigration Equality. Attorney del Olmo is a member of the Massachusetts State and Federal Bars, an active member of the American Immigration Lawyers Association (AILA), and since 2014, serves as one of the AILA New Members Division Liaisons.

Stacy A. L. Best has been a lawyer for more than 20 years. She is an assistant bar counsel in the Massachusetts Office of Bar Counsel, Board of Bar Overseers of the Supreme Judicial Court (BBO) for more than 10 years. At the Office of Bar Counsel, Attorney Best investigated alleged violations of the Rules of Professional Conduct, and litigates all stages of the disciplinary proceedings including all appeals. Ms. Best began her career as a staff attorney in the trial division of the Committee for Public Counsel Services (CPCS). She tried cases at the district and superior court levels representing indigent clients charged with felonies. Attorney Best is also a former clinical instructor at the Criminal Justice Institute at Harvard Law School. Several of her students obtained trial experience while under her direct supervision. Attorney Best is a regular faculty member of Harvard's Trial Advocacy Workshop, a three-week program taught by some of the best lawyers and judges around the country. Ms. Best is a "transplant" who moved from California to go to law school. She is a 1995 graduate of the Boston College School of Law.

Reid Trautz is the Director of the American Immigration Lawyers Association's Practice and Professionalism Center, where he provides ethics guidance and management advisory services to lawyers to help improve their businesses and the delivery of legal services to their clients. He is a nationally recognized advisor, author and presenter on practice issues, including business process improvement, law practice technology, and legal ethics. He is the co-author of *The Busy Lawyer's Guide to Success: Essential Tips to Power your Practice,* published by the ABA, and is

a frequent contributor to legal publications nationwide. Reid is an elected Fellow of the College of Law Practice Management, and was named to the Fastcase 50 list of global legal innovators in 2012.

Welcome & Introductions

Hot Topics for Dirty Immigration Lawyers:

Gregory Romanovsky started his legal education in Moscow, Russia in 1992, and received his U.S. law degree (J.D.) from Boston College Law School in 2000. He has practiced U.S. immigration law since that time. From 2009 to -2013, Greg served as Chair of the AILA New England Litigation Committee and pioneered "1st Things First" – a quarterly review of court cases affecting practitioners in the First Circuit. He now serves as Chair of AILA New England. A frequent speaker at immigration law conferences and workshops, Greg has been repeatedly named by Super Lawyers Magazine as a New England Super Lawyer in the field of immigration law.

Benjamin Johnson is currently the AILA National Executive Director and has held that position since January of 2016. Prior to that, he was the Executive Director of the American Immigration Council, where he started off as the founding Director of the Council's Immigration Policy Center in 2003. Mr. Johnson has written extensively on immigration law and policy, and has appeared on National Public Radio, Fox News, BBC World News, and other television and radio programs. In 1994, Mr. Johnson co-founded and served as the Legal Director of the Immigration Outreach Center in Phoenix, Arizona. In 1999, he joined the staff of the American Immigration Lawyers Association as Associate Director of Advocacy, where he worked with Congress, the Administration, and federal agencies on a wide variety of immigration-related issues. Prior to his work on immigration issues, he worked as a criminal and civil trial attorney in San Diego, California. Mr. Johnson is a graduate of the University of San Diego School of Law and studied international and comparative law at Kings College in London.

William A. Stock is an immigration lawyer from Philadelphia, PA, and the current President of AILA. He is a founding partner of Klasko Immigration Law Partners, LLP, where he leads the Corporate Immigration team from the firm's Philadelphia headquarters. With more than 23 years of experience practicing immigration law, Mr. Stock focuses his practice on employment-based immigration for some of the largest companies, health care systems, and universities in the country, as well as individual investors, researchers, and physicians. In addition, Mr. Stock also handles complex family based, citizenship, and naturalization matters, as well as defends clients in removal and Department of Labor enforcement proceedings. He has an impressive track record of litigating against the government in the federal courts to obtain immigration benefits unlawfully withheld. Long active in AILA on both national and local levels, Mr. Stock has served several terms on the association's Board of Governors and received the organization's Joseph Minsky Young Lawyer Award for outstanding accomplishments in immigration law in 2000. A frequent speaker and author on immigration law topics, Mr. Stock has taught immigration law at Villanova University Law School. He has served on the editorial board of Bender's Immigration Bulletin and was a senior editor of AILA's annual Immigration Practice Pointers.

Beth Werlin is the Executive Director of the American Immigration Council. She leads the Council's efforts to promote sensible and humane immigration policies and to achieve justice and fairness for all immigrants under the laws. She previously served as Policy Director from 2015-2016 and in a variety of positions on the Council's legal team from 2001 to 2015. Over her career, she has worked to protect the rights of noncitizens and to ensure that the immigration agencies are held accountable for violations of the law. She has represented plaintiffs and amicus curiae in immigration litigation in the federal courts and before the Board of Immigration Appeals and is the author of numerous practice advisories. She was a NAPIL (Equal Justice Works) fellow and before that was a judicial law clerk at the immigration court in Boston, Massachusetts. Beth earned her J.D. from Boston College Law School and her B.A. from Tufts University.

It's Just Another Brick in the Wall – Current Admission Issues at Ports:

Leslie A. Holman served as the President of AILA from 2014 to2015. She is the founder of Holman Immigration Law, a firm located in Burlington, Vermont and dedicated to the practice of immigration and nationality law. Ms. Holman is currently the Vice Chair of AILA's National CBP liaison committee and has previously served as chair of AILA's Admissions and Border Enforcement Committee, vice-chair of the National CBP Liaison Committee, and as a member of the National Interagency Committee. She continues to serve as liaison to the regional ports of entry for AILA's New England chapter. Ms. Holman is also a member of the Vermont State Advisory Committee to the U.S. Commission on Civil Rights and a member of the Programming Committee of the Flynn Center for the Performing Arts. In 2008, she was awarded the Sam Williamson Mentor Award for excellence in mentoring and counseling.

Danielle Rizzo is Senior Counsel at Harris Beach, PLLC in Buffalo, NY. She limits her practice to immigration law and focuses on employment-based immigration. She is currently serving as chair of AILA's national CBP Liaison Committee, and is a past Chair of the AILA Upstate NY Chapter and of the AILA national Publications Committee. Danielle frequently represents foreign traders and investors seeking work authorization in the United States, as well as Canadian citizens seeking entry to the U.S. under the North American Free Trade Agreement (NAFTA). She often meets with individual in person at the U.S.-Canadian border to represent them before U.S. Customs and Border Protection officers who are responsible for adjudicating their applications to the United States. She also represents U.S. companies and their foreign national workforce in navigating the visa and permanent residency application processes.

Ramon Curiel is a partner at Oliva, Saks, Garcia & Curiel LLP in San Antonio, Texas and has practiced immigration law for more than 17 years. He received his J.D. from Texas Tech University School of Law and an LL.M. in International Law from St. Mary's University. He has served as the AILA liaison for the San Antonio District Office of USCIS for eight years. He is currently a member of the AILA National CBP Liaison Committee, the chair for the CBP Committee for the Latin American and Caribbean Chapter, member of the CBP/USCIS Committee for the Rome District Chapter, and the local CBP liaison for San Antonio. He is a past-chair of the International Law Section of the San Antonio Bar Association. He also served as a member of the Unauthorized Practice of Law Committee of the Supreme Court of Texas in

San Antonio. He practices exclusively immigration law focused on business related cases with an emphasis on professionals, entrepreneurs, and investors.

Break

Interagency Panel: Perspectives in a Changing Landscape:

Anthony Drago, Jr., Esq. is a sole practitioner with an office in Boston, MA. He is admitted to the bars in MA and NY and has been a member of AILA since 1996. Attorney Drago served as an elected Director on AILA's Board of Governors from June 2011 through May 2013, and was Chapter Chair of AILA NE from June 2009 through May 2010. He was previously Chair of the AILA national Liaison Committee for EOIR and has been Co-Chair of the AILA NE Chapter Liaison Committee for ICE, ERO for many years. He currently serves on the AILA national CBP Liaison Committee and is a regular speaker at AILA conferences.

Denis C. Riodan, District Director, District 1, U.S. Citizenship and Immigration Services

Bartholomew Cahill, Asst. Special Agent in Charge, Homeland Security Investigations

Todd J. Thurlow, Assistant Field Office Director, ICE, Enforcement and Removal Operations

Clint Lamm, Port Director, Customs and Border Protection

Michael Manning, Border Security Coordinator, Customs and Border Protection

Neil Algarin, Supervisory Officer, Customs and Border Protection

Lunch

Concurrent Workshop Tracks

TRACK ONE – Morris Auditorium – REMOVAL DEFENSE

Humanitarian Relief & Alternatives During the Trump Era:

Alexandra Peredo Carroll is a Pro Bono Coordinating Attorney at KIND's Boston Office. At KIND, Alex mentors and trains pro bono attorneys on issues regarding the presentation of unaccompanied children in removal proceedings. Prior to joining KIND, Alex ran a solo immigration practice in Cambridge, Massachusetts. From 2009 to 2010 she worked as an associate at an immigration firm in San Juan, Puerto Rico, handling mostly removal defense and family based-cases while managing the litigation side of the firm. Alex opened her office in Boston in 2011 and her practice evolved to focus on the representation of children in removal proceedings. Prior to her career in immigration law, Alex was a staff attorney at Massachusetts Advocates for Children. Alex is an active AILA member, serving as liaison for the Congressional, National Day of Action, and UPIL committees.

Nareg Kandilian founded his Watertown firm, Kandilian Law Offices, in November of 2011. His firm practices exclusively in immigration and naturalization law, with emphasis on family-based immigration law and removal (deportation) defense. Attorney Kandilian is an active member of the American Immigration Lawyers Association. He served as co-liaison to the ICE Enforcement and Removal Operations (ERO) for the AILA New England Chapter between 2012 and 2014. Prior to that, he served as co-liaison to the chapter's New Members division where he assisted in the organization of monthly chapter meetings and related events. Recently, he has been selected as a Super Lawyers Rising Star between 2013 and 2017, and he continues to present at local professional conferences.

Kira Gagarin is the owner of Gagarin Law, with offices in Framingham and Boston, Massachusetts. She received her J.D. from Suffolk University Law School and her LL.M in International Law from Instituto Superior de Derecho y Economia, in Madrid, Spain. Originally from Russia and having lived in Spain, Kira is fluent in Russian and Spanish and conversant in Portuguese. She opened her practice in January of 2011 and focuses on family immigration and deportation defense, specializing in defending children in removal proceedings. She is currently one of the AILA New England's liaisons to ICE ERO. She also volunteers with several local organizations to provide immigrants with pro bono representation.

De-ICE-ing Strategies: Federal Litigation for Inclement Times:

Stefanie Fisher is a partner at Araujo & Fisher, where she represents clients in family and employment-based immigration, as well as before consulates and in removal proceedings. She has served on AILA New England's Federal Litigation Committee since 2013 and has been the organization's Events/Meetings Coordinator since 2015. The most interesting thing she ever did before becoming a lawyer was to serve as an international election monitor in El Salvador. She is a graduate of Northeastern University School of Law.

Susan Church is a trial and appellate attorney focusing mainly on immigration law and criminal defense. After graduating from Suffolk Law School, she worked as a public defender at the New Hampshire Public Defenders Office in Nashua and Orford, New Hampshire. In November 2005, Attorney Church established her own firm, Demissie & Church, with her current partner, Attorney Derege Demissie. At Demissie & Church, Attorney Church advocated for immigrants with criminal convictions facing deportation and immigrants seeking immigration benefits in the United States. From 2012-2018 she has served as a Board member of the American Immigration Lawyers Association of New England, taking the title of Chair in 2016 to 2017. In 2017, Attorney Church successfully sued President Trump for his anti-immigrant travel and visa processing ban on Muslim immigrants from seven affected countries, obtaining a Temporary Restraining Order from the Federal District Court. She is also a frequent lecturer at Massachusetts Continuing Legal Education programs, American Immigration Lawyers Association of New England, and the Boston Bar Association and the Mass Bar Association. Attorney Church has also appeared as a guest commentator on national television and radio.

Kathleen Gillespie has been practicing immigration law since 2004. Earlier in her career, she worked as an associate at a law firm specializing in removal defense and post-conviction relief,

and later served as the interim supervising attorney at the Post-Deportation Human Rights Project at Boston College. Since 2007, Ms. Gillespie has been an independent consultant providing legal research and writing services to immigration and criminal practitioners. She also serves as a mentor attorney with the Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services.

Networking/Cookie Break

ICE, ICE, Baby: Pre- and Post-Removal:

Annelise Araujo is a founding partner of Araujo & Fisher, LLC in Boston, Massachusetts. A native of Rio de Janeiro, Brazil, Annelise represents clients in removal, family, and business immigration. Annelise serves as the co-chair for the New England Annual Conference, as liaison to the Office of Chief Counsel, and as liaison to the Boston Asylum office. Annelise holds a juris doctor from the University of Toledo College of Law.

Howard Silverman is a partner at RSST Law Group in Boston, Massachusetts and has been practicing exclusively in the field of immigration and nationality law since 1984. His practice focuses primarily on asylum and deportation cases, as well as family immigration and citizenship issues. Mr. Silverman previously served as the Chair of the New England Chapter of AILA and as co-liaison to the local Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations Office for the New England Chapter. He has also been Vice-Chair of AILA's National ICE Liaison Committee, a member of AILA's Interagency Committee and the Board of Directors of the American Immigration Law Foundation (AILF), and also served as the co-liaison to the AILA New England Chapter's ICE Homeland Security Investigations, Office of Chief Counsel in Boston, and Executive Office for Immigration Review (EOIR) Liaison Committees. Mr. Silverman has been a speaker at immigration law programs and workshops nationally and in the Boston area, and has been presented with the PAIR Project Mentor of the Year Award three times for his volunteer work supervising pro bono attorneys representing political asylum applicants. Mr. Silverman is listed in The Best Lawyers in America and was named the Best Lawyers' 2014 and 2018 Boston Immigration "Lawyer of the Year." He has also been granted the AV rating, the highest rating available by Martindale-Hubbell. In addition, he has been named by *Super Lawyers Magazine* as a New England Super Lawyer in the field of immigration law since 2006. He graduated from Northeastern University School of Law and is licensed to practice law in Massachusetts.

Ron Abramson began his career with the New Hampshire Public Defender Program before establishing himself as one of the State's preeminent immigration lawyers. In a career spanning 23+ years, Ron has handled a multitude of immigration, criminal defense, civil litigation, and international legal matters. Ron has also served as an international trade consultant, and as a law professor in the U.S. and abroad. As a naturalized U.S. citizen, Ron's passion and main professional focus is immigration law. He has successfully obtained all manner of business and family-based visas, has taught at national training programs, and has litigated a number of cases all the way to the U.S. Circuit Courts. Ron currently works for IMMIGRATION + SOLUTIONS pllc, with offices in Manchester and Nashua, New Hampshire. A native of Chile, Ron has served as New Hampshire AILA USCIS and Congressional Liaison. Ron received a B.A. in English and

Philosophy from Emory University, and obtained his J.D. from the George Washington University Law School. He is incredulous about the fact that he's been practicing law for over half his life.

Complimentary Conference Reception

TRACK TWO – Connolly Center, 4th Floor – BUSINESS IMMIGRATION

Compliance Strategies to Defend Our Clients:

Leslie Ditrani, Ditrani Law, LLC, has been practicing immigration law since 1994. She has broad expertise in business and family immigration matters. Her business experience includes representing Boston area start-ups and entrepreneurs as well as small to mid-size businesses. Leslie was elected to the AILA New England Chapter, Executive Board, 2008-2013, and has been Co-Chair of the Annual AILA New England Immigration Law Conference since 2007. She has been on the board of the Massachusetts Immigrant and Refugee Advocacy Coalition and the Cambridge Community Learning Center. Leslie is active in her community and her bar organization and was honored as one of the Lawyer's Weekly Top Women of the Law in 2015. In 2016, Leslie was appointed to the Cambridge Coalition on Immigrant Rights and Citizenship. Leslie is a graduate of William Smith College, Geneva, New York; and Northeastern University School of Law, Boston, Massachusetts.

Amy Peck is a Principal in the Omaha, Nebraska office of Jackson Lewis P.C. She dedicates her practice exclusively to immigration law and worksite compliance, and she is the Co-Leader of the firm's immigration practice group. Ms. Peck is one of 21 Directors elected to serve on the 14,000-member American Immigration Lawyers Association (AILA) Board of Governors. She is currently serving on the Board of Trustees of the American Immigration Council. Ms. Peck is a member of the AILA National Verification Committee, which liaises with USCIS, ICE, and OCAHO on I-9, E-Verify, and related worksite issues. Ms. Peck recently served on the AILA National USCIS Benefits Committee, the Interagency Committee, the Annual Conference Committee, Chair of the AILA Midyear Conference Business Track, previously chaired the AILA FOIA Liaison Committee, the AILA Comprehensive Reform Committee (2010-2011) and is the founding member of the Global Migration Action Group (2009-present). She served as Chair of the AILA National Executive Office for Immigration Review (EOIR) liaison committee (2008-2010). Ms. Peck also served as Chair of the Strategic Planning Committee for AILA (2008-2009) and served on the Spring Conference committee (2008-2010). She was chosen as the editor of the AILA Midyear Conference materials in 2012, and the past Chair of the ICE liaison committee (2004-2006). Ms. Peck is a frequent speaker on worksite enforcement issues, and has recently been quoted in *The New York Times* and *The Wall Street Journal* on employment and enforcement immigration issues.

Katie Nokes Minervino has been practicing exclusively employment-based immigration law at Pierce Atwood LLP for the past ten years, helping employers and employees create and execute immigration strategies to meet their short and long-term immigration needs and advising on employment verification compliance issues. Katie has a national business immigration practice that includes obtaining immigration benefits for workers in a variety of industries and in a wide

range of immigration work authorized categories, and she works closely with clients to ensure their immigration needs are met in a timely and efficient manner by corporate immigration attorneys who are personally engaged in and invested in each process. Katie is the current Vice-Chair of the American Immigration Lawyers Association Verification & Documentation Liaison Committee. She has been a member of this committee since 2014.

PERM Under the Trump Administration:

Madeline Cronin is a partner at the law firm Iandoli Desai & Cronin P.C. Her practice concentrates on employment-based immigration as well as family matters. She has lectured on U.S. immigration law topics at Massachusetts Continuing Legal Education seminars, educational institutions, and to professional associations. She has been a long-time AILA member, serves as a Volunteer Attorney with the Irish International Immigration Center, and has served as an Asylum Pro Bono Volunteer with the Political Asylum Immigration Representation Project. Madeline holds a B.S. in Business Management from the University of Massachusetts Boston and obtained her J.D. from Southwestern Law School, Los Angeles, California.

Vincent Lau is the managing partner of Clark Lau LLC in Cambridge, Massachusetts. Between 2012 and 2013, Vince served as the Chapter Chair of AILA New England and has been a member of the AILA National DOL Liaison Committee since 2013. He is currently one of the Vice Chairs of the DOL Liaison Committee. Between 2012-2017, he was also an adjunct faculty member at New England Law Boston. He received his B.A. from Yale University, M.A. from the Boston College School of Education, and J.D. from the Boston College Law School. Vince has been voted among The Best Lawyers in America since 2010 and listed with *Who's Who Legal: Corporate Immigration* since 2015.

Sarah K. Peterson is the founder of SPS Immigration PLLC based in Minneapolis, Minnesota. Her employment-based practice focuses on physicians, academia, start-ups, and high-tech companies. Sarah actively participates in AILA on both a local and national level. She currently serves as Chair of AILA's DOL liaison committee and has been an active Elected Director on the AILA Board of Governors since 2012. Sarah has previously served on AILA national liaison committees with the California and Nebraska USCIS Service Centers, Chaired AILA's Healthcare Professionals Committee and served as a member for several years, and Chaired the Minnesota/Dakotas Chapter of AILA. Sarah has served on the Immigration Law Center of Minnesota's Public Policy Committee since 2013. Sarah was recognized in 2016 and 2017 as one of the 40 Up and Comers in Employment Law by *HRE*/Law Dragon, has been listed in the *International Who's Who of Corporate Immigration Lawyers* since 2014, and was selected as one of Minnesota's Lawyer's Up and Coming Attorneys for 2010. She was a contributing author to AILA's Business Immigration Law & Procedure, *second* edition, frequently speaks with the press, and travels internationally to speak on employment-based immigration. Sarah is an Adjunct Professor at the University of Minnesota Law School and holds a joint law degree and master in public policy from the University of Minnesota Law School and the Hubert H. Humphrey Institute of Public Affairs.

Networking/Cookie Break

Business Immigration Under Trump: What's Yet to Come:

Josiah Curtis is an Associate in the Boston Office of Berry Appleman & Leiden LLP where he provides strategic guidance to employers on all facets of the complex U.S. business immigration process. He represents employers in the information technology, energy, insurance, management consulting, and legal industries before the U.S. Department of Labor, U.S. Department of Homeland Security, and U.S. Department of State in addition to providing counsel regarding immigration compliance, program management, and corporate reorganizations. Josiah is an active member of AILA where he serves on the National Steering Committee for AILA's New Members Division and is a frequent speaker at the local and national level on business immigration matters. Prior to joining BAL, Josiah practiced in the Boston office of a large global immigration firm. He is also passionate about giving back to his community and provides pro bono counsel to a number of organizations including Doctors Without Borders, Kids in Need of Defense, and others.

Philip Curtis has practiced law since 1985. He has been in practice with Francis Chin since 1994 and has helped to guide Chin & Curtis since its inception. Prior to joining practice with Francis Chin, Phil was an attorney at Ropes & Gray LLP in Boston, where he specialized in business immigration matters, labor and employment, and employment litigation. In the course of his more than 30 years in the immigration field, Phil has represented and worked with businesses ranging from multi-national public companies to the most recent entrepreneurial start-ups, as well as nonprofits ranging from private secondary schools to large research institutions. He has helped clients to realize the vision of attracting the best talent from around the world. Phil also has a broad range of experience in family-based immigration, naturalization, worksite compliance, and federal and state litigation. Phil is a frequent lecturer and author at national and local conferences sponsored by AILA, Massachusetts Continuing Legal Education, Inc., and the Boston Bar Association. He is an active member of the American Immigration Lawyers Association and formerly served as Media Liaison for the New England Chapter of AILA. Phil has an A.B. in Political Science from Brown University and a J.D. from the University of Chicago Law School.

Scott FitzGerald is the Managing Partner of the Boston, Massachusetts office of Fragomen, Del Rey, Bernsen & Loewy LLP, and a Managing Director of Fragomen Immigration Services India Pvt., Ltd. He has practiced exclusively in the field of corporate immigration and nationality law for over 20 years. He provides multinational corporations, including leading technology companies and financial and educational institutions, with strategic counseling on all matters of U.S. immigration and nationality law, regulation, policy and compliance. Scott is a Board Member of the American Immigration Council, the British American Business Council of New England, and the Council for Emerging National Security Affairs. He is a graduate of Johns Hopkins University and Fordham University Law School.

Practice Pointer Articles

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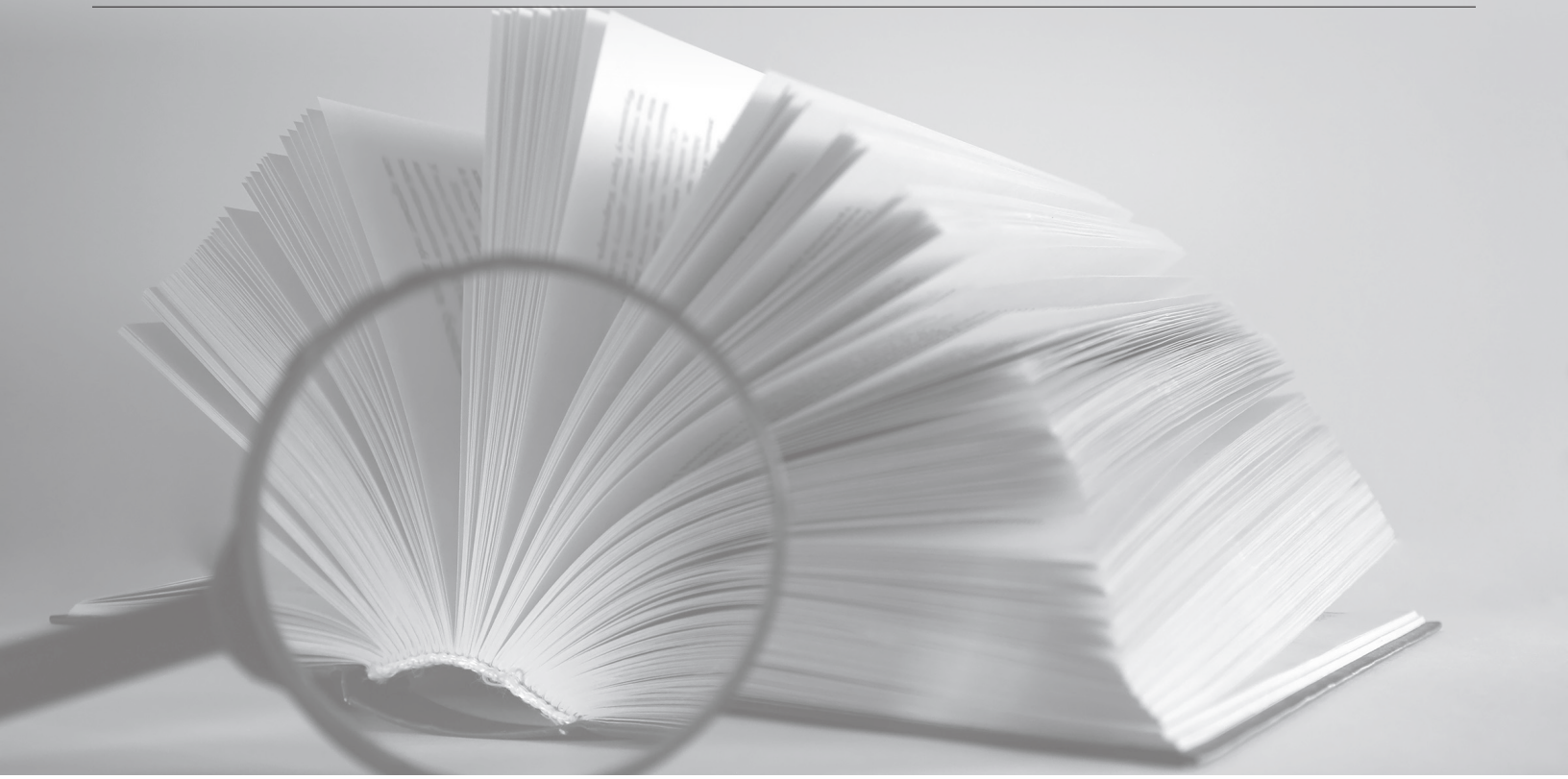

Yes, No, or Maybe: The Importance of Developing a Philosophy of Lawyering in an Era of Immigration Upheaval

By K. Craig Dobson

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

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

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

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

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

1 See generally ABA Model Rules of Professional Conduct. The word "zealous" does not appear in the text of the rules.

2 "Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law." 8 CFR 1003.102.

3 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3. Available at: http://scholarship.shu.edu/shlr/vol45/iss2/3.

4 The concept of "philosophy of lawyering" is broad and encompasses a lawyer's work/life balance, involvement in the development of the profession, and the practice of law itself. See generally Nathan M. Crystal, *Using the Concept of a "Philosophy of Lawyering" in Teaching Professional Responsibility* (2007) 51 St. Louis U.L.J. 1235 (2007). This article focuses on the latter, what Professor Crystal calls "philosophy of practice," defining it as "that part of a lawyer's overall 'philosophy of lawyering' that focuses on a lawyer's philosophy in making discretionary decisions in the practice dimension." *Id* at 1241.

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

6 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 St. Louis U.L.J. 1235 at 1245.

7 Professor Crystal notes that "[s]ome empirical studies (although limited in number and scope) of the behavior of criminal defense lawyers, lawyers in small communities, lawyers in nonlitigation activities, and lawyers in large law firms cast doubt on the claim that neutral partisanship accurately describes the conduct of most lawyers. Indeed, some of these studies suggest that the problem with the way lawyers conceive of their role is the opposite of neutral partisanship; lawyers are not sufficiently zealous in representing their clients because they are concerned about protecting their reputations, preserving relationships with other lawyers, judges, or officials, or advancing their own interests." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 88 (2000).

8 Professor Crystal states that "[c]lients…are entitled to more than word of mouth or the luck of the draw. Clients are entitled to receive from their lawyers a clear expression of the lawyer's philosophy of representation." Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 75, 94 (2000).

9 Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1245 (Chart 3).

10 See Nathan M. Crystal (2007) 51 *St. Louis U.L.J.* 1235 at 1251.

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

Hypothetical

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

A Self-Interested Philosophy of Lawyering

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

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

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

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

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

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

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

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

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

A Morality-Based Philosophy of Lawyering

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

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

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

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

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

An Institutional Values-Based Philosophy of Lawyering

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

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

A Client-Centered Philosophy of Practice

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

20 For an overview of some important philosophies of institutional values, see Nathan M. Crystal, " *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1235 at 1242-1244.

21 Professor Crystal notes that "philosophies of morality and institutional values are not inconsistent because institutional values often embody moral principles." Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1242, 1243.

22 See 8 CFR 103.2(a).

23 Perhaps this line of thinking most closely aligns with Professor Brad Wendell's philosophy of lawyering briefly outlined by Professor Crystal. Nathan M. Crystal, *Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility* (2007) 51 *St. Louis U.L.J.* 1243, 1244.

24 The drafters of the form are apparently fishing for an admission under INA § 212(a)(2)(A)(i), though certain responses may lead an officer to believe the client is a "drug abuser or addict" under INA §212(a)(1)(A) or give them "reason to believe" that the client "is or has been an illicit trafficker in any controlled substance…" under INA §212(a)(2)(C)(i).

25 Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 533.

26 Nathan M. Crystal, Using the Concept of a 'Philosophy of Lawyering' in Teaching Professional Responsibility (2007) 51 *St. Louis U.L.J.* 1241.

27 See generally Keyes, Elizabeth (2015) "Zealous Advocacy: Pushing Against the Borders in Immigration Litigation," *Seton Hall Law Review*: Vol. 45 : Iss. 2 , Article 3 at 532, FN 268.

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

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

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

Developing Your Own Philosophy of Practice

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

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

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

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

Preparing Your Client for Admission to the U.S.
When Attorney Representation at a Port of Entry is Not Permitted
By Leslie Holman, Danielle Rizzo, Ramon Curiel

There is not, and never has been, any right to representation at the port of entry. 8 CFR §292.5(b) provides foreign nationals with the right to attorney representation for all immigration examinations with the following exception: "Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody."

Despite this proviso, U.S. Customs and Border Protection (CBP) and legacy Immigration and Naturalization Service (INS) have a decades long history of permitting attorneys to represent applicants for admission when they are seeking entry. CBP historically welcomed attorney presence at inspection because they help explain how their clients qualify for benefits. However, in August 2017, the CBP field office in Buffalo, NY announced to AILA members that attorneys were no longer welcome at the port of entry. Shortly thereafter, other ports of entry began to follow suit. While attorney representation remains an option at some ports, they are becoming fewer and far between.

Because attorney representation is subject to agency discretion, there are no existing legal grounds to challenge this policy. There is no general constitutional right to attorney representation, other than the 6th Amendment guarantee to attorney representation in criminal prosecutions. This does not extend to civil matters such as immigration.

However, just because it may not be possible for an attorney to accompany an applicant for admission when he or she actually applies for admission does not mean that the applicant is unrepresented. Properly preparing an applicant for his or her solo presentation is representation and there are still several stages of the admission process where attorneys can work with CBP in connection with an application.

The following are the methods by which attorneys can and should represent clients even if they cannot be present during the primary or secondary inspection process:

- If possible, meet with applicants somewhere at or near to the port to prepare to insure important points are fresh in their mind. When doing so: provide clients with a G-28 to sign, review the documentation they will be submitting so that they are prepared to answer questions and can easily refer to passages and points made in support letters, and review with them how and why they qualify for the benefit sought. All of these measures assist clients in knowing what to expect and will make them more at ease and thus, better able to explain things clearly to an officer. If it is not possible or practical to meet in person this preparation can and should be done by phone or Skype.

- Review with applicants nuances surrounding their particular purpose of entry and the law or admission procedures relevant to their application. For example, if a client is seeking reentry under the visa revalidation rule, they must understand the rule and be able to educate an officer if necessary. To support their position, provide applicants with supplemental support materials separate from the application paperwork such as copies of relevant OOH and O*Net entries, government memoranda, case law, AILA liaison minutes, or similar relevant and explanatory materials. Clients should be instructed to present this material only if necessary.

- Some ports require appointments for NAFTA applications. Attorneys should check a port's particular requirements and if an appointment is required the attorney can make the appointment on behalf of an applicant. Even if appointments are not required, applicants should be directed to present their applications during regular weekday business hours.

- It remains possible, even at ports of entry where attorneys may not accompany clients, to contact the port in advance of the client's application for admission if there are complicating factors. For example, Chief Watch Commanders at some ports will review difficult or complex cases and provide the attorney with an opinion on eligibility prior to application.

- Similarly, in situations where complications arise attorneys can still call a port to discuss with a supervisor and those further up the chain if necessary, what transpired. Clients should be directed to observe and commit to memory and then write down post presentation, the name of the officer who adjudicated the petition. Clients should also be directed to make sure that the reason for the complication is enunciated with specificity. If there are no legally sufficient grounds to support a denial of admission or a requested status, attorneys can and should continue up the chain of command which may require going outside of the port.

- If an attorney is unable to correct a situation by moving up the chain of command, he or she can and should submit a TRIP inquiry/complaint on behalf of the client. The CBP website clearly authorizes submission of TRIP requests by someone other than the applicant. There are two electronic methods for submitting TRIP requests. A form can be completed and submitted online at: https://trip.dhs.gov. However, submitting a TRIP request this way does not provide a means for submission of Form 591, which is required when someone other than an applicant is submitting a TRIP request. Thus, to submit a TRIP request on behalf of a client attorneys should complete Forms 590 and 591 and email them along with the required documents to Trip@dhs.gov. Interestingly, the Form 590 allows for the inclusion of more complete information regarding the incident and specifically provides for identifying incidents at the Canadian border. The online submission form does not. The forms and instructions for emailing TRIP requests can be found online at: www.dhs.gov/one-stop-travelers-redress-process.

Thus, although the recent decision by some ports to prevent attorneys from accompanying clients at primary and secondary inspections is a blow and a brick in the promised border wall, it does not in any way mean that attorneys cannot and do not represent their clients in connection with their applications for admission. Rather and as shown above, there are several things that an attorney can and should do in connection with a client's application that will prepare them for the application and that will assist them in the case of negative adjudications.

Interagency – Perspectives in a Changing Landscape

By Anthony Drago, Jr., Esq.

The Homeland Security Act of 2002[1] created the U.S. Department of Homeland Security (DHS). The DHS agencies responsible for implementation and execution of U.S. immigration law under the Immigration and Nationality Act (INA) have not changed over the years. Although the agencies have not changed, the missions of each one – U.S. Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); and U.S. Customs and Border Protection (CBP) – have changed under the current administration in Washington, D.C. This practice pointer provides a general overview of each government agency represented on the Local Interagency Panel.[2] The practice pointer will also touch on issues within the purview of each agency affected by President Trump's executive orders.

I. OVERVIEW: U.S. DEPARTMENT OF HOMELAND SECURITY

The creation of DHS involved the merger of 22 government agencies into one cabinet level agency. Understanding the roles and functions of each agency under DHS is critical to any effective immigration practice. Furthermore, understanding the changing roles for each agency under the Trump administration is essential to survival in the current political climate. In order to effectively represent clients, attorneys must know the specific role of each agency and how that role is being implemented in today's world. By the time attendees of the AILA New England Conference read this article, the practices and policies of each agency may be very different from those in existence at the time this article was written.

II. U.S. CITIZENSHIP AND IMMIGRATION SERVICES

USCIS is the agency responsible for adjudication of applications for immigrant and nonimmigrant status in the United States. USCIS also adjudicates applications for asylum and ensures the proper operation of the electronic employment verification system known as E-Verify. On a national level this agency has in many ways insulated itself from the general public through use of customer service by phone using call centers rather than permitting direct contact with adjudicators. Policy changes under the current administration have been constant and, in many cases, drastic. Therefore, the workload on this agency should increase considerably over time as the current administration continues to impose its anti-immigrant policies and procedures.

USCIS uses a lockbox system to accept application filings from around the country and then distributes its work load between five service centers located in Vermont, Texas, California, Nebraska, and Chicago. Service Centers adjudicate various types of applications and also send applications to local USCIS offices around the country. Prior to October 2017, local USCIS field

[1] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[2] The U.S. Department of Justice, the Department of State and the Executive Office for Immigration Review are also engaged in immigration matters, but these agencies are not represented on the interagency panel. Thus, the immigration related functions of these agencies are not included in this practice pointer.

officers were responsible for adjudication of family based immigrant visa petitions, most non-business based applications to adjust status, applications for naturalization, and other applications which required in person interviews. Effective October 1, 2017, the current administration requires USCIS to interview all employment-based applications to adjust status and all refugee/asylee relative petitions (Form I-730, Refugee/Asylee Relative Petition) for beneficiaries who are in the United States and are petitioning to join a principal asylee/refugee applicant.[3] Because of this policy change, local USCIS offices will now be inundated with thousands of interviews that were not required under the previous administration. Thus, processing times for the local offices are expected to skyrocket and delay the overall adjudication process of immigration benefits by months, if not years.

In District 1, USCIS has offices located in Portland, Maine; Bedford, New Hampshire; St. Albans, Vermont; Johnston, Rhode Island; Lawrence, Massachusetts; and Boston, Massachusetts. Appointments at these offices can be made through the InfoPass system. Information on the location and address of each office can be obtained on the USCIS website located at www.uscis.gov.

In addition to its increased workload on the various applications filed by immigrants and nonimmigrants, USCIS was previously charged with accepting and adjudicating applications filed pursuant to Deferred Action for Childhood Arrivals (DACA) and applications for Temporary Protected Status (TPS). However, the current administration is endeavoring to evaporate those programs and on September 5, 2017 the President rescinded DACA.[4] One other notable policy change under the current administration is the USCIS policy memorandum that supersedes and rescinds prior guidance on providing deference to prior determinations of eligibility in the adjudication of petitions for extension of nonimmigrant status, including rescinding guidance from 2004 and 2015.[5]

USCIS continues to have broad discretion to adjudicate applications and is also bound by the constant changes to its policies as set forth in the President's executive orders and proclamations. If the current administration continues its process of changing how applications are adjudicated and how USCIS functions in general, immigration attorneys can expect some troubling waters to navigate over the next several years.

III. U.S. CUSTOMS & BORDER PROTECTION

With more than 60,000 employees, CBP is one of the world's largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international travel and trade. CBP employees are primarily comprised of

[3] *See* AILA Document No. 17082900. The USCIS website states that the change in policy complies with Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," and is part of the agency's comprehensive strategy to further improve the detection and prevention of fraud and further enhance the integrity of the immigration system.

[4] *See* AILA Doc. No. 17090547.

[5] *See* AILA Doc. No 17102461.

former employees from the U.S. Border Patrol, the U.S. Customs Service, the former U.S. Immigration and Naturalization Service, and the U.S. Department of Agriculture.

CBP is responsible for monitoring and controlling all land and air ports of entry to the United States, which includes securing and facilitating trade and travel while enforcing U.S. laws and regulations such as immigration, agriculture and drug laws. CBP has expertise in preventing the introduction of harmful pests into the United States and recognizing and preventing the entry of organisms that could be used for biological warfare or terrorism. CBP is also responsible for the inspection and admission of all foreign nationals seeking to enter the United States, but immigration issues are a small part of the agency's mission.

CBP officers must inspect and admit non-U.S. citizens in accordance with the statutory requirements under the INA at all ports of entry to this country. CBP officers have broad powers to determine whether non-U.S. citizens should be admitted to this country or whether their admission should be denied or deferred pending further investigation. CBP officers are also permitted to arrest and detain noncitizens and to issue Notices to Appear, thereby referring individuals to the immigration court for removal proceedings.

Noncitizens arriving at U.S. borders are not legally entitled to representation. Therefore, noncitizens can experience a variety of scenarios at U.S. borders in regard to their admissibility to this country. These individuals must prove their admissibility to a CBP officer and need to understand that criminal and immigration history is a critical issue during the admission process.

One current practice of CBP that has garnered national attention is the search of electronic devices of travelers including both U.S. and non-US citizens. The U.S. government reported a major increase in the number of electronic media searches at the border from 4,764 in 2015 to 23,877 in 2016.[6] Pursuant to its broad authority to inspect and admit all entrants to the U.S. at ports of entry, CBP officers may attempt to view content stored on phones, laptops, and other portable electronic devices. On many occasions CBP officers have examined electronic communications, social media postings, and ecommerce activity by obtaining social media identifiers or handle after confiscating electronic devices from a traveler. This practice will continue under the current administration. Until such time as the courts weigh in on the actual rights of travelers seeking to enter the United States it should be expected that in-depth searches of electronic devices at U.S. borders will continue to expand.

The primary port for CBP in the New England area is at Boston Logan International Airport. The CBP office at Logan International Airport, Terminal E in East Boston, MA 02128 can be reached by phone at (617) 568-1810. The CBP office for Boston is located at 10 Causeway Street, Room 603, Boston, MA 02222. For a list of all of the land, air and sea ports of entry in the New England area go to www.cbp.gov.

[6] Gillian Flaccus, *Electronic media searches at border crossings raise worry*, Associated Press (Feb. 18, 2017), http://bigstory.ap.org/article/6851e00bafad45ee9c312a3ea2e4fb2c/electronic-media-searches-border-crossings-raise-worry.

A new strategy employed by our government to prevent certain people from entering the United States involves what the current administration deems "extreme vetting." Since his election President Trump has issued multiple executive orders related to immigration, the first of which threw CBP and ports of entry around the country into a state of chaos based on confusion as to which travelers should be admitted to this country.[7] Implementation of the President's executive orders has had a drastic impact on all noncitizens seeking to enter this country. AILA has been engaged on each executive order working to provide current and relevant information on the legal impact of the orders while seeking to ensure that they are properly challenged in the courts.[8] CBP officers will continue to face challenges at U.S. borders both with implementing the constant policy changes under the Trump administration and in applying the immigration laws evenly and fairly to all people seeking to enter this country.

IV. U.S. Immigration and Customs Enforcement

The ICE website describes the agency as follows:

> U.S. Immigration and Customs Enforcement (ICE) enforces federal laws governing border control, customs, trade and immigration to promote homeland security and public safety. ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 employees in more than 400 offices in the United States and 46 foreign countries. The agency has an annual budget of approximately $6 billion, primarily devoted to three operational directorates – Homeland Security Investigations (HSI), Enforcement and Removal Operations (ERO) and Office of the Principal Legal Advisor (OPLA). A fourth directorate – Management and Administration – supports the three operational branches to advance the ICE mission.[9]

Immigration related work performed by ICE consists of investigating violations of the INA and enforcing the INA within the United States. ICE is responsible for immigration enforcement actions, including workplace violations, human trafficking and harboring, visa abuse, document fraud, and detention and removal of noncitizens. ICE must coordinate its enforcement efforts with the other immigration related agencies in DHS. Thus, the enforcement activity of ICE intersects with the work of the other DHS agencies on a daily basis.

(A) Homeland Security Investigations (HSI)

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[7] The executive orders can be found at https://www.dhs.gov/executive-orders-protecting-homeland.For analysis and updates on the White House's Principles on Immigration refer to AILA InfoNet Docket No. 17101000, which can be found at http://www.aila.org/advo-media/issues/white-house-principles-on-immigration.

[8] For further information on the executive orders and other issues related to the changing landscape for immigration practitioners, see AILA InfoNet at http://www.aila.org/advo-media/issues.

[9] *See* https://www.ice.gov/about.

HSI is responsible for investigating a wide range of domestic and international activities arising from the illegal movement of people and goods into, within and out of the United States.HSI investigations include immigration crimes, human rights violations and human smuggling, smuggling of narcotics, weapons and other types of contraband, financial crimes, cyber-crime and export enforcement issues. In addition to criminal investigations, HSI conducts employment related investigations concerns I-9s and employment of immigrants unauthorized to work in this country. It is important to note that while the function of HSI intersects with many immigration related issues, immigration comprises a small part of the agency's overall mission.

Immigration related investigations performed by HSI are more focused on larger immigration crimes and violations rather than on individual problems attorneys encounter in their day-to-day practice. However, it is important to note that HSI officers have authority to arrest immigrants in this country without authorization and will now uniformly detain such individuals and initiate removal proceedings regardless of whether those individuals are engaged in criminal activity.

HSI is also charged with monitoring the Student and Exchange Visitor Program (SEVP) that manages SEVP-certified schools and nonimmigrant students in F and M status, and their dependents, using the Student and Exchange Visitor Information System (SEVIS). SEVIS is a part of the National Security Investigations Division and acts as a bridge for government organizations that have an interest in information on nonimmigrants whose primary reason for coming to the United States is to be students. Reporting requirements for schools subject to SEVP are made to HSI and the information in SEVIS is accessible to other federal agencies, such as CBP and USCIS. Thus, the work of the DHS agencies intersects in this area since student visa violators must be reported to HSI which in turn would notify ERO and USCIS of the situation if and when immigration benefits are sought or when apprehension and removal is appropriate. This agency has become much more diligent over the years in apprehending and seeking to remove students found to be in violation of their student status.

Based on the enforcement-heavy policies of the Trump administration, HSI will most likely be involved in large scale investigations of fraud and other abuses associated with the programs HSI investigates. Attorneys should expect HSI and the other DHS agencies to share information and coordinate operations targeted at criminal enterprises operating in the United States. Students who violate the terms of their student visa or who are arrested and charged with crimes in the United States should expect HSI to investigate cases vigorously.

HSI's website is located at www.ice.gov. The Boston area HSI office is located at 10 Causeway Street, Room 722 Boston, MA 02222-1054.

(B) Enforcement & Removal Operations (ERO)

ERO enforces the nation's immigration laws. ERO identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the United States.
President Trump's January 25, 2017 executive order entitled, "Enhancing Public Safety in the Interior of the United States" changed the enforcement priorities from those followed under the Obama administration. Section five of the Order states:

> Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:
> (a) Have been convicted of any criminal offense;
> (b) Have been charged with any criminal offense, where such charge has not been resolved;
> (c) Have committed acts that constitute a chargeable criminal offense;
> (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
> (e) Have abused any program related to receipt of public benefits;
> (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
> (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.[10]

In addition to the enforcement priorities requiring ERO to arrest and detain noncitizens, ERO officers effectuate the final removal of those ordered removed from this country. ERO transports removable aliens from point to point and manages noncitizens in custody or in an alternative to detention program. Currently, in Massachusetts the agency refuses to transfer its detainees to state courts for criminal proceedings. Thus, in summary ERO has become an agency that detains and removes individuals from this country.

In light of the new enforcement priorities, virtually anyone in the United States without legal status is subject to apprehension and detention. In fact, ERO is arresting and detaining noncitizens at an alarming pace. Moreover, ERO officers appear to have no discretion on who to arrest and are no longer allowed to release anyone in violation of the immigration laws. This policy and procedure will cause further backlogs in the immigration courts and will cause court dockets to be flooded with bond requests.

Although individuals who are subject to final orders of removal can apply for stays of removal based on a variety of circumstances, the current reality is that ERO denies most, if not all, stay requests. In fact, ERO seems to be operating under an "extraordinary circumstances" policy which requires nothing less than serious and imminent medical issues for a stay to be approved. For individuals on Orders of Supervision, ERO has instituted a 30/30 policy which means that when a person reports to ERO pursuant to the terms of the order of supervision, they are given 30 days to report back to ERO with an airline ticket confirming their departure from the United States within 30 days from the date they report back. Little to no discretion is authorized allowing deviation from this policy and ERO considers the policy both fair and equitable despite the length of time many of these individuals have been in the United States or the medical, emotional and financial issues with their U.S. citizen spouses and children. Individuals on an

[10] The full text of the executive order can be found at https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

order of supervision with criminal convictions should not expect the 30/30 policy to apply and will most likely be taken into custody at their next report date with ERO.

The local ERO office will accept bond payments for detained aliens, as well as stays of removal and/or deferred action requests for aliens who have already been ordered removed. However, as stated above, the new policies and procedures indicate that discretion is utilized very rarely by ERO and most applications for a stay and for deferred action will be denied.

Pursuant to President Trump's new executive orders, it is anticipated that ERO will commence removal proceedings against every noncitizen who is in the United States in violation of the immigration laws. Immigration attorneys must come to terms with the current reality and adjust to the fact that discretion at ERO is a thing of the past.

The Boston Field Office for ERO (covering all of New England) is located at 1000 District Avenue, Burlington, MA 01803. ERO does not detain aliens at this location. Rather, ERO conducts initial processing at this location before transferring aliens subject to detention to various facilities in the Commonwealth. The facilities currently used by ERO to house ICE detainees in Massachusetts are Suffolk County House of Corrections (South Bay), Plymouth County House of Corrections, and Bristol County House of Corrections.

V. CONCLUSION

The immigration functions for each DHS agency discussed in this article will change considerably under the Trump administration. Decisions on who to arrest and detain will continue to be driven by politics and decisions on who should be granted various forms of immigration benefits based on discretion will continue to erode under this administration. Serious backlogs at USCIS on adjudications and overcrowding in prisons should be expected. While the practice of immigration law will continue to differ from jurisdiction to jurisdiction based on the agency leadership team in each part of the country, the overriding policy of the Trump administration will be anti-immigrant.

Until such time as Congress steps in and creates some statutory stability in the Immigration system, further erosion of immigrants' rights should be expected. While each agency represented on the interagency panel has a specific role in the immigration system, they do work together by sharing information to perform their various duties. Quite often there are multiple agencies involved in the review and resolution of an application or petition. Therefore, it is critical to know the role of each agency and how to contact them should an issue arise during the lifecycle of a client's case. More importantly, immigration attorneys must adjust their practices to meet the needs of clients in the current political climate. One thing attorneys and immigrants can be sure of over the next several years is that change will be constant.

Humanitarian Relief and Alternatives During the Trump Era

By Alexandra Peredo Carroll, Nareg Kandilian, and Kira Gagarin

This article provides a brief summary of current hot topics related to humanitarian relief and alternatives under the Trump administration.

Challenging recent USCIS pushback on SIJS:

USCIS centralized processing of I-360, Petition for Special Immigrant Juvenile applications in October of 2016. Prior to centralization, I-360s were adjudicated at the local field offices, usually, but not always, after interview before an ISO. Rarely, if ever, were predicate orders challenged by the local officers adjudicating the I-360 petitions, given that the regulations explicitly state that USCIS should defer to the juvenile court on state law matters. The benefit to local adjudication was that officers were familiar with the juvenile and probate court orders issued by local courts, and were able to ask applicants about the basis for the probate court should there be any question as to the grounds for the state court order. Since centralization, however, we have seen an exponential rise in Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs) and denials issued by USCIS, in particular in cases where the predicate order was entered by the state court after the child had turned 18. There are steps to take to challenge this pushback from USCIS to ensure that your clients' cases are properly adjudicated and approved.

Above all else, it is imperative to submit a strong order from the probate court, acting in its capacity as a juvenile court that comports with the new guidelines outlined in the USCIS policy memo.[1] A sample order is attached at Appendix A.

If you receive an RFE you have to decide whether to seek to amend the probate court order or fight the RFE on its face. If you choose to amend, most Judges will do this administratively. There has been some pushback from probate court Judges stating that the amendment is sought solely to make legal arguments to the USCIS. You should cite to *Guardianship of Penate,* which states, in relevant part, "[T]he immigrant child's motivation for seeking the special findings, if relevant to the child's entitlement to SIJ status, ultimately will be considered by USCIS in its review of the application. The immigrant child's motivation is irrelevant to the judge's special findings."[2] It is not the probate court Judge's place to consider your reasons or motivation for seeking the order or to amend the order. Fight for the amendment, if needed.

In some cases, seeking to amend your predicate order may not be the best path forward. You can still be successful in challenging the RFE and getting cases approved after strong responses to the RFE.

If USCIS is requesting a factual basis for the findings or for the dependency order, make sure to point out that a factual basis request, per the manual, is to be made to ensure that the order of the probate court was "reasonable" and that the case is bona fide. There should be sufficient

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[1] USCIS Policy Manual, "Part J – Special Immigrant Juveniles," *available at* www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ.html.

[2] *Guardianship of Penate*,477 Mass. 268 (2017), *available at https://cases.justia.com/massachusetts/supreme-court/2017-sjc-12138.pdf?ts=1497016963*.

information in the order and affidavit to ensure that the case is, in fact, bona fide and reasonable and you should point out that, accordingly, the standard is met on the face of the application. The affidavit submitted to the probate court should be incorporated by reference in your predicated order. If the affidavit was not previously submitted to USCIS in the initial I-360 petition package, you may submit it in response to the RFE. Alternatively, per the USCIS Policy Manual, you can also draft an affidavit that contains facts that support the findings of the juvenile/probate court.

Pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, the proposition that USCIS cannot challenge the predicate order issued by a state court comes hand in hand with the requirement that USCIS must consent to the petition for SIJS. While USCIS must defer to the state court in the application of state law, USCIS can still review the predicate order to ensure that it is bona fide and not issued solely to obtain an immigration benefit. As immigration attorneys, we tend to think primarily on the immigration benefit whenever we venture into probate court. But don't forget that the primary purpose of seeking special findings is not to obtain an immigration benefit, but rather to ensure the child's health, safety, and welfare. Keep that in mind not only when drafting your predicate orders, but when making your argument to the state court. This is particularly important in cases where the child is over the age of 18, the age of majority in Massachusetts.

In cases where the child is under the age of 18, there are more obvious underlying bases for your request for findings: you are primarily seeking that the child be placed in one parent's custody, or in the guardianship of an adult. Do not disregard or understate the importance of this custodial placement, as children with no parent or guardian need an adult to make legal decisions on their behalf. For children living with one parent, a custody order empowers that parent to make legal decisions on behalf of their child without needing the consent or permission of the other parent.

Where the child is over the age of 18, the Massachusetts Probate and Family Court does not have the jurisdiction to place a child in the custody of an entity or an individual. Therefore, you must seek a decree or judgment indicating that the child is dependent upon the probate and family court for their health, safety, and welfare. Even though dependency on the court satisfies the SIJS statute, you may have to remind USCIS by citing to the regulations at 8 CFR §204.11(c)(3). In *Eccleston v. Bankovsky*, the Court made clear that the Probate and Family Court has jurisdiction pursuant to MGL c. 215 §6 to make determinations about the dependency, care and well-being of youth under the age of 21.[3] Remember to cite to the *Eccleston* in your findings to clarify that the order from the Court was made pursuant to state law.

Another recent challenge by USCIS in over 18 cases is that the Probate and Family Court is not acting in the capacity of a "juvenile court." You will want to refer USCIS back to its policy manual at 6 USCIS-PM J.3(A)(1), and rely on *Recinos v. Escobar*, 473 Mass. 734 (2016). In *Recinos*, the Court, citing to *Eccleston*, supra, makes clear that the definition of a juvenile court includes the Massachusetts Probate and Family Court for purposes of the federal statute.

While you should rely on *Recinos* for the juvenile court argument, you should rely on *Eccleston* for jurisdiction. Please be wary about language in *Recinos* that references jurisdiction for

[3] *Eccleston v. Bankosky*, 438 Mass. 428, 436-37 (2003).

purposes of SIJS. "[T]he Probate and Family Court has jurisdiction, under its broad equity power, over youth between the ages of eighteen and twenty-one for the specific purpose of making the special findings necessary to apply for SIJ status pursuant to the INA."[4]

Practice Pointer on over 18 cases: Remove all references to the term 'declaratory judgment' or the word 'equity' in your proposed orders as it seems to flag for USCIS the need for additional evidence.

Is Discretion Dead in Light of the Trump Administration?

As much as any administration in recent memory, if not more, the Trump administration has made clear its objective to enforce immigration laws to their fullest extent. Consequentially, each immigration agency has been ordered to effectively eliminate its discretionary authority and to exercise its authoritative reach. The result is a drastic departure from enforcement guidelines that were previously formed upon enforcement priorities identified by the Obama Administration.

In turn, as we maneuver between the various government agencies in exhausting all options for relief available to us, it is necessary to understand the functions of each agency and their authoritative powers.

US Citizenship & Immigration Services (USCIS)

In this current environment, it is more important than ever to be cognizant of admissibility and removability provisions of the INA under §212 and §237, respectively. USCIS maintains the discretion to refer an applicant to be placed in removal proceedings via the issuance of a Notice to Appear (NTA).

USCIS practice seems to indicate that the agency will refer an applicant to be placed in removal proceedings where fraud and/or misrepresentation exists. This is subject to interpretation by USCIS and is bound to result in inconsistent applications of this policy.

Practice Tips before USCIS:

- Refer to information provided in the USCIS Policy Manual: www.uscis.gov/policymanual/HTML/PolicyManual.html

- Consider protective measures to minimize the chances towards issuance of a NTA:

    - Practitioners often balance between filing a Form I-290B (Notice of Appeal or Motion) after adverse USCIS decisions versus re-filing an application package. While there are procedural considerations relative to adjudication of a subsequent application, the filing of a Form I-290B may delay and/or prevent issuance of a NTA;

[4] *Recinos v. Escobar*, 473 Mass. 734, 739 (2016).

- USCIS may advise at the interview stage that the subsequent application will not be adjudicated unless the I-290B is withdrawn; the appropriate time to take this action would be at the time of interview of the subsequent application.

- Advance Parole - USCIS maintains the discretion to grant advance parole, and this is an increasingly appealing option (or last-ditch effort) for those who are unable to establish an admission required towards adjustment of status.

    - *Matter of Arrabally and Yerrabelly* is still a viable basis in discussing advance parole with your client, but you must advise your client as to the risks of travelling abroad.[5]

    - As an application for admission, aliens are subject to inadmissibility provisions that may be exercised inconsistently by Customs & Border Protection at various ports of entry.

- Be advised that ICE/ERO is currently detaining beneficiaries with a final order of removal at I-130 interviews. Consider preparing a motion to reopen to file with the Immigration Court immediately upon the client's apprehension. Always obtain informed consent from your client before advising them to attend an interview at USCIS if they have an outstanding final order of removal.

ICE Enforcement & Removal Operations (ERO)

ERO's authoritative powers consist of the ability to arrest and detain aliens, as well as the enforcement of final removal orders issued by the Immigration Judge. In turn, ERO maintains discretion as to whether someone should be detained upon the initiation of removal proceedings prior to appearance before an Immigration Judge.

In its enforcement measures, ICE officers have returned to practices of appearing at various state courthouses to monitor and/or detain aliens of interest. As a result, aliens are prevented from an opportunity to either complete their hearing or even attend a future hearing. Such measures should be monitored carefully in the context of *Lunn* which prevents court officers from ordering a defendant to remain in the courthouse upon procedural completion of the case in order to determine and/or assist ICE in its enforcement.[6]

ICE is also conducting arrests incidental to their primary targets of investigation. For instance, whether at a residence, worksite, or any other place of encounter, officers are inquiring as to the immigration status of others who fall in the vicinity. Enforcement measures are taken regardless of whether these individuals were the primary targets of the investigation.

Upon issuance of a final removal order, ERO will then take necessary measures to execute the removal of an alien to their native country. In efforts to allow an alien to remain in the U.S.

[5] *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).
[6] *Lunn v. Commonwealth*, 477 Mass. 517 (2017).

despite the existence of a removal order, ERO must entertain any application for a stay of removal via the submission of a Form I-246 at the respective local office.

Current enforcement measures have resulted in ICE refusing to grant a stay of removal but for the most dire of circumstances. As an example of their current policy in practice, the local ERO office has indicated that a stay of removal will be granted in circumstances that are *limited in nature and for a specific purpose*. To that effect, they have defined a dire circumstance to be comparable to a family with a child on the transplant list. As such, stay of removal denial rates at a local level have increased drastically.

ICE is also displaying increased enforcement in the course of Order of Supervision (OSUP) check-ins. Due to the current administration's termination of TPS programs, enforcement measures are applied particularly more aggressively to those with TPS who have a final removal order. Otherwise, in instances where ERO does not believe that a basis exists to extend an OSUP to another check-in date or eliminate it all together, ICE is implementing a 30/30 practice such that clients are being asked to return in 30 days with a ticket to leave within 30 days. As such, it is in your best interest to exhaust procedural remedies (i.e., motion to reopen) in anticipation of this request by ICE. Be aware that ICE may be more inclined to detain your client at a check-in if they come to learn that a stay of removal or motion to reopen is or will be submitted.

ICE ERO is often on the front lines of these incidents, therefore the media can be an appealing tool to consider. It is important to note that appealing to the media should be done selectively such that practitioners are fully informed as to the background and underlying history of each client's particular matter. ICE will rely on their strict application of guidance, and the agency has expressed its position that focused inquiries to specific detention officers will not help the cause. Remember that once you choose to share your client's story with the public it may become impossible to limit the information that is shared, including negative facts that you may not want exposed. It is similarly not advisable to post identifying information on social media about the deportation officer as this will not help your case.

Practice Tips before ICE ERO:

- Be focused and direct in highlighting the most extenuating circumstance relative to your client in asking for a release from custody and/or stay of removal;

- Establish that the agency maintains the authority to grant the request, as applicable;

- Exhaust procedural options with the agency as it is often a prerequisite to seeking liaison assistance and/or pursuing federal litigation.

ICE Office of the Chief Counsel (OCC)

OCC represents counsel for DHS responsible for the litigation of cases pending before the Executive Office for Immigration Review Immigration Court. Similar to other agencies, OCC has drastically diminished (if not eliminated) the exercise of prosecutorial discretion to administratively close removal proceedings. In a turn from their previous practice of joining

motions to conditionally terminate in order to see adjustment before USCIS, the agency seems to no longer be joining these motions. Similarly they are opposing requests to admin close either because of a pending request for prosecutorial discretion or even during the pendency of an application before USCIS.

OCC has also clearly stated that they will no longer administratively close cases for the purpose of pursuing a Form I-601A stateside waiver. In turn, this becomes a critical issue to discuss with your client as it pertains to the procedural posture of the case and having to prospectively consider voluntary departure. Practitioners should expect to aggressively litigate cases in light of OCC objections.

Practice Tips before OCC:

- Continue efforts to reach out to the Trial Attorney in obtaining DHS position;

- Rely upon *Matter of Avetisyan* by asking the Immigration Judge to grant a request for administrative closure regardless of DHS objection.[7] Remember that the Court must recalendar upon either party's motion after a grant of admin closure.

Executive Office for Immigration Review

EOIR is responsible for the adjudication of cases in the context of conducting immigration proceedings, appellate reviews, and administrative hearings. Many courts are burdened by a case backlog that spans years ahead, and the ability to adjudicate cases has been hampered by pressure to resolve cases expeditiously. Practitioners should be conscious of pressures imposed upon EOIR to ensure that their cases are heard fully and fairly.[8]

As DHS objections in response to motions by practitioners are becoming a norm in the Immigration Court, it is important to remember the authority by the Immigration Judge to administratively close cases over DHS objection pursuant to *Matter of Avetisyan*. In this context, it is helpful to establish that efforts have been made through DHS to seek a joint motion or otherwise, and then to emphasize how judicial efficiency may be served by a favorable decision to administratively close removal proceedings.[9] However, pursuant to *Matter of W-Y-U-*, the most important factor for the Judge's consideration is "whether the party opposing closure has provided a persuasive reason for the case to proceed."[10]

In light of increased enforcement and the elimination of prosecutorial discretion, Immigration Judges are imposing higher bond amounts. One reason cited for the higher bond amounts is the flight risk components, given the new administration's aggressive enforcement measures.

Practice Tips before EOIR:

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[7] *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).
[8] *See* DOJ Memorandum, "Operating Policies and Procedures Memorandum 17-01: Continuances" (July 31, 2017), *available at* www.justice.gov/eoir/file/oppm17-01/download.
[9] *See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).
[10] *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

- Manage expectations of your client as pertaining to bond amounts and DHS' position;
- Create a record of attempting a joint effort with OCC;
- Identify the judicial inefficiency caused by DHS objections.

U.S. Customs & Border Protection

Customs & Border Protection (CBP) oversees the ability to accept applicants for admission to the United States at a land border or port of entry. It is particularly important in this environment to discuss the risks of departure to any client who may be subject to inadmissibility provisions under INA §212. With every travel and attempted return to the US, one is treated as an "applicant for admission" who is subject to admissibility review at primary and potentially secondary or deferred inspection. While there is no right to counsel in the course of CBP admissibility determinations, some officers (more than others) may be willing to have a discussion pertaining to a particular client.

Practice Tips before CBP:

- Review and anticipate any admissibility issues relative to a client seeking admission and/or return to the US;
- When warranted, ensure that your client travels with all documents necessary in order for CBP to complete its admissibility determination (including court docket records).

Rethinking TPS and DACA

Deferred Action for Childhood Arrivals (DACA)

On December 5, 2017, the Department of Justice announced that it was rescinding DACA and ordered that DACA holders would no longer be eligible for a grant of advance parole. On January 23, 2018 the 9th circuit in *Regents of the University of California vs. DHS*, overruled the administration's rescission, thereby allowing DACA holders to renew their applications for deferred action. Unfortunately, the Court sided with the Department in rescinding eligibility for advance parole.

A consideration for individuals granted DACA prior to turning 18 is the possibility that they may be able to consular process if they are eligible for an immediate relative visa, assuming they maintain eligibility prior to departing the US.

Temporary Protected Status (TPS)

- Haiti – (07/22/2019) will not be renewed
- Nicaragua – (01/05/2019) will not be renewed
- El Salvador – (9/9/2019) will not be renewed
- Sudan (11/2/2018) will not be renewed
- Nepal (6/24/2018) no decision on renewal

- Honduras – (07/05/18) no decision on renewal
- Somalia (9/17/2018) no decision on renewal
- South Sudan (5/2/2019) no decision on renewal
- Syria (3/31/18) no decision on renewal
- Yemen (9/3/18) no decision on renewal

Think of potential alternative forms of relief. Look into reopening any outstanding removal orders. Discuss Advanced Parole with your client, especially if there are USC Children that are approaching 21 years old.[11]

Understand that if there is a previously filed asylum application in the client's background, it is imperative to have a discussion regarding the content of the application, as well as the consequences of a frivolous asylum application in the context of a future adjustment.

Practice pointer: FOIA, FOIA, FOIA! You must obtain a clear history and background of your client's situation. It is important to consider periods of unlawful presence prior to obtaining TPS (or DACA), as well as any prior removal orders that must be reopened.

[11] *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

Sample ONLY – Tailor to your specific case and cite to appropriate state statutes and case law

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

County, ss. **Docket No.**

_____
)
XXX, **)**
)
_____)

SPECIAL FINDINGS OF FACT AND RULINGS OF LAW

After hearing on the instant Complaint and based on the Plaintiff's sworn affidavit provided to the Court, memorandum of law, and other evidence presented, the Court makes the following Special Findings of Fact and Rulings of Law:

1. CHILD'S NAME, was born on DATE, in CITY, COUNTRY. CHILD'S NAME resides in CITY, Massachusetts in XX County in the care of her/his [mother/father/other caretaker] and under the jurisdiction of this Court. CHILD'S NAME is not married.

2. This Court has jurisdiction pursuant to [appropriate state law] and G.L. c. 215 § 6 to make determinations about the dependency, custody, care and well-being of children, including guardianship determinations. This Court finds that CHILD'S NAME is dependent upon this Court for her health, safety, and welfare. *Id.*

3. CHILD'S NAME's [mother/father/parents], the [Defendants/Respondents], [abused/abandoned/ neglected] her/him by [add factual summary]. Cite. For these reasons, this Court finds that CHILD'S NAME's reunification with [one/both of his parents], NAME OF PARENT(S), is not viable due to [abuse/abandonment/neglect/grounds similar to ____ as defined under the laws of the Commonwealth of Massachusetts].

4. Having considered the health, educational, developmental, physical and emotional interests of CHILD'S NAME, this Court determines that it is not in CHILD'S NAME's best interest to return to her country of nationality, COUNTRY. *See, e.g., Custody of Kali*, 439 Mass. 834, 843-45 (2003) (in making a best interests determination, a judge must identify and weigh the pertinent factors). [add factual summary about best interests] For these reasons, it is in CHILD'S NAME's best interests to remain in the United States in the custody of his/her [mother/father/guardian], NAME OF MOTHER/FATHER/GUARDIAN.

5. The above findings were made due to the [abuse/abandonment/neglect/other] of CHILD'S NAME by her/his [mother/father/parents], to provide for her/his safety and well-being, and to protect CHILD'S NAME from future harm, in accordance

Comment [EB1]: Caption appropriately. Guardianship would be captioned as "In re: CHILD'S NAME." Complaints such as paternity, custody, support, divorce, or separate support would be captioned as "Parent A, Plaintiff v. Parent B, Defendant." Note that with all such orders, they should be accompanied by a decree or judgment, such as a decree of guardianship, judgment of paternity and/or custody, or judgement of divorce or separate support.

Comment [EB2]: Insert CHILD'S NAME's name where it says "CHILD'S NAME."

Comment [EB3]: Add G.L. appropriate to your type of case:
Guardianship: G.L. c. 190B §§ 5-201 – 5-204
Paternity/Custody/Support/Visitation for child born out of wedlock: G.L. c. 209C § 10
Divorce & divorce modification: G.L. c. 208 § 28
Separate Support: G.L. c. 209 §§ 32, 32F

Comment [EB4]: Petitions, like a guardianship, involve a Petitioners and Respondents. Complaints, formatted as A v. B., involve Plaintiffs and Defendants.

Comment [EB5]: Only list the words appropriate to your case. Do not say "abused, abandoned or neglected."

Comment [EB6]: Cite case law, statutes, or regulations to clarify how actions constitute definition of abuse, abandonment, neglect, or other similar bases.

Comment [EB7]: Again, list only the words/grounds appropriate to your case. If alleging similar grounds, state what it is similar to.

Sample ONLY – Tailor to your specific case and cite to appropriate state statutes and case law

with the laws of the Commonwealth of Massachusetts.

_____ _____

Date Justice of the Probate and Family Court

Updates on Moral Turpitude and the Categorical Approach: Ideas for Arguments Pursuant to the First Circuit's Analysis

Susan Church and Kathleen Gilespie[1]

Background on Moral Turpitude: Silva Trevino III

The long and puzzling history of *Matter of Silva-Trevino* has hopefully come to an end. Last year, the attorney general withdrew the Bush administration's prior decision, which allowed for the admission of police reports to establish removability. Rather, the attorney general affirmed that the categorical approach applies to the determination of what constitutes a crime involving moral turpitude (CIMT).[2] *See Matter of Silva-Trevino,* 26 I&N Dec. 550 (A.G. 2015),[3] vacating and remanding *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).[4] In the most recent *Silva-Trevino* decision, the Board set forth a uniform standard for determining whether a particular criminal offense is a crime involving moral turpitude.[5] *Matter of Silva-Trevino, 26 I&N Dec. 826, 830 (BIA 2016).*[6]

I. Moral Turpitude in General

The Board of Immigration Appeals (BIA) has long defined a crime involving moral turpitude as "conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general… [it] normally includes only acts that are *malum in se (i.e.,* an act that is inherently immoral)."[7] Generally, crimes involving moral turpitude require intent as an essential element.[8] "Evil or malicious

[1] Susan would like to thank Hillary White for her assistance. Kathleen would like to thank Emma Winger, Jennifer Klein, and Wendy Wayne of the Immigration Impact Unit of the Massachusetts Committee for Public Counsel Services for suggesting inspiring practice tips in their Immigration Case Notes for Massachusetts Criminal Defense Attorneys, July-August 2017 edition. Stefanie Fisher and Melinda Bonacore assisted with editing.

[2] In cases such as *Johnson v. State*, concerning sexual misconduct with a child, the court considered that "the victim and her friend stated that the victim was over 17, and she appeared older than her age." Similarly, the immigration judge in *Silva-Trevino* considered "the respondent knew that the victim of his crime was a minor" by looking at "evidence extrinsic to the record of conviction." *Johnson v. State,* 967 S.W.2d 848, 849 *(*Tex. Crim. App. 1998 (en banc); *see also Bobadilla v. Holder,* 679, F.3d 1052, 1057 (8th Cir. 2012) (allowing consideration of the respondent's record and other extrinsic evidence); *Mata-Guerrero v. Holder,* 627 F.3d 256, 260 (7th Cir. 2010) (same).

[3] Also referred to as "*Silva-Trevino II."*

[4] Also referred to as "*Silva-Trevino I."*

[5] *Matter of Silva-Trevino,* 26 I&N Dec. 826, 830 (BIA 2016)

[6] Also referred to as *"Silva-Trevino III."*

[7] *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3rd Cir. 2004) (citing *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1994)).

intent is said to be the essence of moral turpitude."[9] "Crimes in which evil intent is not an element, no matter how serious the act or how harmful the consequences, do not involve moral turpitude."[10] Typically crimes involving sexual misconduct, theft, significant violence and lying may implicate moral turpitude, especially if done intentionally rather than negligently.[11]

Reckless offenses raise thorny issues. Depending on how a state defines recklessness, an act, when committed recklessly, may or may not implicate moral turpitude. In 2015, the Board found that the offense of "deadly conduct" under Texas law qualified categorically as a CIMT. [12] The statute in that case defined recklessness as being "aware of but consciously disregard[ing] a substantial and unjustifiable risk that the circumstances exist or the result will occur."[13] Previously, in 2011, the Board had held that recklessness could amount to moral turpitude when it "entail[ed] a conscious disregard of a substantial and unjustifiable risk."[14] However, in a 2017 case, the Board seemed to backtrack on its interpretation of the definition of the necessary *mens rea* to catapult a reckless act into the category of a CIMT. In *Matter of Wu*, the Board ruled that a California offense involved moral turpitude where the reckless mental state required only that the "perpetrator have knowledge, while not of the risk of causing such injury, of the facts that make such an injury likely."[15] The Board reasoned that, in deciding whether conduct is morally turpitudinous, "the result should be no different for a person who willfully commits such dangerous conduct with knowledge of all the facts that make it dangerous than it is for one who commits the conduct with the knowledge that it is dangerous."[16] This lowered threshold will likely expand the scope of offenses that can be deemed CIMTs.

II. The Categorical Approach as it Applies to Crimes Involving Moral Turpitude.

In *Silva-Trevino III*, the Board held that the uniform standard in determining whether an alien's conviction constituted a CIMT would be the categorical and modified categorical approaches.[17] Under the categorical approach, the Board and immigration judges look to the criminal statute under which the defendant was convicted to "see if it fits within the generic definition of a crime

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[8] *Matter of Khourn*, 21 I&N Dec. 1041, 1046 (BIA 1997) (citing *Matter of Serna*, 20 I&N Dec. 579, 582 (BIA 1992).

[9] *Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980).

[10] *Matter of Abreu-Semino*, 12 I&N Dec. 579, 582 (BIA 1992).

[11] *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006).

[12] *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015).

[13] Tex. Penal Code Ann. § 6.03(c).

[14] *Matter of Hernandez, 26 I&N Dec. at 466 (citing Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011);

[15] *Matter of Wu*, 27 I&N Dec. 8, 14 (BIA 2017).

[16] *Id.*

[17] *Matter of Silva-Trevino*, 26 I&N Dec. 826, 830 (BIA 2016).

involving moral turpitude."[18] This holding is consistent with the Supreme Court's 2016 opinion in *Mathis v. the United States*, where the Court stated in dicta that the categorical approach is "an elements-only inquiry."[19] Prior to the decisions in *Matter of Silva-Trevino III* and *Mathis*, an immigration judge was able to go so far as to review police reports to determine whether or not something constituted a CIMT. Now, the question is only "whether 'the defendant had been convicted of crimes falling within certain categories,' and not about what the defendant had actually done."[20]

Both *Mathis* and S*ilva-Trevino III* highlight the important distinction between statutes that delineate alternative elements of a crime and statutes that provide various means of satisfying a given element. A criminal statute is divisible when it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction and at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to a relevant generic CIMT. Where an individual element may be carried out in multiple ways, and a judge or jury would not need to make a determination as to which method was used to satisfy the element, a crime remains indivisible. For many charges, when the government has access to the underlying record of conviction, it can prove that a conviction matches the federal definition. However, if a statute is non-divisible, then the government cannot resort to looking at the record of conviction and must instead focus on the elements.

The categorical approach is best exemplified in *Mathis*, where the Supreme Court considered an Iowa burglary statute which allowed conviction for entry into any structure, including air, water, and land vehicles.[21] Federal law allowed only for conviction for entry into a building or structure. The Iowa law did not require the jury to unanimously decide which location the defendant entered to convict. The Supreme Court found that the Iowa statute described alternative ways of satisfying, or carrying out, a single element, instead of alternative elements. As a result, the Iowa statute was held to be non-divisible. The Court rejected the government's attempts to look at the record of conviction and instead followed the precedent in *Descamps v. United State*s, limiting the analysis to the elements of a crime.[22] The Court found that the lower court erred by looking at conviction records indicating what type of structure the alien defendant had been charged with entering. Three months after the decision in *Mathis*, the Board of Immigration Appeals issued a decision in *Matter of Chairez-Castrejon*, 26 I&N Dec 819 (BIA 2016), adopting the practice set forth in *Descamps* and *Mathis*.

In *Silva-Trevino III*, the Board also added another factor to the analysis of what constitutes a CIMT – the realistic probability test.[23] Instead of focusing on the specific facts of the conviction,

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[18] *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016).

[19] *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016).

[20] *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016) (citing *Taylor v. United States*, 495 U.S. 575, 600 (2016).

[21] *Mathis v. United States*, 136 S.Ct. at 2252.

[22] 133 S. Ct. 2276 (2013).

the realistic probability test requires the Board and immigration judges to "focus on the minimum conduct that has a realistic probability of being prosecuted under the statute."[24] This test refers to non-CIMT conduct that could be theoretically prosecuted under a state statute. The Board requires that there be a "realistic probability" that such conduct would actually be prosecuted before rejecting the charge under the state statute as a ground of removability. Thankfully, in *Whyte v. Lynch*, the First Circuit used "common sense" to determine what constitutes the likely minimum conduct, rather than requiring that an actual case of prosecution be presented to the court.[25] At least in the First Circuit, a respondent can still argue that a state conviction does not match the federal definition so long as the minimum non-CIMT conduct alleged fits a common-sense analysis of what may be prosecuted under the statute. An actual prosecution is not required.

Ideas for Arguments under the First Circuit Analysis

Idea #1:

Argue that the reckless form of Massachusetts assault and battery with a dangerous weapon (ABDW) is not categorically a crime involving moral turpitude (CIMT). *See Coelho v. Sessions*, 864 F.3d 56 (1st Cir. 2017).

The question in *Coelho v. Sessions* was whether the petitioner's conviction for assault and battery with a dangerous weapon in violation of Massachusetts General Laws chapter 265 section 15A was categorically a crime involving moral turpitude.

The petitioner in *Coelho* sought relief from removal in the form of Cancellation of Removal under INA §240A(b)(1). The immigration judge (IJ) in Boston pretermitted the petitioner's application, however, based solely on his conviction for a single count of Massachusetts ABDW. The BIA upheld that decision, concluding, as the IJ had, that all forms of Massachusetts ABDW categorically involve moral turpitude.

Massachusetts case law recognizes two separate types of ABDW; intentional and reckless. The *intentional* theory of ABDW punishes "the intentional and unjustified use of force upon the person of another, however slight." The *reckless* theory punishes "the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another." *See Coelho*, 864 F.3d at 61, citing *Commonwealth v. Burno*, 396 Mass. 622, 487 N.E.2d 1366, 1368 (1986).

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[23] *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016).

[24] *Id.*

[25] *Whyte v. Lynch*, 807 F.3d 463, 469–70 (1st Cir. 2016).

On petition for review, the First Circuit focused on the question of whether or not the reckless form of ABDW categorically involves moral turpitude. The First Circuit panel ultimately remanded the case to the BIA because it was not satisfied that the BIA had sufficiently considered the specific nature of "recklessness" under Massachusetts law and how it relates to the definition of "moral turpitude."

In Massachusetts, unlike in many other states, a person may be "reckless" without actually realizing the dangerousness of his or her actions:

> But even if a particular defendant is so stupid or so heedless that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger. A man may be reckless within the meaning of the law although he himself thought he was careful.

Commonwealth v. Welansky, 316 Mass. 383, 398 (1944). "Knowing facts that would cause a reasonable man to know the danger is equivalent to knowing the danger" under Massachusetts law. *Id*.
As such, Mr. Coelho argued that Massachusetts recklessness is similar to criminal negligence, which the Board found was insufficient in *Perez-Contreras*, 20 I. & N. Dec. 615 (BIA 1992) at pages 618-19, and that the *mens rea* required for conviction of the reckless form of Massachusetts ABDW does not suggest the kind of depraved motive or purpose that would satisfy the Board's definition of a CIMT.

After briefing was completed in *Coelho*, the BIA published a decision addressing a similar objective measure of recklessness under California law. *See Matter of Wu*, 27 I&N Dec. 8 (2017). But the First Circuit was not convinced that *Matter of Wu* definitively answered the question of how the BIA would treat Massachusetts recklessness. The First Circuit therefore remanded the matter to the BIA to determine the following:

> First, what is the effect, if any, of *Matter of Wu* on the outcome that Massachusetts ABDW is categorically a CIMT? Second, how does Welansky's prescription—that a defendant "so stupid or so heedless that ... he did not realize" the risk posed by his conduct can nonetheless be deemed to have acted recklessly, so long as "an ordinary normal man under the same circumstances would have realized" the risk—impact the BIA's analysis of the moral depravity of Massachusetts reckless ABDW? Finally, was Coelho convicted of intentional or reckless ABDW?

Coelho v. Sessions, 864 F.3d 56 (1st Cir. 2017). The case was pending before the BIA on remand as of the date this article was completed.

Note: For most pleas in Massachusetts district courts, the plea colloquy recordings are destroyed after a certain amount of time, generally two and a half years. And the First Circuit has held in the context of an Armed Career Criminal Act case that the boilerplate language of Massachusetts criminal complaints is insufficient to establish which form of a crime someone has been convicted of under the categorical approach. *See United States v. Holloway*, 630 F.3d 252 (1st

Cir. 2011). So for most ABDW pleas, there will be no definitive evidence of which form of Massachusetts ABDW your client was in fact convicted.

Tips for immigration practitioners:

- To preserve the issue for further review, deny that any conviction of Massachusetts ADBW is categorically a CIMT.

- If the issue is removability, point out that the government has the burden to prove removability by clear and convincing evidence, and argue that they cannot meet their burden to show which form of ABDW your client was convicted of by reference to the boilerplate language of Massachusetts criminal complaints. *See United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011).

- If the issue is eligibility for relief from removal or for other benefit where the applicant has the burden of proof by a preponderance of the evidence, argue that where all existing *Shepard* documents[26] have been produced but still do not establish which form of Massachusetts ABDW the client was convicted of (*see supra* regarding insufficiency of "boilerplate" criminal complaints), then the *Moncrieffe* presumption that the conviction rested on the least of the acts criminalized cannot be rebutted. *See Peralta Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016).

Idea #2:

Argue that the intentional form of Massachusetts ABDW does not categorically involve moral turpitude either, and as such Massachusetts ABDW is never categorically a crime involving moral turpitude (CIMT). *See United States v. Faust*, 853 F3d 39, 55-60 (2017), *but see United States v. Tavares*, 843 F.3d 1, 14-17 (2017).

Whether or not the Massachusetts ABDW statute is divisible[27], immigration practitioners can

[26]The reviewable record for a conviction by plea is limited to "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." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

[27] In *United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016), the First Circuit held in the context of analyzing Massachusetts ABDW as a crime of violence under the Armed Career Criminal Act (ACCA) that Massachusetts ABDW is divisible as between its reckless and intentional forms by taking an "informed prophecy" approach to how the Massachusetts Supreme Judicial Court would answer the question of divisibility. It also held that intentional ABDW is categorically a crime of violence because the use of a dangerous weapon inherently requires the attempted or threatened use of violent force.

United States v. Tavares appears to have been wrongly decided as to the divisibility of Massachusetts ABDW, since the "informed prophecy" approach appears to conflicts with *Mathis v. United States*, 136 S.Ct. 2243, 2256–57 (2016), which held that where state law and court records are unclear as to whether an offense is divisible or not, the offense is not divisible. And arguably, *Tavares* and its predecessor case, *United States v. Whindelton*, 797 F.3d 105 (1st Cir. 2015), were also wrongly decided as to the question of whether or not intentional ABDW inherently

argue another issue that was raised in *Coelho*, although the First Circuit did not directly address it: does the *intentional* form of Massachusetts ABDW categorically involve moral turpitude?

Like simple assault and battery, the Massachusetts offense of assault and battery with a dangerous weapon is a general intent crime that punishes a wide range of conduct, including *de minimis* conduct or harm. *See Commonwealth v. McNulty*, 937 N.E.2d 16, 32 (Mass. 2010); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1058 (Mass. 1980) (ABDW criminalizes intentional touching, "however slight," with a dangerous weapon); *see U.S. v. Fish*, 758 F.3d at 9 (a conviction for ABDW does not require the use of violent force).

A Massachusetts defendant can be convicted of an intentional ABDW for a slight and harmless touching with an inherently dangerous weapon, or with an object used in a way that is capable of producing serious bodily harm, whether or not the defendant intended to use it that way, and whether or not the defendant had any intent to cause injury. *See Commonwealth v. Ford*, 424 Mass. 709, 711, 677 N.E.2d 1149, 1151-1152 (Mass. 1997) (ABDW is a general intent crime and does not require specific intent to injure the victim, but its intentional branch requires an intentional touching, and not merely an intentional act resulting in a touching); *Commonwealth v. Waite*, 422 Mass. 792, 794 n.2, 665 N.E.2d 982, 985 n.2 (Mass. 1996) (ABDW does not require specific intent to do bodily harm with the dangerous weapon); *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 887 n.4, 469 N.E.2d 797, 801 n.4 (1984) (ABDW "requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another, by means of an instrumentality capable of causing bodily harm"); *Commonwealth v. Appleby*, 380 Mass. 296, 307-308, 402 N.E.2d 1051, 1058-1059 (Mass. 1980) (ABDW "is a general intent crime in Massachusetts . . . . [that] does not require specific intent to injure; it requires only general intent to do the act causing injury . . . . [It] requires that the elements of assault be present . . . , that there be a touching, however slight . . . , that the touching be by means of the weapon . . . , and that the battery be accomplished either by use of an inherently dangerous weapon, or by use of some other object as a weapon with the intent to use that object in a dangerous or potentially dangerous fashion.").

In sum, a Massachusetts defendant can be convicted of an intentional ABDW for a slight and harmless touching with an inherently dangerous weapon, or with an object used as used in a way that is capable of producing serious bodily harm, whether or not the defendant intended to use it that way, and whether or not the defendant had any intent to cause injury.

As such, immigration counsel can and should argue that the minimum conduct criminalized, *see Moncrieffe v. Holder*, 569 U.S.__, 133 S. Ct. 1678, 1684 (2013), compels the conclusion that the intentional from of Massachusetts ABDW is not categorically a CIMT, either. *But see United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016) (holding in the context of a crime of violence analysis that because Massachusetts ABDW involves the use of a dangerous weapon, it inherently requires the attempted or threatened use of violent force).

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requires the attempted or threatened use of violent force. Hopefully the holdings in *Tavares* and *Whindelton* case may be overturned in future. But for now, they remain precedent.

Tips for immigration practitioners:

- As suggested above, to preserve the issue for further review, deny that any conviction of Massachusetts ADBW is categorically a CIMT, and argue that intentional ABDW is not categorically a CIMT.

- For pleas, if the plea colloquy no longer exists, argue that the *Shepard* documents cannot establish that your client was convicted of the intentional form of Massachusetts ABDW, as they are mere boilerplate. *See* argument *supra* under Idea #1.

Idea #3:

Argue that a conviction for either Connecticut or Massachusetts larceny cannot categorically be a "theft offense" for purposes of the aggravated felony definition, because each offense can be committed by fraudulent means, rather than by generic "theft." *De Lima v. Sessions*, 867 F.3d 260 (2017).

A "theft offense" with a sentence of imprisonment of one year or more, suspended or imposed, constitutes an aggravated felony under 8 USC §1101(a)(43)(G). At issue in the *De Lima* case was whether third-degree larceny under Connecticut law can constitute a "theft offense" aggravated felony. Mr. De Lima raised three arguments on appeal: (1) it cannot be a "theft offense" because it does not require an intent to permanently deprive another of the property, (2) it cannot be a "theft offense" because it includes theft of services, (3) it cannot be a theft offense because it also includes fraud offenses.

The BIA has previously held fraud to be separate and distinct from theft, since theft occurs without consent, and fraud occurs with consent that has been unlawfully obtained. *Matter of Garcia-Madruga*, 24 I & N Dec. 436, 439 (BIA 2008).

The First Circuit held in *De Lima* that no intent to permanently deprive is necessary to constitute a "theft offense" aggravated felony, and rejected the argument that "theft offense" cannot include theft of services, as the term is broader than the common law definition of theft.

And unfortunately, the Court declined to consider the argument that Connecticut third degree larceny is broader than a generic "theft offense," because that argument had not been raised before the BIA. Writing in dissent, Judge Lipez would have had the Court consider the argument regarding theft and fraud and reverse the BIA's decision on that ground.

Tip for immigration practitioners:

- Immigration counsel should argue, with support from Judge Lipez's dissent in *De Lima* and the BIA holding in *Garcia-Madruga*, that neither Connecticut third-degree larceny nor Massachusetts larceny under Mass. G.L. ch. 266, § 30 can categorically be "theft offenses," because each can be committed through fraudulent means, rather than by "theft."

- Note: For Massachusetts larceny, a generic larceny complaint cannot not reveal whether the crime was one of fraud or theft. *See Commonwealth v. Mills*, 436 Mass. 387, 391-92 (2002) ("The word 'steal' has become 'a term of art and includes the criminal taking or conversion' by way either of larceny, embezzlement or obtaining by false pretenses."); *see also Holloway, supra*.

Be a "Dirty" Immigration Lawyer

By Annelise Araujo, Esq., Howard Silverman, Esq., and Ron Abramson, Esq.

In New England, the relationship between the American Immigration Lawyers Association (AILA) and Immigration and Customs Enforcement (ICE) had always been a productive one. Through the work of liaisons and good immigration lawyers, ICE officers in New England would use their discretion to focus on priorities, and could be counted on to weigh the positive and negatives of a person's history before reaching a decision.

For the most part, immigration lawyers and ICE agents have always been able to communicate effectively. Until recently even individuals with prior removal orders against them were able to file stays of removal with ICE and remain in the country if there were positive equities and little to no criminal history present in a particular fact scenario.

This cooperation seems to have changed. Although ICE remains polite and willing to meet with AILA, the agents, supervisors and directors have made it clear that their priorities have changed, and they will strictly enforce them. All undocumented individuals are priorities. The exercise of discretion has dramatically changed. Individuals who have been under orders of supervision, and granted stays of removal, for many years, are now routinely being denied stays, even when they have USC spouses or children where grave medical circumstances are present. ICE has indicated that the 30-30 rule (in which the agency gives an individual 30 days to show up with an airline ticket showing a departure date 30 days after that) is a merciful act that many other ICE offices do not grant.

As an immigration lawyer, it is time for you to fight back. Here are the steps you need to take:

1. **Be proactive** – The number of attorneys who will file a motion to reopen a prior removal order without reviewing the client's complete record is astounding. Don't be one of these attorneys, unless removal is imminent and you have no time to file a Freedom of Information Act (FOIA) request. The first thing you must do in these instances is review your client's immigration and criminal record. Remember, you can't rely only (or sometimes not at all) on the information being provided by your client. You must file a FOIA request with any government agency your client has encountered (Executive Office of Immigration Review (EOIR), Customs and Border Protection (CBP), and the Department of Homeland Security (DHS)). Very often you will find the paperwork associated with your client's prior removal order was not properly prepared; errors can result in strong arguments for a motion to reopen. These are some of the most common errors:

    a. The incorrect address for your client is listed on the hearing notice.
    b. The hearing notice was mailed but returned to the court.
    c. The notice to appear (NTA) was never filed with EOIR and your client does not have a removal order.
    d. A non-authorized person signed the NTA.
    e. The NTA was rejected by EOIR and never reissued.
    f. The NTA was never served on the client.

If you know the complete picture, you will be able to better prepare if your client is arrested by ICE, has an order of supervision revoked, or is denied a stay. Therefore, even if your client is not in imminent danger, file a FOIA.

2. **Use your resources and be creative** – The AILA dues you pay each year get you some nice wine at the chapter meetings and, even more importantly, connects you with attorneys who volunteer their time to help you. In New England, the ICE AILA liaisons can help in having a stay denial reviewed by a supervisor. Although they cannot guarantee a positive result for your client, bringing in a liaison means the ICE field officer director will really think about the decision at hand and (possibly) reconsider.

   For this to work, it is imperative that the initial stay request be drafted carefully and within the current administration's guidelines. You have to think outside the box. Why not argue that your client is not a priority? For example, a person who entered under the visa waiver program does not have a removal order, and therefore you can argue he or she is not a priority. It is your job as an advocate to work creatively within the restrictive orders given to ICE officers and give them a reason to approve your stay. It is no longer sufficient to say only that your client has U.S. citizen children. Family ties will not get them off that plane.

   The AILA New England chapter now has a federal litigation program that helps attorneys file petitions in federal court. The program can guide attorneys with less experience in filing petitions in district courts and the First Circuit Court of Appeals. This is a tremendous resource, and especially valuable in the current climate, when the only weapon your client may have is to go beyond the confines of the enforcement and administrative immigration agencies. Furthermore, it is essential that good precedent is formed so that in the future attorneys can rely on your case to support their clients' claims.

3. **Litigating beyond the administrative immigration courts** — Often ICE needs a federal judge to remind them that they, too, are bound by due process and their own regulations, policies and procedures. ICE currently has the mindset to deport as many people as fast as possible and their actions may violate a client's constitutional rights and their own self-imposed rules. It can feel like the Wild West, but it is not. The case of *Terry Helmuth Rombot v. Steven Souza* (1:17-cv-11577-PBS) is a perfect example that federal judges are willing to hold ICE to the rule of law.

   Rombot concerned an Indonesian man who was placed under an order of supervision and periodically checked in with ICE. The order of supervision set forth terms of compliance and stated Rombot would be given an opportunity for orderly departure. *Id.* at 4. However, ICE arrested him without notice and revoked his release.

   The district court, citing *Zadyvdas v. Davus*, 533 U.S. 678 (2001), acknowledged that ICE cannot indefinitely detain aliens post-removal period under 8 USC §1231 (a)(6). In *Zadyvdas*, the Court stated a reasonable detention period is under six months. Additionally, in *Zadyvdas*, the Court clarified that due process applies to all people within the United States, even undocumented individuals.

The court in *Rombot* explained the government has to follow the procedures required under 8 CFR §241.4 to revoke a release.

The court concluded that "ICE, like any agency, 'has the duty to follow its own federal regulations.'" *Id.* at 11, citing *Haoud v. Ashcroft*, 350 F.3d 201, 205 (1st Cir. 2003). Lastly, the court also concluded that ICE violated the due process clause of the Fifth Amendment when it detained Rombot without notice.

Importantly, the court said: "[w]hile ICE does have significant discretion to detain, release or revoke aliens, the agency must follow its own regulation, procedures, and prior written commitment in the Release Notification…The Supreme Court has recognized that an 'alien may no doubt be returned to custody upon a violation of [supervision] conditions,' Zadvydas, 533 U.S. at 700, but it has never given ICE carte blanche to re-incarcerate someone without basic due process protection." Rambot at 13.

The important note to take from this case is to use ICE's own regulations to advocate for your clients, and to challenge the agency in federal court, even when it may seem like the end of the road. The rule of law exists to protect our clients from abuse of discretion on the part of the government. We must be diligent, reviewing every notice our clients receive from ICE, outlining the chronology of ICE's actions in our clients' cases and challenging them when they violate their own rules and the U.S. Constitution. ICE is not the end of the road. Do not be afraid to seek assistance from the federal court, and ask AILA for help when you need it.

If you follow these steps, Jeff Sessions may call you "dirty," but everyone else will call you a great advocate for your clients.

Practice Pointer: Data Privacy Considerations and I-9s – Protecting Employee Information and Avoiding a Breach

By AILA's Verification and Documentation Liaison Committee[1]

This practice pointer focuses on security considerations and safeguards for attorneys and employers as they relate to Form I-9. In an era of frequent data breaches of employee and customer information and heightened awareness and litigation around the loss of such information, it is essential to know and understand employer best practices for completing and retaining I-9s. Privacy rules can affect the advice that attorneys give regarding "missing I-9s," such as when an employer has knowledge of a loss of information that would trigger notification to a state Attorney General or credit bureau.

Note that this area of law is constantly changing. In addition to federal I-9 requirements, there are a wide range of state data laws that apply. Therefore, it is important for practitioners to carefully review and consider all applicable legal requirements for the completion, storage, and transfer of I-9s and to seek legal advice on privacy concerns and any other issues that may be outside of his or her area of expertise.

Basic Privacy Considerations – Understanding and Identifying PII

As a starting point, it is worth mentioning that Personally Identifiable Information (PII) is not simply defined. For a concept that permeates the privacy landscape and receives much attention in a variety of legal sources, there is not *one* clear definition upon which to rely. For example:

- The **U.S. Department of Labor (DOL)** defines PII as: "Any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means. Further, PII is defined as information: (i) that directly identifies an individual (e.g., name, address, social security number or other identifying number or code, telephone number, email address, etc.) or (ii) by which an agency intends to identify specific individuals in conjunction with other data elements, i.e., indirect identification. (These data elements may include a combination of gender, race, birth date, geographic indicator, and other descriptors)."[2]
- The **Department of Homeland Security (DHS)** takes a different approach. DHS defines PII as "any information that permits the identity of an individual to be directly or indirectly inferred, including any information that is linked or linkable to that individual, regardless of whether the

[1] Special thanks to AILA members Lindsay Chichester Koren and Amy L. Peck, who serve on AILA's Verification and Documentation Liaison Committee.

[2] U.S. Dep't of Labor, *Guidance on the Protection of Personal Identifiable Information*, https://www.dol.gov/general/ppii

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individual is a U.S. citizen, legal permanent resident, visitor to the U.S., or employee or contractor to the Department."[3] DHS defines "Sensitive PII" as "Personally Identifiable Information, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual."[4]

- The **National Institute for Standards in Technology** defines PII as "any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information."[5]

Looking beyond these sources does not provide further clarity. If one looks to privacy law, such as state data breach requirements, the definition of PII also varies.[6]

To consider PII as it relates to employment verification, it is most valuable to look at the lens through which we are viewing the information – the I-9 Form – and think about what information on the I-9 might trigger a need for protection.

Completing the I-9 – A Host of PII on One Page

When an employee completes Section 1 of the I-9, a company is collecting information that could be considered PII. Specifically, a company is asking for the individual's name, date of birth, and, if the employee chooses to request it or if the employer is an E-Verify participant, the Social Security Number (SSN). The breach of an individual's first initial/name and last name combined with their SSN generally constitutes a loss of PII in nearly every state jurisdiction that has enacted a law on data breach notification.[7] One state, North Dakota, would treat the loss of the name and date of birth alone as a data breach requiring disclosure.[8]

The next step on the I-9 is provision of a status attestation. If an employee indicates they are a lawful permanent resident (LPR) or an alien authorized to work, the employee must then provide an alien registration number (A Number), an I-94 entry document number, or a foreign passport number and indicate the country of issuance. Any of those numbers would be sufficient to constitute a "government issued identification number," which also is PII under many state data breach laws.

In Section 2, more PII is documented. The employer restates information from Section 1 regarding name and status and inputs the specific information provided on the face of the documentation from the employee that evidence identity and employment authorization. Again, the document number(s)

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[3] U.S. DEP'T OF HOMELAND SECURITY, THE PRIVACY OFFICE, HANDBOOK FOR SAFEGUARDING SENSITIVE PERSONALLY IDENTIFIABLE INFORMATION 4 (2012), *available at* https://www.dhs.gov/sites/default/files/publications/privacy/Guidance/handbookforsafeguardingsensitivePII_march_2012_webversion.pdf

[4] *Id.*

[5] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-536, PRIVACY: ALTERNATIVES EXIST FOR ENHANCING PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION (2008), *available at* http://www.gao.gov/new.items/d08536.pdf.

[6] Nat'l Conference of State Legislatures, Security Breach Notification Laws, http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx

[7] *Id.*

[8] *See* N.D. Cent. Code § 51-30-01.4 (2013)

provided here are sufficient to be a "government issued identification number," triggering the definition of PII under many of the state data breach provisions.

If you are completing the I-9 as an E-Verify participant, there's additional PII to consider in the photo match process. E-Verify employers are required to complete a photo match for certain documents (I-551 Permanent Resident Card, I-766 Employment Authorization Document, and U.S. Passport or Passport Card) and retain a photocopy of those documents. Whether stored electronically or in hard copy with the I-9, this photocopy is one more piece of PII that employers must protect.

I-9 Retention – Safeguarding Employees' Information

Given the amount of PII that can be found on an I-9, it becomes even more important for employers (and their attorneys who review I-9s) to properly safeguard the information. As a best practice, to reduce PII exposure, employers should:

- Store I-9s in a secure location, where access is limited and is locked (or password protected if stored electronically) when not in use;
- Store I-9s separately from the employee's personnel file to limit access and assist in adherence to retention guidelines; and
- Purge and properly destroy I-9s that have passed the retention period (3 years from the date of hire or 1 year from the date of termination, whichever is later).

For electronic I-9 storage, USCIS advises that employers implement an effective records program that:

- Ensures that only authorized personnel have access to electronic records;
- Provides for backup and recovery of records to protect against information loss;
- Ensures that employees are trained to minimize the risk of unauthorized or accidental alteration or erasure of electronic records; and
- Ensures that whenever an individual creates, completes, updates, modifies, alters, or corrects an electronic record, the system creates a secure and permanent record that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken.[9]

When transmitting I-9s electronically, employers and attorneys should take additional precautions. Given the possibility of misdirected email or a security intrusion, I-9s sent via email should be secured. At a minimum, the file should have password protection, and ideally, the file should be encrypted. Encrypting information provides a safeguard against many of the state data breach requirements outlined below.

In sum, ensuring proper access controls and having a mechanism to document when changes or modifications are made to I-9 forms will help minimize the risk of PII exposure.

[9] U.S. CITIZENSHIP & IMMIGRATION SERVICES, HANDBOOK FOR EMPLOYERS M-274 - 10.4 SECURITY (2017), *available at* https://www.uscis.gov/i-9-central/104-security.

Missing I-9s and Triggering a State Disclosure Requirement

The term "missing I-9" is commonly used by employers and attorneys where a company is missing recordation of documentation of employment eligibility. It is also used where the I-9 is lost or was never created. Furthermore, the term is used by electronic providers for reporting purposes.

In this environment of sensitivity around personal information, employers and attorneys alike should be more precise when using the term "missing I-9" and provide some additional context. There is, from a data security perspective, a difference between an I-9 that was never created versus an I-9 that was created and subsequently lost or misplaced. The former creates an immigration compliance concern to overcome, while the latter triggers not only the immigration compliance concern but also a potential PII data breach for which the employer has an obligation to disclose the possible exposure of information to the affected individual.

If an I-9 was completed and is now lost or misplaced, it is time to engage data privacy experts to identify what steps the employer must take. As noted above, state data breach disclosure requirements vary by jurisdiction.[10] In some states, the employer may be required to notify the individuals affected. In others, the employer must notify the individual as well as the state Attorney General. Many states impose temporal requirements on employers to ensure notice is provided quickly to those affected. Depending on the volume and type of information lost or misplaced, the employer may have additional obligations such as notice to credit bureaus, other agencies, or even public disclosure. States may require that the employer provide the affected individual with free credit protection. Attorneys General may investigate the incident to determine whether fines or other penalties are appropriate.

Importantly, employers should be mindful to:

- Promptly notify counsel and appropriate company leadership if it suspects I-9s have been lost or misplaced;
- Document the identity and any contact information the employer has for the affected individual(s);
- Only transmit electronic documents containing I-9s securely (password protected and preferably encrypted);
- Engage privacy counsel to determine whether the employer has data breach notification requirements; and
- Timely send such notifications and respond to any supplemental regulator or employee inquiries regarding the matter.

For attorneys who advise on I-9s, while privacy law expertise is not required, it is important to understand what PII is and what triggers a possible data notification. Furthermore, attorneys who are reviewing I-9s as part of a self-audit or in response to a Notice of Inspection should have a clear understanding and discuss with the client whether "missing I-9s" might mean a possible data loss.

An Ounce of Prevention is Worth a Pound of Remediation

Employers must safeguard the PII of their employees to ensure that the information cannot be accessed by others. Attorneys providing guidance on I-9s should understand these concepts and help elevate

[10] Nat'l Conference of State Legislatures, *supra* note 6.

concerns about lost or misplaced PII. As the I-9 and any supporting documentation, whether in physical or electronic form, contain PII, it is important to ensure that I-9s are protected.

To best protect company and employee information, employers should have a policy in place that defines PII for the company and provides guidance on how such information must be secured. That policy should apply to any individual who uses that information – whether it is employees, vendors, or other third parties. Employers should also reinforce the importance of information security and provide regular security training to their employees.

Finally, employers should include lost or misplaced I-9s as part of any incident response plan it has for possible data security breaches. Employers should work with privacy counsel and conduct a practice exercise of that response plan to ensure that everyone is comfortable with their roles and responsibilities. Above all, employers should not just shrug off lost or misplaced I-9s and assume that they will resurface at some point in the future. Data breach notification laws do not make exceptions or accept excuses.

Mining for Gold in the PERM FAQs

By Sarah Peterson, Vincent Lau, and Catherine Haight[1]

To shed light on ambiguous or evolving issues that come up in PERM processing, practitioners look to the federal regulations[2] and Board of Alien Labor Certification Appeals (BALCA) cases[3] for guidance. An often forgotten third source of practical guidance is the Department of Labor (DOL) Employment and Training Administration's PERM FAQs. By highlighting some of the issues addressed in the PERM FAQs, this article will serve to remind practitioners that "there's gold in them thar hills!"[4]

Practitioners can find the PERM FAQs at: www.foreignlaborcert.doleta.gov/faqsanswers.cfm. When first arriving at this page, there is a link in the middle of the page to "FAQ Rounds." Rather than viewing these as Rounds, it is easiest to view by topic. Wait a few seconds after arriving at the page, or drag your cursor from the side of the page to the middle, and the "Rounds" link turns into a list of pertinent topics, arranged by subject. Practitioners can also search using the feature on the right of the page.

While BALCA has referred to the FAQs in many of its decisions overturning a CO's denial of a PERM application,[5] BALCA has also held that FAQs are not binding authority[6] and cannot be used against the employer.[7] Nonetheless, they provide guidance and clarification on the regulations[8] and are binding on the CO.[9] While practitioners should precisely follow the PERM regulations when preparing a PERM case, the authors recommend also reviewing the FAQs periodically for information pertinent to specific issues that may arise in your cases.

What follows are a few nuggets of gold worth highlighting. For readability purposes, the information below is not organized in the order of the FAQs on the DOL website. Instead, the information is grouped into five broad topics that approximate a typical PERM processing workflow.[10]

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[1] Thanks to Frank Fogelbach, Esq. of Haight Law Group, PLC for his help editing this article.

[2] The PERM regulations can be found at 20 CFR §656.

[3] BALCA cases can be found at www.oalj.dol.gov/.

[4] Mark Twain, The American Claimant (1892).

[5] See, e.g., *Matter of Cosmos Foundation, Inc.*, 2012-PER-01637 (August 4, 2016); *Matter of Eteam, Inc. 2013-PER-00424* (December 1, 2015); *Matter of Target Point Media*, LLC, 2010-PER-01637 (February 27, 2012).

[6] *Matter of HealthAmerica*, 2006-PER-1, 12 (July 18, 2006).

[7] *University of Texas at Brownville* 2010-PER-00887 (July 20, 2011) "FAQ[s]… cannot create a substantive rule adverse to an applicant without first undergoing notice and comment rulemaking."

[8] *University of Texas at Brownville* 2010-PER-00887 (July 20, 2011) "FAQ[s]… have provided guidance and clarification on regulatory requirements."

[9] *Matter of Lakha Enterprises, Inc. d/b/a Usmania*, 2011-PER-01344 (August 26, 2015) "Although the posting of FAQs is not a method by which an agency can impose substantive rules that have the force of law, the OFLC's public pronouncements on compliance are binding on the CO."

[10] Footnote citations to each FAQ in this article are not noted due to the difficulty in citation format; rather, the relevant FAQ may be found based on the FAQ header or a site search for specific words within the FAQs.

FAQs Regarding General Information to Keep in Mind throughout the PERM Process

Timeframes

There are numerous timelines and time periods set forth in the PERM regulations. A timeline refers to the number of days prior to or after a required event. In a timeline, the day of the event is not counted, rather the day that follows the event is counted as day #1, and the last day is included in the count. A time period is the number of days during which an activity must take place. When counting a time period, both the start date and end date are included in the count. Examples of timelines and time periods are included in the FAQs.

Change of address

Refer to this FAQ for guidance on what to do if:

1. The employer changes its mailing address after filing the ETA Form 9089.
2. The employer moves after recruitment is conducted, but before filing the ETA Form 9089.
3. The attorney moves after the ETA Form 9089 is filed.
4. The attorney changes law firms and still represents some, but not all, of the employers in cases filed by the attorney.
5. The attorney takes over cases that were filed by a prior attorney.
6. There is a change of address for the employer or attorney after a case is sent up to BALCA.

Familial Relationships

The familial relationship required to be affirmatively listed under 20 CFR §656.17(l) includes any relationship established by blood, marriage, or adoption, even if distant, including relationships established through marriage, such as in-laws and step families. The term "marriage" includes same-sex marriages that are valid in the jurisdiction where the marriage was celebrated.

Through the ETA Form 9089, the certifying officer must be able to establish that there was a genuine need for the alien, and a genuine opportunity existed for American workers, to compete for the opening. Failure to disclose familial relationships or ownership interests when responding to Question C.9 on the ETA Form 9089 is a material misrepresentation and may be grounds for denial, revocation, or invalidation.[11]

FAQs Regarding Prevailing Wage Requests and Determinations[12]

iCert Portal

Employers who experience difficulties with the iCert portal should email the Help Desk at: OFLC.portal@dol.gov. It may take several days for a response from the Help Desk.

PWR Form (ETA Form 9141)

The employer should input all supporting data into the body of the Employment and Training Administration (ETA) Form 9141. If the employer states, "see attached," and uploads supporting documentation, the National Prevailing Wage Center (NPWC) will not be able to review the

[11] It is the authors' experience that disclosing a familial relationship has not recently resulted in increased audits or denials.
[12] Prevailing Wage FAQs can be found both within the PERM FAQs and below the PERM FAQs in a separate section for Prevailing Wage FAQs.

request. The section for the job duties (Item E.a.5.) permits up to 4,000 characters, or 15 lines. If the employer exceeds these limits, iCert will automatically create an addendum page and insert "See Addendum" in Item E.a.5. The job duties will then appear on the iCert Addendum page.

Similarly, the employer must list every worksite in the body of ETA Form 9141 (Item E.c.7a.). The iCert portal allows for up to 200 locations to be entered in Item E.c.7a. When an employer has multiple worksites, the NPWC will provide a wage for each worksite. The employer must use the highest wage.

Alternate Requirements on a PWR
ETA Form 9141 does not provide a designated space for alternative requirements. However, employers that use alternative requirements must list the alternatives on the form. Alternative job requirements may be listed in the Special Requirements block (E.b.5.) or the Job Duties block (E.a.5.) of the ETA Form 9141. When issuing the prevailing wage, the NPWC will consider only the primary requirements as listed in the Minimum Requirements block (E.b.) of the ETA Form 9141.

Normal Skills
The employer should review O*NET (www.onetonline.org) to understand how the NPWC will assign the six-digit SOC code. Any skills for an occupation not listed as "normal" in O*NET will likely result in an increased wage level.[13] The NPWC defers to O*NET when occupational information conflicts with the Occupational Outlook Handbook (OOH).

ACWIA
The FAQs describe when the NPWC will find an American Competitiveness and Workforce Improvement Act (ACWIA) employer, a combination of occupations, and when the special skills impact the wage level. The NPWC must issue an ACWIA wage for all institutions covered by ACWIA. If the Standard Occupational Code (SOC) assigned to the occupation is not in the ACWIA database, the NPWC will use the wage for the closest classification in the ACWIA database.

Alternate Wage Sources
Alternative wage documentation may be submitted with the initial prevailing wage request.

Returned or Voided PW Determinations
The NPWC cannot reopen a Prevailing Wage Determination (PWD). Rather, the employer should submit a new ETA Form 9141 if the NPWC voids a request due to incomplete information.

Prevailing Wages – Corrections
PWDs are final. However, corrections are available under limited circumstances, including a mismatch between a wage level and the wage amount, an incorrect validity period, or a non-ACWIA wage for an ACWIA institution. To request a correction, the employer may email FLC.PWD@dol.gov and put "Request for Correction: P-xxx-xxxxx-xxxxxx" in the subject line.

[13] *See*, Prevailing Wage Determination Policy Guidance - Nonagricultural Immigration Program, Revised November 2009, at www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

Prevailing Wages – Redetermination
The employer has 30 days to request a redetermination of an unfavorable PWD. To request a redetermination, proceed to the iCert website and use the redetermination request option. Supplemental information may be submitted via FLC.PWD@dol.gov. If the NPWC affirms the employer's redetermination request, i.e., does not change the wage, then the validity period of the initial PWD remains valid. If the NPWC modifies it, then the validity period will be based on the redetermination decision date. Please note that if new Occupational Employment Statistics (OES) wage data is issued while the redetermination is pending, the NPWC will use the most current data available.

Schedule A – Qualified Physical Therapists
Even though Schedule A applications are not submitted to the DOL, the employer is nevertheless required to obtain a PWD, comply with the notice requirements found in §656.10(d), and use ETA Form 9089 when filing the petition with USCIS. Schedule A cases that are denied are not entitled to the reconsideration process found at 20 CFR §656.17.

FAQs Regarding PERM Posting and Recruitment

Notice of Filing
The regulations require posting the Notice of Filing (NOF) for at least ten consecutive business days.[14] A "business day" means Monday through Friday, except for Federal holidays. However, where the employer is open for business on a Saturday, Sunday, and/or holiday, the employer is allowed to consider such days as business days for purposes of the NOF. To do so, the employer must be able to demonstrate that 1) its employees were working on the premises and engaged in normal business activity; 2) the worksite was open and available to its clients and/or customers, if applicable, and to its employees; and 3) its employees had access to the area where the NOF was posted. Conversely, where the employer is not open on a weekday, the employer should not include any such days in its count of the ten-consecutive-business-day period required for the posting of the NOF.

Employee Referral Program
The employer using an employee referral program with incentives can provide dated copies of its notices or memoranda advertising the program and specifying the incentives offered, as well as other appropriate documentation. The employer must also document that its employees were aware of the specific vacancy for which certification is being sought. According to the FAQ, the NOF required under 20 CFR §656.10(d) is not sufficient for this purpose.

Multiple Positions
The employer may use one set of advertisements to recruit for multiple positions as long as the employer reasonably describes the vacancy and reflects the job opportunity as described in ETA Form 9089. As examples, the employer may use multiple vacancy descriptors such as: "5 Attorneys," "Attorneys," or, "Attorneys, multiple openings."

Prevailing Wage
The employer need not wait to receive a PWD before recruiting. If the employer proceeds with recruitment prior to issuance of the PWD, the employer must file the PERM application during the

[14] 20 CFR 656.10(d)(1)(ii).

validity period of the PWD. In addition, the employer cannot use recruitment or NOF that lists a rate of pay lower than the required rate of pay as set forth on the PWD. The employer can use the same prevailing wage determination for more than one application, as long as the underlying facts support the case.

Recruitment report
Although the initial recruitment report provided by the employer need not identify the names of the individual U.S. workers who applied for the job opportunity, it must categorize the lawful job-related reasons for rejection of U.S. applicants and provide the number of U.S. applicants rejected in each category. After reviewing the report, DOL may request the U.S. workers' resumes or applications.

If there was a layoff by the employer in the six months preceding filing the application in the occupation or related occupation in the area of intended employment, the employer must demonstrate that it notified and considered laid-off U.S. workers for the job opportunity.[15] This information must be included in the recruitment report. Merely telling workers to monitor the employer's job postings for future positions is insufficient; instead, the employer must directly notify and consider potentially-qualified workers who were laid off in the six months prior to filing the ETA Form 9089. In addition, at the time of the layoff, the employer has a duty to obtain contact information for the worker in order to notify and consider the worker after the layoff. An employer that files multiple labor certifications should notify each laid-off worker at least once a month that the employer maintains on its website a list of current relevant job openings. The employer must maintain detailed documentation to prove the layoff notice-and-consideration requirements have been met.

College and University Teachers – Recruitment
The NOF need not include the rate of pay for a PERM case filed on behalf of a college or university teacher selected in a competitive selection and recruitment process pursuant to 20 CFR §566.18(d).

FAQS REGARDING INFORMATION TO KEEP IN MIND AT TIME OF FILING

Attestation - Ability to Pay and Ability to Employ
The employer must be able to demonstrate the ability to pay the foreign worker the offered salary at the time of filing the ETA Form 9089 application, *see* 20 CFR §656.10(c)(3). In addition, the employer may be asked to provide evidence that the position is actually available. *See* 20 CFR §656.10(c)(4). For example, if the employer is starting a business, the employer may be asked to demonstrate that its business will be up and running and will have the need for the foreign worker at the time the foreign worker receives permanent residency.

Attestation - Attorney Role
The employer must sign ETA Form 9089 and take full responsibility for all representations made in the application. Knowingly providing false information in the preparation of the application and any supplement or to aid, abet, or counsel someone to do so is a federal offense punishable by imprisonment up to five years. Additionally, the employer, not the attorney, must be the one registering and creating its online PERM account. A subaccount may be created for the attorney. Note that the attorney, unless s/he is an employee of the employer and normally performs such

[15] The applicable regulation regarding layoffs is at 20 CFR §656.17(k).

duties, is not allowed to participate in interviewing or considering U.S. workers for the job offered the foreign worker.

Prohibition on Improper Payments and Transactions
The employer may not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, except from a party with a legitimate, pre-existing business relationship with the employer, and when the work to be performed by the foreign worker will benefit that party. Such activity includes, but is not limited to, recruitment activity, the use of legal services, and any other action associated with the preparation, filing, or pursuit of an application. Additionally, there must not be a reimbursement agreement that would require the foreign worker to reimburse all or some of the employer's fees and costs related to the labor certification. Moreover, the foreign worker's attorney cannot represent the employer on a pro bono basis – assuming the attorney is not also representing the foreign worker pro bono. Where the DOL finds that the employer, or the attorney or agent, is in violation of these rules, the DOL may debar the employer, attorney, or agent from the permanent labor certification program for up to three years.

What to file/Documentation
If the employer or its representative submits to DOL unsolicited documentation in conjunction with, or after filing the ETA Form 9089, the application will be *automatically selected for audit*.[16] Sending documentation other than in response to a request from DOL appears to raise questions sufficient to generate an audit.

Employers must retain all PERM supporting documentation for five years from the date the ETA Form 9089 is filed. It is important that employers are advised of this requirement.

FAQs Relating to Post-Filing Matters

Withdrawal
Pending applications can be withdrawn by accessing the employer's DOL online PERM account and marking the appropriate box. If the application was filed by mail, the withdrawal must be made in writing and sent to the National Processing Center. The employer need not wait to receive confirmation of the withdrawal prior to refiling an application. Note, however, that if the employer has received an audit letter, it must fully respond to the audit, including all required audit response documentation before withdrawing. The withdrawal can be submitted along with the detailed audit response. An already-certified PERM can only be withdrawn by mail.

Audit
The FAQs do not provide strict guidance as to how an employer must maintain documentation necessary to support a labor certification application, e.g., records of recruitment efforts and responses from U.S. workers. The employer, however, must be able to provide the best evidence possible should an audit arise. The best evidence possible is what is specifically requested in the audit. Short of providing that evidence, the employer may provide alternative evidence. For example, if the employer is not able to provide printouts from its website of the job posting, it may provide an affidavit from the official within the employer's organization responsible for posting such occupations on the employer's website attesting, under penalty of perjury, to the posting of the

[16] This does not, however, include unsolicited documentation submitted in conjunction with an employer's request for reconsideration after denial.

job. Whether the OFLC will accept alternative evidence as sufficient, however, depends upon the nature of the submission and the presence of other primary documentation. The more primary evidence that is not provided, the more likely the audit response will be found to be non-responsive or lacking. Whether there is an audit or not, employer must retain supporting documentation for at least five years from the date of filing the labor certification application.

Certifying Officer Review and Board of Alien Labor Certification Appeals
While a request for BALCA review is pending, a new application for the same occupation and the same foreign worker cannot be filed, *See* 20 CFR §656.24(e)(6).

If a labor certification is revoked, the employer may submit a written Request for Review before BALCA under 20 CFR §656.26 within 30 calendar days of the determination.

Request for Extension
The employer or its representative may request, in writing, an extension to a deadline by sending an email to: plc.Atlanta@dol.gov. The extension request must contain a clear reference to the application number, type of documentation, and as much detail as possible regarding the request. The request should be submitted prior to the expiration date but, a Certifying Officer, in his/her discretion, can accept requests after the deadline in rare instances (such as due to extreme weather, etc.). For PERM cases, the operable date is the date on which the case was stamped by the Atlanta National Processing Center (NPC); for appeals, audits, and requests for information, the response date is based on the postmark date.

PERM Appeals Best Practices
Employers must clearly indicate the type of review being sought. If the type of review is not clearly indicated, the NPC will assume that the appeal is a request for reconsideration. Further, the employer cannot simultaneously file a request for reconsideration and BALCA review. Submissions that request a reconsideration and BALCA review will be treated as requests for reconsideration. Finally, if a case is filed asking for a request for reconsideration, it may not be reclassified until the NPC makes a final decision on the request for reconsideration.

If the employer receives a denial for missing or incomplete information, the employer may, in limited circumstances, file a written request for consideration. The request must be filed within 30 days from the denial date, and it can only be for a denial based on a typographical error or oversight, and the correction is supported by documentation that existed at the time of initial filing. In addition, the employer may only file this type of request if it did not have the opportunity to raise the issue at the time of the audit.

Effective October 27, 2014, if the NPC upholds a denial, it will no longer automatically send the case to BALCA for review. Rather, the employer must affirmatively file, in writing, within 30 days of the decision, its appeal to BALCA.

If the employer feels that it received a denial based on government error, it should file a request for reconsideration and, using a brightly colored cover sheet, state that the request is based on DOL error as the sole reason for denial. If the DOL concludes that the denial was not due to DOL error, it will process the appeal as a request for reconsideration and place it in the general reconsideration appeals queue.

Finally, employers may inquire about the status of an appeal through the Help Desk at: PLC.Atlanta@dol.gov. Employers may check the status of a BALCA appeal online at: www.oalj.dol.gov/OALJ_Case_Status.htm.

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DOL ETA's PERM FAQs are periodically updated and provide a wealth of information on numerous important topics. Whether you are looking for a simple clarification or pondering a difficult issue, the FAQs may solve your query. So get out your pick, shovel, and pan, and happy mining!

Business Immigration Under Trump: What The…? And What's Yet to Come

By Josiah Curtis, Philip Curtis, and Scott FitzGerald

The results of the U.S. Presidential election on November 8, 2016 marked the beginning of a new era for U.S. politics, and the nation's immigration system. Since entering office on January 20, 2017, President Trump has led an overhaul of the U.S. immigration system which could have long-lasting and monumental consequences for U.S. employers, foreign nationals and their families. An unfounded belief that immigrants are replacing qualified unemployed U.S. workers has been a catalyst behind Trump's campaign against the current U.S. immigration system. To further his objectives, President Trump has issued executive orders that have resulted in procedural changes within the existing immigration system. The result has included, but is certainly not limited to, significant increases in H-1B requests for evidence; lengthy wait times for adjustment of status applicants; the end of USCIS deference to prior approvals for nonimmigrant extension filings; threats to the future of NAFTA; and a halt to the International Entrepreneur Rule.

Significant Increases in H-1B Requests for Evidence and Denials Leading Practitioners to Litigation

Historically, USCIS has issued Requests for Evidence (RFE) for petitions filed in the H-1B cap lottery each year on issues ranging from the proper classification of an offered role as a specialty occupation to the beneficiary's qualifications for the offered role. Since Trump introduced his "Buy American and Hire American" Executive Order[1], USCIS has significantly increased its issuance of RFEs for cap-subject H-1B petitions filed in FY2018 – an increase of over 45% as of July 2017.[2] AILA members have reported an influx of RFEs that question the use of a Level 1 wage on the Labor Condition Application supporting the petition, specifically questioning whether such a wage could support a specialty occupation position. Members have also reported denials based on the Level 1 issue in some cases. AILA subsequently released a memorandum addressing this new trend in cap-subject H-1B RFEs.[3]

These RFEs depart from standard H-1B RFEs practitioners have seen in years past. RFEs have begun to request additional information that is immaterial to the petition. For example, RFEs have questioned how, by virtue of the proffered position being an entry level job for the company (and as such properly mapped to a Level 1 prevailing wage on the supporting Labor

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[1] Presidential Executive Order on Buy American and Hire American. The White House, Office Of the Press Secretary, April 18, 2017, *available at* www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american.

[2] Trump Administration Red Tape Tangles Up Visas for Skilled Foreigners, Data Shows. Reuters, Yeganeh Torbati, September 20, 2017, *available at* www.reuters.com/article/us-usa-immigration-employment-insight/trump-administration-red-tape-tangles-up-visas-for-skilled-foreigners-data-shows-idUSKCN1BV0G8.

[3] Practice Pointer: Responding to H-1B Requests for Evidences (RFEs) Raising Level 1 or Level 2 Wages Issues, AILA Doc. No. 17090132 (*posted* Sept. 20, 2017).

Condition Application), the position can in fact be considered a "specialty occupation" that requires at least a bachelor's degree for entry into the occupation. In other words, USCIS now contends that because the job is entry level and thus corresponds to the lowest prevailing wage requirement, the position is not a specialty occupation, and therefore not eligible for H-1B sponsorship. Responses to USCIS' requests are varied, but practitioners are commonly arguing that a Level 1 wage does not preclude classification of an offered role as a specialty occupation. This argument is supported by directly relevant Administrative Appeals Office (AAO) decisions.[4] By all accounts this RFE trend is directly linked to the Trump administration's "Buy American and Hire American" initiative and similar directives.

AILA's memorandum addresses the 400 H-1B cases it surveyed that received wage level RFEs and makes some noteworthy observations:

- The RFEs were [issued] predominantly for H-1B cap cases (83%);
- The RFEs were overwhelmingly issued by the VSC (77%) versus the CSC (21%); . . . [and]
- The RFEs are not limited to any particular [occupation].[5]

This increase in RFEs is expected to translate into an increase in H-1B denials for many petitioners across the nation. In the next few months, practitioners will have a better picture of the impact of Trump's Buy American, Hire American initiative when the last of the FY2018 cap-subject H-1B adjudications are completed. In the meantime, practitioners, with AILA's support, are preparing appeals to the AAO for H-1B CAP denials, and are gearing up for what could be a tumultuous legal battle against USCIS and the Trump administration over these issues. Though unlikely to be resolved in the near future, the opportunity to litigate these issues provide practitioners with a legal platform to challenge the Trump administration's new policies.

USCIS Now Requires In-Person Adjustment Interviews For Nearly All Applicants, Increasing AOS Processing Times

It has long been USCIS' practice to waive the interview requirement for employment-based adjustment of status applicants with no criminal history or similar eligibility issues. This policy has changed following President Trump's Executive Order 13780 entitled "Protecting the Nation From Foreign Terrorist Entry into the United States" which includes the interview requirement.[6]

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[4] Specifically, each decision states that "a Level 1 wage designation does not preclude a proffered position from classification as a specialty occupation." *Matter of I-, Inc.*, ID #304789, Page 10, Footnote 5, (AAO Mar. 30, 2017); see also *Matter of S- Inc.*, ID#32072, Page 3, paragraph 2 (under "C. Analysis" Section), (AAO Jan. 6, 2017); *Matter of A-A-, Inc.*, ID#242075, Page 10, Footnote 7, (AAO Mar. 21, 2017); *Matter of N-M- LLP*, ID#225276, Page 10, Footnote 13, (AAO Mar. 7, 2017).

[5] Practice Pointer: Responding to H-1B Requests for Evidences (RFEs) Raising Level 1 or Level 2 Wages Issues, AILA Doc. No. 17090132 (*posted* Sept. 20, 2017).

[6] Executive Order Protecting The Nation From Foreign Terrorist Entry Into the United States. The White House, Office Of the Press Secretary, March 6, 2017, *available at* www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

USCIS announced on August 28, 2017 that it will comply with the Executive Order by expanding the in-person interview process for employment-based adjustment of status applicants. USCIS acknowledges that these applicants did not require in-person interviews in the past, but effective October 1, 2017 applicants are now required to undergo additional screening and vetting.[7] This shift in policy has prompted public concern over an increase in processing times in adjustment of status cases.[8] A Huffington Post article discusses this policy change by stating "[t]he mandatory interview requirement will almost certainly lengthen the already long wait times for green cards."[9] From April 1 – June 30, 2017, USCIS received 41,920 employment-based adjustment of status applications.[10] During the quarter, 29,689 adjustment of status were approved, 1,705 were denied and the rest remained pending adding to the overall number of pending 148, 547 applications.[11]

The two USCIS Service Centers that process adjustment-based adjustment of status applications, the Texas Service Center and the Nebraska Service Center, are processing cases filed on March 17, 2017[12] and February 2, 2017,[13] respectively. Processing times have moved well past the six-month mark, and practitioners should expect the processing times to increase as local USCIS field offices absorb a significant increase in caseload. Anecdotally, USCIS District Directors have estimated the wait time for employment-based AOS interviews could be as long as 12-18 months.

The End of Deference to Prior Approvals for Nonimmigrant Extension Filings

In April 2004, USCIS issued a memo directing adjudicators to defer to the initial immigration sponsorship petition and the determinations of eligibility of that petition when adjudicating extension petitions involving the same parties and underlying facts.[14] Keeping consistent with

[7] USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants, uscis.gov, August 28. 2017, *available at* www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.
[8] The Interview No One Wants, Huffingtonpost.com, Michael Wildes, August 28, 2017, *available at* www.huffingtonpost.com/entry/the-interview-no-one-wants_us_59a476d8e4b03c5da162aebf.
[9] Id.
[10] Department of Homeland Security, U.S. Citizenship and Immigration Services, *Performance Analysis System (PAS)*, June 2017, *available at* www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I485_performancedata_fy2017_qtr3.pdf.
[11] Id.
[12] UCSIS Processing Time Information for the Texas Service Center, uscis.gov, accessed on November 20, 2017, *available at* https://egov.uscis.gov/cris/processTimesDisplay.do.
[13] UCSIS Processing Time Information for the Nebraska Service Center, uscis.gov, accessed on November 20, 2017, *available at* https://egov.uscis.gov/cris/processTimesDisplay.do.
[14] USCIS Policy Memorandum, Subject: The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity., HQOPRD 72/11.3 (April 23, 2004), *available at* www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/readjud_042304.pdf.

the Trump Administration's immigration overhaul, USCIS recently announced the end of deference to prior nonimmigrant approvals. In a policy memorandum issued on October 23, 2017, USCIS announced the rescission of their April 2004 guidance of deference to prior USCIS approval of nonimmigrant petitions when adjudicating extension applications.[15] USCIS' most recent policy memorandum states:

> In adjudicating petitions for immigration benefits, including nonimmigrant petition extensions, adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought. The burden of proof in establishing eligibility is, at all times, on the petitioner. The fundamental issue with the April 23, 2004 memorandum is that it appeared to place the burden on USCIS to obtain and review a separate record of proceeding to assess whether the underlying facts in the current proceeding have, in fact, remained the same. . . . Accordingly, this memorandum makes it clear that the burden of proof remains on the petitioner, even where an extension of nonimmigrant status is sought.[16]

This memorandum applies to all nonimmigrant classifications filed on Form I-129, Petition for a Nonimmigrant Worker and requires adjudicating officers to apply the same level of scrutiny to extension applications as they would to initial petitions, signaling future delays, increased costs and challenges in securing approval of future extension petitions.[17]

Threats to End NAFTA and the Uncertain Future of the TN Category

In May 2017, President Trump publicly objected to the North American Free Trade Agreement (NAFTA) signed by the United States, Mexico, and Canada.[18] NAFTA created an immigration category for professionals who work in a qualifying occupation to work across country borders. In the U.S., this is called the TN category and there are over 60 occupations that qualify under the NAFTA agreement. These occupations are listed in Appendix 1603.D.1 of the trade agreement and include professionals such as engineers, lawyers, accountants and physicians.[19]

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[15] USCIS Policy Memorandum, Subject: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, PM-602-0151 (October 23, 2017), *available at* www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf.

[16] Id.

[17] USCIS Updates Policy Guidance to Apply Same Level of Scrutiny to Both Initial Petitions and Extensions, AILA Doc. No. 17102460 (*posted* Oct. 24, 2017).

[18] Andy J. Semotiuk, *Could NAFTA Professional Visas Be On the Trading Block?*, Forbes.com, May 19, 2017, *available at* www.forbes.com/sites/andyjsemotiuk/2017/05/19/could-nafta-professional-visas-be-on-the-trading-block/#58f5cfd66233.

[19] 8 CFR §214.6. Appendix 1603.D.1 (Annotated) *available at* www.nafsa.org/_/file/_/amresource/8cfr2146.htm.

The U.S. Department of State's Annual Report of the Visa Office reported that 14,768 TN's were issued in 2016, compared to 13,093 and 7,638 issued in 2015 and 2012, respectively.[20] The U.S., Canada, and Mexico are currently in the fifth round of NAFTA negotiations,[21] and to date no mention of the TN category has been made. NAFTA's future is uncertain, but the concern is quite real for U.S. businesses, foreign nationals and the immigration practitioners who represent them.

International Entrepreneur Rule Will Likely Not Be Implemented

The Department of Homeland Security, under the Obama Administration, promulgated the International Entrepreneur Rule, which became a final rule in the Federal Register on January 17, 2017, scheduled to be effective on July 17, 2017.[22] This rule would allow qualifying foreign entrepreneurs to open U.S businesses and remain in the U.S. for a temporary initial period of up to 30 months to oversee and grow their businesses.[23] After the initial period of up to 30 months, a foreign entrepreneur could request an extension of an additional 30 months to remain in the U.S.[24] The purpose of this rule was to "increase and enhance entrepreneurship, innovation, and job creation in the United States."[25] The entrepreneur applicant would be required to show formation of the start-up entity, demonstrate significant U.S. capital investment and potential for rapidly increasing revenue and job creation.[26]

The Department of Homeland Security has sent a formal proposal to rescind the International Entrepreneur rule to the Office of Management and Budget.[27] This is the Trump Administration's first formal step to prevent the International Entrepreneur Rule from taking legal effect, and it is consistent with the Administration's efforts to limit opportunity for foreign workers to work in the United States, even where those individuals may be capable of creating employment for U.S. citizens and creating value here. The Department of Homeland Security will publish a formal notice in the Federal Register for notice and comment once OMB completes its review of the rescission proposal, likely preventing the implementation of this rule.

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[20] US Department of State Annual Report of the Visa Office 2016, *available at* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXVIB.pdf.
[21] Kelsey Johnson, *NAFTA round five: what you need to know*, iPolitics.ca, November 15, 2017, *available at* https://ipolitics.ca/2017/11/15/nafta-round-five-need-know/.
[22] 82 Fed. Reg. 10 (Jan. 17, 2017) *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00481.pdf.
[23] Id.
[24] Id.
[25] Id.
[26] Id.
[27] Rescission of International Entrepreneur Rule, RIN: 1615-AC04, Pending EO 12866 Regulatory Review, Office of Management and Budget, Nov. 17, 2017 *available at* www.reginfo.gov/public/do/eoDetails?rrid=127711.

Conclusion

The Trump administration has moved with alarming speed to revamp the U.S. immigration system, making it increasingly difficult and, in some cases, significantly more expensive for U.S. businesses and foreign nationals to navigate the business immigration process. Practitioners are combatting the ever-changing policies of the Department of Homeland Security and the Department of State, constantly searching for innovative legal arguments to contest unfair decisions. The future of immigration is uncertain, but what is not uncertain is that the legal community remains steadfast in its dedication to advocacy for its clients.