INSIDE: PRIVATE BILLS ◆ *E-R-M-F-* & THE 4TH AMENDMENT

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AN IMMIGRATION DIALOGUE

VOICE

NOVEMBER/DECEMBER 2011

Vol. 2 Issue 6

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Assisted Reproductive Technology and Barriers to Citizenship

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AILA President Eleanor Pelta talks about her and her colleagues' recent trip to New York to raise awareness for comprehensive immigration reform.

Eleanor Pelta

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"Tonight we will continue to actively protest social and political injustices in Arizona. We will sing, we will stand up, and we will be heard."

—Lady Gaga, protesting against Arizona's immigration laws before a live concert

COVER: ILLUSTRATION BY BRADLEY AMBURN
ABOVE, BELOW: SHUTTERSTOCK

SAVE THE DATES

For more AILA conferences and events, visit *www.aila.org/conferences*

AILA

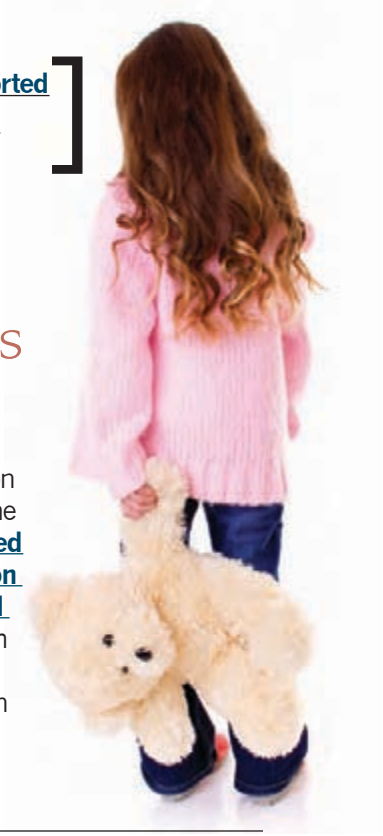
[NEWSLINK]

HIGHLIGHTS FROM AROUND THE GLOBE

Report: 5,100 Children of Deported Parents Now in Foster Care
America's Voice

"Taking parents from their children ... that's un-American."

—**Nancy Pelosi**, U.S. House of Representatives Minority Leader, on findings from a new report from the Applied Research Center, **"Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System,"** which discovered over 5,000 children of deported parents are now stuck in the foster care system.



U.S. Department of Justice, Civil Rights Division

Unfair Employment Practices and the INA

From the Office of Special Counsel for Immigration-Related Unfair Employment Practices

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), in the Justice Department's Civil Rights Division, is responsible for enforcing the anti-discrimination provision of our nation's immigration law, the Immigration and Nationality Act (INA).

Under the INA's anti-discrimination provision, work-authorized employees—whether or not they are U.S. citizens—are protected from four types of discrimination. First, employers may not refuse to hire and may not terminate workers authorized to work in the United States because of their national origin. For example, employers may not refuse to hire a job applicant because of the applicant's foreign appearance or accent.

Second, employers may not refuse to hire and may not terminate certain work-authorized individuals because of their immigration or citizenship status. This means employers may not require job applicants to hold a certain citizenship or visa status unless mandated by law, regulation, executive order, or government contract. Similarly, preferences for U.S. citizens or temporary visa holders are against the law. Of note, employer who prefers to hire undocumented workers over authorized workers may be violating immigration law in two distinct ways: by employing unauthorized workers and by discriminating against authorized workers who may be protected for citizenship status discrimination.

Third, employers may not discriminate by demanding more documents than what the law requires from workers to prove identity and eligibility to work in this country based on an employee's citizenship/immigration status or national origin (known as "document abuse"). A list of acceptable documents is provided on the back of the Employment Eligibility Verification form (commonly known as Form I-9), which employers must complete for all newly hired workers and is published by U.S. Citizenship and Immigration Services.

Finally, employers may not retaliate against workers who assert their rights under the anti-discrimination provision. This includes intimidating, threatening, or coercing an individual to interfere with a right protected by this law or because an individual intends to file or has filed a charge of discrimination or a complaint, or has participated in an investigation or lawsuit based on this law.

Employers that discriminate or retaliate against workers may be required to hire or rehire the worker, pay back wages, pay civil penalties, change internal policies to avoid further discrimination, and comply with a monitoring period imposed by the Department of Justice.

To better understand their responsibilities under the anti-discrimination provision, employers may visit OSC's website. OSC also operates a telephone hotline that serves as an informal means of alternate dispute resolution. Through its hotline, OSC staff can successfully intervene to resolve an allegation of discrimination, precluding the need for OSC to investigate further. Employers can call OSC's employer hotline at 1-800-255-8155 (TDD for the hearing impaired: 1-800-237-2515) with questions about avoiding discrimination during the I-9 and E-Verify processes, as well as questions about non-discriminatory practices relating to hiring and termination. Employees or their representatives can call OSC's employee hotline at 1-800-255-7688 (TDD for the hearing impaired: 1-800-237-2515) to inquire about their rights to be free from discrimination under the INA, to seek assistance in redressing discrimination, and to obtain guidance on completing and submitting a charge of discrimination.

How Can You Tell If an Employer Is Violating the Law?

An employer may be discriminating based on citizenship status or national origin in hiring or termination, or during the employment eligibility verification process if the employer:

- Refuses to hire certain individuals because they are not native English speakers (and there is no job-related need for native English fluency).
- Refuses to hire qualified U.S. citizens because of a preference for hiring temporary visa holders.
- Refuses to hire qualified applicants because of a preference for hiring individuals of a specific national origin.
- Refuses to hire refugees and asylees because they

don't have Social Security cards or green cards.
- Only hires U.S. citizens (unless that policy is specifically required by law).
- Fires work-authorized workers for lying about their prior undocumented status, but does not fire other workers for lying about different aspects of their background.
- Asks certain workers for work authorization documents before offering them jobs.
- Specifically asks a worker for a "green card."
- Asks certain workers for more documents than needed to complete the I-9 form.
- Rejects valid work authorization documents.

What About E-Verify?

An employer's use of E-Verify may be discriminatory if the employer treats workers differently during the E-Verify process based on national origin or citizenship or immigration status, such as if it:

- Runs certain workers through E-Verify before offering them jobs.
- Asks certain workers to run their information through E-Verify's Self Check and show the response.
- Uses E-Verify to check only some, but not all, new workers.
- Refuses to allow certain workers to contest "tentative nonconfirmations" (TNCs).
- Refuses to allow certain workers to work while contesting TNCs.

How Can I Obtain More Information on OSC's Enforcement of the Anti-Discrimination Provision of the INA?

An effective way to become familiar with workers' rights and employers' responsibilities is to take advantage of OSC's public education and outreach resources. OSC staff members travel nationwide to conduct outreach presentations to workers and their advocates as well as to employers and employer representatives. OSC also offers outreach presentations via webinars and teleconferences. Additionally, a variety of printed and video outreach materials are available for download from the OSC website.

Contributed by **Terry Scott**, *OSC's public affairs specialist. The release does not necessarily represent the views of AILA nor does it constitute legal advice or representation.*

UNSOLICITED ADVICE

from **Cletus M. Weber**

Avoiding Scams Against Immigrants and Immigration Lawyers

Scams are as old as humanity itself, and recent ones target immigrants and immigration lawyers. Aside from a humorous anecdote, scams are becoming a growing menace.

The Nigerian E-mail Lord in Beijing

On a recent trip to China, I met an African businessman who approached me to ask an innocuous question about where to find a particular restaurant. As we chatted in a courtyard in Beijing, he told me he was the son of a former Nigerian president, whom he said now worked as a professor at a university in the American Midwest. He even told me his father's name. The businessman said he was looking to make large investments in electronics manufacturing, which seemed plausible enough.

Upon my return, I asked my assistant to investigate his story. The outcome was dubious at best—the "father's" department secretary said that the man had no children at all. Scams have enough truth to seem at least plausible to the cautious, but unfortunately seem truly "real" to the gullible.

Employee Diversion of Client Funds

Sometimes scams take root in one's own firm. For example, a highly experienced AILA member recently told me that he wished he had read seven years earlier another recent article I had written in this column, because it could have saved him a lot of money. The article covered the Pyramid of Value and the Drain of Detriment. The central point of that article was that it takes higher knowledge and experience to provide higher value to your clients, yet when it comes to harming clients, anyone at any level of experience is capable of creating great damage.

The AILA member said that unbeknownst to him, a (now former) employee had secretly called many of his clients and told them that visa numbers were now available, so they should bring to this particular employee thousands of dollars to pay filing fees. The employee ultimately stole $140,000!

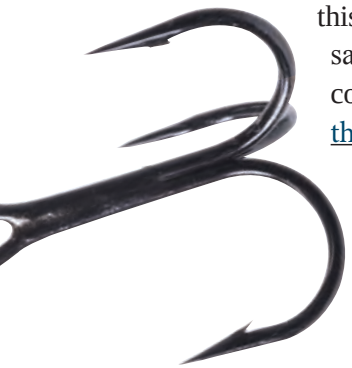
Ironically, this AILA member said the same thing happened to another attorney he knows—and for about the same amount of money!

To increase the likelihood of preventing such crimes against your firm, take a page from the sellers of mailing lists who don't want the purchaser to reuse the list without paying additional fees. Place a few trusted non-client persons into your client list as "seed" clients, and instruct them to immediately inform you of *any* communications from anyone at your firm.

In addition to potentially stealing money on the way in, staff also can steal it on the way out by paying invoices from bogus vendors. Prevent this problem by reviewing your accounting records.

Visa Lottery Scams

I have witnessed scammers take visa-lottery scams to a new height. Once, I received an e-mail from a Swiss citizen saying he had trouble entering his credit card information to pay for his visa-lottery application on our website, and I replied that we don't have such a system on our website. Curious, though, I asked him



Lo and behold, the criminals behind the scam had copied our entire website and parked it on their similar-sounding domain. The only difference? They had replaced our e-mail address with their e-mail address!

"The AILA member said ... a (now former) employee had secretly called many of his clients and told them that visa numbers were now available, so they should bring to this particular employee thousands of dollars to pay filing fees. The employee ultimately stole $140,000!"

to send me the URL for the website he was using, and when he sent it, I noticed that it was somewhat close to ours, but different nonetheless. I warned the guy about the visa-lottery fraud and sent him a link to the U.S. Citizenship and Immigration Services website about scams. I thought that was the last I would hear of the fraud. Our office, however, received a second call from someone asking the same kind of questions. This time, I actually went to the specific URL. Lo and behold, the criminals behind the scam had copied our *entire* website and parked it on their similar-sounding domain. The only difference? They had replaced our e-mail address with their e-mail address!

We are still fighting with their domain provider to shut down that site. A service representative for the domain provider (GoDaddy.com, in this case) immediately acknowledged that the other site was a fraudulent copycat, but nonetheless said that GoDaddy could only process our complaint as a copyright infringement allegation, which would take them awhile to process. We are still waiting.

Another downside to scams that copy your entire website to other places on the Internet: Google and other search engines may punish you for "link farming" and drop your search rankings.

Rapid EB-5 Retainer Refund

Scammers will attack law firms directly, especially EB-5 practices. An e-mail purports to be sent from a Mr. and Ms. Lee, claiming to be Tokyo residents who lost their children and their phone service—but not their Internet connection—in the major earthquake. They ask for a retainer agreement so they can send your law firm $350,000 toward the EB-5 business they are going to establish. The hope is that you will deposit their illegitimate cashier's check into your trust account so they can promptly encounter an "emergency" and demand that you wire back a substantial portion of the deposit immediately. The goal is to get you to wire the funds from your trust account before the bank can determine that the cashier's check is fake. The FBI website provides more details on this type of scam. For additional information, see the warning on AILA's website and the lawyer-specific scam blog, Avoidaclaim.com.

Cletus M. Weber *is co-founder of Peng & Weber, PLLC, based in Mercer Island, WA. His practice focuses on EB-1, NIW, EB-5, and other areas of employment– and investor-based immigration. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

SPOTLIGHT

by **Brian S. Green**

Back Wages for an H-1B? But They Never Worked on One!

Recent Decision Greatly Extends Employers' H-1B Liability

What would your company client say if a government agency instructed it to pay three years of salary to a person who did not work during those three years? As counsel, how would you explain to an employer that it may owe wages to H-1B workers who are living outside the United States, and that the owners of the company may be personally liable? As a result of at least one recent decision by a U.S. Department of Labor (DOL) administrative law judge (ALJ), these are conversations that business immigration practitioners must have with employers of H-1B workers.

DOL has taken more aggressive positions in its enforcement of H-1B regulations, found at 20 CFR §655 *et seq.*, and has pushed for individual owners of companies to be held personally and financially accountable for violations. Recently, DOL released a decision from an ALJ who had found an employer liable for almost three years of back wages for a former intern who was never employed by the company in H-1B status and had spent much of that time in Indonesia.

No Bona Fide Termination

In *Limanseto v. Ganze & Co.*, ALJ No. 2011-LCA-00005 (June 30, 2011), Kevin Limanseto first worked for Ganze as an intern and later through Optional Practical Training. Ganze filed an H-1B petition to employ Limanseto as a tax accountant, but after receiving an approval from U.S. Citizenship and Immigration Services (USCIS), Ganze terminated Limanseto's employment before his H-1B status became effective.

Ganze had certified a labor condition application (LCA) valid from October 1, 2008, to September 2, 2011. *Id.*, at 5, 8. Post-termination, Ganze overlooked two important aspects of H-1B compliance per 20 CFR §655.731(c)(7): (1) failing to withdraw its H-1B petition for roughly two years; and (2) failing to offer Limanseto the reasonable cost of return transportation. The ALJ found that because Ganze did not complete a bona fide termination, it remained liable for all wage payments under the LCA until either its expiration or the proper termination occurred (whichever occurred first). *Id.*, at 6–8.

The ALJ cited to DOL's public comments when adopting the regulation in question, where the agency stated that "the employer, at any time, may terminate the employment …, notify [USCIS], and pay the worker's return transportation, thereby ceasing its obligations to pay for non-productive time under the H-1B program." *Id.*, at 5, citing to 65 Fed. Reg. 80, 170 (Dec. 20, 2000).

No Mitigation

The ALJ rejected Ganze's arguments that Limanseto had found work with a local competitor for four months at a higher wage rate and that these wages should be deducted from Ganze's obligation. The ALJ also ignored the time Limanseto spent in Indonesia, outside of the U.S. workforce, holding that because any separation of Limanseto from Ganze was involuntary and without a bona fide termination, the company was obligated to pay wages for 154.57 weeks, the entire period for which the LCA was valid. *Limanseto*, at 8–9, 13–14. This award totals more than $156,000 sans interest.

Brian S. Green *practices business immigration, including DOL, DOS, CBP and federal litigation, at Murthy Law Firm in Baltimore. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

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How a 'H
Defense Ca

BY **SHEEBA RAJ**

With the passage of many restrictive immigration laws in the 1990s, gone are the days when immigration judges considered all of the facts in clients' cases and granted much-deserved relief to them. Attorneys practicing today must be especially creative in representing clients with complicated cases, and they face many more legal obstacles than ever before. Given the difficulties in obtaining relief under the Immigration and Nationality Act for many clients, it is important to consider the alternatives of private legislation, pardons, and prosecutorial discretion. These alternatives are not easy to pursue but must be considered in representing clients for whom little relief is available.

Case in point: Shigeru Yamada. With no alternative relief, he was in need of a "Hail Mary" defense. "Shiggy," as Shigeru is called, came to the United States legally at a young age, but became an orphan after his mother died in a car accident. Shigeru's aunt became his legal guardian. After Shigeru turned 18, however, he lacked legal status.

Shigeru is one of only a few deserving immigrants to have a private bill passed on their behalf. For Shigeru, his predicament came to an end on December 22, 2010, when President Barack Obama signed into law a bill written just for him. Thanks to Shigeru's attorney, Gail Dulay, and her unrelenting fervor and advocacy on his behalf, Shigeru now possesses a green card.

WATCH Behind the Book: Anna Gallagher talks about "Hail Mary" defenses and the need for more private bills.

"Because Shigeru was such an outstanding young man, so well-liked by his friends, all his former high school teachers, the principal, and many others in the community, there were no serious challenges in seeking the private bill," Dulay said. Dulay had heard about Shigeru's plight from a previous client who was a friend of Shigeru's mother. Dulay, who practices in California and is a former deputy public defender, had represented Shigeru for about five years. She cites a tremendous outpouring of support from Shigeru's loved ones as a critical factor in obtaining the interest of political leaders. "His case was so sad and

Shigeru Yamada (left) and attorney Gail Dulay proudly display the framed private bill passed on Shigeru's behalf.

'Hail Mary' Came to the Rescue

the media attention was so good that we found immediate support on both levels of Congress," Dulay said. *The San Diego Union Tribune* was among the many media outlets covering the passage of Shigeru's private bill after a long six-year wait.

Rep. Bob Filner (D-CA) and Sen. Dianne Feinstein (D-CA) each sponsored the private bill in the Senate and the House of Representatives that eventually passed both houses of the 111th Congress. They decided to help Shigeru several years ago, when there was a public outcry aimed at stopping Shigeru's deportation to his native Japan.

A Last Resort

Introduced by a U.S. senator or congressional representative, a private bill is a proposed law targeted to benefit one person, a small group of people, or a corporation. If a private immigration bill passes, the individual or group can receive legal status in the United States. Dulay explained that a private bill is an appropriate route only when all of the administrative and judicial remedies have been pursued.

"Currently, we have over half a dozen clients who have been allowed to remain in the U.S. with their families because of private bills pending in Congress," said attorney Carl Shusterman, who advised Dulay about pursuing private bills. "When President Clinton signed a private bill on behalf of our client, Guy Taylor, a 16-year-old Canadian orphan whose grandparents lived in the U.S., I was thrilled," said Shusterman. "This victory helped me to think outside the box." Shusterman explained that his firm seeks private bills "where there are strong humanitarian factors involved and where current immigration laws offer no relief."

Current State of Affairs

Private bills are rarely passed these days. The 111th Congress granted lawful permanent residence to only two individuals, one of whom was Yamada. Also, no private immigration bills were signed into law during the 109th or 110th Congress, said Anna Marie Gallagher, head of the litigation and global visas practice of Maggio + Kattar, P.C., and author of AILA's Focus on Private Bills and Pardons in Immigration. "The majority of [the members] in Congress are either afraid to or uninterested in promoting private laws for their constituents," she added. "Some are afraid of potential controversy should negative factors come to light."

AILA's Focus on Private Bills and Pardons in Immigration BUY!

Because comprehensive immigration reform in the near future appears uncertain, private bills are often a noncitizen's last resort to obtain legal status. "Mr. Yamada is a lucky man," said Gallagher. "He is one of the fortunate few who have been the recipients of private immigration laws in the United States during the last decade."

Sixty-three of the 70 private bills pending before the 112th Congress pertain to immigration. To increase one's chances of garnering congressional support, Dulay suggests engaging stakeholders, such as the media and local politicians. "Know who the local reporters and journalists are who handle immigration reporting," she advised. "The more favorable media attention, the more likely that the congressional representative and/or senator will get involved." Dulay also encourages attorneys to know their politicians' views on immigration before asking them to sponsor a private bill. "Even a hard-hearted 'immigrant hater' could possibly be swayed if enough support and media attention [were] generated," she said. To that end, she recommends attorneys consult politically active colleagues regarding the legal and ethical way to approach elected officials.

Sheeba Raj *is the staff legal editor and reporter for* **VOICE**. *She can be reached at sraj@aila.org.*

by SCOTT TITSHAW

Is Your Test Tube Baby

Artificial insemination has been around since at least 1785, when a Scottish surgeon successfully assisted a married couple who were otherwise unable to reproduce. By 1978, the world had its first "test tube" baby, when Louise Brown was conceived through in vitro (within glass) fertilization. Since that time, assisted reproductive technology (ART) and surrogacy have become more and more common. They are now raising new issues under immigration and nationality law.

Family relationships determine the answers to a whole spectrum of questions faced by immigration attorneys, ranging from dependent visa eligibility to cancellation of removal and even citizenship. Many of these issues turn on the recognition of parent-child relationships, including those resulting from ART. The Immigration and Nationality Act (INA), however, was originally enacted in 1952 when in vitro fertilization still existed among the realm of science fiction. Unfortunately, as ART has become popular and family law has adopted appropriate rules, U.S. immigration law has continued to lag far behind.

ART and Citizenship Transmission Upon Birth Abroad

The only attempt to systematically address ART and resulting parent-child relationships under the INA has been in the context of citizenship transmission upon birth abroad. And there is a clear conflict of authority in that area.

The Department of State (DOS) only cares about the nationality of sperm and eggs. According to its *Foreign Affairs Manual* (FAM), a genetic link to a U.S. citizen is always required to transmit citizenship to a child upon birth abroad. *See e.g.*, 7 FAM §1446.2-2(c)(4) (2009) ("[T]he basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg."); *Id.* §1131.4-2(b) (referring specifically to the issue of egg– and sperm-donor identity as the key to citizenship transmission).

This approach leads to absurd and unfair results. For example, if a surrogate gives birth abroad to a child conceived using the egg of a foreign national wife and the sperm of her U.S. citizen husband, then the child is a citizen. On the other hand, if a U.S. citizen carries and gives birth abroad to a baby conceived in vitro using a donated egg and the sperm of her foreign-national husband, then her child is not a citizen. This assumes the egg is donated by a foreign or anonymous donor. If the egg was donated by an identified U.S. citizen friend or relative, DOS would apparently view the resulting child as a U.S. citizen, born "out of wedlock." *Cf.* 7 FAM 1131.4-2 (b) (finding citizenship transmission where a surrogate gives birth to the "child" of a U.S. citizen "claimed mother (egg-donor)").

This policy can result in long delays and even permanent family separation. The parentage issue may not be recognized when a heterosexual married couple can present a birth certificate listing both as parents, but it is highly likely to come up in the context of legal co-parents of the same sex. (Imagine a citizen parent whose only hope is an international adoption of his own legal child.) In some cases, it could even result in stateless children.

DOS fixates on sperm and eggs, even when determining whether a child is "born in wedlock." According to 7 FAM §1445.5-7(a), "[a] child's genetic parents must have been married at the time of the child's birth for the child to acquire citizenship under section 301 [covering children born in wedlock] ..." In the examples above, DOS would apparently consider the child born using the surrogate "born in wedlock." However, the child of the unfortunate married couple who used a donated egg would be "born out of wedlock," even though his U.S. citizen legal mother carried and gave birth to him!

"DOS fixates on sperm and eggs, even when determining whether a child is 'born in wedlock.'"

The U.S. Court of Appeals for the Ninth Circuit has rejected the FAM's genetic essentialist approach. It focuses instead on state or foreign family law to determine whether a child was "born out of wedlock." *See Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000). These Ninth Circuit cases dealt with the children of old-fashioned non-marital sexual relationships, but the court expressly rejected the FAM construction of a blood relationship requirement for U.S. citizenship transmission to a child born in wedlock, and their logic applies even more strongly in cases involving planned pregnancies using ART.

Children born "out of wedlock" fall under INA §309, which expressly requires a "blood relationship" for citizenship transmission, while §INA §301 is silent on that issue. Reasoning that Congress meant this distinction, the court refused to require a "blood relationship" for citizenship transmission from a married U.S. citizen to a child born abroad to him and his wife, the child's biological mother.

The Ninth Circuit's approach is clearly better. It is based on standard rules of statutory construction. DOS, on the other hand, appears to ignore the language of the INA and trace its opinion to a literal translation of the ancient Roman law term jus sanguinis (law of the blood). *See* 7 FAM §1111(a)(2); *Id.* §1131.1-1(a). This is odd. The sixth century scholars who drafted the Justinian Code are an unlikely source of logic for understanding the results of in vitro fertilization. In any case, the text of the INA is clearly a better source of law regulating U.S. citizenship.

The Ninth Circuit's approach also constitutes better policy. It avoids the most arbitrary and cruel distinctions of DOS's approach. First, it promotes the general INA policy of family unity. It also results in fewer stateless children.

Unfortunately, since DOS decides most cases involving citizenship transmission upon birth abroad, its misguided approach now continues to create arbitrary results and prevents the recognition of citizenship for many foreign-born children of ART. Any U.S. citizen contemplating ART or surrogacy that is likely to end in birth abroad should carefully analyze DOS's position before proceeding.

Guidance on Immigration and Cancellation

Fortunately, INA §§101(b)(1) and (2) provide more guidance regarding the meaning of "child" and "parent" for immigration purposes by enumerating qualifying categories. Like the citizenship provisions, this list was drafted with no contemplation of modern ART and surrogacy possibilities. The list of categories, however, provides much more specific guidance for immigration and cancellation purposes. It includes children born in wedlock, stepchildren, certain adopted children, legitimated children, and other "natural" children who have established a bona fide relationship with a parent.

Terms like "child born in wedlock" are undefined, and there is no published guidance from DOS or the Department of Homeland Security regarding recognition of parent-child relationships resulting from →

a U.S. Citizen?

ART for immigration purposes. Yet, DOS could not insist that a genetic link is generally required under INA §101(b)(1) because stepchildren and adopted children are included in the list.

The best approach for determining whether a child conceived using ART was "born in wedlock" is to analyze relevant family law. The Board of Immigration Appeals (BIA) has long deferred to state and foreign family law definitions in other contexts, generally recognizing parent-child and sibling relationships as "legitimate" or "in wedlock," even in cases involving polygamy, which would render the parents inadmissible. Until the INA was amended in 1995, the current references to "born in wedlock" and "born out of wedlock" in INA §§101(b)(1)(A)–(D) referred to "legitimate" and "illegitimate" children. *See, e.g., In re Mohammed Alhaz Uddin*, 2006 WL 3712446 (BIA 2006) (recognizing the stepparent-stepchild relationship between a man's first wife and his son by a second polygamous marriage); *In re Fong*, 17 I&N Dec. 212, 214 (BIA 1980) (referring to U.S. citizen as the legitimate child of his father and his mother, the secondary wife in a polygamous marriage); *In re Mahal*, 12 I&N Dec. 409, 410 (BIA 1967) (recognizing the half-brother relationship of half siblings based on the valid Hindu polygamous Pakistani marriage of their mothers to the same man); *but see In re Man*, 16 I&N Dec. 543, 544 (BIA 1978) (denying a stepchild's petition on behalf of her father's concubine).

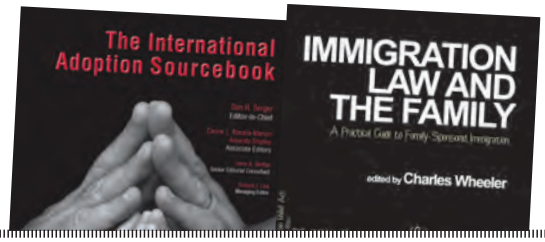
Similarly, the U.S. Supreme Court has recognized that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law," particularly "where a statute deals with a familial relationship; there is no federal law of domestic relationships, which is primarily a matter of state concern." *De Sylva v. Ballentine*, 351 U.S. 570, 580–82 (1956).

PREVIOUS PAGE, ABOVE: SHUTTERSTOCK.COM

Issues Facing Same-Sex Couples

Same-sex couples are likely to suffer more than their heterosexual counterparts from DOS's policy on ART and citizenship transmission. Since birth certificates are the standard evidence of parent-child relationships, consular officials may accept the parental relationships of heterosexual couples without inquiring whether they employed ART or surrogates. However, a birth certificate listing the names of two women or two men as parents would clearly raise questions about a child's genetic origins.

Same-sex marriages might also theoretically raise an additional issue where the INA refers to a child "born in wedlock" or a "stepparent": Does the federal Defense of Marriage Act (DOMA), which establishes



federal definitions of "spouse" and "marriage" as "the legal union of one man and one woman," limit recognition of a child born to same sex spouses? Fortunately, the answer should be no. Legislative history clearly indicates that the federal definition section of DOMA was intended to do precisely what it says, to define the words "marriage" and "spouse" (not "born in wedlock" or "stepchild") for federal purposes. Reading DOMA to prevent recognition of parent-child relationships under the INA also would raise serious issues of constitutionality; the constitutional avoidance doctrine dictates that statutes be given any reasonable construction that avoids serious constitutional concerns.

Children born in civil unions or other legally recognized nonmarital relationships raise further complications. The term "born in wedlock" would not likely include the children of such relationships. Therefore, they may not qualify as children under INA §101(b)(1)(A), but they may sometimes qualify in another category, such as one of those based on adoption.

gray area fit better under INA §301 than INA §309.

An Antiquated Approach

DOS's current position regarding citizenship transmission abroad is misguided and unfair. Hopefully, DOS will reconsider and revise the FAM to better comport with the text of the INA and the realities of modern reproductive technology and family law. In the meantime, attorneys and their clients should understand and be wary of the misguided DOS approach. Fortunately, some individuals present in the United States may have a better chance of claiming citizenship, particularly if the issue arises within the jurisdiction of the Ninth Circuit.

While there is no systematic guidance regarding the recognition of children "born in wedlock"—using ART for purposes of immigration law—federal courts and the BIA have long relied on state and foreign law determinations of family status in other contexts. Although not entirely risk-free, reliance on the relevant family law currently appears to be

"Any U.S. citizen contemplating ART or surrogacy that is likely to end in birth abroad should carefully analyze DOS's position before proceeding."

There may be some hope for similar families under the Ninth Circuit's approach to citizenship transmission. Legally recognized "legitimate" children of two parents in a jurisdiction like the United Kingdom, which recognizes registered partnerships, may not be "born in wedlock." Yet, they would not fit easily into the common understanding of "born out of wedlock" under INA §309, either. This presents a novel question, but there is a good argument that the nonbiological children of U.S. citizen–registered partners in this the best approach to ART in the immigration and removal contexts, as well. In the meantime, let's all hope for clarification—but clarification that is more enlightened than DOS's 1,500-year-old approach.

Scott Titshaw *is an associate professor at Mercer University School of Law. He previously practiced immigration and international business law for 12 years at Arnall Golden Gregory LLP in Atlanta. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

Editorials, Comments, and Opinions

E-R-M-F- Deprives Immigrants

by
Arturo Rios, Jr.

Arturo "Art" Rios, Jr. practices in St. Petersburg, FL, where he focuses on deportation defense and immigration litigation. He also is an adjunct professor at Stetson Law.

"THIS [DECISION] DEPRIVES INDIVIDUALS ... OF THE MOST FUNDAMENTAL CIVIL AND HUMAN RIGHTS AFFORDED BY THE U.S. CONSTITUTION."

On August 16, 2011, in a decision that offends constitutional and human rights, the Board of Immigration Appeals (BIA) held that immigration officers are not required to advise undocumented immigrants who are "arrested without a warrant" of their right to counsel until they are placed in formal proceedings via the filing of Form I-862, Notice to Appear (NTA). What this shocking reinterpretation of existing statutes does is give new sweeping authority to immigration officers to detain suspected immigration law violators indefinitely. This deprives individuals—both undocumented immigrants and lawful permanent residents—of the most fundamental civil and human rights afforded by the U.S. Constitution: due process, equal protection, and freedom from unlawful detention.

In Matter of E–R–M–F– & A–S–M–, 25 I&N Dec. 580 (BIA 2011), the BIA interpreted the immigration enforcement regulation as follows:

> Under 8 CFR §287.3(c), an alien who is arrested without a warrant must be "placed in formal proceedings" by the filing of a Notice to Appear before he is entitled to be advised that he has a right to counsel and that any statements made during interrogation can subsequently be used against him. Consequently, any statements made prior to the initiation of formal proceedings are not obtained in violation of 8 CFR §287.3(c), and the fact that no advisals were given at that time does not render the documents containing those statements inadmissible in removal proceedings.

Fourth Amendment Violation

The BIA's decision violates the Fourth Amendment by permitting unreasonable seizure without a warrant. Although immigration cases are administrative and not criminal, legal precedent exists providing the right of immigrants seized by immigration authorities to be afforded Fourth Amendment due process in a noncriminal matter. One notable precedent is Camara v. Municipal Court, 387 U.S. 523 (1967). In that case, a man was charged with violating the San Francisco Housing Code for refusing to allow a warrantless inspection of his home by city housing inspectors. The man sued on the grounds that his Fourth Amendment rights against unreasonable search and seizure were violated. The U.S. Supreme Court ultimately ruled in his favor.

Fifth Amendment Violation

The BIA's decision violates the Fifth Amendment right to be free from self-incrimination. In addition to ruling that detained immigrants do not need to be advised of their right to counsel until NTAs are filed, the BIA also held that "any statements made during interrogation" while being detained after arrest without a warrant "can subsequently be used against" them. This directly violates the Fifth Amendment (see Miranda v. Arizona, 384 U.S. 436 (1966)).

Again, although immigration proceedings are administrative and not criminal, immigration law is enforceable by criminal process, and, as such, any person suspected of violating →

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SPEAK OUT!
The Legal Action Center is seeking examples of cases where prejudice arose from the government's failure to provide advisals in advance of interrogation. Please send case examples to clearinghouse@immcouncil.org (Subject line: Matter of ERMF).

immigration law and detained by law enforcement officials has a fundamental right to be free from self-incrimination during interrogations.

Sixth Amendment Violation

The BIA's decision violates the Sixth Amendment right to be advised of the right to counsel. Relying on aforementioned principles in this article, I would further argue that the BIA decision is a direct violation of Miranda v. Arizona, 384 U.S. 436 (1966), as well as Padilla v. Kentucky 130 S. Ct. 1473 (2010). In *Miranda*, the Supreme Court ruled that anyone arrested for a crime by law enforcement must be informed of the right to remain silent, the privilege against self-incrimination, and the right to counsel. In *Padilla*, the Supreme Court ruled that noncitizen defendants in criminal cases must be informed by counsel that a guilty plea or a conviction carries the risk of deportation. Individuals suspected of violating U.S. immigration law who are seized and detained have a fundamental constitutional right to be immediately advised of their right to be free from self-incrimination and their right to counsel.

Habeas Corpus

For centuries, English law, which formed the foundation of American law, provided individuals—citizens and noncitizens alike—with the right to be free from unlawful detention. The issuance of NTAs, in essence, is a habeas procedure because it results in a foreign national's interrogation and detention. The BIA's decision, which permits detention before NTAs are filed and before the defendant is advised of his or her right to counsel, is a clear violation of the Constitution's prohibition against unlawful detention. It is critical that this decision be met with due and rightful resistance.

The author's views do not necessarily represent the views of AILA, nor do they constitute legal advice or representation.

POETIC JUSTICE

Julia Manglano Toro *is a Chicago-born, Washington, D.C., lawyer and mother of 3, also partner at Pertierra & Toro, P.C.*

The American Dream Is ...

Two people in love
Two people wishing to create a family
Two people living by their parents' examples of
Strong faith, hard work, respect towards all, and education

In a new country with greater possibilities

Having a family, Having children
Having 6 children with few rooms
Small house or big house
You make it your home

Working at anything
Working at education
Working on the floor, for others, cleaning up,
Working at your dream to be a doctor, a researcher
Working to save lives, to better lives, better the world
In America my parents live their dream
Lived continuing education, for better education, more education
Lived working, cleaning, reading, teaching, helping others
No one helped them, no one looked up to them, until now,
But they looked up to God, and they continued to Dream

They had 6 kids,
6 kids to educate,
6 kids who could fail,
But they had 6 kids who dreamed as they did,
who work hard and love hard, as they did

One a doctor saving lives
One an artist creating beauty through sight and ideas, sound and feelings
One a lawyer, then a judge, then a mother to her children
One a businessman with ethics and brains and strength
One a doctor too, following their path, as well as example of family
One a lawyer, helping other families stick together in a better world

That is the American Dream,
That was what they could not attain anywhere else,
Sending everyone to school,
Giving all kids their support, their time and their love
Without distraction of war, conflict, poverty, death and suffering,
To live life, Not to fear life each day

The American Dream is to be able to love your life and family without obstacle
To continue dreaming without obstacle
To create art, solutions, healing, assistance for others, without obstacle
To not stop dreaming for yourself, your family and your community
To stand in confidence to attain all you strive for without anyone to tell you "no"

That is why people continue to dream the American Dream
Because it exists
Hope stands firm
Families grow
Minds pursue more

Let the American Dream remain a reality
Let people dream, without obstacle
Let people live, without fear
Let people work, without slavery
Let people learn, without violence
Let people laugh, without tears

That is the beauty of the American Dream

BEHIND THE CASE

by Sheeba Raj

CASE: ***Jiang v. Holder,*** **No. 06-73470 (9th Cir. Sept. 26, 2011)**

ATTORNEY: **Daliah Setareh, Legal Aid Foundation of Los Angeles**

CA9 Remands Case to Allow Authentication of Documents

The U.S. Court of Appeals for the Ninth Circuit found that an immigration judge (IJ) erred by refusing to allow a petitioner to authenticate foreign documents through his own testimony, and abused her discretion when she denied a continuance and ruled that the petitioner should be removed.

In Jiang v. Holder, No. 06-73470 (9th Cir. Sept. 26, 2011), the court remanded a ruling by the Board of Immigration Appeals (BIA) that had upheld the IJ's decision to remove the petitioner after rejecting two original Chinese documents submitted by Zhanling Jiang to prove his unmarried status. During the merits hearing, the IJ informed Jiang that she would accept only a consular certification from the U.S. Consulate in China. When Jiang requested a short continuance to obtain it, the IJ refused and ordered him removed. In its decision, the Ninth Circuit deemed the IJ's denial an abuse of discretion, given that Jiang received the certification less than one month later.

"Had we been granted a continuance to obtain the consular certification, we would have obtained the document," explained Daliah Setareh, one of the attorneys at Legal Aid Foundation of Los Angeles (LAFLA) representing Jiang. "The case could have been approved and Jiang could have been living with peace of mind, able to work, live his life, and even apply for U.S. citizenship by now."

LAFLA has represented Jiang since 2004. Previously, Jiang consulted a notario, who had incorrectly written on Jiang's adjustment application that Jiang was married. "This mistake ultimately resulted in the denial of the adjustment application," Setareh said.

Setareh noted that attorneys often confront scenarios where it is challenging to obtain the type of authentication the court requests. For example, victims of torture or persecution may have no access to documents from their homeland. In these situations, she recommends attorneys authenticate documents through self-authentication and Federal Rule of Civil Procedure 44(a)(2).

Sheeba Raj *is the staff legal editor and reporter for* **VOICE**. *She can be reached at sraj@aila.org.*

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Green Card Stories depicts 50 recent immigrants with permanent residence or citizenship in dramatic narratives of about 1,000 words each, accompanied by artistic photos. Rather than couching immigration in terms of economics or politics, these stories appeal to the heart. Green Card Stories dispels the myth that today's immigrants are not as hard-working, energetic, and eager to integrate into U.S. culture as past generations of new arrivals. If the book's profilees share a common trait, it's a mixture of talent and steely determination. Each of them overcame great challenges to come and stay in America.

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TOP 10

according to AILA National Secretary ***Bill Stock***

AILA asked Secretary Bill Stock what his Top 10 practice resources are, and this is what he had to say:

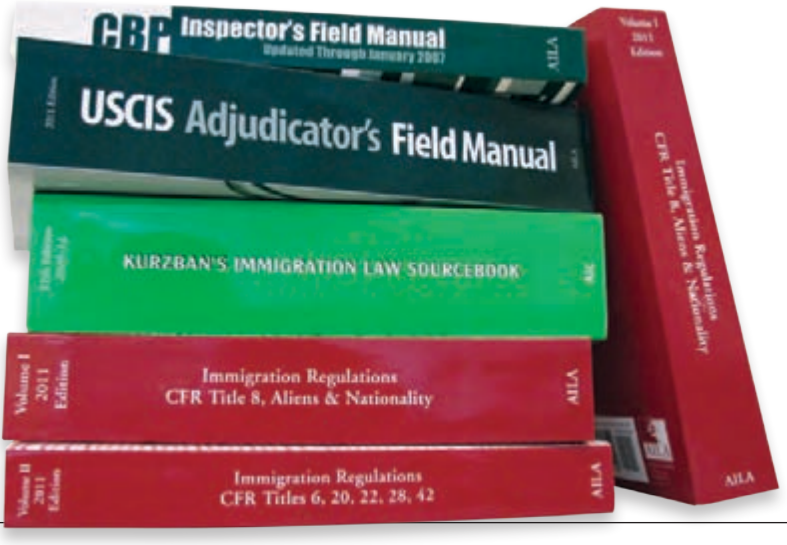
10 **Immigration and Citizenship casebook**—"for its introduction to immigration, its history, and the constitutional and historical framework of immigration"

9 **AILA's Immigration Practice Toolbox**—"the indispensible nuts and bolts for showing what immigration filings should look like"

8 **Professionals: A Matter of Degree**—"everything there is about Hs, that you absolutely need to know as a business immigration lawyer"

7 **Immigration & Nationality Law Handbook**—"for comprehensive articles on all kinds of topics in the nooks and crannies of immigration law" *(the predecessor to Immigration Practice Pointers and can be found only in AILALink archives)*

6 **AILA's Guide to PERM Labor Certification**—"everything about labor certs, that you absolutely need to know after you're done with Hs" *(formerly The David Stanton Manual on Labor Certification)*



WATCH **A recap of Bill Stock's Top 10 immigration practice resources below.**

5 **The Inspector's Field Manual**—"to know what the inspectors are supposed to know"

4 **The Adjudicator's Field Manual**—"to know what the adjudicators are following when they decide your cases"

3 **Kurzban's Immigration Law Sourcebook**—"for a quick refresher on just about anything in immigration law, and the essential first step for further reference"

2 **Immigration Law and Procedure**—"for just about everything in immigration law"

And for Bill Stock's Number ONE practice resource:

1 **AILA's INA and CFR**—"because you can't do anything at all without them"

AILA seminars

NOVEMBER 15 ▶ Guiding Clients Through Export Control Regulations—Part II *[Web]*

NOVEMBER 17 ▶ 204(l) and the Posthumous Petitioner: It Ain't Over 'Til It's Over *[Web]*

NOVEMBER 22 ▶ The Plight of The Crewman: Strategies for Representing C-1/D Entrants Under Current Law *[Web]*

NOVEMBER 29 ▶ FB-2A Derivatives: Dirty Secrets Revealed *[Web]*

DECEMBER 6 ▶ PERM Audits Are Coming Back—A Detailed Look at Some Specific Pitfalls to Avoid *[Audio]*

View the complete list of upcoming seminars at: *www.aila.org/seminars*.

AILA: A 'Great Place' To Work!

The November 2011 issue of *The Washingtonian* magazine features AILA as one of 50 Great Places to Work in the Washington, D.C., metropolitan area. Among *The Washingtonian's* 50 winning workplaces, there is a mix of sizes (from an organization of just 11 employees to one with more than 68,000), and industries (trade associations, government agencies, IT firms, government contractors, nonprofits, law firms, and more). Of more than 200 entrants, the 50 winners were chosen on the basis of pay and benefits, challenging and interesting work, great work/life balance, opportunities to learn and grow, financial stability, commitment to charity and community, and the recognition and respect given to employees. "It means a lot for us to receive this public recognition," said AILA Executive Director Crystal Williams. "To be acknowledged as a workplace where employees trust the people they work for, have pride in what they do, enjoy the people they work with, take pleasure in what they do, and feel a sense of appreciation deserves kudos on a job well done to all AILA employees."

Pro Bono at Work!

AILA hosted two clinics in October at the Esperanza Center in Baltimore, MD, where the Immigration Legal Services Program is located. More than 40 families who were victimized by notario Manuel Albán and his company, Loma International Business Group, Inc., were assisted. See FTC v. Loma International Business Group for more information on the case against him.

Comments? use your VOICE

THIS JUST IN! AILA President Eleanor Pelta (top) and President-Elect Laura Lichter recently traveled to New York to speak with prominent members of the news media about issues that are important to our association and clients. Look for news coverage regarding access to counsel in immigration proceedings, the visa barriers to innovation and entrepreneurship by immigrants, and the need for real prosecutorial discretion from ICE. Visit the Press Room for more details on the trip, including a list of networks and publishers who met with us.

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WHAT'S HAPPENING!

THE 4-1-1:

Texas and Rome District Chapters member **Ruby L. Powers** and her husband, Burak Powers, welcomed their first child, Rex Newton, on Jan. 7, 2011. Ruby is the founding attorney of a U.S. immigration law firm based in Houston with a new office in Dubai.

D.C. Chapter member **Leslie K. Dellon** has opened her own law practice, L. Dellon Immigration Law LLC, in Bethesda, MD.

Chicago Chapter member **Dhenu Savla** was recently published in the *Illinois Bar Journal* and has opened his own practice in downtown Chicago.

D.C. Chapter member **Emily Sumner** has opened Sumner Immigration Law PLLC based in Richmond.

Ohio Chapter members **Nadeen Aljijakli** and **Lauren M. Kosseff** recently launched Aljijakli & Kosseff LLC, an immigration law firm with offices in Cleveland and New York City. Nadeen was an associate with Duane Morris LLP's Immigration Practice Group and Lauren had worked in private practice.

Colorado Chapter member **Sandra Saltrese-Miller** is pleased to announce the expansion of her firm, Saltrese Faville & DeSeguin LL.C. There will be a new office in Santa Fe, joining the current office in Denver.

Southern CA Chapter member **Lincoln Stone** (center) was honored in Uganda by having a water well named after him. As part of his wife's missionary work, Lincoln and their children joined her to promote helping those in need.

N.J. Chapter member **Richard Toscano** has relocated his firm to Center Avenue in Fort Lee, NJ.

New England Chapter members **Mona T. Movafaghi** and **Christina R. Simpson** have joined Drummond Woodsum in Portsmouth, NH.

Oregon Chapter member **Brent Renison** is the recipient of the 2011 Oregon State Bar President's Public Service Award. This award is given to an attorney who has made substantial contributions to the public through recent efforts involving pro bono services.

Southern CA Chapter member **Scott Daniel McVarish** had a case featured in The New Republic.

Missouri/Kansas Chapter member **Stephen Legomsky**, Washington University Law professor, has been appointed chief counsel for USCIS effective October 24.

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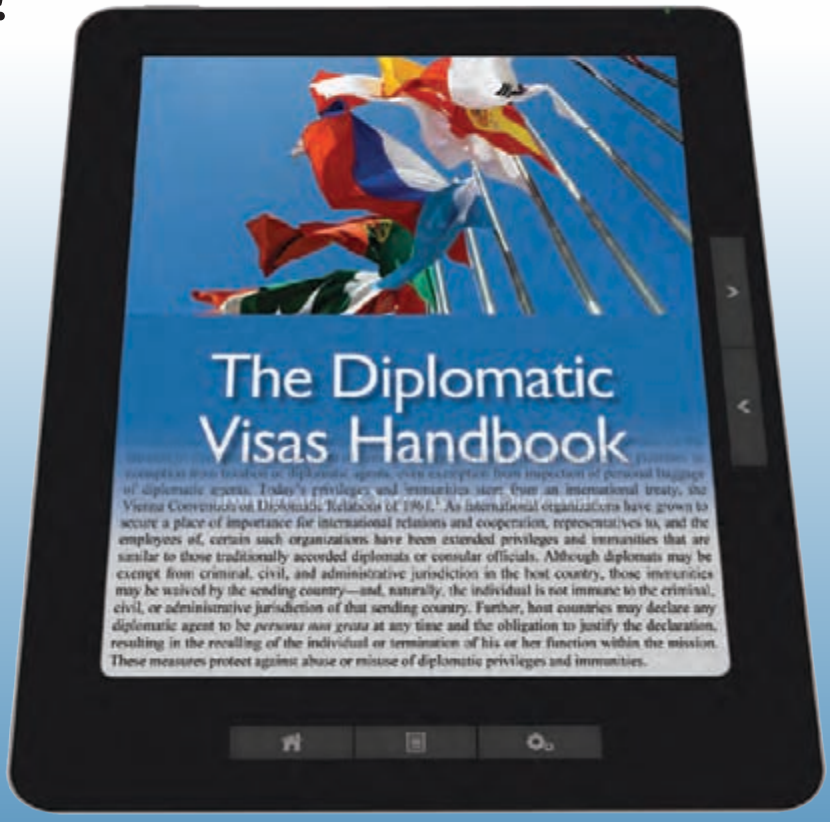

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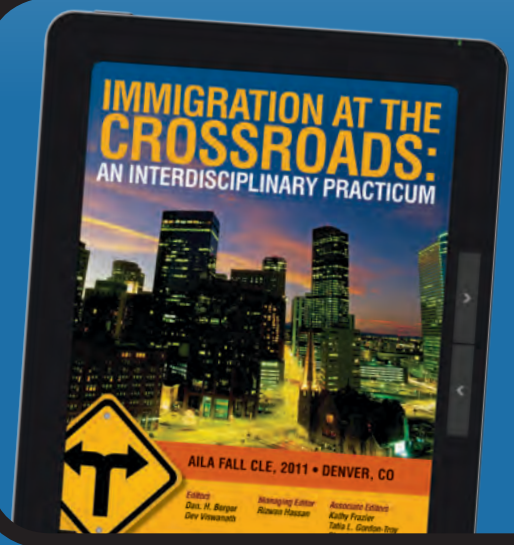

Another Book from AILA Publications!

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