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VOICE

JULY/AUGUST 2011

Vol. 2 Issue 4

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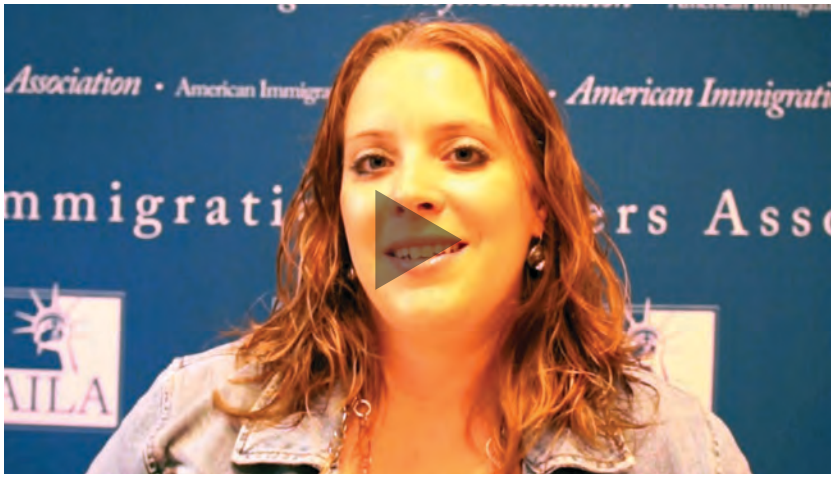

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DEPARTMENTS

COVER STORY

FEATURES

"Immigrants make jobs, rather than take them. We all benefit."

—New York Mayor **Michael Bloomberg,** to Detroit News

COVER: SHUTTERSTOCK
ABOVE, BELOW: SHUTTERSTOCK; AILA PHOTO

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

"The complaint contends that [Jason] Ankeny is not licensed to practice law, nor is he otherwise authorized to represent others in immigration matters."

State Says Immig. Advisor Violated Laws
Bellingham Herald

Snyder Touts Benefits of Immigration
Detroit News

"One of the keys to Michigan's future is to look back to our past and one of the keys to our past … (is) the topic of immigration."
—Michigan Governor **Rick Snyder**

New Immigration Law Targets Use of Fake IDs
Atlanta Journal-Constitution

"Not only does it not fit the crime, it's absolutely anti-human rights."
—**Teodoro Maus**, president, Georgia Latino Alliance for Human Rights

"Immigration advocates say that the [Secure Communities] program nets individuals accused of minor offenses and also **undermines trust** between communities and law enforcement."

Judge says Feds 'Mislead' Public on Controversial Immigration Program
Knoxville News Sentinel

The Council's Legal Action Center (LAC) applauds the Board of Immigration Appeals for advancing family unity in its June 23, 2011, decision, *Matter of Le*. The Board's long-awaited ruling favorably resolves the issue of whether the child of a fiancee of a U.S. citizen (a K-2 visa holder), who legally entered the U.S. when under age 21, is eligible for adjustment of status even after turning age 21. The decision is consistent with amicus briefs submitted to the Board by the LAC.

BIA Sets Favorable Precedent for Children of Fiancees
American Immigration Council

SHUTTERSTOCK/GOVERNMENT PHOTO

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What's New?

- **Recent Prosecutorial Discretion Memos**
- **Immigration Practice Pointers, 2011–12 Ed.**
- **Numerous decisions, Laws/Regs, and fillable immigration forms**

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AILA Publications—Written ... Edited ... Published by Immigration Lawyers

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THAT'S A WRAP!

Highlights from AILA's 2011 Annual Conference

aila SAN DIEGO

FROM TOP LEFT, CLOCKWISE:
(1) Open Bar? Now that's what I'm talking about!

(2) Now where exactly is the food court on this map?

(3) Laptops, i-Pads, smartphones, oh my!

(4) Good thing I skipped breakfast!

SHARPEN YOUR KNOWLEDGE OF BASIC AND ADVANCED IMMIGRATION LAW TOPICS

Forms & Fundamentals

An indispensable reference for everyone from the novice immigration attorney to law students, ***Forms & Fundamentals*** provides an understanding of the basic concepts and "how-to" tips and tactics on essential areas of immigration law practice.

BONUS! Formerly *Navigating the Fundamentals of Immigration Law,* ***Forms & Fundamentals*** reinvigorates this reference with annotations and tips for completing the most popular immigration forms:

- I-129
- I-130
- I-140
- I-485
- I-751
- I-765
- I-864
- DS-156E
- DC-160
- G-325
- N-400
- ETA-9035

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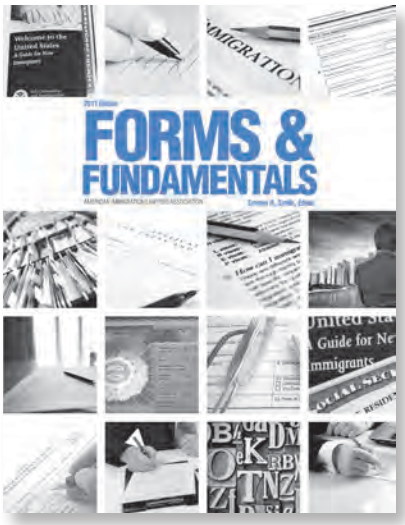

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Immigration Practice Pointers brings you streamlined, in-depth practice advisories that move you beyond the basics with cutting-edge analyses on a variety of advanced immigration law topics.

In addition, ***Immigration Practice Pointers*** provides guidance on practice management issues such as:

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and more!

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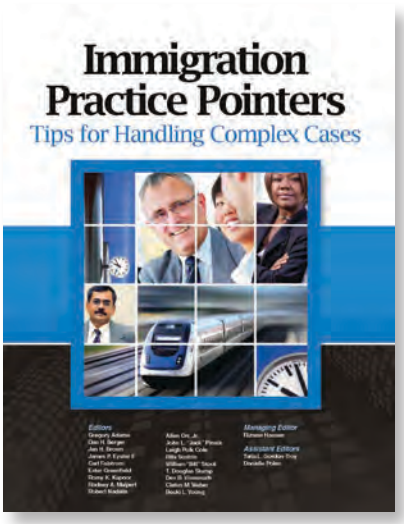

NOTE: *Forms & Fundamentals* and *Immigration Practice Pointers* were the handbooks for the 2011 Annual Conference.

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UNSOLICITED ADVICE

from Cletus M. Weber

Consider Buying Your Own Office

About three years ago, AILA National purchased its second office building as its headquarters. If you have a relatively stable law practice, consider following suit. However, bear in mind the following pointers as you decide whether ownership is right for you.

GOOD DECISIONS WILL MAKE YOU MONEY WHILE YOU SLEEP

Due to relatively low commercial real estate prices, now is an especially good time to buy if you can find the right building or business condominium. If yours is similar to most immigration law practices, you certainly won't need a skyscraper, either. A good purchase can yield financial benefits, such as leverage on your investment, long-term appreciation of your property (think extra retirement income), tax write-offs for depreciation and other expenses, as well as potential rental income from tenants.

BAD DECISIONS (OR BAD LUCK) WILL STEAL YOUR MONEY AND YOUR SLEEP

Although buying your own building can be a perfect decision under the right circumstances, you will be very sorry if you purchase the wrong building. You are better off missing out on pots of gold than you are buying a single building that subjects you to financial waterboarding.

ANALYZE OBJECTIVELY AND DECIDE VERY CAREFULLY

Avoid mistakes by analyzing your needs and potential opportunities carefully and objectively. Leave emotions behind. Ask yourself:

- Do you want to be a landlord? Consider the obligations of a landlord. For example, if something malfunctions, you have to find help or fix it yourself. Also, you still have to pay your mortgage if tenants vacate or withhold rent.
- Is your practice stable enough? If you have been practicing for seven years or more, you already should know the likelihood of expanding, contracting, or moving your practice in the future. On the other hand, if you started your practice only recently, you must plan extra cautiously.
- Are you financially conservative and disciplined? If you already have a leaky financial bucket, buying your own office building is likely to complicate your life.
- Are you interested in real estate generally? Do you at least have someone who can help you? If buying your own building sounds feasible, consult lawyers already on this path to see if the decision makes sense for you and to learn the intricacies of ownership.

Ultimately, purchasing one's own office building is not ideal for all immigration lawyers. However, if you own a relatively steady practice, demonstrate financial savvy, and feel comfortable accepting responsibilities accompanying ownership, you should consider it.

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.*

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

SPOTLIGHT

by **Andrew Johnson**

Seven Years Up and Running

This is part three of a three-part series that suggests (1) how to start your own immigration law firm; (2) how to increase the organization and efficiency of a 3-year-old firm; and (3) how to increase productivity in a 7-year-old firm.

Once your immigration firm enters its seventh year of operation, look at the big picture and strive to increase productivity. Consider the following questions: Are you adequately staffed? Is your marketing effective? How much money is owed to the firm? Are you wasting your time by doing jobs that should be delegated or systematized? What part of your immigration practice is producing the most business? Do you want to increase fees at the end of the year? There is always a more efficient way to run a firm, so always ask yourself what aspects could be improved.

Disaster Plan

Execute a contingency plan to address staff turnover or a steep increase in business. Hire backup staff consisting of a contract attorney who can travel anywhere in the country to tackle a case, contact local attorneys who can handle interviews and master calendar hearings, and find a paralegal or paralegal service that can undertake an overload of work. Hiring new employees can take months, so a contingency contract staff can help avoid loss in productivity.

Technology

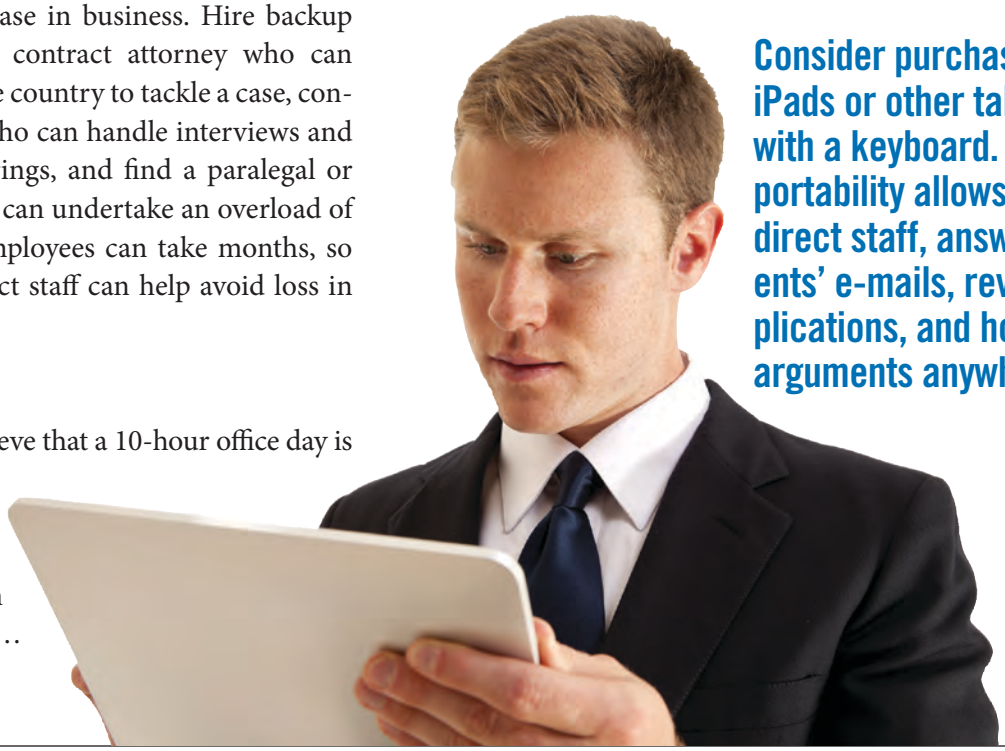
Attorneys often believe that a 10-hour office day is required to enhance productivity. However, with the correct setup, work can be done anywhere … anytime.

For example, consider purchasing iPads or other tablets with a keyboard. Their portability allows you to direct staff, answer clients' e-mails, review applications, and hone legal arguments anywhere. Also, because voice recognition software has improved significantly, dictating long messages to e-mail can save time, especially for staff, and they will have written instructions from you to attach to a file. Finally, all staff should use cordless telephonic headsets. Along with avoiding the inconvenience of holding a phone to their ears, cordless headsets allow employees to communicate with clients while moving throughout the office to pull files or use the computer.

Comments? use your **VOICE**

Office Lease

Depending on your law practice's location, consider ownership of the building or leasing an entire floor. Since your law firm has been operating for at least seven years, the building owner might consider you to be a low-risk tenant and be willing to ne-



Consider purchasing iPads or other tablets with a keyboard. Their portability allows you to direct staff, answer clients' e-mails, review applications, and hone legal arguments anywhere.

g ... What Now?

gotiate favorable terms. You can rent the extra space to generate additional income and allow flexibility for expansion. Also, having other attorneys as tenants may increase business through referrals.

FOR MORE INFORMATION on buying office space, see the Unsolicited Advice column.

Marketing

Raise the visibility of your firm through persistent and widespread marketing approaches. For instance, engage your clientele's community. For example, if your firm represents members of a specific ethnic group, become a board member of their local chamber of commerce and offer free legal services to the organization. Spend more time interacting with groups rather than individuals. Use your contacts within the community to sponsor events, or offer a free newsletter that addresses the organization's immigration concerns. Also, business immigration firms can provide e-mail updates to HR departments about immigration issues. You can also speak at business conferences about compliance issues. Finally, advertise an expertise within immigration law.

Change

We have all heard this phrase: "The definition of insanity is doing the same thing over and over again and expecting different results." If you are unhappy with your firm's organization, efficiency, marketing, staff or income, you must take proactive action. Not everything will work, but taking no action and hoping for change is insane.

Andrew Johnson *is founder of the Law Offices of Andrew P. Johnson, PC in New York. His practice focuses on investor and employment visas, along with federal appellate litigation. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

AILA seminars

JULY 28	Consular Processing—Dealing with ESTA and the Visa Waiver Program *[Audio]*
AUGUST 11	Coping with the H Cap *[Audio]*
AUGUST 16	The Material Support and Persecutor of Others Bars *[Web]*
AUGUST 18	Creative Strategies for Prevailing Wage Determination (LCA/PERM) *[Web]*
AUGUST 23	Even More Advanced Parole—Parole Beyond Pending Applications to Adjust Status *[Audio]*
AUGUST 25	Central American and Mexican Gang and Cartel Related Asylum Claims *[Web]*

Save the Dates 2011

SEPTEMBER 8-9 — **Paralegals Conference**
Washington, DC
www.aila.org/paralegals

SEPTEMBER 16 — **Fall CLE Conference**
Denver, CO
www.aila.org/fall

NOVEMBER 10-12 — **24th Annual AILA California Chapters Conference**
San Francisco, CA
www.aila.org/ca

DECEMBER 1 — **14th Annual AILA New York Chapter Immigration Law Symposium**
New York, NY
www.aila.org/ny

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

highlighting: Michael Naranjo and Page Barnes

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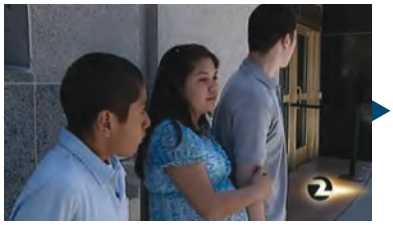
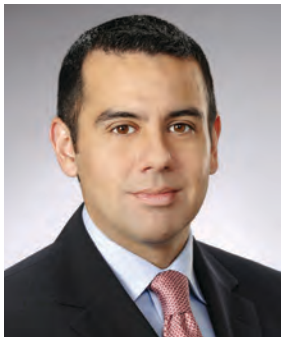


Go to KTVU to see Yessica's story.

Michael Naranjo and **Page Barnes** are the latest recipients of the Face of AILA distinction, nominated by long-time colleague **Marilia Zellner**. Marilia, who is AILA's first Face of AILA recipient, told VOICE about a case that her agency, Community Legal Services in East Palo Alto, had referred to the law firm of Foley & Lardner in San Francisco. Michael, who is senior counsel with the firm and Page, who is a partner, worked on this case with others in the Foley firm. A San Francisco news station, KTVU, captured Yessica Ramirez's heartwrenching story about facing deportation to Mexico after living in the United States for 23 years. With her attorneys' help, Yessica has received another stay of removal.



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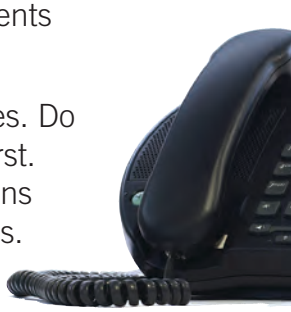
THINGS I WISH I HAD KNOWN WHEN I STARTED PRACTICING IMMIGRATION LAW

Notes to Previous Selves by:
Paul Zulkie,
Sarah Brown,
Gerry Chapman,
and Greg Siskind

The Sarah List

Sarah Z. Brown, Miley & Brown, PC

- Always review the statute and then the regulations. Also, always write and speak using the statutory language so you produce accurate and succinct arguments.
- Really listen to clients and your staff.
- Lean on colleagues. Do your homework first. Then, ask questions and discuss issues.



The Gerry List

Gerard Chapman, Chapman Law Firm

- **Know when you are the most effective during the day and when to schedule appointments.**
- When a client says, "Money is no object," it almost always means, "I want to tell you this now so I will feel like I have made a real commitment, but once the time and expense really get out there, I want you, the lawyer, to absorb whatever I later decide I do not want to pay."
- **Timing is everything.**

(Posted 07/27/11)

- **Sign up for every Recent Postings list on AILA's InfoNet.**
- Patience and kindness with clients almost ensures amazing success.
- Document everything involving each file and contact. Use a program to retain your notes.
- **Return every phone call whether you want to or not.**
- **Attend as many AILA conferences as you can and participate.**
- Purchase malpractice insurance even if you think you do not need it or feel you cannot afford it.
- Double check for deadlines.
- Treat your staff with affection and respect. They are your most important asset.

in absentia
(in ab-sen-shuh)

- Pronounce terms of art correctly. It is "consular" officer, not "counselor" officer. Also, say "in absentia," not "in abstentia."

"Treat your staff with affection and respect. They are your most important asset."

- Write in plain language.
- Clearly explain the anticipated costs and services during the first meeting with a client. Use an invoice each time, and whenever possible, use a fee agreement so the client understands his or her responsibilities and rights.
- Never embarrass an opponent or the adjudicator/ immigration judge. Always give your opponent or the adjudicator/ immigration judge a way to save face and still rule in your favor (make someone else the villain).
- Treat everyone in your office as adults and expect them to act that way around you. If they do not, let them know they have fallen short.
- Always inform a client of any mistakes and apologize for the damage. Then, ask how you can remedy the situation. Not admitting the mistake or trying to revise history only worsens matters.
- The attorney/client relationship is just as intimate as a spouse/ spouse relationship, and probably carries more responsibilities.
- **Even so, the excitement and satisfaction of practicing law pale in comparison to the love your family will give you.**

SHUTTERSTOCK IMAGES

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

The Paul List

Paul Zulkie, Zulkie Partners LLC

- Decide between running a full-service immigration practice or a specialized immigration practice.
- Selectively accept cases.
- Manage the high-maintenance client.
- Cross-train your staff.
- Turn off your e-mail and phone.

The Greg List

Gregory Siskind, Siskind Susser PC

- **Measure the return on your marketing investments in years, not weeks or months.** If you have done your homework and the investment appears wise, but you are not seeing a return, either you misjudged it or you simply need to remain persistent.
- **Set a clear phone or e-mail return policy in your office.** For example, if you get a message in the morning, return it by the afternoon of the same day. If it arrives in the afternoon, then return it by the next morning. Also, if you cannot return it, ask an employee to apologize to the client for the delay and see if it makes sense to schedule a time to chat.
- **Evaluate carefully the benefits and disadvantages of certain work settings.** For example, working in a large general practice firm may enhance your prestige and provide possible access to marketing immigration services to the firm's clients. However, ensure that the firm really promotes cross-selling and receives enough referrals because you will not receive referrals from other lawyers. If you join a boutique, know that you might have more flexibility to develop the niche practice that suits you and adaptability to weather some changes in the market. Unfortunately, you also might experience less insulation from shifts in the marketplace.
- **Be really careful about hiring prematurely.** If you own a robust practice, try to use incentives, such as overtime, bonuses, etc., to encourage your current staff to perform the extra work. Alternatively, consider hiring on a contract or temporary basis. Only hire someone permanently if the workload has not returned to normal after a sustained period.
- **Invest in scanners for everyone in your office who uses a computer.** More specifically, use a sheet-fed scanner that is full duplex. Also, invest in a full version of Adobe Acrobat coupled with good scanning software to easily store all scanned documents and link to client files, as well as find documents through a quick search of your computer system.

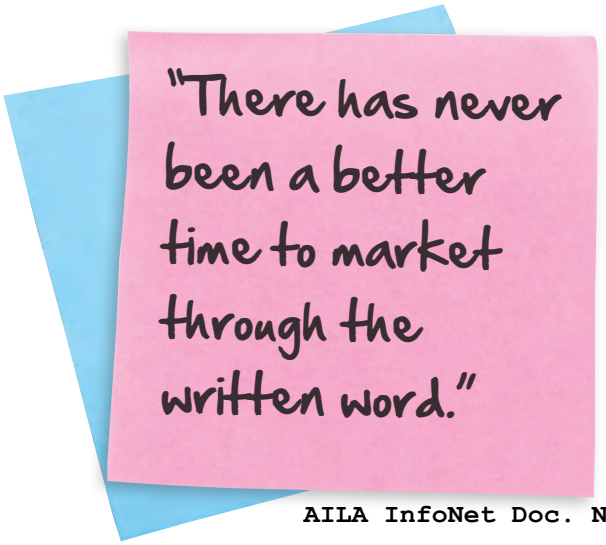
- **Be cautious about employees who regularly complain about clients** and always seem to blame the client for problems arising in the case. Sure, there are difficult clients and complaints involving them are normal and, perhaps, justified. However, sometimes the problem is your employee, who may be seriously damaging your practice.
- **Remember there are three things you can successfully deliver to clients: (1) low fees; (2) high-quality service; and (3) fast service.** If you try to deliver all three, you will go out of business. Pick two and stick to the plan.

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

- Develop a system for measuring profitability and productivity.
- Establish billing requirements for attorneys and paralegals.
- Avoid fronting filing fees and costs. We are not bankers.
- Stay on top of accounts receivable collections.
- Define the scope of service in a flat fee/ commodity environment.

Online tools such as Twitter, Facebook, and Dropbox can greatly help your practice.

- **Do not try to cling to a client when a conflict of interest surfaces.** Consult the other party early if you want a waiver of the conflict or consider referring the matter to a "conflict buddy"—a lawyer to whom you regularly refer your conflict cases and who is ready to reciprocate.
- **Write prolifically.** There are numerous opportunities to write books and articles, as well as a range of self-publishing options, including Internet-based and e-mail newsletters, blogging, and even Tweeting and Facebooking. There has never been a better time to market through the written word if you have the time and the talent.
- **Implement an effective back-up system.** If you have a computer that dies, a server that crashes, etc., you do not want to lose critical information or documents. Consider an online back-up system, as well as an on-site back-up system—or possibly both—as well as a service like Dropbox, which is an incredibly useful tool for making your files available in the cloud without ever having to think about backing up.



For the Podcast Enthusiast:

JUNE 3, 2011:
Six Steps to Transition Your Practice from Paper to Digital Files

April 1, 2011:
Terminating the Attorney-Client Relationship with Respect to Immigration Proceedings

February 2011:
Business Development for the Little Guys—How to Make Your Small Firm Better

October 2010:
20 Technology Tips to Be More Productive and Improve Your Practice

December 2009:
Managing Client Anxiety While Maintaining Your Sanity

February 2009:
Understanding and Dealing with the Stress of Immigration Practice

Related Resources:

"The Immigration Law Firm Stimulus Package: Diversifying Your Practice and Increasing Law Firm Profitability Through Effective Billing Procedures," *AILA Doc. No. 10082461.*

"Getting Paid: A Primer for Immigration Lawyers," *AILA Doc. No. 10080361.*

Immigration Practice News, a quarterly newsletter by AILA's Ethics and Practice Management Committee.

The authors' views do not necessarily represent the views of AILA nor do they serve as legal advice or representation.

AILA InfoNet Doc. No. 11072768. (Posted 07/27/11)

THEFT, DRUGS, DECEPTION: OH MY!

by LAUREN LANTZ
AND CHARLOTTE SLOCOMBE

"Oh, I forgot to mention that I was convicted for theft when I was about 20 years old. That's not going to affect my visa application, right? I've always been fine traveling under visa waiver."

These are words that we, as immigration practitioners, dread hearing from our clients. Even though we've asked them about any past criminal offenses at the outset, we unexpectedly have to explain that they may indeed be ineligible to receive a nonimmigrant visa and that their past travel to the United States under the Visa Waiver Program (VWP) may even be considered misrepresentation in the eyes of U.S. immigration officials. Suddenly, a straightforward intracompany transfer to the United States is no longer so straightforward. Or perhaps this individual is the primary applicant's spouse, and you must explain why he or she may not be able to accompany his or her wife or husband to the United States. Without addressing any dual representation issues that might arise from this hypothetical, how do you go about tackling the issues? How can you best prepare these clients for the types of questions that may be posed at the embassy interview? And what are their chances of success?

This article addresses only the following inadmissibilities: crimes involving moral turpitude (9 FAM 40.21(a) N2); alcohol and controlled-substance violations, including inadmissibility based on drug trafficking (9 FAM 40.23. *See also* INA §212(a)(2)(C)); mental or physical disorder (9 FAM 40.11 N11. *See also* INA §212(a)(1)(A)(iii)); drug addiction or abuse (9 FAM 40.11 N12. *See also* INA §212(a)(1)(A)(iv)); and misrepresentation (9 FAM 40.63 N2. *See also* INA §212(a)(6)(C)).

Where to Begin?

Careful groundwork is necessary to address all inadmissibility issues. There also are procedural matters that may have to be considered. For instance, some U.S. embassies, such as those in London and Belfast, utilize prescreening policies whereby nonimmigrant visa applicants with a record of an arrest or conviction must scan and e-mail a recently procured U.K. police certificate and their own specific-to-post Personal Data Form (VCU)[1] to the embassy before they can even be scheduled for an interview appointment. By doing so, they are often granted extra time at the interview, and, in more serious cases, they will speak to a special consular officer who has received additional training in relation to inadmissibility adjudications. Such a client must be counseled regarding timing and travel plans.

After any procedural aspects relating to these newly discovered circumstances have been addressed, you probably will have to sit down with the facts and prepare a well-thought-out legal submission. In the best-case scenario, you would argue that the applicant is actually admissible; in the next best instance, that he or she should be granted a waiver of inad-

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missibility. Of course, even the best legal submission cannot speak for the client; therefore, the best practice is to ensure that the client has a thorough understanding of the issues prior to visiting the embassy.

If the client was merely arrested, the incident must be disclosed in the application and the client should expect questioning at the embassy interview, but typically the consular officer would not find him or her

Acts That Could Make Your Client Inadmissible

It is imperative to address all potential inadmissibility issues so as not to overlook any potential pitfall that could hinder the application. For example, an individual with a controlled-substance conviction may be inadmissible not only because of the offense, but may be found inadmissible for misrepresentation, drug abuse, and even drug trafficking, depending on the circumstances. It is crucial to address all potential issues as these are identified in the *Foreign Affairs Manual* (FAM) and the Immigration and Nationality Act (INA). Failure to do so leaves one open to the risk of having an angry client, who, having attended an embassy interview, demands to know why his or her conviction did not appear to be the main line of questioning, and why another factor resulted in a finding of inadmissibility.

Crimes Involving Moral Turpitude

Clients often ask for the definition of a crime involving moral turpitude (CIMT). A CIMT, according to the FAM, is a crime with one or more of the following elements: (1) fraud; (2) larceny; and (3) intent to harm a person or thing (9 FAM 40.21(a) N2.2). A visa applicant who has been convicted of, or who admits the essential elements of, a CIMT is deemed inadmissible (INA §212(a)(2)(A)(i)(I)).

Was There a Conviction?

First, it is critical to determine whether there was actually a conviction for the offense, as opposed to an arrest or other lesser penalty. Title 9 FAM 40.21(a) N3 notes that INA §101(a)(48) defines "conviction" as either: (1) a formal judgment of guilt entered by a court; or (2) if adjudication has been withheld, either a finding of guilty by judge or jury or a plea of guilty or nolo contendere by the alien or an admission from the alien of sufficient facts to warrant a finding of guilt; and (3) the imposition of some form of punishment, penalty, or restraint of liberty by a judge.

ineligible based on the arrest alone. However, if the client verbally admits having committed the essential elements of a CIMT (or a drug offense, discussed below) to the consular officer, then he or she can be found ineligible despite the fact that there was no conviction (9 FAM 40.21(a) N5.1). Analysis can become even more complicated with charges that have been brought forward but for which judgment has yet to be rendered. Of course, more often than not, the embassy would decline to make a determination at the embassy appointment and would instead await the outcome of the matter before rendering judgment (9 FAM 40.21(a) N3.3. *See also* INA §221(g)). Overall, though, if there was (or is) no conviction, you will likely have a strong argument for admissibility.

A common scenario is one in which the client has received a caution—rather than a conviction—for an offense, usually a CIMT (although a caution can be issued for an alcohol or controlled-substance offense). This penalty is available to authorities in some countries, including the United Kingdom and the Republic of Ireland.[2] A caution is more than the verbal slap on the wrist that the name might imply. The recipient must admit the commission of the offense and consent to receive the caution as an alternative to prosecution. It can seem difficult to justify the position that an individual with a caution should not be ineligible for a visa. An individual who has been cautioned has admitted the offense, and the consular officer has the discretion to render ineligible an applicant who admits the essential elements of a CIMT or a drug offense. Clients who have been cautioned for a CIMT historically have been successful in obtaining visas; U.S. embassies have typically neither held a caution to reach the standard of a conviction nor have they deemed the existence of a caution to rise to the standard of having admitted the essential elements of a CIMT.

If a client has been convicted of a clear CIMT, →

however—for example, multiple counts of fraud—there will usually be no grounds for arguing admissibility. Rather, a good waiver argument will have to be made, and the client's expectations for success must be managed accordingly. However, what if the offense is something not as clear cut? For instance, what if the client was involved in a fight, perhaps even out of self-defense, and was later convicted of assault? Would this be considered a CIMT in relation to U.S. visa issuance? The difficulty in making such a determination is that there are typically varying degrees of offenses depending on the governing jurisdiction. For example, in the United Kingdom, there are no fewer than seven different types of assault.[3] As set forth in the FAM, there are five types of assault that can be considered CIMTs. Simple assault, which is defined as that which does not require intent or depraved motive, so long as it is not dangerous or deadly, is explicitly not a CIMT (9 FAM 40.21(a) N2.3-3).

Furthermore, admissibility analysis can be complicated where the offense involved may not exist in the United States. Inadmissibility examination must include a careful examination of the relevant point(s) of law to determine whether the statute requires intent. In the United Kingdom, there exists the offense of "actual bodily harm" (ABH), which, essentially, is assault resulting in serious physical or psychiatric harm to the victim.[4] Under the Crown Prosecution Service's sentencing guidelines, and as set forth in governing case law, the requisite mens rea for conviction of ABH is "reckless," which does not rise to the level of intentional (*Regina v. Cunningham* [1957] 2 QB 396). In the past, it was difficult to reconcile the mens rea of ABH with the intent required under the FAM when evaluating admissibility; historically, the U.S. Embassy in London has held that ABH is a CIMT. Recently, an advisory opinion from an adjudication made at the U.S. Embassy in London confirmed that ABH is not a CIMT.

Look for Exceptions

If the client clearly has been convicted and the applicable statute explicitly requires intent, then analysis must move to whether there is any exception in the FAM for the circumstances of the individual. There are exceptions to the general rules.

An act of juvenile delinquency under U.S. standards cannot be the basis for a finding of inadmissibility (9 FAM 40.21(a) N9.2. *See also* INA §212(a)(2)(A)(i)(I)). The Federal Juvenile Delinquency Act differentiates between two types of juvenile delinquents: those under the age of 15 (9 FAM 40.21(a) N9.1), and those between ages 15 and 18 (9 FAM 40.21(a) N9.4-2). Juveniles under the age of 15 at the time of the delinquency cannot be found inadmissible under INA §212(a)(2)(A)(i)(I) by reason of any offense. If the visa applicant was between the ages of 15 and 18 when convicted, then he or she cannot be found inadmissible because of the conviction unless he or she had been tried and convicted as an adult for a felony involving violence (9 FAM 40.21(a) N9.4-2; 18 USC §16). There also is an exception for conviction or admission of simple possession or use of controlled substance(s), the act(s) or which occurred under the age of 18, but excluded from this specific exception are convictions or admissions relating to drug trafficking, importing/exporting, and manufacturing (9 FAM 40.21(b) N2.1). Also useful is a further exception that provides admissibility for a visa applicant whose offense occurred while he or she was under the age of 18, despite the conviction having taken place after he or she reached the age of 18, where the offense took place at least five years ago, and he or she meets the requirements of the "petty offense" exception.

The petty offense exception can be used by an individual who has been convicted of, or admitted the elements of, only one offense for which the maximum possible penalty was one year's imprisonment, and for which the individual was not sentenced to more than six months' imprisonment (regardless of the duration actually served) (9 FAM 40.21(a) N7.1). Again, careful review of the statute(s) involved and the relevant sentencing guidelines is necessary. If the language is particularly complex, it may be appropriate to seek advice from a local criminal law specialist. It can be extremely difficult to reconcile criminal law—which varies from country to country—with U.S. immigration and criminal law.

Often a key factor in determining the maximum penalty possible for an offense is the court in which the case was heard. In the United Kingdom, for example, cases can be heard in either a magistrates' court or a Crown court. Magistrates' courts deal with sum-

mary (less serious) offenses. If the client's case went through a magistrates' court, it is likely that he or she will qualify for the petty offense exception, as typically the maximum penalty possible for a matter heard in magistrates' court is six months' imprisonment, thus qualifying exactly for the exception. Indictable or more serious offenses, such as robbery and rape, must be heard in Crown court. Certain offenses, appropriately called "either way offenses," can be dealt with in either magistrates' court or Crown court.[5] It is, therefore, essential that the client obtain a current police report—and any court-related documents—from the country where the offense occurred as early as possible in the visa application process to determine which court dealt with the matter.

Alcohol, Drugs, and Trafficking

Although it does not often render an applicant inadmissible, any arrest or conviction for an alcohol-related driving offense (driving under the influence, or DUI) must be declared on every U.S. visa application. Client expectations must be managed, particularly with regard to timing. Since June 2010, U.S. embassies worldwide have been required to refer a visa applicant to a panel physician when he or she has a single drunk-driving arrest or conviction within the previous five years, or two or more arrests or convictions within the previous 10 years, or if there is any other evidence to suggest an alcohol problem (9 FAM 40.11 N11.2(b)). The only exception is if the applicant had a single alcohol-related arrest or conviction within the previous five years, and on a previous nonimmigrant visa (NIV) application was required to visit the physician, was found eligible by the consular officer following the physician visit, and has not had another alcohol-related arrest or conviction since. In this case, the medical exam does not have to be repeated (9 FAM 41.11 N11.2(d)).

It is also crucial that clients understand the importance of the physician appointment. Although it is uncommon, it is possible to fail the medical examination. The panel physician is required to administer both a physical and mental examination; failure to pass both portions of the examination could result in the determination that the applicant is ineligible because of alcohol abuse or addiction. It should be noted that the physician does not make the determination of visa inadmissibility; the consular officer must ultimately make such a determination. Thus, there is no doctor/patient confidentiality. All conversations and results are relayed to the embassy; hence, the visa applicant can be found inadmissible if he or she admits to taking illegal drugs, even if the blood test comes back clean. Such a verdict could be rendered under the FAM classification of drug abuser or addict (9 FAM 40.11. *See also* INA §212(a)(1)(A)(iv)). If this is the case, a waiver argument would indeed have to be made. It is advisable for counsel to research the particular embassy's trends in relation to DUI applications and panel physicians; for example, U.S. embassies in India appear to be particularly strict in regard to physician testing.

Applicants with a controlled-substance conviction normally have a more difficult case to argue in attempting to obtain a waiver of their inadmissibility. The embassy stance tends to be very anti-drug. INA §212(a)(2)(A)(i)(II) renders ineligible an applicant who has a conviction for any violation related to a controlled substance, and there is no distinction between possession and use (9 FAM 40.21(b) N3). In addition, unlike prior versions of the statute, the current version of the INA does not require intent in relation to possession (9 FAM 40.21(b) N4.2).

Example: A client comes to you for counsel in relation to an otherwise straightforward L-1 application and tells you that some years ago, he was with a friend in the street when the police stopped and searched them both. He had been holding a bag →

for the friend and there were traces of cocaine in the bag. The client will likely be devastated when you tell him that for the purpose of obtaining a U.S. visa, it is irrelevant that he had no knowledge of cocaine traces in the bag. If he received only a caution for this offense, it would not be considered a conviction for inadmissibility purposes and there would be a very good chance that his visa application would be successful. However, you can certainly imagine that this client is going to be subjected to a demanding examination regarding drugs and drug habits during his embassy interview.

If a client has a controlled-substance offense on record—whether an arrest, conviction, caution, or otherwise—it is crucial for the client to understand that, particularly for controlled-substance offenses, consular officers have broad discretion to render applicants inadmissible, depending on the circumstances. Inadmissibility can be based on admission of an offense and does not require conviction, as is the case with CIMTs (9 FAM 40.21(b) N1). Furthermore, INA §212(a)(C) permits a consular officer to use his or her judgment in declaring an applicant inadmissible where the consular officer believes that he or she had the intent to resell drugs, even if no resale took place (*See also* 9 FAM 40.23 N1.1(a)). In addition, the threshold for determination is "reason to believe," meaning that the consular officer need only have reason to believe that the applicant had the intent to participate in trafficking, whether as a primary or an incidental participant. Here, it should be emphasized that a finding of inadmissibility can be rendered even if the charges were dropped (9 FAM 40.23 N1.1(b)). Our office has had experience with findings of inadmissibility under the trafficking clause. One particular visa applicant was charged with possession of a controlled substance (Ecstasy—that is, MDMA, 3, 4-methylenedioxymethamphetamine). The record indicated that some of the tablets had been broken, which indicated, in the mind of the consular officer, intent to traffic. Although the applicant was not convicted, and in fact the charges were later dropped, the consular officer found him inadmissible based on the discretion granted to consular officers under the trafficking clause.

In addition, a visa applicant can be deemed inadmissible by virtue of a physical or mental disorder coupled with a history of harmful behavior related to the disorder (9 FAM 40.11 N11.5. *See also* INA §212(a)(1)(A)(iii)). For example, the individual has caused physiological or physical injury to him- or herself or to someone else, has threatened the health or safety of him- or herself or another person, or his or her actions have resulted in property damage. This FAM provision can be especially damaging to those with DUIs, as the provision extends beyond controlled-substance offenses to apply to alcohol-related offenses as well. Furthermore, as mentioned earlier, inadmissibility can be based on drug abuse or addiction, which is defined as nonmedical use of any drug listed in Section 202 of the Controlled Substance Act (9 FAM 40.11 N11.5(a)(3). *See also* INA §212(a)(1)(A)(iv) and 21 USC §812 (2002)).

Often the passage of time is the only factor that can assist in a case involving a controlled-substance conviction, particularly where the applicant was found inadmissible under the physical/mental behavior provision. An individual whose circumstances categorize him or her as "in remission" is not ineligible to receive a nonimmigrant visa. Since June 2010, an applicant is considered to be in remission if he or she has had no nonmedical use of any substance listed in Section 202 of the Controlled Substance Act or associated harmful behavior for a period of one year or more (9 FAM 40.11.1(4)). A great deal of discretion is applied in these cases. The embassy can be pragmatic in its adjudication and will take into account the totality of the circumstances. For instance, if the visa applicant is a high-profile individual who publicly admits his or her abuse or addiction, but who wishes to travel to the United States to participate in a rehabilitation program for that abuse or addiction, there is likely to be a greater chance of success.

That Dreaded Box on the I-94W

Beyond any inadmissibility related to the offense(s), another issue is raised all too often: the client has a CIMT or controlled-substance conviction and he or she has traveled to the United States on the VWP, often having made many entries in VWP status. The individual may not remember the (seemingly minor) offense, which may have occurred a decade or more before. Sometimes the individual was not paying attention to the question on the Form I-94W or thought

"crime of moral turpitude" must be too heinous a categorization for his or her long-ago theft of a shirt. It is also quite common for individuals to believe that their conviction need not be declared on the I-94W form if it was considered "spent" at the time of entry. In the United Kingdom, any conviction that is spent is, in effect, considered expunged and need not be declared, for example, to potential employers, according to the Rehabilitation of Offenders Act 1974. It tends to be common knowledge that any spent conviction need not be declared in the United Kingdom, but it is rare for an individual to know that, regardless of spent status, any CIMT conviction or controlled-substance conviction must be declared on the I-94W, or that the individual should have had a visa all along. The police have been known to misinform visa applicants about the need to disclose spent convictions.

The identification of any potential misrepresentation connected with VWP travel is essential at the outset. Misrepresentation renders an individual ineligible where: (1) a misrepresentation was made; (2) the misrepresentation was willful; and (3) the misrepresentation was material (9 FAM 40.63 N2. *See also* INA §212(a)(6)(C)). It goes without saying that where the client has a misdemeanour CIMT or controlled-substance conviction, and upon entry to the United States did not tick "yes" to the relevant question on the I-94W, then a misrepresentation was made. However, there may be arguments that can be made in relation to the second and third prongs of the misrepresentation definition—willfulness and materiality.

Materiality depends on whether, at the time of entry, the individual in fact had ticked the "yes" box; would doing so have rendered him or her inadmissible on the true facts? Would it have shut off a line of inquiry that is relevant to his or her eligibility and that might have resulted in a proper determination that he or she is inadmissible? 9 FAM 40.63 N6.1. *See also Matter of S & B C*, 9 I&N 436, 447 (BIA 1960; AG 1961).

For example, failing to disclose a conviction for rape or for a controlled-substance violation would be material, as an applicant with such a conviction is automatically ineligible for the VWP and, further, inadmissible. On the other hand, failing to disclose a conviction for DUI should be immaterial (unless the individual is considered an alcoholic (INA §212 (a)(1)(A)(iii)), as a DUI is neither a CIMT nor a controlled-substance conviction. Applicants with a DUI in their past do tend to be eligible for the VWP. It is only when an applicant applies for a visa that a DUI must be disclosed on the DS-160 application form; but a DUI should not raise misrepresentation issues in terms of past travel to the United States. Similarly, where an applicant clearly qualifies for the petty →

offense exception, there should not be a finding of ineligibility based on misrepresentation because there should not be a finding of materiality for the same reasons (although there will likely be questions at the embassy interview about why the offense was not declared on the I-94W). However, the embassy retains discretion, so caution is advised.

The embassy also is unlikely to appreciate responses such as, "My previous lawyer/My friend told me I didn't need to declare it," particularly when referring to a lack of disclosure on a past U.S. visa application. There really is little or no defense to having answered the arrest/conviction question on the DS-160 incorrectly; the I-94W has a narrower breadth, querying only about arrests/convictions for CIMT and controlled-substance violations.

INA §212(d)(3)—Saving Grace?

If a client is clearly inadmissible, counsel must fall on the proverbial sword and acknowledge the client's inadmissibility. Consular officers have broad discretion to recommend a waiver for an individual who is inadmissible because of a CIMT or an alcohol-related or controlled-substance offense, or on a health-related ground, as previously discussed (9 FAM 40.11 N13). The FAM guidance points to three factors to consider when making this decision: (1) the recency and seriousness of the activity or condition that renders the applicant inadmissible; (2) the reasons for the proposed travel to the United States; and (3) the effect, if any, of the individual's travel on U.S. interests (9 FAM 40.301 N3). These factors were first set forth in *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978).

In this situation, the legal submission requesting a waiver should be as strong as possible. It may even be appropriate to request character references or other letters of support from the client's employer, family, and friends. If the arguments seem capable of going either way, such letters or other evidence of character could be the determining factor in recommending a waiver—although, conversely, little weight is often given to supporting documentation.

Fortunately, consular officers usually have proven reasonable in applying INA and FAM provisions during adjudication. For the most part, consular of-

ficers will use the "reasonable human" standard. A consular officer will tend to base his or her reasoning on whether he or she would feel comfortable having the visa applicant as a neighbor. If a potential client reveals that he or she has a misdemeanour CIMT conviction from years ago, but an otherwise clean history, there should be a good chance of success—provided the individual presents him- or herself honestly and in a contrite manner.

The Embassy and Afterward

After all the preparation, the client will visit the embassy to submit his or her documentation, have the interview, and, hopefully, be issued a visa outright. If the consular officer deems the client inadmissible but decides to recommend a waiver for the ground(s) of inadmissibility, the officer's recommendation, along with any supporting documents, will be forwarded by e-mail to the U.S. Department of Homeland Security (DHS). Processing at DHS can take anywhere from several days to several months. Typically, DHS will uphold an embassy's recommendation and notify the embassy that the visa can be issued.

If the embassy needs interpretation on a point of law before admissibility can be determined, embassy staff can request an advisory opinion from the U.S. Department of State's (DOS) Visa Office (VO). If this occurs, the client should be counseled that the determination regarding admissibility will likely take some time.

Take the example of a client who pled guilty and was incarcerated because of an offense related to wiretapping and modifying the contents of a computer without authorization. These offenses are not explicitly mentioned in FAM and the relevant statutes do not explicitly mention intent. On this basis, an argument would have to be made for the admissibility of the client. In such circumstances, the embassy may seek an advisory opinion and the process could be prolonged. Our office has experienced some disagreement between the embassy and the VO in relation to client admissibility versus inadmissibility. Therefore, counsel should fully perform a thorough admissibility analysis even where factors such as incarceration risk clouding both case preparation and consular adjudication.

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EDITORIAL

Don't Give Up the Fight!

Pass That Microphone VOICE

Editorials, Comments, Opinions

A man and two of his cousins, illegal immigrants from Guatemala, had been kidnapped and sexually assaulted in broad daylight on a number of occasions at one of the main subway stations in Boston by someone posing as a legacy INS inspector. In that case, my co-counsel and I successfully sued the Massachusetts Bay Transportation Authority (MBTA). Since then, I have specialized in these types of cases. Even now, in this conservative, "post-Arizona" political climate, these cases yield victories for indigent immigrants.

I do not hide the clients' status from the opposing party. I know that many attorneys strongly disagree with this strategy. I only reveal the client's immigration history after conducting a full investigation, often including a consultation with an immigration attorney about status, and always with the full, informed consent of the client. The fear of exposing their undocumented status may render immigrant victims helpless against their perpetrators. Fortunately, none of my clients has been deported or subjected to removal proceedings, either during or as a result of the litigation they pursued. The problems emerging in the struggle to procure justice are systemic and political. Nevertheless, my uphill battle pales in comparison to the daily burden of immigrants, especially illegal ones, and victims of sexual harassment and assault. So, to all of you like me, who wage these battles, do not give up the fight. To any who are not, I urge you to join me!

Submitted by **Tyler Fox**, *a civil rights attorney in Cambridge, MA. Some portions of this editorial were omitted due to space limitations.*

Beyond the Embassy

Comments? use your VOICE

Visa applicants who are ultimately not successful can appeal to the Administrative Appeals Office, but only with arguments based on interpretation of law, not fact. Clients who are of the mindset to continue even beyond this step may wish to know that they have the option of bringing suit in relation to the denial. In recent years, judicial decisions have continued to erode the doctrine of absolute consular nonreviewability. Decisions in U.S. federal courts have held that that there is an exception to the doctrine of nonreviewability where the denial of a visa implicates the constitutional rights of U.S. citizens. *See* Bustamante v. Mukasey, No. 06-17228 (9th Cir., July 9, 2008). *See also* Saavedra Bruno v. Albright, 197 F.3d 1153, 1163, (D.C. Cir. 1999). Exception expanded from precedent Kleindienst v. Mandel, 408 U.S. 753 (1972). In *Mandel*, the attorney general declined to waive Mandel's inadmissibility. Since *Mandel*, the doctrine of reviewability where the decision affects the constitutional rights of U.S. citizens has been expanded to include that of consular officers in relation to visa adjudications.

Overall, it is difficult to apply objectivity to what is, in reality, a very subjective analysis. Each case is unique and must be assessed on its merits. Signs of remorsefulness and rehabilitation are often the greatest factors in a successful application or, where necessary, in obtaining a waiver recommendation. Preparing a client with a colorful past for an embassy visa interview can be challenging, yet rewarding. With appropriate preparation, inadmissibility often can be overcome—though the client must prepare as well.

Lauren Lantz *is an attorney with Fragomen LLP in London. Her practice is limited to U.S. immigration law.* **Charlotte Slocombe** *is a U.S. attorney and a solicitor with Fragomen LLP in London. She manages the London-based U.S. consular team. The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 http://photos.state.gov/libraries/unitedkingdom/164203/cons-visa/VCU01_London.pdf.
2 See An Garda Síochána Online and U.K. Home Office Online.
3See Crown Prosecution Service Online, Offenses Against the Person Incorporating the Charging Standard.
4 Offenses Against the Person Act 1861, Section 47. See also Crown Prosecution Service, note 3.
5 See HM Courts and Tribunal Service Online.

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BEHIND THE CASE

by Sheeba Raj

CASE: ***Matter of A–T–*** **(IJ Apr. 18, 2011) (Baltimore, Md.) (Gossart, IJ)**

ATTORNEYS: **Sarah Cave**, Hughes Hubbard & Reed LLP; **Natalie Nanasi**, Tahirih Justice Center; **Jenny-Brooke Condon** and **Bryan Lonegan**, Center of Social Justice at Seton Hall University School of Law; and **Ronald Richey**, solo practitioner

FGM Victim Receives Protection After Rare Attorney General Involvement

After a seven-year legal battle, in what had become a high-profile asylum case, an immigration judge (IJ) in Baltimore reversed himself and finally granted protection to a young woman who suffered female genital mutilation (FGM) and feared further persecution if she were returned to Mali.

In *Matter of A–T–*, the IJ had previously denied a young woman's claim for asylum, which the Board of Immigration Appeals (BIA) affirmed concluding that FGM survivors pursuing asylum had to show that they would likely experience in the future the exact type of harm that they previously suffered.[1] This held FGM victims to a higher standard than other asylum applicants. In a rare intervention in 2008, then–U.S. Attorney General Michael Mukasey cited flaws in the BIA's reasoning, vacated the decision, and remanded the case to the BIA.[2] The BIA, in turn, sent the case back to the IJ for reconsideration.

Intervention by the Office of the Attorney General is a rare occurrence, according to a 2010 law review article.[3] In fact, the record shows that the attorney general only reviewed approximately 17 decisions between 1999 and 2009. Sarah L. Cave of Hughes Hubbard & Reed LLP, one of the attorneys representing A–T–, noted that a respondent may ask the attorney general to review his or her case under 8 CFR §1003.1(h)(1). "We had written a letter to the attorney general at the time, Michael Mukasey," Cave explained, "and we set forth in considerable detail the bases why we believed that the Board's decision was erroneous and why it was ripe for his review." Cave and her co-counsel had even persuaded 31 senators to write a joint letter to Mukasey encouraging his review of the BIA's decision.

Pursuing Asylum Again

Although the IJ reversed his original decision, he only granted A–T– withholding of removal. He refused to grant asylum because A–T– filed for asylum after the one-year filing deadline. While A–T– and her legal team welcome the IJ's decision, withholding of removal does not offer A–T– the same level of protection as a grant of asylum, so they are appealing the decision to the BIA, arguing that A–T– is entitled to an exception of the one-year filing deadline because of changed circumstances. "We're arguing that the threat of the forced marriage didn't become real until August 2003, when she found out that the dowry had been paid … and filing before then would have been premature," said Natalie Nanasi, senior immigration staff attorney at Tahirih Justice Center and one of A–T–'s lawyers. Although A–T– entered the United States in October 2000 but did not submit an application until May 2004, Nanasi believes the changed circumstance justifies another look at A–T–'s asylum claim. According to her, the IJ had ruled that, because the procedural posture involved withholding of removal, his ability to consider asylum on remand was precluded by the previous rulings in the case. Relying on *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978), a case holding that IJs have the authority to consider all matters within their discretion where there is no final order, the legal team is contending that the IJ had the power to consider A–T–'s eligibility for asylum.

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Fostering Open Communication

To enhance representation of abused immigrant women, Nanasi emphasized establishing a rapport with clients. "If they [attorneys] are not getting the full story from their client, that means that the judge is not getting the full story and that the judge, therefore, is not going to make the best determination of the case," said Nanasi. To that end, she underscored the importance of describing the attorney-client privilege. "I often spend a lot of time walking clients through those very specific details of confidentiality so that they feel safe."

CASE: ***Matter of M–A–M–*, 25 I&N Dec. 474 (BIA 2011)**

ATTORNEYS: University of Houston Law Center's Immigration Clinic (Profs. **Janet Beck**, **Susham Modi**, and **Geoffrey Hoffman** (UHLCIC Director)); law students **Andrea Penedo** and **Catharine Yen**

BIA Remands Case of Mental Competency; Outlines 5-Step Process for IJ Assessment

Indigent immigrants struggle to navigate the complex U.S. legal system to seek humanitarian relief, often due to financial constraints and language barriers. Mental disabilities compound those challenges, not only for the afflicted immigrants, but for the immigration judges (IJs) presiding over removal proceedings. According to an unnamed judge, the Executive Office for Immigration Review (EOIR) spearheaded only a few trainings to help IJs identify mental illnesses in those who appear before them.[4] However, in Matter of *M–A–M–*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals (BIA) has provided a much-needed framework to help IJs assess the mental competency of those individuals.

According to Professor Janet B. Beck of the University of Houston Law Center's Immigration Clinic (UHLCIC), the BIA recognized that the guidelines issued by EOIR were insufficient to deal with mentally challenged immigrants. "More and more people with mental disabilities are coming to the attention of immigration attorneys," Beck said. As a result, the competency of this vulnerable population is "a national issue and people are e-mailing us and asking questions," she added.

Through UHLCIC, Beck was one of many who represented M–A–M– during various stages of the case. She, along with UHLCIC Director Geoffrey Hoffman, Professor Susham Modi, and law students Andrea Penedo and Catharine Yen, volunteered to represent M–A–M– through the BIA Pro Bono Project because of UHLCIC's experience in handling matters involving mental competency.

"We're interested in the issue of competency," said Beck. "Prof. Hoffman has been dealing with another client who has competency issues, and so the clinic was involved in this in other ways." Not only has UHLCIC represented mentally challenged immigrants, Beck also mentioned that it hosted a workshop on June 3 addressing the representation of immigrants with mental disabilities.

BIA's Mandate

In *M–A–M–*, the BIA outlined a specific five-step process to tackle the question of mental competency, including the requirement that IJs "articulate the rationale for their decisions regarding competency issues." The Board then remanded the case back to the IJ to address the steps outlined in the decision. "In this case, there is good cause to believe that the respondent lacked sufficient competency to proceed with the hearing," the Board noted. It pointed to the numerous psychiatric reports and a prior finding that M–A–M– lacked the requisite fitness to proceed. "Given these circumstances," the BIA concluded, "we will remand the record to the Immigration Judge to apply the framework articulated here." →

M–A–M– is a Jamaican citizen, who is also a lawful permanent resident. He was placed in removal proceedings on account of his criminal convictions. Beset with a prolonged history of mental illness, questions regarding his competency to stand trial surfaced throughout several hearings. During the merits hearing, the IJ asked M–A–M– if he was able to proceed. Appearing pro se, he replied that he would "do the best he could." The judge conducted no additional inquiry into his mental health and, ultimately, denied M–A–M– request for asylum based on a fear of persecution in Jamaica on account of his mental disabilities.

In mounting M–A–M–'s defense, UHLCIC filed a motion to remand arguing that the IJ failed to adequately evaluate M–A–M–'s mental fitness "because after reading the transcript, the client might be mentally incompetent," said Beck. "He was not given any procedural safeguards. He was not evaluated. He was a pro se applicant. Therefore, had he been evaluated, he might have been found to be incompetent," she surmised.

No Personal Contact

Beck and Penedo noted the challenges UHLCIC faced in representing M–A–M–. Communication was limited because, procedurally, the appeal process is limited to the record. "In the appeal phase, we communicated with the client by mail," Beck noted. But during the remand phase, video conferencing and phone calls are available lines of communication with M–A–M–.

UHLCIC and the American Immigration Council are working together on a practice advisory discussing strategies and procedures relating to the representation of mentally incompetent immigrants. In the meantime, Beck strongly emphasizes the need for "a pre-hearing conference with the immigration judge because that outlines everyone's duties and spells out what everyone's going to do—the judge, the DHS attorney, and the attorney for respondent."

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

1 *Matter of A–T–*, 24 I&N Dec. 296 (BIA 2007).
2 *Matter of A–T–*, 24 I&N Dec. 617 (AG 2008).
3 Laura S. Trice, "Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions," 85 *N.Y.U. L. Rev* 1766, 1767 n. 8 (2010).
4 Human Rights Watch, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System, July 2010, at 35.

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BALANCE

by Danielle Polen

The Yoga of Travel

It is said that the practice of yoga teaches us to cultivate a sense of balance in the midst of life's ups and downs. However, the physical and psychological stresses that often accompany travel can tax even the most grounded among us. With the summer travel season officially in full swing, the following tips can help you stay healthy and centered while on the road, whether you're traveling for business or pleasure:

Keep your body moving. No need to abandon your yoga practice just because you're traveling. Yoga requires no special equipment and can even be practiced in-flight (folks like Madonna and Sting reportedly take to the airplane aisles to get their practice in, although we highly discourage the practice of handstand in the airplane lavatory). Once you touch down (or otherwise reach your final destination), a variety of yoga-related options are available, including online practice sequences and visits to studios in your destination city. *Yoga Journal* even offers the iPractice app!

TO-GO YOGA: Download the iPractice App for $2.99

Choose healthy eating. Eating on the road might include anything from business dinners, to airport fast food, to restaurant meals—even a gas station food aisle is fair game to take the edge off. While it's a challenge to maintain healthy eating habits while on the road, it's not impossible. Peter Greenberg, the author of The Traveler's Diet: Eating Right and Staying Fit on the Road, offers culinary tips for business travelers on his blog.

Practice non-attachment. While the more detail-oriented may harbor the illusion they've planned for all possible travel contingencies, things don't always turn out as planned, as Johnny Depp's character in "The Tourist" finds out. Yogic philosophy encourages us to practice letting go of our attachments—our attachment to certainty in our lives, to who we think we are, to our plans for the future, and even to our bodies. And as we learn to let go of expected outcomes, we may find that the joy is as much in the journey as in the destination itself—however unexpected or imperfect the outcome.

Danielle Polen *is the associate director of AILA Publications. She is also an experienced, registered yoga teacher through the Yoga Alliance. She can be reached at* dpolen@aila.org.

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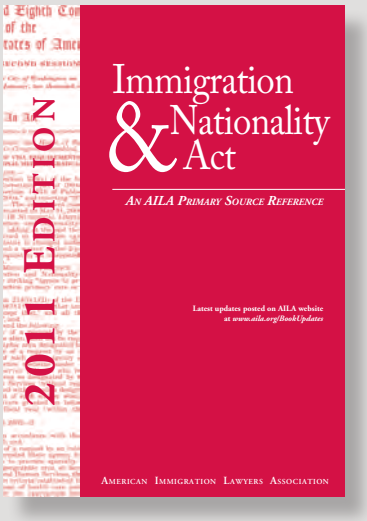

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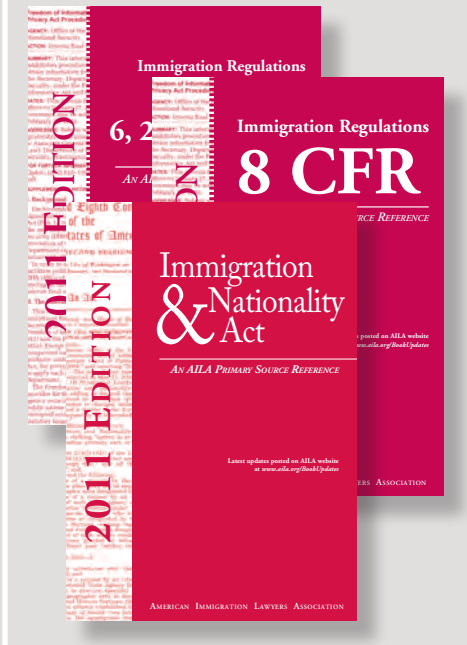

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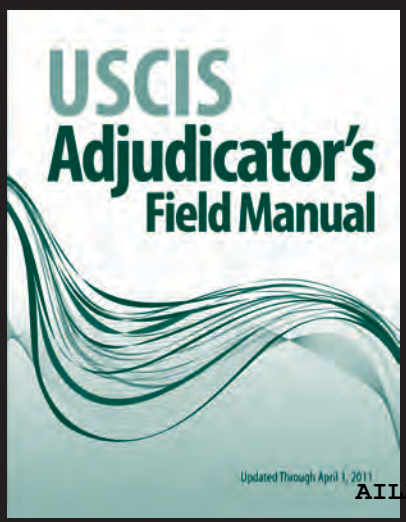

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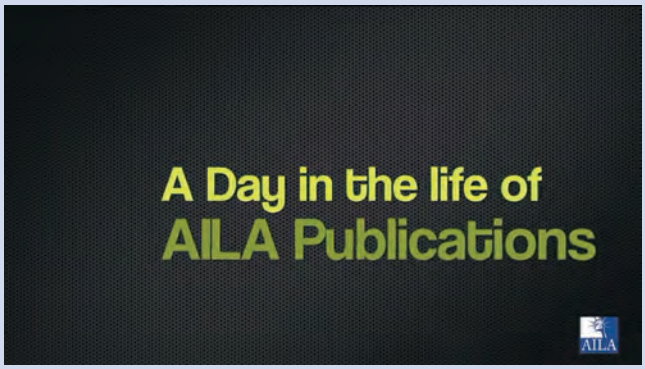
Catch the Buzz!

The Exhibit Hall was all abuzz as attendees of the 2011 annual conference in San Diego rushed in to buy AILA's latest releases and some trusted favorites, like the new *Business Immigration* and *Waivers* books as well as *Kurzban's* and many others.

At times, the checkout rivaled the lines of a Black Friday sale; but the busy bees of AILA—*i.e.*, AILA staff—took it all in stride!

Mark your calendar now for the 2012 annual conference in Nashville, where you could star in our next video installment of "A Day in the Life of AILA Publications."



CONGRATS TO MAYA YOUNG WONG! Meet this year's winner of the 14th Annual Creative Writing Contest presented by the American Immigration Council's Community Education Center. Fifth grader **Maya Young Wong** (center, with mother Sally Wong (left) and aunt Lynda Wong) presented her winning entry before a captive audience during AIC's Annual American Heritage Awards.

Community members line up to receive free legal advice.

Connecticut Chapter member Douglas Penn gets comfortable as he dishes out some much-needed advice and guidance.

AILA PHOTOS

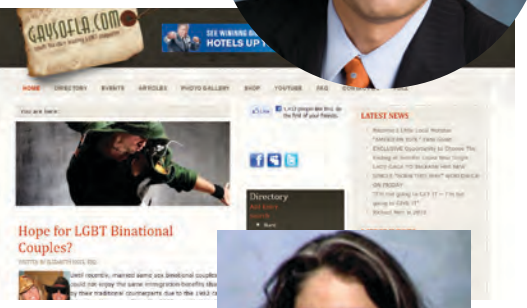
AILA Celebrates Successful Free Pro Bono Clinic at AC

More than 80 AILA members participated in AILA's Inaugural Annual Conference Pro Bono Clinic at Thomas Jefferson School of Law in San Diego. Our goal: to promote and showcase AILA's commitment to pro bono while serving the local San Diego community. The event was a smashing success! About 125 community residents participated in mini-classes on Immigration 101, Know Your Rights, Naturalization, and TPS. Many participants received free one-on-one advice from AILA members in town for the annual conference. AILA hopes to make the pro bono clinic an annual event. See you next year in Nashville!

Check out highlights from AC on Page 9

aila SAN DIEGO June 15–18, 2011

WHAT'S HAPPENING!



THE 4-1-1:

AILA awards former President **Bernard Wolfsdorf**, of Wolfsdorf Immigration Law Group, the 2011 AILA Service Excellence Award in recognition of his outstanding service, over a period of years, in advancing the mission, development, and value of AILA for its members and the public it serves.

Northern Calif. members **Courtney McDermed** and **Jeremiah Johnson** recently opened Johnson & McDermed, LLP in San Francisco, specializing in family immigration and deportation defense. Courtney was an associate with Van Der Hout, Brigagliano & Nightingale for seven years. Jeremiah had been a partner at Reeves & Associates prior to starting their firm.

D.C. Chapter member **Jennifer Cortes** has started a solo practice, The Cortes Law Firm, LLC in Rockville, MD, after being with the Law Office of David Goren for five years.

Atlanta Chapter member **Asheesh K. Sharma** has started a solo practice, Sharma Law Offices, LLC in Atlanta, after practicing seven years with immigration firms.

Southern Fl. Chapter member **Randall L Sidlosca** has joined Arnstein & Lehr, LLP in Chicago as a shareholder and is leading the firm's immigration practice group.

At-large member **Margaret D. Stock** has joined Lane Powell as counsel to the firm's Immigration Practice Group. She plans to focus her practice on immigration and citizenship law.

Central Fl. Chapter member **Elizabeth Ricci**, of Rambana & Ricci, PLLC, published articles in GaySoFla, a digital magazine, and in the *Gay & Lesbian Review*'s July/August 2011 issue.

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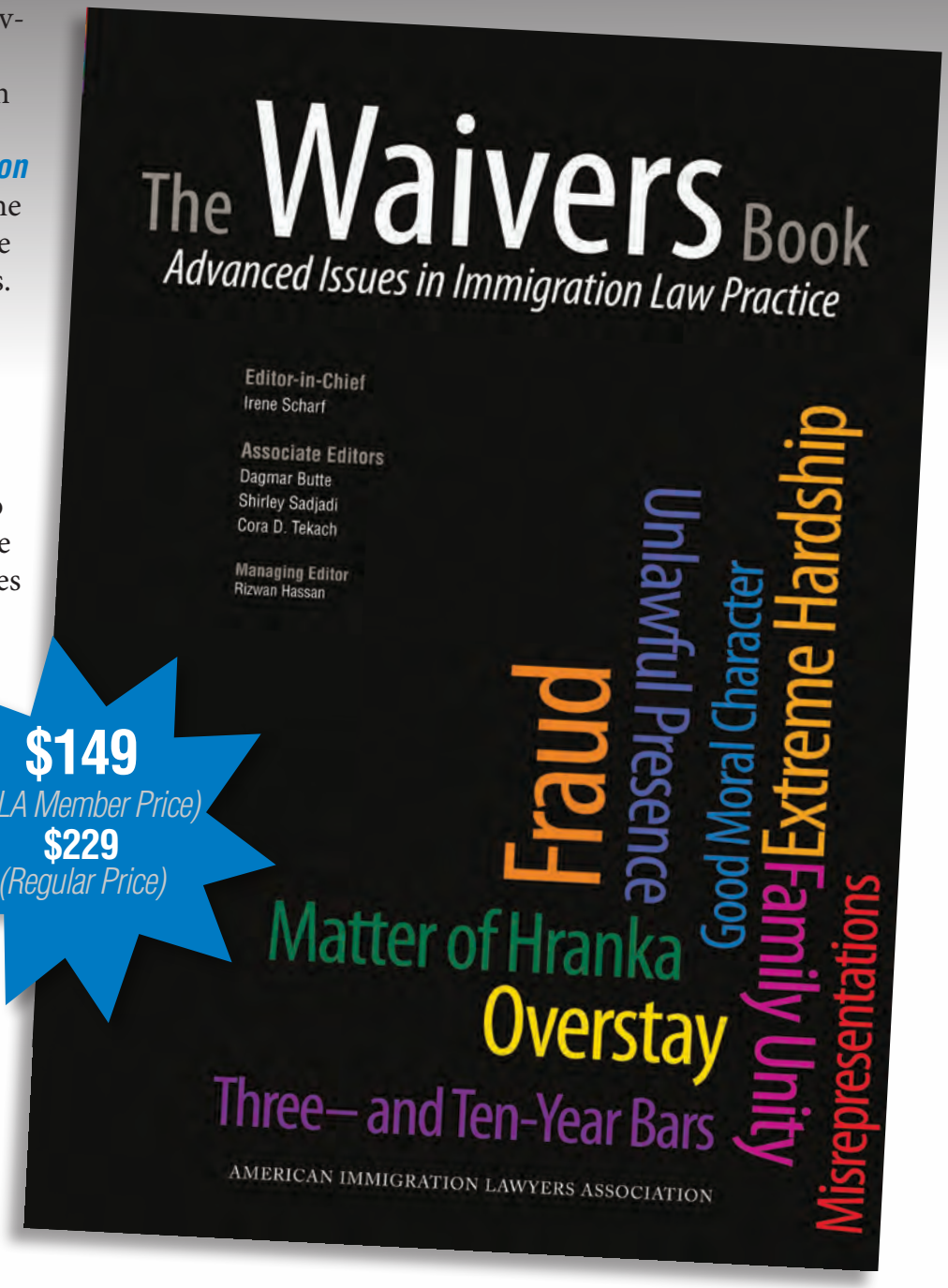

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