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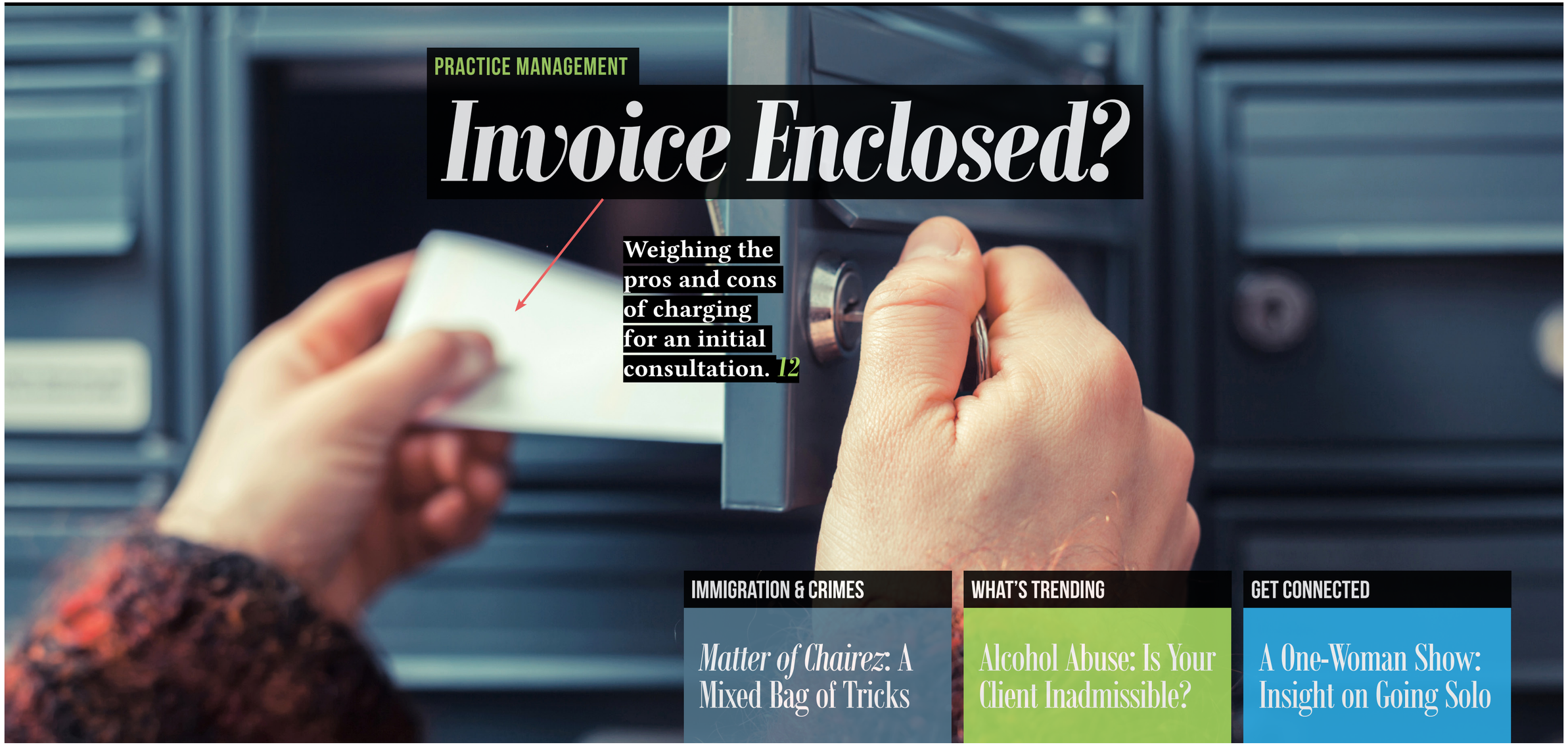

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Matter of Chairez: A Mixed Bag of Tricks

by Mary E. Kramer

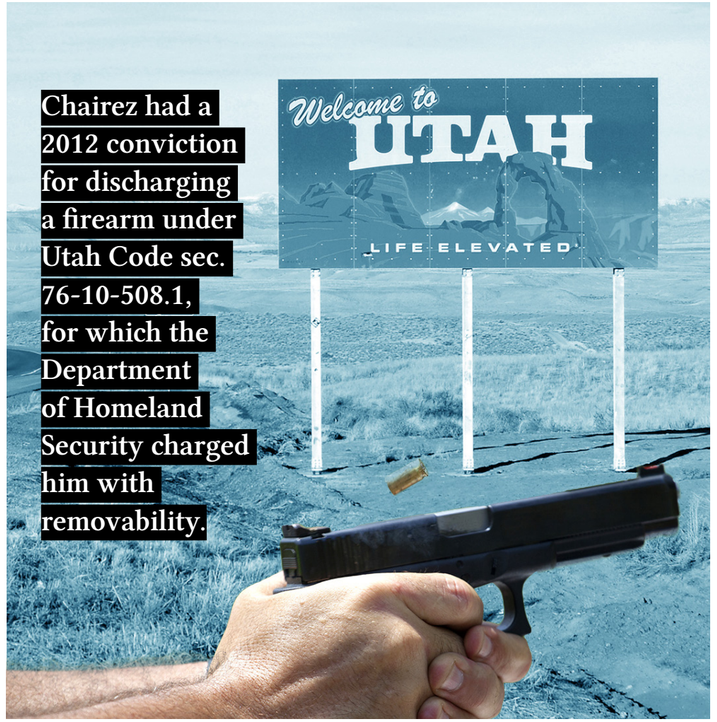
In my inaugural column for VOICE in March 2014, I discussed Moncrieffe v. Holder, 133 S. Ct. 1678 (2012), and Descamps v. U.S., 133 S. Ct. 2276 (2013), and opined that the Board of Immigration Appeals' (BIA) reigning decision on the categorical approach, Matter of Lanferman, 25 I&N Dec. 721 (BIA 2012) was abrogated by these two U.S. Supreme Court decisions. My prediction came true this summer when the BIA issued a precedent decision in Matter of Chairez, 26 I&N Dec. 349 (BIA 2014), withdrawing from *Lanferman*. In *Chairez*, the BIA adopts a strict categorical approach to divisibility but expands the use of the realistic probability test. So what does *Chairez* mean for immigration practitioners representing a noncitizen facing removal for a crime?

Chairez had a 2012 conviction for discharging a firearm under Utah Code sec. 76-10-508.1, for which he was sentenced to an indeterminate term of imprisonment not to exceed five years. For this offense, the Department of Homeland Security charged him with removability under two grounds: a "crime of violence," at INA §237(a)(2)(A)(iii), defined as an aggravated felony at INA §101(a)(43)(F); and a firearm offense at INA §237(a)(2)(C).

Back to a Strict Categorical Approach

Like many INA provisions, a "crime of violence" constituting an aggravated felony is defined according to federal criminal law; 18 USC §16 defines a "crime of violence" as "(a) an offense that has as an element of the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The best way for a practitioner to think of a "crime of violence" is to consider the intentional, active-use-of-violent-physical-force. *See* Leocal v. Ashcroft, 543 U.S. 1, 9 (2004); Johnson v. U.S., 559 U.S. 133, 140 (2010). In *Chairez*, the BIA notes that based on case law, §16 envisions an intentional act: "use" requires "volition." *Chairez*, at 350.

The BIA focused on subsection (a) of the Utah statute because in comparison to subsections (b) and (c), clause (a) is substantially different, in that "this section requires only that the accused 'know[] or hav[e] reason to believe' that discharge of the firearm may endanger a person; it does not require that the firearm be discharged for a particular purpose." *Id.* at 351–52. The BIA specified that the phrase "knowing or having reason to believe" at subsection (a) could be established by intent, knowledge, or recklessness—recklessness is



Chairez had a 2012 conviction for discharging a firearm under Utah Code sec. 76-10-508.1, for which the Department of Homeland Security charged him with removability.

not the intentional use of violent physical force and does not meet the definition of "crime of violence." *Id.* at 352.

The Board next turned to the question of whether the terms "intent, knowledge, or recklessness" are necessary alternative elements, or means. *Id.* In proceedings below, the immigration judge found clause (a) divisible as to these three mental states. *Id.* The Board, however, disagreed with the immigration judge's decision, in light of *Descamps*, noting that under Utah law, a jury is not required to unanimously decide on the particular mental state involved in a prosecution, but may convict based on either intent, knowledge, or recklessness. *Id.* Accordingly, the mens rea are alternative means, not alternative elements, and sec. 76-10-508.1 is not a divisible statute. Assuming the least culpable conduct described by the entire statute—recklessness—sec. 76-10-508.1 does not qualify as a crime of violence.

The Board dismissed the aggravated felony charge and withdrew its decision in *Lanferman*. *Lanferman* had allowed an adjudicator to look to the record of conviction, whenever a statute was overly broad, to determine which portion of the statute applied to a particular prosecution. In other words, *Lanferman* used an expanded approach to divisibility.

Practice Pointer: With *Chairez*, the key for immigration lawyers is to examine jury instructions and state case law to determine whether different phrases and terms qualify as required alternative elements, or are simply various means of committing the crime, among which a jury does not have to choose.

Use of the 'Realistic Probability' Test

Chairez was not so fortunate in the second half of the Board's analysis: removability for a firearms offense at INA §237(a)(2)(C). Chairez argued that because Utah's firearms statutes did not contain an exception for antique firearms—as does the comparable federal statute—it is not a categorical match, *à la Moncrieffe*. The Board disagreed, finding Chairez removable on the basis that he bore the burden of establishing a realistic probability that sec. 76-10-508.1 had ever been used to prosecute discharging an antique firearm. In the absence of a realistic probability, as opposed to a theoretical possibility, that either Chairez or someone else had been prosecuted for use of an antique firearm, the Utah section qualifies categorically as a firearms offense under INA §237(a)(2)(C).

Application of the realistic probability test—with the burden on the respondent—poses practical problems for practitioners and certainly confuses the categorical

approach. Unfortunately, the BIA borrowed directly from dicta in the U.S. Supreme Court's decision in *Moncrieffe*, where the Supreme Court placated the government's concerns that its decision to look to the least culpable conduct could render INA §237(a)(2)(C) meaningless—precisely because of the antique firearm exception. *Moncrieffe*, 133 S. Ct. at 1685. The Supreme Court opened the door to application of the realistic probability test and placed the burden squarely on the respondent. Could this be right?

The Supreme Court used the realistic probability test in another immigration case, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), involving California's vehicle theft statute. The Court wrote: To establish that the statute of conviction is not categorically a theft offense, the individual must provide the immigration court with a real case where the California statute has been applied to prosecute a person for an offense that was not a generic theft crime. *Id.* at 193. In the absence of an actual case, as opposed to a theoretical example, wherein the statute was used to charge a non-theft case, the California statute is categorically a theft crime. The realistic probability test poses an arduous task for defense counsel.

So how is one to discern whether a strict categorical approach saves the day, or the realistic probability test sends one scurrying to the virtual library to search for the random antique firearm prosecution? The answer may lie in the parameters of *Chairez*. In terms of a crime of violence and the search for mens rea, the statute listed different types of mental state: deliberate intent, knowledge, and recklessness. The task was determining whether a deliberating judge or jury need find, under Utah law, one or the other—or whether any was suitable to sustain a conviction. The point being: the statute laid out the words, and the BIA then distinguished means and elements, finding these words to be means—hence no divisibility.

In the absence of a specific example—a real case—the fact that the state statute varied from the federal law provision (because it did not contain a specific exception for antiques) did not mean it could not qualify categorically as a firearms offense.

For further discussion of the realistic probability test, see Mary E. Kramer, Immigration Consequences of Criminal Activity: A Guide to Representing Foreign-Born Defendants (5th Ed. AILA), also on AILALink.

MARY E. KRAMER is author of Immigration Consequences of Criminal Activity. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

'SOCing' It to 'Em: Strange Tales from USCIS

by Jennifer A. Minear

Sometimes I think there must be an entire team of U.S. Citizenship and Immigration Services (USCIS) employees in some secret silo in Nebraska whose sole purpose is to devise new and ever more, creative strategies to deny employment-based nonimmigrant petitions. They've moved beyond boilerplate Requests for Evidence (RFEs) for "specialty occupation" and "specialized knowledge." Here's one of my current favorite, nonsensical RFE trends.

According to INA §212(p)(1), the Department of Labor (DOL) may look only at wages offered to employees at institutions of higher education and related or affiliated nonprofit entities when calculating prevailing wages for those types of employers. To comply with the statute, DOL uses two separate prevailing wage databases in calculating prevailing wage: The "American Competitiveness and Workforce Improvement Act (ACWIA)–Higher Education Database," used for colleges/universities and their related nonprofit entities; and the "All Industries Database," used for everyone else.

"Sometimes I think there must be **an entire team of [USCIS] employees in some secret silo in Nebraska** whose sole purpose is to devise new and ever more, creative strategies to deny employment-based nonimmigrant petitions."

The ACWIA database contains wage data for only 300 of the 900 SOC categories, according to an October 2010 DOL Stakeholders Meeting, at p. 8 (AILA Doc. No. 10111762). When DOL is asked to provide prevailing wage data for an employer that is entitled to the ACWIA wage in an occupation for which there is no ACWIA data available, DOL assigns the closest SOC code for which there is ACWIA data available. *Id.* Sometimes, this can lead to bizarre results. For example, there is no data for clinical physicians available in the ACWIA database, so DOL applies the wage data for "Medical Scientists, Except Epidemiologists" as the closest match to what the clinical physician actually does—which is to say, no match at all.

The solution is fairly simple: DOL could comply with its obligation under the INA to provide a complete and accurate alternative wage database for ACWIA-qualifying entities. In the absence of that, petitioners have been successfully filing H-1B petitions for years based on certified labor condition applications (LCAs) that cite prevailing wage data for the "closest matching" SOC code for which data is available; that is, until late 2013, when USCIS began issuing RFEs on these cases asserting that federal regulations require a certified LCA "in the occupational specialty in which the alien(s) will be employed" (8 CFR §214.2(h)(4)(i)(B)(l)) and that, unless the petitioner could produce a certified LCA in the correct occupational classification, the petition would be denied.

When my office responded to one such RFE, arguing that we could not provide a certified LCA using wage data for the correct SOC code because the data didn't exist in the ACWIA database, the response was essentially that the employer should (somehow) have done it anyway, and so the petition was denied. It seemed USCIS was instructing the petitioner to ignore the federal statute that requires it to use ACWIA data for prevailing wages and instead provide an LCA based on the All Industries wages—the only DOL wage source that contained data for the correct SOC code.

"[I]t frankly burns my biscuits that USCIS would expect a petitioner to purchase a wage survey as a work-around for DOL not doing its job when DOL itself—the agency charged with rendering prevailing wage determinations—relies on the 'next closest' match in its ACWIA database."

Alternatively, petitioners could seek a prevailing wage determination, but since DOL would also rely on the "wrong" SOC code in rendering that determination, one imagines that would not satisfy USCIS. Also, who has time to wait six to eight weeks for DOL to provide a formal determination when you already know what the result will be? Another option would be an alternative, published wage survey that meets DOL's stringent criteria. But (1) such surveys do not exist for every occupation; and (2) it frankly burns my biscuits that USCIS would expect a petitioner to purchase a wage survey as a work-around for DOL not doing its job when DOL itself—the agency charged with rendering prevailing wage determinations—relies on the "next closest" match in its ACWIA database.

I am aware of USCIS's recent approvals of several cases filed by ACWIA petitioners that relied on a certified LCA with the ACWIA database as the prevailing wage source. As of the date of this publication, there still is no guidance from USCIS acknowledging the need for ACWIA petitioners to rely on the wage data available for the closest matching SOC code in cases where there is no ACWIA wage data for the SOC code corresponding to the offered position.

In light of this uncertainty, when my office has a case where the law requires us to use ACWIA wages for an occupation for which ACWIA data is unavailable, we now submit two sets of certified LCAs: one that uses the ACWIA database as a wage source (and applies wage data for the SOC code that is the "closest match" to the offered occupation); and one that uses the All Industries wage data. We then invite USCIS to approve the petition based on whichever LCA it thinks is correct. Those petitions have not yet been adjudicated, but I like to think of that as "SOCing" it to USCIS.

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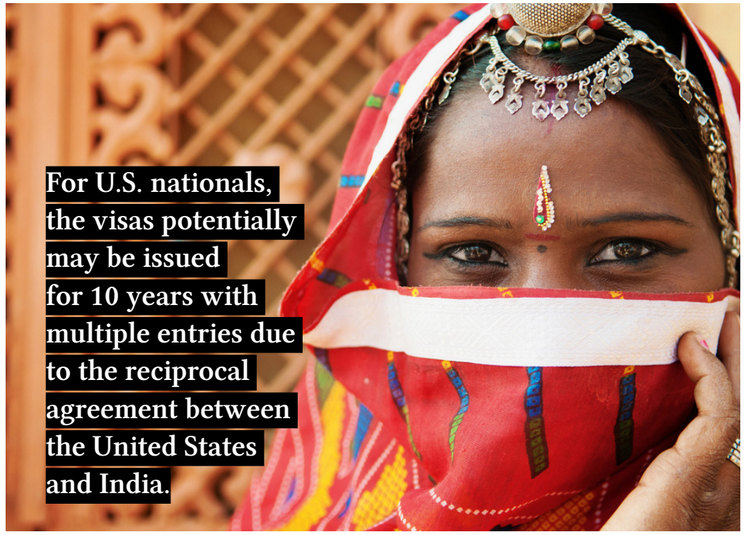
Indian Business Visas

by Poorvi Chothani

India offers short-term business visas to foreign nationals who are traveling to the country to engage in a range of permissible business activities, subject to certain criteria, such as:

- attending meetings, conferences, or seminars;
- negotiating with potential suppliers;
- participating in joint ventures;
- serving as a director of an Indian company;
- attending trainings in India; or
- monitoring ongoing projects by foreign experts/specialists and providing technical guidance.

The maximum length of stay for each visit is six months, and these visas do not allow employment in India.



Validity of Business Visas

Business visas can be valid for single or multiple entries for up to five years. For U.S. nationals, the visas potentially may be issued for 10 years with multiple entries due to the reciprocal agreement between the United States and India, wherein Indian nationals are provided 10-year, multipe-entry B-1/B-2 visas. However, in practice, the Indian government rarely issues 10-year validity visas. Under this category, the period of continuous stay in India for each visit is limited to 180 days, and the stay within the country may be extended only under certain circumstances.

Extensions or Modifications

India's Ministry of Home Affairs (MHA) guidelines clearly state that business visas are non-convertible and non-extendable after five years from the date of issuance. In a case where a business visa is granted for less than five years, it may be extended for up to a maximum of five years if (a) the gross turnover from the business (for which the foreign national has been granted a visa) is at least 10 million rupees per year (within two years of setting up the business); and (b) the extension request is submitted between 15 to 30 working days before the previously issued business visa expires. Individuals who meet these criteria may obtain their first extension from the MHA. Further extensions can be approved on a year-to-year basis subject to certain limitations. If the visa extension is denied, then the foreign national is expected to leave India immediately after the business visa expires.

Change of Visa Category

Note that a business visa may be converted to an entry visa if a foreign national who has come to India on such a visa marries an Indian national during the validity of his or her visa and does not intend to continue staying on a business visa. A business visa may also be converted to a medical visa if a foreign national falls ill after entering India, rendering him or her unfit to travel and requiring special medical treatment, or if he or she is otherwise eligible for this category.

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Denial Notice Gone Missing—BALCA Uses 'Equitable Tolling'

by Emily Neumann

In Matter of Kentrox, Inc., 2012-PER-00038 (May 22, 2014), the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) injected some much-needed common sense into the oftentimes frustrating PERM process when it decided to grant an employer's late request for reconsideration after the employer and its attorney failed to receive a denial letter in the mail.

As part of the written opinion, BALCA suggested that the time period for requesting reconsideration may be "equitably tolled" in a situation where neither the employer nor its attorney received a denial letter sent by regular mail. Although there was no proof of actual delivery, the certifying officer (CO) presumed delivery on the basis that the mail was not returned to the Atlanta National Processing Center (ANPC). However, BALCA indicates that even though the mail was not returned, the CO is not entitled to the presumption of delivery without proof of the ANPC's internal mailing procedures.

BALCA further noted that, even if there was a presumption of delivery, it was rebutted by the affidavits and e-mail correspondence submitted with the Request for Reconsideration. In the Request, the employer explained the situation regarding the missing denial letter, submitted affidavits regarding the nonreceipt of the denial, and also provided a copy of the e-mail inquiry that had resulted in the issuance of the second denial letter. In fact, the parties showed that they were unaware of the first denial letter having been issued and made an e-mail inquiry regarding the status of the case. In response to the inquiry, a second denial letter was issued, which was received by the employer's attorney. A Request for Reconsideration was made within 30 days of the second denial letter's receipt. The CO declined to process the Request because it was not timely and instead forwarded the appeal to BALCA. In reaching its determination, BALCA considered circumstantial evidence of the lack of a motive for failure to respond, concluding that it was unlikely that the employer would have completely failed to respond to the first denial letter if it actually had been received.

> "BALCA **injected some much-needed common sense into the oftentimes frustrating PERM process** when it decided to grant an employer's late request for reconsideration after the employer and its attorney failed to receive a denial letter in the mail."

'Not Substantially Comparable' Leads to Denial

The employer's application for permanent alien labor certification involved a foreigner whose qualifying experience was gained while working for the sponsoring employer. In addition to the standard recruitment documentation, an Audit Notification was issued to request that the employer either document that the position in which the foreigner gained the qualifying experience was not substantially comparable to the offered position (20 CFR §656.17(i)(3)(i)), or document that it was no longer feasible to train a worker to qualify for the position (20 CFR §656.17(i)(3)(ii)). The employer submitted a statement from its vice president of engineering addressing the infeasibility to train a new worker. The CO issued a denial solely on the ground that the employer's audit response failed to address the "not substantially comparable" prong and

did not make any reference to the "infeasibility to train" prong, which was documented by the employer.

While addressing the substance of the Request for Reconsideration, namely, the sufficiency of the employer's "infeasibility to train" documentation, BALCA reviewed various pre-PERM cases finding that: (1) an employer must document a change in circumstances to demonstrate infeasibility; (2) the burden of proof is a heavy one requiring concrete documentation, but it is not insurmountable; (3) the documentation must show more than just inefficiency; and (4) a mere contention of business growth is insufficient.

BALCA found that the statement from the employer's vice president of engineering clearly indicated that the writer was intimately knowledgeable of the employer's products and business needs; was thorough and specific; and was written by a person with first-hand knowledge about whether it was feasible to train a new worker. Given these findings, BALCA held that the employer had sufficiently documented that it was no longer feasible to train a worker to qualify for the position and therefore granted certification.

A 'Mail Gone Missing' Argument

The "equitable tolling" finding provides a potentially winning argument to other employers facing similar circumstances of mail gone missing in the context of the lengthy PERM process. A procedure already exists for settings in which a certified ETA 9089 is lost in the mail (*i.e.*, request U.S. Citizenship and Immigration Services to obtain a duplicate from the Department of Labor in conjunction with a Form I-140 petition). With this decision, the analogous situation of a denial notice gone missing has been addressed. Further, the common-sense approach taken by the BALCA panel in accepting this employer's statement of "infeasibility to train" suggests that the usual skepticism of such statements can be overcome.

> **Practice Pointer:** The employer must articulate a clear and well-reasoned argument that is supported by the facts surrounding its operations and defines true hardships that would be faced if an individual cannot continue in the role because he or she has unique skills that cannot be transferred. An employer's meritorious fact-based, well-reasoned presentation will be considered and accepted if it is persuasive.

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Abdelghany to the Rescue! Hmm, Not Just Yet ...

CASE: *In re: Roger Anthony Simmonds*, A 034 062 738 (BIA Mar. 24, 2014)
ATTORNEY: Siana J. McLean

by Sheeba Raj

Earlier this year, Upstate New York Chapter member Siana McLean was absolutely ecstatic when she came across Matter of Abdelghany, 26 I&N Dec. 254 (BIA 2014) on InfoNet because the case favorably addressed an issue she had raised in a motion to reopen under the former INA §212(c), which once vested in the attorney general the discretion to waive the deportation of lawful permanent residents.

"I think I had to read [the case] four times just to make sure it said what I actually thought it said," McLean, an attorney at Muscato & Shatkin LLP in Buffalo, recalled with a laugh. "Went back over my brief, went back over the facts of the case, just to make sure that [my client] did not fall into any of the exceptions" that were stated in *Abdelghany*.

McLean's client, Roger Anthony Simmonds, a Jamaican national and U.S. lawful permanent resident, was convicted of second-degree murder following trial in February 1986. But immigration proceedings didn't begin until 1997, rendering him ineligible for §212(c) relief. He appeared pro se and appealed, but in vain. Simmonds accepted his fate, but when he was released from criminal custody and transferred to Immigration and Customs Enforcement's Buffalo Federal Detention Facility in November 2013, another detainee—also McLean's client—told him about INS v. St. Cyr, 533 U.S. 289 (2001), which held that "[§212(c)] relief remains available for aliens ... whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [§212(c)] relief at the time of their plea under the law then in effect." Filled with newfound hope, Simmonds contacted McLean.

After consulting Kurzban's Immigration Law Sourcebook and practice advisories issued by the American Immigration Council and the National Immigration Project, among other sources, McLean cited Vartelas v. Holder, 566 U.S. __ (2012), in her motion to reopen for the proposition that a showing of reliance on the availability of relief is not necessary to bar the retroactive application of INA §212(c). That is, a defendant who was convicted after trial should be treated the same as someone who pleads guilty in anticipation of the law—a point underscored in *Abdelghany*, 26 I&N Dec. 254 at 268.

Unfortunately, on July 14, 2014, the immigration judge denied Simmonds §212(c) relief as a matter of discretion and made no reference to *Abdelghany*. McLean will appeal the decision.

For attorneys who are filing motions to reopen and requesting relief under INA §212(c), McLean said, "Don't foreclose the possibility of the eligibility. If their conviction happened before '96, just run through all of the possible hindrances. If it happened before 1990, they're even in a much better position than if it happened between '90 and '96 because the Immigration Act of 1990 changed the rules regarding the sentences for an aggravated felon. After 1990, an aggravated felon was only eligible for §212(c) if the sentence was less than five years." She added that for motions to reopen in general, if timeliness is an issue, argue why the Board should exercise its sua sponte authority to reopen a case, despite any statutory limitations.

SHEEBA RAJ is the staff legal editor and reporter for VOICE.

Invoice Enclosed?

Weighing the Initial Consultation Fee

by Charla S. Haas

Some immigration attorneys do not charge for an initial consultation, maintaining that this policy will lead to a greater number of appointments and, therefore, retained cases; and it will help steer clients away from the competition. While these are valid considerations, each attorney must weigh the cost in time and money that is spent dealing with a large number of nonpaying potential clients. Many busy immigration attorneys simply cannot afford to freely offer the time it takes to thoroughly analyze an immigration case, an area of law where there are rarely simple answers. People who are searching for a cheap immigration lawyer do not truly understand how much time and effort is involved in learning and keeping up with immigration law and how much time it takes to analyze and explain the law in understandable terms.

If a potential client is unwilling or reluctant to pay a consultation fee, the staff should be trained to explain that the law is complex, fact patterns are complex, and they are paying for the attorney's time and expertise. They should inform the potential client of the lawyer's training and experience, and that the volume of people with questions about immigration is so high that the lawyer must charge.

One compromise is to inform the potential client that, in many cases, the attorney will credit the consultation fee to the case.

In-Person and Telephonic: Pros and Cons

Individual lawyers have different styles and techniques for initial client interviews. Some prefer a brief telephonic conversation before scheduling an in-person or in-depth telephonic or Skype consultation. Whichever method an attorney chooses will, of course, be honed over time. Below are some points to consider when developing consultation procedures.

In Person:

- Better rapport and communication with client/family/employer is established.
- The attorney can better evaluate the client's credibility, mental capacity, or ability to comprehend the complexities of the case.

"Many busy immigration attorneys simply **cannot afford to freely offer the time it takes to thoroughly analyze an immigration case**, an area of law where there are rarely simple answers."

- Clients appreciate that the attorney's focus is on his or her case and there is less expectation of a quickie consultation.
- Face-to-face consultations make it easier and quicker to get documents signed such as FOIA's, records release forms, IRS transcripts, and in many cases, fingerprints for FBI checks.

Telephonic:

- Advisable to get paid in advance and get documents in advance: questionnaire, immigration documents, biographical documents, employment, criminal, etc.
- Telephone or Skype works better for long-distance clients, and is far more efficient and less time-consuming than e-mailing back and forth.
- Immigration issues are very complex and difficult to explain to some people over the phone, especially if language is a problem.
- There is no such thing as a quickie immigration consultation. Immigration laws and most fact patterns are complex, and clients are often resistant to or hesitant to give important information unless pressed and questioned thoroughly.
- The telephone can be used effectively to screen cases, but attorneys should be very careful of giving advice without having thoroughly gathered all the facts and considering all the consequences, especially if not retained. Otherwise, the attorney may be on the hook for any actions the client takes as a result.
- Very thorough notes should be taken during the telephonic consultation and the basic details of the conversation confirmed in writing to the client.
- NEVER answer immigration questions over the telephone or the Internet for an unidentified person. There is no way an attorney can know if there is a potential conflict of interest or what the person's motives and purposes really are.
- Never quote fees over the phone without gathering all the facts and analyzing the case. A range of fees may be reasonable, but people who shop for cheap immigration fees should be educated about the complexities, constant change, and risks; and if they refuse to be educated or believe that there is no such thing as a simple or routine immigration case, an attorney should not represent the person.

Comprehensive Questionnaire in Advance?

Comprehensive questionnaires are invaluable, time-saving tools that efficiently extract the voluminous information required from a prospective client for an immigration consultation. Some attorneys are afraid that detailed questionnaires scare away potential clients. Others maintain that this information can be effectively obtained in the consultation. While this may be true, it is extremely time-consuming. Having prospective clients complete comprehensive questionnaires prior to the initial consultation saves time for the attorney and educates clients about the complexity of immigration law. In addition, clients already are invested in the consultation process, and the attorney-client relationship, before the consultation begins.

Clients are often very reluctant to give complete details about the number of children or marriages. Some think only relationships in the United States count, even if the questionnaire asks for details about all relationships. Some think children born out of wedlock or spouses who were left behind long ago do not count, and, therefore, they omit this necessary information. They will omit illegal employment because they are afraid they will get in trouble with the authorities. Criminal activity is often downplayed or not disclosed for many reasons. Sometimes the client does not want a family member to find out about other relationships or criminal conduct. In marriage cases, both topics can be probed in a *Stokes* interview and must be disclosed to the spouse. A written questionnaire makes clear that this information is required and helps to elicit the information.

"Having prospective clients complete comprehensive questionnaires prior to the initial consultation **saves time for the attorney and educates clients** about the complexity of immigration law."

A thorough, general immigration questionnaire for nonpermanent residents will ask detailed questions about the client and the client's family, including past residences and contact details, immigration history, employment history, inadmissibility grounds, especially criminal and fraud, deportability grounds, tax issues, criminal victim or domestic abuse information, education of client and a noncitizen spouse, membership in groups and organizations, and persecution history, where relevant, etc.

A thorough naturalization questionnaire includes detailed biographic questions for the client, parents, spouses, and children, and detailed questions regarding immigration history, including all exits from and entries to the United States. It also includes questions regarding inadmissibility, deportability, good moral character, public charge issues, employment and address history, military and Selective Service history, voting history, political opinions and involvement of certain types, and membership in groups and organizations.

Questionnaires for family members for certain types of cases also are helpful and should include questions about biographical, residences, employment and financial, immigration history, and criminal history.

Questionnaires for employers for certain types of cases are helpful and should include questions about company information and objectives, location addresses, and financial issues.

Practice Pointer: Questionnaires must be constantly updated as laws and forms change. It is also helpful to have questionnaires translated into various languages for non–English-speaking clients.

CHARLA S. HAAS is the founding attorney of Haas Immigration Law Firm, PLC in Nashville. This is an excerpt from a previously published article, "From Consultation to Contract: Steps, Tips, Forms, and Procedures," AILA's Immigration Practice Pointers (2014–15 Ed.). The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

Alcohol Abuse: Is Your Client Inadmissible?

by Laurel Scott

Visa applicants can be found inadmissible due to physical or mental disorders with associated harmful behavior to themselves, to others, or to property. Alcohol abuse is considered to be one such mental disorder. But the abuse need not rise to the level of addiction or alcoholism. Rather, a person is abusing alcohol if its use is interfering with his or her life. Alcohol abuse, by itself, is not "enough" to cause a finding of inadmissibility, according to the *Foreign Affairs Manual* (FAM), Title 9, 40.11 N11.2. What is required is an associated harmful behavior, such as driving while intoxicated.

The civil surgeon (for applicants within the United States) or panel physician (for applicants at a consulate) follows the Centers for Disease Control's (CDC) Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders. In these instructions, the doctor is encouraged to base his or her finding of alcohol abuse on medical and psychiatric standards found outside the Technical Instructions and on any of the applicant's records available to the doctor, including criminal history and the question and answer portion of the medical exam. While these guidelines may arguably be appropriate from a medical standpoint, from the attorney's perspective, the Technical Instructions on this subject can appear vague and highly subjective.

While alcohol-related arrests are not specifically discussed in the Technical Instructions, they are specifically described in the FAM, which indicates that even a nonimmigrant visa applicant should be sent to a panel physician for evaluation if he or she:

1. Has a single alcohol-related arrest or conviction in the past five years (note: arrest is enough, conviction not required)
2. Two or more alcohol-related arrests in the past 10 years, or
3. Other evidence to suggest an alcohol problem. *Id.*

These guidelines in the FAM only indicate when there might be a problem for the panel physician to review. The panel physician makes the determination based on his or her own judgment and expertise, which may be subjective. Under INA §222(f), neither the attorney nor the applicant has any right to see the report by the panel physician because it is exempt from a request under the Freedom of Information Act (FOIA) and the Privacy Act. According to anecdotal evidence, some attorneys allege that in Ciudad Juarez, an inadmissibility finding will always be made if the applicant has been arrested for DUI within the two-year period preceding the medical exam. There are no similar reports for other consulates.

Immigrant vs. Nonimmigrant Waivers

There is an immigrant waiver described in INA §212(g)(3) with guidelines in 8 CFR §212.7(b)(2). No qualifying relative is required. Granting the waiver is a matter of pure discretion. Unfortunately, in order for the waiver to be granted, the applicant must arrange to report to a mental health facility in the United States in advance of entry into the United States and must show how it will be paid for. The waiver application is adjudicated by CDC, not USCIS, and often takes six months or more.

Nonimmigrant waiver applicants make an informal request under INA §212(d)(3) to the consular officer, who forwards the request electronically to the Admissibility Review Office (ARO), part of DHS. Electronic submission leads consular officers to limit the application to just a few pages. These nonimmigrant waivers also typically take six months or more.

Applicants Outside vs. Inside the United States

If a visa applicant outside the United States wants to contest the finding of the panel physician, the only way to appeal the decision is for the consular officer to file a request for an advisory opinion with the CDC. If the consular officer refuses to file the advisory opinion request, neither the applicant nor the applicant's attorney can force him or her to do so. Something the author learned during a private discussion with a former immigrant visa chief is that the CDC almost never overturns the panel physician's finding.

For adjustment-of-status applicants inside the United States, where the civil surgeon's reports are not exempt from FOIA, the applicant has the right to convene a medical review board under 42 CFR §34.8 to contest the findings of the civil surgeon. There is no guidance in the Code of Federal Regulations regarding how the applicant makes the request or who pays for it. Alcohol-related inadmissibility findings are rare for adjustment of status applicants in the United States, compared to visa applicants abroad, possibly because 9 FAM 40.11 N11.2 does not apply to adjustment-of-status applicants.

There is little an attorney can do to prevent or refute a finding of alcohol abuse at the consulate. Immigrant waiver applications for this ground are so difficult, lengthy, and expensive that most immigrants would prefer to wait until the alleged abuse is two years in remission, rather than apply for a waiver. The nonimmigrant waiver process leaves little room for the attorney to participate. In summary, the role of the attorney in alcohol abuse inadmissibility is not so much to try to prevent the finding, rebut it, or waive it, but rather to predict when it will occur and plan accordingly.

LAUREL SCOTT is the founding attorney at Scott and Associates, Attorneys at Law, PLLC in Houston. She has focused her practice on immigrant waivers of inadmissibility for the past 11 years.

The Moment I Knew Why I Became an Immigration Lawyer

by Sheri A. Benchetrit

In 2006, my family and I moved to Miami from Michigan. My husband, Michael, had received a job offer that changed our lives. At the time, I was a sitting magistrate for the 47th District Court in Farmington Hills, MI, and I had been practicing law since 1992. Since I was only licensed in Michigan, my options for practicing law were limited. After struggling with being relegated to a law clerk and thereafter a contract attorney doing essentially the work of a law clerk, I decided that it was time for a change. Michael had been an immigration lawyer for as long as I'd known him, and since his practice was the reason we moved to Florida, I decided that maybe the adage, "If you can't beat 'em, join 'em," was right. Upon my arrival to South Florida, I began working for a small immigration firm in North Miami Beach. The firm's principal had relocated out of state and needed someone to take over the practice. With a lot of guidance from the firm's owner and my husband, I came to learn and love immigration law.

At the end of March 2008, a reverend of a Haitian church in South Florida told me about a parishioner whose wife was being held in Broward Transition Center (BTC), an immigration holding facility in Pompano Beach, FL. I soon met with her husband, who explained their unbelievable story. The pair married in Haiti and were parents to four children. They divorced in 1994 while still living in Haiti, and the husband, a.k.a. "Sam," subsequently moved to the United States, where he remarried and had another child. Sam got his green card and later became a U.S. citizen. Soon thereafter, he brought all four of his children from Haiti to the United States where they, too, became U.S. citizens. They have since graduated from college and started their own families.

Benchetrit (center) and the Haitian family she helped.

In 1999, Sam's ex-wife, a.k.a. "May," entered the United States seeking asylum. She was placed in removal proceedings in Miami. The following year, Sam divorced his second wife, and once again became involved with May. In October 2000, the immigration judge denied the claim for asylum, a common outcome for asylum applications filed by Haitians. An appeal was filed by their attorney at the time. While her case was pending, May and Sam learned that they were expecting their fifth child together. On April 11, 2001, the two remarried. On April 30, 2001, the pair filed an I-130/I-485 package for May. Unfortunately, in order to save money, the couple prepared the package without a licensed attorney and did not understand that since the appeal was still pending, May was either considered "in proceedings" or "ordered deported," and, therefore, only the I-130 should have been filed. INA §245(i) allows certain foreign-born persons to apply for adjustment of status to lawful permanent residence without leaving the United States even if they entered the country unlawfully or overstayed their status. Instead of returning to their country to apply for a green card, they submit an I-485, pay the regular filing fee plus a $1,000 fine and, hopefully, get their green card in the United States. In order to qualify under INA §245(i), they (or their parents

while they were a minor) must have had a relative or an employer file a visa petition (Forms I-130 and I-140) or a labor certification on the their behalf on or before April 30, 2001, and that petition must have been approvable, but not necessarily approved.

During their interview stemming from the I-130/I-485 package, they were advised by the officer that they needed to file a motion with the Board of Immigration Appeals (BIA) to remand the case back to the immigration judge who had denied her asylum claim in order to request that the case be reopened to allow the I-130 to be adjudicated. Their attorney for the asylum case filed the motion, but it was never ruled on by the BIA. Instead, in May 2002, an order denying the appeal and affirming the order of removal was issued. Sam and May never returned to the U.S. Citizenship and Immigration Services (USCIS) office; in May 2004, the I-130/I-485 was denied as abandoned. In 2008, May was picked up by Immigration and Customs Enforcement on a random traffic stop and this is where I entered the picture.

Still new to the practice of immigration law, this case certainly presented me with a challenge. I immediately filed a new I-130, followed by a motion to the BIA to reopen the case sua sponte in view of its failure to rule on the earlier motion. I also attempted to meet with an officer in the West Palm Beach USCIS office, but to no avail. We also attempted to obtain an order staying her removal. Conversations with trial counsel at BTC were also fruitless; in fact, they threatened to reopen Sam's citizenship case, claiming that it must have been fraudulent. Nothing worked! In June 2008, May was removed to Haiti.

"As a mother, I couldn't imagine the pain of being separated from one's children for years. However, **as a lawyer, I felt helpless and worried sick about my client's survival**."

Eventually, the I-130 was approved by USCIS, and I-212/I-601 waivers were filed. By this time, the family had endured multiple tragedies. First, Sam's son from his second marriage contracted viral encephalitis—a brain infection—and fell into a coma. Although he recovered, he had lost his ability to speak, eat, and walk; he had to learn to do these basic human functions from scratch. In January 2010, a massive earthquake struck Haiti. The earthquake was the worst of its kind in nearly 200 years, causing thousands of deaths and countless injuries. The devastation was so widespread that several years later, the country has still not fully recovered. Much of the country was left homeless, as a majority of its buildings had incurred substantial structural damage and were deemed uninhabitable. Consequently, tent cities sprung up almost overnight. Furthermore, the country was then struck with yet another crisis—a massive outbreak of cholera. One of the hardest hit areas was St. Marc, the place where May lived and where there was only one hospital left standing.

As a mother, I couldn't imagine the pain of being separated from one's children for years. However, as a lawyer, I felt helpless and worried sick about my client's survival.

Finally, we got the news that the waivers of inadmissibility had been granted. May would be coming home! One morning in early February 2011, Sam called to say that May would be landing soon, and upon her arrival, they would visit my office in Aventura before heading home to Port St. Lucie. Two years had passed since I had last seen my client at the detention center before her deportation. We hugged, cried, and took pictures. It was a very powerful experience knowing that I was able to help reunite a 10-year-old boy with his mom. It was also the moment I knew exactly why I had become an immigration lawyer.

SHERI A. BENCHETRIT practices immigration law at Stok Folk + Kon in Aventura, FL.

Running a One-Woman Show

by Sheeba Raj

Kira Gagarin hung out a shingle shortly after graduating from school and vows to work only for herself.

"[W]hile I think that being a one-woman show … is stressful and can be overwhelming, that's OK with me," Gagarin said. "I don't think it's for everyone as others prefer going to work, doing their thing, and then leaving work at work."

But Gagarin did have her reservations. "The thought [to go solo], I think, had never crossed my mind just because it seemed so difficult to go from nothing to make something," said Gagarin, the daughter of Russian political asylees who relocated to the United States in 1989. But she warmed up to the idea following dead-end job interviews and her friends' deep discontent with their own employment or the lack thereof.

After graduating with an LLM from an institution in Madrid in June 2010, Gagarin performed document review from November 2010 to March 2011 to earn enough money to start her own practice. "[D]ocument review is pretty decent money, but it's very boring, so there's only so much I could do of [it]," she lamented. Moving back in with her parents for eight months in Newton, MA, also helped scale back expenses.

RESOURCES FOR NEW AILA MEMBERS

If you are new to immigration law or looking to start your own practice like Kira Gagarin, there are many AILA resources at your disposal to navigate the complicated world of immigration law. Let AILA Membership Associate Eric Kokuma point you in the right direction for practice advice.

AILA InfoNet Doc. No. 14100148. (Posted 10/1/14)

With her nest egg, her limited practical legal experience from internships, and guidance from Starting Out Solo, Inc., a nonprofit organization dedicated to supporting Massachusetts-based attorneys going solo straight out of school, Gagarin opened her office in Framingham, MA, in January 2011. She went full-time three months later after finishing her last document review project. Gagarin rented space in one building, but then relocated to another one in the same city after befriending a criminal attorney who worked on an aspect of one of Gagarin's cases. The two of them, along with a real estate attorney, have been sharing office space since November 2012.

Gagarin handles matters involving deportation defense, humanitarian relief, and family immigration. And since the nascent stages of her practice, Gagarin has relied on AILA's resources for professional growth, such as Kurzban's Immigration Law Sourcebook, AILA's annual conferences, and the New Members Division list serve, to which she contributes regularly. "I think you have to be conscious of the fact that you have to ask lots of questions and I'm very lucky to be in immigration law, where 99 percent of other practitioners are extremely generous," she said.

For current law students and recent graduates contemplating a solo practice, Gagarin provides some insight into her own.

Kira Gagarin (rear, fourth from left) while working pro bono in Artesia, NM.

Rainmaking

Gagarin's referrals typically stem from pro bono representation, involvement in community events, and Know Your Rights presentations at ESL classes. "I think people appreciate when you're trying to inform them and empower them, and then they, hopefully, will trust you to address their immigration cases," she said.

Client Communication

Gagarin's law practice thrives on untraditional methods of communication. For example, VoIP phone service allows Gagarin to make and receive calls wherever she is. Clients are also encouraged to send text messages, which Gagarin says suits everyone's hectic schedules. Plus, "a lot of my clients don't have access to e-mail, so I like texting, as strange as that sounds," she explained. And these text messages can be preserved in client's files.

Money Matters

From invoicing to processing payments to monitoring expenses, Gagarin uses QuickBooks to keep track of the flow of money. Regarding the payments themselves, clients can enjoy flat fees and payment plans. Gagarin said that "very few people" fail to keep up with their payments, but for those who fall behind, ending the attorney-client relationship is one option if a hearing is not on the horizon.

Hours

As with any growing practice, Gagarin's schedule varies, but a "good day" has her working between 9:30 am and 6 pm. On Saturdays, Gagarin rents space in downtown Boston and receives clients between 11 am and 2 pm.

Although she relishes the freedom that running one's own practice gives her, Gagarin does embrace its challenges. "[I]f I am at work all day on a Saturday, I know it is for my own business, not so that someone else can take credit for my work," she said.

SHEEBA RAJ is the staff legal editor and reporter for VOICE.

AILA InfoNet Doc. No. 14100148. (Posted 10/1/14)

Dispatches from the Front Lines

by Teresa A. Statler

In Border Patrol Nation: Dispatches from the Front Lines of Homeland Security, Todd Miller tells us that the U.S. Border Patrol is the most visible of the Department of Homeland Security's agencies and that it "is now touching a lot more people's lives than ever before." Along with increasing its ranks from 8,500 in 2001 to more than 21,000 today, the Border Patrol does more than just patrol the U.S. land borders. Miller recounts the Border Patrol's security and surveillance missions, in effect "creating an intensely controlled border zone buzzing with armed authorities openly patrolling strip malls, flea markets, residential areas, train stations and bus depots—to the degree that many in the borderlands, from federal magistrates to grassroots activists, have compared what they experience to a military occupation."

And who knew that the Border Patrol offers an "Explorer Program" for teenagers? This reader was dismayed to learn of the training and indoctrination of 14 to 18-year-olds wearing black boots, T-shirts, and dark green Border Patrol pants. Although the Explorers "learn about borders, citizenship, [Customs and Border Protection], and even a little bit of immigration law," Miller writes that they learn about paramilitary and law enforcement tactics, including weapons training and "takedown moves." Even more distressing was the chapter titled "Unfinished Business in Indian Country," where the sovereign and sacred lands of the Tohono O'odham tribal members in Arizona have been taken over by the Border Patrol.

Miller also paints the sad picture of his hometown of Niagara Falls, where the former honeymoon capital—now down on its economic luck—has become an important staging ground in *Border Patrol Nation*. Locals wonder why the Border Patrol, with its helicopters, boats, planes, bikes, and mopeds, is expanding while almost everything else in Niagara Falls is falling apart.

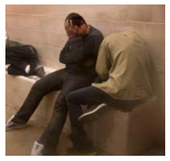
Concerned immigration advocates and U.S. citizens in general should read *Border Patrol Nation* and recommend it to friends and family. Miller deserves accolades for his well-researched work about the growing inhumanity and transformation of our country into one large militarized border zone.

BOOK

Border Patrol Nation: Dispatches from the Front Lines of Homeland Security

2014, 358 pages

BACKTRACK



Flagrant Abuse Goes Unchecked

WHAT'S HAPPENING

AILA congratulates attorneys whose reputations and expertise have been honored by The International Who's Who of Corporate Immigration Lawyers this year.

Carolinas Chapter member **BRADLEY B. BANIAS** has become an adjunct professor at his alma mater, the Charleston School of Law, where he teaches immigration and citizenship law this semester.

Washington State Chapter member **MARIA MARTY** and Washington, D.C. Chapter member **MADELINE ELLIS** opened their firm, Marty & Ellis LLP, with offices in the D.C. and Seattle metropolitan areas.

TERESA A. STATLER practices immigration law in Portland, OR, emphasizing on family, asylum, and removal. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

AILA's Mentor Program—A Winning Formula

by Leslie A. Holman

The immigration process is rife with evolving laws and regulations that are inconsistently applied to cases. Often, the only way to get critical, up-to-the minute information on the state of adjudications is by asking a fellow practitioner. AILA's Mentor Program provides that opportunity.

AILA mentors are members with at least five years' experience in a particular subject area who generously volunteer their time and knowledge with fellow members. Their contact information, as well as the preferred method of contact, appears in the mentor directory, which can be found on the right-hand side of InfoNet. Thus, getting speedy assistance from a peer is only a phone call or e-mail away.

Once you connect with a mentor, he or she can clarify a particular law or regulation, recommend sources to research, shed light on regional nuances and adjudicatory trends, or help navigate an ethical dilemma. The most effective way to get meaningful assistance from a mentor is to first research the issue, explain your problem to the mentor and the information you have found, and then ask him or her the remaining questions. By following these steps, your mentor will quickly warm up to you and both of you will embark on a fruitful discussion.

As a mentor, I have discovered that I benefit as much, if not more so, than I did when I was a new attorney seeking others' assistance. Every question I am asked either makes me smarter because I am forced to think of something that might not have crossed my mind, or I am introduced to another fact pattern that throws a monkey wrench into the way things "should" work in immigration law. Or I find myself reviewing areas of law or situations that I have not encountered in some time.

Once in a while, I consult a mentor when I need guidance. I recently needed to make an eligibility determination under the Child Status Protection Act. It is one of the most complicated statutes we have. I called a mentor and expert in the area and he worked through the analysis with me. Not only did I determine what to advise my client, but I also learned how to apply the statute going forward. Simply put, I consider the Mentor Program as my personal CLE without cost.

I have met some of my now-closest friends through my participation in the program, and at every conference I attend, someone always thanks me for having helped them in the past. That, alone, makes my continued participation in the program worthwhile.

I encourage all AILA members, both new and seasoned, to become involved in the Mentor Program. I promise you won't regret it. By paying it forward, we gain satisfaction from helping others and increase the likelihood of clients getting quality representation.

AILA President **LESLIE A. HOLMAN** is the founder of Holman Immigration Law in Burlington, VT. She is also a recipient of AILA's Sam Williamson Mentor Award.

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EDITORIAL

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ABOUT

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