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The Categorical, Realistic, Circumstance Concoction: What's Next?

by Mary E. Kramer

In the late days of summer 2014, the Board of Immigration Appeals (BIA) issued three precedent decisions in cases involving controlled substance offenses, something I refer to as the "summer trilogy." In the process, the BIA applied its interpretation of the categorical approach and complicated matters by tacking onto the analysis the realistic probability test and the circumstance-specific approach. *Oy veh.* In the meantime, the U.S. Supreme Court accepted certiorari in the case of the ordinary sock—yes, sock—leaving lawyers across the country to ponder, "When does footwear qualify as drug paraphernalia?"

The Dog Days of Summer

In Matter of L-G-H-, 26 I&N Dec. 365 (BIA 2014), the BIA addressed whether Fla. Stat. §893.13(1)(a)(1) qualifies as an aggravated felony "illicit trafficking" offense under INA §101(a)(43)(B). First, the BIA provided a bit of background: Fla. Stat. 893.13, which penalizes the sale and delivery of controlled substances, was amended by the Legislature in 2002 to eliminate the mens rea element of knowledge.

Therefore, a person can be prosecuted and convicted of the sale, delivery, distribution, or manufacture of a controlled substance without having had any knowledge as to the illicit nature of the drug. For this reason, the Florida law is broader than the federal Controlled Substances Act (CSA), which requires a mens rea of knowledge or intent for the same conduct.

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A year before *Matter of L-G-H-*, the Eleventh Circuit found in Donawa v. U.S. Att'y Gen., 735 F.3d 1275 (11th Cir. 2013) that INA §101(a)(43)(B) is essentially a divisible statute containing two prongs: "illicit trafficking" offenses and "drug trafficking crimes," as defined by the federal CSA. These are similar concepts that may overlap (*e.g.*, a conviction might easily qualify under both prongs), but they have important distinctions that may result in a crime falling under one prong, but not the other. For example, because it is not a categorical match to the federal CSA, Florida's law is not a "drug trafficking crime." Illicit trafficking is a different analysis.

In *L-G-H-*, the BIA found that "illicit trafficking" is any controlled substance crime that is a felony, and involves the element of unlawful commercial

dealing for consideration. The BIA coined the phrase "commercial transaction" and held that a finding of commercial dealing does not require a mens rea of knowledge as an essential element of the offense. Applying a categorical approach *à la* Matter of Chairez, 26 I&N Dec. 349 (BIA 2014) and Descamps v. U.S., No. 11-9540, 570 U.S. ___ (2013), the BIA found that Florida's statute contains multiple discrete offenses: sale, manufacture, distribution, delivery, etc.,—not all of which necessarily satisfy the commercial transaction test. The Board then applied a modified categorical approach and determined that L-G-H- committed a "sale," which qualifies as "illicit trafficking" under INA §101(a)(43)(B).

The decision in *Matter of L-G-H-* is interesting because it clarifies the distinction between illicit trafficking and federal drug trafficking crimes. However, the Board finds that the sale, manufacture, delivery, etc., qualify as alternative, distinct elements of Fla. Stat. §893.13. I disagree because these terms represent not alternative elements, but rather, alternative means of violating the statute. The Florida Standard Jury Instructions clearly indicate that for a conviction, a jury need only find beyond a reasonable doubt that a defendant did any one of those things—the jury need not specify which one. For example, the jury need not make a finding that the defendant

"For example, the jury need not make a finding that the defendant "sold" rather than "manufactured"—a conviction will lie either way. **For this reason, I view Fla. Stat. §893.13 as indivisible and not supporting use of the modified categorical approach.**"

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Back to School: A Math Lesson

Matter of Dominguez-Rodriguez, 26 I&N Dec. 408 (BIA 2014), addressed whether a categorical or circumstance-specific approach applies to the personal possession exception at INA §237(a)(2)(B)(i). This provision makes a person removable for a controlled substance violation, but contains an exception for one offense of simple possession of 30 grams or less of marijuana. A Las Vegas court convicted Dominguez of possession of more than one ounce of marijuana. Math geeks, cooks, and other scientific types know that an ounce equals approximately 28.5 grams. Applying Moncrieffe v. Holder, 133 S. Ct. 1678 (2013), the immigration judge (IJ) ruled in favor of Dominguez, finding that the least culpable conduct described by statute would be less than 30 grams. To prove a larger amount, the Department of Homeland Security would have had to rely on the record of conviction, which, in this case, was silent as to the amount of marijuana involved. The BIA disagreed with the IJ's approach, reversing and remanding with instructions to employ a circumstance-specific inquiry, using all relevant evidence to determine the amount of marijuana involved in Dominguez's offense. In so doing, the BIA placed the burden of proof, by clear and convincing evidence, on the Department of Homeland Security. Additionally, the BIA found that *Moncrieffe* does not undermine its precedent decision in Matter of Davey, 26 I&N Dec. 37 (BIA 2012), which concluded that the "30 grams or less" exception within INA §237(a)(2)(B)(i) is determined not by the categorical approach, but by a circumstance-specific inquiry.

Matter of Ferreira, 26 I&N Dec. 415 (BIA 2014), decided one day after *Dominguez-Rodriguez*, presented the purest of categorical approach issues: Whether a controlled substance conviction in Connecticut for "sale of certain illegal drugs" qualifies as an aggravated felony illicit trafficking crime, and/or a controlled substance violation, where the Connecticut schedule of substances was broader than the federal CSA. Specifically, the 2010

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Connecticut schedule included two "obscure" opiate derivatives that were not included on the federal lists: benzylfentanyl and thenylfentanyl. In the absence of a precise categorical match, according to Ferreira, the statute of conviction did not render him deportable under either INA §237(a)(2)(A)(iii) (aggravated felony) or §237(a)(2)(B), both of which reference the federal CSA. The IJ disagreed and looked to the record of conviction to identify the nature of the substances involved in Ferreira's conviction. Relying on *Moncrieffe,* the BIA reversed and remanded, saying that a state offense categorically matches a generic federal offense only if a conviction for the state offense "'necessarily' involved … facts equating" to the generic federal offense.

Sounds good, right? But then the BIA threw in the realistic probability test, courtesy of the Supreme Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), and the Board's June 2014 decision in *Matter of Chairez.* Hence, the BIA remanded the case for further "fact-finding" requiring Ferreira to show there was a realistic probability that Connecticut actually prosecuted offenses involving these obscure substances. By tacking on a realistic probability analysis, the Board has emasculated the categorical approach.

And What About the Sock, You Ask?

The Supreme Court accepted certiorari in the case of Mellouli v. Holder, arising out of an Eighth Circuit decision to deport Mellouli under INA §237(a)(2)(B); apparently, Mellouli had a few pills stuffed in his sock that were discovered while he was being booked on unrelated charges. He ultimately pled to misdemeanor possession of drug paraphernalia (*i.e.*, the sock); neither the state statute nor the record of conviction identified the type of controlled substance involved. The Court will now decide whether a state conviction must specifically demonstrate whether the sock—uh, paraphernalia—is related to a controlled substance identified by the federal CSA in order for the conviction to support removability under INA §237(a)(2)(B). Stay tuned!

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Don't Rely on DOL Math: Here's My Two Cents (or Sense)

by Sherry Neal

In applications for Schedule-A positions (registered nurses and physical therapists), as well as in all PERM cases, the employer must obtain a prevailing wage determination from the National Processing Center (NPC) under 20 CFR §656.40(a). The NPC issues the prevailing wage for the position based on the details of the job (title, duties, requirements, and location). The primary source that the NPC uses—unless requested otherwise by the petitioner—is the Department of Labor's (DOL) Occupational Employment Statistics (OES). However, differences can arise between the OES wage listed online and the prevailing wage issued by DOL. The problem is simple math: rounding.

For example, the Level 1 wage for a registered nurse in Houston looks like this:

> Level 1: $27.47 hour – $57,138 year

But the numbers are not equal. If you multiply $27.47 per hour by 2,080 hours, it equals $57,137.60 per year. That is .40 less than the OES annual wage. If the employer posts the internal posting at $27.47 per hour and then obtains the prevailing wage stated on a rounded annual basis of $57,138, the posted wage is less than the wage on the prevailing wage determination. Accordingly, when the petitioner files Form I-140 with the internal posting, the petition can be denied because the posted wage (multiplied on an annual basis) is less than the annual wage on the prevailing wage determination. Of course, the difference is only .40 per year, but that is enough to trigger a Notice of Intent to Deny on the I-140 and, ultimately, a denial.

"The problem is simple math: rounding. ... Of course, the difference is only .40 per year, but that is enough to trigger a Notice of Intent to Deny on the I-140 and, ultimately, a denial."

Similarly, sometimes, the annual wage on the OES online survey is rounded down, instead of up, and the prevailing wage comes back slightly higher than the annual wage stated on the OES wage survey.

For example, the OES wage may list an hourly wage of $20.13 and a yearly wage of $41,870. Yet the prevailing wage determination may provide the exact number, which is $41,870.40 per year. If the petitioner files the I-140 with an internal posting with the wage of $41,870, the petition can be denied. Although it is the same wage stated in the OES online system, it is not the exact wage on the prevailing wage determination. Again, just a .40 difference is enough to lead to an unfavorable result at U.S. Citizenship and Immigration Services (USCIS).

This is not the first time that DOL has created a prevailing wage issue. It happened in 2011 and led to the denial of a number of PERM cases. In 2011, during a DOL Office of Foreign Labor Certification Stakeholder meeting, AILA brought the issue to DOL's attention and the agency acknowledged the error. DOL stated that it would accept either OES wage

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(whether rounded or not) for PERM cases. However, Schedule-A cases bypass USCIS and USCIS did not always accept the small rounding error in Schedule-A cases, even though the error was due to DOL and was not caused by the employer.

Practice Pointer 1: Before posting a notice, compare the hourly wage with the annual wage. Take the hourly wage on the OES wage survey and multiply it by 2,080 hours to see if it exactly matches the annual wage on the OES wage survey. If not, make sure you use the highest wage. If you want to post it as an hourly wage, simply increase the hourly amount to match the annual rate. For example, in the first example above, the hourly wage would need to be posted at $27.48 per hour (instead of $27.47 per hour) to meet the $57,138 annual wage.

Practice Pointer 2: Before you file a petition, compare the wage in the posting with the wage on the prevailing wage determination to make sure that the posted wage is at least as high as the prevailing wage determination. If not, then repost the internal posting to reflect a wage that is at least as high as the prevailing wage determination.

Practice Pointer 3: Before you file a petition, compare all of your wages to make sure that they are consistent. In addition to the wage being listed on the ETA Form 9089 and on the prevailing wage determination, it should be listed on the I-140 and the letter in support. Make sure the wage is listed consistently on the I-140, ETA 9089, and the letter in support. And always ensure that the consistent wage is at least as high as the wage on the prevailing wage determination.

In summary, while DOL may have inconsistencies in its OES wages as described in the above examples and, therefore, in its prevailing wage determinations, it is the attorney's job to make sure the employer's petition is correct before it gets filed with USCIS.

The Bureau of Labor Statistics provides wage estimates for more than 800 occupations for the nation as a whole, for individual states, and for metropolitan and nonmetropolitan areas.

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A Global S.O.S. for Non-U.S. Immigration Matters

by Audrey Lustgarten

As evidenced by the growth of AILA's Global Migration Section (GMS) and the expansion of global departments in large U.S. immigration law firms in recent years, more and more corporate clients have been sending employees abroad for business. A U.S. attorney has three options for addressing a client's needs while avoiding the practical risks and ethical pitfalls that can arise in a global matter: (1) decline it; (2) handle it him- or herself; or (3) refer it to a global mobility firm.

1. Declining the Matter

Declining the matter is certainly the most straightforward and least time-consuming option, but it can jeopardize client relations. At best, the client may be irritated. At worst, he or she might retain other counsel competent to handle both U.S. and global matters.

2. Handling the Matter Personally

Alternatively, a U.S. attorney could handle the global matter. This would allow him or her to completely control the case and retain all fees charged. However, practical legal and ethical issues do arise from this decision. For example, many foreign jurisdictions prohibit individuals who are not licensed there from practicing immigration law. And even in jurisdictions without such a ban, a U.S. attorney must adhere to the U.S. rules of professional responsibility requiring the provision of proper representation and, as a result, he or she must spend the significant time to learn the immigration laws and procedures of the jurisdiction.

3. Referring to a Global Mobility Firm

Referring the client to other counsel is likely a better option than declining the matter or handling the matter personally. Traditionally, the options were to refer the client to a large U.S. immigration firm with a global department. Recently, however, a number of global firms that handle only outbound matters have emerged, presenting a viable third option. These firms coordinate global matters by using a network of local advisors around the world who have been vetted to ensure that they are qualified to practice immigration law and meet certain standards governing experience and responsiveness. Such firms add value to clients who have global matters in several jurisdictions, but want a single point of contact in the United States to manage all of their global work. Note that not all of these global firms are U.S. law firms, although most employ U.S.-admitted attorneys. However, they are distinct from so-called "global visa shops" that simply help people file for tourist or business visas. Global firms handle a full range of immigration matters, including work visas, work permits, and residence permits.

Alternatively, the U.S. attorney can coordinate the matter with a local attorney or advisor. In this scenario, a U.S. attorney retains a local attorney or advisor to provide expert guidance, but still communicates with his or her client regularly.

Be aware that the global immigration field is growing rapidly and it is only a matter of time before you receive global questions from your clients. The global resources available to you through AILA can help you address those questions. AILA members, including this author, Audrey Lustgarten, have developed resources on confidentiality considerations when working with foreign counsel, UPL and Foreign Corrupt Practice Act issues (article and podcast), and ethical considerations when working with counsel in non-U.S. jurisdictions.

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Who Has Control over the Beneficiary? Still a Complex Question

by Emily Neumann

The upcoming New Year will commemorate the five-year anniversary of the memorandum on third-party site placements by Donald Neufeld, the associate director of Service Center Operations at U.S. Citizenship and Immigration Services (USCIS). The USCIS memorandum was intended to provide guidance on the criteria to be used when analyzing whether an employer-employee relationship exists in the context of H-1B petitions involving beneficiaries placed at a work site that is not operated by the petitioning employer. A petitioner runs the risk of not being considered a U.S. employer and, thus, receiving a denial of an H-1B petition if the requisite control over the beneficiary cannot be established.

Unclear Guidance

The memorandum sets forth a series of relevant factors and describes examples in which the employer-employee relationship would or would not exist. Two such examples involve the information technology industry, a common user of the H-1B visa program:

Valid employer-employee relationship would exist	Valid employer-employee relationship would not exist
• Long-term placement at a third-party work site	• Third-party placement/"Job-Shop"
• Computer software development company	• Computer consulting company
• Contract to develop in-house computer program	• Contract to fill core position to maintain payroll
• Use petitioner's proprietary software and expertise	• No proprietary information used
• Beneficiary reports weekly to manager employed by petitioner	• Beneficiary reports to manager employed by third party
• Beneficiary paid by petitioner and receives employee benefits	• Not specified ★
• Not specified ★★	• Beneficiary's progress reviews completed by third party

★ In the infographic where a valid relationship does exist, the memo mentions that the petitioner pays the beneficiary and provides employee benefits. But in the example where a valid relationship does not exist, the memo does not indicate who pays the beneficiary or whether benefits are provided.

★★ In the infographic where a valid relationship does not exist, the memo specifies that the beneficiary's progress is reviewed only by the third party. But in the example where a valid relationship does exist, the memo does not specify who reviews the beneficiary's progress.

Anecdotal evidence suggests that many third-party placements fall somewhere between the two scenarios highlighted in the memorandum, and so the analysis remains problematic. Typical Requests for Evidence issued regarding third-party placements include a list of the relevant factors followed by instructions to provide a combination of evidence, such as an itinerary, employment agreement, employment offer letter, contracts, statements of work and letters from authorized officials of the third party, description of job duties, description of the performance review process, and an organizational chart.

Clarification: Use at Your Own Risk

After the memorandum was released, an additional list of Q&As was published to provide further guidance. Importantly, the Q&As clarified that a letter or other documentation from the end-client (*i.e.*, third party) was not required. Instead, petitioners could submit a combination of any documents to establish that the employer-employee relationship will exist. Further, the Q&As specifically confirm that there are situations in which a consulting company or staffing company would be able to establish a valid employer-employee relationship. Namely, a valid employer-employee relationship may be established if a consulting or staffing company can demonstrate by a preponderance of the evidence that it has the right to control the work of the beneficiary through factors, including:

- whether the petitioner will pay the beneficiary's salary;
- whether the petitioner will determine the beneficiary's location and relocation assignments;
- and whether the petitioner will perform supervisory duties such as conducting performance reviews, training, and counseling for the beneficiary.

"Anecdotal evidence suggests that many third-party placements fall somewhere between the two scenarios highlighted in the memorandum, and **so the analysis remains problematic.**"

While the Q&As appear to leave the door open for a consulting company to obtain an approval without documents from the end-client, in reality, the lack of evidence from the end-client remains a common ground for denial. Alternative documents often are considered to be insufficient to establish that the required relationship exists. Practitioners representing end-client entities in reliance on the Q&As rightfully advise their clients that they are not required to provide documentation to suppliers seeking H-1B petition approval for beneficiaries to be placed at their site.

Yet reliance on these same Q&As by petitioners filing an H-1B petition may ultimately lead to denial. End-clients seeking the expertise of consulting companies for their projects may be well-advised to provide documentation for smoother processing when an H-1B beneficiary is involved.

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Husband's Addictions Lead to 'Extreme Cruelty' Ruling

CASE: *B-J-G-, AXXX XXX 333* (BIA, unpublished, May 29, 2014)
ATTORNEY: Joy Athanasiou, Elkind Alterman Harston PC

by Sheeba Raj

In a decision dated May 29, 2014, the Board of Immigration Appeals (BIA) deemed a respondent eligible for cancellation of removal under a special provision in the Violence Against Women Act (VAWA) based on years of psychological abuse caused by her husband's alcoholism and gambling.

The BIA took issue with the immigration judge's characterization of the husband's actions as "irresponsible," as opposed to "extremely cruel." *See* INA §240A(b)(2)(A). In its opinion, the Board members wrote that while the respondent was not subjected to physical abuse in the marriage, "[i]n this case, the husband's alcoholism has caused the respondent extreme stress and anxiety. For instance, the respondent testified that her husband's severe alcoholism puts himself and others in danger when he drives, has isolated her socially, and results in an 'aggressive' demeanor towards her. His alcoholism further exacerbates a compulsive gambling habit that often causes him to psychologically abuse the respondent and continually places her welfare at risk." The BIA also noted the husband's failure to support the respondent's adjustment of status application because of his alcoholism.

For Joy Athanasiou, of counsel at Elkind Alterman Harston PC in Denver, it was hard to imagine her client prevailing at the BIA because of the lack of physical abuse and no involvement from police and therapists, as well as minimal case law addressing extreme cruelty. "[I]t's hard for people to see or to believe that there's been any abuse if there's no physical manifestation," she said.

Nevertheless, Athanasiou built her legal arguments on U.S. Citizenship and Immigration Services' own words. For example, in its denial of the parties' second marriage petition, USCIS wrote:

"On May 7, 2008, you failed to appear for your spouse's removal hearing. When questioned as to why you did not appear, your spouse stated that you did not appear because you are an 'alcoholic.' Consequently, there was a question as to the viability of your relationship."

Athanasiou included this language in her brief to the BIA, followed by the *Merriam-Webster's Dictionary* definition of "viable," to underscore the point that even the USCIS adjudicator deemed the parties' relationship unhealthy and incapable of functioning because of the link between the viability of the relationship and the husband's alcoholism.

She also relied on a 2003 Q&A session in which Department of Homeland Security representatives discussed how extreme cruelty can be demonstrated in VAWA self-petitions.

While her client prevailed, Athanasiou said one thing she would have done differently is to seek a pro bono therapist or expert to prepare an evaluation, which would have strengthened the VAWA case.

Following an appearance in immigration court on August 19, 2014, Athanasiou's client's background check was cleared. And in November 2014, the court granted cancellation of removal.

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

Removal cases are won before you set foot in immigration court. By the time you are ready for a hearing, you have mastered the facts, researched the law, developed a theory of the case, identified the strengths and weaknesses of your client's position, and identified the evidence you want to present. Preparation for a case begins at intake.

Prior to Engagement

HAVE AN INTAKE QUESTIONNAIRE.

A well-drafted intake questionnaire should do much more than provide the basic biographic information you need to complete common forms. Time, place and manner of entry, grounds of removability and inadmissibility, family members, health issues, or a fear of harm in one's home country should be identified. A questionnaire gives you a good starting point to have a discussion with your client.

HAVE A DETAILED DISCUSSION WITH THE CLIENT. There is no substitute for a detailed conversation with your client. This may take several hours. Use a translator, have tissues ready, offer water, and listen. Ask follow-up questions. Once you have a handle on the facts, explain the law clearly so that the client understands what will be expected of him or her so he or she understands how the questions you ask and the documents you request are relevant to the case. Clients who understand the standards that they must meet will be better able to assist in their own defense. It may take several conversations to build the level of trust necessary for clients to confide fully. In addition, as documents support or undermine your clients' account of their case, further conversations may be necessary.

SIGN AN ENGAGEMENT LETTER. Representation involves obligations on the part of both the attorney and the client. A proper engagement letter will lay out the terms of the representation, making it clear what is expected of you, as the attorney, and of the client. It should be clear, easy to read, and in duplicate so that both attorney and client have a copy. Finally, you need to take the time to explain terms to the client and confirm his or her understanding.

GET A RETAINER. Removal cases entail a lot of work,

"**There is no substitute for a detailed conversation with your client.** This may take several hours. Use a translator, have tissues ready, offer water, and listen. Ask follow-up questions."

so it is necessary for you to protect your most valuable asset, your time. Having a retainer causes your client to "have skin in the game," and provides you with the security of knowing that your time will be compensated.

After Engagement

DEVELOP A PLAN. One best practice is to write a plan of work upon being retained. This will allow you to develop your theory of the case, organize your thoughts, confirm essential facts, identify issues and potential problems, and inform clients of what they need to do to assist in their case. If you work with associates or paralegals, a plan of work letter will provide them with a roadmap to the case. A plan of work is a tremendous asset in ensuring that the clients understand the case, what needs to be accomplished, and how they can work with the attorney.

DEVELOP A THEORY OF THE CASE. Every case should be summarized in three sentences. A theory should marry the facts with the standard for relief (*e.g.*, Jose is afraid to return home to El Salvador because he fears violence from the dominant gang, the MS-13, that murdered his twin brother and threatened him, telling him that they would "do to him what they did to his brother;" or, "Although Maria has been convicted of aggravated assault, that one incident should not define her. For more than 30 years, Maria has lived in the United States. For many of those years, she was the victim of regular domestic violence. She has raised four children by herself and is a valuable worker at her company and a well-liked figure at her church."). This theory should be the starting point for a written brief, the beginning of an opening statement, the 30 seconds you have to explain the case to the trial attorney, and the heart of a closing.

GET DOCUMENTS. Hopefully, your clients have documents from their immigration cases. Sometimes, a previous lawyer can be helpful. If a client does not have documents, a request under the Freedom of Information Act (FOIA) can reveal the majority of the documents. By using Track 3 processing, documents usually can be obtained in about a month. Criminal records can be obtained from the court where the arrest occurred. Because it is never a good idea to rely on your client's interpretation and representation of

the nature of his or her criminal records, an FBI rap sheet should be requested. In the Ninth Circuit, the court's holding in Dent v. Holder, 627 F.3d 365 (9th Cir. 2010), provides counsel with another means of seeking records of the client. In *Dent*, the Ninth Circuit held that an individual in removal proceedings is entitled to the client's "A file." The documents available through a *Dent* request are, arguably, broader than what is available through the FOIA, and a *Dent* request may be faster and more fruitful than a FOIA request. Use the American Immigration Council's excellent practice advisory on using *Dent*.

Outside the Ninth Circuit, U.S. Immigration and Customs Enforcement (ICE) counsel pay little heed to *Dent* requests, and the author has not seen judges enforce them.

IDENTIFY EVIDENCE THAT WILL BE NEEDED. Beyond government documents, a lot of additional evidence is required to support claims: tax returns, school records, birth, death and marriage records, medical documents, diplomas, certifications, awards and recognitions, media reports, and other personal effects. Decide whether the case can be improved with the use of expert witnesses, whether to perform a physical or psychological evaluation, country conditions analysis, or credibility enhancement.

> "**Identify all forms of relief for which your client may be eligible.** ... Decide whether you want to file an application at the first opportunity or whether it is to your client's benefit to delay filing."

Identify witnesses who can support your theory of the case with factual or opinion testimony. Discuss with clients what other types of evidence they can produce and provide them with a comprehensive list and a deadline for getting you the documents.

EVALUATE A PLEADING STRATEGY. Review the Notice to Appear carefully and decide which facts to admit and which should be denied. Based on that, decide whether to concede removability or challenge it. In removal proceedings under INA §237, the government bears the burden of proof to establish removability by clear and convincing evidence. *See* INA 240(c)(3); *Woodby v. INS*, 385 U.S. 276 (1966). However, the burden of proof is on the foreign national in cases involving inadmissibility to establish admissibility. *See* INA 240(c)(2). Explain pleading, the burden of proof, and the strategy to the client so he or she understands what will happen at the first master calendar hearing.

EVALUATE RELIEF. Identify all forms of relief for which your client may be eligible. Evaluate the strengths and weaknesses of each claim. Decide whether you want to file an application at the first opportunity or whether it is to your client's benefit to delay filing. Fee-in the application in advance, get a stamp on the application, and get a hearing date.

SEND WRITTEN NOTICE. Send written notice of the hearing to the client in advance of the hearing and call the day before the hearing to make sure your client knows when and where to meet you.

The Day of the Hearing

Get a good night's sleep. Have a good breakfast. Arrive early. Let your client know you are there. Bring your file. Bring a pen. Dress well. Be polite. Speak clearly and confidently. Call your client by his or her name (*e.g.*, "Trustworthy counsel for Ms. Reyes.") As your client sees it, this is what he or she is paying for. A confident and friendly demeanor in court will help establish the client's trust.

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Running Your Own Practice

(And Caring for This Little Guy, too!)

by Veronica B. Guinto

After working as a judicial clerk in New York and an associate for a firm in California, I decided to hang out my own shingle two years ago. Running my own shop gave me the flexibility to choose my own clients and to take care of my young son. The decision didn't come so easily, though, as I first considered the emotional and financial challenges that this new endeavor would throw at me. After many discussions with my husband, parents (my babysitters), and mentors, I gained the confidence and support I needed to take this leap of faith.

Sometime during my first year as a solo, I almost threw in the towel. My first wave of clients had come and gone, and I didn't know when (or if) a second wave would come. I did not know how to get clients, therefore, I had a difficult time motivating myself to develop clientele. After sitting in the office for a few hours with no legal work to do and no phone calls, I would leave and spend the rest of the day hanging out with my 18-month-old son. It was definitely easier to ignore my problem than do something about it. Then I received an e-mail invitation to a "marketing for women" event from a list serve I had joined when I first became a solo. The event was exactly what I needed. There were two women who spoke; both were married, one had children, one was a solo and the other was a partner in a small firm,

"Sometime during my first year as a solo, I almost threw in the towel. My first wave of clients had come and gone, and I didn't know when (or if) a second wave would come."

and both had been out on their own for at least 10 years. Their stories were inspirational and I yearned to learn more about their respective paths to success, so I scheduled lunch and coffee dates with them to talk more about their careers and life outside of work. I was pleasantly surprised how supportive these women were to me and the words of encouragement and advice they easily shared. Months later, one of the women, who practiced personal injury and aviation law, asked me to be a guest writer in her firm's blog to discuss whether immigration status affects one's ability to bring a personal injury lawsuit in California!

A Few Key Success Tips

FIND A LOCAL SCORE CHAPTER. The SCORE Association is a nonprofit organization comprising volunteer business counselors supported by the U.S. Small Business Administration. SCORE members provide free advice to business owners. I met with a SCORE counselor about marketing on a tight budget. The counselor helped me realize that many people find a lawyer by word of mouth. Rather than invest in traditional ads, he recommended that I involve myself in community organizations because this is the first step to developing a professional reputation and a brand within your community. Find a local SCORE chapter and see what advice a counselor can offer you.

FIND MENTORS. I approached a friend with a thriving solo immigration practice and later volunteered at her office to see if solo life and immigration law was what I wanted to do. The experience was invaluable and helped solidify my decision to open my own office. Surround yourself with colleagues you can turn to and trust. You will be surprised by the number of attorneys willing to lend advice and a hand to up-and-coming solos. AILA's Mentor Directory is a resource at your disposal. And commiserating with others in similar situations will help you get through the bad days and make you realize that your struggles are not unique and that they can be overcome.

JOIN THE LOCAL BAR AND OTHER ORGANIZATIONS. At first, I volunteered at a local nonprofit that handles immigration cases. There, I gained exposure to the community and to different immigration

BACKTRACK

AILA President Leslie Holman on AILA's Mentor Program

RESOURCES TO HELP YOU FLY SOLO

AILA offers some great resources to help enable you to take that leap of faith.

Prepare for Takeoff

- The Law Practice Management Track Recordings from the 2014 AILA Annual Conference cover a plethora of topics, and you **SAVE 20%** buying the bundle instead of the individual recordings! Also check out the **FREE** recording, The Business Side of Running a Practice.

- AILA's comprehensive start-up guide, Launching an Immigration Practice, is perfect for those starting out in the immigration field, but also for those looking to inject fresh ideas and energy into their practice **(FREE!)**.

Make Sure Your Practice Soars

AILA's Immigration Practice Starter Set includes the resources essential to practicing immigration law, including *Kurzban's Immigration Law Sourcebook* and *AILA's Immigration Practice Toolbox*.

cases and issues. I simultaneously established a good relationship with the organization, and my colleagues there subsequently added me to their referral list. To this day, that relationship continues to produce solid referrals.

LEARN HOW TO MARKET YOURSELF. Do not sit in your office waiting for your phone to ring. If your schedule is not booked with client meetings, then schedule lunches or coffee dates with other solos or small-firm practitioners regardless of their area of practice. Remember, networking does not have to be "schmoozing." It can simply be an opportunity for you to learn about the work and operations of another practitioner or professional. As you build a network of professionals, your clients will start to depend on you for referrals. It's been two years since my practice first took root and changes abound. I've moved into a larger office. I'm also ready to hire my first associate.

MINIMIZE UNNECESSARY EXPENSES. I initially worked from home, met clients at local coffee shops, and rented a mailbox for a business address. Then I rented a single office space when I felt comfortable with paying monthly rent. Luckily, the market today offers many economical options for new solos. For example, many cities have business centers with virtual offices, co-sharing spaces, or traditional office spaces, and they provide phone and mail services. As for research tools, I couldn't afford a subscription at first, so I resorted to local law libraries for access to online legal research databases, and the immigration nonprofit at which I volunteered allowed me to use their legal resources.

GET LEGAL MALPRACTICE INSURANCE. Contact the insurer endorsed by your local bar association, or check into the AILA Lawyers Professional Liability Insurance Program. Be sure to ask the agent if you are eligible for a part-time attorney rate, given that, as a new solo, you may not be doing 40+ hours of legal work each week. This can significantly cut your insurance premiums.

Starting a practice involves a high degree of risk, but it also has the potential to yield big rewards. While I have experienced a roller coaster of ups and downs, I also have grown so much, both personally and professionally. I am proud of how far I have come and am excited about what lies ahead. If you're up for the challenge, be ready for the ride of your life.

RECORDED

AILA Podcast

Selecting the Right Case Management System for Your Practice (FREE!)

+ LIBRARY

VERONICA B. GUINTO is a solo practitioner in Oakland, CA, handling employment law and immigration law cases.

The Good Fortune of 'Winning' the Diversity Visa Lottery

by Drilona Breçani

It was 1997. Albania had descended into anarchy and a near civil war, triggered by the collapse of several financial pyramid schemes and underlying political pressures. The uncertainty and the fatal impact of this dashed the hopes and dreams of many for what post-communist Albania would be—a land of peace and prosperity— and resulted in a mass emigration of Albanians. Months before the violence erupted, my father had won the Diversity Visa Lottery, which meant that our family could move to the United States as his derivative beneficiaries. Despite our excitement, though, plans to take advantage of this sheer luck had been placed on the back burner because we were enjoying a good life in Albania. However, the unfolding chaos and uprising made us reconsider our decision to stay and pushed us to expedite the process as much as possible. Therefore, on June 22, 1997, we left our former lives behind in pursuit of safety and the American Dream.

Every year, around this time, I am reminded of our good fortune. Registration for the Diversity Visa lottery begins every October. According to INA §203(c), visas are allotted for a class of immigrants known as

"diversity immigrants" hailing from countries with historically low rates of immigration to the United States. Albania is one of those countries. Thanks to this process, my family and I made it to the United States.

My parents gave up their lives and careers, and left their parents and siblings behind, in order to start a new life in a foreign country. For me, the American Dream meant following in my father's footsteps. My father was a well-respected judge in Albania and it is no coincidence that 17 years later, I, his daughter, have become an immigration attorney. I love the profession I have chosen, and I take great pride in helping other immigrants pursue their own American Dream, and, in a small way, "pay it forward."

Every time Powerball mania sweeps the nation, our family is reminded, yet again, that we have won the biggest lottery of them all. While winning money could be life-changing, winning the Diversity Visa Lottery is life-changing. Winning the Powerball would certainly provide financial freedom, but winning the Diversity Visa Lottery provides another kind of freedom: the freedom from persecution, civil war, discrimination, violence, corruption, religious intolerance, gender inequality, and the freedom to live in safety while pursuing the American Dream. This kind of freedom cannot be bought, and is to some, like my family, far more valuable than any financial freedom. To quote the MasterCard ads, this kind of freedom is "priceless."

DRILONA BREÇANI is an associate at Egan LLP in Toronto.

Strategies to Help You Land an Immigration Internship

by Cletus M. Weber

Searching for paid or unpaid internships in immigration law is much more fruitful if you work hard, prepare well, and make the most of all opportunities. Consider these tips:

WORK. Finding a job is a job. You have to work hard at it—not just go through the motions. McCandidate cover letters and résumés to McFirms asking for McInternships will virtually guarantee failure. Instead, learn everything you reasonably can about the entity and its lawyers and then carefully tailor your cover letter, résumé, and interview accordingly.

SHINE. Prospective employers treat everything you do—your research, cover letter, résumé, interview, and follow-up—as a test of how you are likely to work if actually hired. Prove yourself.

BELIEVE. Repeated rejections and nonresponsiveness from prospective employers can easily cause you to lower your expectations. Belief, however, creates true commitment, which creates stronger efforts and better results. Even if you never

BACKTRACK

Get Connected: Law Students, Get Started!

THE IMMIGRATION INTERNSHIP

Law student volunteers at the 2014 AILA Annual Conference in Boston took some time out of their schedules to speak about their summer internships. Hear about their experiences and their advice for fellow law students who are interested in pursuing a career in immigration law.

land an internship, the people you meet and the lessons you learn along the way will prepare you better for finding your first job out of law school.

BE CREATIVE. Apply for internships before they get posted. Define your own internship and ask prospective employers if they think it could benefit them. Considering the employer's perspective and not just your own will help you better align your skills with their needs.

NETWORK. Seek out lawyers willing to give you an informational interview, impress them by preparing seriously, and then ask for names of other lawyers who may be looking for someone good like you. Repeat.

UNDERSTAND. Immigration law is complex and requires significant training and oversight to ensure productivity and avoid devastating mistakes. Even working for "free," you still have to create value for your employer.

BE HONEST. Strive to put yourself in the most favorable light, but never overstate your qualifications. Saying you have done something "innumerable" times when you've only done it a handful of times will completely destroy your credibility.

KNOW THYSELF. Consider carefully what is really important to you and then prioritize your needs in terms of salary, hours, location, type of work, environment, learning opportunities, long-term opportunities, flexibility, etc. Good interviewers ask these questions, and good candidates know the answers clearly and immediately.

PREPARE. As with trials, your success in interviewing is about how well you prepare. In fact, how you prepare for an interview is a direct reflection of your potential as an employee or intern, and employers will see it right away.

PLAY. Learn how to play the game. Employers cannot ask you directly whether you will be a good employee or intern, so they ask you indirectly with questions like, "Who was your least favorite previous employer and why?" or "What motivates you?" Find these standard questions online and carefully develop clear, concise, truthful answers directly applicable to you.

RESOURCE

Check out AILA's Career Center for can't-miss professional opportunities.

CLETUS M. WEBER is co-founder of Peng & Weber, PLLC, based in Mercer Island, WA. He is a senior editor of Immigration Options for Investors & Entrepreneurs, 3rd Ed. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation. Eryne Richards, an associate attorney at Peng & Weber, PLLC, contributed valuable input to this article.

Behind the Statue: The Story of Lady Liberty

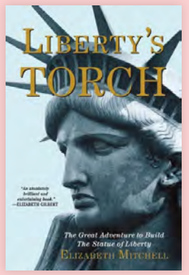
by Teresa A. Statler

The Statue of Liberty is one of our country's most recognizable symbols; a stylized version of it is even contained within AILA's logo. In Liberty's Torch: The Great Adventure to Build the Statue of Liberty, author Elizabeth Mitchell tells us the statue's fascinating history and in so doing, dispels some myths. The statue was the long-held dream of a visionary French sculptor, Frédéric Auguste Bartholdi (1834–1904). Bartholdi, who hailed from the Alsatian town of Colmar, studied in Paris and traveled to Egypt, where he was inspired and intrigued by the Great Pyramids and the Sphinx. After that trip, he designed a female colossus as a lighthouse and proposed to the Pasha of Egypt that this be placed at the entrance of the newly-built Suez Canal. Turned down by the Pasha, Bartholdi nurtured his dream for almost 20 years until he convinced French luminaries to fund his project as a "gift" to the American people. Slightly modified from his original design, Lady Liberty became the icon we all know in New York's Harbor, "Liberty Enlightening the World."

Getting the statute built was an incredible effort on the part of Bartholdi, who constructed it in his Paris studio, then dismantled it for the trip across the Atlantic. Mitchell also tells us that Bartholdi chose Bedloe's Island in New York Harbor, after Boston, Philadelphia, and Washington, D.C. all declined to be involved in his project. Publisher Joseph Pulitzer was a key figure in raising the necessary funds from American individuals and organizations for the pedestal and for the statue's erection. Pulitzer decided that his newspaper, *The World*, would publish the names of all donors, no matter how small the amount. Once the coffers were empty, Bartholdi, along with American businessmen and politicians, cobbled together the funds from many sources; this went on right up to the date the statue was inaugurated in 1886. Bartholdi also sold postcards of the statue, and an admission fee was charged to enter the statue's crown, which was on display at the 1878 World's Fair in Paris. Although Congress had passed a resolution in 1877 to help fund the statue, it did not come through until July 1886, authorizing only $36,000 for the inaugural celebration.

Mitchell's book is well-researched, entertaining, and recommended for history buffs and immigration lawyers.

BOOK



Liberty's Torch: The Great Adventure to Build the Statue of Liberty

2014, 384 pages

WHAT'S HAPPENING

Klasko Immigration Law Partners, LLP welcomes attorneys **LISA T. FELIX**, **MICHELE GALLO**, **FEIGE M. GRUNDMAN**, **R. TINA PATEL**, and **ANDREW J. ZELTNER** to the firm.

NY Chapter member **LEON WILDES** has been honored by the Cardozo School of Law where he taught immigration law for 33 years.

TX Chapter member **CYNTHIA R. LOPEZ** recently filmed a three-part documentary focusing on the misconceptions in the media regarding asylum cases. All three episodes can be found on YouTube.

TERESA A. STATLER practices in Portland, OR, where her practice emphasizes removal defense, family-based immigration matters, and asylum.

Tap into AILA's Professional Liability Insurance and Save!

by Sheeba Raj

The Hanover Insurance Group offers AILA members professional liability insurance that covers errors and omissions committed during the practice of law. It covers all attorneys in a firm, independent contractors, those who serve as "of counsel," and non-lawyer employees, including representatives accredited by the Board of Immigration Appeals. "We know that our insured attorneys consider their reputation as one of their most valuable assets," said Gayle Wissinger, lawyers professional liability product manager at The Hanover Insurance Group. "We understand the risks and issues surrounding their business and livelihood, and have designed a customizable program to protect those needs."

What You'll Pay

Premiums are determined by a variety of factors, such as the location of the firm, the limit and deductible selected, the type of risk management practices within the firm, disciplinary experience, and the areas of practice. Some practice areas are more likely to generate claims, so attorneys who engage in these practices will pay a higher premium. Once a policy

is underwritten, the premium would typically not be adjusted until the time of renewal, said Wissinger. "So if the insured, perhaps, brings in an associate lawyer some time during the policy term, we're not going to make an additional charge for that lawyer until we get to the renewal and then we will add them to the policy," she explained.

Additional Coverage

The policy provides additional benefits, including a $50,000 supplemental limit for defense of disciplinary complaints. "This typically involves assisting the insured lawyer with his [or] her initial written response to the complaint, as well as representing the lawyer during any hearings to determine guilt and appropriate sanctions," Wissinger said. Other benefits include a $50,000 supplemental limit for defense of employment practices claims, and reimbursement for income lost during time spent defending the claim in a deposition, trial, etc. This protection is a differentiator for The Hanover Group and is included without an extra charge, she noted.

Liability payments stemming from criminal acts are not covered under the policy. So, say, an insured is charged with fraud. According to Wissinger, the company will defend the allegations, but is not responsible for indemnity for that part of the claim if the court deems the insured guilty of fraud.

Risk Aversion

The Hanover Group also offers risk management services with Hinshaw & Culbertson, LLP, a national law firm that specializes in the defense of professional liability claims. The firm's website, which only policy holders can access, provides a wealth of resources, including articles about risk management and templates for many forms and documents typically used in a well-managed law office, such as engagement letters, non-engagement letters, client intake check lists, and many others.

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

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ABOUT

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