**INSIDE:** Handling Foreign Convictions ♦ Traps in the Virtual Office

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

*AN IMMIGRATION DIALOGUE*

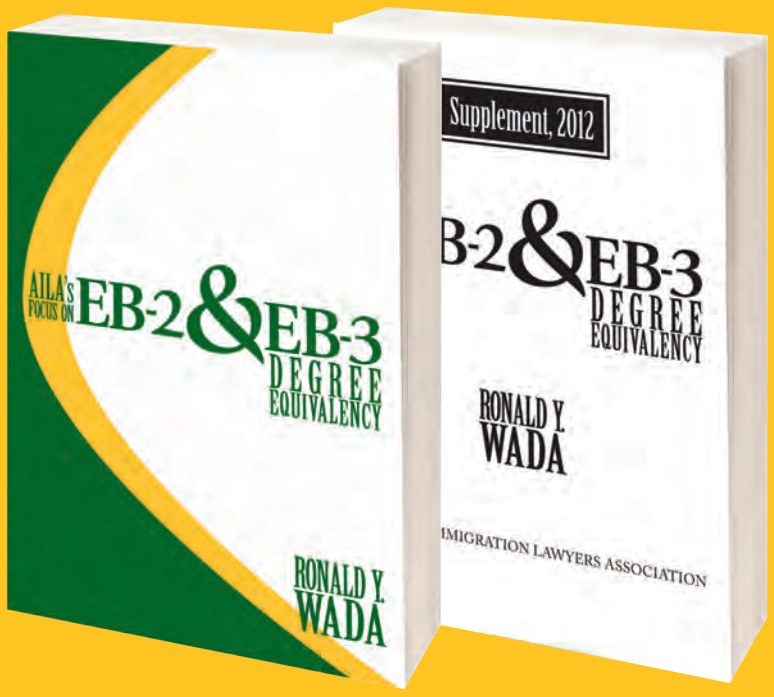
# VOICE

NOVEMBER/DECEMBER 2012

Vol. 3 Issue 6

# SYRIANS UNDER FIRE

# Making the Grade on Degree Equivalency Issues

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**by David Leopold, former AILA president and current general counsel.**

By reelecting President Obama and, at the same time, retaining a Republican majority in the House of Representatives, the American people—including a whopping 70-plus percent of Latino voters—have directed both parties to work together to implement Mr. Obama's vision. The electorate spoke loud and clear [Nov. 6], ordering Washington to put aside partisan politics and overhaul America's broken immigration system so that our families remain safe and together, our businesses regain their competitive edge in the global economy, and due process is restored and protected.

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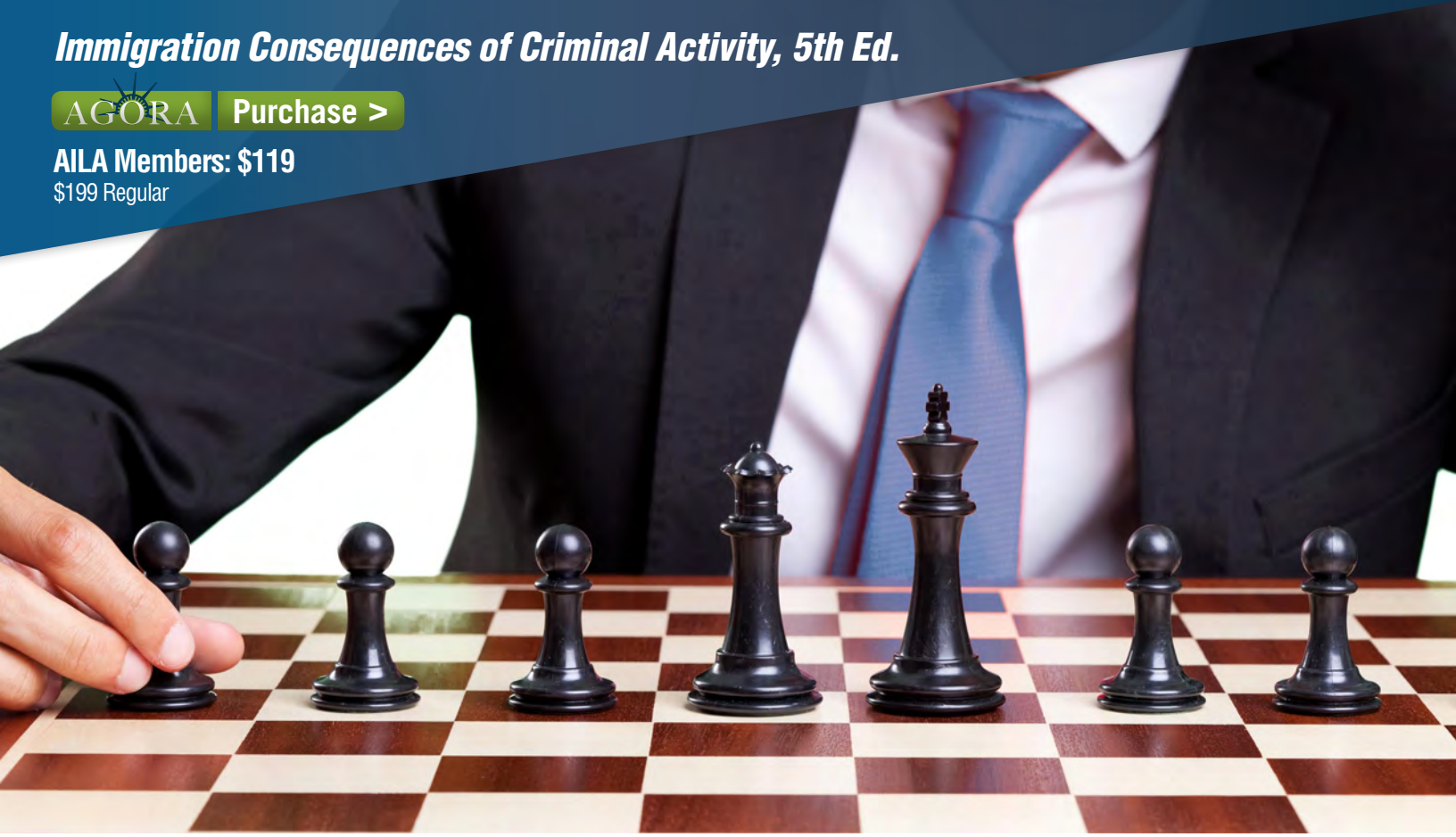

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***and more!***

***Get tips for filing strong motions and pleadings, identifying possible plea solutions, and more!***

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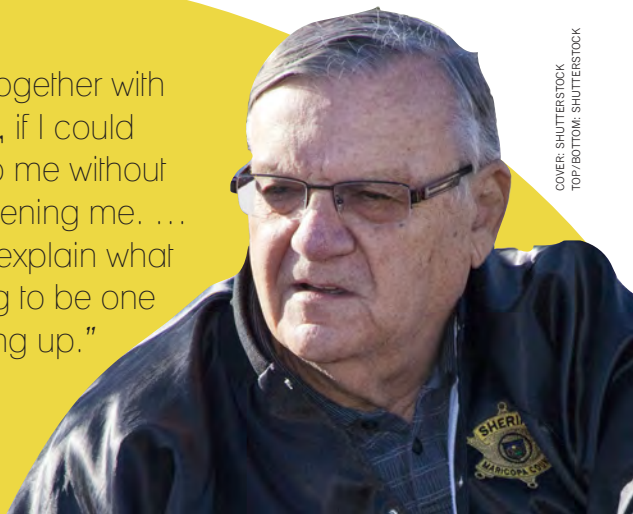
## FEATURES



"I would hope to get together with the Latino community, if I could ever have them talk to me without screaming and threatening me. … So I hope to … try to explain what we do, so that's going to be one of my missions coming up."
—Maricopa County, AZ, **Sheriff Joe Arpaio**, after being reelected on Nov. 6.



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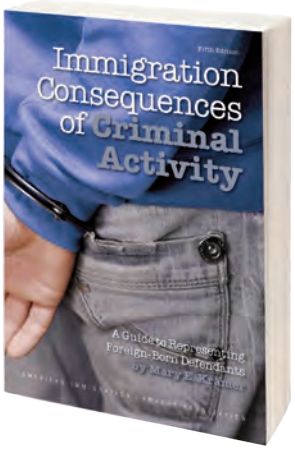


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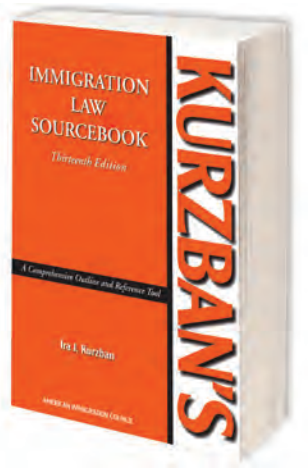


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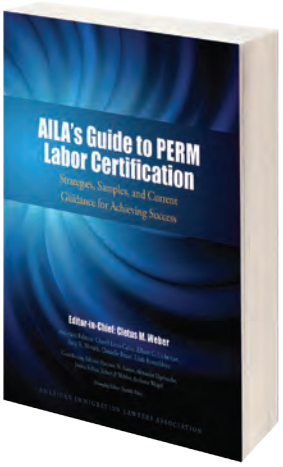


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# UNSOLICITED ADVICE

*from* **Cletus M. Weber**

# Government's Improved Access to Own Data May Affect Your Practice

A colleague asked me to review an L-1B "specialized knowledge" petition for a software engineer who seemed to clearly qualify, but nonetheless received a Request for Evidence (RFE). U.S. Citizenship and Immigration Services (USCIS) had expressed concern that the proposed beneficiary had come to the United States six months earlier in B-1 status for "training" in cloud computing. Essentially, USCIS was questioning how the beneficiary could be so "specialized" if he only recently received "training." (USCIS ultimately approved the petition, given that the areas of specialization and training were fundamentally different.)

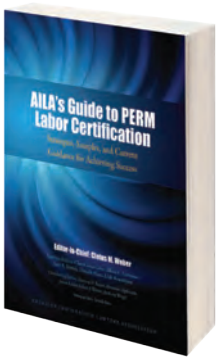
Although not stated explicitly, the source of the RFE's information was either the Department of State (DOS) (*i.e.*, U.S. consulate) or U.S. Customs and Border Patrol (CBP), both of which interviewed the former B-1 visa applicant—and not from USCIS's own data.

## NSC Access to CSC Data

Recently, I reviewed an extraordinary ability–based I-140 petition that had been denied by the Nebraska Service Center (NSC). USCIS asserted the beneficiary was not doing "research" as the head of a small medical-products company because the previously filed H-1B petition had listed the beneficiary's duties as X percent management, Y percent sales, and Z percent traveling for meetings, etc., without "research" having been explicitly listed as one of the primary duties.

The source of the information could only have been the California Service Center (CSC), as that is where the H-1B petition was adjudicated—and not NSC's own data.








## Likely Effect on Your Practice

As with most changes in our practices these days, improved government coordination of its data has both pluses and minuses. On the plus side, if you already practice very carefully and plan out your clients' cases ahead of time, you might be rewarded for your diligence toward harmonizing factual descriptions throughout your clients' immigration lives.

On the minus side, the government's improving access to its data is likely to create an overemphasis on perfect descriptive consistency at the expense of common sense and reasonableness in adjudications. To be sure, I am not advocating that the government overlook clear inconsistencies in relevant factual information. I am just saying that in real life, circumstances do change over time and even when they remain the same, they can be truthfully described in more than one way depending on the factors emphasized.

I predict at least some adjudicators are likely to become increasingly fixated on whether minutiae match instead of trying to make a reasonable determination of whether the beneficiary actually qualifies. You've been warned.

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**Cletus M. Weber** *is co-founder of Peng & Weber, PLLC. He is editor-in-chief of* AILA's Guide to PERM Labor Certification. *The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

# SPOTLIGHT

*by* **Dr. Megan Seltz**

# Counseling for Domestic Violence Clients

Domestic violence (DV) impacts all races and socio-economic backgrounds. Some immigrants in the throes of marital discord, however, face more barriers to obtaining help because they rely on their abusive spouses to maintain lawful status in the United States or they fear the stigma of divorce or separation. Nevertheless, immigrant DV survivors have not only legal issues to address, but, at times, their psychological issues, too.



## Incorporating Reports from Psychologists

Attorneys can refer DV-related cases to psychologists to bolster legal filings. Usually, psychologists evaluate the medical and psychological consequences of the abuse. During the sessions, clients frequently learn that they suffer from mood and anxiety disorders, not just post-traumatic stress disorder. Psychologists will recommend a variety of treatments, such as psychotherapy and activities to combat social isolation or to manage anxiety. They also prepare a comprehensive report that describes, among other things, the harmful effects of the abuse, as well as a social history that contextualizes the abuse in familial and cultural terms. Attorneys can include this report with the applications for relief under the Violence Against Women Act, which allows DV survivors to pursue lawful status without their abusers.

Other times, attorneys refer cases to psychologists when they suspect interpersonal violence in a client's relationship. Generally, primary psychotherapy treatment goals include promoting safety, strengthening coping and decision-making skills, and challenging irrational beliefs that the abuse is acceptable or normal behavior. During therapy, a client can reflect on the status quo of the relationship and the possible ramifications of continuing it. If he or she decides to leave the abuser, then the client would consider the steps to execute that goal. With permission from the client, the psychologist informs the attorney of the evaluation. For some


**Dr. Megan Seltz** *is a bilingual clinical psychologist in Jackson Heights, NY. She specializes in psychotherapy, immigration and forensic consultations, and expert evaluations. She can be reached at* mseltzphd@hotmail.com. *The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*


**ASK THE DOCTOR:**

**It is believed that applicants with older children have a better chance of being granted cancellation of removal than applicants with younger children. However, is the psychological impact of relocation actually greater in older children than in younger children?**

ILLUSTRATION BY BRADLEY AMBURN

clients, however, the shame of divorce or separation is too overpowering, causing them to remain in the relationship. But they would still receive counseling from the psychologist in the meantime. In other cases, the psychologist recommends marital counseling and the couple works toward salvaging the relationship.

Mental issues often arise while representing a DV client. Therefore, attorneys should collaborate with psychologists, whose findings and recommendations can help strengthen applications for relief and help clients put their lives back together.



Many argue that older children suffer more acute hardship than younger children when a parent is deported. For example, some attorneys and judges have described their perception that older children have a better understanding of the difficulties they will face adjusting to life in a different country. For example, New York Chapter member Alexis Pimentel said that because older children are acclimated to the American lifestyle, including the school system, removing them from the United States would result in extreme and unusual hardship. Another New York Chapter member, Carol Wolfenson, agreed, saying that it is easier to relocate a younger child, even if the relocation is abrupt. Moreover, because older children can often communicate their hardship more clearly to adults, including the immigration judges responsible for deciding whether to deport the child with his or her parent, there is a general perception that their hardship is more severe than that of younger children.

There are factors to suggest that young children would adjust well to deportation. For example, young children are typically resilient, so they may adapt better to new environments. Psychology, however, undercuts the proposition that younger children are significantly less affected by deportation. Studies show that the origins of character formation and psychopathology occur in the early months and years of life.[1] It could be argued, then, that deportation or family fragmentation would generally harm younger children more.

Sigmund Freud believed that early child development sets the stage for adult character formation and later life experiences.[2] At any point during the first six years of life, an external stressor can create a developmental arrest, which can inflict lifelong psychic trauma.[3] Pediatricians, including, Dr. William Sears, also report the need for significant early parental investment and presence to help ensure a secure child.[4] Many schools of psychotherapy focus on exploring early childhood experiences to gain insight into suffering in adulthood.

Deportation presents unique problems for young children. For example, young children may suffer disorders specific to childhood that cause hardship and require evaluations and treatment inaccessible or unavailable in their countries of origin. For example, Attention Deficit Hyperactivity Disorder, autism, and learning and motor delays can adversely impact most aspects of a child's everyday life. If diagnosed early, these conditions are more likely to be effectively addressed. However, if a young child is deported from the United States, then he or she would be more likely to lose the opportunity to receive intervention and/or other public initiatives available in this country designed to treat these illnesses.

1 N. McWilliams, *Psychoanalytic Diagnosis* 40–41 (Guilford Press 1994).
2 *Id.* at 19–39.
3 *Id.*
4 W. Sears & M. Sears, *The Baby Book, Chapter on Contemporary Parenting* 279–429 (Hachette Book Group USA 2003).

# RIDING THE CIRCUITS

*by* **Shoba Sivaprasad Wadhia**

# CA9 Upholds Law, Limits *Chevron* Deference for 'Aging-Out' Children

The U.S. Ninth Circuit Court of Appeals recently held that children who are under the age of 21 when they are listed as a "derivative" on a permanent residence application should be able to retain their space in line even if they turn 21 before the immigrant visa is issued.

The issue in *De Osorio v. Mayorkas*, No. 09-56786, (9th Cir. Sept. 26, 2012), is whether children who are named on visa petitions filed on behalf of their parents should remain eligible to apply for a visa after "aging out," or turning 21, before the visa becomes available. The implications of *De Osorio* are significant, as it enables adult children to receive a permanent resident card in a more predictable and shorter timeframe than would be the case if they were required to begin the immigrant visa process anew upon turning age 21.

## The Family Immigration Cap and *Chevron*

Congress designed the complex family immigration system that is capped at 480,000 visas annually. Those deemed "immediate relatives" (spouses, children, parents of U.S. citizens) are not subject to this or any other quota. But the other family categories (unmarried adult children of U.S. citizens, spouses and children under the age of 21 of green card holders, etc.) are subject to specific quotas within the 480,000 limit. When a petition is filed by a sponsor for a qualifying relative, the filing date is labeled as a "priority date," which becomes the benchmark that is used by the agency to measure the wait time for a particular petition to reach the front of the quota line. These congressionally created quotas, coupled with agency processing delays, create a paradigm where children listed as "derivatives" on their parents' immigrant visa petitions can turn 21 before their priority date becomes "current" and a visa becomes available. When children reach the age of 21, they no longer qualify as dependents of their parents on an immigrant visa petition. Adult-age children require an independent visa petition to immigrate to the United States.

The Ninth Circuit illustrated the problem as follows:



> For example, U.S. citizen Adele files a [visa] petition on behalf of her adult son, Aron, and includes Aron's daughter, Naira, as a derivative beneficiary. By the time Aron receives a visa, Naira is over 21. Adele can no longer petition on Naira's behalf, as there is no qualifying relationship between a grandmother and her adult granddaughter. Once Aron becomes a [lawful permanent resident], Aron may file a [new visa] petition [in a different visa category] for his daughter, Naira. Similarly, U.S. citizen Adele files a [visa] petition for her sister, Kristen, and includes Kristen's daughter, Sandy, as a derivative beneficiary. If Sandy is over 21 when Kristen receives her visa, Adele cannot petition for Sandy, because Adele cannot petition for her adult niece. Kristen may file a [new visa] petition [in a different visa category] for her daughter, Sandy. The question here is whether the original [visa] petition[s] should be automatically converted to [the new visa petitions], and if the [new visa] petition[s] retain the priority date of the [original] petitions.

To remedy the problem of children "aging out" of visa petitions filed by family members on behalf of their parents, Congress enacted the Child Status Protection Act (CSPA) in 2001. Among other things, the CSPA enables certain noncitizens who were children when they were

## Attorney Shusterman: "Let the 90 Days Elapse Before You File"

Several years after Congress passed the CSPA, the BIA issued two unpublished decisions[1] that allowed the beneficiaries in those cases to avoid removal and apply for adjustment of status under the 2B category based on the automatic conversion clause. "But for whatever reason, the [BIA] never designated those as precedent, so they only applied to those people," said Carl Shusterman, one of the lead attorneys in *De Osorio*. He was filing 2B petitions for various clients and asking to retain the original priority date, but he received letters from the immigration authorities refusing to use the old date, or no response at all. He gathered these clients and sued in federal court in 2008. Then came Matter of Wang, 25 I&N Dec. 28 (BIA 2009), where the BIA determined that the automatic conversion clause applied only to beneficiaries of 2A petitions.

The issue regarding the class of beneficiaries that can rely on the automatic conversion clause has divided the circuits. In Khalid v. Holder, 655 F.3d 363 (5th Cir. 2011), the Fifth Circuit ruled as the *De Osorio* court did. The Second Circuit, however, upheld *Matter of Wang* in Li v. Renaud, 654 F.3d 376 (2d Cir. 2011). According to Shusterman, both cases never went before the U.S. Supreme Court; the government in *Khalid* didn't file a writ of certiorari and the pro bono attorneys in *Li* ran out of resources. The government has 90 days after the entry of judgment to decide whether to challenge *De Osorio* and file a writ. As *De Osorio* is a nationwide class-action suit, Shusterman, who owns a law practice in Los Angeles, recommended attorneys should hold off on preparing green-card applications for clients out of status until after the 90 days elapse and the government doesn't appeal the decision. "But, otherwise, the only people that I would advise to file now are people who are in removal or deportation proceedings, or people who are in status and want to file an I-130," he said, adding that the parents of the clients should file the I-130.

1 *Matter of Garcia*, A79 001 587, 2006 WL 2183654 (BIA June 16, 2006). *Matter of Elizabeth Garcia*, 2007 WL 2463913 (BIA July 24, 2007).

listed as "derivatives" on their parents' visa petitions to retain a priority date even after turning 21 before the visa becomes available. Specifically, the CSPA states:

> **Retention of priority date.** If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition. 8 U.S.C. 1153(h)(3).

Despite the plain language of the CSPA, the Board of Immigration Appeals (BIA) had previously held in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009) that the CSPA does not apply to a now-adult noncitizen who was previously listed as a derivative on a visa petition filed on behalf of the child's parent. Following *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Ninth Circuit rejected the BIA's analysis, concluding that the plain language of the CSPA unambiguously enables now-adult derivative beneficiaries of a visa petition to retain their priority date when a new visa petition is filed for them.

### A System of Safeguarding

The implications of *De Osorio* are not merely theoretical. The AILA amicus committee hails the court's recognition about the limits of *Chevron* deference and safeguarding of individuals who have waited for years to immigrate under the family immigration system. Amicus briefs were filed by multiple entities, including the American Immigration Lawyers Association; Catholic Legal Immigration Network, Inc.; American Immigration Council; National Immigrant Justice Center; and Active Dreams, LLC. See more AILA resources on CSPA.

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**Professor Shoba Sivaprasad Wadhia** *directs Penn State's* Center for Immigrants' Rights, *an immigration policy clinic where students produce practitioner toolkits, white papers, and primers of national impact on behalf of client organizations. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

POSTED BY Christine Mehfoud

# The Enforcement Focus on Visa Fraud

The federal government's increased scrutiny of employers for immigration-related violations does not stop at the employment verification process. The Department of Homeland Security (DHS), the Department of State (DOS), and the Department of Labor (DOL) also have ramped up efforts to investigate visa fraud.

## Improper Use of the H-1B Visa

Because the number of petitions filed with U.S. Citizenship and Immigration Services each year for H-1B visas far exceeds the limited number of those available, the H-1B visa has become quite valuable both to the foreign worker and many employers. With increased value comes increased fraud, followed closely by increased enforcement.

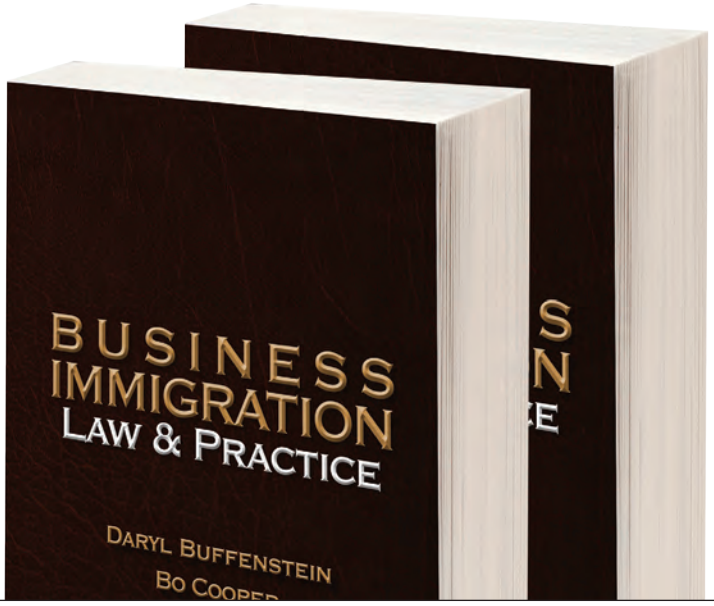
An H-1B visa permits a qualified foreign worker to work temporarily in the United States in a specialty occupation. However, the H-1B visa also carries with it stringent requirements, including certain educational and professional requirements for the worker and certain obligations regarding the type of work and wage offered by the employer. Employers can run afoul of these stringent requirements by taking actions that many employers may not realize are wrong, such as sending H-1B employees to unauthorized worksites or assigning responsibilities to the H-1B worker that fall outside the visa's approved scope.

DHS and DOL have increased unannounced site inspections of employers of H-1B workers, seeking to verify the working conditions and specifications stated in the visa petitions. Inspectors usually speak to company officials and the H-1B visa worker, as well as review relevant documents. Employers must ensure that their statements in a visa petition accurately reflect the details of the position and the qualifications of the foreign worker who fills that position.

Penalties for improper visa use can include criminal penalties, payment of back wages, loss of the ability to sponsor future workers, and significant civil monetary penalties. For example, the DOL Wage and Hour Division may assess civil money penalties with maximums ranging from $1,000 to $35,000 per violation, depending on the type and severity of the violation.

## Improper Circumvention of the H-1B Visa

Recent enforcement efforts also have focused on attempts to circumvent the stringent H-1B visa requirements and cap by improperly substituting other less expensive and more readily available visa options. In particular, some employers have attempted to use the B-1



visa as a substitute. The B-1 visa is only available for business-related travel to the United States—not for working here. See McGuireWoods Legal Update.

India's three largest IT firms (Infosys Technologies Limited, Larsen & Toubro InfoTech, and Tata Consultancy Services) recently have come under scrutiny for alleged visa fraud. At least one of these companies (Infosys) is the subject of a DHS and DOS criminal investigation, and a DHS Form I-9 audit for which Infosys has acknowledged that "DHS has found errors in a significant percentage of [its] Forms I-9 …."

In light of the increased enforcement directed at H-1B employers and because of the unique and often extensive requirements of each visa category, employers should consult experienced immigration counsel when petitioning for business-related immigration visas. In addition, employers should review their immigration compliance program for visa compliance safeguards. Make sure you ask important questions, some of which are:

- How does the company determine when and how it will sponsor employees for work authorization?
- Who is responsible for determining the appropriate visa to use for those employees?
- Is the company using the right visa for the employees it has chosen to sponsor?
- Once a visa is obtained, who monitors the sponsored employees' work to ensure it complies with the visa petition?
- Have the responsibilities, pay, or work location for any sponsored employees changed over time?

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**Christine Mehfoud** *is a lawyer with McGuireWoods LLP, and maintains a blog on immigration enforcement via Subject to Inquiry. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

# IMMIGRATION LAW AND THE VIRTUAL WORKPLACE

by Danielle M. Rizzo


The emergence of the virtual workplace has created a new set of problems for the immigration practitioner with corporate or business clients who allow some form of "virtual" office work for their employees. In some cases, a virtual workplace means that employees work from a home office 100 percent of the time. In other cases, an employer maintains a brick-and-mortar office while allowing employees the option of telecommuting a set number of days per week, or as dictated by work load. These arrangements, while becoming increasingly common in the workplace, are not factored into the way many immigration benefits programs are regulated. For example, an H-1B worker who is permitted to work from home on certain days will need to have a labor condition application certified for both the home worksite and the employer's worksite. In the context of labor certifications, a telecommuting option creates additional employer obligations in terms of advertising. In each of these scenarios, the practitioner faces the challenge of interpreting regulations that are silent on the issue of virtual worksites and applying them to real world situations in which the virtual worksite exists. Fortunately, in the context of L-1 petitions, case law allows the petitioner some flexibility in maintaining a virtual worksite.

## THE STANDARD TO FOLLOW

In a precedent decision, Matter of Chartier, 16 I&N Dec. 284 (BIA 1977), the Board of Immigration Appeals

"While *Chartier* was decided in the 1
workplace situation, it applies direct

(BIA) held that a Canadian foreign national may be admitted to the United States as an intra-company transferee in L-1 status, even though the beneficiary does not work for a related legal entity abroad. The petitioner in that case was Grow Chemical Company, a manufacturer of thinners and solvents that had never established a Canadian subsidiary or branch office. *Id.* at 285. When the beneficiary was employed by Grow, he worked from his home in Canada, and his job involved visiting customer sites to ensure that the company's products were being applied properly. *Id.*

In holding that the beneficiary was entitled to L-1 status as part of his transfer to the United States to


ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK

970s and did not deal with a virtual
ly to the modern virtual workplace."

perform similar services, the BIA cited the definition of L-1 status in Immigration and Nationality Act (INA) §101(a)(15)(L), which states:

> Any alien who, immediately preceding his time of application for admission into the United States, has been employed continuously for one year *by a firm or corporation* or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him. (Emphasis added).

The BIA noted that this definition does not require the employer to have a subsidiary or other legal entity abroad, and concluded: "We see no reason why a distinction should be made between United States companies with subsidiaries abroad and United States companies with employees abroad who work directly for the parent company." *Id.* at 287–288.

*Chartier* is still good law. It was explicitly recognized as valid in the comments to the Final Rule, which added the regulations that interpret INA §101(a)(15)(L). In addition, there has been no subsequent decision overturning *Chartier*.



## A DIRECT CORRELATION TO TODAY'S WORKPLACE

While *Chartier* was decided in the 1970s and did not deal with a virtual workplace situation, it applies directly to the modern virtual workplace. There are often instances in which a foreign national works from a foreign country on behalf of a U.S. employer using a virtual office. The employee may be a W-2 employee who works abroad from a home office. In such a case, if it can be shown that the employee filled a managerial, executive, or specialized knowledge role from abroad and will be coming to the United States to fill a managerial, executive, or specialized knowledge role, he or she may qualify for L-1 classification under *Chartier*.

In addressing legacy Immigration and Naturalization Service's concerns that foreign beneficiaries should not be permitted to enter the United States in L-1 status if there is no office abroad to which the foreign national could return upon conclusion of his or her stay, the BIA stated in dicta that it considered the petitioner's overseas affiliate to which the beneficiary might be transferred. This language should not be read to undercut the clear holding of *Chartier*, however, which is, "We see no reason why a distinction should be made between United States companies with subsidiaries abroad and United States companies with employees abroad who work directly for the parent company." There is no requirement in case law or regulation that a related company exists in a foreign country.

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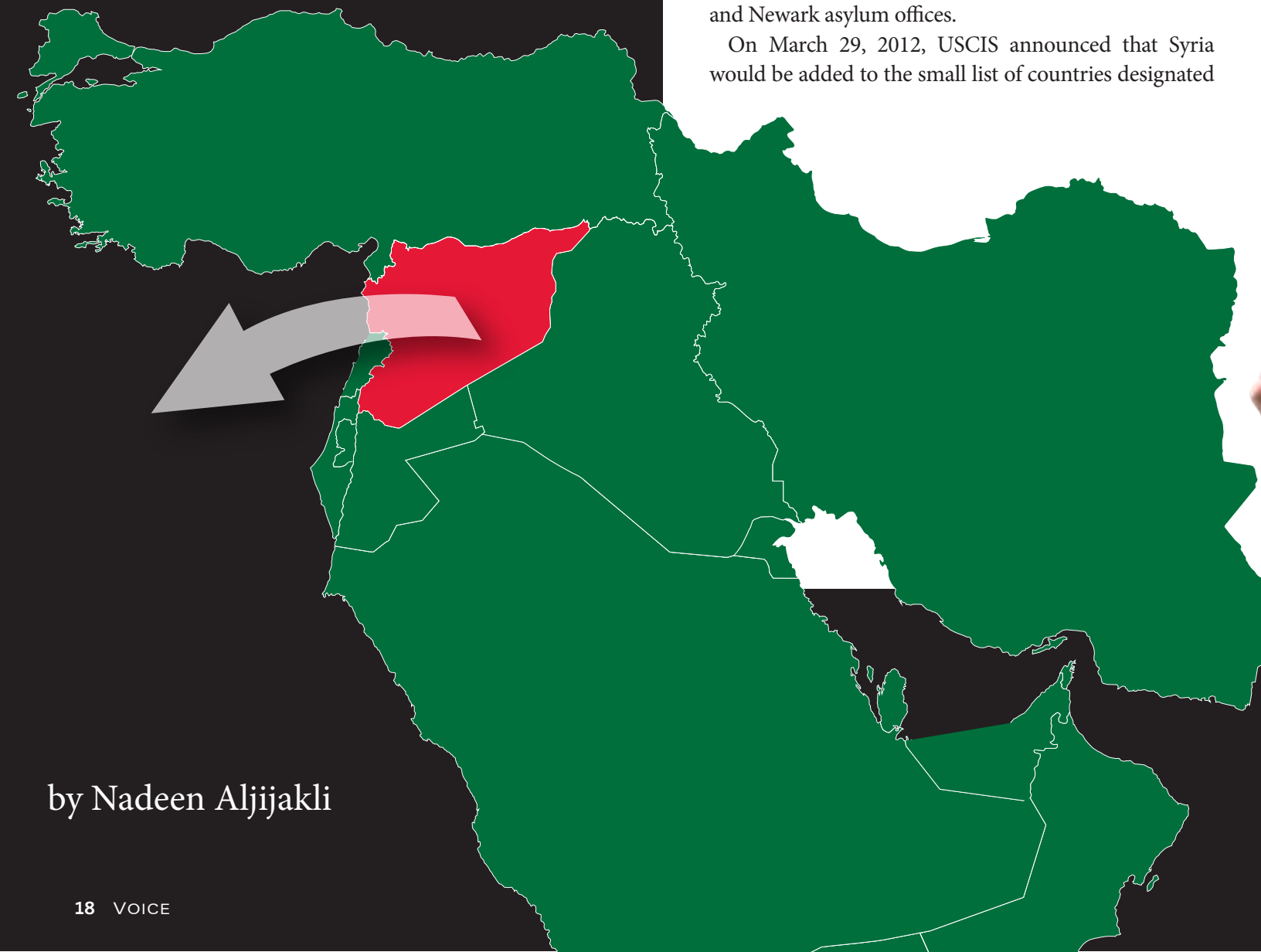
# SYRIANS UNDER FIRE

## Seeking Asylum in America

by Nadeen Aljijakli

An IT professional. A physician. A mother of six. A college student. What do these individuals have in common? They are Syrian asylum applicants in the United States. They represent the diverse faces of those impacted by the Syrian revolution—the nationwide uprising against the Assad regime and its brutal crackdown on the opposition—which has claimed the lives of more than 30,000 Syrians,[1] including countless women and children. Since the start of the conflict in March 2011, there has been, unsurprisingly, a growing number of Syrian asylum applicants. U.S. Citizenship and Immigration Services (USCIS) has reported that 566 Syrian nationals applied for asylum between January 2011 and August 2012, not including applications filed defensively in immigration court,[2] compared to 36 applications filed in 2010. Of the 441 applications that were filed between January 2012 and August 2012, 65 percent were approved. During this time, the highest number of applications were filed with the Los Angeles and Newark asylum offices.

On March 29, 2012, USCIS announced that Syria would be added to the small list of countries designated



for Temporary Protected Status (TPS), which potentially affects thousands of Syrians living in the United States. To date, USCIS has reported that 2,478 applications have been filed. While TPS provides a safe haven and immigration benefits for some Syrians, there are many others who will not qualify because of their date of arrival in the United States. Of those who do qualify, many cannot afford to have only temporary protection, as they view their return to Syria, at any time, as a death sentence. The author's clients (with true identities protected) are examples:

"Ahmad," the IT professional, who used his expertise to assist other activists in safely connecting in cyberspace without government monitoring, and also provided to thousands of Syrians access to online revolution footage and news blocked by the regime;

"Adnan," the medical doctor, who led efforts to provide safe, underground treatment options for wounded protesters who would otherwise be targeted at hospitals by the regime;

"Yasmin," the mother of six young children, whose home was burned down by security forces because she was identified at various protests and a revolution flag was found in her home; or

"Tarek," a 22-year-old college student, who attended protests on a daily basis in honor of his fallen friends and survived being shot in the chest by regime forces. These are compelling cases for asylum—based on the protected ground of political opinion—involving individuals for whom returning to Syria is not an option, as they are labeled as criminals by the regime and the risk to their lives is near certain.

## Challenging the 'Privacy' of Social Media

Despite the undeniable carnage and atrocities inflicted upon the Syrian people by the regime, some asylum-seekers are still facing serious challenges to their claims. Based on regular inquiries received by the author, it appears that Syrians who have resided in the United States before the conflict are having more difficulties in winning their asylum claims than recent arrivals, including some who have been heavily involved in political opposition activities taking place in the United States against the regime.

Although human rights groups, such as Amnesty International, have consistently reported that the regime is closely monitoring activists throughout the world and particularly in the United States,[3] the U.S. government appears skeptical that the regime would be able to discover such political activity. Therefore, it is important to document your client's political activities and, equally →

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important, to explain to the adjudicator how the regime can locate this information. For instance, Facebook has been a critical organizing tool and vehicle for political expression for Syrian activists. Based on the author's experience, however, USCIS often diminishes the risk of Facebook political postings, concluding that it is a private social media forum in which the user fully controls access to his or her posts.

**TIP: It is imperative to provide widely available reports confirming that the regime regularly captures user information from activist detainees, often through torture, in order to access data about other activist friends in order to blacklist and target them, accordingly. In addition, the regime and its loyalists have formed the "Syrian Electronic Army," which is tasked with monitoring and exposing online opposition activity, as well as hacking activist user accounts. Providing such background information is a vital component to a successful claim.**

Syrians who have immediate relatives remaining in Syria meet similar challenges in presenting their claims. It is important to distinguish such cases from *Matter of A–E–M–*, 21 I&N Dec. 1157 (BIA 1998) to show that the reasonableness of the applicant's fear of persecution is not reduced in any way because his or her family has remained in Syria for a limited period of time after his or her departure. This can be shown by documenting any threats or deteriorating living conditions experienced by the family members and/or any efforts those relatives are making to flee the country. Advocates can proactively address such issues before they become red flags for the adjudicator.

## Challenging the 'Assistance' in Persecution of Others

Another potential pitfall to watch for is the persecutor bar, which disqualifies asylum applicants who have assisted, even indirectly, in the persecution of others on account of a protected ground.[4] Although the Syrian opposition movement has been overwhelmingly peaceful, there have been isolated reports of human rights abuses by the Free Syria Army (FSA), the militarized resistance that has supplemented the movement. If your client has provided assistance to other activists in any form, even by way of humanitarian means, USCIS may inquire as to whether FSA members were among them in order to determine whether the persecutor bar applies.

**"Many Syrian asylum claims can be successful; however, even as the conditions in Syria continue to deteriorate … advocates must remain vigilant in preparing the case thoroughly and presenting an individualized claim."**

**TIP: Your client must be carefully prepared to address such questions, if applicable. Ironically, even though the U.S. government has recently granted a license for Americans to donate explicitly to the FSA through an approved organization, this act alone does not shield asylum-seekers from facing the persecutor bar if certain conditions are met. Additionally, the question of the persecutor bar may arise if your client has served in the Syrian military, as Syria has a two-year compulsory military service requirement that applies to most adult males.**

Lastly, it is important that immigration attorneys are not overly confident in presenting Syrian asylum claims relying solely on the overwhelming, but general, evidence of the regime's targeting of political

opponents. Despite the severity of the regime's crackdown against the Syrian people, each claim must be established in its own right with particularized circumstances. Even the Syrian whose home was devastatingly shelled and destroyed by security forces may not be able to meet the standard necessary for asylum if he or she was not targeted individually on the basis of a protected ground, such as political opinion or religion, but rather caught in the crossfire of warlike conditions.[5] Many Syrian asylum claims can be successful; however, even as the conditions in Syria continue to deteriorate and the strength of a claim may appear obvious, advocates must remain vigilant in preparing the case thoroughly and presenting an individualized claim.

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1 "Syrian death toll now tops 30,000: activist group," *Reuters*, Sept. 26, 2012. As of Oct. 24, 2012, the author received word through her human rights network that the death toll is now closer to 40,000.

2 E-mail from USCIS's Office of Communications, Media Relations Division, to the author (Sept. 25, 2012) (on file with author).

3 *See e.g.*, Amnesty International, The Long Reach of the Mukhabaraat: Violence and Harassment against Syrians Abroad and Their Relatives Back Home, Oct. 3, 2011, at 7–11.

4 *See* Immigration and Nationality Act (INA) §208(b)(2)(A)(i).

5 *See* INA §101(a)(42)(A).


# Your Client Has a Foreign Conviction. What Now?

## by Terrence Ayala and Ellen von Geyso

Immigration lawyers face a challenge when dealing with a client who has a foreign conviction. This is especially so where the conviction arises under a statute relating to the control and management of an otherwise legal business. U.S. immigration laws say that a conviction under most narcotics and several other statutes will render a foreign national inadmissible. Those same laws, however, would quickly become unmanageable if they attempted to specify every foreign statute, which, if violated, would yield a negative immigration consequence.

Since 1891, immigration officials have relied on a tractable standard to decide whether a visitor will be admitted to the United States.[1] Thus, because there is no black-and-white litmus test, practitioners must carefully assess each foreign statute giving rise to a conviction to determine whether it presents a crime involving moral turpitude (CIMT) under U.S law. That task would be much simpler if the U.S. Department of State (DOS) maintained a publicly accessible listing of its prior determinations regarding which foreign statutes present CIMTs. Unfortunately, and at least since 2003, DOS has maintained that such determinations are confidential. If a consular official has questions concerning the effect of a particular foreign statute, he or she may request an advisory opinion from DOS's Office of Legislation, Regulations, and Advisory Assistance, Advisory Opinions Division. 9 *Foreign Affairs Manual* (FAM) 40.6 N2.1.

However, when a consular officer requests an advisory opinion, the Visa Office (VO) will not issue a copy of the advisory opinion to the applicant or the lawyer. *See* "DOS Answers to AILA Questions (Oct. 14, 2003)," AILA InfoNet Doc. No. 03102043 (advisory opinions not published). Rather, the VO will send a letter to the lawyer or applicant explaining the substance of the advisory opinion, unless classified or other sensitive information is involved. Accordingly, as we attempt to assess the immigration consequences of convictions under a broad range of statutes, we are left to our own devices.

Regarding convictions arising under statutes or regulations in the business context, those assessments can be particularly challenging. For example, consider the body of statutes that govern business formation and capitalization. It might surprise some lawyers in European countries to learn that there are no minimum capital requirements for LLCs formed in the United States. Similarly, American lawyers might find it surprising to learn that, under German law, to form a GmbH (*"Gesellschaft mit beschränkter Haftung,"* a German private limited company), organizers must make an initial capital investment of Euros 25,000. Moreover, this required initial registered capital—as a general rule—may not be distributed to the shareholders. Indeed, in certain European jurisdictions, managers have been subjected to criminal liability after failing to report capital deficiencies or initiate an insolvency proceeding on time. This is just one set of laws that illustrates how a foreign statutory framework can diverge from U.S. laws in the immigration context.



For this discussion, assume that you are asked to assist a German client with a nonimmigrant visa application that is to be submitted to a U.S. consulate. While interviewing the client, you learn that she faced charges similar to those prosecuted in the recent cases involving Volkswagen (VW) executives. In this highly publicized case, high-level VW executives were charged with aiding and abetting in connection with, among other things, embezzlement and abuse of trust. M. Landler, "Sentence in Volkswagen Scandal," *N.Y. Times*, Feb. 23, 2008; V. Ram, "Volkert: The Man Volkswagen Would Forget," *Forbes*, Feb. 25, 2008.

Ultimately, in your case, the client was only charged with and convicted of embezzlement and abuse of trust under §266 *Strafgesetzbuch* (StGB), the German Criminal Code.

If not analyzed properly by immigration counsel, a conviction for such a charge may yield significant immigration consequences for a European manager →

who seeks a U.S. visa. As we will illustrate here, however, one can argue that the charge does not rise to the level of a CIMT under U.S. law. We will discuss the steps practitioners should take to give U.S. consular officials the information they will need to give clients facing these circumstances fair and expeditious consideration. While this discussion focuses on the German case as an example, the guidance applies to business-related immigration applications that might be presented at a U.S. consulate anywhere in the world.

## Step One: The Record

During the intake, clients should disclose all prior convictions, arrests, citations, charges, or stints in prison, no matter when or where they occurred. This is because DOS and U.S. Citizenship and Immigration Services (USCIS) will expect applicants to reveal all encounters with law enforcement—even those that may fall outside the reporting period that a foreign jurisdiction deems appropriate. For example, in the German context, a client might obtain a *"Führungszeugnis"* (a German "Certificate of Good Conduct") and assume that the information in it rises to the level of full disclosure. This may leave a client with the misunderstanding that any infraction that is not mentioned in the Certificate need not be disclosed. Therefore, practitioners should advise clients about the immigration consequences of intentional and unintentional omissions and help them gather court records documenting long-forgotten offenses or arrests. Obtaining these items from foreign courts might require more legwork because of language issues, as well as privacy considerations that stand in stark contrast to our "sunshine" laws. Often, due to stricter privacy laws abroad, certain criminal infractions may have been expunged by the time your client consults you.

**TIP: Begin any search for foreign records by visiting DOS's Visa Reciprocity Tables. DOS states which records it believes are available in each country and who might help you obtain them. Nevertheless, the Visa Reciprocity Tables and list of contacts should not be deemed conclusive or authoritative. Immigration attorneys should consult local counsel who know the criminal case record-keeping practices and procedures in the relevant jurisdictions.**



After the client has provided complete details of his or her criminal history, the practitioner should obtain a certified copy of the record of conviction, including the charging document. Again, in the German context, this is distinguishable from a *Führungszeugnis*. The record of conviction is the set of documents that includes, in most cases, the charging instrument and the judgment. The former is a document that the client can obtain through the Federal Central Criminal Register (FCCR). It is only available for applicants older than 14 years of age and may be requested only by the applicant or by the legal guardian for a minor, not by the attorney. However, due to Germany's highly protective privacy laws, not all convictions are actually recorded in the certificate. Although they are registered in the FCCR, petty and first-time convictions receiving a fine of no more than 90 daily units or imprisonment of no more than three months are not usually listed in the certificate. German courts impose a fine in daily units, which are determined based on the personal and financial circumstances of the offender. The amount that he or she earns or receives each day becomes the "daily unit" or "daily rate." The fine may not exceed 90 times the amount that the offender earns or receives each day. *See* StGB §40. Moreover, a suspended juvenile conviction is usually not listed in the certificate. Accordingly, one should not rely solely on the Certificate of Good Conduct as evidence of the absence of a prior conviction.

Unfortunately, privacy and disclosure laws outside the United States greatly reduce the scope and quality

of information that can be obtained by third parties, including a client's attorney. Some services advertise that they will provide criminal histories covering as much as seven years; however, great caution should be exercised before relying upon such services. Instead, if a practitioner is concerned about the information available regarding a client's history, he or she should consult a local attorney to confirm the records and sources.

## Step Two: Obtain a Proper Translation

Get a certified translation of all documents, including the relevant statutes. Preparing such a translation is a critical step that requires a unique combination of skills and sensitivity. Unfortunately, even a certified and highly experienced translator might not know the nuances of the legal concepts involved. Therefore, counsel must discuss and approve the translation with the translator before it is finalized.

In addition, it is often prudent to obtain translations of statutes that are related to those cited in the judgment, even though the client was not charged under the related statutes. Consider the circumstance where a defendant is convicted of a "lesser included offense" (a lesser included offense encompasses some, but not all, elements of a more serious crime, *e.g.*, unlawful entry is a lesser included offense of burglary). It is possible that the statute describing the more serious crime contains additional elements, such as a scienter requirement. The more serious offense may also resemble U.S. criminal provisions more closely than the actual statute of conviction. In either situation, having a translation of the other relevant statutes will support an argument that the foreign prosecutors consciously distinguished your client's case from one that more closely resembled a CIMT under U.S. law. With your work product in hand, your client will then be in a better position to explain to the consular officer handling his or her application that the actual judgment does not rise to the level of an excludable offense.



**TIP: When dealing with foreign convictions, even the slightest variation in the translation may affect the evaluation and, ultimately, the result of the case. Therefore, have the translation prepared or at least reviewed by an attorney who is admitted to practice in the country of the conviction's origin and in the United States. It is even more advantageous if the translation is prepared through consultations with an attorney who has experience handling criminal matters in U.S. courts.**

## Step Three: Addressing the Substantive Issues

The *Foreign Affairs Manual* (FAM) offers a thumbnail description of the types of crimes that will give rise to CIMTs. Moreover, according to 9 FAM 40.21(a), the consular officer must determine whether the conduct proscribed by the foreign statute would be deemed immoral under "the moral standards generally prevailing in the United States" and render the applicant inadmissible. Therefore, attorneys must compare the relevant foreign statute with the analogous U.S. statute because, for example, a crime labeled as "embezzlement" in a translation of the foreign statute might differ from the crime labeled as "embezzlement" under U.S. law. Where a foreign statute lacks any of the elements required to sustain a conviction under U.S. law, it should not be read to state a CIMT. U.S. legal research resources, such as LEXIS, Westlaw, Fastcase, and AILA's InfoNet can facilitate the analysis.

Regarding the German conviction in our example, 9 FAM 40.21(a) and the accompanying notes indicate that StGB §266 is not a CIMT. Moreover, 9 FAM 40.21(a) N2.2 describes the most common elements involving moral turpitude as fraud, larceny, and intent to harm persons or things. And, specifically addressing →

property crimes, such as embezzlement, 9 FAM 40.21(a) N2.3-1 states that crimes rising to the level of a CIMT "involve an inherently evil intent ...." According to an unofficial translation, StGB §266 says:

> ***Embezzlement and Abuse of Trust***
> *Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine.*

Note that StGB §266 (as translated) is completely silent with regard to the element of intent. Because the caption in this translation describes StGB §266 as "Embezzlement and Breach of Trust," we will compare it to D.C. Code §22-3211 (2001), which addresses embezzlement.

> *§22-3211. Theft.*
> *(a) For the purpose of this section, the term "wrongfully obtains or uses" means: (1) taking or exercising control over property; (2) making an unauthorized use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception. The term "wrongfully obtains or uses" includes conduct previously known as larceny, larceny by trick, larceny by trust,* ***embezzlement****, and false pretenses (emphasis added).*
>
> *(b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:*
> *(1) To deprive the other of a right to the property or a benefit of the property; or*
> *(2) To appropriate the property to his or her own use or to the use of a third person.*
>
> *(c) In cases in which the theft of property is in the form of services, proof that a person obtained services that he or she knew or had reason to believe were*

"When dealing with foreign convictions, even the slightest variation in the translation may affect the evaluation and, ultimately, the result of the case."

*available to him or her only for compensation and that he or she departed from the place where the services were obtained knowing or having reason to believe that no payment had been made for the services rendered in circumstances where payment is ordinarily made immediately upon the rendering of the services or prior to departure from the place where the services are obtained, shall be prima facie evidence that the person had committed the offense of theft.*

Let us compare the conduct proscribed under §266 against that proscribed under §22-3211. Under §266, the conduct proscribed is that which *"causes damage to the person, whose property interests he was responsible for."* In contrast, §22-3211 proscribes conduct that "deprive[s] the other of a right" or "appropriate[s] the property to his or her own use or to the use of a third person." From this, we can see that the U.S. statute requires a showing that the defendant engaged in some form of taking. On the other hand, the German statute merely requires a showing that the defendant's action or inaction resulted in a loss experienced by the victim. Thus, the German statute reaches a much broader range of conduct, including conduct that might be deemed innocent in the United States.

In addition, §266 does not explicitly state an intent requirement. Rather, §266 must be read in conjunction with StGB §15, which addresses the intent element. German criminal law differs from the U.S. law because most serious U.S. crimes are specific intent crimes, where the intent is defined in the relevant U.S. statutes. In Germany, "intent" is defined in the official commentary on StGB §15. Only some crimes have explicitly stated specific intent requirements. Under German law, intent is not only acting and doing willfully and knowingly, but also so acting and doing while having contingent intent, referred to as "*dolus eventualis*."[2] *Dolus eventualis* consists of two components: (1) the cognitive element that considers the state of the accused's knowledge that the offense may occur, and (2) a volitional or dispositional element that has never been part of the common law criminal analysis. Accordingly, under German law, one can be found to have violated §266, upon a showing that he or she acted with an intent of *dolus eventualis*, which would be somewhat equivalent to "recklessness" under U.S. law. Therefore, §266 does not provide a criminal mental state or any type of evil intent that would sustain a conviction under U.S. law.

**TIP: Once you have gathered and reviewed the aforementioned materials, the next step is to decide whether (a) to pursue a waiver of inadmissibility or (b) to submit a letter (or memorandum of law) explaining why the conviction in question is not a CIMT. Assuming the latter, the letter, attachments, and the client's visa application should be submitted to the consulate with a cover letter presenting the best arguments for finding that the client is not inadmissible and is eligible for a visa.**

## Final Thoughts

While this article uses a particular conviction under German law as an example, the analysis required and practical considerations facing visa applicants and their immigration counsel are relevant to any foreign conviction. In representing such a client, it is vital to compile a clear and complete record reflecting the client's history. Also, contact attorneys who are licensed in the relevant foreign jurisdiction and the United States. By engaging in such robust consultations, practitioners will be providing their clients with the zealous representation they deserve.

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1 *See* P. R. Dadhania, "The Categorical Approach for Crimes Involving Moral Turpitude After *Silva-Trevino*," 111 *Colum. L. Rev.* 313, 315 n.14 (2011).

2 *See* G. Taylor, "Concepts of Intention in German Criminal Law," 24 *Oxford J Legal Studies* 99–127 (2004). For a comparison of intent concepts under common law to those under civil law, see R. L. Christopher, "Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions," 28 *Cardozo L. Rev.*, Vol. 28:6, p. 2675.

# POETIC JUSTICE

**Julia Manglano Toro** *is a Chicago-born mother of 3 and a Washington, D.C., solo practitioner*

## In Search of Human Rights

Hear the human rights
Hear the nightmare
Hear the cries
Hear the anxiety

See the human rights
See the scars
See the gunshots
See the child suffering

Feel the human rights
Feel the bullet
Feel the cuts
Feel the handcuffs

Conflicts continue
Courts don't care
Domestic violence doesn't disappear
Police don't protect
The process is painful
All there is, is fear

In search of human rights

*Editorials, Comments, and Opinions*

# In Support of Military Spouses

*by*
**Sean R. Hanover**
*Hanover is the principal attorney at Hanover Law, P.C. in Washington, D.C.*

"*DEL MUNDO* IS AN ADDITIONAL ARROW FOR THE IMMIGRATION ATTORNEY'S QUIVER."

Having been actively involved with the U.S. Armed Forces for many years, I was delighted to help a young Navy family struggling with an immigration challenge. Seaman Frank Brown and his Japanese wife, Asoka Brown (both aliases to protect their identities), experienced significant problems stemming from Asoka's undocumented status. She had originally entered the United States legally through the Visa Waiver Program in October 2008 and married Frank. She then returned to Japan, where she continued to work and raise their only child. She did not adjust status and her husband did not sponsor her. In 2009, after concluding affairs in Japan, Asoka returned to North America, with Frank accompanying her; Frank had received an order to transfer to Norfolk, VA. They first vacationed in Canada and then entered the United States across the Canadian border without inspection. This uninspected entry was unintentional; as they drove to Norfolk, they gave no thought to the border crossing.

The Browns then stayed in the United States for three years without adjusting status or applying for any type of legal status. They approached our law firm in early 2012 to obtain help getting legal status. Asoka's entry without inspection status made this a difficult proposition. This was further complicated by Frank's impending deployment to the Persian Gulf; the prolonged separation would leave Asoka severely hamstrung without him—she could not legally drive, work, or do anything outside of the immediate area of the base, where her military family ID card was operative.

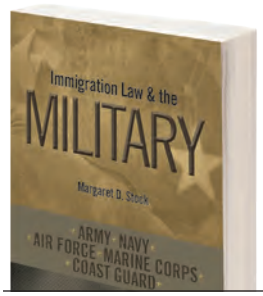
## WHAT OUR RESEARCH REVEALED

We determined that Asoka was eligible to adjust status based on *Del Mundo v. Rosenberg*, 341 F. Supp. 345 (C.D. Cal. 1972). While rather dated, this case remains valid, and clarifies the rights of service members married to undocumented immigrants. In *Del Mundo*, the petitioner, a service member in the U.S. Navy, married an undocumented immigrant who had entered the United States illegally and faced deportation proceedings. The court articulated a policy rationale for adjusting the status of the spouse of a service member who entered without documentation:

> Petitioner's husband is under military orders to remain in the United States, stationed at San Diego for a specified tour of duty. The Respondent's refusal to allow Petitioner to remain with her husband here during his tour of duty in the United States has placed an unreasonable burden upon the serviceman, a burden which is contrary to the language, intent and purpose of 8 USC §1354, undermines the morale of the serviceman, and is thus harmful to the best interests of the Armed Forces. *Id.* at 349.

In that vein, the court established a two-step test to see if a service member and his or her spouse should receive any protection under this ruling:

1. Is the spouse in fact a member of the U.S. Armed Services? →

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2. Is the marriage valid under the [state] law? *Id.* at 349.

While *Del Mundo* involved a stay and adjustment of status during the pendency of a deportation proceeding, the case still applies to Asoka. After all, her unlawful status rendered her removable and ineligible to re-enter the United States for 10 years. Consequently, Frank could neither take his family with him overseas and return to the United States, nor could he let his wife remain legally in the United States—the very situation envisioned by *Del Mundo*.

We filed a standard Form I-130 for the Browns in April 2012. The application included a narrative explaining how the Browns' situation paralleled the facts in *Del Mundo*. Additionally, we provided certified orders showing that Frank was permitted to have dependents accompany him. We also supplied proof of legal marriage in the United States, which must accompany the Form I-130 in any case.

## THE OUTCOME WE'D HOPED FOR

Asoka was asked to provide biometrics about one month after the filing. She attended the I-130 interview, where she was represented by our office. By August 2012, she had received approval of her adjustment to lawful permanent resident status. This case was resolved in record time, even in the case of military clients.

Use of the *Del Mundo* case is not well-documented in the immigration law community. Furthermore, it remains an open question how the BIA or other federal courts would treat an appeal in which *Del Mundo* is invoked as the basis for relief. Nonetheless, when assisting a member of our armed forces whose spouse faces an immigration issue similar to Asoka's, *Del Mundo* is an additional arrow for the immigration attorney's quiver.

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

# Congratulations to the Winners of the *Kurzban's 13th Edition* Haiku Contest for 2012!


Eric Lockwood
**Charity: Esperanza Immigrant Rights Project**

*The regs daunt like a*
*tsunami wave, an orange*
*life-vest sits nearby*

Keith L. Southam
**Charity: National Immigrant Justice Center**
**(part of the Heartland Alliance)**

*Questions abounding;*
*Index; flip; scan; scowl; repeat;*
*Answer resounding.*

Sarah Woelk
**Charity: Casa Marianella Immigration Legal Services**

*Tell the publisher*
*This book should be on Kindle.*
*I can't carry it.*

Matthew J. Lamberti
**Charity: York County Prison Library to be donated by Pennsylvania Immigration Resource Ctr.**

*Index like water*
*Covering all legal grounds*
*And sustaining life*

Nolan Garrido
**Charity: Farmworker Association of Florida**

*Fighting the good fight*
*Kurzban's lights our wayward road*
*As Congress bickers*

**A copy of *Kurzban's* will be donated to each winner's named charity.**

# BEHIND THE CASE

*by* Sheeba Raj

**CASES:**
***Hajro et al. v. USCIS, et al.,***
**No. C 08-1350-PSG**
**(N.D. Cal. Oct. 15, 2012)**

***Hajro v. Barrett,***
**No. C 10-1772 MEJ,**
**(N.D. Cal. Sept. 18, 2012)**

**ATTORNEY:**
**Kip Evan Steinberg *et al.***

## Recovering Fees Under EAJA and FOIA ... It Can Be Done!

The U.S. District Court for the Northern District of California has awarded more than $300,000 in attorney's fees and costs under the Freedom of Information Act (FOIA) for FOIA violations after rejecting the government's claim that bureaucratic inefficiencies caused delays and withholding of documents requested by the plaintiffs. The court held that the government's actions "may not have been in good faith" and that "the evidence suggests its actions teeter on the edge of obduracy."

In a decision dated October 15, 2012, U.S Magistrate Judge Paul Grewal determined that the government is responsible for attorney's fees dating back to 2007, totaling more than 470 hours. According to the court's opinion, FOIA authorizes the court to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section [5 USC §552(a)(4)(E)] in which the complainant has substantially prevailed." The opinion goes on to list the criteria necessary for a show of entitlement to fees under FOIA.

AILA member Kip Evan Steinberg was among the three attorneys granted fees and costs associated with their representation of Mirsad Hajro. He, alone, requested close to $286,000 to cover his fees over a five-year period.

In a related opinion dated September 18, 2012, Chief U.S. Magistrate Judge Maria-Elena James ordered the government to pay Steinberg $66,764.44 under the Equal Access to Justice Act (EAJA) for costs and fees incurred during his representation of Hajro. In the underlying case, James had ruled that Steinberg's client "did not provide false testimony in connection with his Form I-485 or N-400 Applications," and deemed him eligible for naturalization, while finding the government unable to substantially justify its legal positions. The award is appealable, however, and the government has 60 days to file.

> **"[Y]OU'RE NOT DOING YOUR JOB FULLY AS AN ATTORNEY IF YOU'RE NOT ABLE TO TAKE ADVANTAGE OF ALL THE TOOLS OF THE PRACTICE TO ADVANCE YOUR CLIENTS' INTERESTS ...."**
> —Kip Steinberg

Steinberg, who runs his own practice in San Rafael, CA, noted that costs and fees under EAJA are mandatory if the government fails to meet its burden. "What's discretionary, [however], is the amount of fees and the amount of hours [judges] will allow," he explained. "The judge can often cut down your hours or say you were inefficient or you took too much time on this. They can disallow things, but they didn't in my case. They granted me virtually everything." Also, an attorney who has established eligibility for an award is also entitled to recover "fees on fees," said Steinberg, citing Commissioner, INS v. Jean, 496 U.S. 154 (1990). That is, he or she can receive remuneration for time reasonably spent on pursuing the fees request.

Steinberg also said that some AILA at-

torneys shy away from federal court representation and stick to administrative work "because so much of [the] administrative work is discretionary and they don't want to antagonize immigration officers by suing them, and I couldn't disagree more for several reasons." He explained that, in his experience, "the government people only respect you more when you hold them accountable by going to court." Also, "you're not doing your job fully as an attorney if you're not able to take advantage of all the tools of the practice to advance your clients' interests …."

For practitioners considering recouping attorney's fees and costs, Steinberg recommended consulting AILA's resources, for example, Washington Chapter member Robert Pauw's Litigating Immigration Cases in Federal Court; the book dedicates a full chapter to this issue. He also suggested asking fellow AILA attorneys to share their pleadings. One also can join AILA's Federal Court Litigation Section.


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

# The *Foreign Affairs Manual*: It's for More Than Just Consular Processing

*by Jason Mills*



The pre-conceived notion that the *Foreign Affairs Manual* (FAM) is a resource dedicated solely to consular processing couldn't be further from the truth. Rather, it is a comprehensive resource that weaves together statutes, regulations, and case law regarding other types of immigration law, including family-based and criminal immigration cases processed and filed entirely in the United States.

## Criminal Immigration

Let's say a corporate client with an H-1B visa recently filed an adjustment of status in an EB-2 category. He is very worried about information that he presented in his adjustment of status application because he did not disclose that he was arrested for a minor theft offense when he was 19 years old in England. At the time, he had taken someone's cell phone as a prank, but ended up keeping it. The case was filed and disposed of as a misdemeanor ticket. He paid a fine and served no jail time. He understands through his own research that the criminal act itself is considered a petty offense and will not affect his ability to adjust. The client, however, did not disclose this arrest on his adjustment of status application because he did not want his employer to know about this embarrassing fact.

Considering that he has an interview in a few days, he asks an attorney about the possible ramifications of his nondisclosure, including a denial of the application. In 9 FAM 40.6 Exhibit I, a chart lists the grounds of inadmissibility for immigrants and nonimmigrants, as well as the applicable waivers. Using this chart, the attorney can quickly find the appropriate ground of inadmissibility, which, in this case, is a potential misrepresentation, as well as the applicable waiver, if one exists. Additionally, this chart mentions 9 FAM 40.63, which provides related statutory and regulatory provisions. The corresponding notes offer, among other things, the criteria for inadmissibility under INA §212(a)(6)(C)(i), precedent cases, and information on timely retractions of misrepresentations. According to 9 FAM 40.63 N4.6, the client can timely retract the misrepresentation at the interview. By doing so, the client is likely to avert a finding of inadmissibility, even if the misrepresentation is found to be material.

## Family-Based Immigration

Relevant to family-based immigration cases, the FAM describes the criteria for a "valid" marriage for immigration purposes. 9 FAM 40.1 N.1.1–1.5. So let's say a Texas-based client would like to adjust status in the United States but is unsure if his marriage is legitimate. He entered as a B-2 visa holder, but overstayed. He is later arrested for driving while intoxicated in Texas. While serving a sentence after being convicted for this offense, he entered into a proxy marriage with a U.S. citizen he had been dating. He was later released because U.S. Immigration and Customs Enforcement did not issue a detainer in his case. He would like to know if he can file a one-step adjustment. He has addressed the issue of his arrest, but worries if the proxy marriage will be deemed valid. An attorney can use the FAM to determine whether the proxy marriage is valid.

A portion of 9 FAM 40.1 N.1.1, which includes succinct references to the relevant Defense of Marriage Act and INA provisions, at first glance, appears to generally not recognize proxy marriages as valid for immigration purposes. *See* 9 FAM 40.1 N1.1b. But see 9 FAM 40.1 N1.3-1 "Consummated," where it states, "For the purpose of issuing an immigrant visa (IV) to a 'spouse,' a proxy marriage that has been subsequently consummated is deemed to have been valid as of the date of the proxy ceremony. Proxy marriages consummated prior to the proxy ceremony cannot serve as a basis for the valid marriage for immigration purposes."

# CIS Ombudsman Recommends Improvements to Asylum Process for Unaccompanied Children

*by David Cleveland*

On September 20, 2012, the Office of the U.S. Citizenship and Immigration Services (USCIS) Ombudsman (CIS Ombudsman) published recommendations regarding how to improve the asylum process for unaccompanied alien children (UAC). In the document titled, "Ensuring a Fair and Effective Asylum Process for Unaccompanied Children" (Sept. 20, 2012), the CIS Ombudsman concluded that the current USCIS procedures "do not provide adequate protections" for such children, and cause unnecessary delay and confusion. *Id.*

For example, the child, without immigration status, is apprehended and placed into the custody of the Department of Health and Human Services (HHS), which has social workers trained to assess parent-child relationships and housing needs. HHS determines the child to be a UAC. The child then appears before an immigration judge and Immigration and Customs Enforcement counsel, who agree that the child is a UAC. But upon transfer to USCIS, the asylum officer spends "half of the entire interview" on whether the child is still a UAC. *Id.* at 6. The case is sent to USCIS headquarters, where it stays for more than one year. *See id.* at 11. USCIS then rejects the case and sends it back to immigration court.

"This circular process of returning cases to [the Executive Office for Immigration Review (EOIR)] can immediately be eliminated if USCIS relies on determinations made in immigration court," the CIS Ombudsman recommends. And Congress did not require a re-determination of UAC status, but USCIS nonetheless expends valuable resources on that issue. This creates "delay and confusion," and thwarts the will of Congress. *Id.* at 4.

As a practical matter:

1. Ask your asylum office to have a designated point of contact for coordinating UAC interview schedules.
2. E-mail the Ombudsman at cisombudsman.feedback@dhs.gov when USCIS is ignoring the recommendations of the Ombudsman.
3. For general information, see the CIS Ombudman's website.
4. To request case assistance, use the Form DHS-7001.

**David L. Cleveland** *is a staff attorney at Catholic Charities of Washington, D.C., during which time he secured asylum or withholding of removal for people from 39 countries. He also served as chair of the AILA Asylum Committee from 2004 to 2005.*



The client says that he and his spouse have been cohabitating since his release and the marriage has been consummated since that time. Of course, counsel must stress the importance of documenting their shared experiences, purchases, and residence. However, it is reassuring that the FAM supports the legal validity of a proxy marriage.

## Keep the FAM at Your Fingertips

The FAM is an important research tool that is often overlooked when handling non-consular processing cases. Its easy-to-follow format provides statutes, regulations, and case law for quick cross-referencing. Make sure this invaluable resource is among the first you consult.

**Jason Mills** *is the owner and primary attorney at The Law Office of Jason Mills in Fort Worth, TX. He became the first-ever board certified attorney in immigration and nationality law by the Texas Board of Legal Specialization in Tarrant County in 2006. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

# WHAT'S HAPPENING!

## THE 4-1-1:

Washington, D.C. Chapter member **Alberto Benítez**, professor of clinical law at The George Washington University Law School, has been named a 2012 recipient of the Elizabeth Hurlock Beckman Award by Wells Fargo. This $25,000 award recognizes educators who have inspired their former students to "create an organization [that] has demonstrably conferred a benefit on the community at large" or "establish on a lasting basis a concept, procedure, or movement of comparable benefit to the community at large."

On September 14, Department of Homeland Secretary Janet Napolitano announced that **Maria Odom** was appointed as the new Citizenship and Immigration Services Ombudsman. Odom most recently served as the executive director of Catholic Legal Immigration Network, Inc. She also has worked for the private sector and the U.S. Department of Justice.

Washington State Chapter member **Lisa N. Ellis**, an associate at Ellis Li & McKinstry PLLC, has written *Visa Solutions for International Students, Scholars, and Sponsors: What You Need to Know (Quick Prep)*.


Washington State Chapter member **Tahmina Watson** gave birth to a daughter, Sarina Mishel Watson (right), on June 21, 2012.

Central Florida Chapter member **Elizabeth Ricci** was quoted in 850 Magazine, where she discussed the importance of completing I-9 forms correctly.

Upstate New York Chapter member **Esra Gules-Guctas** has relocated her law office to Clifton Park, NY.

Washington, D.C. Chapter member **Nici Kersey** (formerly employed by Seyfarth Shaw LLP in Atlanta) has moved to the Charlottesville, VA, area and opened Kersey Immigration Compliance, LLC.

NY Chapter member **Luanda E. Cavaco** passed away on September 15 after losing her battle against sarcoma. AILA's thoughts and prayers are with her family.

COURTESY PHOTOS

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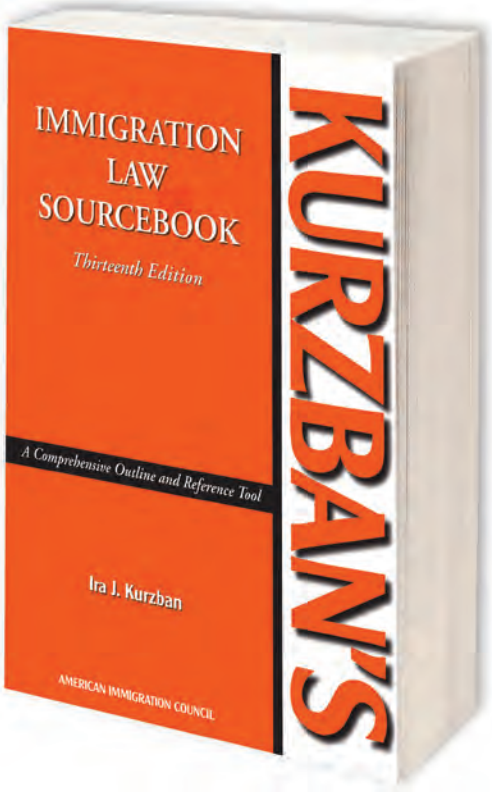


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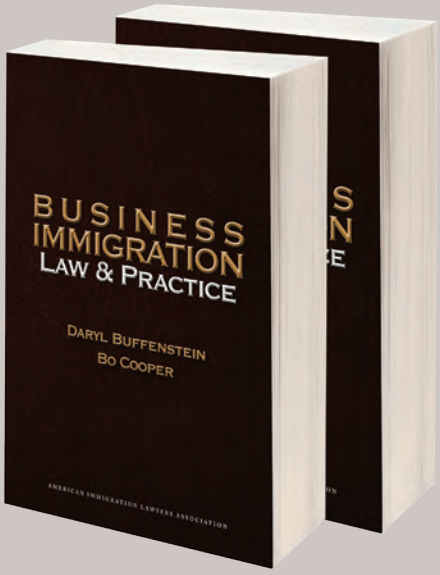


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