

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AN IMMIGRATION DIALOGUE

# VOICE

MARCH/APRIL 2011  
VOL. 2 ISSUE 2

## NEW SERIES:

Starting a  
Law Firm

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*Practicing Solo?*

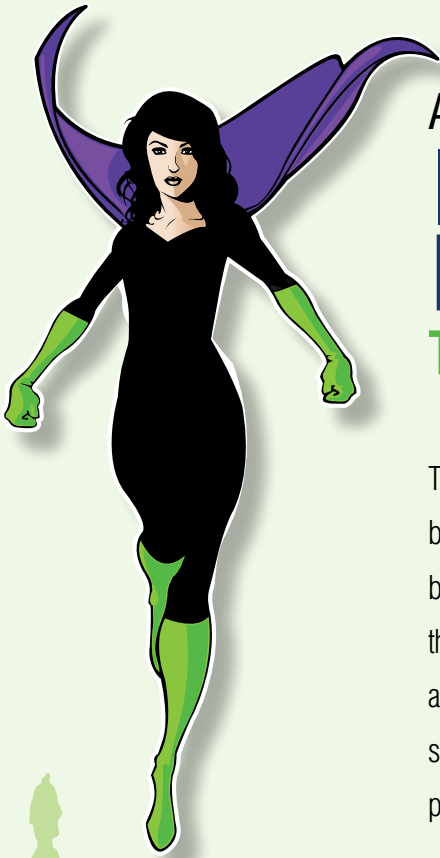
Now's the  
Time to Hire

**EB-5s:**  
Permanent  
Residence Thru  
Job Creation

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from

PERSECUTION to  
The Central American  
Gang Phenomenon  
REFUGEE



## AILA IS A STRATEGIC PLAYER IN THE **IMMIGRATION REFORM MOVEMENT!** **TAKE ACTION TOGETHER ON APRIL 7!**

The path to immigration reform may be rockier since the start of the 112th Congress, but AILA is ready to confront the adversity head on. The enforcement-only stage has been set by the House majority and we must remind our representatives and senators that we cannot enforce our way out of a broken immigration system. Stand strong and united on April 7 for AILA's **2011 National Day of Action**. It does not take superpowers to make a difference on Capitol Hill; it takes real solutions explained by people with a practical understanding of the problems.

AILA members will mobilize to teach members of Congress about the complexities of immigration law and explain the way that the law impacts their clients. AILA advocates who prefer to act locally will be able to visit the local offices of their U.S. representatives and senators, and talk to the district staff members who typically handle constituent services and immigration casework. Showing them the amount of public support for progressive reform is half our strategy for keeping this debate objective. Free registration includes a breakfast briefing, a luncheon, and complimentary access to the ***American Immigration Council's Immigrant Achievement Awards and Reception!***



# READY, SET, ACTION

A message from AILA  
Director of Advocacy Gregory Chen,  
urging your participation in  
National Day of Action on April 7.



## VOICE

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## What's New?

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- more immigration forms, now totaling 271
- Coming to AILALink in March—***The Consular Practice Handbook!***

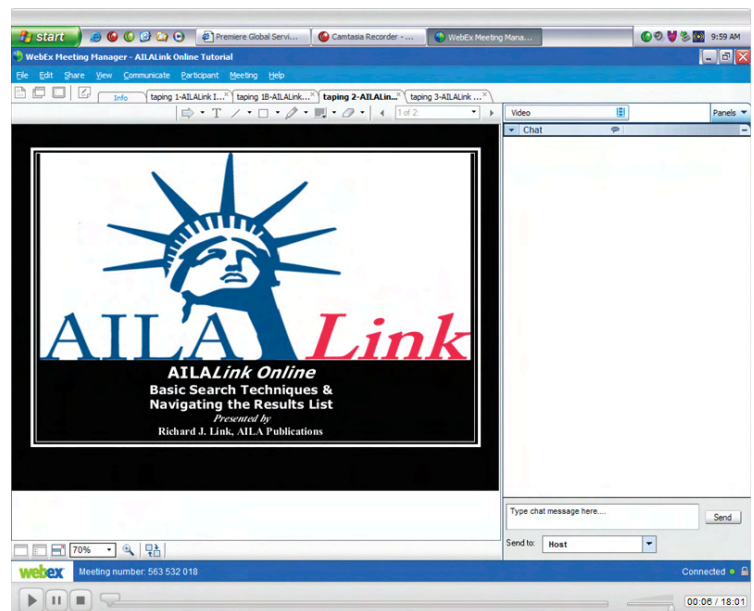


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After many Central Americans migrated to the United States to escape civil conflicts, they found themselves out of their culture and living in poverty. As a result, a small percentage of the young immigrants joined gangs or formed gangs of their own.  
*by Thomas Boerman*

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Despite a global economic crisis, foreign investors with substantial capital continue to explore business opportunities in the United States—spurring a boom in the EB-5 program.  
*by Kate Kalmykov*

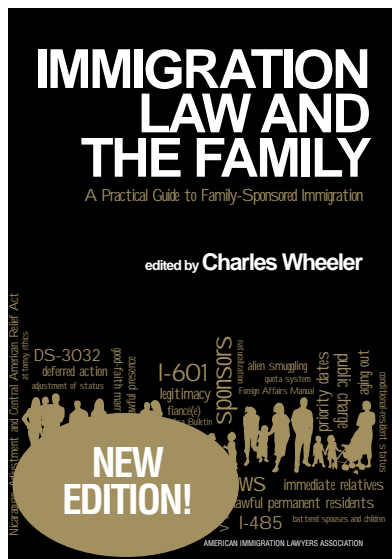


Justice will come. I'm sure. Wherever there is ... a kid, who could be the son and the daughter of a Latino immigrant, who cannot attend a school in the United States of America, that kid **should be a concern to all of us and our responsibility.**

—Colombian singer **SHAKIRA** comments on the various anti-immigration bills in the United States (AP via Washington Post)

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**“The president has thrown down the gauntlet, challenging Congress. It is incumbent upon the Republican leadership to respond by intervening to defend DOMA, or they will become complicit in the president’s neglect of duty.”**

—Tony Perkins, Family Research Council

**Same-Sex Marriage, Civil Unions, and Domestic Partnerships**

*The New York Times*

**CHECK OUT: “Immigrating as Same-Sex Couple” in the June 2010 issue of VOICE**

**Utah Senator Unveils Broad Immigration Reform**

*Bloomberg News*

**“It’s opening our doors and saying, ‘Come to Utah if you’re illegal.’ It will make our problems worse.”—Rep. Chris Herrod, R-Provo**



**HELP WANTED**

**All but the smallest Georgia businesses would have to screen new employees’ immigration status under legislation a House committee approved on Feb. 28.**

**Ga. House Panel OKs Tough Immigration Bill**

*Atlanta Business Chronicle*

Senate Vice President John Vratil, a Leawood Republican, said **he thinks it is foolish to consider Arizona-style reforms** now while that state’s new laws are entangled in legal challenges.

**Kansas Unveils Arizona-like Bill Targeting Illegals**

*Illegal Alien News Update*



**Oakland Homes Raided  
After Fed Death in Mexico**

*The Detroit News*

**The coordinated raids  
“are attacking trans-  
national gangs and  
their associates with  
links to drug traffick-  
ing organizations.”**

—Khaalid Walls, spokesman  
for Detroit ICE

**“Prosecutors said  
Howard Industries  
knowingly hired illegal  
immigrants and even  
hired some of them  
after the Social Securi-  
ty Administration told  
the company that their  
Social Security  
numbers were not  
valid.”**

**Howard Industries Guilty  
in Immigration Raid**  
*AP via KansasCity.com*



**Ring Sold Fake IDs to  
Immigrants in 11 States**

*FOX News*

**“This was not a  
mom-and-pop  
organization but  
rather organized crime  
on a grand scale.”**

—John Morton, ICE Director

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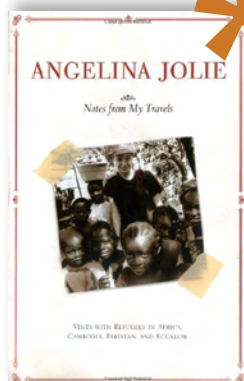
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# READER'S CORNER

## Immigration in Prose: *AILA Staff Picks*



BUY

Review courtesy of **Sara Ibrahim**, AILA Liaison Associate, whose work includes liaison with the AILA Refugee and Asylum Committee.

### *Notes from My Travels: Visits with Refugees in Africa, Cambodia, Pakistan and Ecuador* by Angelina Jolie

**"I** think we all want justice and equality. We all want a chance for a life with meaning. All of us would like to believe that if we were in a bad situation someone would help us," writes Angelina Jolie in *Notes from My Travels*. The book is a compilation of Jolie's notes from her trips to Sierra Leone, Tanzania, Cambodia, Pakistan, and Ecuador before and after becoming a United Nations High Commissioner for Refugees (UNHCR) [Goodwill Ambassador](#). Her trip to Cambodia, which included traveling with [Halo Trust](#) and visiting the Tuol Sleng Genocide museum, changed her life.

Jolie focuses on the stories of the refugees

she meets, the UNHCR staff, and other nongovernmental organization (NGO) staff. How the experience affected her is revealed when she writes about her nightmares, her physical journey, and her gratitude in between pages documenting what she witnessed. Gratitude is a major theme in her journals, starting with her dedication to the UNHCR staff and men, women, and children who are now or have been refugees.

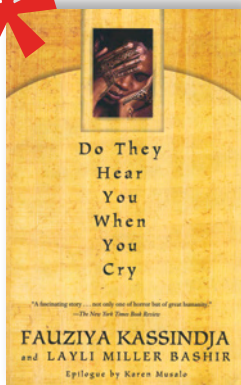
Her experience in Cambodia reminded me of a visit to Bosnia several years ago with [Global Youth Connect](#). Witnessing the resilience and warmth of everyone we met in the aftermath of genocide changed my life.

For more on Jolie's work through the UNHCR, you can find more than 30 of her [field missions](#), as well as [excerpts](#) from several of her journals.

### *Do They Hear You When You Cry* by Fauziya Kassindja, Layli Miller Bashir, and Karen Musalo

**F**GM. Thankfully, the average American has no idea what that acronym means. Female genital mutilation is not a common practice in America, a fact for which we should be grateful; others are not so lucky.

*Do They Hear You When You Cry* is the true story of Fauziya Kassindja, told in her own words only a year after her harrowing experience with the U.S. immigration system finally ended. As a 17-year-old, Fauziya fled her homeland of Togo to escape FGM and her forced marriage to a man more than twice her age who already had three wives. Her father was deceased; her banished mother had no say in her future; her powerless older siblings had to watch as their baby sister came under



BUY

Review courtesy of **Amanda Walkins**, AILA Member Outreach Associate.

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the wrath of their conservative aunt. She faced the hardest decision a person must make—to stay with family at home and face unavoidable suffering, or to leave everything familiar and risk the unknown. Fauziya knew that if she stayed, she would be subject to the FGM ritual.

She manages to flee Togo for the United States, only to be imprisoned and abused. Dejected, Fauziya struggles in her quest for asylum, which has been well-documented for legal purposes. But I encourage you to share this story with others, especially those who would like to think that our current immigration system needs no reforms. Perhaps this glimpse into one immigrant's life will remind us of the sanctuary this country has provided for millions. Perhaps it will serve to humanize immigrants as individuals seeking help, rather than a group of faceless "others." ▼

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# UNSOLICITED ADVICE

from Cletus M. Weber

## You Should Consider Hiring Someone for Your Immigration Practice

If you have been practicing immigration law solo or with a partner for more than a few months and have yet to add any employees, now is the time to start thinking about hiring someone. Although employees certainly add a level of challenge to your practice, they also create a good opportunity for you to spend a larger percentage of your time on the tasks most valuable to your clients.

### Pyramid of Value

Not all tasks provide the same value to the client. The Pyramid of Value below represents the relative value that various types of tasks provide to your client. The Pyramid of Value conceptualizes some important practical considerations:

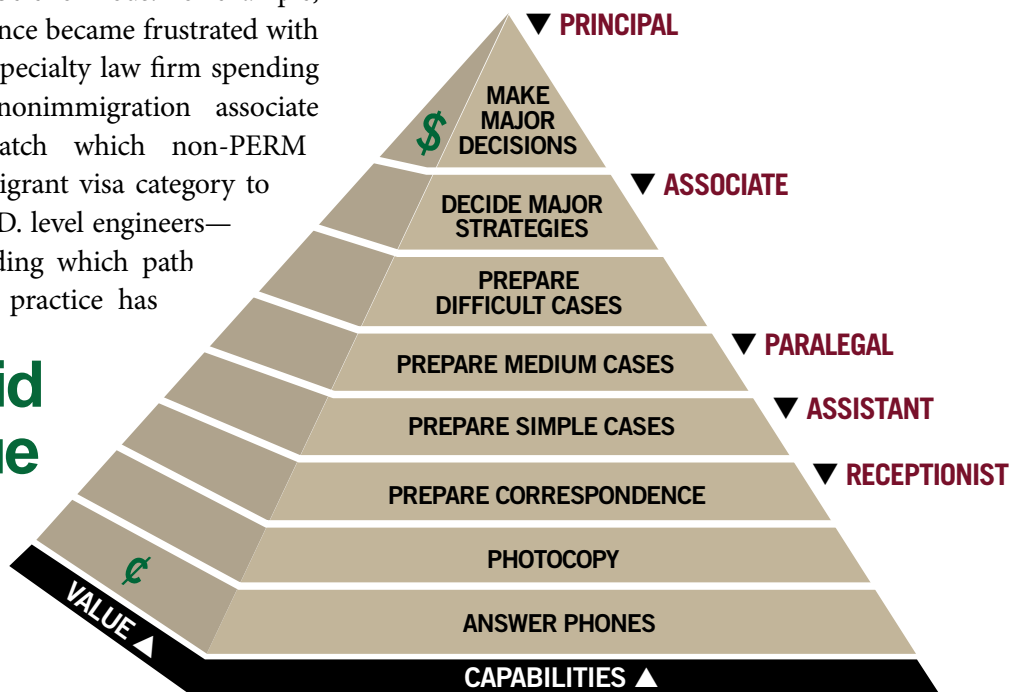
The biggest nuggets of gold reside at the top of the pyramid. The largest chunks of lead rest at the bottom.

Value at the peak can be enormous. For example, a technology company once became frustrated with a multi-national, multi-specialty law firm spending about \$5,000 for a nonimmigration associate to research from scratch which non-PERM employment-based immigrant visa category to pursue for one of its Ph.D. level engineers—without ultimately deciding which path to pursue. Because my practice has

focused on such cases for many years, I took only about two minutes to review the résumé and decide. Comparatively speaking, I created \$150,000 per hour of value for this particular client—at least for those two minutes. Similar instances of great value can be found in all areas of immigration law and at many stages of a case.

For a task done well, the value to your client is about the same irrespective of who may have completed the task. For example, an approved H-1B petition provides the same value to your client whether you did the entire case yourself or had a staff member do everything, except for some early communications and the final review. Conversely, walking to the post office to mail the petition to USCIS provides a relatively low benefit to the client irrespective of whether you or your staff member does the walking. ➔

### Pyramid of Value



GRAPHIC BY BRADLEY AMBURN/SHUTTERSTOCK.COM

## Drain of Detriment

The flip-side of the Pyramid of Value is the Drain of Detriment. In most ways, the Pyramid of Value and the Drain of Detriment are just the opposite of each other. For example, some mistakes can cause tremendous detriment to the client. Likewise, a task done poorly causes generally the same level of detriment to the client irrespective of who in your office did the poor work.

There is one major difference, though. On the Pyramid of Value, lower-level staff generally lack the experience needed to make single contributions of major value to your clients, but in the Drain of Detriment, these same staff members can easily make mistakes of enormous harm to your clients.

For example, an overly “helpful” receptionist potentially can create great harm by having this phone conversation with a client:

“All of our lawyers are attending the national AILA conference this week, but from what you’re saying, it’s definitely safe to travel. To your home country is fine, too. Yes, the spouse and kids can go, too. No problem.”

Likewise, simply mailing documents to the wrong address, or mixing up originals and photocopies on forms being filed, among other things, can all cause serious harm to clients.

## Moving Up Without Sliding Down

Ultimately, you can create the highest total value for your clients by moving your own time upward on the Pyramid of Value without allowing *anyone* on your team to slide down the Drain of Detriment. To do so requires competent, caring, and careful staff and clear communication to ensure they know your and your clients’ needs and expectations.



## Drain of Detriment

Hiring and managing employees is a book on its own, but below are some tips for maximizing the value you create for your clients:

- **Hire help to cover the bottom levels first.** These are the tasks where your own time provides the lowest relative value to your clients. (Starting with part-time help is fine.)
  - **Hire properly.** Test first and interview second. This order prevents hiring someone you like but who doesn’t possess the right skill-set for the job.
  - **Communicate clearly and often.** Employees can’t read minds any better than you can. Your clients’ and your needs have to be clear for your employees at all times.
- **Overcome the crippling “I can do everything better myself” rationalization.** This almost always will keep you from finding someone to help you better serve your clients. Instead think, “With the right help and careful staff supervision, I can create much more total value for my clients than I can on my own.”

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Best of luck moving yourself up the Pyramid of Value while keeping everyone away from the Drain of Detriment. ▀

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



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## Starting an Immigration Law Firm

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

### Don't Quit Your Day Job

Before you open your immigration law practice, there is plenty of work to be done. Remember, on the day the shingle goes up, the firm still has no income, only expenses. Before opening for business, office space must be rented, staff hired, and a marketing strategy put in place. In addition, you should hire an accountant, form a business entity, set up bank accounts, obtain health and malpractice insurance, and fulfill all State Bar requirements related to the establishment of a law practice.

*The art of delegation is sometimes viewed in a negative light. However, delegating certain tasks means that immigration applications are reviewed twice before leaving the office.*

### Should You Enter into a Partnership?

This is a good question because you will spend more time with your partner than with your spouse. The premise that the partnership will be dissolved at some point should be written into the partnership agreement. The partnership should be based on practicing law, and each partner must be comfortable with the other's work ethic and habits before entering into an agreement. Before committing to a partnership, consider sharing expenses for a period of time to allow yourself the opportunity to evaluate whether a full partnership would be advantageous.

### Keep Your Costs Down

Remember, when the phone is ringing off the hook and your waiting room is filled with clients, that is the time to rent the bigger office and hire more staff. Until then, you should keep major expenses

to a minimum. Payroll is the highest expenditure of any business, but the phone must be answered. If you are on a shoestring budget, you can hire someone to work from home. They can screen calls, take messages, set up appointments, and keep you updated via e-mail.

When renting an office, it is important to negotiate the shortest lease possible in order to allow for flexibility in case your firm grows more quickly than expected. Also, you can rent a small office space from a large law firm and use that firm's conference room to meet with clients. Along with saving rent, you will be able to make contacts with the other lawyers and potentially increase referrals to your firm.

Your office location should be in an area with a high concentration of your target clientele. However, if your practice entails daily appearances at immigration court, your office should be close to the court. If that is not possible, you should devise a system in which other attorneys cover some of your master calendar hearings.

### Build Immigration Court Efficiency

After opening your practice, you will need to attend many immigration court hearings and U.S. Citizenship and Immigration Services (USCIS) field office interviews to represent your client. From day one, you should speak with attorneys at the master calendar hearings and USCIS interviews about outsourcing. But there will be cases that you will need to take personally. However, there also are cases that should be outsourced to contract attorneys, such as continuance requests, documentation submission, etc. It is important to remember that as long as the contract attorney is well prepared for the case, you can still provide quality service to your clients. Moreover, some contract attorneys have years of experience and



◀ **NEED MORE ADVICE?** [Contact Reid Trautz](#), Director of AILA's Practice & Professionalism Center. Along with AILA member Sandra Grossman, Reid organized AILA's Open House CLE, "How to Start Your Own Immigration Practice," on Feb. 11, 2011.

can be an excellent source of information about a specific USCIS field office procedure or the habits of a particular immigration judge.

### **Build Business Immigration Efficiency**

After your first year of practice, you should not be completing forms for business immigration. Instead, you should be making legal decisions about the applications, writing request for evidence responses, and reviewing everything before it leaves the office. The art of delegation is sometimes viewed in a negative light. However, delegating certain tasks means that immigration applications are reviewed twice before leaving the office. You could delegate basic tasks to your secretary, such as completing biographical data on certain forms, or you can hire a paralegal to complete the entire application. This would allow more time for you to review the application, make the appropriate decisions, and write the legal arguments.

### **Market Your Firm**

It is important to allocate a certain amount of money to marketing each month. In the beginning, you should prioritize your marketing budget over any increase in payroll or rent. It is critical to get new clients into your office. Over time, your firm should receive more referrals from satisfied clients, and you may be able to reduce your marketing budget. If you intend to target a certain ethnic group, you should find out which newspapers are popular in that community. Try to negotiate a preliminary four- to six-month trial price for an advertisement in the newspaper. If the newspaper claims to have a wide circulation that will reach many potential clients, then you should request a low initial rate to confirm the newspaper's assertions. It is also a good idea to write informative immigration articles for the newspaper. Internet advertising is an

option, but you should demand a low trial price and make sure there is a way to track how many times your advertisement is viewed on the Internet.

Since target advertising is the goal, smaller periodicals such as newsletters published by ethnic business groups, cultural centers, churches, or mosques, can be cost effective and an excellent way of attracting clients. Speaking engagements are another option. Your clients may belong to an ethnic chamber of commerce, church, or mosque that invites local speakers. You should ask if they could help you set up a brief immigration presentation followed by a question/answer period. Depending on the audience's sophistication, you can present a short PowerPoint presentation illustrating the various immigration options available.

### **Collect Valuable Information**

When a new client calls or walks into the office, make sure he or she completes a client information form, which should include a question on where he or she heard about the firm. You should review this information each month and adjust your marketing strategy accordingly. In addition, request phone numbers, mailing addresses, and e-mail addresses. This information can be a marketing gold mine. All the client information eventually should be stored in a database. You can then send out relevant immigration information to all of your clients. The database can be the perfect target-rich, low-cost marketing tool. ▼

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

# FOREIGN INVESTMENT:



**A Path to Permanent Residence  
Through Job Creation**

**O**ver the past few years, the EB-5 program has grown in popularity. While at first glance this may seem surprising considering the global economic crisis, further examination reveals that foreign investors with substantial capital continue to explore business opportunities in the United States for a variety of reasons. These include the continued weakness of the dollar as compared to foreign currencies, the ability to self-sponsor for a permanent resident card where few or no other opportunities exist for obtaining U.S. permanent residence, and the ability to obtain an immigrant visa with short processing times and no backlog.

In addition to foreign investors, the U.S. government also has taken an increased interest in the program as a viable option for creation of jobs in a time of



## TIP #1

### Get to Know Your Client

While due diligence in the context of the business is a major theme in EB-5 petitions, it is also critical for an attorney to get to know his or her client as well as the client's objectives from the outset of the representation. Few clients are aware that two paths to EB-5 exist: the individual EB-5 petition and the regional center EB-5. To better determine which best meets your clients' objectives, discuss with your clients their needs and future plans.

#### ***Determine the Amount of Capital the Client Wants to Invest:***

The amount of investment for most regional center EB-5s is usually \$500,000. Given the exchange rates in recent years, this has become more affordable to many investors. While some individual EB-5 investments can be limited to \$500,000, the investor

by **Kate Kalmykov**

unprecedented unemployment, as well as a means of attracting high net-worth individuals to the country. The EB-5 program not only encourages the formation of new businesses, but also provides funds for new ventures and projects when other means of obtaining capital has become a serious problem.

As a result, in the past few years the EB-5 program has grown tremendously. As of October 2010, there were 114 approved regional centers, operating in 34 states, including the District of Columbia and Guam. There are approximately 83 initial designation regional center proposals pending with U.S. Citizenship and Immigration Services (USCIS). The rate of EB-5 petition filings tripled between fiscal years 2008 and 2009, and is expected to keep growing. While many business immigration attorneys have seen a drop-off of business in traditional areas of practice such as H-1Bs or PERM applications, the EB-5 offers a path for expansion of their practices and consequently has become one of the most popular topics in immigration law. What follows are 10 tips for preparing successful EB-5 applications.

must prove that the investment is in a "rural area" or in an area that has experienced unemployment of at least 150 percent of the national average rate. The latter is commonly referred to as a Targeted Employment Area (TEA). If the investor cannot meet the burden of proof on these points, the required amount of investment is \$1 million.

#### ***Speak with the Client About His or Her Plans on***

***Obtaining Permanent Residence:*** The individual EB-5 is a better option for entrepreneurs interested in opening a new business or investing in an existing business in the United States. The individual EB-5 requires that the investor be actively "engaged" in the management of the enterprise and demonstrate that he or she has created 10 full-time jobs for U.S. workers at the time of filing the I-526 petition, or that he or she will create these jobs within two years. While this option certainly provides investors with greater control over their investment and the ability to maximize profits, it may not be the best option for those with no business experience. Those without business experience ➡



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may risk losing their permanent residence status at the I-829 Petition by Entrepreneur to Remove Conditions stage, if they cannot demonstrate that they have sustained their investment or created the requisite number of jobs. For those individuals with limited business experience, the regional center EB-5 may be an ideal fit. It is often used by retirees, for students who wish to pursue a higher education in the United States, individuals not interested in employment in the United States, and those who plan to work in the United States at some time in the future but do not want their immigration status to be linked to a particular business in which they must actively participate.

### ***Identify the Investor's Travel Plans:***

The regional center EB-5 offers flexibility to travel, as the individual is not tied to the business in which he or she has invested.

### ***Explain the Lawful Source of Funds Requirement to the Client:***

For both individual and regional center EB-5 petitions, the applicant must demonstrate that the source of investment capital is lawful. In documenting a lawful source of funds, the ultimate focus is on the person who originally obtained the funds while tracing the funds from that person to the investor. Your client may have a brilliant business idea and the funds to support it, but if the funds were not lawfully obtained, you will not be able to proceed with the petition.

***Forewarn Your Client of the Need for Substantial Documentation:*** In order to trace the funds back to the investor, substantial documentation must be included in the EB-5 petition. While the last five

years of tax returns always are submitted with the petition, if income earned in earlier tax years is the source of the investment, the client should be advised that he or she will be expected to submit tax returns reflecting the years that show the highest income level. Likewise, documentation evidencing the source of the investment will be required whether it is business records, documentation of a sale of real estate, a sale of stock, inheritance money, a judgment from a lawsuit, or a gift. Bank records showing the funds and their subsequent transfer to the investment also are required.

In countries that operate on a cash economy, have currency restrictions, or no tax filing requirement, obtaining documentation of source of funds becomes a thorny issue. Often you must perform research to document these conditions and determine creative ways to trace the funds. Statements from a tax or financial professional from the foreign country are often helpful in explaining the country's accepted financial practices. Moreover, clients from countries with high instances of fraud or from countries for which the United States has national security concerns should be warned that USCIS may require an even greater amount of documentation

to evidence the tracing and source of funds.

***Identify Dependent Age-Out Issues at the Outset of Representation:*** If the investor has children who are close to aging out, you should discuss the timing of the investment. Often a regional center petition is much quicker to compile than an individual EB-5.

***Determine if Your Client Has Criminal Convictions or Previous Immigration Violations at the Outset of***

**YOUR CLIENT MAY  
HAVE A BRILLIANT  
BUSINESS IDEA  
AND THE FUNDS TO  
SUPPORT IT, BUT IF  
THE FUNDS WERE  
NOT LAWFULLY  
OBTAINED, YOU WILL  
NOT BE ABLE TO  
PROCEED WITH THE  
PETITION.**

***Representation That May Render Them Inadmissible:***

It is critical for the immigrant investor to be aware of the risks and probability for a successful outcome prior to investing funds.

 **TIP #2**  
**Be Prepared to Answer Questions Regarding Length of Time the Funds Must Remain Invested**

Many investors are concerned about how long they would be parting with their funds. In stakeholder meetings held during the past year, USCIS has clarified many important issues for EB-5 investors. While USCIS had previously indicated that the EB-5 investment would need to be for a specific period of time, such as five years, USCIS recently changed this position and stated that there is no requirement that the investment be made for a specific period of time. Rather, the requirement is that the funds must be committed until after the removal of conditions on permanent residence. However, various regional

centers may impose their own requirements on how long the capital must be committed, and this is information that should be obtained prior to the client's investment.

 **TIP #3**  
**Inform Clients of Your Role in the EB-5 Process**

EB-5 counsel will not only be expected to review and advise on the immigration aspects of the EB-5 petition, but will be expected to have sufficient knowledge of business, tax, accounting, and securities to spot issues and know when to refer clients to counsel specializing in those areas of practice. Immigration attorneys should be wary of becoming too involved in questions outside their expertise, such as those related to the security of the investment, rate of return, expected date of return, feasibility of the project, likelihood of job creation, and other related issues. A business or financial expert should handle these types of questions. However, immigration →



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## IN A WORST CASE SCENARIO, FIRST INVESTORS MAY EXPERIENCE DENIALS IF USCIS DETERMINES THAT THE PROJECT DOES NOT COMPORT WITH THE REGULATORY REQUIREMENTS.

counsel should be able to assist clients in obtaining information to aid them in selecting a regional center or project, for if the project does not succeed, the client may not ultimately get permanent resident status. It is therefore prudent to approach regional centers about their success rates in filings for both I-526 [Immigrant Petition by Alien Entrepreneur](#), and I-829 [Petition by Entrepreneur to Remove Conditions](#).



### TIP #4

#### **Advise Clients That Investment in a Regional Center Does Not Mean Automatic EB-5 Approval**

Many clients assume that because USCIS has designated a regional center that the agency will

automatically approve their petitions. This is not the case. The regional center designation only means that USCIS has authorized the center to pool investments in a certain geographical area in designated industries in order to utilize indirect employment creation in addition to, or instead of, direct employment creation. Even though a regional center may be approved, the project in which the investor invests funds may not be approved for a multitude of reasons.

Clients should be made aware of a recent change by which regional centers can apply for project pre-approval. Although, at the time of writing this practice pointer, not many regional centers had undergone this process, this may add an increased

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level of comfort to investors. However, on frequent occasions, USCIS has raised questions pertaining to projects that have a long record of approvals, and USCIS also can raise questions pertaining to projects that have been pre-approved.

Given these trends, it is often advisable to suggest to clients that they not be one of the first or last investors in a regional center. If the project has not been pre-approved and no I-526 petitions have yet been approved through it, the first investors may experience a delay in adjudication of their petitions. USCIS has held all petitions in certain projects pending adjudication of a request for evidence on job creation methodology, the business plan, or related issues. In a worst case scenario, first investors may experience denials if USCIS determines that the project does not comport with the regulatory requirements. While prior approvals of I-526 petitions for the same project or the pre-approval of a project does not stop USCIS from later questioning aspects of the project, it does provide some level of certainty. Likewise, an investor may not want to be one of the last investors in a regional center project, as any direct or indirect employment creation already may have been allocated to prior investors in the project. Moreover, any shortfall in the projected employment creation could potentially impact investors who are the last to invest.

### **TIP #5** **Explain to Clients That the “At-Risk” Requirement Also Applies in Regional Center Cases**

Many clients carry the misperception that if they invest in a regional center and it fails, the money is guaranteed by the U.S. government. Counsel must advise clients prior to investment that the regional center project represents an at-risk investment, and it is possible that the regional center will go bankrupt. The economy also can impact the project’s practicability and time-frame of completion, which will impact job creation. Should any of these things



occur, the investor could lose his or her investment money and be unable to remove the conditions on permanent residence at the I-829 stage.

### **TIP #6** **“At Risk” Does Not Mean Your Client Cannot Purchase Insurance**

Given the economic climate, many investors have expressed concerns as to whether they can obtain insurance for their investment. USCIS has taken the position that an EB-5 investor can use funds unrelated to the EB-5 investment to purchase insurance from a third party (unrelated to the commercial enterprise or a regional center). This does not alleviate the requirement that the investor’s capital remain “at risk.” Moreover, an indemnity policy cannot constitute a redemption agreement or a guaranteed buy-back arrangement for the investor’s investment in the commercial enterprise. A determination as to whether a specific indemnity policy is contrary to the statutory and regulatory requirements has to be made on a case-by-case basis.

### **TIP #7** **What Can Investors Do if the EB-5 Investment Fails?**

As many new regional centers have entered the EB-5 arena, we are seeing that more and more of them are unable to collect the funds within the specified time-frame or are unsuccessful as an enterprise. Likewise, economic conditions have been particularly hard on new businesses and many have failed to launch. In these cases, the I-526 may have been approved based on the business plan and documentation submitted to USCIS. However, if at the I-829 stage the investment has not succeeded and the jobs were not created, the investor’s petition will be denied. Once USCIS denies the I-829, the investor can try to remove the conditions before an immigration judge or the BIA. If he or she is not successful, the investor will be deemed removable. ➡

## WHILE USCIS HAS NOT DEFINED “MATERIAL CHANGE” IN THE CONTEXT OF EB-5, TRENDS IN ADJUDICATION INDICATE THAT DEVIATIONS FROM THE ORIGINAL BUSINESS PLAN WARRANT A DENIAL.

### **TIP #8** **Business Losses Do Not Necessarily Sound the Death Knell for the I-829**

Is your individual EB-5 client's business in the red? It may not necessarily be a bad thing. Often new businesses generate taxable losses due to various non-cash tax deductions like accelerated depreciation, amortization, or due to certain tax credits that make the tax returns show a loss. This does not mean that the business is a failure—it may in fact be a viable, thriving entity that has created the requisite amount of jobs. It is the EB-5 attorney's job to familiarize him- or herself with tax filings to identify these issues or seek the assistance of a tax professional when it is unclear.

### **TIP #9** **What Happens When Sound Business Decisions Collide with USCIS Policies**

USCIS has recently taken the position that if the project experiences a “material change” after approval of the I-526, it will deny the I-829. While USCIS has not defined “material change” in the context of EB-5, trends in adjudication indicate that deviations from the original business plan warrant a denial. Examples of deviations in the business plan can include delays in the progress of the project, delays in job creation, creation of jobs by the business for positions not originally envisioned in the I-526 business plan, or moving the funds to a new project once it becomes apparent that the original project will not succeed. Therefore, although the requisite amount of jobs may have been created by moving the investment funds to a new project, if the new project differs from what was originally contemplated in the I-526 business plan, the I-829 may be denied.

### **TIP #10** **If There Is a Material Change, Inform Clients of the Possibility of Filing a New I-526**

The December 11, 2009, [Neufeld Memorandum](#) introduced an option for investors whose I-829 could be denied due to material change. Since USCIS has not offered a definition of what constitutes material change, investors and regional centers have to make their own determination of how much divergence from a business plan due to normal business events or economic reality is acceptable. In cases where it is believed that material change has occurred, investors can take action to protect themselves from I-829 denial and

the possibility of being placed in removal proceedings. Specifically, investors may file a new I-526 petition based on the original investment, albeit on the new project or business plan. Once the I-526 and the I-485 or immigrant visa is approved, the investor would restart the two-year conditional residence period anew. However, this is by no means a “fix all.” Only the investor, his or her spouse, and children under 21 can benefit from this new process. Children who are over 21 years of age at the time of the new I-526 filing will not be able to derive the immigration benefit from their parents. In these cases, counsel must work with the aged-out dependents to consider other immigration options that will allow them to remain in the United States. ▼

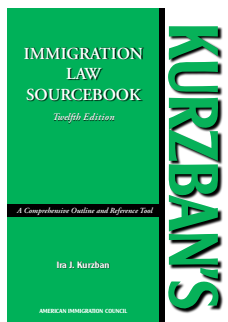
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# BALANCE



by Danielle Polen

## Sweet Dreams

Charles M. Shulz once said, “Sometimes I lie awake at night, and I ask, ‘Where have I gone wrong?’ Then a voice says to me, ‘This is going to take more than one night.’” Unfortunately, there’s more truth than humor in that statement for many individuals: According to the National Institutes of Health’s National Center for Sleep Disorders Research, about 30–40 percent of adults say they have some symptoms of insomnia within a given year. While it may be tempting to reach for over-the-counter sleep aids, a [2006 study](#) published in the *Journal of the American Medical Association* showed that participants who learned relaxation techniques and made modifications like reducing stimuli in the bedroom improved their sleep more than those who opted for pharmaceuticals. Among the techniques that have proven to be useful in combating insomnia

**“... Participants who engaged in a daily yoga routine fell asleep 30 percent faster, and woke during the night with 35 percent less frequency.”**

is yoga. Results from a [2004 study](#) conducted by Harvard Medical School showed that participants who engaged in a daily yoga routine fell asleep 30 percent faster, and woke during the night with 35 percent less frequency. So if [counting sheep](#) (or fire engines) has proven unsuccessful, why not [try this restful routine](#) to help banish your insomnia.

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



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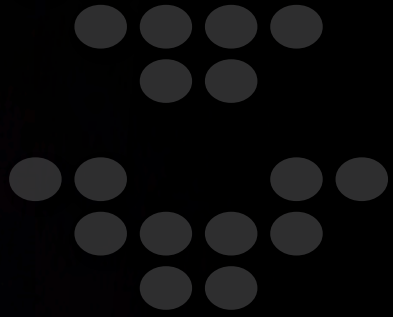
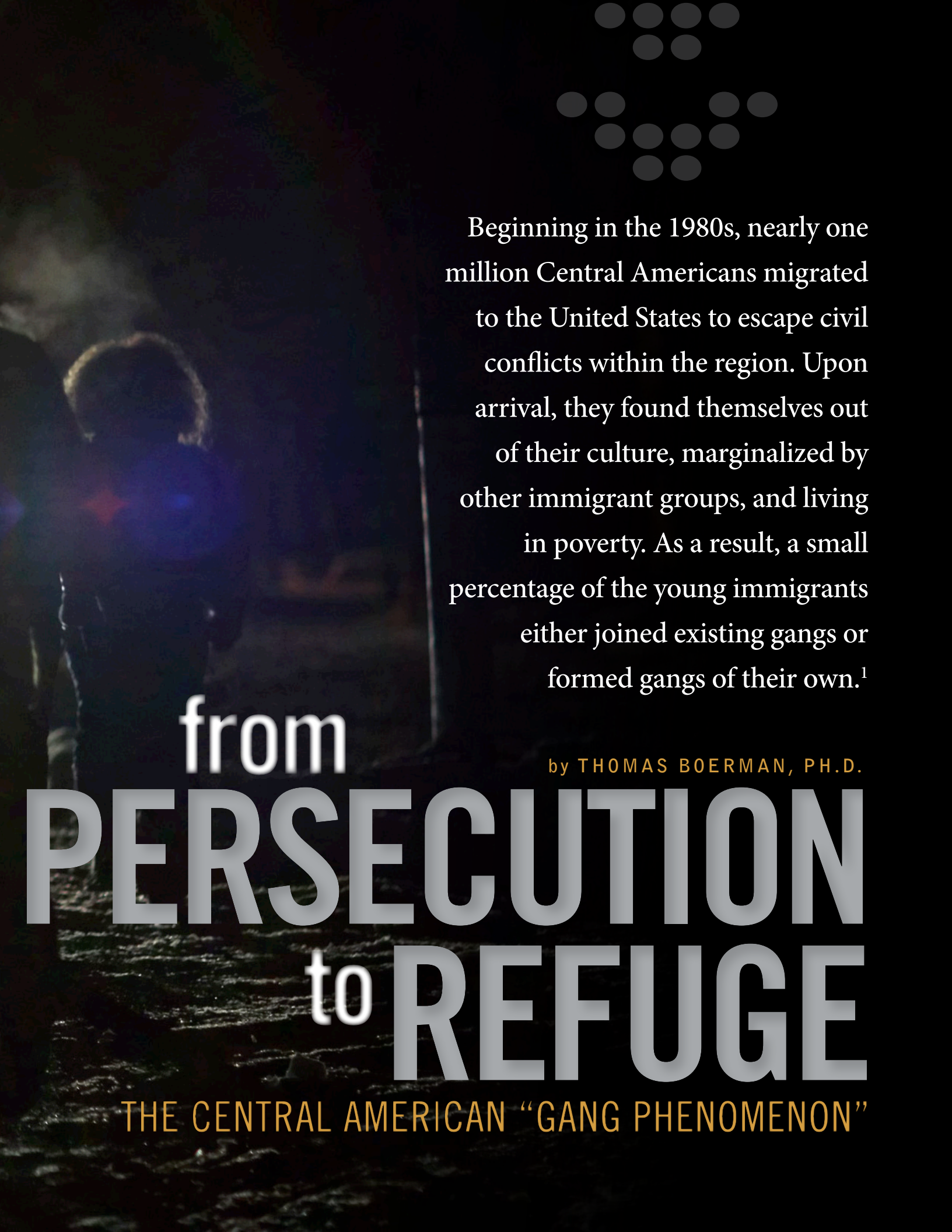
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Beginning in the 1980s, nearly one million Central Americans migrated to the United States to escape civil conflicts within the region. Upon arrival, they found themselves out of their culture, marginalized by other immigrant groups, and living in poverty. As a result, a small percentage of the young immigrants either joined existing gangs or formed gangs of their own.<sup>1</sup>

by THOMAS BOERMAN, PH.D.

# from PERSECUTION to REFUGE

THE CENTRAL AMERICAN “GANG PHENOMENON”

In the 1990s, the U.S. government enacted the Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), which led to the return of thousands of refugees to Central America.<sup>2</sup> Many had been raised in the United States, spoke limited Spanish, had been traumatized by war, lacked family or community ties within their home country, and had varying degrees of gang experience. Upon return, some deportees joined with demobilized guerrillas and former military personnel, who had turned to crime in the aftermath of civil wars, to form the nexus of the gang and organized crime phenomenon that now plagues the region.

### The Current State

Gangs in El Salvador, Honduras, Guatemala, and in some areas of Mexico are involved in criminality that ranges from opportunistic to highly sophisticated, and engage in incomprehensible levels of brutality toward rival gangs, police, government officials, and the public. Although construed as a “gang problem,” the phenomenon is substantially more complex and involves the dynamic relationships between gangs, organized crime, and drug trafficking organizations. Certainly not all gangs are involved with these more sophisticated actors, but the co-mingling is significant. Disentangling gangs from other criminal groups has become increasingly difficult.

Regional governments responded to the ascent of gangs by enacting laws and tactics known as *Mano Dura* (tough or firm hand). However, these have been largely ineffective at eradicating the problem.<sup>3</sup>

### Gangs: “Domestic Terrorists”

Central American gangs and organized criminal groups have undermined states’ capacity to fulfill basic functions of governance to the point of making legitimate institutions largely irrelevant. It is commonly recognized that they now exercise effective control over much of Guatemala and the Central American region,<sup>4</sup> subjecting those who oppose their efforts to acts of intimidation and brutality. For state officials or members of the public who refuse to succumb to gangs’ demands or attempt to hold them legally accountable, it is



often an expression of their political opposition to gangs—an effort to reclaim their communities and countries from criminal groups that are attempting a virtual takeover.

A legal attaché to the U.S. Embassy in El Salvador compared gangs to “domestic terrorists,” stating that their objective is to destabilize society<sup>5</sup> by imposing their power and undermining that of the state. Because regional governments’ capacities and legitimacy were marginal to begin with, criminal groups have been able to advance their objectives with relative ease.

### Gang Mentality and Asylum-Seekers

In the context of gang-related claims, it is crucial to understand the gang mentality and the concept of “respect.” For gang members, being “respected” is tantamount to being feared. To reject their recruitment efforts, refuse to pay extortion, refuse



Get AILA's seminar recordings “[Gang-Based Asylum Applications](#)” (Sept. 16, 2010) and “[Particular Social Group Analysis in the Brave New Post-S-E-G World](#)” (March 15, 2011) for more guidance.



to participate in anti-gang activities, or even flee to avoid gang persecution are perceived to be acts of “disrespect.” The resulting response is generally violent and retaliatory. It is this element of gang mentality that underlies persecution and drives migration to the United States as the only perceived alternative to escalating levels of risk and brutality.

There are several other factors that relate directly to asylum applicants. First, once an individual (or family) has been targeted, the threat does not tend to diminish with time, even over the course of years. Second, threats to individuals routinely generalize to members of their family, the family as a whole, or a subset of the family. Third, gang members interpret attempts to avoid them or their demands as challenges or acts of antagonism, so petitioners who flee to the United States, and are then subsequently removed from the United States, may be at greater risk upon return than they were prior to their departure.

### Developing Case Strategy

Experienced attorneys agree that *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), has been commonly misinterpreted, and frequently misapplied. The ruling grew out of a case involving forced gang recruitment

in El Salvador and has been generally—and erroneously—construed as applicable in essentially *any* recruitment-based claim, irrespective of case facts. Moreover, some government attorneys and judges have applied *S-E-G-* to virtually *all* Central American claims, even those that do not involve forced recruitment. As such, attorneys and experts must address the ways in which the ruling has been misinterpreted, and differentiate individual cases from *S-E-G-* (Note: *Matter of S-E-G-* has been reopened and there is cause for cautious optimism, but the ruling still has precedential value).

In terms of strategy, attorneys should first determine whether there is a basis for a non-gang-based claim. For example, intimate-partner violence or child abuse claims may include gang components where it may be preferable to base primary arguments on those elements and argue the gang dimension as a secondary risk factor.

***[A]ttorneys and experts must address the ways in which the ruling has been misinterpreted, and differentiate individual cases from S-E-G-.”***

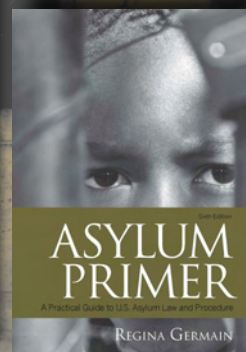
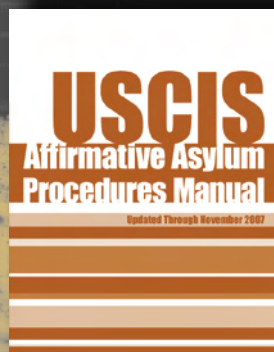
If there is no alternative to a gang-based claim, work with experts to ascertain whether there are alternatives to particular social group (PSG) arguments. For instance, case facts often support political opinion arguments, both imputed and expressed. Examples include petitioners who were persecuted, or would be at risk of persecution, because they: (1) reported gang crime to police or cooperated with investigations; (2) made public anti-gang political statements; (3) participated in law enforcement, military community, or church-based anti-gang efforts; and/or (4) refused to succumb to extortion or other demands based on anti-gang political opinions. Some judges have even chosen to view resisting forced gang recruitment as an expression of political opinion versus viewing it through the lens of *S-E-G-*. The key is that the petitioner must hold an anti-gang political opinion and the facts must establish that the persecution was, or would be, on account of that opinion. ➡

Attorneys also may argue religiously-based persecution. These claims typically involve youth who were threatened or recruited due to their involvement in the church and/or religious schools, or adults who were persecuted, or are at risk of persecution, because of their religiously-based outreach efforts and/or anti-gang moral

position.<sup>6</sup> The church is an outspoken critic of gangs, so successfully recruiting religious youth and “punishing” clergy and laity have both symbolic and strategic value. Attorneys and experts must establish that gangs would reasonably have known that the petitioner was actively religious, and that he or she was targeted on account of his or her religion or religious expression. The courts have acknowledged the relationship between moral and political opinion. Therefore, attorneys and experts may need to assess whether to argue religiously-based claims, political opinion, or a combination of both.

If no PSG alternative exists, explore groups that address judges’ concerns about social visibility, recognizability and particularity, e.g., “family as social group,” “economically marginalized youth from homes with no adult male presence,” or “economically marginalized females with no male dominated family or social network.” Each of these groups has parameters around it, and experts can be used to clarify to the court that members are recognized within their communities and targeted by gangs for reasons that relate directly to their membership in that group.

***Given the challenges associated with Central American gang-based claims, attorneys are strongly encouraged to enlist the services of experts who are willing to actively partner at multiple stages of the process.”***



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## Use of Expert Witnesses

The dearth of research and citable resources, coupled with the unfavorable climate of the courts, makes it essential for attorneys to engage experts. Experts can play an important role by interviewing petitioners to establish the credibility of the claim, assisting attorneys to develop case strategy, participating in the development of direct examination questions, and by drafting individualized affidavits that: (1) place case facts within the Central American socio-political context

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of vis-à-vis gangs; (2) explain past persecution based on a comprehensive understanding of gang culture and mentality; and (3) predict the risk to petitioners, if returned. And since expert affidavits alone are not likely to be sufficient, attorneys should seek out experts experienced in providing testimony.

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experts who are willing to actively partner at multiple stages of the process. ▀

## Conclusion

It is well known that courts take a dim view of Central American gang-based asylum claims, making it imperative that strategies differentiate case facts from *Matter of S-E-G-* and reflect an understanding of both the socio-political context of Central America, and the culture and mentality of gangs. Individual case facts must then be placed within this larger context and leveraged to predict risk to petitioners, if returned, in a manner that fits within the framework of U.S. asylum law. Given the challenges associated with Central American gang-based claims, attorneys are strongly encouraged to enlist the services of

**Dr. Thomas Boerman** has worked as a trial consultant and expert witness in approximately 100 Central American gang-related asylum cases and has been involved in Central American human rights issues since 1985.

1 For a more comprehensive discussion of the Central American gang phenomenon, see generally T. Boerman, *Central American Gangs: An Overview of the Phenomenon in Latin America and the U.S.*, 15(1) *J. of Gang Research* 35–52 (2007); J.D. Corsetti, Note, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 *Geo. Immigr. L.J.* 407 (2006).

2 See Clare Ribando Seelke, Cong. Research Serv., “[Gangs in Central America](#),” RS22141 (2009).

3 See F. Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail To Reflect Global Reality*, 63 *U. Miami L. Rev.* 301–338 (2009); Washington Office on Latin America, *Central American Gang Related Asylum: A Resource Guide* (May 2008); U.S. Agency for Int’l Dev., *Central America and Mexico Gang Assessment* (2006); Pedraza Fariña, Miller, & Cavallaro, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador*, International Human Rights Clinic, Harvard Law School (2010).

4 See Dr. H. Brands, *Crime, Violence, and the Crisis in Guatemala: A Case Study in the Erosion of the State* (2010).

5 See “[Gangs Akin to Terrorist, FBI Agent Says](#),” *LA Times*, April 23, 2010.

6 In an [unpublished opinion](#), on June 19, 2009, an immigration judge granted a case to a Salvadoran man who claimed past persecution on account of a particular social group. The group was defined as “people with a shared past experience of religious leaders in El Salvador who refused to participate in the illegal drug trade.”



## ITAR Myths & Facts

**Do you know which of these assumptions are false?**

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- 2) *If there is an export violation it is the Company's liability. Individual officers and employees cannot be held personally liable;*
- 3) *Our products are EAR-99 because they are not listed specifically on the CCL;*
- 4) *We have an ECCN number assigned by BIS therefore our products are not subject to the ITAR;*
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## Detention Dialogues

**D**etention Dialogues, a student-run program, pairs immigration detainees in Northern California with volunteer visitors. Christina Fialho, a 2L at Santa Clara Law School, co-founded this program that is part of a national movement through the Detention Watch Network. “Our goal is to provide companionship for immigrants in detention and a link to the outside world,” says Fialho. The organization recruits, trains, transports, and mentors volunteers to visit and befriend immigrants held in civil detention at the West County Detention Facility in Richmond, CA. It also operates a Community/Student Awareness Program and is beginning to work with a number of organizations to increase pro bono representation for individuals detained by ICE. Detention Dialogues is a member of the Detention Watch Network and a recipient of the Ignatian Center for Jesuit Education’s Bannan Grant. Detention Dialogues also receives



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institutional support from Santa Clara University and the California Institute of Integral Studies. If you would like to get involved, [e-mail Christina Fialho](#).



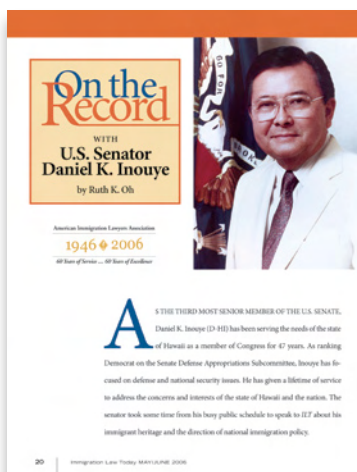
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## HONORING IMMIGRANTS’ ACHIEVEMENTS

**T**he American Immigration Council will host its 16th Annual Immigrant Achievement Awards on April 7, 2011, in Washington, D.C., at the Hyatt Regency Capitol Hill. Among the honorees will be U.S. Senator Daniel Inouye (D-HI). For the latest information on the awards banquet and to RSVP, visit [www.americanimmigrationcouncil.org/DCIAA](http://www.americanimmigrationcouncil.org/DCIAA), or contact Megan Hess at (202) 507-7517 or [mhess@immcouncil.org](mailto:mhess@immcouncil.org).

AILA’s May-June 2006 issue of *Immigration Law Today* published [an article](#) about Inouye’s lifetime achievements.



## CELEBRATING CULTURAL HERITAGE THROUGH ART:

The [American Society of International Law](#) launched an online periodical in 2010 to celebrate cultural heritage. The [Cultural Heritage and the Arts Review](#) is a semi-yearly periodical of the Society’s [Cultural Heritage and the Arts Interest Group](#). The editor-in-chief is Interest Group Co-Chair Cristian DeFrancia.



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# WHAT'S HAPPENING!

## THE 4-1-1:

Texas Chapter member **Maria L. Saucedo**'s son, Vincent Patrick Saucedo, a junior at UT-Austin, appeared on the MTV series, "[My Life as Liz](#)," on February 8, 2011. ▶



Southern Florida Chapter member **William Gerstein** has become certified by the Florida Bar as an expert in immigration and nationality law.



◀ D.C. Chapter member **Elena Hung** has started a solo practice, [Law Office of Elena Hung](#), in Washington, D.C., after five years of practice with a small immigration firm.

The Executive Office for Immigration Review (EOIR) celebrated the 10th anniversary of the

Board of Immigration Appeals Pro Bono Project in January 2011. EOIR implemented the project to improve access to legal information and increase pro

bono representation for individuals whom the Department of Homeland Security is detaining while their immigration cases are under appeal.

Texas Chapter member and former AILA President **Kathleen Campbell Walker** was quoted in a [Dallas Morning News](#) article about a suspect arrested for attempting to use a weapon of mass destruction. ▶



Cox Smith Matthews Incorporated of El Paso is pleased to announce the addition of **Susan W. Ramos** to its Immigration Group. Susan is admitted to the bars of Texas, New Mexico, and North Carolina. Her practice will focus primarily on family-based immigration and removal matters.

New York Chapter member **Suzanne Seltzer**, of Klasko, Rulon, Stock & Seltzer, has been selected one of the country's leading corporate immigration lawyers by *The International Who's Who of Corporate Immigration Lawyers 2011*.

## CELEBRATING 25<sup>+</sup> YEARS OF AILA MEMBERSHIP

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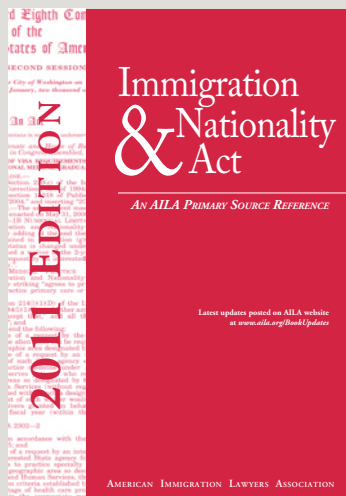




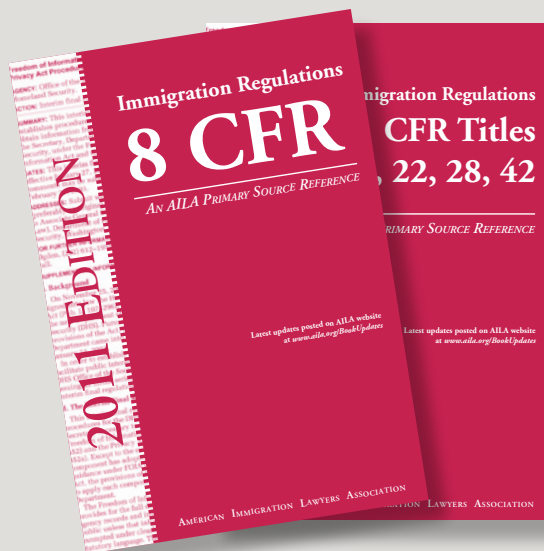
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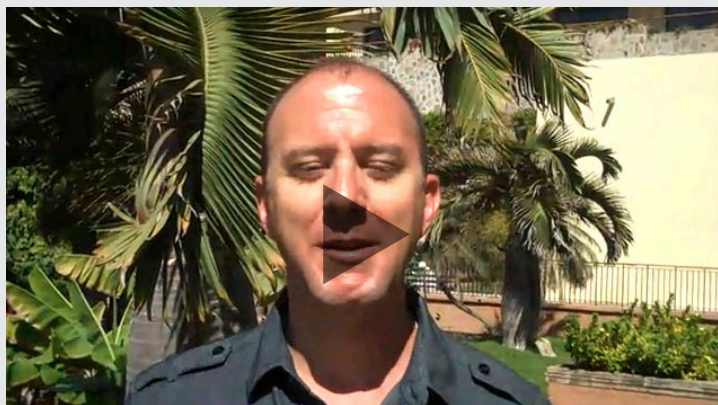
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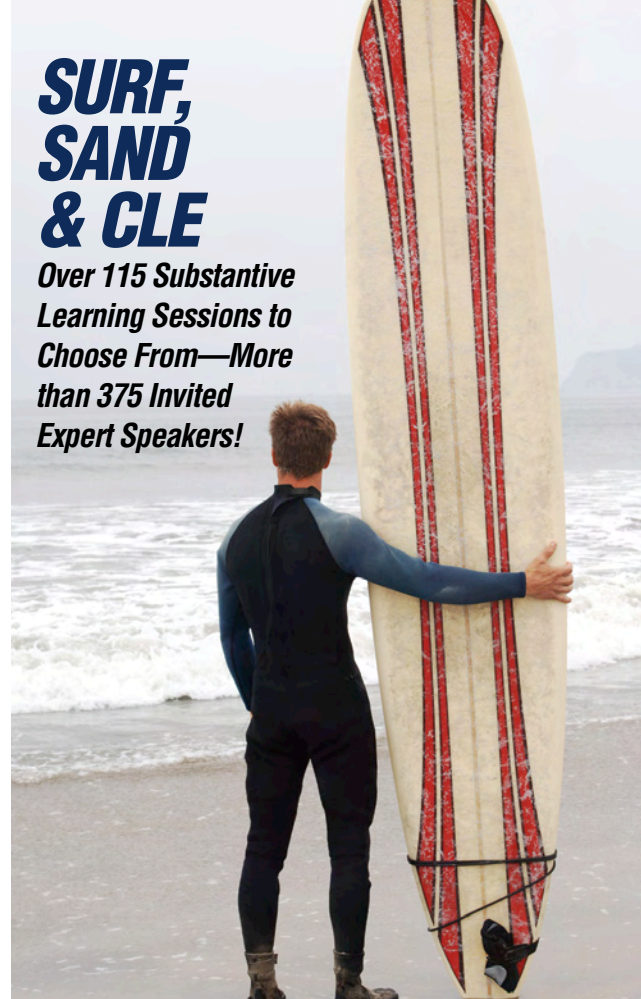
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