AMERICAN IMMIGRATION LAWYERS ASSOCIATION

*AN IMMIGRATION DIALOGUE*

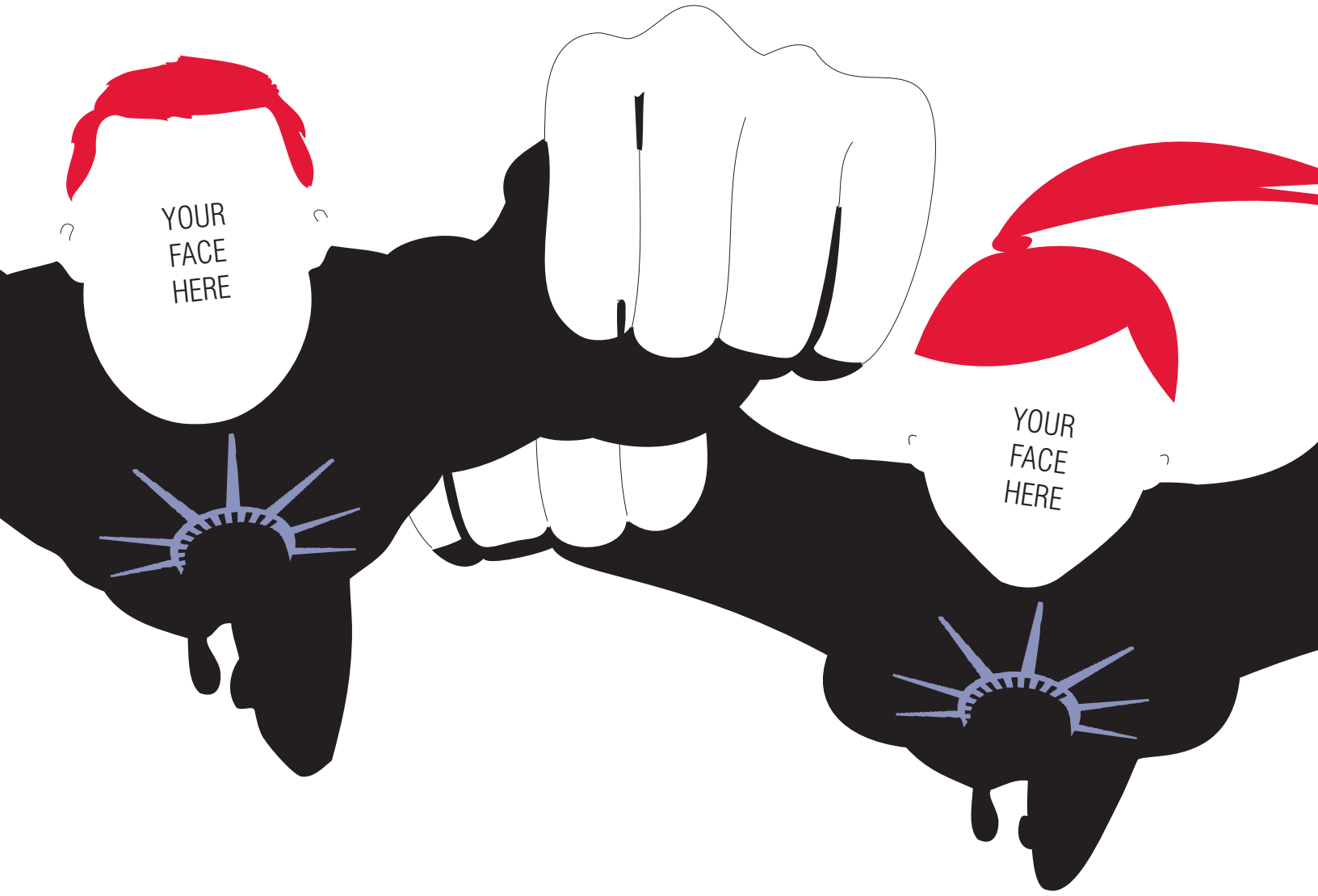
# VOICE

MARCH/APRIL 2012

Vol. 3 Issue 2

# SUREFIRE HIRES

*How to recruit the right employees for your immigration firm*

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# NDA12

## NATIONAL DAY OF ACTION

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)

# SUPERHERO FOR A DAY

Grassroots Advocacy Associate Anu Joshi urges you to attend National Day of Action on March 29 and pound the halls of Congress with this simple message: Immigration is good for America.



VOICE

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## DEPARTMENTS





## FEATURES



"It was important for me to relate to that time when I arrived in New York. ... Carlos Galindo's dignity is similar to all those 11 million undocumented workers in U.S. They live their lives with ... that power and that passion, and they never give up. That's me."

—Demian Bichir, actor and native of Mexico, discussing his Oscar-nominated role of Los Angeles gardener Carlos Galindo in the movie "A Better Life." (Source: Associated Press)

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# NEWSLINK

HIGHLIGHTS FROM AROUND THE GLOBE

"An undocumented immigrant living in Georgia who claimed that his boss stole a winning lottery ticket from him was declared by a jury to be the legitimate winner of the $750,000 prize."

**750K Lottery Ticket Belongs to Undocumented Immigrant, Jury Says**
*FOX News Latino*

**Immigration Case Challenges Justice Department's Credibility**
*The Wall Street Journal*

**"The Justice Department has said it was prepared to correct its possibly misleading statements that influenced a Supreme Court ruling against immigrants facing deportation."**

**Adviser to Immigrants Accused of Misrepresentation**
*The Washington Post*

**"When the legion of struggling cleaners, cooks and day laborers needed legal and immigration help in the Washington area, Luis Ramirez appeared to be their high-profile champion."**

"David González, a gay Costa Rican immigrant, was spared deportation based on the fact that he is married to a male U.S. citizen. This is the first case of this nature in Texas. ..."

**Undocumented Immigrant Spared Due To Gay Marriage**
*Inside Costa Rica*

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Midfielder Javier Morales and forward Alvaro Saborio have received immigration "green cards," according to team officials, which make them both lawful permanent residents of the United States and, for the purposes of Major League Soccer rosters, full-blooded Americans.

**Green cards turn RSL stars into Americans for MLS purposes**
*Salt Lake Tribune*

**Deportation Often Means Losing Custody of US-Born Children**
*Fox News Latino*

North Carolina officials are seeking the termination of a deported Mexican man's parental rights, **arguing that his U.S.-born children are better off in this country than in Mexico.**

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**APR 19, 2012** — Is EB-2 an Option? Analyzing Foreign Educational Credentials using EDGE *[Web Seminar]*

**APR 26, 2012** — Cancellation of Removal for Non-LPRs and LPRs *[Audio Seminar]*

AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)

POSTED BY Christine Mehfoud

# Form I-9 Audits: Risky Without an Expert

Given the increased focus on employers' immigration-related compliance efforts, many companies are conducting Form I-9 audits. While all companies are well-advised to conduct a Form I-9 audit annually (or immediately if one has not been conducted within the last year), conducting one without the relevant expertise can do more harm than good. My favorite and, therefore, often repeated phrase regarding immigration compliance is, "Form I-9s are complex." That bears repeating in bold: **Form I-9s are complex.**


## Form over Substance?

The I-9 form is one of the most misunderstood federal government forms. The form is not a simple linear document with blanks that need to be completed. Rather, the I-9 form is an interactive process with numerous rules that must be followed (most of which do not appear on the face of the form). To Immigration and Customs Enforcement (ICE) and the Department of Justice, both of which investigate Immigration Reform and Control Act of 1986 and related I-9 violations, the procedure and manner by which the form is completed are just as important as the information provided on the form—it is the procedure and manner used that most often get employers into trouble.[1]

As a result, employers can get themselves into a heap of trouble by trying to correct mistakes on the form in an inappropriate manner. For example, I've heard many times, "Why can't we just populate the missing information from our HR system into Section 1 of the Form?" Well, only the employee can complete Section 1. Here's another one of my favorites, "The employee only completed List B and List C, but did not complete List A. We need to call her in and have her complete List A." Well, employers should not accept more than the required documentation for Section 2, and the employer is responsible for completing Section 2 of the form. These procedural missteps could subject the employer to significant penalties including, but not limited to, fines, debarment, and negative publicity.

Some employers will correct a missing employee signature in Section 1 by creating a new I-9, often stating that the old I-9 is "out of date" and needs to be "redone." The employer then destroys the original I-9, leaving it no method to prove that it complied with the timing requirements of the form. Further, the employer has just made it clear to ICE that not only was the employer not fully compliant with the I-9 procedure when that employee was hired (which may have been as early as 1986), the employer is even worse at it now—not a good position to be in.

## HR Personnel Are Not Trained Auditors

Unfortunately, these mistakes occur because most HR personnel responsible for the I-9 process have little to no formal training. While lack of Form I-9 training is extremely risky in today's enforcement environment, even more risky is allowing HR to conduct an audit of its own work. The use of independent, experienced auditors is key.

Employers should tread carefully and ensure that they involve experienced immigration counsel in their auditing. Competent counsel can help get existing I-9s in order, and the process can serve as an excellent training exercise for the HR personnel.

---

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

1 *See* ICE Press Release, "Abercrombie and Fitch fined after I-9 audit" (Sept. 28, 2010), AILA InfoNet Doc. No. 10092962.

**LISTEN AND LEARN:** Shhhh—I Think I Hear a Silent Raid Coming. But I'm Not Worried, My I-9s Are Airtight Seminar Recording 12/8/2011

AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)

# UNSOLICITED ADVICE

*from* **Cletus M. Weber**

# Poisonous Flowers and DOL's Crazy 90-Day PWD Validity Rule

Did you know that the Department of Labor (DOL) has a PERM rule that applies only during the spring and summer months? Sounds crazy, doesn't it? Well, it is, but if you don't watch out during spring and summer PERM recruitment, DOL will trap you with this rule.

## Things Aren't Always What They Seem

In a recent decision, Matter of Karl Storz Endoscopy-America, 2011-PER-00040 (BALCA 12/1/11) (en banc), the Board of Alien Labor Certification Appeals (BALCA) highlights the practical arbitrariness (and inherent danger) of the rule. Everything about the rule appears deceptively reasonable on its face. Title 20 of the CFR §656.40(a) requires PERM employers to obtain a prevailing wage determination (PWD) for all PERM applications. In turn, 20 CFR §656.40(c) creates a timing relationship between the prevailing wage determination and PERM recruitment. It states that the employer either: (a) must "begin the recruitment" during the validity period of the PWD; or (b) must file the ETA-9089, Application for Permanent Employment Certification, during this period.

Aside from being at odds with the regulatory preamble (and having other issues), *Matter of Karl Storz Endoscopy-America* seems reasonable on its face, too. It states that "begin the recruitment" refers only to the first item of recruitment (not to just one of the items, as was held in other BALCA decisions).

**LISTEN AND LEARN:** Creative Strategies for Prevailing Wage Determination (LCA/PERM) Seminar Recording (8/18/2011)

The problem is 20 CFR §656.40(c), with respect to the portion that addresses when the employer chooses to "begin the recruitment." It effectively creates a seasonal rule—completely innocuous in the dormant fall and winter months, but potentially deadly in the spring and summer. This means that when you request a PWD near the July 1 annual cut-off date, DOL then limits the PWD to only 90 days (instead of one year) to allow DOL to update its online wage database. →

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Like Oleanders, this PERM rule may seem innocuous but could be hazardous.

"[The rule] effectively creates a seasonal rule—completely innocuous in the dormant fall and winter months, but potentially deadly in the spring and summer."

### Arbitrary or Not … Beware

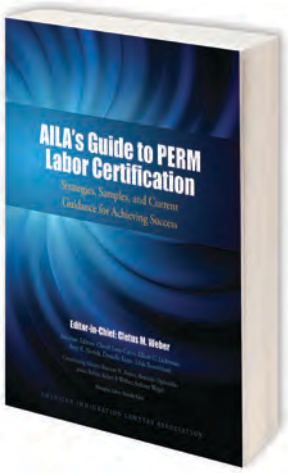
To remember the seasonal relevance of this PWD validity rule, you might think of it as poisonous flowers that bloom only in spring and summer, never in fall or winter. It may seem arbitrary, but beware of this rule. Consider these steps for avoiding the seasonal trap:

Postpone the start of recruitment in all PERM cases until you have a valid PWD in hand. Do this even in cases with highly predictable PWD requests, such as those in which the job is subject to a collective bargaining agreement or the employer is offering a salary higher than Level IV for a clearly defined field, such as accountant.

If you absolutely must begin recruitment before PWD issuance—most likely because the beneficiary is running short on H-1B time—be sure to calendar the dates carefully and complete the recruitment promptly. If you don't, the 90-day PWD may expire long before you finish recruitment. Also consider that DOL will likely be slow in issuing the PWD or will issue something unexpected—or both.

If you must start early but then find your recruitment dragging on too long, immediately file for a replacement PWD before your recruitment goes stale under the 180-day rule in 20 CFR §§656.17(e)(1) and (e)(2).

Stopping to smell the flowers is normally a good thing, but this 90-day PWD rule is one flower you want to avoid.






Comments? use your VOICE

**Cletus M. Weber** *is co-founder of Peng & Weber, PLLC, based in Mercer Island, WA. 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.*



AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)

**AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)**

# SPOTLIGHT

*by* **Andrea Montavon-McKillip**

# Prosecutorial Discretion and Your Client

Serving as keynote speaker at AILA's 2011 Annual Conference in San Diego, Immigration and Customs Enforcement (ICE) Director John Morton said that ICE had annual resources to remove less than 4 percent of all individuals unlawfully in the United States. He remarked that immigration detention centers should not serve as penal settings. Rather, they should function solely to detain those who pose a flight risk or a danger to the community, and should operate for the sole purpose of removal. The next day, Morton issued two memoranda to ICE employees about using prosecutorial discretion to prioritize the agency's resources. He defined prosecutorial discretion as the decision "not to assert the full scope of the enforcement authority available to the agency in a given case."

During the months after the release of those memos, immigration practitioners observed how Morton's guidance was being applied in the field. In November 2011, AILA and the American Immigration Council released a survey of 28 ICE offices nationwide, which found great discrepancies in the way the Morton memos were being applied, if at all. Indeed, despite our best efforts, ICE won't exercise prosecutorial discretion in many meritorious cases.

## Take Your Cue from the Memos

Nevertheless, prosecutorial discretion remains an important tool, particularly in detainee cases in which the immigration court is unlikely to grant bond. It is important to recognize that prosecutorial discretion should be requested only in those cases where your client meets most of Morton's 19 enumerated positive factors, has one or more of the eight "super-special" factors, or has some other circumstance that makes his or her case especially sympathetic.

ICE officers frown upon the barrage of skeletal requests in cases where the detainee has a better chance of winning the lottery than being released from detention. At a recent South Florida AILA-ICE liaison meeting, one of the ICE representatives said, "Simply attaching a prosecutorial discretion memo or mentioning prosecutorial discretion is not particularly compelling or persuasive." Therefore, a strong request for prosecutorial discretion is not something that can be prepared in an afternoon; ample time is necessary to draft a detailed memo explaining why the Morton memos pertain to your case. The good news is that if you start the process immediately upon detention, you may be able to secure the client's release before a bond hearing is even scheduled. Also, because the 19 Morton factors mirror many of the factors required for applications for relief, you already will have collected much of the evidence for the individual hearing after your request for prosecutorial discretion is completed.

### ADDITIONAL RESOURCES

**Update on Implementation of Prosecutorial Discretion Policy** [Audio Seminar] (2/16/2012)

**LAC Practice Advisory: DHS Review of Low Priority Cases for Prosecutorial Discretion** (2/15/2012)

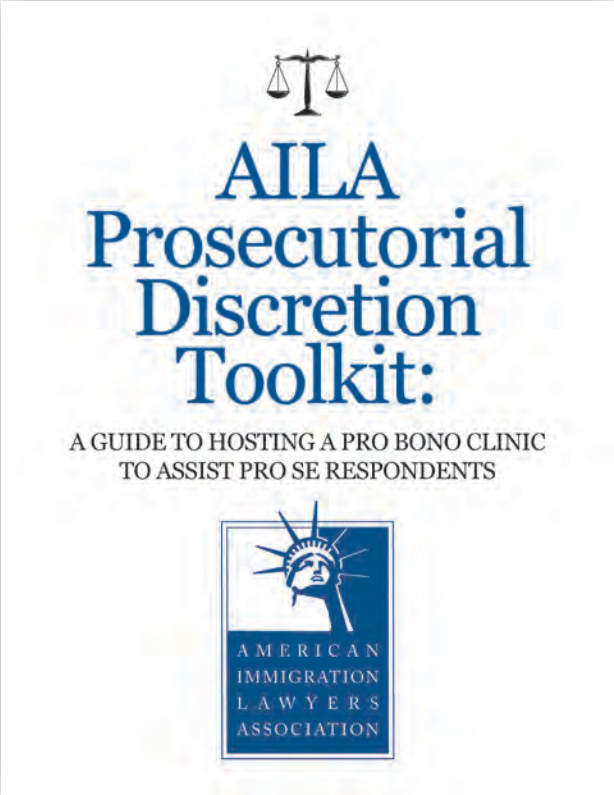
**Participate in a Survey on Prosecutorial Discretion** (2/8/2012)

**Current Developments in Prosecutorial Discretion & Pilot Programs** [Podcast] (12/13/2011) FREE!

**When All Else Fails, Try Deferred Action: What Is It and How to Get It!** [Web Seminar] (10/25/2011)

## Step by Step …

Start by identifying the district officer (DO) to which your client is assigned and get his or her contact information. Mail or e-mail the DO a G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, or EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court, so that the DO knows he or she is authorized to speak to you about your cli-

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"Don't ignore or gloss over negative factors. Instead, put them into context or explain why they are outweighed by the positive factors."

ent's case. Follow up with phone calls to the DO with an e-mail copied to the DO's supervisor and the field office director. In the meantime, gather documents to support each of the 19 factors relevant in your client's case. For example, if your client has no criminal convictions, get a certificate of no criminal history. If your client has a sick child, get a certified copy of the birth certificate and a copy of the medical records.

Your next step is to draft a cover letter to the DO and copy the supervisor. Analyze each of the relevant factors, and refer to the attached supporting documentation. Use exhibit or page numbers so the DO can easily refer to the supporting documents. Don't ignore or gloss over negative factors. Instead, put them into context or explain why they are outweighed by the positive factors.

Then, ask for specific relief, as opposed to a general request for prosecutorial discretion. For example, request release from detention or deferred action with employment authorization. Also remember to include contact information for your client if released.

Finally, include this excellent quote in your letter if it applies to your case:

> As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. *Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.*" (March 2, 2011, ICE memo)

Indeed, in order to detain such immigrants, "ICE officers or special agents must obtain approval from the field office director." *Id.* at 4.

In conclusion, begin working on your request for prosecutorial discretion as soon as you have confirmed that the Morton memos apply to your detained client. Make a well-documented and well-organized request, and you may just have your client home with family before he or she ever sees an immigration judge.

**Andrea Montavon-McKillip** *is principal of the Law Office of Andrea Montavon-McKillip, P.A., in Fort Lauderdale. She practices immigration law and appellate litigation. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

**LISTEN AND LEARN:** Managing the New I-129 Export Control Certification in Your Practice
[Audio Seminar] February 1, 2011

# No Single 'Bright Line'

BY ARON FINKELSTEIN
AND TIMOTHY SACHSE

*After nine months, these attorneys still had no clear answer to four BIS advisory requests on I-129 forms.*

U.S. Citizenship and Immigration Services (USCIS) issued a revised Form I-129, Petition for a Nonimmigrant Worker, on November 10, 2010, which requires U.S. employers to certify their compliance with U.S. export licensing requirements when petitioning for H-1B, H-1B1, L-1, and O-1A visa classifications on behalf of employees. Specifically, the U.S. employer must certify that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined whether an export license from the U.S. Department of Commerce and/or the U.S. Department of State is needed before technology or technical data is released to a foreign-national employee. The failure to properly do so may expose the employer to legal liability. This article recaps efforts to seek guidance from the Department of Commerce's Bureau of Industry and Security in relation to Form I-129's "deemed export" certification requirement. The critical take-away is that because export control law is highly complex and specialized, it is important for immigration practitioners to advise clients to seek guidance from an expert in EAR and ITAR in order to determine whether a license is required in any given case.

## Seeking Clarification

Given the importance of this new certification requirement, we decided to seek guidance from the U.S. Department of Commerce's Bureau of Industry and Security (BIS). We had hoped that BIS would issue advisory opinions that would help our clients better understand their obligations under this new requirement. In particular, we desired a "bright line" test that our clients could use in all circumstances to determine whether a U.S. export license is needed from the Department of Commerce. As described below, we requested four advisory opinions from BIS. Unfortunately, BIS's broad responses failed to establish that bright line test.

The EAR exempts from its provisions technology or software that is "publicly available." Thus, in our first request for an advisory opinion, we sought clarification as to what type of software is considered publicly available. In particular, we wanted to know whether software that is developed and modified using only programming languages in the public domain, such as C++ and Java, would fall within the definition of publicly available software. If so, a large portion of the software developed and/or modified by foreign-national employees in the United States would exceed BIS's regulatory authority.

Three weeks later, we received a short, three-sentence answer in which BIS stated that all software, no matter how developed, will be separately evaluated to determine whether it is subject to the EAR. →

ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK.COM

"We desired a 'bright line' test that our clients could use in all circumstances to determine whether a U.S. export license is needed from the Department of Commerce. … Unfortunately, BIS's broad responses failed to establish that bright line test."

## ROAD TO I-129 CERTIFICATION

**USCIS Part 6 Form I-129 Training: What You Need to Know Before You Sign**
[Web Seminar]

**WHO: This training is targeted at the senior-level person who would be signing the I-129 petition, attorneys, in-house counsel, and HR/immigration professionals who want a better understanding of export laws and how they relate to the I-129.**

**WHAT: Brought to you by AILA and True Compliance Group, this training introduces you to the new requirements for completing Part 6 of Form I-129 for all H-1B, L-1, and O-1A categories.**

**HOW: Complete this training to become familiar with ITAR and EAR and how they relate to your Form I-129 petition. Learn about the different entities and concepts you need to understand in order to complete Part 6.**

**WHY: This is an extremely complex area of the law. You should familiarize yourself with the concepts of Part 6 to determine what steps you will need to take before you can sign the Form I-129 petition.**

**CERTIFICATE: After completing this program, you will receive a certificate for your records that verifies your completion of the program. Keep this with your I-129 petition.**

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[Web Seminar] 11/8/2011

**Guiding Clients Through Export Control Regulations—Part II**
[Web Seminar] 11/15/2011

Although not directly stated, this response made it clear that software developed and modified using only programming languages in the public domain is not necessarily exempt from the provisions of the EAR; unfortunately, BIS's response did not help clarify employers' obligations under the new certification requirement.

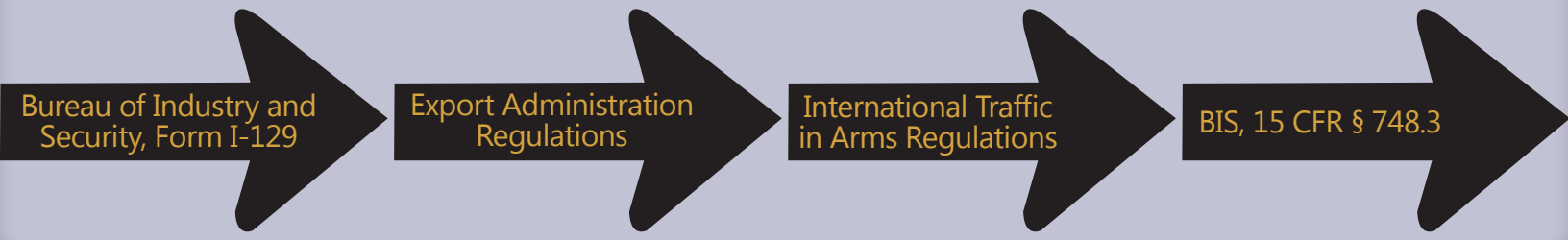
Due to the broad nature of this first response, we sought an opinion regarding which party is required to obtain the license. We presented BIS with a situation that commonly arises in the IT field: IT staffing companies sending foreign-national employees to third-party client sites. We described a situation where the IT staffing company, which is the petitioner on Form I-129, has the sole authority to fire or reassign the foreign national employee, but has no control over the technology or technical data that the foreign national employee receives at the third-party site. We asserted that the third-party client, and not the IT staffing company, is the party required to obtain a license from BIS.

Almost two months later, BIS confirmed our understanding, stating that "the third party client is responsible for obtaining any required authorization from the BIS for the deemed export of technology or source code subject to the EAR to the foreign national employee." BIS explained that because the third-party client is releasing the technology or source code to the foreign national, the third-party client is the "exporter" and, therefore, the party required to obtain the license.

However, Form I-129 requires the petitioner to certify that it will not release *or otherwise provide access to* controlled technology to its foreign national employee (emphasis added). Thus, even though the petitioner is not responsible for obtaining a license, it nonetheless may be required to certify on Form I-129 that a license has been obtained when the third-party client releases controlled technology to the foreign-national employee. On this note, BIS instructed us to contact USCIS "with any questions regarding this new certification requirement."

In our third request for an advisory opinion, we sought a determination as to whether an employer can release non-controlled technology to a foreign


AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)




national when this technology is required for the production of a controlled technology. We provided a hypothetical situation in which product "X" is controlled, and production technology "A" is required for the production of product "X". We asked whether a license is required in order to release production technology "A" to a foreign national.

More than three months later, BIS responded, describing three situations where a license would be required under our hypothetical situation. Two of the situations were irrelevant to foreign-national employees in the United States (and thus not relevant to Form I-129). The remaining situation, however, is very relevant because it describes production technology that is provided to a foreign national inside the United States. In such a situation, BIS stated that a license may be required before the release of such technology to foreign nationals of certain countries, *e.g.*, North Korea and Cuba. From this response, it appears that a license is only needed when the production technology described in our hypothetical situation is released to foreign nationals of certain countries. Although this general group of countries can be inferred from BIS's response, a thorough review of the EAR should be conducted before releasing production technology to any foreign-national employee, regardless of country of origin.

In our final advisory opinion request, we again sought an opinion regarding publicly available technology. But this time, we described a specific software program that is created using only public programming languages, but with source code that is publicly unavailable. We asked that BIS explain whether the release of this source code to a foreign national would require a license. More than four months later, BIS finally responded, providing a general overview of the EAR and how it relates to the release of source code to foreign nationals inside the United States. BIS then stated that it cannot determine whether a license is required in such a situation without a formal classification review. Thus, similar to our first advisory opinion request, we again discovered that each situation must be evaluated separately in order to determine whether a license is required in a specific situation.



## Nine Months and Three Weeks Later …

Ultimately, from the four advisory opinions requested and the responses described above, we learned that each situation is unique and must be analyzed individually; BIS will not provide a bright line test. Therefore, if a U.S. employer is unsure whether a license is required from BIS, it should not seek an advisory opinion but a classification request from BIS, wherein BIS will advise whether a specific item is subject to the EAR. In order to obtain a classification from BIS, the employer must submit descriptive literature, brochures, and precise technical specifications or papers that describe the item(s) in sufficient technical detail. For more information on how to submit a classification request and the documentation required, please see 15 CFR §748.3. In addition, BIS has created a flow chart that can help determine if a license is needed.

---

*Murthy Law Firm attorneys* **Aron Finkelstein** *and Christopher Drinan, along with honors program law clerk* **Timothy Sachse**, *drafted all of the advisory opinion requests described herein. The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

# HIRE the right people the first time

BY SUZANNE SELTZER

A firm is only as good as the people who work for it. Attracting and retaining clients requires an investment in human capital, in the form of employees and staff, capable of handling client matters in a productive and efficient manner. This article provides guidance on attracting and identifying the best talent to improve your organization, and then retaining those key employees. It is only by employing the best people to perform their best and stay with your firm for the long-term, that you are able to effectively manage your firm and its valuable human resources.

One of the never-ending challenges of running a practice—big or small—is finding the right staff. Whether because the practice is growing or changing, or because staff is moving up or on, there seems to be very little respite from the recruitment process. The following suggestions may facilitate the process:

## Clearly Define the Position

Before identifying a desirable candidate, the managing attorney should clearly define the position he or she will be expected to fill. This should include more than the job titles of "paralegal" or even "senior paralegal." Think extensively about the job duties that the individual will perform and the requisite skills. For example, a position that will involve preparing H-1B petitions should clearly indicate what aspects of the H-1B petition will be the individual's responsibility: Is it working from templates or more original drafting? Will it include determining the prevailing wage and preparing the public access file? Will it involve contact with the petitioner and beneficiary, or using information already contained in a database? To whom should the individual report?

While it may seem tedious, a detailed outline of the job duties will save time. Clearly defined job duties will help you articulate the skills necessary to perform the job, and this, in turn, will allow you to focus on desirable candidates. For example, if the position is more senior and independent, it will not only require more years of experience, but also strong writing skills, organizational skills, attention to detail, and the ability to analyze and interpret data. In addition, it may require an ability to establish systems for managing multiple cases and developing ongoing relationships with clients.

## Clearly Define the Advertisement

Once the position is clearly defined, you are ready to place the advertisement. In fact, you already may have a draft of the advertisement by virtue of

"[THE ADVERTISEMENT] SHOULD EMPHASIZE THE KEY SKILLS YOU ARE SEEKING—WHETHER EXCELLENT WRITING AND ACADEMIC CREDENTIALS OR STRONG INTERPERSONAL SKILLS AND FLUENCY IN GERMAN AND MANDARIN."

your efforts in describing the job. For example, the text of the advertisement may indicate the number of years of experience required or simply note "senior" position. It may include handling a variety of employment-based immigration matters for a specific industry, or perhaps focus more on specific case types, such as H-1Bs and PERM, or hospitals and research organizations. Most importantly, it should emphasize the key skills you are seeking—whether excellent writing and academic credentials or strong interpersonal skills and fluency in German and Mandarin. Hopefully, this will result in fewer unqualified candidates applying for the position, although it is certainly not a panacea.

Deciding where to place the ad comes next. As immigration lawyers, many of us are familiar with the U.S. Department of Labor's required and alternative recruitment techniques. Moreover, the Internet does a lot of this work for us, as an ad placed on one website may be picked up by an automated software program ("spiders" or "robots") and get published on multiple websites. A word of caution: an ad moving from site to site can be like a game of telephone, with some of the descriptions and requirements added or changed. If this appears to be a problem, it may be helpful to ask prospective employees where they saw the ad.

## Review Résumés for Specifics

Once the ad has run, there is an initial flood of résumés that can be somewhat overwhelming. Fortunately or unfortunately, it often turns out that of the numerous résumés, only a few may have anything resembling the required skills and experience. One way to quickly weed through the résumés is to do a cursory review to see if the candidate followed →

directions. If the ad required a writing sample or transcripts, are they included? Did the candidate take the time to draft a cover letter? If so, is it well-written? Often, a cover letter will provide a more accurate picture of the candidate's writing skills than a writing sample. For example, typos in a cover letter or on a résumé foreshadow typos in the future. And in immigration law, typos are not easily forgiven.

### Ask the Hard Questions

At long last, the time for the interview has arrived. Ask the candidates about the experience mentioned on their résumés. Ask the candidates specific questions, not just how many of this or that type of petition they prepared, but ask detailed questions about the work they undertook. In other words, have the candidate walk you through their role and responsibilities. This shows you whether they understand the concepts, and how well they can explain them to clients. In addition, ask about a favorite case or assignment, or the most challenging or difficult case and how it was handled. Also, what questions might they have for you? Did they bother to read your website? This is important in gauging their interest in the position.

**Visit AILA's Practice and Professionalism Center for more tips on starting and building a law practice.**

Finally, allow the other employees in the office to interview the candidate (for larger offices, maybe just the other employees in the team or group the candidate will be joining). A candidate may show a different side to peers, or your employees may be able to glean certain things you missed. In addition, if people are collaborating in teams or in nearby quarters, it is important that they get along. Is this someone who fits into the firm culture?

It is difficult to devote the requisite time to finding the right candidate with client deadlines and other issues inherent in running a law firm. But hiring the right person can make your practice run more smoothly and create a law firm culture that everyone will enjoy.

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**Suzanne B. Seltzer** *is a partner of Klasko, Rulon, Stock & Seltzer LLP, and the chair of AILA's USCIS Benefits and Policy Liaison Committee. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*



AILA InfoNet Doc. No. 12031460. (Posted 03/14/12)

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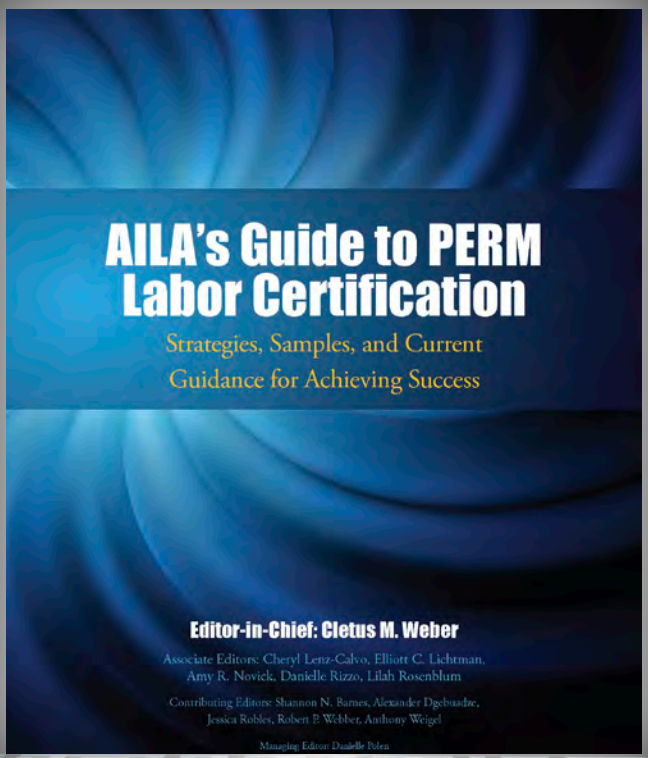


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# BEHIND THE CASE

*by* Sheeba Raj

**CASE:** ***Judulang v. Holder, No. 10-694, 565 U.S. ____, 2011*** **(12/12/2011).**

**ATTORNEY:**
**Mark Fleming, WilmerHale LLP**

## SCt.: BIA ''Comparable Grounds'' Test is Arbitrary and Capricious

Comparing it to a "coin flip," the U.S. Supreme Court invalidated the Board of Immigration Appeals' (BIA) "comparable grounds" test, calling it "arbitrary and capricious" under the Administrative Procedures Act. In a unanimous ruling in Judulang v. Holder, No. 10-694, the Court wrote, "By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner."

Under this now-defunct approach, lawful permanent residents in the United States with pre-1996 convictions could apply for INA §212(c) relief only if they demonstrated that the ground of deportation was comparable to a ground of inadmissibility.

When he first started litigating the case, Mark Fleming, a partner in WilmerHale LLP's Boston office, said no courts of appeals had analyzed the BIA's "comparable grounds" approach first announced in In re Blake, 23 I&N Dec. 722, 728 (2005), and in In re Brieva-Perez, 23 I&N Dec. 766, 772–73 (2005), because it was rather new. While the *Judulang* case was before the U.S. Court of Appeals for the Ninth Circuit, however, other circuits were upholding the BIA's approach. Then, several days before Fleming argued the case in the Ninth Circuit, the U.S. Court of Appeals for the Second Circuit issued its opinion in Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007), refusing to follow the BIA's approach.

"All of a sudden," said Fleming, "an issue, that while interesting, had not gotten much play in the federal courts, was the subject of a circuit split, and we anticipated at some point it would be ripe for the Supreme Court to review the case, but we certainly did not expect that it would be Mr. Judulang's case that would be the vehicle that the Court would choose."

Fleming values his collaboration with lawyers and organizations in mounting Judulang's successful defense. In addition to receiving amicus briefs from AILA and National Association of Criminal Defense Lawyers, former immigration officials from the Department of Homeland Security "filed what I thought was a very persuasive brief setting forth their view on what the law had been prior to *Blake* and *Brieva*," Fleming recounts. "I am not an immigration lawyer by training, so it was important for me to immerse myself as much as I could [and consult] with people who practice in those areas full time so that I would be in a position to assist the Court in understanding our position and arriving at the right answer."

Fleming recommends either working with an attorney who has handled Supreme Court cases or studying the protocol, because "[y]ou can't simply reproduce the arguments that you had presented either to the agency or to the courts below." Conferring with colleagues to brainstorm about what questions to anticipate from the justices and the answers that most effectively present the client's position also helps, he said.

**CASE:** ***U.S. v. Santis-Hernandez et al.*****, Case No. CR 10-1057-ODW (Ca. District Ct.)**

**ATTORNEY:** **Madhu N. Sharma, Stone & Grzegorek LLP**

# Fed Dist. Ct.: Judge Issues Certification in U Visa Case

Last April, a federal judge issued a certification for 12 victims of a smuggling ring who were held hostage in a load-house in Riverside, CA, after the attorneys in the case had trouble obtaining the certification from the Department of Homeland Security (DHS), even though the judge had deemed the victims "material witnesses" in the underlying criminal case. And because no application for a U visa is complete without a certification from a qualified government official, often times, attorneys may not think of the judge as another source for certification.

In the case of *U.S. v. Santis-Hernandez et al.*, Case No. CR 10-1057-ODW, smugglers had held 44 people in a load house while they awaited ransom from family members. Conditions were deplorable—there was little food and water and sexual assaults were committed against the women behind boarded windows. "The case is unique because the crime prosecuted was a federal criminal smuggling offense," said Madhu N. Sharma, an attorney at Stone & Grzegorek LLP in Los Angeles, who collaborated on the motion to request U visa certification for the 12 victims.

Ms. Sharma, along with other attorneys in the Los Angeles raids response network, reviewed the regulations and determined that 8 CFR §214.14(c)(2)(i) authorizes judges to issue certifications. "We were concerned that the judge would think that he would not be the appropriate authority," Ms. Sharma said. "The judge didn't even bat an eye and granted certification … [T]he judges are sometimes the only and proper adjudicators of this certification because they are particularly unbiased and they don't have political pressures or pressures in the preparation of trial as a prosecutor might have."

Ms. Sharma and her firm represented two of the 12 material witnesses. She also helped coordinate the placement of the other 10 with nonprofit attorneys located where the 10 lived. Ms. Sharma also provided AILA with a sample motion that attorneys can use as a template. "Now that we know this model can work, the [federal public defenders] plan to continue filing these motions in other cases."

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

**LISTEN TO** Finding Compassion in Immigration Law—The U and T Visas Seminar [Web Seminar Recording] 1/19/2012



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# POETIC JUSTICE

**Julia Manglano Toro** *is a Chicago-born, Washington, D.C., lawyer and mother of 3, also partner at Pertierra & Toro, P.C.*



## An Immigrant's Thoughts

I have to go to court tomorrow
I do not know if I'll be able to
Go back to my house
They don't think I belong here
They want me to go back there
Where I was born

I haven't been there for years
I don't know if I'll find my way there
If my town is in the same place
If my neighbors moved from there
To here

I'm afraid
Do I say good-bye tonight?
When I put my children to sleep, do I say good-bye,
When they go to school, and I go to court,
When my husband goes to work, and a friend drives me
To court
Do I say good-bye? For how long?

Will they lock me up in court?
I have my children here, going to school here,
Made a home here,
I've hurt no one here,
I only go to work and church
I've only worked so not to live in danger and dirt

They don't want me here
Just give me a chance
Hear my story
You'll know how good here can be
For me and you and everybody

So when I go to court
I'm afraid to say good-bye
What would you do
Your last day here?
...just hope it's not your last good-bye?

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# BALANCE

*by Danielle Polen*

# Get Your *Chi* On

Sometimes, our best efforts at being in balance just aren't enough and we need some outside assistance. After three recent back-to-back trips with varying degrees of stress, my immune system finally gave out and I got sick. I immediately made an appointment to see my fabulous acupuncturist, Kate.

**EASE THE PAIN:** Listen to NPR's report on how acupuncturists like Kate can help you!

The practice of acupuncture dates back thousands of years, and how it works depends upon whom you ask. According to Chinese thought, the body (indeed, all of nature) contains two opposing forces—yin and yang. When these constantly shifting forces are in balance, the body is in its most optimal (healthy) state. When out of balance, a state of disharmony, illness, or disease manifests. Our life-force energy, known as *chi*, flows along pathways throughout the body and maintains yin and yang in balance. However, the flow of energy can sometimes get disrupted or blocked, leading to illness. The intention of the acupuncturist is to get the *chi* flowing again by stimulating specific points on the body, thereby enabling the body to heal itself.

From a Western perspective, acupuncture "works" by stimulating certain points on the body to create a shift in the vibration of energy, which in turn encourages the release of certain chemicals and hormones. These chemicals can help boost the immune system and provide relief from pain and inflammation.

While still a relatively new practice in the United States, studies show that acupuncture is quickly gaining in acceptance and popularity. According to the National Center for Complementary and Alternative Medicine, people use acupuncture to treat a variety of conditions, including back pain, joint pain, neck pain, headaches, and sciatica, and stress management.

While acupuncture certainly has become more widespread in this country, there are still plenty of people who either fear the idea of being treated with needles, or who are just plain skeptical. For me, however, it's a useful tool for maintaining balance and good health. And like the old saying goes: "There must be something to acupuncture—you never see any sick porcupines!"

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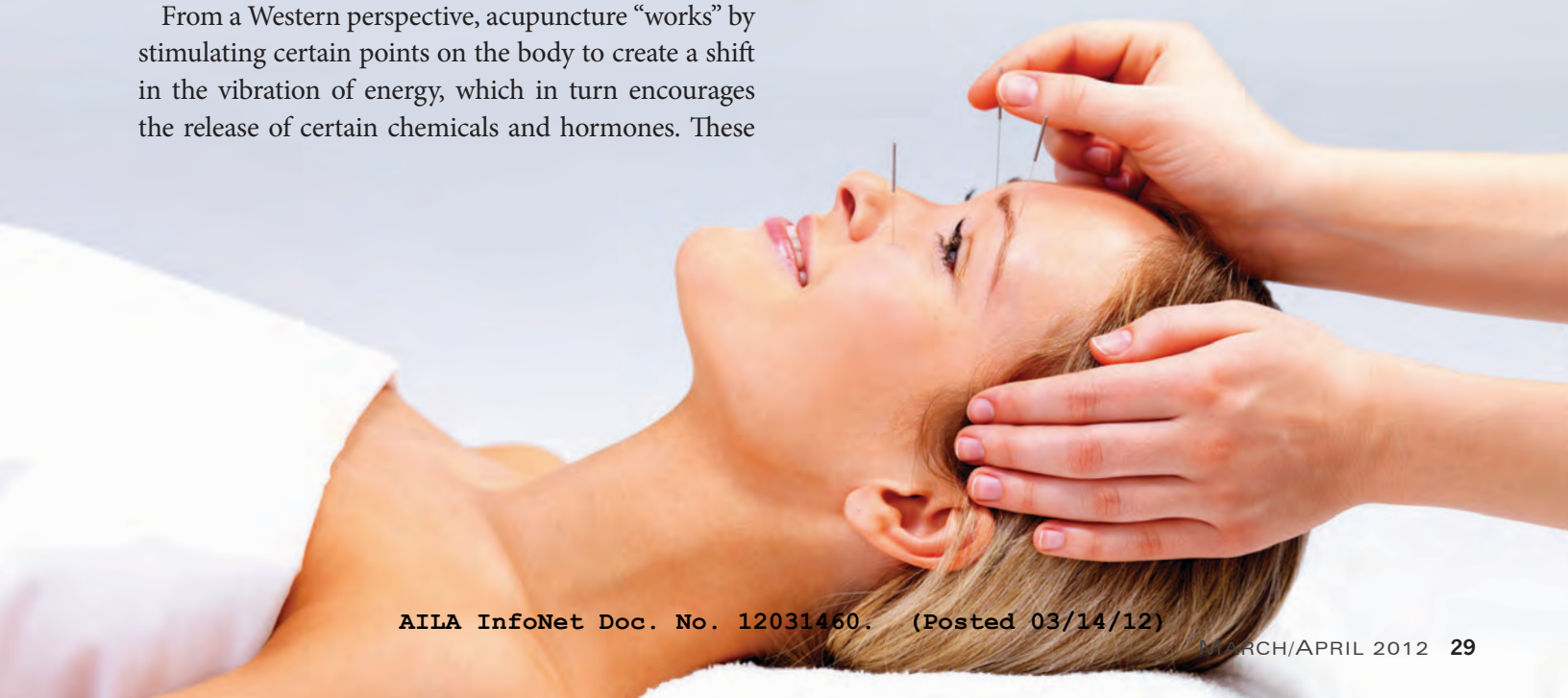
**Danielle Polen** *is Associate Director, Publications. She is also an experienced, registered yoga teacher through the Yoga Alliance. She can be reached at* dpolen@aila.org.



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# AILA Goes Viral: View 'The Impossible Dream'

AILA firmly believes in seeking out new channels of communication and new audiences to engage—our latest endeavor is no exception. Introducing AILA's first animated short video, "The Impossible Dream: U.S. Visas for Foreign Entrepreneurs," focusing on how our broken immigration system is affecting the business climate in the United States.

The story centers on the life of Bulgarian immigrant "Daniel Rutinksy", a recent business school graduate and entrepreneur who endures a number of struggles as he attempts to navigate our immigration laws and find a way to keep his life (and business) in the United States. The video highlights the economic repercussions facing this nation and all Americans when these entrepreneurs are forced to take their businesses to other countries.

AILA encourages sharing of this video with peers, clients, and local communities in order to dispel myths and better educate the public about the need for meaningful immigration reform. The video will be housed in the Press Room. Contact newsroom@aila.org for more information.

**RESEARCHING?** We've done the work for you! Visit 'Featured Topics' on **AILA's InfoNet** for commonly researched issues!

## HIGHLIGHTS FROM AILA'S 4TH ANNUAL OPEN HOUSE: February 17, 2012


Attendees received a special publications discount and learned about upcoming releases.

During "Ask the Executive Director," Crystal Williams fielded many questions from attendees.


**A TIME FOR CELEBRATION: MARCH 29, 2012!**

The American Immigration Council will hold its 17th annual **Washington, D.C. Immigrant Achievement Awards**, on **March 29, 2012**, at the Hyatt Regency Capitol Hill. The Council will be honoring immigrants who have contributed to our nation with their innovative and entrepreneurial accomplishments. For tickets or more information, contact Megan Hess at mhess@immcouncil.org.

Members were encouraged to participate in National Day of Action and the fight against notario fraud.

Many educational sessions took place, including an AILA*Link* training and Q&A.

# WHAT'S HAPPENING!

## THE 4-1-1:

Philadelphia chapter member **H. Ronald Klasko** (right) addressed real estate lawyers from around the state at the Pennsylvania Bar Institute's 15th Annual Real Estate Institute. He discussed what they need to know to help their clients raise capital for U.S. projects through USCIS's EB-5 Visa Program.

In other Philadelphia chapter news, members **Matthew Galati** (right), **Daniel Lundy**, and **Nataliya Rymer** (right) have joined Klasko, Rulon, Stock & Seltzer, LLP as associates.

Oregon chapter member **Dagmar Butte** has been selected by *Who's Who Legal* for inclusion in two key reference guides—*The International Who's Who of Corporate Immigration Lawyers 2012*, and *The International Who's Who of Business Lawyers 2012*. She is one of only two Oregon lawyers chosen for this honor.

New York chapter member **Frances C. Berger** is now of counsel at Masliah & Soloway, PC. Fran's practice has concentrated on employment-based immigration. She also handles family-based immigration and naturalization matters.

Oregon chapter member **James Lane** was elected to a two-year term as a member of the Oregon State Bar International Law Section Executive Committee. He will promote the objectives of the OSB with respect to international law issues as they affect Oregon attorneys.

Georgia/Alabama member **June E. Hyatt** has served as the keynote speaker at an Immigration/International Law Conference at the Universidad Autonoma de Tlaxcala in Tlaxcala, Mexico. The principal goal for the conference is to raise the awareness of Mexican global interests and foster international dialogue.

South Florida chapter member **Gina M. Fraga** has opened Fraga Law, P.A. with offices in West Palm Beach and Puerto Rico.

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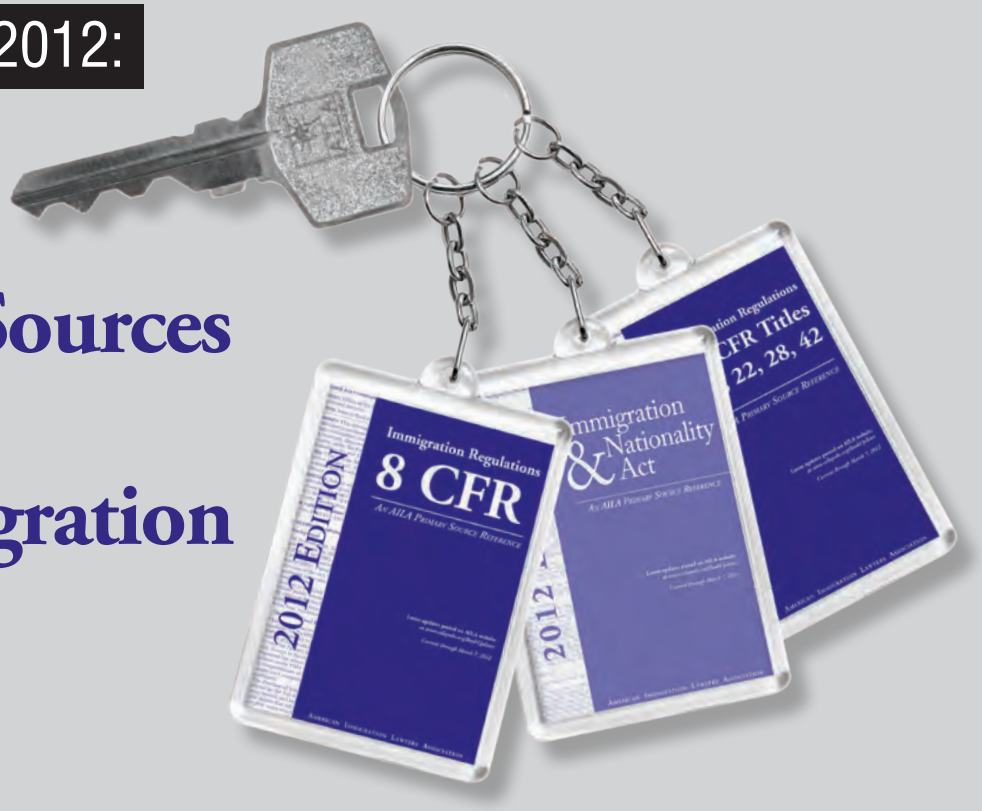
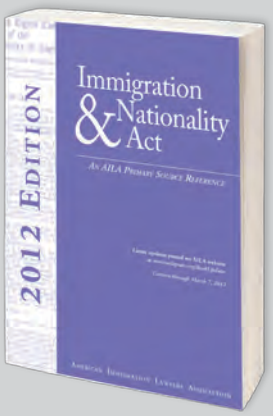



# AILA's Primary Sources Are the Key to a Successful Immigration Law Practice

***AILA's Immigration & Nationality Act (INA)*** and ***Immigration Regulations (CFR)*** work together to provide you with reliable sources at your fingertips. Updated through March 1, 2012, AILA's ***INA*** and ***CFR*** incorporate all statutory and regulatory changes from 2011 and early 2012.

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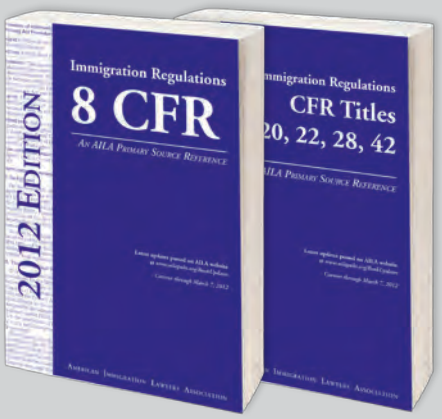


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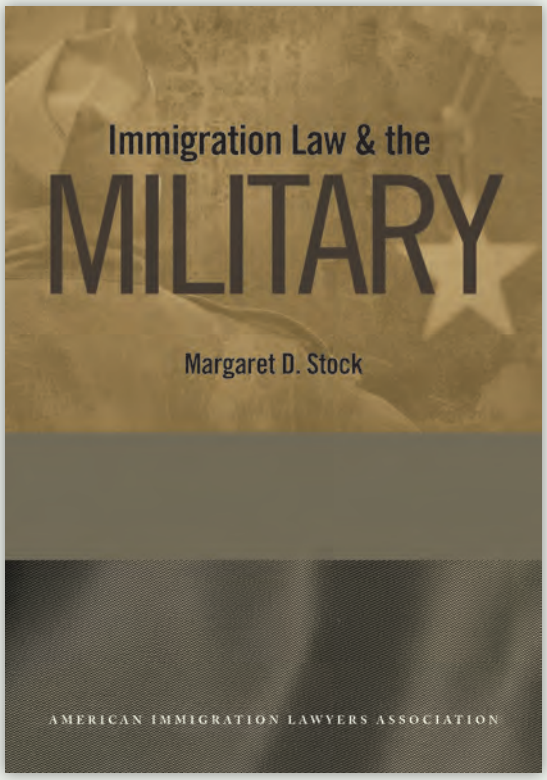


## *Immigration Law & the Military*

by Margaret D. Stock

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When assisting members of the U.S. military with immigration issues, you must be mindful of the many unique aspects of U.S. immigration law that specifically apply to the military. ***Immigration Law & the Military*** by retired Lieutenant Colonel Margaret D. Stock serves as your primer on all issues of immigration and citizenship laws and their effects on members of the U.S. military and their families.

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