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THE DAPA DILEMMA

'Should I Apply?'

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THE DAPA DILEMMA

'Should I Apply?'

Immigration attorneys are sure to face this inevitable question in the coming months. Learn how to best advise your clients on DAPA. 9

AILA Doc. No. 15022601. (Posted 2/26/15)

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AILA Doc. No. 15022601. (Posted 2/26/15)

Capture Your Audience: Reduce Weak, Passive Legal Writing

by Cletus M. Weber

Unless you practice primarily criminal or immigration defense, you should write in active voice whenever possible. Passive voice is suited for defense because it substantially reduces the logical and visual connection between a defendant and an alleged act, but most of the time you will want to strengthen this relationship. If you don't write in the active voice (or are not sure whether you do), consider these tips and examples:

Reduce 'Is,' 'Was,' and 'Were'

To write actively, watch out for the tell-tale signs of passive writing: "is," "was," and "were," especially when these words are attached to past-tense verbs (filed, washed, dropped, etc.). On their own, "is," "was," and "were" typically only glue an adjective (*e.g.*, hot) to a noun (*e.g.*, water), as in "Water is hot." Instead, attach them without glue and move directly to what you really want to say—*e.g.*, "The hot water melted the ice." Using past-tense verbs (*e.g.*, incurred and filed) with "is," "was," or "were" sucks even more life from your writing. Compare the following examples:

> "Costs were incurred."
> **Instead: "She paid."**

> "Documents are to be filed."
> **Instead: "File documents."**

If you fall into the bad habit of consistently writing in the passive voice—a common characteristic of government-speak—you will create writing that is largely vague and bloated. You may find the passive approach easier to write, but you will also lose your audience more quickly.

Shun '-tion' and Punt '-ment'

Numerous nouns ending in "-tion" (*e.g.*, indication, manifestation, and demonstration) indicate passive voice. All of them can easily be made active by converting them to their verb forms. Compare the following:

> **Passive:** A manifestation of intent.
> **Active:** May show intent.

Words that end in "-ment" (*e.g.*, achievement) can similarly dull your writing. Eliminate them the same way. For instance, write, "Sally achieved success."

Deviate

Not all passive writing is bad. Some is very powerful, such as Benjamin Franklin's advice that "Time is money," or Thomas Paine's observation that "These are the times that try men's souls." Mix it up. Just don't dwell in the passive voice.

Check

In addition to proofreading, try searching your documents electronically for "tion," "ment," and "is," "was," and "were." You may not have time to do this on every document every time, but practicing this whenever possible will help you see where you can improve.

Try

To write actively requires a lot of effort in the beginning. In short order, though, you will be writing actively without much effort. And your readers will thank you.

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

G-28s with USCIS and the Administrative Procedure Act

by Bradley B. Banias

Most people agree that the arbitrary rejection of a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, poses a problem, but reasonable minds disagree on a remedy. Some urge political solutions. Others urge no-holds-barred class action litigation. While this deliberation persists, G-28s continue to be rejected, lost, and ignored.

Until the various interests achieve a systemic solution, immigration attorneys should know that, in the right circumstances, they can still help push the debate forward through litigation.

Specifically, immigration attorneys should consider challenging benefit denials that are accompanied by the rejection of properly-filed G-28s by U.S. Citizenship and Immigration Services (USCIS), because such rejection can be an independent ground for challenging a denial under the Administrative Procedure Act (APA) in federal district court. There are at least three bases under the APA for making such an argument.

"Until the various interests achieve a systemic solution, immigration attorneys should know that, in the right circumstances, they can still **help push the [G-28] debate forward through litigation**."

Grounds for Challenging Improper G-28 Rejections

First, the improper rejection of a G-28 likely violates the agency's own regulations. Though USCIS's regulations are a bit murky, the relevant ones do give USCIS non-discretionary duties to: (1) accept a properly signed G-28; (2) consider the attorney's letter (if one is included); and (3) provide the attorney with a copy of all notices and decisions. *See* 8 CFR §103.2(a)(3), (b)(19). These are procedural requirements. Thus, if USCIS arbitrarily rejects a G-28, it likely will have violated all three duties: it will have failed to accept a properly signed G-28; it will have ignored any attorney letter; and it will not have sent notices or decisions to the attorney of record. These failures matter under the APA because they allow a court to set aside a final agency action if they are done "without observance of procedure required by law." 5 USC §706(2)(D).

Second, an improper rejection of a G-28 may deprive an applicant of the right to retain counsel at their own expense. Regardless of whether this right rises to a constitutional level, the regulations provide that a noncitizen "may" be represented by counsel. 8 CFR §103.2(a)(3). Improperly refusing to review an attorney's letter or recognize an attorney's appearance, therefore, likely violates the aforementioned APA section. 5 USC §706(2)(D). And, if a claim can be made under the U.S. Constitution, such arbitrary action can violate the APA by being unconstitutional. 5 USC §706(2)(B).

Finally, an improper rejection of a G-28 may render a decision arbitrary and capricious. An attorney's letter enclosed in an application typically addresses any significant issues the applicant may have with eligibility. Thus, an attorney's letter often contains arguments about why the attached evidence meets the regulatory and statutory requirements for a particular benefit. Further, it may cite to binding administrative

case law. Importantly, the attorney's letter is likely the only place in the record that contains such an argument. Under the APA and long-established U.S. Supreme Court precedent, an administrative decision is arbitrary and capricious if the agency wholly fails to consider an important aspect of the problem. Motor Vehicles Mfrs Ass'n v. State Farm Mut., 463 U.S. 29 (1983). Thus, if USCIS rejects a G-28 and refuses to read the attorney's letter, USCIS will be refusing to review an important aspect of the application.

Violation Must Prejudice the Applicant to Be Actionable

Even if the arbitrary rejection of a G-28 leads to these APA violations, to be actionable under the APA, such violations must prejudice the applicant. This is the key part of the analysis. The APA takes into account a harmless error standard. That is, if a technical violation did not affect the outcome of a decision, then this violation is harmless and a court need not invalidate the decision. Thus, if USCIS rejects a G-28, but addresses all of the arguments in the attorney cover letter, there will be no APA violation. Or, suppose the G-28 is rejected and USCIS fails to send the attorney a Notice of Intent to Deny (NOID), but the client receives it and delivers it to the attorney. If the attorney helps in the response and the final decision takes into account the NOID response, then there is no prejudice. Therefore, the attorney must be able to show that USCIS's improper rejection of the G-28 prejudiced his or her client.

If USCIS arbitrarily rejects a G-28, and such rejection negatively influences the final decision, the G-28 rejection alone may provide an independent basis for setting aside the denial under the APA. This argument has strong merit: in light of the serious interests associated with a visa application, the arbitrary rejection of a procedural form seems petty. When real people are affected, district judges are unlikely to exercise patience with such pettiness.

Thus, while the G-28 debate continues, individual challenges to denials that are accompanied by G-28 rejections are viable. Such challenges will protect clients and the attorney's role in the process. Further, a modicum of success in federal district court litigation—potentially accompanied by the award of attorney's fees under the Equal Access to Justice Act—will force the agency either to fix its process or engage in the debate.

BRADLEY B. BANIAS, a former attorney with DOJ's Office of Immigration Litigation, is developing a nationwide, federal court immigration litigation practice at Barnwell, Whaley, Patterson and Helms in Charleston, SC. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

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Preparing Clients for the Marriage Interview

by Jonathan S. Greene

Chuck and Hope were looking forward to their upcoming U.S. Citizenship and Immigration Services (USCIS) interview that would allow Hope to adjust her status to permanent residence based on their marriage. Their immigration lawyer, Marilyn, insisted on a meeting as soon as the interview notice arrived, so Chuck and Hope showed up at Marilyn's office two weeks before the interview to discuss their strategy.

HOPE: "Good morning. I'm a little nervous about this interview, but I know you will help us through it."

MARILYN: "We are going to prepare for the interview thoroughly. I'll be there during your interview to help when necessary, too. So let's dig in and get ready."

Over the next few issues of VOICE, the Family Immigration column will run a series of articles about how attorneys and their clients should prepare for a marriage-based adjustment of status interview. The first article illustrates a meeting between an attorney and her clients, all of whom are fictitious.

Marilyn pulled out the couple's case file and turned to the Form I-130, Petition for Alien Relative.

MARILYN: "Chuck, since you are the U.S citizen sponsor, the USCIS officer is likely to ask you questions about the I-130 petition. So let's make sure all of the information on the form is still correct."

Marilyn asked Chuck about each of the entries on the form. He provided the same answers as the information he listed on the form, but he needed a little prompting from Hope about some of the answers. Marilyn then asked Chuck about what was contained on his Form G-325A, Biographic Information. She asked Hope about each entry on the Form I-485, Application to Register Permanent Residence or Adjust Status, and her Form G-325A. Marilyn discovered a minor clerical error on one of the forms and made a note to tell the USCIS officer about the discrepancy during the interview, even if the clients were not asked about it.

MARILYN: "Do you have a complete copy of the forms we submitted? We e-mailed you a scanned version of the entire packet five months ago, but here is a paper copy of the forms. You did pretty well in giving me the answers today, but I want each of you to review all of the information on all of the forms because you may be asked about it by the officer. Chuck, that means you have to know the information on Hope's G-325A form, and Hope, you need to know Chuck's form inside and out."

Marilyn looks at the documents in the file.

MARILYN: "The USCIS officer is going to want updated documents. Do you remember the list of documents I asked you to provide when we filed this case? I'd like you to gather the same types of documents for the last five months only. Please send them to me by no later than three days before the interview so I can review them, OK?"

CHUCK: "Is there anything special that you want from us?"

MARILYN: "Yes, if you have already filed your new joint tax returns, please provide them. That will update your Form I-864, Affidavit of Support, and also show your joint financial responsibility."

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Basics of the I-130 and Adjustment of Status

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Marilyn also handed Chuck a list of potential documents for the case, including new bank statements, utility bills, insurance documents, updated leases, car purchase records, bills, and major appliance purchase receipts.

MARILYN: "Chuck, we are also going to need a new letter from your employer confirming your continuing employment. Please make sure the letter has your date of hire, rate of pay, and job title. Have you traveled anywhere since we filed the packet?"

Hope told her that they had only gone to Chicago to visit Chuck's aunt and uncle. Marilyn told them to send her a copy of their e-tickets and photos from the trip.

MARILYN: "For the interview, you should also bring your original marriage certificate or a court-certified copy. Hope, you should bring your passport, original birth certificate, driver's license, Social Security card, and the Employment Authorization Card you just received. Chuck, you should bring your driver's license and proof of citizenship, such as your passport or original birth certificate."

HOPE: "How should we dress for the interview?"

MARILYN: "Please dress nicely. Some lawyers say to dress like you are going for a job interview. I recommend that men were a suit or at least a tie. Dressing nicely shows respect for the process and communicates to the officer that you took some effort to be ready for the interview.

"The USCIS officer is going to be judging your demeanor, so during the interview, you should also sit close together. USCIS officers tend to look skeptically at married people who sit so far apart that another person could fit in between them."

Marilyn told them about the importance of maintaining eye contact with the officer when providing answers and not fidgeting. She suggested that they refrain from placing any of their papers on the officer's desk so as not to invade the officer's personal workspace.

CHUCK: "Are we allowed to joke around with the officer, or is this all business?"

MARILYN: "That answer depends on the demeanor of the officer. If we get an officer who just wants to get through the interview, you should just be direct with the officer. If we get an officer who is more friendly, it's appropriate to smile and be cordial. But you shouldn't make any jokes during the interview. Of course, if the officer says something funny, it would be natural to smile and even laugh a little."

Marilyn gave Chuck and Hope a set of questions that have been frequently asked during marriage interviews and told the couple to practice answering the questions. If they had any inconsistent answers during their practice, they should discuss them and try to resolve the differences. Marilyn cautioned the couple that USCIS officers certainly could ask other questions besides those on the list, but practicing from the list could help them understand the types of questions that would be asked to show that their marriage is bona fide.

The couple wrapped up the meeting and agreed to get together again with Marilyn a few days before the interview for more practice and to review the new documents. Marilyn reminded Hope that she needed to complete the medical examination as soon as possible and gave her a list of the physicians designated by USCIS in the area. Marilyn felt that Chuck and Hope were getting well prepared for the upcoming interview.

MARILYN: "Just remember to send me the documents before our next meeting, and please contact me immediately if any issues arise before we get together."

JONATHAN S. GREENE is the founder of the Greene Law Firm, an immigration and family law firm in Columbia, MD. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

Top Five Tips to Charge What You Are Worth

by Reid F. Trautz and Maheen Taqui

In the January 2015 VOICE, we discussed how many lawyers limit the value of their own services when discussing fees with clients. So how do you build your confidence and resist the urge to lower your fee when talking to a client? We advised in the first part of this tip that it's time to "push through the guilt, end the wrestling matches, and begin with a new outlook" … but how do you put that into practice to help keep you from deviating from your goal of quoting the fee you know you are worth? Below are five possible solutions:

1 HAVE A WRITTEN SET OF PRICES. Create a confidential pricing list for each of the services you offer, and include the reasons you believe you deserve the fee along with the anticipated amount of time and energy spent on each type of case. Have this price list physically available to you (and only you) during each consultation. Use it to give yourself confidence that the fee you are about to quote was objectively reasoned before any guilt can sneak in.

2 GO AHEAD, ASK YOUR CLIENTS THIS QUESTION: "WHAT ARE MY SERVICES WORTH TO YOU?" Instead of listing all the reasons why you are worth your fee, let them answer why they need your help, what you will help them accomplish, and how you will impact their lives. These are important questions that clients need to understand and work through to recognize your value to their future.

3 PUT THE COST IN RELATIVE TERMS. Ask your clients, "How much did you spend on _____?" Bring the cost back to the client. How much did your client spend on their daughter's quinceañera? How much was spent on a recent vacation? Did they lend a friend or family member money? Was their money well spent? Now put it in terms of their case—once their case is concluded, what will they have gained? A more financially stable business? Marital bliss? A better life for themselves and their families? A way to make a living free from persecution? By putting your value in the context of their lives, clients will be less likely to complain about your fee or fail to pay it in full.

4 CREATE A PRO BONO LIST. Consider in advance the number of pro bono cases you want (and can afford) to take on each year. Have the list of those cases handy for each client consultation. (Again, for your edification only.) If you have space for five cases and the list is full, then do not feel obligated to take on another pro bono case from the person in front of you who cannot afford to pay.

Put your services in the context of your clients' lives to add more value and clients will be less likely to complain about your fee or fail to pay.

5 IF ALL ELSE FAILS, KEEP A PICTURE OF YOUR FAMILY. By reducing your fee, you are not just hurting yourself, you're hurting your family. Keep their pictures close by. When meeting with clients in your office, have a picture of your family on the desk and look to it when you feel you may be wavering towards underselling your services. Think about it this way—taking on a reduced fee case will only make you take on another case to compensate, which means more work and less time with your loved ones.

REID F. TRAUTZ is the director of the AILA Practice and Professionalism Center. **MAHEEN TAQUI** is the Practice and Professionalism Center's associate.

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The DAPA Dilemma: 'Should I Apply?'

Assuming President Obama's immigration executive action is soon implemented, immigration attorneys around the country will be presented with the crucial question: "Should I apply?" Here are tips to help your clients weigh the pros and cons.

by Patrick Taurel

On February 16, 2015, a federal judge issued a preliminary injunction in *Texas, et al. v. U.S.A*, temporarily blocking the implementation of the expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA) initiatives. While DACA provides temporary protection to undocumented individuals who came to the United States as children, the individuals protected under DAPA are undocumented parents of U.S. citizens and green card holders. To gain a better understanding of what the preliminary injunction does *and does not* proclaim, please read Judge Temporarily Halts Expanded DACA and DAPA.

Soon after the injunction was handed down and the day before this article went to press, the U.S. Department of Justice (DOJ) filed an emergency stay request, as well as a notice of appeal with the U.S. District Court for the Southern District of Texas, and President Obama pledged to fight the injunction with "every tool at [his] disposal."

With so many legal scholars and immigration experts, not to mention the DOJ's Office of Legal Counsel, weighing in on the side of implementing DAPA and expanding DACA, it's easy to imagine a higher court lifting the dubious preliminary injunction and ultimately recognizing the deferred action programs for what they are: perfectly lawful. Assuming these programs are implemented, how can attorneys responsibly respond to clients' fears about applying?

You're in a consultation. You've screened for the wide array of relief you typically screen for—Us, Ts, asylum, adjustment, and so on—and nothing looks promising … except DAPA. So you spend the remainder of the hour helping your potential client understand a little more about the new program. You explain what deferred action is and isn't. You go through the eligibility criteria, the facts applicants will need to establish with supporting evidence, the filing fee, the biometrics process, and all the other material information your client should know. And then comes the inevitable question: "OK, should I apply?"

Common Fears

Your client tells you what she's been hearing in the community: people are saying that the courts won't just block the program temporarily but permanently. She's heard that a future president or Congress can do the same. It isn't safe to apply, she decides. The government will use your information against you. So isn't this basically just signing up for deportation?

What's the best way to handle these questions? Put five AILA members in a room and you'll probably get six answers. That's not surprising because every case is different and there isn't a single right way to tackle questions like these. But there are better ways and worse ones. And one of our goals as lawyers—indeed, one of our fundamental obligations—is to help clients make the best possible decisions.

Informed Decisions

So let's start there—with the basic requirement of helping our clients make informed decisions about our representation of them. Informed consent obligations flow primarily from our duty to communicate with clients, which requires, among other things, that a lawyer explain matters such that clients can make informed decisions regarding the representation. For a more thorough discussion of the ethical implications of representing noncitizens in connection with the Immigration Accountability Executive Action announced by President Obama on November 20, 2014, read the AILA ethics practice advisory titled Ethical Considerations in Advising and Representing People Who May Benefit from the Immigration Accountability Executive Action.

ADVISORY

Ethical Considerations in Advising People Who May Benefit from Executive Action (FREE!)

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The ABA's Model Rules of Professional Conduct define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated *adequate information and explanation about the material risks* of and reasonably available alternatives to the proposed course of conduct" (emphasis added). What "material risks" should lawyers articulate to clients who may be considering requesting DACA or DAPA? The answer will depend, of course, on the particular circumstances of the client's case. Individuals with an arguably disqualifying criminal history and those with adverse immigration histories will experience heightened risks compared to those who fall squarely within the eligibility criteria and present what we might call "clean" cases.

Acknowledging DAPA's Limitations

What are the baseline "material risks" that lawyers should make all potential DACA and DAPA requestors aware of, regardless of the equities in the individual case? At a minimum, before a client signs up for help with DACA or DAPA, informed consent requires explaining the basic risks associated with—and the limitations inherent in—these prosecutorial discretion programs. These warnings include:

- The DACA and DAPA programs can be terminated at any time by the current administration, by a future administration, by Congress, or by the courts.
- An individual's own deferred action grant can be terminated at any time and without the sorts of procedural protections associated with removing a person's visa or green card.
- Deferred action is discretionary. Thus, there is no guarantee the Department of Homeland Security (DHS) will grant a client's request, even if the client meets the DACA or DAPA guidelines.
- Deferred action does not afford a client lawful status and it does not place a recipient on a pathway to citizenship or a green card.
- The application process requires submitting a sworn statement revealing the client's unlawful status to a government agency empowered to initiate enforcement action.
- DHS has adopted a confidentiality policy, but there are some exceptions, and the agency has said they may change the confidentiality policy at any time.

"**[B]efore a client signs up for help with DACA or DAPA**, informed consent requires explaining the basic risks associated with—and the limitations inherent in—these prosecutorial discretion programs."

Contextualizing the Risks

While clients must be made aware of these significant drawbacks, one important way for lawyers to add value to the client's cost-benefit analysis is to put all of this into context. Draw on lessons from DACA and the history of immigration enforcement policy and help your clients weigh the pros and cons of applying, as well as those of not applying. What follows are my thoughts on helping clients think through this difficult question. Others may wish to tread more cautiously; I'll admit that this is arguably an aggressive take.

If DACA is any clue, DAPA requestors who meet the eligibility criteria face minimal risks. Many unsuccessful DACA applicants faced nothing worse than a denial, which comes without prejudice to reapplying, although it does cost the requestor $465 in application fees. Remember, however, that individuals who meet the U.S. Citizenship and Immigration Services' (USCIS) criteria for issuance of a notice to appear face a risk of referral to Immigration and Customs Enforcement (ICE) and other negative consequences. Although the number of DACA requestors who have been referred to ICE as a consequence of requesting DACA is unknown, as of June 31, 2014, USCIS had terminated the deferred action of a relatively small number of individuals: 147 DACA recipients out of more than half a million.

But, of course, what clients often want is an analysis that looks beyond the current administration. They want to know about long-term risks and what will happen if an enemy of deferred action takes the reins. When responding to these concerns, lawyers must acknowledge that the conduct of future administrations cannot be predicted, but the past carries important lessons on what the public can reasonably expect.

First, in the many years that presidents have been creating temporary deportation relief programs like DAPA, there have been no instances of which the American Immigration Council is aware where the government has enforced the law against the qualifying population en masse.

Second, many individuals protected under administrative deportation deferral programs went on to benefit from legislation passed in the wake of once-controversial executive actions. Laws enacted to provide lawful status to those afforded deportation reprieves by executive action abound; among them, the Cuban Adjustment Act of 1966, the Nicaraguan Adjustment and Central American Relief Act, and the Haitian Refugee Immigration Fairness Act of 1998. Even individuals protected under the Family Fairness Policy—a group whom Congress purposely excluded from the Immigration Reform and Control Act of 1986—eventually received statutory protection under the Immigration Act of 1990.

Third, many of the individuals who qualify for DAPA—long-term residents who do not pose a threat to public safety and who have U.S. citizen or legal permanent resident (LPR) family members—are precisely the sorts of individuals who would not be considered enforcement priorities under longstanding bipartisan immigration policy. Memoranda from Bill Clinton's Immigration and Naturalization Service to George W. Bush's DHS have identified various factors to consider when exercising prosecutorial discretion including length of residence in the United States, criminal history, humanitarian concerns, and whether the noncitizen is likely to become eligible for relief—positive equities that potential DAPA requestors tend to have in droves.

Finally, in light of public support for the President's announcement, particularly within the Latino community, there is a significant political risk for any political party attempting to end DACA and DAPA.

Remember the Positive: Focus on the Big Picture

That contextualizes what many would regard as the most important drawbacks and risks associated with DACA and DAPA, but what about the positives? What do people gain? Only highlighting the risks fails to provide the client with the assistance he or she really needs, which is help weighing the pros and the cons. The pros are many—a reprieve from exposure to deportation; work authorization; and the possibility of applying for and receiving a Social Security number, driver's license, and advance parole; among others—but what clients should also consider are the cons associated with not applying. Not applying means more sleepless nights. It means more stress. It means more fear. It could mean continued out-of-state tuition rates. It means no possibility of traveling abroad to see relatives. Although applying for these deferred action programs does carry some measure of risk, in many ways, the risks themselves are no worse than the ones many clients are already facing. And by receiving the benefits that come with DACA and DAPA, they are, in many senses, minimizing daily risks while banding together with a larger community of immigrants who are coming forward and seemingly placing themselves on the right side of the law, in the hopes that the U.S. government does right by them in the long term. We do right by our clients when we help them understand all of this.

DAPA/DACA

Also check out:

Judge Halts Expanded DACA, and DAPA

For the latest news, see AILA's **Administrative Reform** page.

PATRICK TAUREL is a legal fellow with the American Immigration Council. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

AILA Doc. No. 15022601. (Posted 2/26/15)

by Beth Werlin

Judge Temporarily Halts Expanded DACA and DAPA

Five things you need to know about Judge Hanen's February 16 decision.

On February 16, 2015, Judge Andrew S. Hanen, a federal district court judge, issued a decision in the lawsuit brought by Texas and 25 other states challenging President Obama's new deferred action initiatives. In his decision, he issued a preliminary injunction, meaning that he temporarily blocked the implementation of the expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Legal Permanent Residents (DAPA) initiatives. These initiatives are intended to offer temporary deportation reprieves to many undocumented individuals who came to the United States either as children or who are undocumented parents of U.S. citizen and green card holders. These individuals must pass a background check and meet other requirements. The government had been preparing to launch the expanded DACA initiative this week and the DAPA program later this spring.

Here are five things you need to know about Judge Hanen's decision:

1. This is a temporary setback, not a defeat.

The President's executive actions announced last November are the result of hard-fought battles in the streets, in the media, and in the halls of Congress. The administration took great care in vetting the expanded DACA and DAPA initiatives ahead of time, obtaining a lengthy, detailed legal opinion from lawyers with Department of Justice's Office of Legal Counsel (OLC). Judge Hanen's views are not only at odds with the OLC opinion, but with Supreme Court precedent, decades of practice, and the views of 136 law professors, as well. We are strong on the law and this decision will be overturned.

> "**Judge Hanen's views are not only at odds with the OLC opinion**, but with Supreme Court precedent, decades of practice, and the views of 136 law professors, as well."

Immediately after the decision was issued, the White House announced its commitment to challenging the court's order. As the White House said, "The district court's decision wrongly prevents lawful, commonsense policies from taking effect and the Department of Justice has indicated that it will appeal that decision." The case will now go to the Fifth Circuit Court of Appeals. It is unclear how long it will be before the appeals court ultimately rules. In the meantime, potential applicants for expanded DACA and DAPA should continue collecting documents and saving for filing fees so they will be ready to apply when the injunction is lifted.

2. The decision does not affect the original DACA program and other administrative reforms announced in November 2014.

The court's opinion stated clearly that the only programs at issue in the lawsuit are the expanded DACA and DAPA initiatives. The original DACA program, first announced in June 2012, is not affected by the lawsuit. As the Secretary of Homeland Security said in a statement on February 17: "Individuals may continue to come forward and request initial grant of DACA or renewal of DACA pursuant to the guidelines established in 2012."

In addition, other aspects of the President's November 2014 executive actions also remain fully intact. This includes the new immigration enforcement priorities memorandum. This memo establishes a department-wide set of priorities that focus on the removal of individuals who pose threats to "national security, public safety, and border security." It went into effect on January 5, 2015. Virtually every person who is eligible for expanded DACA and DAPA will not qualify as an enforcement priority and will be a strong candidate for the favorable exercise of prosecutorial

discretion, should they come into contact with immigration enforcement officers.

3. The court reached narrow legal issues.

In his decision, Judge Hanen concluded that Texas has satisfied standing requirements (*i.e.*, has alleged an injury that would give it legal authority to bring the suit), and also is likely to prevail on one of its legal claims, namely that the administration violated the Administrative Procedure Act by failing to comply with technical requirements for issuing a new rule. The court did not rule on the primary legal claim that the deferred action initiatives are unconstitutional. Although the judge's opinion contains pages of political rhetoric and suggestions of wrongdoing, at the end of the day, the only issues he ultimately decided are narrow ones.

4. The judge cherry-picked the facts.

Judge Hanen's decision that Texas has "standing," or legal authority, to bring this suit relies upon alleged injuries that the states will suffer when expanded DACA and DAPA are implemented. The judge focuses primarily on the costs of processing driver's licenses for individuals granted deferred action. Yet the judge ignores the record evidence demonstrating that these initiatives have economic benefits for the states and the nation as whole. Specifically, the deferred action initiatives will positively impact the U.S. economy by raising wages, increasing tax revenue, and creating new jobs. Immigration, civil rights, and labor groups submitted an amicus "friend of the court" brief in the case outlining these benefits.

5. There is widespread support for the deferred action initiatives.

Although 26 states have signed on as plaintiffs in this lawsuit, many of those states have relatively few noncitizens who might benefit from expanded DACA or DAPA. In contrast, 12 states plus the District of Columbia, 33 cities, along with the U.S. Conference of Mayors and the National League of Cities, and police chiefs have filed amicus "friend of the court" briefs in support of the initiatives. According to the Migration Policy Institute, the cities backing the initiatives actually have a larger total population of undocumented immigrants than the states that are suing the federal government. The fact that those most impacted believe that the deferred action initiatives are beneficial to their communities is telling and undermines the plaintiff-states' claims. Further, polls indicate that a majority of the American public backs the administration's executive actions, while opposing efforts to overturn the initiatives.

DAPA/DACA

Also check out:

The DACA Dilemma

For the latest news, see AILA's **Administrative Reform** page.

BETH WERLIN is the director of policy at The American Immigration Council.

AILA Doc. No. 15022601. (Posted 2/26/15)

Meet a Pro Bono Innovator

by Phyllis A. Forman

AILA members have a long and distinguished history of pro bono service to their communities. In Philadelphia, one member in particular stands out: Ms. Valentine Brown of the AILA New Jersey Chapter. Widely-acknowledged throughout the greater Philadelphia and southern New Jersey areas for her commitment to advancing pro bono practice and young lawyer mentoring, Ms. Brown has been appointed pro bono partner of Duane Morris's firm-wide pro bono program. The Practice and Professionalism Center congratulates Ms. Brown on her recent accomplishments and looks forward to working with her to develop a new partnership with the AILA Military Assistance Program (MAP).

Since joining Duane Morris in 2009, Ms. Brown has sought to establish potential pro bono initiatives based on the attorneys' interests and goals. While the firm currently has a strong veterans' pro bono group, Ms. Brown envisions a new initiative to complement it: a firm-wide AILA MAP. Since 2008, AILA's collaboration with the U.S. military's Legal Assistance Office of the Judge Advocate General has assisted active duty members and their families in immigration

HELPING CHILDREN IN COLORADO

In February's Interview of the Month, AILA's Colorado Chapter Chair David Kolko discusses how the chapter, together with the Rocky Mountain Immigrant Advocacy Network (RMIAN) and the Colorado Bar Association (CBA), helped the unaccompanied children in Colorado.

BOOK

Immigration Law & the Military (Coming Soon)

matters. Ms. Brown has already liaised with AILA to refer cases to Duane Morris volunteers.

A productive MAP initiative at Duane Morris is promising, given Ms. Brown's history of fostering other successful pro bono initiatives. In 2010, she founded the firm's Violence Against Women Pro Bono Practice Group. Under this program and through Immigration IMPACT, a Philadelphia-wide project in collaboration with the Association of Pro Bono Counsel, Ms. Brown mentors and trains attorneys to provide assistance to women suffering gender-based violence. Within the project's first year, assistance to domestic violence victims had more than doubled. The program's success was honored in 2014. In addition, HIAS Pennsylvania recognized Ms. Brown with its Gold Door Award for commitments to immigrants to ensure their contributions to the region's cultural well-being are being realized.

Pro bono initiatives at Duane Morris fostered by Ms. Brown have inspired many of the firm's attorneys to engage in pro bono representation of clients who would otherwise not be served. We hope her story will inspire you, too!

PHYLLIS A. FORMAN is a solo practitioner in Philadelphia and member of the AILA National Pro Bono Services Committee.

AILA MEMBERS PROVIDED
20,000 HOURS
OF PRO BONO SERVICES ...

THAT'S WORTH MORE THAN
$5 MILLION*
IN BILLABLE SERVICE HOURS

CONGRATULATIONS TO THE LAWYERS OF THE ARTESIA PRO BONO PROJECT!

In the fall of 2014, more than 250 AILA members generously left their practices, for up to two weeks at a time, to head to Artesia, NM, to provide a voice for the voiceless and fight the unjust machine of family detention. Dozens more provided off the ground support and guidance. What these members gave of themselves—time, sleep, righteous anger, and fierce compassion—cannot be measured. But the impact on the lives of women and children in the New Mexico desert can be measured—more than 1,200 women and children were served in the Project's short tenure. This incredible effort is AILA's greatest achievement towards the promotion of justice to date!

*AILA members provided more than 20,000 hours of Pro Bono service during the course of the Artesia project. Assuming the AILA Marketplace Study average of $250 per billable hour, that's worth more than $5 million in Pro Bono Services!

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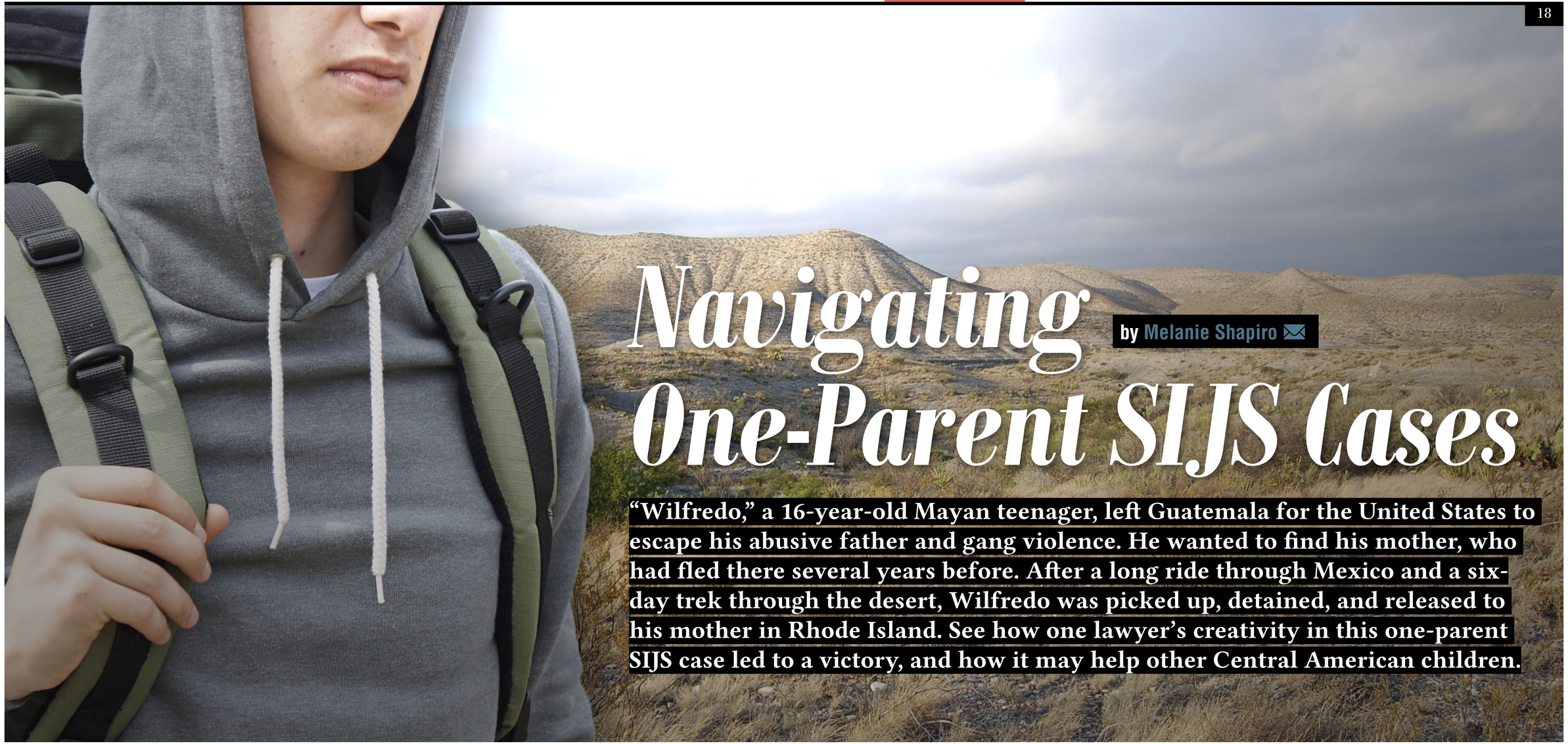

Navigating One-Parent SIJS Cases

by Melanie Shapiro

"Wilfredo," a 16-year-old Mayan teenager, left Guatemala for the United States to escape his abusive father and gang violence. He wanted to find his mother, who had fled there several years before. After a long ride through Mexico and a six-day trek through the desert, Wilfredo was picked up, detained, and released to his mother in Rhode Island. See how one lawyer's creativity in this one-parent SIJS case led to a victory, and how it may help other Central American children.

DRAMATIZATION: "WILFREDO" JOURNEYS THROUGH THE DESERT TO GET TO THE UNITED STATES. SUBJECT'S NAME HAS BEEN CHANGED TO PROTECT HIS IDENTITY.

The purpose of the Special Immigrant Juvenile program is to help foreign children in the United States who have been abused, abandoned, or neglected. SIJ status (SIJS) is a wonderful remedy that immigration practitioners use to keep vulnerable children safe, especially when a potential asylum claim may be complicated by one-year deadline issues or involves gang-related violence. In particular, SIJS may be one of the few available remedies for Central American children fleeing gang-related violence, as the federal courts, the Board of Immigration Appeals, and immigration judges are generally unreceptive to other claims. Usually these cases include findings of abuse, neglect, or abandonment against both parents, but one-parent SIJS is also possible. The following story illustrates a typical one-parent SIJS case that I encountered in my practice. It explains how the incongruity between the law and the regulations, as well as the creativity in developing an argument, led to a successful outcome for my client.

Wilfredo's Story

"Wilfredo" [his name has been change to protect confidentiality] is a 16-year-old indigenous Mayan boy who fled Guatemala because of a fear of the gangs and because he wanted to reunite with his mother, Flora. She left Wilfredo when he was 10 years old to work in the United States and sent money home to support him. Before coming to the United States, Flora got up every day at 3 a.m. to cook pigs that she had slaughtered and then to travel an hour to Guatemala City, where she sold the pork from a cart. She would return home late and then cook dinner. This was her routine six days a week.

"**SIJS may be one of the few available remedies for Central American children fleeing gang-related violence** as the federal courts, the Board of Immigration Appeals, and immigration judges are generally unreceptive to other claims."

Flora was married to Juan, a raging alcoholic who repeatedly raped her, beat her, and beat their animals to upset her further. Flora bore him 12 children. Two died. One child, Julio, suffers from epilepsy and was deemed mentally retarded. In an attempt to get Flora to return, Juan often called to report that he was beating Julio, and threatened to continue to do so until she returns. Although she hasn't seen Juan for many years now, she still cringes and is quick to cry upon hearing his name.

Wilfredo also fell on hard times in Guatemala. His formal education was interrupted at age 12, when he was taken out of school and forced to work on a farm with his father. Wilfredo recalls the hot sun on his neck as he bent over harvesting crops, as well as the calluses on his hands, the beatings, and the put-downs if he did not work quickly enough. But the abuse wasn't just limited to the fields. One day, on his way to his cousin's house, members of the Mara Salvatrucha gang beat him up and left him in the street.

In search of refuge, Wilfredo fled to the United States with a coyote. A bus took him through Mexico to the southern U.S. border. The lengthy ride was followed by a six-day trek through the desert with little food and water. He was discovered by an immigration agent, brought to a detention facility, and then released as a minor to his mother in Rhode Island. Wilfredo then enrolled in high school, where he faced language and educational gaps. One teacher even made anti-immigrant remarks to him.

Eligibility for SIJS

Obtaining permanent residence through SIJS involves a three-step process, the first of which requires seeking an order from the relevant state family court establishing custody, and also indicating that it is in the child's best interests to remain in the United

States with the parent or guardian.[1] The special findings issued by a state court judge must include the following: (1) the minor is dependent upon the state court for his or her care and protection; (2) reunification with one or both of the minor's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and (3) it would not be in the minor's best interest to be returned to the minor's or parent's previous country of nationality or country of last habitual residence. INA §101(a)(27)(J).

One-Parent SIJS

Most SIJS cases include findings against both parents. In Wilfredo's case, though, we we wanted him to be able to remain in the United States with his mother, so I had to establish one-parent SIJS. To do this I first looked to the legislative history of SIJS.

The Immigration Act of 1990 created a new classification of "Special Immigrant Juvenile," which provides lawful immigration status to undocumented minor children whose parents are unavailable to provide for their care and protection. INA §101(a)(27)(J). In 1997, Congress amended this statute to require that a minor child be deemed eligible for long-term foster care due to abuse, neglect, or abandonment. However, in 2008, the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) further amended SIJS eligibility requirements by eliminating the need to find the child eligible for long-term foster care. Significantly, the TVPRA provides SIJS eligibility based on a finding against just one parent.

As a result of the amendment to SIJS eligibility, then, a minor living with one parent, like Wilfredo, who can prove abuse, neglect, or abandonment by the other parent, is eligible for SIJS. *See* INA §101(a)(27)(J); *see also* Matter of E–G–, 24 Misc.3d 1238 (N.Y. Fam. Ct. 2009). In many Central American cases, one parent is often absent in the relationship, having abandoned the child, and this forms a basis to seek SIJS relief.

Developing a Creative Argument

Each state has its own particular courts and procedures relating to custody matters. In Rhode Island, the family court and probate court are separate. Thus, it is necessary to seek appointment of a guardian in probate court, and then that guardian petitions for the special findings in family court. When a child is living with one of the parents, it can be tricky to have a court appoint a guardian. In Wilfredo's case, we had his pastor appointed as guardian. We argued that Wilfredo needed a father figure and that, because his mother is undocumented, she is not a stable figure because she could be deported at any time.

When we moved for special findings in family court, we argued that the plain language of the clause "one or both parents" signified that either was acceptable. We were successful in obtaining special findings for the first one-parent SIJS case in Rhode Island.

As lawyers, we are taught early on that every word counts. With often few regulations or clear guidance to help us, it is our duty to zealously present the best arguments possible to obtain a favorable result. When handling one-parent SIJS cases, creativity is key in developing such arguments. In this case, arguing that the child needed a father figure and a stable person to care for him in the event that his mother was deported was not a straightforward SIJS approach, but it was a creative one that got the job done.

1 Once the predicate order has been obtained, the second step is to file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The final step is to file a Form I-485, Application to Adjust Status to Permanent Resident, based on an approved I-360.

MELANIE SHAPIRO is an immigration attorney with her own practice in Dedham, MA. She practices holistic, compassionate lawyering. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

Enhance Your Practice: Join AILA's Federal Litigation Section

by Danielle E. Rosché

You've worked hard to establish a relationship with your clients. You know their cases and they trust you. So, when their case hits a snag, trust yourself to advocate for them in federal court.

Why Go the Federal Litigation Route?

Federal litigation can involve anything from petitions for review of an Executive Office for Immigration Review (EOIR) decision, district court actions for either stalled or wrongly decided U.S. Citizenship and Immigration Services (USCIS) and EOIR decisions, or even 42 USC §1983 claims for civil rights violations. Taking your client's case away from the administrative realm and into federal court allows for faster resolution and, in some cases, can even save your client money.

When I first started practicing law in 2009, all litigation matters at the firm where I worked were referred out. For our clients, this meant incurring additional costs to hire a separate attorney who had to learn their cases from scratch; for the law firm, it meant a loss in business, not only of the fees for the litigation, but also on future business from that client. The reality was that many of our clients who would have strong federal claims did not seek such relief because they didn't want to hire a second attorney. As a new practitioner, I never liked telling my clients that all I could do for them was to keep calling USCIS or their congressional representative for assistance. Going to federal court allows you to bypass the agency appeals process entirely, and also allows for recovery of legal fees. Moving this litigation in-house allows less expensive and faster filings, faster release where detention is concerned, and the satisfaction of knowing that when your client's rights are being infringed, you have the ability to hold the government accountable.

> "With the resources and advice of AILA's Federal Court Litigation section, **federal litigation is within the grasp of all attorneys.**"

The Importance of AILA's Federal Court Litigation Section

Drawing strength from my youthful energy and righteous indignation, I persuaded the partners at my firm to allow me to train in federal litigation and join AILA's Federal Court Litigation Section. Since no other attorney there practiced in federal court, I relied entirely on AILA and its incredibly supportive network of attorneys to guide me in this arena.

The Federal Court Litigation conferences and section listserve help with the procedural aspects of practicing in federal court. They also help with brainstorming tough issues that may be worthy of federal litigation, and with identifying which of your cases may benefit from litigation. From challenging mandatory detention to seeking faster and fuller disclosure under the Freedom of Information Act (FOIA), options for federal litigation abound once you start looking for them.

Federal Litigation Practice in Action

Establishing a federal litigation practice gives you the power as a zealous advocate to take your clients' cases to the final stage. Federal litigation allows you to challenge unjust agency interpretations. Before starting the litigation practice at my old firm, we often would tell clients that although the law was unclear, or possibly even interpreted in an unjust manner, we couldn't take their case because, under the agency's

interpretation, we would lose. But federal litigation gives clients another option to challenge those interpretations and regulations that are ultra vires. Although it's important to fully disclose the risks and costs to the clients, once they are on board, taking these types of cases is incredibly satisfying.

Being comfortable in federal court is another useful skill when handling affirmative applications with USCIS or FOIA requests. Although many USCIS functions are discretionary, USCIS does not have the discretion to avoid adjudicating a case. This is especially so where statutes and regulations set a clear time-frame for adjudication, such as with naturalization and FOIA cases. When a client's case stalls, a writ of mandamus is a powerful tool to jumpstart action or find a misrouted file. As the law is clearly established in these types of matters, new practitioners can comfortably enter the arena of federal litigation with a simple nuts-and-bolts case and some guidance from an AILA mentor. One of my favorite secrets about mandamus actions is that often just filing the complaint will get USCIS to adjudicate your case so they can avoid having to file a response. Cases that have been in black holes for years can be resolved within a matter of weeks once the U.S. Department of Homeland Security (DHS) realizes they'll have to defend their time frames in front of a federal judge.

Attorney Fees

Besides helping your clients assert their rights, federal litigation offers another reward: attorney fees under the Equal Access to Justice Act (EAJA). The November/December 2012 issue of VOICE has a great article on the issue of EAJA fees. Federal litigation can be prohibitively expensive for indigent clients. EAJA fees allow you to recover fees and costs if you win and the government's position was not substantially justified. Although your client can only recover fees for litigation expenses, the judge will consider the government's position both during and before the litigation. This means that even if DHS settles your case immediately after filing, you still may be able to recover fees based on USCIS's unreasonable behavior. EAJA fees allow you to share some of the risk with your client for the double reward of beating the government and then making them write you a check for the pleasure.

When clients have been wronged, they don't want you to suggest another attorney for them if they'd like to pursue litigation. With the resources and advice of AILA's Federal Court Litigation Section, federal litigation is within the grasp of all attorneys. Having the ability to take your cases to federal court provides a cheaper alternative for your client, maintains important relationships, enhances the reputation of your firm, and, in the end, is just plain fun!

San Diego Chapter member **DANIELLE E. ROSCHÉ** is an associate at The Law Offices of Aziz J. Asmar, where she concentrates her practice on deportation defense, immigration consequences of criminal acts, protections for crime victims and refugees, and federal litigation. The author's views do not necessarily represent the views of AILA, nor do they constitute legal advice or representation.

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CONTRIBUTORS
Bradley B. Banias, Phyllis A. Forman, Jonathan S. Greene, Danielle E. Rosché, Melanie Shapiro, Maheen Taqui, Patrick Taurel, Reid F. Trautz, Cletus M. Weber, Beth Werlin

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