AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AN IMMIGRATION DIALOGUE

VOICE

SEPTEMBER/OCTOBER 2011

Vol. 2 Issue 5

I WALKED OUT A PATRIOT: An AILA Member Takes the Mic

THE SELECTIVE SERVICE'S IMPACT ON IMMIGRANTS

Deciphering the Visa Bulletin and Coping With the Long Wait for Immigrant Visas

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AILA WIKI: 'READ, WRITE, CONTRIBUTE'

Executive Director Crystal Williams welcomes readers to the fall issue, and encourages members to check out the newest resource: the AILA Wiki.

VOICE

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—Immediate Past AILA President **David Leopold**

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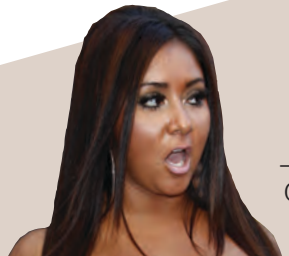
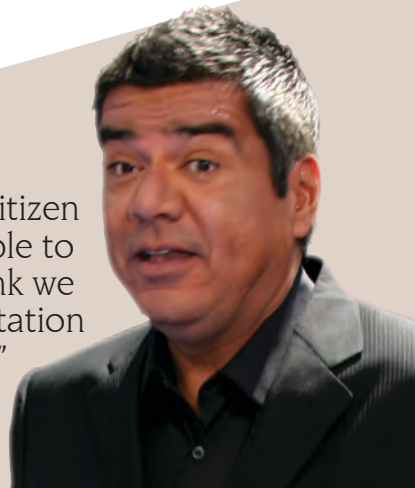


"Obama says that every citizen should have a job and be able to speak English. I agree and I think we should start with the deportation of the cast of 'The Jersey Shore.'"

—Comedian **George Lopez** on President Barack Obama's immigration reform speech in El Paso



NEWSLINK

HIGHLIGHTS FROM AROUND THE GLOBE

Australian High Court Rules Against Refugee Swap
Associated Press

"Australia's highest court [has ruled] that asylum seekers can't be sent to Malaysia, a major blow to the government's plan to stem an influx of people from poor, war-torn countries attempting to reach Australia by boat."

California Moves To Limit Cities' Ability To Impound Cars
The Los Angeles Times

"The state Senate [has voted] to restrict cities' ability to impound cars driven by people caught at sobriety checkpoints without driver's licenses. The action came as a direct response to the city of Bell, which made it a practice to confiscate vehicles from unlicensed motorists—many of them illegal immigrants—and then charge high impound fees or sell them in order to fill city coffers."

"[FL Residents] fear that the [immigration] detention center will increase traffic in their area, lower the value of their homes, and use their public resources."

Residents Protest Proposed Center
The FL Independent

"Fifteen people were arrested ... after a melee broke out when a park employee asked a Muslim woman to remove her headscarf before boarding a ride."

Police Baton Crowd After Woman Refuses to Remove Headscarf
Gothamist

Save the Dates!

AILA

Registration Now Open for the Following Conferences!

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Paralegals Conference
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Washington, DC
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December 1
New York, NY

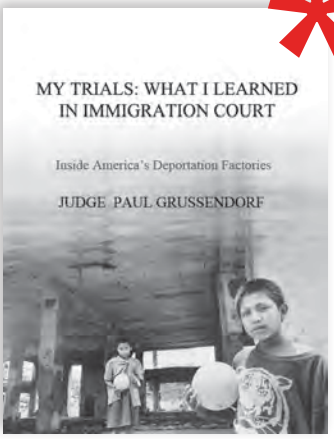
California Chapters Conference
November 10-12
San Francisco, CA

EB-5 CLE Conference
October 20-21
San Antonio, TX

Solo & Small Practice Business Clinic
October 27-28
Washington, DC
Webcast Option Available

READER'S CORNER

Immigration in Prose: AILA Staff Picks



BUY

Review Courtesy of Danielle M. Polen, AILA's Associate Director of Publications, former student of Judge Grussendorf

My Trials: What I Learned in Immigration Court

by Judge Paul Grussendorf

Economist and author Thomas Sowell writes that "[t]here are only two ways of telling the complete truth—anonymously and posthumously." Former Immigration Judge Paul Grussendorf challenges this axiom in his no-holds-barred memoir that recounts his 20+-year journey advocating for the rights of immigrants within our nation's dysfunctional immigration system. With a cast of colorful characters and compelling tales, My Trials: What I Learned in Immigration Court is both a scathing indictment of a broken immigration system that sends vulnerable immigrants back to the perilous situations from which they fled, and a heartfelt call for a return to the values upon which our nation of immigrants was founded.

While the self-published manuscript could have benefited from some additional editing and reorganization, the content is engaging enough that the reader should have no trouble overlooking some of the book's structural weaknesses.

Indeed, Grussendorf paints a compassionate portrait of a fascinating range of individuals who have gotten caught up in our immigration system, from the tragic Ghanaian woman sold by her parents into sexual slavery to settle a family debt, to the contortionist Swiss-German client who hoped to seek asylum as protection from alien abduction, to the Dominican detainee who testified at his immigration hearing about the rather explicit sexual advice that he reportedly received via a direct pipeline from God.

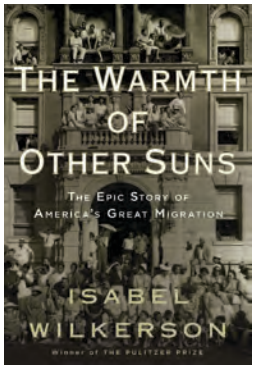
And while Grussendorf's well-timed sense of humor is apparent in many of these stories, he spares no detail when describing the abject misery and sobering injustice faced by so many immigrants who seek refuge upon our shores.

In the book's Prologue ("Why I Wrote this Book"), Grussendorf cites a February 2010 report by the American Bar Association (ABA), which noted that a total of 231 immigration judges hear more than 300,000 cases a year, an average of 1,200 for each judge, or three times the load of federal district judges. According to the ABA report, judges "feel overworked, frustrated, and … like they are on a treadmill." In a New York Times article discussing the report's release, National Association of Immigration Judges President Dana L. Marks likened asylum hearings to "holding death penalty cases in traffic court."

"Perhaps it would be an overstatement to say that the daily abuse and mismanagement I have seen in our immigration courts threatens [sic] our democracy," muses Grussendorf. "I have no doubt that it threatens our values, as a nation that abides by the rule of law and that receives the fugitive from persecution with open arms. I have written this book in hopes of preserving that wonderful heritage, which is now in serious danger of being obliterated."

Presumably, Grussendorf has no aspirations of further employment with the U.S. government, having undoubtedly burned his bridges with the publication of this memoir. However, perhaps his courage to speak the truth—neither anonymously nor posthumously—will serve as a call to others within the system to break their silence and do the same.

YOU MIGHT ALSO LIKE:



The Warmth of Other Suns: The Epic Story of America's Great Migration (Vintage)
by Isabel Wilkerson
(Oct 4, 2011)

UNSOLICITED ADVICE

from **Cletus M. Weber**

When Your Mind's All Over the Map, Use Mind-Mapping Software

Ever have great ideas fly away while searching for the right place to put them in a document you are drafting? Or have difficulty creating an organized appeal brief from a messy pile of reports, cases, yellow pads, and sticky notes? Alternatives:

If so, consider mind-mapping software. I use it to create most things I write these days, including these "Unsolicited Advice" columns. I consider it to be a great creative tool and a substantial time-saver, especially when writing complex documents.

Essentially, mind-mapping software works like a desktop whiteboard. You can write your thoughts all over the place and then easily connect, disconnect, reconnect, and group them until you achieve something organized and clear.

Although you can use Microsoft Word or other word-processing programs to achieve the same thing, those programs are linear, not visual. You have to scroll around and cut and paste repeatedly to organize your thoughts.

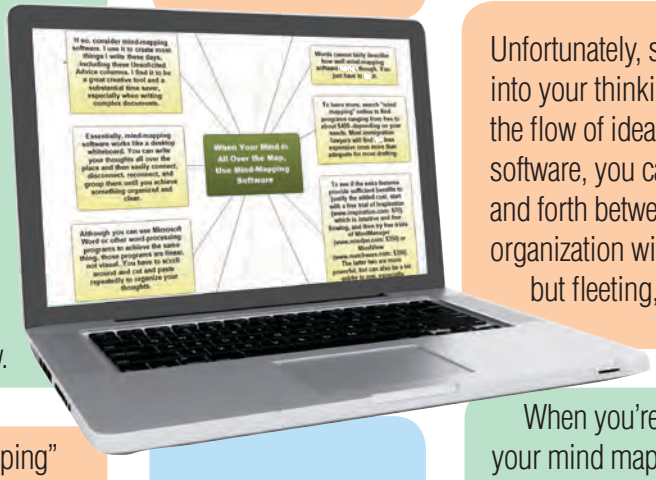
Unfortunately, scrolling around eats into your thinking time and impedes the flow of ideas. With mind-mapping software, you can easily move back and forth between idea-generation and organization without losing those great, but fleeting, ideas as you go.

When you're finished mind-mapping, your mind map looks similar to what you see on the laptop screen in the illustration above. These programs can then easily export your mind map directly into a perfectly organized and formatted Word document.

Words cannot describe how well mind-mapping software works. You must try it.

To learn more, search "mind mapping" online to find programs ranging from free to about $400—depending on your needs. Most immigration lawyers will find the less expensive ones more than adequate for most drafting.

To see if the extra features provide sufficient benefits to justify the added cost, start with a free trial of Inspiration (Inspiration Software, Inc.: $70), which is intuitive and free-flowing, and then try free trials of MindManager (Mindjet.com: $350) or MindView (MatchWare.com: $390). The latter two are more powerful, but can be a bit quirky to use, especially MindView.



I hope you find mind-mapping software to be one of the most useful tools you have encountered in many years. I know I have.

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

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AILA LAWYERS MEMBER ADVANTAGE

SPOTLIGHT

by **Dan Snyder**

Nonresidents Ease Burden with U.S. Wills

A nonresident of the United States who owns U.S. property may want a surviving spouse or other beneficiary to inherit such property. In addition to considering applicable U.S. gift and estate tax provisions, the nonresident also should contemplate having a U.S. will that specifies the disposition of such property upon his or her death.

Probate. Beware!

Upon the nonresident's death and in the absence of a U.S. will that dictates the disposition of U.S. property, the property will be submitted for probate in the United States. Unfortunately, the U.S. probate process follows, rather than accompanies, the probate process in the deceased nonresident's home country.

Because each process can be lengthy, unanticipated and devastating personal and financial consequences for the decedent's beneficiaries can arise. In one instance, in which this author was involved, a nonresident French woman was the heir to a house located in the United States. Because her husband, the decedent, did not leave a U.S. will specifying that she should receive the house, the property was first subjected to probate in France and then in the United States. Both probate processes consumed much time, during which mortgage payments became due on the house. Consequently, the widow defaulted on the mortgage. Before she could provide a clear title to the home's purchaser, the mortgage company repossessed the property. The wife lost all equity in the house.

What You Don't Do Can Burden Your Loved Ones

No one wishes to cause such difficulties or heartbreak for a beneficiary, but it is easy to understand how such wrenching situations unfold. For example, many countries do not levy gift or estate taxes, and many nonresidents either stop living in the United States or never lived in this country. In such cases, he or she may not see a pressing need to draft a U.S. will. Many nonresidents also may not be thoroughly versed in laws governing the ownership and transfer of U.S. property. A nonresident, for example, may own a share in a U.S. limited liability corporation (LLC) that owns tangible U.S. property. Tangible U.S. property items include U.S. real estate, an obligation of a U.S. person, U.S. corporation stock, equipment and other hard assets, patents, copyrights, and other rights used in the United States. If the U.S. LLC owns such property, the nonresident's LLC share would be subject to U.S. estate laws.

Immigration attorneys, when meeting with nonresidents, should ask if they own or contemplate owning any U.S. property. If they do, immigration attorneys should discuss with their clients the importance of having a U.S. will and consult with an estate tax specialist who can help avoid U.S. estate tax difficulties for beneficiaries.

Dan Snyder, JD, CPA *is a manager of International Tax Services in the Fort Worth office of Weaver, the largest regional, independent, certified public accounting firm in the Southwest with offices throughout* Texas. *He can be reached at 817-882-7387 or Dan.Snyder@WeaverLLP.com. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

AILA Called for Action and

'Off Target' Report on Immigration Enforcement Hits Bulls Eye

With Widespread Member Participation and Support, AILA Launched a Successful Campaign Against Unreasonable Immigration Enforcement Actions

AILA's Advocacy department has released it latest report, "Immigration Enforcement Off Target: Minor Offenses with Major Consequences," which questions the Department of Homeland Security's motives behind, and implementation of, certain initiatives. The report examines the dangers of merging civil immigration enforcement with local criminal law enforcement, stating that "DHS has the responsibility to ensure that its immigration enforcement initiatives promote overall public safety and security and do not get in the way of [local law enforcement agency] efforts. Right now DHS is failing in that responsibility."

The Off Target report, which was a member-driven effort, draws upon cases from 24 states and the District of Columbia. The vast majority of cases involve people who had lived in the United States for years, paid taxes, had families, and contributed to their communities. "The report confirms what DHS statistics already show—that the government is deporting tens of thousands of people referred by local law enforcement who pose no threat to our country or to our communities," said AILA President Eleanor Pelta.

In nearly every case in AILA's report, DHS acted on local police referrals and began deportation action against people with no criminal background who had been picked up for minor offenses—like loitering—or no offense at all.

"DHS claims it's targeting dangerous people, but AILA found otherwise," Pelta added. These people

CATCH THE BUZZ! 'Off Target' in the Press

"This is an encouraging announcement. For months, AILA has been talking about the need for smart, targeted enforcement. DHS should focus its limited resources on prosecuting those who are a danger to our communities or would do our nation harm, not wasting taxpayer money going after long-time residents, spouses of U.S. veterans, students, the elderly, and others with deep ties to our communities." **—AILA President Eleanor Pelta**

READ "AILA Calls DHS Prioritization Plan Strong Step Forward for Immigration Enforcement"

"Department of Homeland Security practices have ushered in a sea change in who is being deported, and our attorneys have literally been flooded with people coming in to their offices who have been picked up by local police for small time stuff." **—Gregory Chen, AILA Director of Advocacy**

READ "Federal Policy Resulting in Wave of Deportations Draws Protests" from *New York Times*

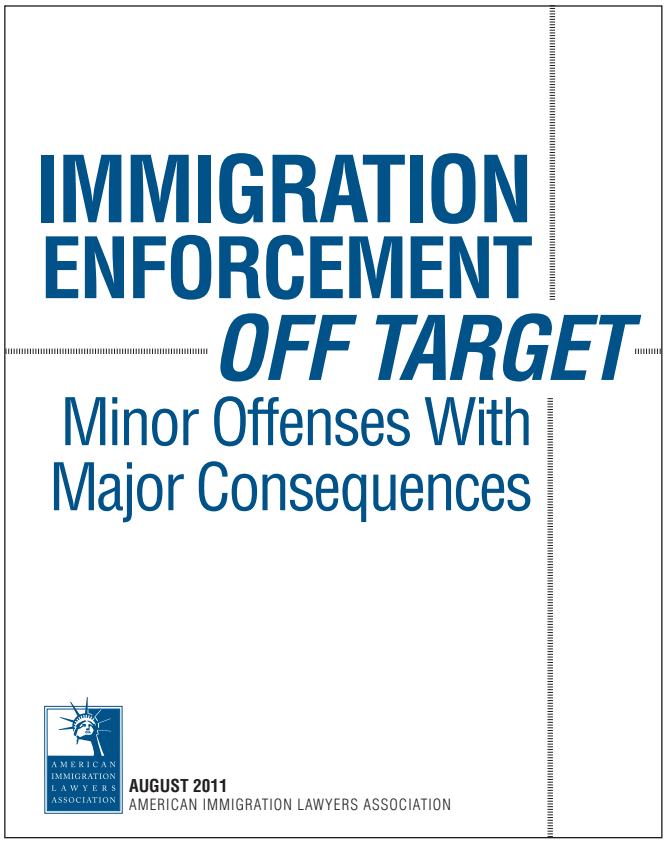
A warm *THANK YOU* to all the AILA members who submitted information and played a role in formulating this report!

You Answered!

WATCH AND LEARN: Listen to an overview of the report's findings and recommendations for DHS.

are not the high priority, public safety threats this administration says it's targeting. DHS should not be wasting resources pursuing low priority cases."

AILA's report comprises information submitted by AILA members from across the nation, and without their support and answer to AILA's call to action, the report never would have made such a major impact.



READ IT NOW!

"AILA's report … describes 127 cases of people put in deportation proceedings after being picked up for … minor offenses like loitering, changing lanes without signaling, or talking on the phone while driving. Are these really the kinds of criminal offenses that should put someone on DHS's priority list for deportation?" **—David Leopold**

READ Immediate Past President David Leopold's blog

Legal Action Center Releases Q&A on DHS P.D. Memo

The American Immigration Council's Legal Action Center also wants to hear from you! In order to monitor how the new guidance is being implemented in the field, share your experiences by completing a survey. This will help with ongoing liaison and advocacy efforts with DHS. TAKE THE SURVEY!

LAUNCHING SEPTEMBER 13:

Marketplace Study: Focus on Immigration Law Practice

Do you really know what to charge for your services? Are you paying salaries that are too high or too low? These questions and more will garner answers to provide a better snapshot of immigration practice, economics, and management trends to help you be better prepared for tomorrow. ***But we need your participation!*** On September 13, be on the lookout for more information on how you can be a part of AILA's first-ever tool for members that eliminates the guesswork and bridges the gap to confidently navigating the immigration practice marketplace.

IMMIGRANTS IN THE MILITARY

THE SELECTIVE SERVICE REQUIREMENT

The road to the American Dream can run through the Selective Service System. Why? Because one of the most cherished and hallowed principles underpinning the American way of life is the connection between rights and responsibilities. Citizenship has its rewards, but also its duties. One such obligation requires nearly all men who reach the age of 18 to register with Selective Service. That includes not only U.S. citizens, but immigrants and undocumented individuals living here. This article provides a general explanation of the Military Selective Service Act (MSSA) while considering the special problems of undocumented people.

Then and Now

Conscription winds its way like a thread throughout American history, even back to colonial times. For a long period of that history, the U.S. Army ran conscription. Another hallowed principle of American life, however, is civilian control of the military. In 1940, as war clouds gathered over Europe, Selective Service was created as an independent civilian agency to reflect that principle.

Selective Service was a visible symbol of the unpopular Vietnam War. Former President Richard Nixon and Congress ended the draft in 1973, and the registration requirement in 1975. The Soviet invasion of Afghanistan and a study exposing America's lack of preparedness led to reinstatement of the registration requirement in 1980. Since then, nearly 70 million men have registered, many of them immigrants.

Comments? use your VOICE

Under federal law, a man who fails to register might forever forfeit the right of citizenship, but also other benefits, such as student financial aid and federal employment. These privileges lead to the American Dream, especially for immigrants.

The Statue of Justice may wear a blindfold, but not Selective Service or the American Immigration Lawyers Association (AILA). The agency and AILA can work together to ensure rights are respected, even when the duties of citizenship are enforced.

Current Law and Its Application

The MSSA, like many laws, needs a proper interpretation. In June 1999, the Immigration and Naturalization Service (legacy INS), now known as the U.S. Citizenship and Immigration Services (USCIS), sent its regional directors guidance on the connection between citizenship and the requirement to register with Selective Service.[1] Those guidelines, which are summarized below, still apply today.

Without taking anything away from the requirement of every man living in the United States to register during ages 18 through 25, one →

SHUTTERSTOCK

provision in the MSSA offers at least some recourse to the man who failed to register.

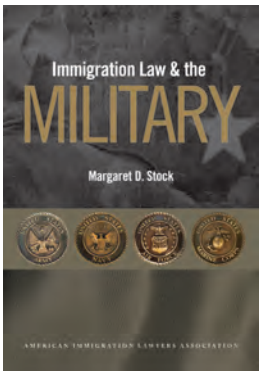
According to MSSA §12(g):
"(g) A person may not be denied a right, privilege, or benefit under Federal law by reason of failure to present himself for and submit to registration under Section 3 (of the Military Selective Service Act) if--
(1) the requirement for the person to so register has terminated or become inapplicable to the person, and …
(2) the person shows by a preponderance of the evidence that the failure to register was not a knowing and willful failure to register."

Meeting the requirements of (1) is easier. A man might present a passport or Form I-94 (Arrival-Departure Record), for example, showing that he did not enter the country until he was 26 or older. Or he may have been eligible by age, but here on a valid visa.

Satisfying (2) is harder. The burden is on the non-registrant to prove his failure was not "knowing and willful." Also, he needs to prove it, not to Selective Service, but to the agency granting the benefit or privilege he seeks, such as USCIS. Harder, but not impossible. Often, the immigrant did not speak English when he arrived, casting doubt on the expectation that he should have understood the registration requirement. Or perhaps he did not attend a U.S. high school, where most young men learn about the registration requirement. Since a military draft has not been in force since 1973, Selective Service is not a hot topic of street talk. So if a man does not hear about the requirement in high school and if he never even attended high school in the United States, then he is unlikely to know about it at all. However, these are factors for USCIS to weigh and consider, not Selective Service.

Selective Service has long suspected that fear is second only to ignorance of the MSSA in explaining why so many undocumented men fail to register.

Wait, there's more.



COMING SOON!

Immigration Law & the Military

by Margaret Stock, founder of AILA's Military Assistance Program

Men born between March 29, 1957, and December 31, 1959, were never required to register, citizen or immigrant. That is because men born during that span had no way to register when they turned 18. The registration requirement was suspended between 1975 and 1980. When the requirement was reinstated, it applied only to men born on or after January 1, 1960.

Men born before March 29, 1957, were required to register. However, an immigrant born before that period who entered the United States after March 29, 1975, was exempted.

Seeking to Naturalize

This brings us to perhaps the most important consideration for immigrants and immigration lawyers. Failure to register with Selective Service will generally not affect the eligibility of a man who is 31 or older when applying for naturalization.

Little known is the fact that Selective Service registration is not a requirement for naturalization, per se. Rather, §316(a) of the Immigration and Nationality Act (INA) requires the applicant to demonstrate his good moral character. Also, INA §337(a)(5)(A) requires a willingness to bear arms on behalf of the United States. According to standing USCIS policy, a refusal (or knowing and willful failure) to register manifests both an unwillingness to defend the country and a lack of good moral character.

However, if the failure to register, even if "knowing and willful," occurred outside the statutory period (ages 26 to 31) when the applicant needed to establish his good moral character, USCIS would have to show some other basis to deny the application.

Any applicant denied citizenship, for whatever reason, should know that he may appeal within

USCIS. The undocumented individual also should know, above all, that Selective Service will not report him to USCIS.

Selective Service could not report an undocumented person even if it wanted to. Our forms ask for name, address, date of birth, and Social Security Number (SSN), if available. We do not ask for residency status. Our mission requires us to register young men, not deport them. Even at our Data Management Center where records are kept, Selective Service has no way of determining that a registrant is in the country illegally.

Selective Service has long suspected that fear is second only to ignorance of the MSSA in explaining why so many undocumented men fail to register. By nature, an undocumented person does not want to attract attention. So he will keep a low profile and have absolutely nothing to do with any government agency for fear such exposure could lead to deportation. It also is likely that many undocumented people come from authoritarian countries and identify all government entities as agents of repression.

Most undocumented people who stay here eventually consider applying for citizenship. Only then do they encounter the Selective Service registration requirement. By then, it might be too late.

Working with Community Organizations

Registration compliance levels are lowest in areas of high immigrant population, such as Texas and California, and pockets of other states. Since undocumented individuals are invisible by nature, Selective Service has contacted organizations dealing with immigrants, legal or illegal. We stress our protection of privacy, but even more the vital importance of registration.

The United States is a nation of immigrants. Immigrants have served proudly in the U.S. Armed Forces. Immigrants have reinvigorated this country periodically throughout our history and enriched our cultural life. Through their hard work and sacrifices, their children and their children's children have assimilated and fully embraced the American Dream.

However, that dream can be shattered by a simple mistake like failing to register with Selective Service. AILA can minimize such tragedies by stressing the importance of registering, reminding clients of both their rights and responsibilities, and assuring them that Selective Service shares AILA's desire to protect the privacy of registrants.

Many immigrant males are registered by the U.S. Department of State when they enter the country. Alternatively, any man age 18 through 25 with an SSN can register online. With or without an SSN, a man can register at any U.S. post office.

It's quick, it's easy, and it's the law.

Lawrence G. Romo *is the 12th director of the Selective Service System and was appointed by President Barack Obama on December 4, 2009. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 Legacy INS Memo, W. Yates, "INS on Effect of Failure to Register for Selective Service on Naturalization Eligibility" (June 18, 1999), AILA InfoNet Doc. No. 99010740.

One hundred years. That is how long some relatives of immigrants from Mexico might have to wait before an immigrant visa becomes available. Case in point: In November 1995, I was retained by a legalization beneficiary who had just naturalized. He sought my help to obtain legal status for his wife and children. He previously had been advised not to file visa petitions, but instead to seek citizenship as a faster way of obtaining his family's legal status. By the time he consulted me, however, his oldest daughter had turned 21. My review of the *Visa Bulletin* of November 1995 indicated that beneficiaries may submit visa applications under the first-preference category (F-1) for Mexico with priority dates before April 1, 1995. Accordingly, I assured my client that, while his daughter would have to wait perhaps a year, she would be able to become a resident soon. Fifteen years later, she is still waiting. To make matters worse, not once in all those 15 years has the Mexico F-1 category passed April 1, 1995.

Since then, I have learned a great deal about the workings of the *Visa Bulletin* and the complex braid it moves along—comprising country quotas, consular processing, adjustment of status, naturalization, and demand. I have learned, for instance, that looking at the monthly *Visa Bulletin* is analogous to looking at the stars in a clear night sky—in each case, when properly understood, we are looking at history. The *Visa Bulletin* is an indication of demand conditions in each preference category as they existed at the time of the published available priority dates.

Consequently, at the Immigration Project in Illinois, where I serve as the executive director, we do not prepare

CIEN AÑOS DE ES

SPARA (100 Years of Waiting)

THE LONG DELAY FOR IMMIGRANT VISAS

by MARTI JONES

a Form I-130, Petition for Alien Relative, for a Mexican national without first counseling the petitioner (and the beneficiary, if he or she is presently in the United States) that, unless the law changes favorably, both petitioner and beneficiary will most likely be dead before a visa becomes available, based on a petition filed in 2011 for a Mexican relative in any preference category (except the F-2A preference category for spouses and children of lawful permanent residents).

DOS Visa Statistics

We began that practice several years ago based on my own analysis of the impossibly high Mexican demand levels. In 2010, however, the U.S. Department of State (DOS), in an effort to increase the transparency of the *Visa Bulletin*, published several reports in the Visa Statistics section of its website.[1] These reports remove any justification for failing to fully and completely explain the reality confronting anyone filing a Form I-130 in 2011. Since the publication of that data, our staff attorneys review DOS's published Immigrant Visa Waiting List[2] when counseling potential petitioners from all countries. As that report reveals, the existence of lengthy waiting lists is not exclusively a Mexican problem. We explain to our clients that we cannot decide for them whether to file the Form I-130, but we must ensure that they understand that, as a practical matter, filing a Form I-130 for relatives in preference categories is the equivalent of purchasing a very expensive lottery ticket. →

Clients neither understand this reality, nor do many immigration attorneys. Some immigration attorneys (mostly inexperienced) still employ the same practice as I did 15 years ago—review the *Visa Bulletin*, and based on the waiting time required of the dates currently being processed, say to the client, "Your priority date will come current in 13 to 16 years." And while there is no ethical rule prohibiting this advice, I believe it is thoughtless, if not professionally irresponsible. Our clients make choices based on our assessment of when an immigrant visa will be available. A colleague commented that he advises his clients that the waiting period is unpredictable because movement of the *Visa Bulletin* is an erratic mystery. From month to month, that may be accurate. On a larger scale, however, predicting the movement of the *Visa Bulletin* requires detailed and careful analysis, which can be facilitated using data available on DOS's website, under Visa Statistics.

Crunching the Numbers

The Visa Statistics section proves useful in effectively counseling families. Case in point: Consider a U.S. citizen and his Jordanian sister, both in their late 40s, who sought advice regarding filing an F-4 (brothers and sisters of U.S. citizens) preference visa petition. The sister, her husband, and young son entered the United States on tourist visas (B-1/B-2 category). I began my consultation by walking them quickly through DOS's Annual Immigrant Visa Waiting List Report and the basic math.

To get the number of visas available for the "Other Countries" category, first take the full category quota (65,000) and subtract 7 percent of the quota for each country at or above the 7 percent per-country cap (5 x 4,555 = 22,775) to get the number of visas available for non-oversubscribed countries—answer: 42,225. Then, take the number of pending F-4 applicants (brothers and sisters of U.S. citizens) and subtract the applicants from the five countries at or above the 7 percent cap—answer: 958,442 pending other-country applicants. Divide that by 42,225 for an estimate of the number of years it will take before visas are available for current applicants. The result: a prospective wait of 22.7 years, the estimate that I gave our clients. I also informed them that this was an understated estimate, given the several years' worth of F-4 preference petitions still pending at U.S. Citizenship and Immigration Services (USCIS).[3]

We discussed the reality that given current law, the petitioner will have reached his 70s and the beneficiary would be in her late 60s before an immigrant visa would be available. Furthermore, the beneficiary's son would have aged out. We also explored the potential for nonrenewability of the beneficiary's tourist visa, due to demonstrated immigrant intent (this has been less of an issue lately because of broader awareness of the impossibly lengthy preference waiting lists, but the possibility cannot be dismissed). Finally, I explained that I could not recommend for or against filing the Form I-130, because that is a decision they have to make for themselves. Based on my experience, I could advise them that a change of immigration law is inevitable in the next 25 years, and such a change might vacate the category—or terminate it completely—offering some potential benefit for those who file Form I-130s now. However, I could also advise them of the possible negatives—the potential impact on the beneficiaries of B-1/B-2 visas, the cost, and the insubstantial nature of any future benefit.

Moving at a Snail's Pace

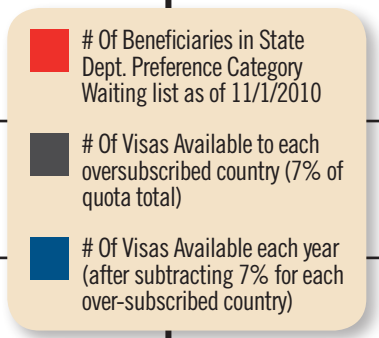
Another example involves a Mexican client who wanted to know when a visa petition, filed by her lawful permanent resident (LPR) father on September 17, 1992, would come current. Our first step, of course, was to read the *Visa Bulletin* that was current at the time. It showed that visas were available for applicants with priority dates before August 22, 1992. This was encouraging because less than 30 days separated her priority date from those currently available.

Based on my experience, this means she has about one more year to wait. For this analysis, I reviewed the report of available priority dates in all Mexican preference categories for the past 18 years.[4] A scan of

ILLUSTRATION ON PREVIOUS PAGE BY BRADLEY AMBURN

Estimated Waiting Times for Visa Availability of Family Preference Petitions Filed After 11/1/2010

Preference Category/ Family Relationship	All Countries Not Listed	Mexico	Other Oversubscribed Countries	Other Oversubscribed Countries	Other Oversubscribed Countries	Other Oversubscribed Countries
1st/unmarried children of U.S.C. (+21)	157,036 ÷ 20,124 = 7.5 Yrs	80,764 ÷ 1,638 = 49 Years	Philippines 33,218 ÷ 1,638 = 20 Years			
2A /spouse & unmarried (<21) children of LPR	165,719 ÷ 35,833 = 3.39 Yrs	163,436 ÷ 42,950 = 3.80 Yrs	Dominican Rep. 31,883 ÷ 9,151 =3.48 Years			
2B /unmarried adult children of LPR (≥21)	217,630 ÷ 20,752 = 10.49 Yrs	219,428 ÷ 1,838 =119.38 Yrs	Philippines 59,029 ÷ 1,838 =32.12 Years	Dominican Rep. 56,486 ÷ 1,838 = 30.73 Years		
3rd/married children of USC	367,403 ÷ 16,848 = 21.81 Yrs	174,761 ÷ 1,638 =106.69 Yrs	Philippines 164,022 ÷ 1,638 =100.13 Years	Vietnam 80,737 ÷ 1,638 = 49.29 Years	India 66,160 ÷ 1,638 = 40.39 Years	
4th/brothers & sisters of USC	958,442 ÷ 42,225 = 22.7 Yrs	738,635 ÷ 4,555 =162.16 Yrs	India 230,411 ÷ 4,555 = 50.58 Years	Philippines 217,168 ÷ 4,555 =47.68 Years	China (Mainland) 193,752 ÷ 4,555 = 42.54 Years	Vietnam 176,654 ÷ 4,555 =38.78 Years



Estimates based on State Department "Annual Report of Immigrant Visa Applicants in the Family-sponsored and Employment-based Preferences Registered at the National Visa Center as of November 1, 2010"; http://www.travel.state.gov/pdf/WaitingListItem.pdf. Note that these numbers do not include petitions still pending approval or held at USCIS. Based on USCIS processing reports, three to six years of applications are not included in these numbers.

the data for the F-2B category (unmarried sons and daughters of LPRs) from this report indicates that the average rate of movement over the past 18 years has been 7.2 months per year. To arrive at this figure, examine the data from the charts in the Mexico Family Preference Cut-off Dates for Fiscal Years 1992–2010. We see that on October 1, 1992, the current priority date was September 1, 1981, while on October 1, 2010, the current priority date was June 22, 1992. The difference between the priority dates current at the beginning and end of this 18-year period was 10 years, nine months, and three weeks—or 10.8125 years. Divide that number by the intervening period of 18 years, and you get the average annual rate of advance, or 0.6 of a year (multiplying 0.6 by 12 months = 7.2 months per year).

This would demonstrate that my client's petition would become current in less than a year, except that I know from experience that the movement in the Mexico F-2B line over the past 10 years has not been nearly that rapid. A closer inspection of the F-2B data confirms my experience. In the first five years of the report, from October 1991 to October 1996, the F-2B line advanced rapidly from September 1981 to November 1990. It is relatively safe to assume that many of the beneficiaries in this category probably qualified for amnesty between 1981 and 1990, thus emptying the category significantly. In contrast, as the *Visa Bulletin* reached 1991, advancement slowed down. Again, historical knowledge tells us that many legalization beneficiaries did not begin filing visa petitions for their families until they became LPRs in late 1990 and early 1991. Visas first became available for 1991 priority dates in June 1996. It took until June 2004—eight years—before visas became available for applicants with priority dates in January 1992. It was not until October 2006 that DOS could unequivocally make immigrant visas available for all 1991 F-2B applicants. Between October 1996 and October 2006, the category advanced at an average rate of six weeks per year. That rate has since slowed even further. Between October 2006 and October 2010, the category advanced from February 15, 1992, to June 22, 1992—barely more than one month per year. →

Counsel Must be Well-Informed

While a determination based on the average rate of movement over many years is a more accurate predictor than simply reviewing the current *Visa Bulletin*, a more thorough understanding of the entire process can improve the advice we offer clients. For instance, in the above scenario involving the Mexican client and her father, most practitioners might strongly recommend to the client that she encourage her father to apply for naturalization. But a review of the history of movement in the first-preference category for Mexico could provide grounds for greater caution, especially with priority dates after the mid-1990s. Over the past 18 years, the September 17, 1992, priority date has been current in the first-preference category more than eight times, only to have the dates retrogress as F-2B beneficiaries with earlier priority dates move into the F-1 category upon the naturalization of their petitioning parent. As recently as May 2007, this priority date was unavailable for a period of 20 months and will not become current again until December 2008.

So it is foolish to assure a client that his or her petitioner's naturalization will inevitably make a visa available sooner. Nevertheless, with a September 17, 1992, priority date, trends seem to support the recommendation for naturalization. This is because of the relative convergence between the available priority dates in the Mexico F-1 and F-2B categories. As the priority dates in these categories converge, there are fewer waiting F-2B beneficiaries who might move into the F-1 category. As a result, the F-1 category is unlikely to retrograde as much in the future.

However, retrogression is also caused by signal delays between USCIS and DOS. Because applicants waiting abroad have priority over applicants in the United States, DOS's National Visa Center (NVC) sends fee bills and begins immigrant visa processing months before the priority dates are current. Based on fees paid, the NVC has a fairly accurate record of interested applicants waiting abroad well in advance of priority dates coming current.

In contrast, an adjustment applicant must wait until the priority date is current before applying for a visa. Depending on processing times, six months to a year or more may elapse before USCIS requests a visa from DOS. In the meantime, DOS continues to advance the priority dates each month based on the visa demand it controls and measures. USCIS completes processing of Forms I-485, Applications to Register Permanent Residence or Adjust Status, months after a priority date becomes available and asks DOS for visa numbers for applicants with priority dates months or sometimes years before those dates currently available. In this scenario, DOS is forced to retrogress priority dates to accommodate this "unexpected" demand.

Use the Resources Available

DOS has made the Immigrant Visa Waiting Lists and the movement of the *Visa Bulletin* more transparent. These reports help us advise our clients more intelligently about filing family-preference-category visa petitions. Note that this concern does not apply to the 2A category, where the 50,000-per-year visas have helped minimize individual country backlogs because they are not subject to a per-country cap. While additional data would help us counsel waitlisted clients—for example, a breakdown of the Waiting List by priority date year—facing the reality of exactly how long the waiting lists are can only help us and our clients make the best decisions for themselves and their families.

Marti Jones *is executive director and senior staff attorney for the Immigration Project, a nonprofit agency serving central and southern Illinois. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 U.S. Department of State (DOS) website, "Annual IV Waiting List Report"; *see also* "Annual Numerical Limits for Fiscal Year 2011."

2 DOS website, "Annual IV Waiting List Report."

3 U.S. Citizenship and Immigration Services website, "USCIS Processing Time Information for California Service Center."

4 DOS website, "Mexico Family Preference Cut-off Dates for Fiscal Years 1992–2010."

'I Walked Out a Patriot'

by **Tahmina Watson**

Tahmina Watson is the founder of Watson Immigration Law in Seattle. She was a practicing barrister in London before immigrating to the United States.

"THAT'S WHEN IT DAWNED ON ME THAT ALL OF THE DREAMS I HAVE HAD FOR MYSELF … WERE ALL COMING TRUE IN AMERICA."

Despite the many successful petitions for naturalization that I have filed on behalf of others, I never really understood or appreciated the enormity of the naturalization ceremony until October 13, 2010, when, on that day, I became a naturalized citizen of the United States.

As an immigration attorney, I have helped numerous people pursue this same dream. I prepare forms, file petitions, get clients ready for interviews, and take care of anything else necessary to ensure that petitions are successful. Whether it is a simple case or a complicated one, my efforts are zealous. When my clients take the oath, they are ecstatic, and so am I. But before I experienced it for myself, my reaction was nonchalant—as counsel, I would send a congratulatory note with a closing letter, then move to the next case without pausing for reflection.

When I first became eligible to apply for naturalization, I was not inclined to. I am British, and I honestly couldn't think of any good reason to become a U.S. citizen, despite my husband's urging. It was not until January 2010, when our daughter, Sofia, arrived, that I realized how important it was for me to have the same citizenship as my child.

Once I decided to apply, I knew that all I needed was a little time and motivation to complete the forms and file my petition, just as I had done for dozens of clients. But as I continued to work on clients' cases, my form remained blank, sitting on my desk for months.

I finally enlisted the help of my paralegal, Silviya. As embarrassing as it sounds, I failed to provide the required documents—not because I didn't want to, but because I had other important deadlines. My daughter was 5 months old and I was just barely getting through each day, nursing around the clock, changing diapers, and ensuring my solo practice stayed afloat. There were requests for evidence and appeal deadlines that needed immediate attention. Plus, I was president of the King County Chapter of Washington Women Lawyers.

Eventually, it came down to one item missing—a passport photo. As a new mother juggling competing priorities, having perfect hair was no longer on the list. I found all sorts of excuses not to take a photograph until Silviya demanded it. I had particularly greasy hair that day, but, grudgingly, I headed off to the Walgreens photo center.

We filed the petition just like every other, depositing it in the nearest FedEx drop-box. When the biometrics appointment notice arrived, I received an e-mail notification and an Outlook calendar entry in my inbox, just as I do for my clients. Then the interview notice arrived, which was added to my calendar as well. "No different from any other case," I told myself.

I needed to study for the civics test, so I glanced at the questions. They looked easy enough, so I considered myself prepared. Then I promptly failed the mock test that my paralegal, Nicole, administered to me! So before the interview, I studied late into the night, often finding questions that were difficult. How many U.S. citizens know what the Federalist Papers are and who wrote them? Do you? →

PASS THE MICROPHONE is a chance to share your story or your client's story with colleagues and members of the public. We'd love to Pass the Microphone to you! Contact voice@aila.org.

By now, I had become annoyed with the wait and wanted to move on, as I had other cases to handle. On the morning of my interview, I arrived at U.S. Citizenship and Immigration Services (USCIS) in Tukwila, WA. I waited my turn. Upon hearing my name called, I recognized the officer assigned to me from previous appointments. First, we confirmed the details in my naturalization application (Form N-400). Then came the civics test. A computer randomly generates 10 of 100 potential questions, and I was required to answer at least six of those questions correctly. This was followed by the reading and writing test, where I had to read a given sentence and write another sentence in English. At the conclusion of my interview, I heard the magical words I generally wait to hear for my clients, "Congratulations, you have passed the test!"

I called my husband to tell him the good news. He wanted to attend the naturalization ceremony scheduled for later that day, but I told him not to bother. He ignored my down playing of the event and joined me anyway. While waiting to enter the room, my excitement began to build; but as an immigration practitioner, I simply thought, "Yea for closing another case!"

The room was packed with about 80 other citizens-to-be and their guests. The ceremony began with a welcome speech by Linda Dougherty, the USCIS Seattle District Office director.

Soon after, they played a video set to the music of "God Bless the USA" by Lee Greenwood. The lyrics accompanied images of the forefathers, of war, and of children waving the U.S. flag.

Reading the lyrics and watching these images made my skin tingle with goose bumps. That's when it dawned on me that all of the dreams I have had for myself—a wonderful husband and family, a successful career, a lovely home, happiness—were all coming true in America. I had never dreamed of becoming an American, but America had made all of my dreams come true. I could no longer hold back the tears, for at that very moment, I was re-born. I was happy. I was grateful. And I realized that this was not a client's case, but my own life. Once the ceremony ended, with my certificate in hand, I walked out a proud American. I walked out a patriot.

As immigration attorneys, we often don't stop to think about the enormous effect our approvals can have on our clients' lives. Remember to take a moment to congratulate yourself for the good work you do, and to think about all the ways in which your client will benefit as a result of obtaining citizenship.

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

POETIC JUSTICE

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

ROWS OF FEAR

rows tightly packed
anxiety throughout
fear all about

family worries, normal,
job concerns, fine,
thinking about family,
health, school, schedules
plus, possible removal

could be told to go
could be told to never come back
go where?
to your country
but is it?
do you know it?
have a home in it?

home is here,
family here,
job here
nothing there, no one
no one for whom to live, work, wake up

anyone would be scared
all there is, is hope
hope for the best decision
hope to have the strength
hope, despite family separation

only hope, faith, and love
all intangible
to get us through our worries
home, family, school, work
hope for the unknown future
out of these tightly packed
rows of fear.

by Julia Manglano Toro

BEHIND THE CASE

by Sheeba Raj

CASE: ***Prestol Espinal v. Attorney General,*** **No. 10-1473 (3d Cir. Aug. 3, 2011).**

ATTORNEY:
Jacqueline Brown Scott

CA3: Post-Departure Bar Out of Sync with IIRAIRA

The U.S. Court of Appeals for the Third Circuit joined five other circuits in August 2011 when it ruled that the post-departure bar, which bars departed noncitizens from filing motions to reopen and motions to reconsider, clashes with Congress's unambiguous intent to permit such motions.

The Third Circuit ruled in Prestol Espinal v. Attorney General, No. 10-1473 (3d Cir. Aug. 3, 2011), that "[t]he plain text of [IIRAIRA] provides each alien with the right to file one motion to reopen and one motion to reconsider, provides time periods during which an alien is entitled to do so, and makes no exception for aliens who are no longer in this country." The court now joins the Second, Fourth, Sixth, Seventh, and Ninth Circuits in invalidating the regulation.

Taking the Case, Pro Bono

Ramon Julio Prestol Espinal had appeared pro se in removal proceedings until AILA member Jacqueline Brown Scott became involved in his case. The Department of Homeland Security had charged Prestol Espinal with being present in the United States without being admitted or paroled. It also alleged that his criminal convictions rendered him removable. Prestol Espinal conceded removability, but requested protection because gang members in his native Dominican Republic sought to kill him in retaliation for his cooperation with the Drug Enforcement Agency. The immigration judge denied Prestol Espinal's applications for asylum, withholding of removal, and relief under the Convention Against Torture; then the Board of Immigration Appeals (BIA) upheld that decision. About three weeks later, Prestol Espinal was deported to the Dominican Republic. Brown Scott, who received the case through the BIA Pro Bono Project in August 2009, timely filed a motion to reconsider the BIA's denial. The Board, however, cited a lack of jurisdiction to entertain the motion because Prestol Espinal had left the United States.

Having never handled a matter concerning the post-departure bar, codified at 8 CFR §1003.2(d), Brown Scott scoured the Internet for resources, finding a practice advisory on motions to reopen (which has since been updated) issued by the Post-Deportation Human Rights Project,[1] After consulting Project staff, she realized there wasn't much more to go on. "I wanted to know if there were Third Circuit cases that were in the pipeline that would help him. It turned out there weren't—I was going to be the case," Brown Scott said.

LAC, NLG Lend a Helping Hand

The American Immigration Council's Legal Action Center (LAC) and the National Lawyers Guild served as amici curiae in Prestol Espinal. "Around 2005, LAC was hearing from a lot of immigration lawyers and AILA members about problems their clients were facing trying to get their cases reopened after they had been deported," said LAC Deputy Director Beth Werlin. "Around the same time, we began thinking about the regulation and realizing it was incompatible with the statute," added Werlin. "We did a thorough regulatory history and found its underpinnings were linked to a statute barring judicial review post departure, which Congress removed in 1996. We thought we had a strong argument … and started reaching out to lawyers to find partners to litigate this issue with us."

Werlin welcomed the Third Circuit's decision, saying, "To date, it's the most clear and complete analysis of the issue and sets the stage for the other circuit courts that haven't ruled yet. It also, hopefully, will prompt the agency to withdraw its regulation."

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Brown Scott noted that communication with Prestol Espinal has been difficult throughout her representation. When she first took his case, Prestol Espinal was detained in Pennsylvania. Brown Scott's solo practice is based in San Francisco, so they corresponded mostly by postal mail. With her client now in the Dominican Republic, they write letters and speak over the phone sporadically. "Now, he doesn't stay in one place, he doesn't feel safe there. He doesn't have one phone number, so I have to kind of track him down," said Brown Scott.

Brown Scott encourages other attorneys to challenge the post-departure bar when they encounter it. "It's been invalidated in most circuits that it has become an issue in," she said. "I would say that if, in your circuit, it hasn't been invalidated yet, and you want to keep zealously representing your client, to definitely challenge it. The case law is definitely in favor of respondents who challenge it …"

CASE:
***Viridiana v. Holder,* No. 06-73335 (9th Cir. July 19, 2011)**

ATTORNEY:
Gihan L. Thomas

CA9: Notario Deceit Augments Untimely Asylum Filing

Fraudulent deceit by notarios constitutes "extraordinary circumstances" that excuse an untimely filing of an asylum application, ruled the U.S. Court of Appeals for the Ninth Circuit in Viridiana v. Holder, No. 06-73335 (9th Cir. July 19, 2011).

Gihan Thomas, who represents Winnie Viridiana, applauded the Ninth Circuit's ruling. "We have →

Unpublished BIA Case Cites New Exceptions to Late Asylum Filing

One's HIV-positive status or receipt of an approved labor certification could excuse missing the one-year filing deadline for asylum, according to an unpublished decision issued by the Board of Immigration Appeals (BIA) in July 2011.

In its ruling, the BIA agreed with the immigration judge's conclusion that "the [R]espondent has not shown that he filed his asylum application within a reasonable period following the 'extraordinary circumstances' justifying his late filing." But the Board clearly pointed out that "an approved labor certification on his behalf would qualify as an 'extraordinary circumstance,'" yet it refused to overturn the IJ's decision due to Respondent's unreasonable two-year delay in filing his asylum application after his prospective employer withdrew the immigrant visa petition.

Regarding Respondent's HIV-positive status, the BIA ruled in favor of Respondent, stating, "In light of the Immigration Judge's unchallenged conclusion that [R]espondent had shown a likelihood of persecution on account of his HIV positive status, we find that [R]espondent also met the lower burden of proof required to establish eligibility of asylum, *i.e.*, a well-founded fear of persecution on account of a ground protected under the [Immigration and Nationality] Act."

"I see a lot of clients who know they've missed the one-year filing deadline for asylum, but have never heard of the exceptions to it," said AILA member Paul O'Dwyer, Respondent's attorney. O'Dwyer was pleased with the Board's conclusion, adding, "Whether or not your client is eligible for an exception to the one-year filing deadline is not always immediately evident during an initial consultation."

O'Dwyer said he believed this particular decision should have been precedential because the BIA determined for the first time two exceptions to a lapsed filing deadline—an HIV-positive test result as a changed circumstance and a pending immigrant visa petition based on an approved labor certification as an extraordinary circumstance.

many, many clients from different backgrounds around the world … and people just prey on their ignorance of the law and their lack of English capability," Thomas said.

Comments? use your VOICE

Thomas plans to rebrief the Board of Immigration Appeals (BIA) and hopes the case will be remanded to an immigration judge who will grant Viridiana asylum. Thomas credits her success thus far to "a fortified record proving fraud against Ms. Viridiana, favorable caselaw, and a sympathetic Ninth Circuit panel."

The Court's Reasoning

In remanding the decision to the BIA for further review, the Ninth Circuit concluded that the facts Viridiana had presented "suggest that she qualifies for relief under 8 CFR §208.4(a)(5). We therefore grant the petition and remand for the agency to consider whether the ordeal Viridiana experienced constitutes fraudulent deceit by an immigration consultant and whether she filed her asylum application within a reasonable time after such circumstance, thereby excusing the untimeliness …"

Viridiana is an Indonesian citizen of Chinese descent whose asylum claim rested on her fear of persecution based on her ethnicity. She left Indonesia and entered the United States on a visitor's visa in January 2001. Approximately five months later, Viridiana sought to extend her nonimmigrant status and file for asylum by consulting an immigration consultant and court-certified Indonesian interpreter whom she found through an advertisement in an Indonesian magazine. She understood that he was not a lawyer when she chose to utilize his services, paying him $1,300 in cash installments for his assistance.

In August 2001, the notario filed an application to extend Viridiana's visa, which legacy INS denied. From July 2001 to March 2002, Viridiana called the notario's office multiple times to learn the status of her asylum application. The notario rebuffed Viridiana's inquiries and, despite her persistence, never filed her asylum application. In April 2002, an attorney with Warmuth & Niu filed Viridiana's application for asylum, withholding of removal, and relief under the Convention Against Torture. At the time the asylum application was submitted, Viridiana had been present in the United States for one year and three months, making it three months late.

Out with the Old, in the with New

In January 2011, the Ninth Circuit had ruled in favor of Viridiana but granted the U.S. Department of Justice's petition for rehearing in April. In its July 19, 2011, decision, the court noted a withdrawal of the January decision in light of its conclusion, stating that it believes Viridiana "presents a compelling case."

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

1 Center for Human Rights and International Justice at Boston College.

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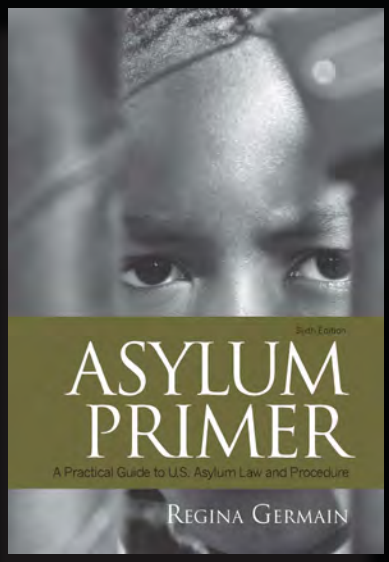

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by Danielle Polen

Autumnal Balance

Autumn is my favorite time of year. I love the rich smell of the earth, the crisp air, the golden sunlight, and the wellspring of creativity that I always feel during the fall season. After the passing of the autumnal equinox on September 23—the day on which light and darkness are in balance—the days grow shorter and darkness begins to descend. All around us, nature is winding down after the abundance of the fall harvest, in preparation for the dormancy of winter.

Despite this contraction that is taking place in the natural world, it's easy for many of us to become overwhelmed this time of year, with post-vacation workload surges, the beginning of a new school year, impending fiscal-year deadlines, and the approach of the holidays, with all their attendant obligations. In addition, our bodies can become more susceptible to illness as we attempt to navigate the above expectations while simultaneously acclimating to rapid shifts in weather, a loss of daylight, and, for many, the more sedentary lifestyle and heavier diet that colder weather seems to encourage.

How can we heed nature's cues and honor this natural shift toward slowing down and turning inward while still meeting our daily and seasonal obligations? What actions can we take to remain in balance and preserve our health during this season of rapid change?

I find that establishing a more regular routine of exercising, working, eating, and sleeping provides me with the stability I need to navigate the change of seasons in a healthy way. While it may be more of a challenge to rise when the world is still dark, beginning my daily routine with a few minutes of seated meditation or reflection, and even some gentle stretching, helps me stay both grounded and energized. I also heed my body's natural call for a shift in diet that includes fewer cold and raw foods and more warming, heartier foods, such as soups and teas, grains and legumes, seasonal root vegetables, and even the occasional meat dish for additional nourishment. Adding warming spices, such as cinnamon, cardamom, turmeric, and ginger to our autumn recipes also can serve to bolster our immune system. Finally, aligning our yoga practice with the shift in seasons can help us remain healthy, productive, and joyful. Here's to celebrating the transformative magic of autumn!

SPICE IT UP! A dash of a warm spice such as ginger, cinnamon, or cardamom can bolster your immune system for cooler weather.

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

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Help Keep the DREAM Alive!

AILA Dream Defenders (AD2) is a collaborative pro bono project that aims to provide immigration legal assistance and advocacy support to DREAMers—young adults who would qualify for relief under the DREAM Act if it were to become law. Through AD2, AILA members can support the movement to pass the DREAM Act and provide pro bono legal services to immigrant youth who seek to fulfill their potential in the country they call home.

Contact stimmons@aila.org for more information.

VOLUNTEER!

AILA DREAM Defenders (AD2) is a dynamic new collaboration between the American Immigration Lawyers Association (AILA), the National Immigration Project of the National Lawyers Guild (NIPNLG), the National Immigration Law Center (NILC), DREAM Activist, United We Dream (UWD), the National Immigrant Youth Alliance (NIYA), and Educators for Fair Consideration (E4FC).

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"Where, despite our best efforts, government agencies remain intractable and officials refuse to act reasonably, AILA members must be ready to sue to protect our clients' rights. After all, we are left with little choice. We can no longer let agencies get away with making up, ignoring, or changing the law as they see fit."

—**David Leopold**, AILA Immediate Past President

JOIN NOW! Be a Part of AILA History!

Florida Court Circumvents *Padilla v. Kentucky*

by Richard William Barner III

In Padilla v. Kentucky, 130 S. Ct. 1473 (2010), the U.S. Supreme Court required criminal defense attorneys to advise their noncitizen clients of any potential immigration consequences of a criminal conviction. The *Padilla* Court held that effective assistance of counsel in a criminal case requires affirmative, competent advice regarding immigration consequences.

In *Padilla*, a criminal defendant facing deportation asked to vacate a criminal plea on the grounds that his attorney did not explain the immigration consequences of the plea.

In contrast, judges, not attorneys, in Florida are required to advise a criminal defendant that a plea to a criminal charge may result in deportation if he or she is not a U.S. citizen (Florida Criminal Rule of Procedure 3.172(c)(8)).

This statute, which predates *Padilla*, offers an entirely different procedure, one that permits a criminal defendant facing deportation to vacate a criminal plea if the judge fails to advise him or her of potential immigration consequences.

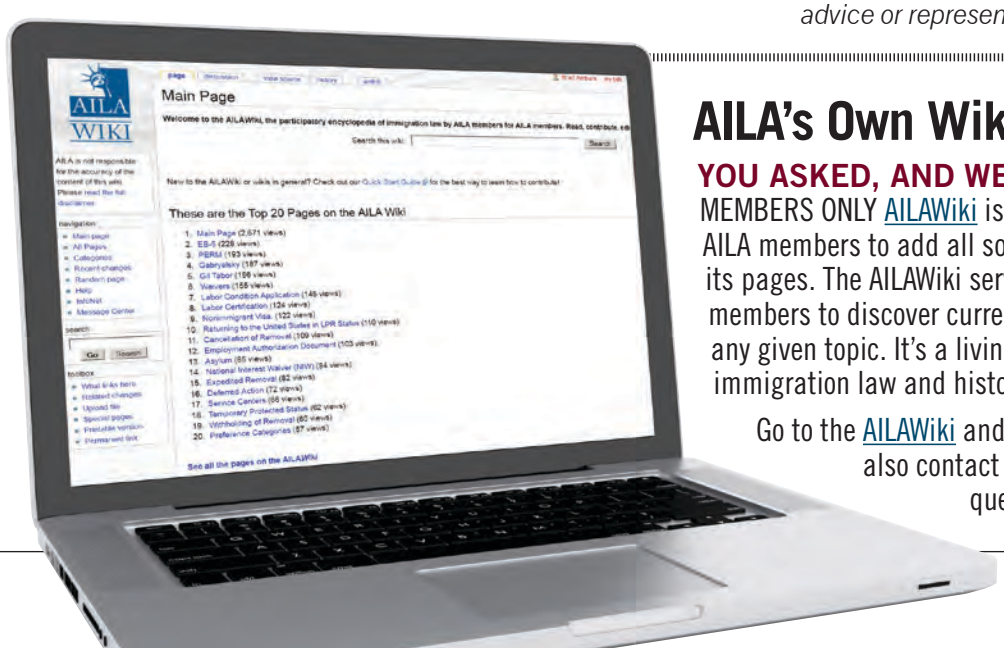
The Fourth District Court of Appeals (FDCA), in Flores v. State, 35 Fla. Law Weekly D1562a, ruled that the judge's colloquy cures a defense attorney's failure to advise a client regarding the immigration consequences flowing from a criminal conviction. Moreover, the *Flores* court held that even improper advice of counsel is nullified by the judge's proper plea colloquy (for example, instructing a client that a deportable offense will not result in deportation).

Contrary to the ruling of the FDCA, the Third District Court of Appeals, in Hernandez v. State, 36 Fla. Law Weekly D713b, subsequently upheld the *Padilla* requirement that defense attorneys must advise their clients of the immigration consequences of a criminal plea, regardless of the judge's colloquy, therefore preserving the right for a criminal defendant who is subject to deportation to vacate a plea based on ineffective assistance of counsel.

The *Hernandez* court certified this conflict to the Florida Supreme Court in April 2011, but the Florida Supreme Court has yet to rule. We will watch closely to see how the conflict is resolved.

PODCAST, ANYONE? Dec. 2010: Putting *Padilla v. Kentucky* in Practice

Richard William Barner III *is a partner in Barner Rossen PA in Sunrise, FL. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*



AILA's Own Wikipedia: the AILAWiki

YOU ASKED, AND WE DELIVERED! The long-awaited MEMBERS ONLY AILAWiki is up and running, and waiting for AILA members to add all sorts of immigration-related content to its pages. The AILAWiki serves as a virtual gathering point for members to discover current and accumulated knowledge on any given topic. It's a living encyclopedia where knowledge of immigration law and history can be explored and explained.

Go to the AILAWiki and start contributing today! You can also contact webmaster@aila.org for Wiki-related questions.

AILA PHOTOS

WHAT'S HAPPENING!

THE 4-1-1:

D.C. Chapter member **Vera Fry**, former assistant district counsel for legacy INS, has been named partner at Goel & Anderson, LLC.

N.J. Chapter members **David H. Nachman**, **Michael Phulwani**, and **Ludka Zimovcak** have consolidated their practices into NPZ LAW GROUP (VISASERVE).

William McBride Law Group PA will be filming a documentary about U.S. citizens married to undocumented immigrants as a way to promote "parole in place."

Carolinas Chapter member **Heather Sivaraman**, of the Law Offices of Dayna Kelly in Carrboro, NC, will chair the North Carolina Bar Association Immigration Law Committee for the 2011–12 term.

NorCal Chapter member **Haitham Edward Ballout** appeared in California's *Super Lawyers* magazine in a story about his life as a child in Lebanon and his transition to life in the United States.

WA State Chapter member **Søren M. Rottman** has opened Rottman Law Office in Yakima, WA, focusing on immigration and citizenship matters. Søren was previously with the Northwest Immigrant Rights Project for more than nine years.

SoCal Chapter member **Reba Aghchay** finally made a commitment to expand her family. **Dizle**, the bulldog, is a life-long friend. Reba says, "What a wonderful commitment! Totally recommended!"

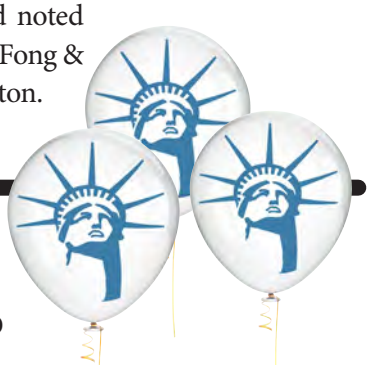
TX Chapter member **Angela M. Lopez** has become a member of Badmus Law Firm, PLLC, located in Dallas.

San Diego Chapter member **Lisa L. Galliath** has opened her own firm after 15 years of practicing immigration law. Her focus will be on NIV matters, family immigration, naturalization, and consular processing.

Mississippi Immigrant Rights Alliance Project director and Mid-South Chapter member **L. Patricia Ice** appeared in The Nation magazine highlighting her involvement in the passage of a Jackson, MS, ordinance that prohibits police from asking people to prove their immigration status.

TX Chapter member **Gary Endelman**, former immigration counsel for BP and noted I-9 authority, has joined Fong & Associates, LLP in Houston.

COURTESY PHOTOS: SHUTTERSTOCK



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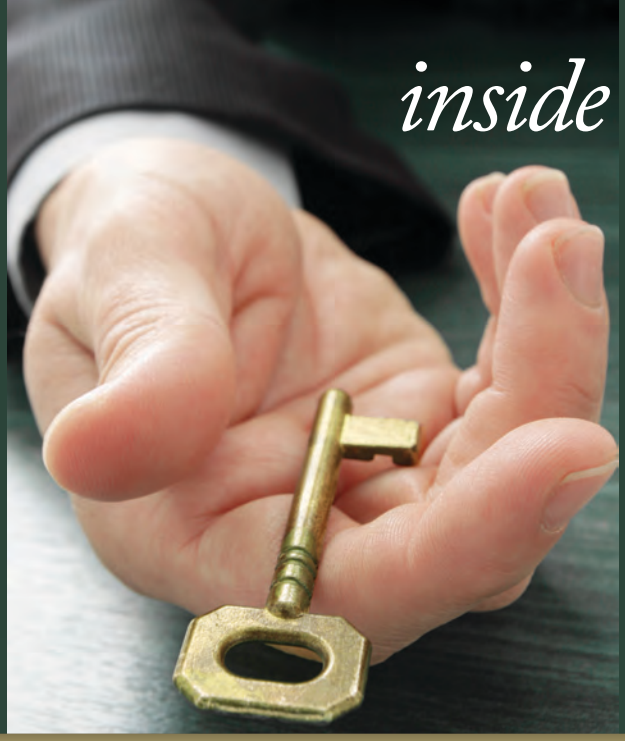

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Implementation of INA §204(*l*) Relating to Surviving Family Members

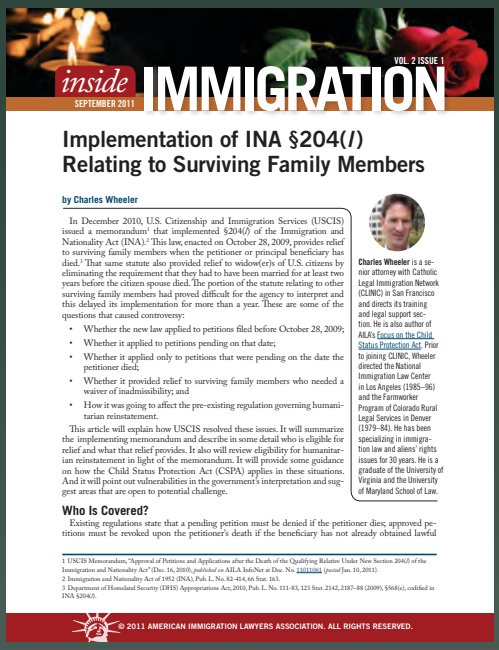
by Charles Wheeler

The October 2009 law meant to provide relief to surviving family members raised more questions than it answered. This issue of Inside Immigration provides guidance and tips on USCIS's interpretation of this law.

This monograph:

- explains how USCIS resolved the issues the law raised
- summarizes the USCIS memo
- describes in detail who is eligible for coverage and what relief is provided
- reveals weaknesses in the government's interpretation
- provides strategies for challenging particular areas
- provides clarity on residence requirements, discretionary denial, inadmissibility and waivers, humanitarian reinstatement

… and more!



inside IMMIGRATION
SEPTEMBER 2011 VOL. 2 ISSUE 1

Implementation of INA §204(*l*) Relating to Surviving Family Members

by Charles Wheeler

In December 2010, U.S. Citizenship and Immigration Services (USCIS) issued a memorandum[1] that implemented §204(*l*) of the Immigration and Nationality Act (INA).[2] This law, enacted on October 28, 2009, provides relief to surviving family members when the petitioner or principal beneficiary has died.[3] That same statute also provided relief to widow(er)s of U.S. citizens by eliminating the requirement that they had to have been married for at least two years before the citizen spouse died. The portion of the statute relating to other surviving family members had proved difficult for the agency to interpret and this delayed its implementation for more than a year. These are some of the questions that caused controversy:

- Whether the new law applied to petitions filed before October 28, 2009;
- Whether it applied to petitions pending on that date;
- Whether it applied only to petitions that were pending on the date the petitioner died;
- Whether it provided relief to surviving family members who needed a waiver of inadmissibility; and
- How it was going to affect the pre-existing regulation governing humanitarian reinstatement.

This article will explain how USCIS resolved these issues. It will summarize the implementing memorandum and describe in some detail who is eligible for relief and what that relief provides. It also will review eligibility for humanitarian reinstatement in light of the memorandum. It will provide some guidance on how the Child Status Protection Act (CSPA) applies in these situations. And it will point out vulnerabilities in the government's interpretation and suggest areas that are open to potential challenge.

Who Is Covered?

Existing regulations state that a pending petition must be denied if the petitioner dies; approved petitions must be revoked upon the petitioner's death if the beneficiary has not already obtained lawful

Charles Wheeler is a senior attorney with Catholic Legal Immigration Network (CLINIC) in San Francisco and directs its training and legal support section. He is also author of AILA's Focus on the Child Status Protection Act. Prior to joining CLINIC, Wheeler directed the National Immigration Law Center in Los Angeles (1985–96) and the Farmworker Program of Colorado Rural Legal Services in Denver (1979–84). He has been specializing in immigration law and aliens' rights issues for 30 years. He is a graduate of the University of Virginia and the University of Maryland School of Law.

1 USCIS Memorandum, "Approval of Petitions and Applications after the Death of the Qualifying Relative Under New Section 204(*l*) of the Immigration and Nationality Act" (Dec. 16, 2010), *published on* AILA InfoNet at Doc. No. 11011061 (*posted* Jan. 10, 2011).
2 Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163.
3 Department of Homeland Security (DHS) Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2187–88 (2009), §568(c), codified in INA §204(*l*).

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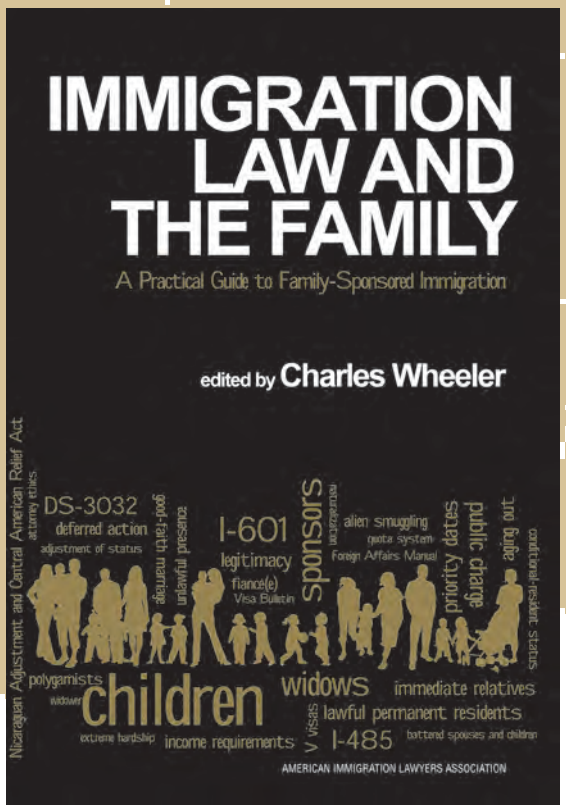

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