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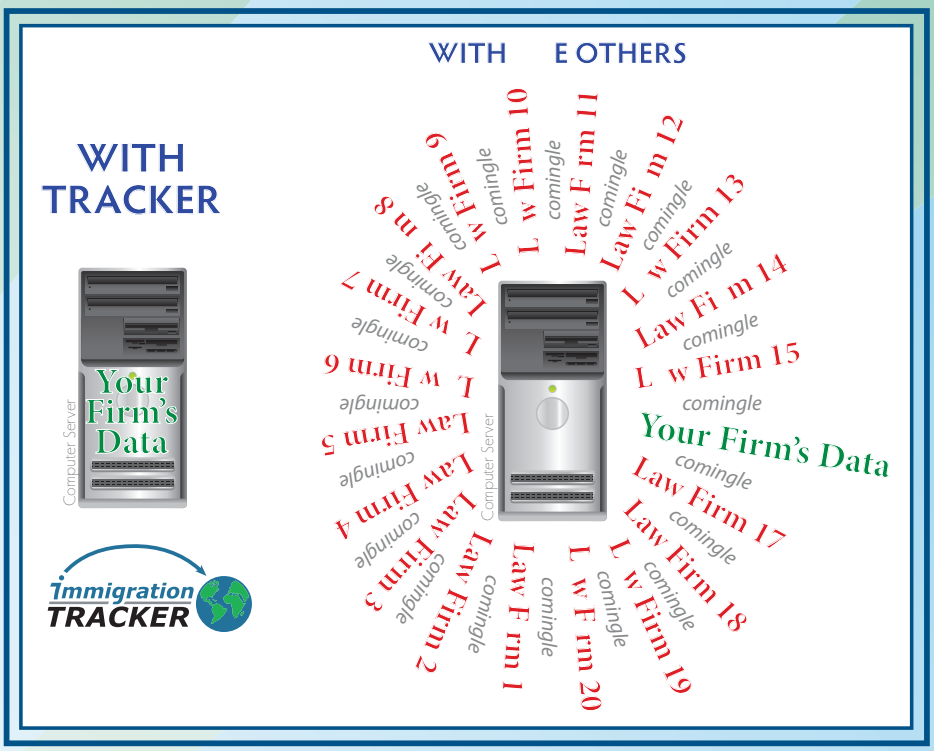

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"NOTABLE QUOTE"

The humanitarian costs of these raids are immeasurable and unacceptable in a civilized society. I call upon the Department of Homeland Security and President Bush to reconsider the use of these worksite enforcement raids, and without the implementation of necessary human rights protections, to please abandon them. We ask them and the country, including the presidential candidates, to again turn their energies for building support for a comprehensive overhaul of our broken immigration system.

— Bishop John Wester, chairman of the U.S. Conference of Catholic Bishops Committee on Migration. (Source: AFP, September 11, 2008).

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A Call to Civic Duty Based on Informed Decision

THE DAY IS FAST APPROACHING when Americans will be called upon to exercise one of their most important constitutional rights: the right to vote. This is a civic duty that no American citizen should take lightly, for the road to that ballot box has been paved with much blood, suffering, and struggle. From the War of Independence to the amendments that gave all men and women of legal age and social status the right to vote comes this great opportunity to elect the leader of "the free world."

Where We Stand

There is much at stake in this presidential election. Hot-button issues include the war in Iraq, this nation's mortgage crisis, and, of course, the need to fix a broken immigration system. As immigration lawyers and advocates, we should be at the forefront in ensuring that the candidates do not lose sight of this issue. It is our obligation to not only push for immigration reforms that will continue to make America competitive in the 21st century, but also to vote for the person we believe will make sound and informed decisions in dealing with this crisis.

Where the Candidates Stand

Both Senators John McCain (R-AZ) and Barack Obama (D-IL) have made promises to place immigration as a top item in their agendas. However, given their prior voting patterns, neither candidate has maintained a consistent commitment to his position on immigration (*see www.ontheissues.org/default.htm*).

McCain cosponsored a bill in 2006 that would have legalized millions of immigrants, created a guest-worker program, and strengthened border control. The presidential candidate for the Republican Party believes that "border security is essential to national security" and is eager to reauthorize E-verify. McCain has also tried to assuage his party's concerns while attempting to continue his more humane approach to immigration reform (*see www.gop.com/pdf/PlatformFINAL_WithCover.pdf*). How will he, as president, promote the type of immigration reform that is most beneficial to all?

While we know that many of these hot-button issues … will not be resolved overnight, a path toward affirmative resolution depends on who we elect to the White House.

Obama's voting record in the Senate closely parallels McCain's voting record. He has voted to strengthen border controls and supported building a fence to increase border security. Obama also supported the comprehensive immigration reform bill that included family reunification, as well as a plan to meet employers' need for workers when U.S. workers cannot be found to fill jobs. However, he has faced criticism for voting for five amendments designed to kill the Senate's bipartisan immigration reform deal. Overall, Obama is consistent with the Democratic Party's immigration platform in supporting a system that "requires undocumented immigrants, who are in good standing, to pay a fine, pay taxes, learn English, and go to the back of the line for the opportunity to become citizens" (*see www.democrats.org/a/national/american_community/immigration/*).

The other independent candidates fall in all areas of the immigration spectrum. America's Independent Party candidate, Alan Keyes, is anti-immigration and has pledged to deploy a minimum of 30,000 troops to bolster security measures around the entire perimeter of the contiguous territory of the United States if elected president (*see www.aipnews.com/talk/forums/thread-view.asp?tid=125&posts=2*). The Green Party candidate, Ralph Nader, opposes the exploitation of illegal workers and favors a guest worker program. However, he also believes that H-1B visas contribute to the "brain drain" of developing countries as their highly skilled workers are lured by corporate America (*see www.ontheissues.org/Celeb/Ralph_Nader_Immigration.htm*).

Make It Count

There is no time like the present to exercise our right to vote. While we know that many of these hot-button issues—especially the tangled web that is the current immigration crisis—will not be resolved overnight, a path toward affirmative resolution depends on who we elect to the White House. It is our obligation and responsibility to make an informed decision when we approach that ballot box on November 4, 2008. Get out there and vote!

AILA President CHARLES H. KUCK *serves as managing partner of Kuck Casablanca LLC in Atlanta and is the editor-in-chief of AILA's* Immigration Litigation Toolbox, 2nd Ed.

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Saving Immigrant Detainees Through Litigation

IMMIGRATION ATTORNEYS ARE ALL TOO FAMILIAR with immigration enforcement's callous treatment of noncitizens. Increasingly, noncitizens are rounded up and shipped to remote detention centers where they have little or no access to counsel. The opaque nature of immigration detention has spawned a system in which the constitutional rights and well-being of detainees are violated.

The National Prison Project of the American Civil Liberties Union (ACLU) has successfully pursued class action litigation on behalf of immigrant detainees. During the course of litigation over the medical treatment provided to immigration detainees, ACLU discovered egregious civil rights violations that demanded individual relief. To address these wrongs, it turned to the Public Justice Foundation, a national nonprofit formed to support the work of Public Justice (PJ).

Public Access to Justice

PJ is a public-interest litigation firm that challenges governmental and individual wrongdoing and holds accountable those who abuse power. To achieve its goals, PJ leverages resources by forming trial "teams" with private litigators. Case duties are divided along the following lines: private litigators take responsibility for all day-to-day activities such as discovery, experts, motions to compel, and costs. PJ takes responsibility for legal research, briefs, and some oral arguments.

Finding a private litigator to partner with can be challenging. Sometimes, private attorneys lack the right experience, such as a combination of tort and civil rights experience. At other times, firms are reluctant to commit to impact work—especially when the opponent is the federal government with its unlimited resources.

To overcome this hurdle, PJ established a nationwide cadre of "state coordinators" familiar with the jurisdiction and its private bar. The coordinators provide PJ with leads to private litigators who have the right mix of experience and resources. Potential team members don't necessarily have prior relationships with PJ.

According to Adele Kimmel, PJ managing attorney and litigator, "Some civil rights litigators who were initially unfamiliar with us have become very strong supporters … giving significant pro bono donations to PJ."

Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate.

Compelling Collaborations

The collaborations are winning cases, impacting the law, and bringing attention to the massive problems with immigration detention. The case involving Moises Carranza-Reyes's detention in 2003 at Park County, a private facility in Colorado (Civil Action No. 05-cv-00377-WDM-BNB), is a prime example. The facility's "pods" were designed to hold 20 to 30 detainees. Instead, they housed 50. The facility did not provide laundry services, cleaning services, cleaning supplies, or trash cans. Prisoners wore dirty uniforms. Vomit, bloody sputum, and feces were smeared throughout the pods.

Moises was forced to sleep on a soiled mattress on the floor between two other detainees who were so sick they could not get up for meals. Moises would bring food to them. Although healthy when admitted, Moises became ill within a few days of admission. The facility gave him Motrin, but it was totally ineffective in treating the strep infection he had developed. Both Moises's legs became gangrenous and he went into cardiac and pulmonary arrest. Only then was he taken to the Denver Medical Center for treatment, where he was given a 2 percent chance of survival. Moises's leg was amputated below the knee and part of his lung was removed. He remained in a coma for six weeks.

All the while, U.S. Immigration and Customs Enforcement (ICE) had Moises shackled to his hospital bed. Shortly after his medical condition became known, ICE deported the other Park County detainees, many of whom were ill. Vindication would come in 2007, when PJ obtained a $1.5 million settlement for Moises.

Another PJ case involved ICE detainee Francisco Castaneda, who sought medical treatment for a penile lesion (*see Castaneda v. U.S., Case No. CV 07-07241 DDP(JCx)*). Several medical professionals said he needed a prompt biopsy. Instead of the needed biopsy, Francisco received ibuprofen, antihistamines, and extra boxer shorts. His health continued to deteriorate and the lesion worsened; it became extremely painful, and emitted a bloody discharge and odor. Still, the biopsy was

refused on the basis that it was an "elective" procedure. In February 2007, Francisco was released. Only then was he able to obtain the needed biopsy that confirmed the lesion was cancerous. On Valentine's Day 2007, Francisco's penis was amputated, and on February 16, 2008, he died from the cancer.

To address the unimaginable humiliation and pain Francisco had suffered before his preventable death, PJ sued the federal government for violation of equal protection under the Fifth Amendment for failure to provide immigration detainees with the level of medical care provided other federal detainees, and violation of the prohibition against cruel and unusual punishment under the Eighth Amendment. PJ also has asserted constitutional claims against state officials under the Eighth and Fourteenth Amendments.

On March 11, 2008, the federal district court in Los Angeles rejected the Public Health Service's motion to dismiss the claim against it, finding that the Federal Tort Claim Act (FTCA) did not provide immunity for its violation of Francisco's constitutional rights. The extraordinary ruling expands available relief and makes individuals personally liable for the civil rights violations of immigration detainees. In his stinging opinion, Judge Dean D. Pregerson stated:

> Defendants' own records bespeak of conduct that transcends negligence by miles. It bespeaks of conduct that, if true, should be taught to every law student as conduct for which the moniker 'cruel' is inadequate.

The defendants have appealed the decision. The case, however, moves forward. In late April 2008, the government admitted the elements of the FTCA violations (liability for the neglect and causation of Francisco's death). It then moved to stay discovery on the constitutional claims, but the court denied the request. →

PRO BONO PROFILE:

Meet Anthony Pelino

The year 1999 was a turning point for Anthony Pelino, a solo immigration practitioner in Boston. He contacted this author, then executive director of the Florence Immigrant and Refugee Rights Project (Florence Project) in Florence, AZ, for advice on a complex asylum claim while a part-time clinical professor at Boston University School of Law. In addition to getting an earful of advice, Anthony received this author's presumptuous pitch: come hither for a vacation to rural Arizona at your expense and provide pro bono representation to some of the Florence Project's indigent detained clients.

While quizzical at first, Anthony took the bait. In 2000, over the course of two weeks, he successfully represented a total of six immigration detainees—all with criminal records—in their compelling claims for relief from removal.

"Through my baptism by fire, I became hooked on representing detainees," said Anthony. "These clients were vulnerable, isolated, and in desperate need for competent counsel by virtue of their detention in what appeared to me then to be a surreal prison town in the middle of nowhere."

Now nine years later, Florence is Anthony's epicenter. In February 2001, he took the plunge and moved to Florence to establish a law practice devoted to representing immigration detainees. "There was the lure of the desert, the adrenaline of fast-paced, high-stakes deportation defense, and my conscience given the legal representation crisis for detainees," reflects Anthony.

"It was the most fulfilling move I've made," he added. "In detention practice, I know I make a meaningful difference—whether it's protecting victims of persecution, torture, or trafficking from deportation to possible death or keeping families together."

While Anthony's practice is now thriving, he remains an ardent pro bono champion for immigration detainees. At any given time, he handles between five to 10 challenging pro bono matters referred by a variety of sources, including the Florence Project. Through his pro bono work, Anthony has developed particular expertise in representing detained women, sexual minorities, and people with mental and physical disabilities.

Additionally, Anthony recommends that American Immigration Lawyers Association (AILA) members donate their time and talent to counsel and assist the 32,000 detainees held in one of the more than 400 detention facilities nationwide.

"As attorneys, we have both a moral and ethical imperative to help bring justice to the lives and cases of indigent DHS detainees," reminds Anthony. "We are their gatekeepers to the justice system and the key to their freedom."

Courtesy of Christopher Nugent, senior counsel with the Community Services Team of Holland & Knight LLP in Washington, D.C., and a member of the AILA National Pro Bono Services Committee.

Adele Kimmel, PJs lead attorney on the case, noted the government has, in the past, stonewalled providing information. But that doesn't deter her.

"Public Justice is committed to pursuing constitutional violations that arise from the federal government's health care policies for detainees, as well as the government's utter failure to provide sufficient funding and staffing for detainees' medical care," said Kimmel.

PJ also is concerned about private detention facilities. "All too often, when detainees are housed in facilities operated by a private company, profits are valued over lives and the result is a complete failure to provide detainees with adequate medical care," Kimmel added.

Upholding Civil Rights

PJ's work is helping to expose civil rights violations and bring about needed change. The tragic cases of Moises and Francisco serve as poster children for the importance of pro bono counsel. While detained, Francisco begged his sister to find him a lawyer. Unfortunately, she was unable to find anyone to take his case. Francisco's case poignantly shows that pro bono lawyers don't only dispense needed legal advice; they also provide the transparency and accountability needed to stem egregious civil rights violations.

KATHLEEN A. MOCCIO *is a member of the American Immigration Lawyers Association's National Pro Bono Services Committee and practices immigration law in Minneapolis.*

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MOBILIZE NOW!

How Your Vote Impacts the Future of Immigration

by L. Batya Schwartz Ehrens

ILLUSTRATION NATULRICH / 123RF

With presidential and congressional elections looming around the corner, Americans continue to debate, worry, and wonder which candidates will best serve the changing needs of our nation. Whereas most issues on the political table fall into neat, divided platters of foreign or domestic policy, the great immigration debate is unique in that it reflects—and will literally redefine—who and what falls within U.S. borders. The election outcome ultimately affects not only internal affairs, but also the global posture of this country.

IMMIGRATION LAWYERS PLAY A KEY ROLE as ambassadors, advocates, educators, lobbyists, therapists, friends, and, of course, pursuers of justice for their clients. Today, however, a new type of immigration debate has emerged and gained momentum as advocates of just immigration policies and proponents of increased national security struggle to balance this legacy of opportunity and hope with this country's changing security needs.

Thomas Friedman suggests that the United States has strayed too far, and describes this nation's post-9/11 global reputation as "The United States of Fighting Terrorism" rather than the land of opportunity for immigration and the preeminent destination for tourism, education, economic and political freedom, technology, and environmental consciousness (*see* T. Friedman, "9/11 Is Over" *New York Times*, Sept. 30, 2007). As the crucial election approaches, Americans can take heed of Friedman's article in electing leaders to maintain this country's reputation as a welcoming and prosperous nation with "increased but invisible" protection.

History of Immigration in U.S. Elections

Although immigrants historically have viewed the United States as the land of opportunity, each wave of immigration revives sentiments of distrust and disdain by those already prospering (often only one or two generations after *their* ancestors migrated to this country). A century ago, people feared that German, Irish, Jewish, and Italian immigrants seeking economic opportunities were taking jobs, driving wages down at the expense of the working class, refusing to learn English, and overburdening public services.

Today, immigration statistics are eerily similar to 100 years ago. Accordingly, the same fears and complaints about immigrants surface, sometimes accompanied by the recognition that the United States owes much of its economic prosperity to its immigrants, but more often by belief of some Americans that their immigrant roots were more legitimate and worthy of citizenship because their immigrant predecessors did everything "legally."

However, these restricted viewpoints fail to appreciate the legislative and political evolution over the last century that has limited immigrants' ability to navigate legal pathways to citizenship. Between 1890 and 1919, a flood of immigrants from Southern and Eastern Europe entered the United States "legally" with little more than a boat ticket, a relative or friend to vouch for them, and a bill of clean health. By the 1920 U.S. presidential election, xenophobia was rampant and the electorate feared crime, labor unrest, and political radicalism, which were attributed to the immigrant population.[1]

The 1921 Emergency Quota Act was passed, which limited the annual number of immigrants entirely based on country of origin—immigration from any country was limited to 3 percent of the number of persons from that country living in the United States, according to the 1910 U.S. census figures. In 1924, immigration, again, became a platform issue for the Republican Party. The Immigration Act of 1924, or Johnson-Reed Act (including the National Origins Act and Asian Exclusion Act), was passed, reducing the country quotas to 2 percent of the people from that country based on the 1890 U.S. census.[2] The quotas primarily affected Southern and Eastern European immigrants, who had been arriving in large numbers since the 1890s. Immigration from Eastern Europe, which exceeded 400,000 in 1919, was cut to fewer than 40,000, while immigration from Italy was restricted to 4,000. Furthermore, all Asians were forbidden from immigrating, even if the quotas for their country of origin were not met. As fewer new immigrants entered the United States from these countries, proponents of the quotas saw success. Foreign languages and ethnic businesses faded away as immigrants became "Americanized."

In recent years, under pressure from pro-immigrant advocacy groups and anti-immigrant restrictionist groups like The Minutemen and their allies (with powerful public relations mechanisms and voting power), both the Senate and House have revisited immigration legislation. In the past three years, Congress has voted on several legislative acts that would regulate immigration by addressing border protection, anti-terrorism, family– and employment-based backlogs, comprehensive immigration reform, deportation, employer raids, and many other pressing issues (*see* Secure America and Orderly Immigration Act (S. 1033, 2005); Comprehensive Immigration Reform Act of 2006 (S. 2611); Comprehensive Immigration Reform Act of 2007 (S. 1348); and Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007 (S. 1639)).

→

In Their Own Words:
2008 Presidential Candidates on Immigration

This election is about the 12 million people living in the shadows, the communities taking immigration enforcement into their own hands; they're counting on us to stop the hateful rhetoric filling our airwaves, rise above the fear and demagoguery, and finally enact comprehensive immigration reform … [I]t's time for a president who won't walk away from comprehensive immigration reform when it becomes politically unpopular … At the same time, we'll secure our borders and crack down on employers who hire undocumented workers. That's how we'll reconcile our values as both a nation of immigrants and a nation of laws.

— *Democratic presidential candidate* Sen. Barack Obama (D-IL), *Congressional Hispanic Caucus Institute Gala, Sept. 10, 2008*

We will secure the borders first ... I know how to do that. I come from a border state, where we know about building walls, and vehicle barriers, and sensors, and all of the things necessary … And then we will move onto the other aspects of this issue, probably as importantly as tamper-proof biometric documents, which, then, unless an employer hires someone with those documents, that employer will be prosecuted to the fullest extent of the law.

— *Republican presidential candidate* Sen. John McCain (R-AZ), *California Republican debate, Jan. 30, 2008*

I hereby Pledge that as President I will not reward those who have come to our country illegally with the precious gift of American citizenship, by granting them any form of amnesty … I hereby Pledge that I will as President regard the ongoing invasion of our country by millions of foreign nationals as the clear and present danger to our nation's security that it is, and that I will therefore take swift Executive action to confront and end it.

— *America's Independent Party presidential candidate* Allan Keyes's *pledge to the Minutemen Civil Defense Corps, Aug. 25, 2008*

Exploiting immigrant workers puts a downward pressure on U.S. labor wages and standards. A $10 minimum wage would open many of these jobs to unemployed American workers. As for the H-1B visas, the United States should stop the "brain draining" of highly skilled people in the Third World who are desperately needed to develop their own economies.

— *Green Party presidential candidate* Ralph Nader, *Green Party 2008 Presidential Candidate Questionnaire, Feb. 3, 2008*

Presidential Election

To those basing their voting decisions for the next president on a candidate's immigration policies, both Senators John McCain (R-AZ) and Barack Obama (D-IL) have made promises to place immigration as a top agenda item. However, it remains to be seen whether either actually will carry out his promises if given the opportunity. Given their prior voting patterns, neither candidate has maintained a consistent commitment to his position on immigration (see all voting records for McCain, Obama, and Biden at *www.ontheissues.org/default.htm*).

Throughout the primaries, the Republican Party candidates debated and vied to be the toughest on immigration, promising a giant fence that would ease the country's greatest immigration nightmares. In contrast, Democratic contenders Senator Hillary Rodham Clinton (D-NY) and Obama both remained elusive and noncommittal, most likely for fear of isolating supporters who were unconvinced that immigration reform and national security could be achieved together. However, in 2006, both Obama and Clinton supported a bill sponsored by McCain that proposed legal status for undocumented immigrants who met conditions such as learning English. Furthermore, all three supported the border fence.

JOHN MCCAIN: Republican Presidential Candidate

McCain reversed his position on the 2006 Senate bill that he cosponsored, which would have legalized millions of immigrants, created a guest-worker program, and strengthened border control. After being attacked by his party for the proposal, he restated his position and has become a proponent for securing the border first. McCain has been criticized for trading in his commitment to address immigration in "a humane and compassionate fashion" to prioritize border security under pressure from the GOP. This major position change reflects McCain's response when pressured by his largely anti-immigrant constituents.

Furthermore, McCain believes that the solution to repairing the immigration system begins at enforcing and fortifying the U.S. borders in order to stop illegal immigration through Mexico before continuing with immigration policy

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reform. He has prioritized investing in more stringent border security, and, if elected, this will most likely be his first move.

McCain also has expressed support for holding employers accountable for knowingly hiring unauthorized workers, and he supports E-verify, the U.S. Department of Homeland Security's (DHS) electronic tracking system that would help employers more accurately screen workers. E-verify actually may expose unauthorized aliens to the government as employers extend the reach of DHS employers' human resource departments. Thus, it is crucial to understand all consequences of this very controversial program before endorsing it as an ideal solution to reduce unauthorized employment.

McCain's statements and speeches from 1998 to 2008 paint the picture of someone committed to immigrant rights. He was honored by La Raza for opposing English as the official language, considers illegal immigrants "God's children," and proudly boasts of his bipartisanship with respect to voting on immigration in the Senate. He also has supported guest-worker programs. However, by abandoning a bill he actually once cosponsored, one cannot help but question his commitment to his bipartisan values, and more importantly, his commitment to the rationale that drove him to cosponsor the bill in 2006.

Although his positions on immigration do not vary dramatically from his opponent, Obama, McCain continues to face pressure from his party, which diverts his position and commitment to a comprehensive solution favoring immigrants. From an immigration perspective, McCain's biggest weakness is his inability to withstand pressure from his conservative party, as well as his response to that pressure by shifting his priorities from comprehensive solutions to border security.

PHOTO MISTYDAWNPHOTO / DREAMSTIME

SARAH PALIN: Republican Vice-Presidential Candidate

McCain's running mate, Governor Sarah Palin of Alaska, has taken no previous action and has made no statements on immigration. However, she has been →

Voting Records on Key Immigration Bills: *U.S. Senators Up for Re-election in 2008*

Senator	State-Party	CIR 109th	CIR 110th	DREAM Act
Pryor, Mark	D-AR	Y	N	N
Biden, Joseph	D-DE	Y	Y	Y
Harkin, Tom	D-IA	Y	N	Y
Durbin, Richard	D-IL	Y	Y	Y
Landrieu, Mary	D-LA	Y	N	N
Kerry, John	D-MA	Y	Y	Y
Levin, Carl	D-MI	Y	Y	Y
Baucus, Max	D-MT	Y	N	N
Lautenberg, Frank	D-NJ	Y	Y	Y
Reed, Jack	D-RI	Y	Y	Y
Johnson, Tim	D-SD	Y	N/A	Y
Rockefeller, John	D-WV	N/A	N	Y
Stevens, Ted	R-AK	Y	N	N
Sessions, Jeff	R-AL	N	N	N
Allard, Wayne *	R-CO	N	N	N
Chambliss, Saxby	R-GA	N	N	N
Craig, Larry *	R-ID	Y	Y	Y
Roberts, Pat	R-KS	N	N	N
McConnell, Mitch	R-KY	Y	N	N
Collins, Susan	R-ME	Y	N	Y
Coleman, Norm	R-MN	Y	N	Y
Cochran, Thad	R-MS	N	N	N
Wicker, Roger	R-MS	N/A	N/A	N/A
Dole, Elizabeth	R-NC	N	N	N
Hagel, Chuck *	R-NE	Y	Y	Y
Sununu, John	R-NH	N	N	N
Domenici, Pete *	R-NM	Y	N	N
Inhofe, James	R-OK	N	N	N
Smith, Gordon	R-OR	Y	N	N
Graham, Lindsey	R-SC	Y	Y	N
Alexander, Lamar	R-TN	N	N	N
Cornyn, John	R-TX	N	N	N
Warner, John *	R-VA	Y	N	N
Barrasso, John	R-WY	N/A	N	N
Enzi, Michael	R-WY	N	N	N

* Not seeking re-election. The Senate has 100 members, with about one-third being elected for a six-year term in dual-seat constituencies (two from each state) every two years. There are currently no term limits for senators or members of the House of Representatives, thus, a person can be re-elected every term until they no longer wish to seek re-election or have passed away.

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identified as a supporter of Pat Buchanan during his 2000 presidential campaign, who is best known as one of the most anti-immigrant and anti-Semitic politicians in the United States.

If McCain is elected as the next president, Palin assumes the role not only of vice president, but also as president of the Senate of the United States. In that role, she would have the tie-breaking vote in the Senate on any immigration issue that arises. Due to the highly controversial and difficult immigration issues that have been presented in Congress over the past four years, including, but not limited to the DREAM Act, comprehensive immigration reform (CIR), material support, and E-verify regulations, it is possible that Palin could be the tie-breaking vote for immigration legislation on which she has absolutely no background or previous voting record.

Barack Obama: Democratic Presidential Candidate

Obama's voting record in the Senate closely parallels McCain's voting record. He has voted to strengthen border controls and supports building a fence to increase border security. In 2007, Obama supported the CIR bill supporting family unification, as well as meeting demand for positions that employers cannot find U.S. workers to fill. He also has expressed support for making the current citizenship process shorter, easier, and less expensive for legal immigrants seeking citizenship. Obama believes that employers should be held accountable for hiring unauthorized workers (which may result in a move toward E-verify). Like his opponent and his running mate, Obama believes in creating a pathway to citizenship for undocumented immigrants.

In the past, Obama has faced criticism for voting for five amendments designed to kill the Senate's bipartisan immigration reform deal. However, throughout his campaigning, he has promoted an agenda to find a balance between immigrants and laws, and his voting record—especially in recent times—has reflected that goal.

Joseph Biden: Democratic Vice-Presidential Candidate

Senator Joseph Biden (D-DE) maintains that it is impractical to deport approximately 12–14 million illegal immigrants, and has supported Bush's plan to create a border fence as well as pathways to citizenship. However, his support for the border fence comes from the desire to tackle drug trafficking rather than to halt illegal crossings. Like McCain and Obama, Biden voted in favor of CIR and has stated that Americans have an obligation to repair the broken immigration system. He supports employer sanctions as well as a guest worker program. Biden also voted to allow undocumented aliens to participate in Social Security and supports legislation for earned citizenship for undocumented immigrants currently in the United States.

Biden is dependable as a consistent proponent for immigration reform. His views and voting record reflect an understanding of the issues America faces, as well as a commitment to finding →

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viable solutions. Of the four major players in this election, Biden is most likely to support powerful changes that will improve the lives of immigrants.

State Legislation

Although Congress was unable to make any significant progress in immigration this year, according to a report issued by the National Conference of States Legislatures, in 2007 alone, state legislatures passed 240 laws regarding immigration (out of 1,562 proposed) addressing "law enforcement, employer sanctions, driver's licenses, and other identification, for both legal and unauthorized immigrants."[3] The increase in state legislation reflects an urgency to respond to public concerns, but also presents the dangers of irresponsible legislation on some of the most delicate issues in immigration. For example, Mississippi Governor Hayley Barbour signed an employer sanction law that mandates employers to use E-verify. By using the system, employers are absolved from criminal liability for hiring undocumented workers, while undocumented workers could face felony charges for holding a job. This type of legislation creates an environment ripe for employer abuses and exploitation without any accountability for employers.

Advocating Fair Immigration Reforms

Recent congressional voting has not resulted in any significant advancement supporting a viable solution for fair immigration reform. However, with all the media publicity and public outrage on both sides of the issue, there must be continued advocacy for immigration reforms and steady pressure on Congress to pass legislation that will address the weaknesses of the current immigration system. America's future rests on developing fair pathways to citizenship, immigration measures to increase economic self-reliance, and improvements to this nation's current refugee system, among many other important changes.

Unfortunately, Congress receives disproportionate and continuous feedback, support, and pressure from anti-immigrant constituents, most of whom are acting based on irrational fears and unsubstantiated beliefs that immigrants threaten their safety and prosperity. Many Democratic leaders who would traditionally support pro-immigrant legislation are wary to take a stand for fear of isolating themselves from more conservative supporters.

On November 4, 2008, Americans will once again have an opportunity to support congressional leaders up for re-election who vote favorably for pro-immigrant legislation. Immigration attorneys have a narrow window of opportunity in the next month before elections to carry out their heightened obligations as advocates in support of candidates who vote in favor of legislation that will benefit immigrants. Below are some suggested methods to get your message out to the public:

► Respond to highly visible editorials to publicly denounce enforcement-only immigration tactics;

► Write articles in ethnic and local newspapers to explain how immigrants stimulate the economy, while the expense of deporting 12 million immigrants can be momentous;

► Educate clients and the general public so they understand the implications of the congressional elections, and encourage those who can to vote;

► Contact congressional representatives;

► Show the public how immigrants benefit our country by supporting lobbyists and advocacy groups and encouraging constituents to do the same; and

► After the elections, continue learning, teaching, and lobbying so that immigration remains on the agenda.

One of the most effective means of change beyond grassroots advocacy work is by supporting organizations like Immigrants' List (founded by several American Immigration Lawyers Association members) that raises funds through donations to build pro-immigrant coalitions (*see www.immigrantslist.org*). Immigrants' List provides financial backing to congressional leaders →

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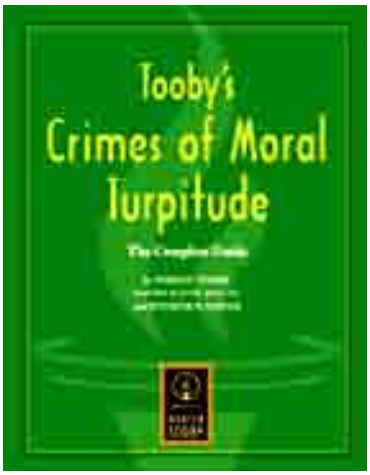

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who have voted favorably for important bills and acts, regardless of party affiliation, and shows that even in a rampantly anti-immigrant environment, it is possible to be pro-immigrant and obtain the financial backing necessary to win an election. This year's elections are critical to the future of immigration legislation, because now is the opportunity to elect leaders who will provide a positive voice for immigration.

Advocate for Change

In addition to securing safe haven, visas, and green cards for clients, immigration attorneys also have a duty to serve their clients by advocating for their needs and debunking myths that feed anti-immigrant hysteria. Armed with accurate information from trustworthy sources, these advocates can enable more Americans to make educated voting decisions about who will ultimately best protect their values.

The movement to close U.S. borders and expel undocumented immigrants is gaining support and growing at great speed. However, if the pro-immigrant movement mobilizes to become a powerful voting block, it can influence national politics. Advocates must prepare their communities to replace the widespread panic over terrorism and economic instability channeled into this immigration debate with rational immigration solutions that uphold this country's compassionate traditions and ensure its competitive edge in the age of globalization. Until the general elections, immigration advocates still have the time and opportunity to reach out to the voting communities. On November 4, 2008, 100 U.S. representatives, 35 U.S. senators, and one U.S. president will be elected. Together, they will determine the fate of generations of immigrants seeking to become an American. Are you ready to exercise your constitutional right to vote for the next body of power? ILT

L. BATYA SCHWARTZ EHRENS *is an immigration attorney at Pollack, Pollack, Isaac, & DeCicco LLP in New York, NY, and serves as co-chair of the New Members Division for AILA's New York chapter.*

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Notes

[1] *See http://hnn.us/articles/25364.html.*

[2] *See http://en.wikipedia.org/wiki/Immigration_Act_of_1924.*

[3] *See National Conference of State Legislatures Report at http://ipsnorthamerica.net/news.php?idnews=1448.*

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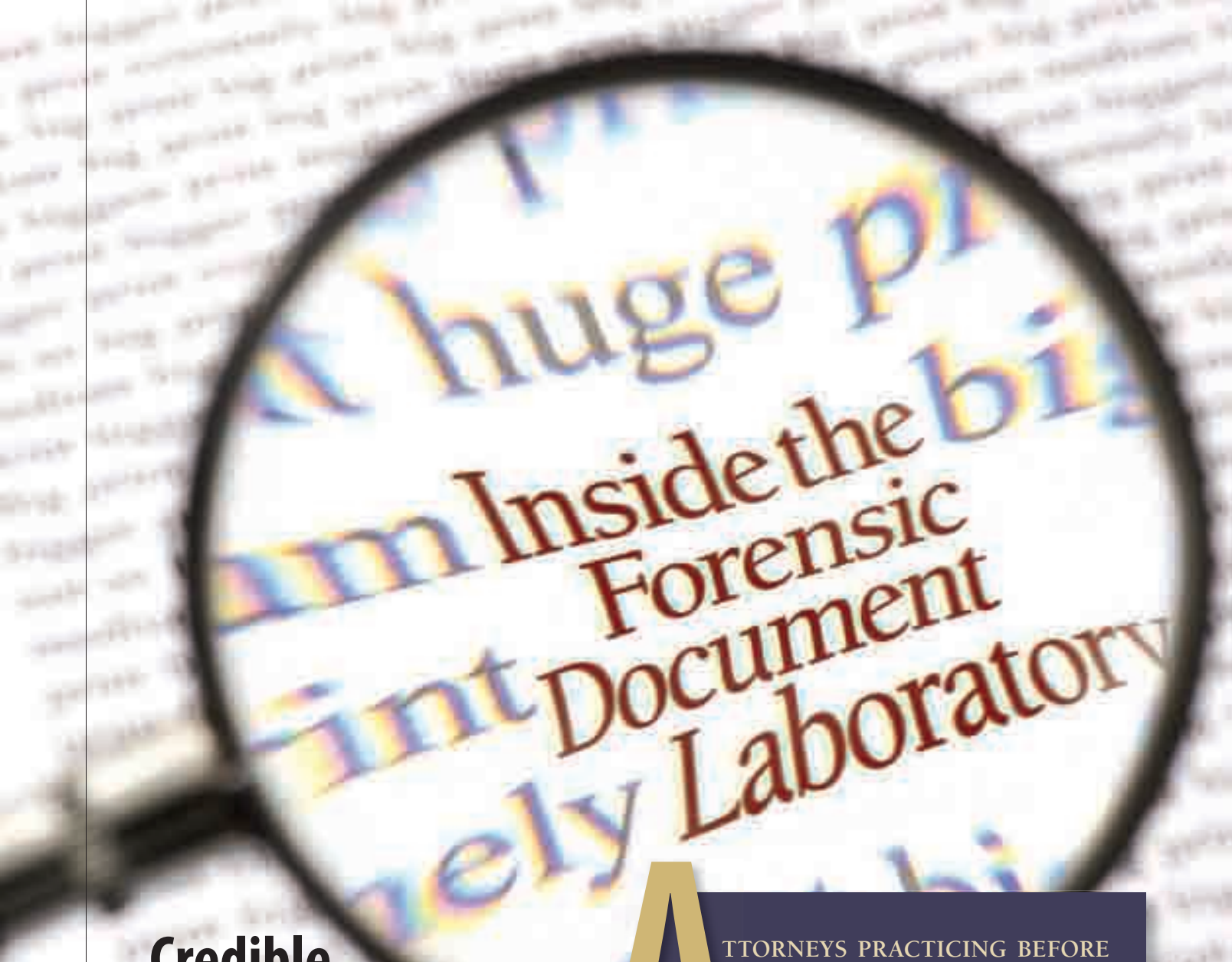

Credible Evidence or Unreliable Due Process Violations?

by Jason Dzubow

ATTORNEYS PRACTICING BEFORE THE IMMIGRATION COURTS have seen a growing reliance on Forensic Document Laboratory (FDL) reports, as the FDL has expanded its mission and operations over the last seven years. In reaching credibility determinations, immigration judges (IJs) give great weight to the FDL reports, and such reports may be determinative of credibility regardless of any other evidence presented. But little is known as to how the FDL determines fraudulent documents, because its chain of custody does not follow a particular pattern.

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> The respondent claims to be a male native and citizen of Mauritania. In support of this claim, he proffered documents purporting to be an identity card and a birth extract from the Republic of Mauritania. [T]he Immigration and Naturalization Service submitted into evidence a report from its Forensics Document Laboratory stating that the respondent's identity card is a "known counterfeit" and the birth certificate is "probably counterfeit." The respondent's attorney characterized the report as "conclusory" and questioned its efficacy, absent an opportunity for the parties to examine the documents that the respondent had originally submitted to the Service. The Immigration Judge found the respondent deportable under section 241(a)(1)(B) of the Immigration and Nationality Act, ... [and] denied his applications for asylum and withholding of deportation under sections 208 and 243(h),
>
> **— *Matter of O–D–*, 21 I&N Dec. 1079, 1083 (BIA 1998)**
>
> The respondent, an Albanian, was active in Albania's Democratic Party in 2000. At her hearing, the immigration service's lawyer presented a forensic document examiner employed by the service named, Gideon Epstein, who testified that four of the nine documents that [the respondent] had attached to her application for asylum were probably fakes (he didn't analyze the other five). He based this assessment on the fact that the documents had been produced by color laser technology, which … is … expensive (and Albania is poor). Also, the printed text on the documents … did not contain the diacritical marks (accents) that are part of the spelling of many of the Albanian words in that text. Epstein acknowledged, however, that he does not speak or read Albanian and had no access to official Albanian texts comparable to [respondent's] documents. Admitting that he could not "rule out" the possibility that they were authentic, he concluded merely that they were "probably not what they're purported to be." The immigration judge concluded that the documents were of "highly questionable authenticity" and solely on this ground rejected [the respondent's] testimony about being persecuted for activities on behalf of the Democratic Party.
>
> **— *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005)**

The FDL works under U.S. Immigration and Customs Enforcement (ICE) to "combat travel and identity document fraud." Approximately 20 percent of the FDL's forensic work involves criminal matters, and ICE reports that "nearly all" cases in which the FDL provides expert testimony result in either convictions or plea bargains based on the lab's forensic analysis. With findings done behind closed doors, is the FDL report really credible evidence or just another due process rights violation of aliens in immigration proceedings?

The FDL Report

Most reports from the FDL contain only conclusory information about the document sent for analysis. For example, one report analyzing a police document from Ethiopia states only that a "comparative examination" has revealed that the document "does not conform to genuine specimens of the letters and wet seal impressions on file and was determined to be counterfeit."

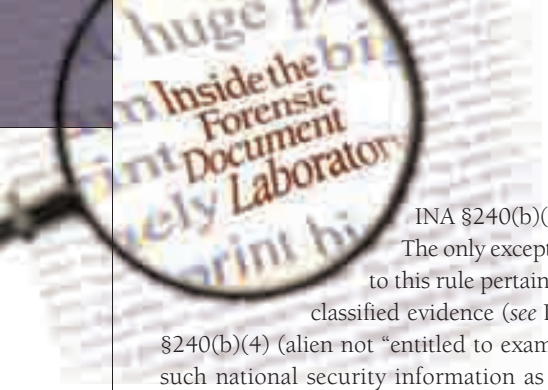
The FDL is reluctant to provide insight into its methodology. In a recent letter to the author's firm, a senior forensic document examiner at the FDL states:

> It is not customary for FDL examiners to include comprehensive details of the examination when reporting conclusions … The FDL does not provide access to the reference collection of specimens to third party entities nor does it disclose provided third party information. To do so would potentially grind government operations to a halt since agencies would not share information if that information were released. The FDL does not provide specimens that, in the wrong hands, could make it easier to counterfeit a document in the future. However, the examiner assures the firm that the analysis of the FDL is "the product of reliable principles and methods based upon sufficient data, which have been applied to the facts of [the] case." Such principles include "side-by-side comparison" of the alien's document with "genuine specimens" obtained from U.S. government officials assigned to the relevant overseas posts. The examiner concludes, the weight given to an "expert witness's findings can be determined through the expert's testimony both on direct and cross examination."

Thus, the FDL submits conclusory "expert" reports but does not reveal its methodology or allow the alien—or the IJ—to examine the "genuine specimens" used for comparison. It does not reveal where, when, or how the "genuine specimens" were obtained, but assures the alien and the court that its analysis is based on "reliable principles" and "sufficient data." Such standards hardly seem appropriate to a court of law. Yet, IJs now routinely rely on these types of reports to deny applications for relief, even where the applications are otherwise supported by credible evidence (*see Matter of O–D–*, 21 I&N Dec. 1079, 1083 (BIA 1998) (submission of counterfeit document, absent any explanation for such presentation, casts serious doubt on the applicant's overall credibility and diminishes the reliability of his other evidence)). What, then, can be done to counter an FDL report?

Due Process Violations

Aliens in removal proceedings are entitled to due process of law (*see Reno v. Flores*, 507 U.S. 292, 306 (1993)). One due process right accorded foreign nationals in removal proceedings is the "reasonable opportunity to examine the evidence against the alien." (*See* →



INA §240(b)(4).) The only exception to this rule pertains to classified evidence (*see* INA §240(b)(4) (alien not "entitled to examine such national security information as the Government may proffer")). The regulations governing removal proceedings under 8 CFR §1240.11(c)(3)(iv) further refine a nonimmigrant's rights with regard to classified evidence as:

> Service counsel may … present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing. When the immigration judge receives such classified information, he or she shall inform the alien. The agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the alien, whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its sources. The summary should be as detailed as possible, in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state whether such information is material to the decision.

Thus, in cases where classified evidence is proffered by the government, such evidence is submitted to the IJ and an effort is made to provide the nonimmigrant with information about the evidence that is "as detailed as possible."

In cases involving an FDL report, however, the underlying evidence is not submitted to the IJ, let alone to the foreign national. This means that ICE is more protective of the evidence relied on by the FDL than it is protective of national security information. Clearly, something is amiss.

Are the courts a forum where aliens' cases may be reviewed fairly or are they merely a rubber stamp for the U.S. Department of Homeland Security?

Not Necessarily "Expert" Report

The FDL justifies its refusal to reveal the data underlying its reports on the basis that the reports are "expert" testimony, and, as such, neither the foreign national nor the IJ may review the evidence used to create the reports. In other words, the report itself is the evidence—the FDL has filtered and analyzed the underlying data and presented its expert finding to the court. The Federal Rules of Evidence, Rule 702, offers guidance about expert testimony[1]:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FDL reports based on "comparative examinations" do not constitute expert testimony because such reports generally do not require "scientific, technical, or other specialized knowledge." Any layperson can place one document next to another to determine whether they are the same or different. Under these circumstances, the IJ and the nonimmigrant should be permitted to review the underlying data themselves; they should not be forced to rely on the unsupported conclusions of the FDL.

Further, even if a particular report does require expert knowledge, the IJ is required to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable," (*see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *see also Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (Although *Daubert* does not "strictly apply" to immigration proceedings, the "spirit of *Daubert*" is applicable to such proceedings)).

PRACTICE POINTER: The IJ (and the foreign national's attorney) can improve reliability by insisting on receiving crucial information such as: (1) where the FDL obtained the documents used for comparison; (2) if the FDL has a complete set of all documents used by the issuing government or organization; (3) how the FDL obtained the documents; and (4) methods of examination and the results obtained.

Unless the IJ has reviewed the underlying data and answered these questions, he or she has not fulfilled the duty to ensure the FDL report's reliability. Such is the minimum requirement for due process. (*See Zahedi v. INS*, 222 F.3d 1157 (9th Cir. 2000) (requiring some degree of specificity from the FDL).)

Unclassified Evidence Review

Except in the case of classified →

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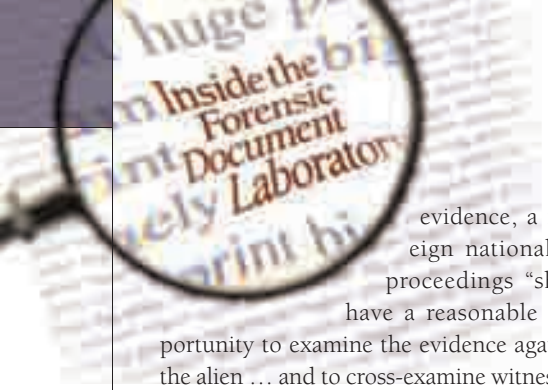

evidence, a foreign national in proceedings "shall have a reasonable opportunity to examine the evidence against the alien … and to cross-examine witnesses presented by the Government," (*see* INA §240(b)(4)).

The evidence relied on in the FDL reports is generally not classified evidence. Nevertheless, the FDL justifies its refusal to allow IJs and respondents to review the underlying evidence because releasing the specimens might cause them to fall into the "wrong hands," which "could make it easier to counterfeit a document in the future." Not only is this explanation insulting to IJs and the immigration bar, it wholly fails to address the due process concerns raised by the FDL reports. The FDL's theoretical worries about documents becoming public should not be permitted to trump respondent's right to due process of law. The act clearly allows nonimmigrants the right to review the evidence against them; it makes no accommodation for the FDL's concern that such review might lead to better forgeries. Further, the FDL's justification provides no basis for refusing to release the documents to the IJ. If judges are trusted with classified evidence, surely they may be trusted with the unclassified documents used to create an FDL report. If the FDL will not release the underlying data used by the FDL, attorneys should move to exclude the report as a violation of due process.

Aside from the right to examine evidence, foreign nationals have the right to cross-examine government witnesses, including the ICE employees who create FDL reports (*see* INA §240(b)(4)). Courts have held that "INS may not use an affidavit from an absent witness 'unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing.'" (*See Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004) (quoting *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *see also Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985); *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997).)

There is no reason why the FDL employees cannot be available in person or by phone. A well-prepared cross-examination could raise serious doubts about the basis for an FDL report, and could lead to that report being excluded from evidence. (*See, e.g., Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005) (government testimony excluded after examination revealed that "expert" on Albanian document does not speak Albanian and is not familiar with the situation in Albania); *Tadesse v. Gonzales*, 492 F.3d 905 (7th Cir 2007) (Board of Immigration Appeals (BIA) decision reversed where IJ improperly limited cross-examination of FDL expert).)

Establish Chain of Custody

One strategy to neutralize an FDL report that has gained some traction in the federal courts relates to the "chain of custody" of the document in question. The Second Circuit U.S. Court of Appeals has held that when an applicant whose testimony is otherwise credible claims he or she has no knowledge that a document is fraudulent, the IJ "must make an explicit finding that the applicant knew the document to be fraudulent before the IJ can use the fraudulent document as the basis for an adverse credibility determination" (*see Carovic v. Mukasey*, 519 F.3d 90, 97–98 (2d Cir. 2008)). At least two other courts have reached a similar conclusion (*see Koursky v. Ashcroft*, 355 F.3d 1038, 1040 (7th Cir. 2004); *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907, 913 (9th Cir. 2004); *Matter of O–D–*).

PRACTICE POINTER: Thus, where a third party in the respondent's home country has sent him or her an allegedly fraudulent document, the respondent may avoid an adverse credibility finding by demonstrating that he or she had no knowledge that the document is fraudulent. Since the attorney cannot know in advance which documents will be challenged, it is important to establish the chain of custody of all documents submitted by the alien.

An Existential Question

Use of the FDL reports presents an existential question for the immigration court system: Are the courts a forum where aliens' cases may be reviewed fairly or are they merely a rubber stamp for the U.S. Department of Homeland Security? Attorneys representing immigrants should not allow the reports to go unchallenged. Our clients' cases—and the integrity of the immigration court system—are at stake. ILT

JASON DZUBOW *is a named partner of the law firm Mensah, Butler & Dzubow, PLLC in Washington, D.C.*

Notes

[1] "The Federal Rules of Evidence do not apply in INS proceedings, *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996), but the less rigid constraints of due process impose outer limits based upon considerations of fairness and reliability." *See Yongo v. INS*, 355 F.3d 27, 30 (1st Cir. 2004).

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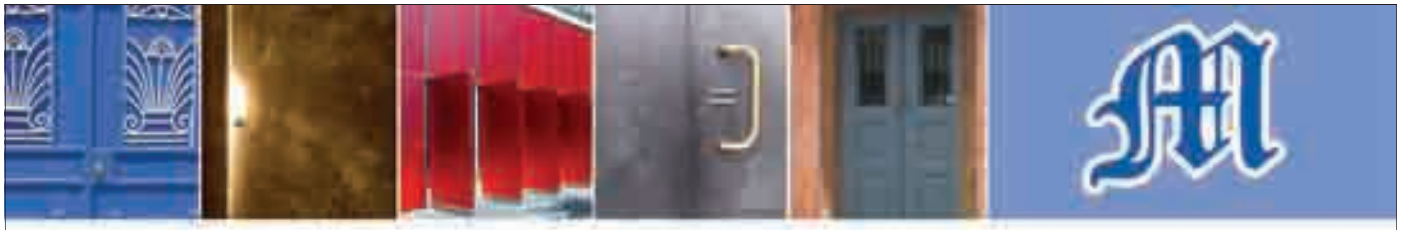

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Immigration Law & the Transgen

A kind of case has come my way, which I have never had in my 12-plus years of immigration practice. There must be at least one of you who have had this issue before you. Some of you will be quite uncomfortable with it. If so, please accept my apologies in advance … "Frances," a naturalized U.S. citizen (USC) and an Ecuadorian man, Leo, married in Canada. The USC wife is a trans-sexual female originally from Singapore who has completed all of the sex-change procedures, including sex reassignment surgery (SRS). I know that same-sex marriages are not acceptable bases for U.S. immigration. But what about a marriage where an otherwise "straight" man happened to fall in love with and married a trans-sexual? Is there any case law on this? Have any of you filed any such cases? [Slightly modified version of a posting on the American Immigration Lawyers Association members' message board.]

THE PRACTITIONER WHO POSTED THE ABOVE QUERY IS NOT ALONE. Each year, Immigration Equality and the Transgender Law Center receive hundreds of inquiries involving the unique issues faced by transgender individuals who are noncitizens or who are in relationships with noncitizens. Recognizing that this constantly evolving area of the law is unfamiliar to most practitioners, the two organizations obtained a grant from the Arcus Foundation to write a transgender immigration manual that will detail the unique intersection of immigration law and transgender issues, soon to be published and distributed by AILA Publications (*www.ailapubs.org*). See this issue for more information. Below are just some of the key pointers covered in the manual.

Transgender 101

The term "transgender" is broadly used to include individuals whose gender identity or expression is different from the one they were assigned at birth. For example, an individual who appeared anatomically male at birth would have an M indicated on the birth certificate and be given a masculine-sounding name such as Martin. As Martin grows up, she may realize that she feels female and is uncomfortable with her male anatomy. As an adult, Martin may decide to dress as a female and may undergo medical steps to "transition" to being more female. These medical steps may (or may not) include: taking hormones, having electrolysis, having implants, and having surgery. Martin may take on a more feminine sounding name, such as Marie, and may go to court to have her name and gender marker lawfully changed. In transgender parlance, Marie would be called a male-to-female (MTF) transgender woman.

DID YOU KNOW? Often the term "transsexual" is used to denote individuals who are fully living in the opposite of their birth sex, whereas "transgender" may include a broader range of individuals, including people who are simply gender nonconforming ("butch" women, effeminate men, or androgynous individuals of both sexes). By way of contrast, "sexual orientation" denotes whether an individual is primarily romantically and sexually attracted to individuals of the opposite sex, the same sex, or both sexes.

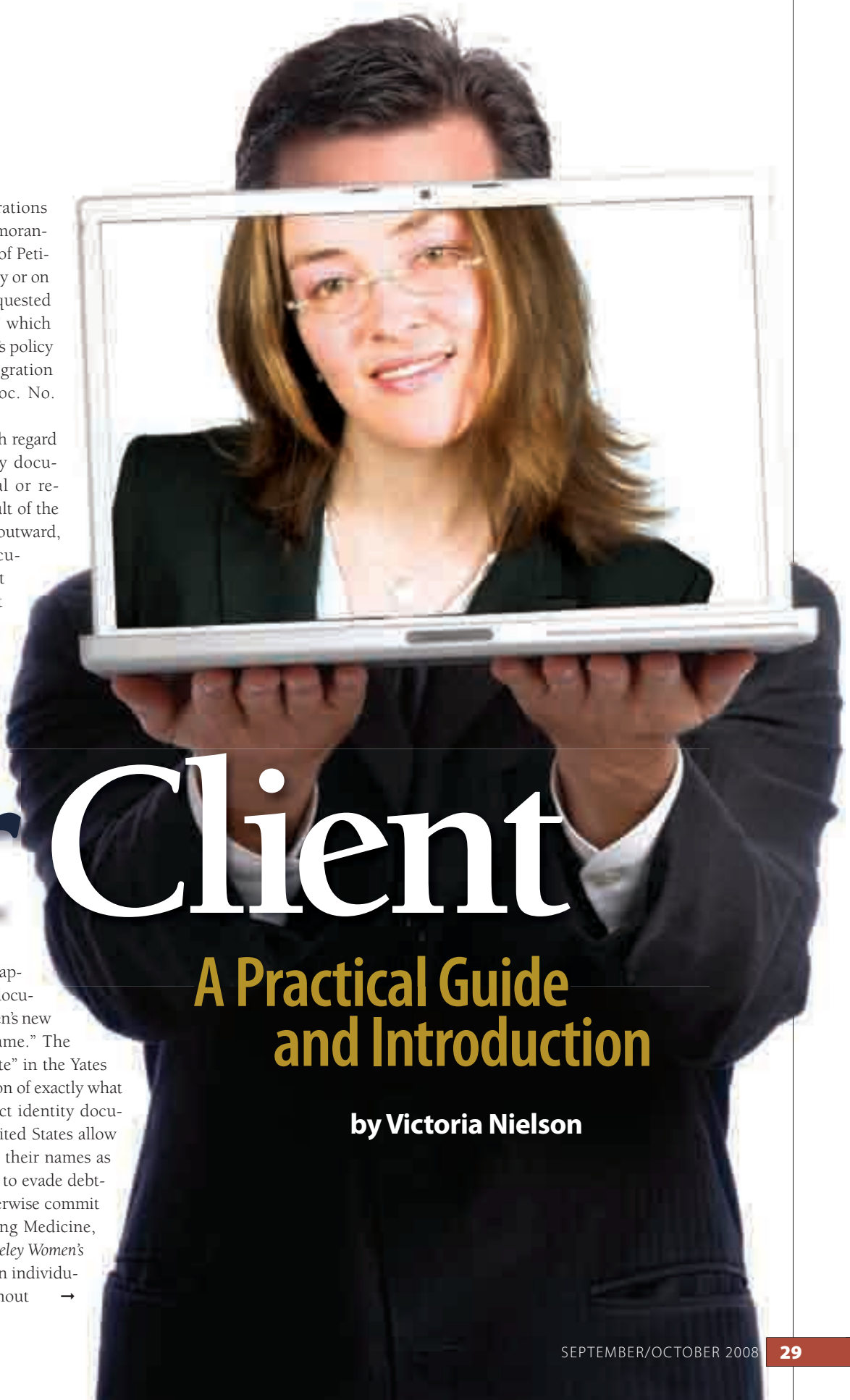
It is important to bear in mind that "gender identity" and "sexual orientation" are two distinct concepts. Thus, a transgender woman may identify as heterosexual if she is attracted to men, as lesbian if she is attracted to women, or as bisexual if she is attracted to both sexes.

The fact that an individual is transgender will often be directly relevant to one's immigration issue. It will, therefore, be necessary for the practitioner to ask personal questions about legal and medical steps the client has taken to "transition" to the "corrected" gender. The important thing is to let the client know why this information is relevant to the case, assure attorney-client privilege and confidentiality, and ask the questions respectfully and non-judgmentally.

Identity Documents

One of the ways in which immigration law intersects with transgender identity is when a foreign-born transgender individual obtains identity documents from U.S. Department of Homeland Security (DHS). For example, Frances, who was born in Singapore, obtained lawful permanent resident (LPR) status and became a naturalized USC as a minor through her mother. At the time Frances's mother naturalized, Frances was still living as a male and using the name she was given at birth, "Robert." Although Singapore will not allow Frances to amend her birth certificate, she will be able to get a Singaporean passport in the female gender (*see In re Ahmad*, A96-609-556, 2007 WL 3301748 (BIA, 2007)). Since her current naturalization certificate says "male," is she able to obtain an amended naturalization certificate with her correct name and sex?

U.S. Citizenship and Immigration Services' (USCIS) former



der Client

A Practical Guide and Introduction

by Victoria Nielson

Associate Director for Operations William Yates released a memorandum in 2004, "Adjudication of Petitions and Applications Filed by or on Behalf of, or Documents Requested by, Transsexual Individuals," which purported to spell out USCIS's policy regarding transgender immigration issues (*see* AILA InfoNet Doc. No. 04080367).

The memo stated that with regard to identity documents, "Any documentation (whether original or replacement) issued as the result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance."

The memo includes the caveat that such corrected documentation would be issued, "provided, of course, that the alien submits appropriate medical and other documentation establishing the alien's new claimed gender and legal name." The use of the phrase "appropriate" in the Yates memo leaves open the question of exactly what is required in order to correct identity documents. Most states in the United States allow individuals to legally change their names as long as they are not doing so to evade debtors, law enforcement, or otherwise commit fraud (*see* D. Spade, "Resisting Medicine, Remodeling Gender," 18 *Berkeley Women's L.J.* 15 at 16, n.4 (2004)). If an individual is in the United States without →

PHOTO ERIC HOOD / ISTOCK

lawful status, the state court may require one to serve the name change petition on DHS, and this may put him or her at risk for the initiation of removal proceedings. Once the individual obtains a court order or corrected identity documents in one's new name from the country of origin, it is quite clear that USCIS will consider this "appropriate" documentation for identity document purposes.

It is far less clear what DHS will accept as "appropriate" medical documentation. In the above fact pattern, Frances has had complete SRS and has a passport from her country of origin that has been issued in her corrected gender, so she should be able to obtain a naturalization certificate in the female gender. Although her case appears clear-cut under the Yates memo, in practice, many frontline USCIS officers are completely unfamiliar with transgender issues, and these applications are routinely (wrongfully) denied.

The outcome becomes even harder to predict when the applicant has taken some medical steps to correct his or her gender but has not had complete SRS. For example, many female-to-male (FTM) transgender men have mastectomies but choose not to undergo SRS because the surgical procedures are not as advanced as they are for MTFs (*see* J. Tobin, "International Justice and Shifting Paradigms: Note: Against the Surgical Requirement for Change of Legal Sex," 38 *Case W. Res. J. Int'l L.* 393, 401 (2006/2007). If the foreign national does not complete SRS and does not intend to do so in the future, he or she should still submit evidence demonstrating what medical procedures has been done, as well as a letter from a doctor explaining that the medical transition is complete. There has been at least one non-precedential Board of Immigration Appeals (BIA) case that recognized an FTM man's male gender even though he had not completed SRS (*see In re Orenn* (*In re Oren I*), A79-761-848, 2004 WL 1167318 (BIA 2004)). Whether this will suffice for DHS will probably be analyzed (and fought) on a case-by-case basis.

Marriage-Based Petitions

Perhaps the most politically charged area of immigration law for transgender foreign nationals is the realm of marriage-based petitions. To determine whether any marriage is valid for immigration purposes, DHS first looks to whether it was valid under relevant state law, and then, whether it is valid under immigration law (*see Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982)). In determining whether the marriage is valid under the Immigration and Nationality Act (INA), the BIA has looked not only at whether the marriage is bona fide, but also whether it violates a strong public policy consideration. Thus, marriages have been held not to qualify the applicant for immigration benefits where the marriage was polygamous even when the marriage was valid in the country where entered into (*In Re* H–, 9 I&N Dec. 640 (BIA 1962)).

For many years, legacy Immigration and Naturalization Service and DHS applied these long-standing principles of marriage-based adjudications to applications involving a transgender individual. In 2004, however, the Yates memo cited above brought forward a completely different rule, stating instead that "CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so." Thus, the Yates memo essentially undid years of marriage-based jurisprudence. On its face, the memo did not state that only birth sex would be recognized in these cases, but rather any marriage-based petition involving anyone who "claims to be transsexual" would be denied. Around the time of this memo, there was a rash of denials of marriage-based petitions involving transgender applicants.

Then, in 2005, the BIA issued a monumental precedential decision, *In re Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005), which restored the long-standing rule that the marriage would be valid for immigration purposes if it was valid in the state of residence and it was valid under the INA. The BIA held that Lovo-Lara, who was a U.S.-born, MTF transgender woman who had completed SRS and had a corrected birth certificate issued by her home state of North Carolina, was a female. The BIA concluded that her North Carolina-based marriage, entered into with a biologically born male citizen of El Salvador, was valid for immigration purposes.

In reaching this conclusion, the BIA first determined that the marriage was valid under the law of the state—North Carolina—where it was entered into and where the couple was domiciled. This conclusion was based on the facts that North Carolina did not have any statutes or case law prohibiting marriage when a spouse is transgender, and it had a statute that affirmatively provided that transgender individuals could amend their birth certificates to reflect their corrected gender. Since North Carolina acknowledged that Lovo-Lara was female by amending her birth certificate, it followed that North Carolina viewed her marriage to a male as opposite sex.

The BIA went on to consider whether the marriage was valid under the INA. Although DHS argued that the Defense of Marriage Act (DOMA) (DOMA §3(a), 110 Stat. at 2419, 1 USC §7 (2000)), which defines marriage as "only a legal union between one man and one woman as husband and wife," precluded the recognition of a marriage where one spouse was born the same gender as the other, the BIA found DOMA to be inapplicable because Lovo-Lara's marriage was opposite sex.

Returning to the initial practitioner's post on the Message Center, would the marriage of Frances and Leo be recognized for immigration purposes (assuming that it is otherwise a legal marriage and that Leo is otherwise admissible)? Since Frances has had complete SRS and since she has obtained government-issued documents from her country of origin recognizing that she is female, the marriage should be seen as opposite sex for immigration purposes. The dispositive question is whether the marriage would be valid under the state law where the couple is domiciled. If the couple is based in New Jersey, which has favorable case law recognizing a marriage involving a post-SRS transgender spouse, it should be valid for immigration purposes (*see M.T. v. J.T.*, 140 N.J. Super. 77, 90 (N.J. Super. Ct. App. Div. 1976)). If, on the other hand, the couple resides in Florida, which has case law stating that Florida only looks to birth sex to determine whether a marriage is opposite sex, then the petition for immigration probably will be denied.

Asylum

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Do's & Don'ts Checklist in Representing Transgender Clients

Do:

- Respect your client's self-identification. If your client identifies as male, whether he looks male to you, use the name and pronoun that he prefers in your interactions.
- Use your client's chosen name in submissions to DHS.
- Even if your client has not had a legal name change, you can include both names, such as Cristiano "Cristina" Nunez, in your correspondence and applications.
- Get as much information as you need about your client's transition to zealously represent him or her in a nonjudgmental, professional manner.

Don't:

- Make assumptions about your client's transgender identity based on whether he or she chooses to have surgery or undergo other medical interventions.
- Ask personal questions about your client's transgender identity unless they are legally relevant to the case.
- Conceal your client's transgender identity from DHS if it is relevant to the case. It is much better to fight complex legal issues honestly than to have a client's application denied for failure to disclose a relevant fact.

not only will Leo's adjustment application be denied, but he may end up in removal proceedings if he is currently out of status. But let's alter the fact pattern slightly and say that in the course of adjudicating the marriage-based petition, DHS discovered that Frances's mother committed fraud in obtaining her LPR status, and therefore, Frances never should have been given LPR status. Frances is now placed in removal proceedings. Does Frances have any relief?

Fortunately, she may have another option to remain in the United States if she fears returning to her country because of her transgender identity. Since 1994, the BIA has recognized sexual orientation as potentially forming a "particular social group." Since the *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), which granted withholding of deportation to a Cuban citizen who had been forced to spend time in a labor camp and check in regularly with government officials because he was a gay man, there have been more than a dozen precedential federal circuit court decisions concerning sexual orientation-based asylum claims.

Particular Social Group

Although there has not yet been a precedential case that explicitly addresses whether transgender identity constitutes a "particular social group," there have been several Ninth Circuit U.S. Court of Appeals cases where the applicant is clearly transgender (*see Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004); *Ornelas-Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006); *Morales v. Gonzalez*, 478 F.3d 972 (9th Cir. 2007)). In *Hernandez-Montiel v. INS*, the Ninth Circuit found that "gay men with female sexual identity" comprised a particular social group in Mexico. In that case, even though Hernandez-Montiel had suffered past persecution, including death threats and rape at the hands of a Mexican police officer, the immigration judge and the BIA denied the application because they found that the harm Hernandez-Montiel had suffered was not on the recognized ground of being gay but due to dressing as a woman. While the BIA recognized that sexual orientation was an immutable characteristic or one so fundamental to a person's identity that one should not be required to change it, the BIA was not willing to find that dressing in female clothing deserved protection under asylum law. The Ninth Circuit, however, recognized that Hernandez-Montiel's feminine attire was an integral part of the appellant's "female sexual identity," thus making it a protected behavior under asylum law.

Since there have been several cases that have recognized the particular social group of "gay males with female sexual identities," it may be strategic to advance this as one particular social group construction in an applicant's asylum claim, provided, of course, that the applicant can truthfully state that this is a way that he or she self-identifies. In many cases involving transgender claims for asylum, it is helpful to provide alternative theories of the case, with one particular social group being simply, for example, "transgender women," and a second social group formulation that includes sexual orientation, such as "gay men with female sexual identity" or "imputed sexual orientation."

The idea behind these different social group configurations is that even if the applicant does not currently identify as homosexual, if one is returned to one's country, that person may be viewed by others as gay if would-be persecutors do not recognize his or her sex change. Using these alternative social group categories will offer the applicant a strong legal argument for a cognizable social group in the event the adjudicator refuses to recognize transgender identity as a particular social group. Including sexual orientation also can provide the crucial nexus to the intent of the persecutors.

Meeting the Standard

Even without adding any claim based on sexual orientation, the particular social group of "transgender identity" should meet the standard set forth in *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) as being an aspect of the individual that one "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." In some ways, cases involving transgender asylum applicants are more likely to succeed than cases based on sexual orientation. One reason for this is that while it can be extremely difficult for a gay or lesbian asylum-seeker to prove his or her sexual orientation to a skeptical

adjudicator, in cases of transgender identity, there is generally some extrinsic proof—such as medical documentation, or even outward appearance—clearly showing the individual as transgender. Moreover, in many countries, transgender individuals continue to face disproportionately high rates of discrimination, harassment, and violence, making it easier to prove the danger the applicant will face if returned to his or her country of origin.

Another issue that disproportionately affects both sexual orientation and transgender-based claims for asylum is the one-year filing deadline. While most individuals fleeing persecution based on political opinion probably have some notion that they can seek refuge in the United States, for individuals who fear persecution based on their gender identity, it is far less likely that they will be aware of the possibility of seeking asylum on this ground. If a transgender foreign national has missed the one-year filing deadline, he or she may still be able to succeed under one of the exceptions to the rule. If the applicant recently has taken medical steps to transition, such as an MTF woman obtaining breast implants, she may be able to argue that she falls under the "changed circumstances" exception. Essentially, she would be arguing that now that she has taken steps to irrevocably alter her body, it would be impossible for her to hide her transgender identity if she is returned to her country. This recent change puts her at increased risk for persecution. Transgender asylum-seekers also may qualify under the "exceptional circumstances" exception if they suffer from mental health problems related to persecution they may have suffered in the past, depression, or other issues relating to the applicant's own difficulties in accepting his or her transgender identity.

Every claim for asylum is based so uniquely on the individual facts of the case that it is impossible to say if Frances (from the fact pattern above) has a strong asylum claim. Her case would be strongest if she were filing within one year of her last entry into the United States and if she had suffered persecution in the past on account of her transgender identity.

PRACTICE POINTER: Strong claims for persecution could be based on her having been detained, beaten, threatened, or sexually assaulted by the police. Likewise, if private actors had subjected her to physical harm or serious threats to her safety, if she could demonstrate that her government is unwilling or unable to protect her, then she may prevail. The outcome of her case would hinge on the details of what happened to her in the past as well as on the documented country conditions regarding treatment of transgender individuals.

→

Call to Challenge

A practitioner who is confronted with a couple like Frances and Leo should not feel intimidated by the unique challenges of immigration cases involving transgender individuals. Rather, the practitioner should feel excited to be presented with the opportunity to delve into a cutting-edge and developing area of the law. Each time an immigration practitioner represents a transgender client, he or she should expect to educate the adjudicating officer or judge about transgender issues. By successfully doing so, the practitioner may help develop this area of the law, while forever improving the life of the individual client. ILT

VICTORIA NEILSON *is the legal director of Immigration Equality, a national organization based in New York that fights for equality under the immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals.*


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Billing Strategies for Immigration Lawyers

THE ATTORNEY-CLIENT RELATIONSHIP RELIES ON TRUST—aside from legal skills and abilities—especially when it comes to billing and fees. To establish a relationship of trust, you must ascertain and manage the client's expectations, set an appropriate and client-friendly fee, and establish good billing procedures. Every lawyer wants clients who are happy and loyal, and who will make business referrals and pay in full and on time. The way a lawyer approaches billing can have a profound effect on garnering these kinds of clients, and exploring these matters from the client's perspective will greatly improve the chances of having a satisfied, well-paying client.

Initial Consultation

There are many ways to calculate fees, but no matter the method, it is imperative to have an in-depth discussion with the client at the beginning of the engagement. This initial discussion can set the tone for the entire relationship. Underinforming clients about costs and fees or over-stating the likelihood of a particular outcome risks damaging the client's trust. It is your job to determine the expectations of each client and continue to manage the client's expectation throughout the whole legal process.

Define the Scope of Engagement

Be clear about the scope of the work you are going to perform. Include the anticipated length of the engagement and the stages involved. This is particularly important for immigration lawyers, since the attorney-client relationship can last for several years, and may include long periods of "inactivity" while waiting for approval of petitions.

Immigration lawyers working with clients in the United States for employment purposes may work with recruiting agencies, employers, or other attorneys through several different steps or applications. For example, if your client is a doctor coming to the United States to work for a particular hospital, you may be working with the hospital, its lawyer, and the client through filing Form I-129 petition for a nonimmigrant worker, with the hospital through Form I-140 immigrant petition for an alien worker for a permanent position, and finally, through the adjustment status or consular processing stage of the permanent residence. After that, the doctor might wish to become a U.S. citizen and go through the naturalization process using Form N-400.

Being able to communicate with a client in his or her native language or explaining the situation in terms the client can understand also adds value.

Considering all of the complications, steps, and stages that many immigration clients must go through, it is imperative that you are clear at the outset about what you are agreeing to do for the client and what it will cost. For example, does your agreement cover just the I-129 and H-1B visa, or does your agreement include all steps through naturalization? Is the client retaining you for purposes of preparing documents, petitions, or applications only, or are you expected to perform additional services? Does the fee include a request for evidence or an appeal? Which petitions or visa applications are covered by your fee, and which will be the subject of a separate fee agreement?

Identify the Desired Result

Identify a desired result and discuss the likelihood of reaching that result with the client. The client probably has little experience with the law and may not know what a typical engagement involves. Offer clients a fact sheet, timeline, and/or list of frequently asked questions that will help explain the process and aid in their decision-making.

Creating a case plan or timeline helps to make the client more familiar and comfortable with the process, explains how each step contributes to the client's desired outcome, and enables the client to understand the value of the services you provide. Giving them something to take with them that they can refer back to will help "sell" not only your services, but your fee.

Manage Client's Expectations

Make time to listen to the clients and what they expect from working with you. Sometimes, discussing the client's expectations in-depth leads to a determination that the client's expectations are unrealistic or do not align with your way of practicing law.

If a client's desired result is unlikely or unrealistic, it is imperative that you explain why. It is always easier to deal with these issues head-on at the beginning of the engagement rather than to explain them to a client after work has commenced. If the client is unwilling to accept the reality of the situation, you may want to consider not accepting the client.

Be sure to explore the client's expectations in terms of service as well. How often will the client hear from you and in what manner of communication? Will they talk to you or to a paralegal? The nature of immigration law also requires that you establish expectations with clients up front about waiting periods. For example, how long should the client expect to wait for a response to his or her petition or application?

Since the law is constantly changing, managing expectations also requires that you inform clients that regulations change over time. As such, what might have been true in the past (for their friends, family, etc.) may not be true today. The advice or plan of action that you discuss with the client now may be different in the future as a result of changes in the law or in the current regulations. As such, clients' expectations must be managed throughout the engagement, and clients must be advised immediately when changes in the law affect their status or the plan of action that you've created.

Establish Value

Most clients will experience *some* "sticker shock" when they first learn of your fees. The key is to get the client to recognize the sticker shock and be willing to talk with you about your services anyway, especially if the client has the option to wait to make a decision to retain a lawyer.

Once you have determined the client's needs, wants, and expectations, you can discuss your services and your fees to establish value, which takes the client's desired result one step further. It requires you to explore the far-reaching implications of the outcome of the matter and of the process itself. Your job is to help the client realize how important the matter or their desired outcome is, and how significant your representation is in reaching that goal. If you can work with the client to articulate that value, the sticker shock should be only temporary.

Value has two parts: value of the *outcome* and value of your *services* to the client. Even if the client's desired outcome isn't reached, your services have value. Value, like desired outcome, may be intangible. Each client's circumstances, background, goals, and perspectives are different. These factors will affect what the client values and the course of action the client wishes to pursue. And, of course, all of these will affect the fee.

If possible, have the client quantify his or her desired outcome. If the desired outcome can't be easily quantified in a "hard" number or dollar figure, ask questions to establish what the engagement means to the client. Is there some intangible, emotional attachment to the outcome? If the client's immigration status changes, it might have a significant impact on the client's family and their livelihood.

Establishing value also requires that you differentiate yourself and your service using the client's values and priorities. Make yourself irreplaceable and create loyal clients by taking the time to ascertain the key elements that are important to your clients and focus your services around those key elements to set you apart from others. Articulate the benefits your clients will receive as a result of working with you. Keep in mind that what you're really selling is your expertise and your ability to help the client reach his or her goal or eliminate or reduce his or her problems. The more valuable the client considers the representation and the outcome to be, the less price-sensitive the client will be.

Part of differentiating yourself as an immigration lawyer requires that you educate the client about why it is necessary for the client to employ an attorney. Make sure that you can articulate the reasons why an experienced immigration lawyer is necessary to help the client navigate the intricacies, forms, and stages of the immigration process. Show clients the pitfalls of improper advice or poorly drafted petitions; discuss the cost and waiting periods of appeals and the value of getting a petition granted the first time.

Being able to communicate with a client in his or her →

native language or explaining the situation in terms the client can understand also adds value. Your interactions with employers, other attorneys, and recruiters on the client's behalf are other elements of value. Many of these issues might be "invisible" to clients unless you discuss them during your initial consultation.

Dispel Objections and Misconceptions

Clients come with pre-conceived notions about their case and the legal process, and objections or misconceptions about lawyers, their services, and their fees. Explore these ideas with clients at the outset to correct any misconceptions and address any underlying objections or fears.

One particular area of concern is the confusion over the Latin American *notario*—in some countries a licensed lawyer—and the notary public in the United States. Unfortunately, some unscrupulous notaries advertise themselves as *notarios* to capitalize on this confusion and purport to provide immigration law services despite not being licensed attorneys and having little or no knowledge of U.S. immigration law.

Another area of concern involves dual representation, such as in employment-based cases. In a situation in which you provide legal advice to or receive confidential information from both the corporate employer and the potential employee, they are *both* your clients. They both must understand that you have a duty to communicate with and are ethically obligated to consider the interests of both parties, regardless of who pays your fee. You must explain that if and when a conflict of interest arises, you will be unable to take sides, and that if the conflict cannot be resolved, you will be required to withdraw from the representation of both parties. You must warn clients that there are limits to your confidentiality in a dual representation situation and that you are required to disclose information to both parties.

Client-Friendly Fee Structures

In a successful lawyer-client relationship, both sides feel that they got a fair deal. You must be able to effectively communicate to your client how your pricing is tied to the attributes the client most highly values. There is no one right fee structure and the structure might change depending on a client's needs and ability to pay.

Fixed Fees

You can use fixed fees even though it is not always possible to anticipate all of the costs or fees in a particular matter. Set a fixed fee

Put It in Writing: *The Importance of the Engagement/Agreement Letter*

Many ethics codes require a written engagement letter or agreement in place before legal services can be provided. However, all attorneys should prepare a written engagement agreement, regardless of whether their jurisdiction requires it. There are certain points that should be covered in this letter, with the most crucial ones being:

- **Your rates and how they will be calculated (flat, fixed, staged, etc.);**
- **Whether there is a maximum or upper limit to your fees;**
- **Whether the fee is tied to results;**
- **The frequency of bills and when payment is due (upon receipt, within 15 days, etc.);**
- **The format of bills and what they will contain;**
- **The scope of services to be provided;**
- **The circumstances and variables that may affect the fee;**
- **Additional costs and expenses that may be incurred; and**
- **Information about withdrawal for nonpayment or other consequences, including interest fees charged for late payment.**

Explain each of these points to your client and have him or her initial the fee provisions in the agreement. For sample agreements, see *AILA's Immigration Practice Toolbox*, *www.ailapubs.org*.

based on your experience and the information available at the beginning of the engagement. Use "change orders" or "supplemental services agreements" when circumstances change or unforeseen issues arise. Advise the client of potential factors that would change the outcome, the fee, or the time it will take to conclude the matter.

Staged Fees

Even if you can't quote a fee upfront for the entire matter, you may be able to offer the client a fixed fee in stages or bill on a task-based basis. At the beginning of each stage, quote a fee for that stage based on what already has occurred and what you anticipate for the next stage. When the scope of the work and the fee are agreed upon before the work is performed, the client won't be surprised by the bill later.

Options

Consider providing the client with options that control the amount of services and the fee level. Package some services at a lower fee than what the services would cost separately, or provide additional services to the client at a premium fee. Try establishing a minimum fee with the basics of your services and then offer some premium options that provide higher value and are more aggressively priced. Consider incorporating unlimited access to you within your premium package, thereby reducing the client's anxiety about additional fees or expenses for each communication.

Guarantees

A guarantee of service (rather than the outcome) gives the client a reason to contact you at the first sign of discomfort, rather than after the client is so dissatisfied that the relationship is beyond →

PHOTO EPRESSMASTER / DREAMSTIME

repair. Most lawyers already effectively guarantee satisfaction by reducing the fee, writing off or writing down the bill, discounting or foregoing collection if the client complains or fails to pay. But those "guarantees" are given after the client is already dissatisfied or has failed to pay. By then, it is usually too late to salvage the relationship. Guaranteeing service upfront increases the client's trust level without changing the practical effect on your services.

You can only guarantee what you can control. *Never* guarantee results—they're outside of your control (and such a guarantee would likely violate your state's ethical rules). You *can* guarantee a certain level of service and commitment to your clients.

Explaining the Fee

The best time to discuss fees is at the beginning of the engagement. Your services are

always more valuable to the client before the work has been performed. A client that starts off unwilling to pay for your services when his or her problem has yet to be solved will not become more willing to pay in the future.

Clients are not that concerned about process—they are concerned with *service* and *results*. Communicate your fees in terms of the value the client will receive rather than on your cost to provide those services. Discuss how your services will advance the client's goals.

Basic Billing Practices and Systems

Use billing as an opportunity to communicate and reinforce the value you provide to your clients by detailing the work performed and what it means to the client. If possible, get paid upfront or use evergreen retainers in which the client replenishes the original retainer as work is performed (subject to your jurisdiction's ethical rules). If you bill in stages, show the client which stage you're in and why that stage is important to the client's desired outcome. Highlight your services in your bills, especially the services that set you apart from your competition.

A good billing entry itemizes who performed the work, what was done, when, and why. For example, rather than "telephone call to client" say, "telephone conference with client regarding status of petition for change of immigration status."

Bill while services are fresh in the client's mind, particularly at the end of an engagement; don't wait until your regular billing cycle is completed. Include the balance, due date, and preferred payment method on every bill. Tell the client who to contact with billing questions and how to contact them.

Even if you receive payment upfront, document your services and the status of the retainer fee for the client. Don't wait until the retainer is exhausted before alerting the client that additional payment is due. If unanticipated services arise, discuss them with the client before you send them an additional bill.

If you haven't talked to your clients about what's happening with their matter in awhile, do so before the bill goes out—the impression that the lawyer has time to bill them but not to communicate directly with them about their case can be aggravating to clients. Since immigration cases necessarily involve long wait times, periodically contact the client to let him or her know you have not forgotten about the case, but that you have not yet received a response or additional information on the case. If possible, tell the client when you expect to receive a response. Advise clients immediately of a change in status or a change in the law that will affect their matter.

Your ability to collect on any bill declines over time. Develop a follow-up system for your accounts receivable. Send a follow-up letter a few days after payment is due. If no payment is received, follow-up in writing no more than 15 days later. Call the client once bills are 30 days past due. Keeping the client's perspective in mind when you structure your fees and talking to clients about your services and your fee arrangement can reinforce the trust in the attorney-client relationship.

ALLISON C. SHIELDS, *president of Legal Ease Consulting, Inc., helps lawyers attract and retain their ideal clients, focus on high-value tasks, and get more done in less time. Read her blog at* www.LegalEaseConsulting.com *or visit her website at* www.LawyerMeltdown.com.

Cruisin' Africa: A Semester on Safari and Two Years in Mali

THERE IS SOMETHING MYSTERIOUS AND FASCINATING about the vast continent of Africa and that it takes a simultaneous review of two books to scratch the surface of its rich cultures and heritage. *Africa on Six Wheels: A Semester on Safari* (University of Nebraska Press; $17.95, paperback) chronicles a unique study-abroad program of travel through South and East Africa by van. *Monique and the Mango Rains: Two Years with a Midwife in Mali* (Waveland Press; $17.95, paperback) traces the adventures of a Peace Corps volunteer in a West African village from 1989 to 1991. The books share the common themes of African hospitality to U.S. visitors and the visitors' challenges and rewards in adapting to the local lifestyle and conditions. These books will make all but hearty travelers think twice about venturing to rural Africa, but readers will enjoy being transported to those countries through these two accounts.

A Semester on Safari

Professor Betty Levitov had her work cut out for her when she proposed a semester-long course involving travel through Africa. Not only were the logistics complicated, but she would have to convince both the administration of Doane College in Nebraska and the parents of students (mostly from Nebraska and many of whom had never traveled outside the United States) to allow the trip in the first place. It was impossible to guarantee a no-risk trip, so Levitov hosted a meeting with the parents at her house, serving them honest, open answers and good food to smooth the way.

The course, entitled "Introduction to Africa," begins with the students getting a blank map of the continent to fill in—"requiring perfect spelling as well as precise locations of fifty-three countries." After some lectures on African history, the students leave for Kenya. From there, they travel south through Tanzania, Malawi, Zambia, Zimbabwe, Botswana, Namibia, and South Africa. On the way, each student spends one week in an "apprenticeship," shadowing a member of the community, such as a teacher, artisan, fisherman, cook, street vendor, or soldier. The students also do their best to learn functional Swahili. The openness of the local culture makes these connections easy to coordinate and extremely rewarding. During the trip, Levitov periodically imagines the administrators' reactions:

> When the students are bungee jumping from the Victoria Falls Bridge or we are sand-boarding on the Namibian dunes, I think, "What if the vice president for financial affairs could see us now?" … [They would worry about] lawsuits, ruinous financial settlements, and damaging publicity.

Thankfully, the students faced no major problems on the trips, aside from a healthy share of minor crime and unpleasant illnesses that passed with time. This is perhaps because they mostly avoided larger cities beset with higher crime rates, more overt poverty, and fewer avenues in getting to know people. Aside from Sudan, Somalia, Eritrea, and Libya, all other African countries are on Levitov's list to visit at future semester travels.

Two Years in Mali

Monique and the Mango Rains has a very different style from *Africa on Wheels*. Written more like a literary travelogue,

Kris Holloway describes very little about her life or "finding herself" in Africa through her work as a Peace Corps volunteer almost 20 years ago. The book focuses on one very small village, Nampossela, rather than the whole continent, and tells the story of Monique, its unsung hero.

In her early twenties, Monique provides the only medical care her village sees in a run-down clinic and birthing center. She is trapped in a marriage with a man who mostly ignores her and co-opts her salary to buy a radio, scooter, and other unnecessary expenditures.

The difficulty of life in the village echoes throughout the book. At a funeral for an elderly woman, Holloway writes:

> People begin to dance, and as they did, the strangeness began to fade. I had never lived so close to death. Death here was not quarantined, something that only took place in slaughterhouses and hospitals, [and] that only occasionally escaped in the form of car accidents. It was in every home, all the time. And for a person to have lived this long, in a place where life is frequently cut short, it was truly something to celebrate.

Yet, as with *Semester on Safari*, the openness of the culture drew Holloway in. She "loved living in an inviting community, where you were always asked to share food and drink, where you spent time greeting and joking rather than avoiding others because of a busy schedule. Generations intermingled, there was always an excuse for celebrating, and death was sad, but not feared."

Many specific aspects of life in the village were eye-opening to Holloway as a visitor and to the readers. The lack of knowledge about health (hydration, nutrition, etc.), especially about caring for infants and young children, is surprising (keeping in mind the book takes place almost 20 years ago). Also, the way young children are cared for differs markedly from child-centric America. For example, Monique carries her son, Basil, strapped to her back while she delivers babies.

Overall, *Monique and the Mango Rains* is relatively nonjudgmental. At one point, Holloway realizes that the women she has seen giving birth have been circumcised (excised), and that is the reason there is so much tearing in childbirth. Holloway and Monique discuss these issues later in the book in a casual, open way. A portrait of their deep friendship emerges in the retelling of conversations like these.

Even though Holloway, as the Peace Corps volunteer, is supposed to be bringing knowledge and assistance, Monique is the one with the actual medical knowledge, which creates an interesting dynamic. The one way in which Holloway can do more to assist Monique is as a liaison to village elders on behalf of the clinic—something that is only possible because of her status as a Westerner. →

Authors' Q&As

Dan Berger spoke to Levitov and Holloway, who candidly talked about their writings and the impact the books have had on their lives as well as those around them.

Still Cruisin'

Levitov still runs the "Introduction to Africa" course and is still exploring new paths with each trip. She also has taken an alumni group, ages 26–71; a higher-end adventure with a private bus instead of the old van, and pricier spice tours and gorilla safaris. However, the effect on the participants was as striking as with the college students. The trip opened their eyes to life in Africa. Levitov noted that finding someone to take over the program is a challenge, as faculty members with children are less able to take extended trips on the road.

Q: How many people over the years have asked your help in getting to the United States?

A: Very few. I am helping [to] bring a wildlife guide to Doane for a residency, [but] no one else. The philosophy of my program is to learn from, rather than change, the places I and my students visit.

Q: Over the years, have you found ways to bring greater security and peace of mind to the worried parents and administrators?

A: Little has changed. I still do not even bring a cell phone (but can now easily borrow one), although e-mail makes it easier to update people in the United States of our adventures. I get used to being without 9-1-1 service. Even if there is an emergency, the group is often a day's trip from a hospital, and treating a major illness or accident would be a challenge. I feel that students on my trips are actually more careful than students on a study-abroad program in Europe because the risks in Africa are real and palpable.

Interestingly, Doane University has recently created the Doane Corps, a program like the Peace Corps, for alumni to do after-graduation service in Africa. For more information, see *www.doane.edu/Alumni-Donors/Alumni/Stay_Connected/Magazine/Summer07/18744 and www.doane.edu/Academics/Programs/doane-corps*.

Mali Encounters

Because Holloway lives in Berger's town in Massachusetts, he had the chance to meet her in person. Since the book was written, Mali has become a democracy, the radio is less controlled, cell phones and the Internet have brought connections between the bigger cities and the Western media, and global climate change has wreaked havoc with the staple cotton crop.

Q: What was Mali like as seen by a Westerner?

A: I was introduced to a different world. None of my sisters [was] betrothed at age five and married at age 17 as Monique was.

Q: Did Malians want to obtain U.S. visas?

A: Very few did, and the ones who had visited found the United States exciting, prosperous, and green, but also cold and expensive.

Q: How do you balance helping without trying to change the village to Western standards?

A: I am involved in raising money for a new clinic—the goal is to help out the first year, then less the second year, and finally making it self-sustaining so it becomes a local venture. The people in the village have guided the process, choosing dental care over birth control, and specifically asking for separate birthing and sick patient areas.

For more information about the books reviewed and the authors, see *www.nebraskapress.unl.edu/product/Africa-on-Six-Wheels,673129.aspx* and *www.moniquemangorains.com*.

After Holloway's Peace Corps service ended, Monique made a trip to the United States where, together, they conducted presentations, traveled, and obtained some very much-needed dental work for Monique (the dentist noted that he could not believe how much pain she had lived with). Not long after she returned to Africa, Monique became pregnant for the fifth time and died in childbirth. Holloway wanted to understand the medical reasons, but gave in to the local culture by accepting the peacefulness of her departure as described in a series of beautifully written letters from Monique's family. Despite Monique's attempts to obtain and use birth control (which was very uncommon at that time), she was not able to avoid her final, tragic pregnancy.

Less Is More

Levitov and Holloway stress the minimal number of possessions in small African villages and how this affected the American visitors. Levitov writes that she even felt self-conscious about bringing a guidebook (standard fare for a Western traveler) because, "If you can't eat it, wear it, sell it, or use it for changing a tire, it's not truly valuable in Africa." She meets a 90-year-old man, whose sole possession is a long stick that he had owned all his life—it was used for "farming, hammering, fixing, securing, and walking."

Both books also note the different sense of time in Africa, where people are not tied to the clock as Westerners are. This makes it nearly impossible for Levitov to plan when they would

CHAVEZ WORLD

be in each town—a driver arrives 11 days late after spending days negotiating at a border-crossing for the right to pass, the van repairs depend on getting parts, etc. In Tanzania, she notes that she "never figured out the best times to find food. At lunch, the ingredients might not be bought from the market, although the proprietor will not admit it. He takes my order, disappears into the back room, and returns to sit in his chair and drink chai." She learns to use the waiting periods as opportunities to talk to people and get to know them—in the true spirit of the local culture.

Finally, the books stress the communal nature of life in Africa. Levitov noted that there is "no alone time in Africa." Relatives, friends, and neighbors always fill one's house and one's days. The idea of "I need my space" is a U.S. concept that she did not appreciate until she was without it. Given that both authors are non-Muslim, foreign women, it is surprising how few times they were excluded from anything. Once in Tanzania, Levitov was kept out of a mosque she wanted to visit, while village males excluded Holloway from some games and meetings. Otherwise, the students and authors were welcomed and included through most of their travels. ILT

DAN H. BERGER *is chair of the American Immigration Lawyers Association Board of Publications and named partner at Curran & Berger in Northampton, MA, where* REBECCA SCHAPIRO *is a paralegal.*

Local Law Enforcement and Immigration

Community Conflict in the Making

MAYOR DONALD CRESITELLO OF MORRISTOWN, NJ, recently began negotiations with U.S. Immigration and Customs Enforcement (ICE) to deputize Morristown police officers to enforce federal immigration laws. As a mayor in a neighboring New Jersey municipality, this author understands what may compel Cresitello to take these drastic steps. However, while there certainly are concerns about national security, the law has always placed immigration enforcement in the exclusive jurisdiction of the federal government. Efforts to secure this nation from those hostile to it must be tempered by respect for its national heritage and commitment to civil rights. The plan to deputize local police to enforce federal immigration laws is contrary to those values, and Cresitello should reconsider his compact with ICE.

Negative Impact

At first blush, the ability of local police to enforce federal immigration law seems like a viable solution to our nation's challenge of illegal immigration. However, piling the additional duties of immigration enforcement on the already strained local police departments will do little more than force illegal immigrants further into society's shadows. The negative effects resulting from this policy are significant.

The job of local police is to investigate and prosecute crime. Enforcement of immigration laws by local police will discourage and even prevent undocumented immigrants from accessing police services, and will deprive police of the benefit of immigrants' cooperation in fighting and investigating crime.

Undocumented immigrants already are wary of law enforcement authority. By deputizing local police to enforce immigration laws, undocumented immigrants will not come forward to report crime, and will be less likely to offer information or to cooperate with police out of fear of revealing their immigration status. Such alienation of immigrant populations will only lead to increased crime and decreased intelligence and crime-fighting capability, reversing years of local police efforts to gain the trust of immigrant communities.

Immigrants who are victims of domestic violence will be particularly impacted by this deputizing of local law enforcement. An advocate for battered immigrants at the St. Paul Domestic Abuse Intervention Project noted that local police involvement in immigration enforcement increases fear in "already vulnerable communities."

"Most immigrants in battered women shelters are too afraid to call police, even if they have been badly assaulted by their partner." (*See* G. Pendleton, "Local Police Enforcement of Immigration Law and its on Victims of Domestic Violence," American Bar Association Commission on Domestic Violence at *www.immigrationforum.org*.)

These immigrants, who are often women, could potentially obtain legal status in the United States via the battered-spouse petition or the U-visa process. However, if these women are afraid to report the abuse to the local authorities for fear of detention by ICE before they can file a petition with U.S. Citizenship and Immigration Services, then they will have no police records documenting the abuse they suffered. As a result, it will be difficult for these women to meet their burden of proof to obtain legal status through the battered-spouse petition procedure. Instead, they will remain in their abusive relationships, and the violence will continue undetected (*see Hernandez v. Ashcroft*, 345 F.3d 824, 841 (9th Cir. 2003)).

Burgeoning Concern

Cresitello's efforts are widely opposed by major law enforcement organizations, including the International Association of Chiefs of Police and the Major Cities Police Chiefs Association. Local officers often find their definitive duty to their community compromised when they are compelled to enforce federal immigration law.

"As a law enforcement officer, my number one responsibility is community policing and community safety. It's hard to accomplish that goal if the community is afraid to speak with the police," expressed Officer Nicolas Yanez, president of the Omaha chapter of the Latino Peace Officers Association. "For example, [] witnesses or victims of crime are afraid to come forward to report crimes for fear we might take action against them based on their immigration status."

Fear undermines the trust and authorities that police officers rely on to do their job effectively, and members of local law enforcement are frustrated with the difficult position thrust upon them.

Hillsdale, NJ, Police Department Sgt. Robert Francaviglia said, "We've been trying to get the immigrants in our town to believe that we're not like many of the governments in their old countries, governments that were corrupt and want to railroad them, not serve them."

Police chiefs from around the country have echoed such concerns (see a compilation of these concerns at *www.*

bordc.org/resources/police.pdf). Local police have worked hard to gain the trust and cooperation of America's growing immigrant population. Morristown police have undoubtedly done the same. By proceeding with the ICE agreement to enforce immigration laws locally, Morristown police stand to exchange this hard-earned partnership for heightened hostility, underreporting of crime, impediments to investigations, and increased liability for civil rights violations.

Furthermore, adding immigration enforcement to the ambit of local police duties will strain the resources of local police. Requiring local police to pick up the slack of federal immigration agencies will only divert crime-fighting resources without solving the problem of illegal immigration. This misguided solution raises practical concerns and questions heralded some time ago by Michael Vietri, Chief of Police of Palisades Park, NJ.

"If the Justice Department deputizes us and we make an arrest, then what do we do? Send them to the county jail? Now I'd be paying my officers to go to the county courthouse or jail, or worse, farther away to Newark? Who's going to reimburse us?" asked Vieteri. "There are so many people who could get arrested in Palisades Park alone. You're talking maybe having to deal with county and federal courts. [T]he point about doing this to fight terrorism sounds like a decent idea, but when you go deeper, you see the possible effects." (*See* "Policing Immigration," *Bergen Record*, April 22, 2002.)

Civil Rights Violation

Perhaps most importantly, local police run the risk of violating the civil rights of both legal and illegal immigrants when enforcing immigration laws. A federal district judge held that the city of →

Mamaroneck, NY, violated the equal protection rights of Latino day laborers when the city implemented a law enforcement campaign intended to reduce their presence (*see Doe v. Village of Mamaroneck*, 462 F. Supp.2d 520, 550 (SDNY 2006)).

Historically, Mamaroneck was the site where day laborers gathered to seek employment. Before the 1990s, the workers were predominantly Caucasian. In recent years, however, the Latino population of the area has grown, and the laborers who meet in Mamaroneck are now almost exclusively Latino. The city of Mamaroneck implemented its campaign to eliminate the presence of the day laborers, increase traffic citations against the potential employers picking up workers, heighten police presence in the area, and even harass the workers.

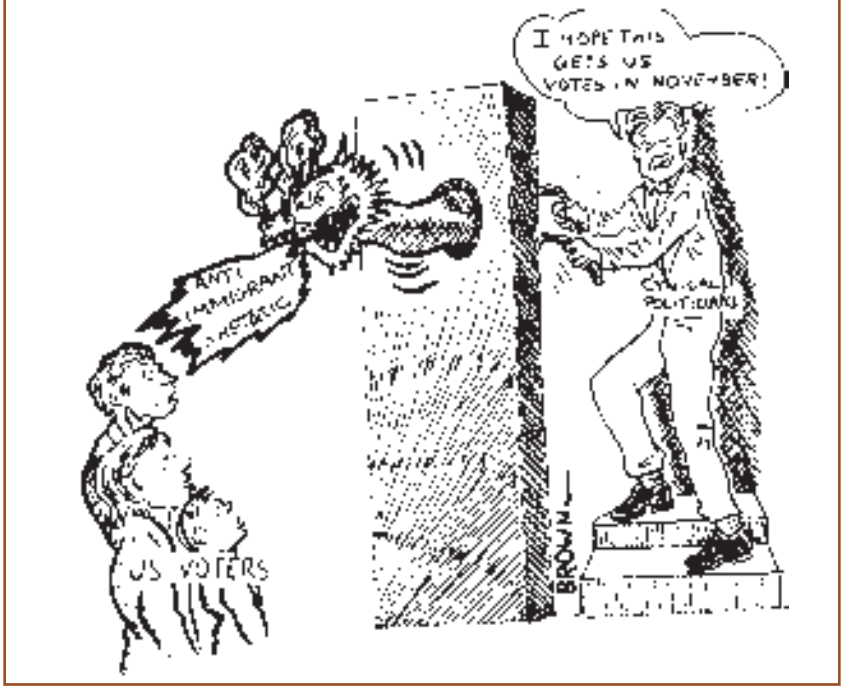
The district judge concluded that the fact that the laborers were Latinos was a "motivating factor" in this campaign. The campaign was impermissibly targeted against Latinos on the basis of race, and thus, constituted a discriminatory application of a facially neutral policy. Therefore, heightened police action against immigrants where their nation of origin determines their citation or arrest violates the equal protection rights of immigrants. Similar violations may result when local police begin to request immigration documents from people because they appear foreign or speak with an accent.

The Community and Beyond

The challenge of illegal immigration is a national one; thus, addressing the challenge should, therefore, be done at the national level. The solution is not to force immigrant communities into the shadows. Congress must enact comprehensive immigration reform that incorporates legalization, appropriate legal channels for hiring low-skilled workers, and increased employer enforcement and sanctions. Until then, it would be wise to maintain immigrant communities' trust in the police and engage all residents in keeping the community safe in Morristown and across America. ILT

MAYOR MICHAEL WILDES *of Englewood, NJ, is a former federal prosecutor, an immigration lawyer, and a partner in the law firm of Wildes & Weinberg. He also is a member of New Jersey Governor Corzine's Blue Ribbon Panel on Immigrant Policy.*

BROWN AROUND TOWN



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Screening the Visas of Love

A Microscopic View of the Couple

THEY SAY THAT LOVE IS "A MANY SPLENDOR THING," but for couples who are in long-distance relationships halfway around the globe, love usually means one of them moves to the United States to take the relationship to the next level. This move is made possible through the K visa, which allows a U.S. citizen (USC) to petition for his or her fiancé(e) or spouse, the fiancé(e)'s unmarried minor child (K-2), and the spouse's unmarried minor child (K-4) to enter the United States.

U.S. Citizenship and Immigration Services (USCIS) examines the relationship's authenticity before granting the petition. Lately, however, aside from proof of a bona fide relationship, the evaluation of the petitioner's background has become a critical step in the planning of K visas. This is largely due to emerging laws and regulations protecting beneficiaries and their children from domestic abuse, specifically, the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248, §§401–02, 120 Stat. 587, 622–23) and the International Marriage Broker Regulation Act of 2006 (IMBRA) (Pub. L. No. 109-162). Both laws impose new restrictions and disclosures that create delays in the adjudication of K visas.

K Visa Process

Processing a K visa petition requires mental acuity and endless patience. There are many documents to complete and varying waiting periods for the completion and approval of the steps toward obtaining the visa. Throughout the whole process, both petitioner and beneficiary must demonstrate that they have a bona fide romantic relationship.

K-1 and K-2 Visa Process

As part of the application, the petitioner must submit evidence that: (1) the parties have previously met in person within two years before the date of filing the petition (unless a waiver is granted); (2) have a bona fide intention to marry; and (3) are legally able and willing to marry in the United States within 90 days of the fiancé(e)'s entry (*see* 9 FAM 41.81 N12).

The USC petitioner must file Form I-129F, Petition for Alien Fiance(e), and supporting documentation with the USCIS office having jurisdiction over his or her place of residence. After approval, USCIS submits the file to the National Visa Center (NVC), which forwards the file to the post that processes immigrant visas for the fiancé(e)'s place of residence. The post sends a letter to the beneficiary outlining the steps and documents required to apply for the visa.

PRACTICE POINTER: Sometimes, NVC only informs the petitioner—not the attorney of record—that it has forwarded the case to the post. Once the post receives the case, it also is likely to communicate only with the petitioner and beneficiary. Thus, attorneys can send status inquiries to NVC via e-mail at *nvcattorney@state.gov* or fax to (603) 334-0759 (*see* AILA InfoNet Doc. No. 06101860). Make sure to include the USCIS receipt number and/or NVC case number in the subject line. The body of the communication should contain the full names and dates of birth of the petitioner and beneficiary and the attorney's contact information. NVC also requires that attorneys provide a copy of the signed Form G-28, Notice of Entry of Appearance as Attorney or Representative.

An approved I-129F petition is valid for four months and may be revalidated by the consular officer for additional periods of four months if it expires before the processing of the visa application is completed. Most posts require that the petitioner submit Form I-134, Affidavit of Support, and supporting evidence with the visa application filing. Form I-864, Affidavit of Support, is not required at this stage.

If the interview is successful, the beneficiary receives a visa stamp valid for a single entry to the United States within six months of issuance and a sealed envelope to present at the port-of-entry. The beneficiary is admitted for a 90-day period to get married. If following-to-join, the K-2 visa must be issued within one year from the date that the K-1 visa is issued.

K-1 and K-2 Adjustment of Status

After marriage, the spouse must file for adjustment of status (AOS). Form I-130, Petition for Alien Relative, does not need to be filed for the K-1 or K-2 to apply for AOS. The beneficiaries' status will be conditional if the immigrant visa is available prior to the second anniversary of the marriage. In general, the K-1 cannot adjust except through the petitioner who filed the I-129F.

The applicant is not required to file a medical examination (only the vaccination supplement is needed) if the medical exam was performed as part of the K visa issuance and the exam occurred not more than one year prior to the time of the application for adjustment.

The K-2 beneficiary derives his or her status from being the child of the K-1 and

may apply for AOS even if the USC marries the K-1 fiancé(e) after the child turns 18 years old (*see* 8 CFR §214.2(k)(6)(ii) (outlining AOS for K-2)). However, under USCIS's current interpretation, officers should only allow the AOS of a K-2 child under the age of 21, provided the requirements for AOS in INA §245 are met (*see* AILA InfoNet Doc. No. 07040618). Therefore, when filing an adjustment for a minor with a potential age-out problem (becoming ineligible to adjust status because of turning 21 years old), expedited processing should be requested.

If the marriage does not occur within 90 days, the K visa holder is subject to removal. If the marriage takes place outside the 90-day period due to unforeseen circumstances, the original petitioner could file Form I-130, Petition for Alien Relative, concurrently with an AOS application.

The American Immigration Lawyers Association (AILA) has requested that USCIS reconsider its interpretation of the eligibility of a K-2 to adjust status after reaching 21 years of age (*see* AILA InfoNet at Doc. No. 08040235). It is AILA's position that a K-2 dependent remain eligible to adjust status after age 21 if he or she obtained the K-2 visa prior to age 21. This position is supported by the decision in *Verovkin v. Still*, 2007 WL 4557782 (ND Cal. 2007), which held that the date of determining a K-2 eligibility for adjustment is the date the K-2 visa is issued. The K-2 visa holder does not age-out, provided the visa was issued prior to him or her turning 21.

K-3 and K-4 Visa Process

The K-3 visa allows a USC to petition for his or her spouse and the spouse's minor child (K-4) to enter the United States while waiting for approval of the I-130 petition. To apply for the K-3 visa, the petitioner must file an I-130 prior to filing the I-129F. The USC does not need to file a separate I-129F for the child. The statute does not require the issuance of the I-130 receipt notice prior to filing the I-129F. However, the instructions for Form I-129F provide that the petitioner must await the receipt of the I-130 prior to filing the I-129F.

AILA has requested that USCIS revise the K-3 processing procedures to permit concurrent filing of the I-130 and I-129F petitions. USCIS has indicated that it will review the procedure for potential concurrent filing of these documents (*see* AILA InfoNet at Doc. No. 08040235).

In many instances, the parties might not be aware of the potential problems of the criminal convictions, the new filing limitations, and the high burden of proof for an Adam Walsh waiver.

Note: The California Service Center, which currently adjudicates most I-129F forms, is processing the I-130 and I-129F almost in the same amount of time, which creates a disincentive to filing the I-129F to obtain a K-3 classification to expedite the admission process of the beneficiary.

Once the I-129F is approved, USCIS forwards the file to NVC, which notifies the post in the country that the marriage occurred. If the marriage took place in the United States, NVC sends the petition to the post of the beneficiary's nationality. The post will contact the beneficiary to provide the steps and information required for visa processing.

After a successful interview, the K-3 beneficiary and K-4 dependent receive a multiple-entry visa with up to a 10-year validity. However, the K-4 visa validity caps the day before his or her 21st birthday.

K-3 and K-4 Adjustment of Status

Upon successful admission, the K-3 can file for AOS. The K-4 cannot file for adjustment until the USC petitioner files Form I-130 for the child. Thus, the petitioner also should initially file an I-130 petition on behalf of the derivative child in order to facilitate the child's AOS and protect the child from "aging out."

PRACTICE POINTER: Unlike the K-2 child, the K-4 adjusts status as the stepchild of the petitioner. Thus, the marriage between the USC and the K-3 spouse must have occurred prior to the K-4 child's 18th birthday.

If the K-4 does not meet the definition of stepchild under INA §101(b)(1)(B) because the relationship between the parents occurred after the child's 18th birthday, the approval of the K-4 might be difficult because the child will not be able to adjust status once in the United States.

Travel

The K-1 and K-2 are one-time entry visas. After filing for AOS, the K-1 and K-2 must request advance parole to travel. The K-3 and K-4 may travel outside the United States using the K visa even if they have applied for AOS prior to departure. The regulations provide that travel →

outside of the country by an applicant for AOS—who is not under exclusion, deportation, or removal proceeding, and who is in lawful K-3 or K-4 status—shall not be deemed an abandonment of the application if, upon returning, the alien is in possession of a valid K-3 or K-4 visa and remains eligible for K-3 or K-4 status (*see* 8 CFR §245.2(a)(4)(ij)(c)).

Employment Authorization

K visa holders are employment-authorized incident to status. However, they must apply for work authorization by filing Form I-765, Application for Employment Authorization. In practice, most applicants file for work authorization as part of the AOS process.

The International Marriage Broker Regulation Act (IMBRA)

IMBRA amended and supplemented INA §§214(d)(1), (3) and §§214(r)(1), (3) to require that the petitioner of a K-1 or K-3 visa disclose, as part of the I-129F petition, information of any criminal convictions for specific crimes involving domestic violence, sexual assault, child abuse and neglect, dating violence, and stalking, among others. USCIS guidance provides that if the petitioner has been convicted of any of the listed crimes, or if USCIS learns of the petitioner's convictions, he or she is required to submit certified copies of all court and police records showing the charges and dispositions of every conviction (*see* AILA InfoNet Doc. No. 06080164). If the petition is approved, the U.S. Department of State will disclose this information to the beneficiary during the consular interview.

PRACTICE POINTER: IMBRA limits the number of petitions a K-1 petitioner can file or have approved. If the petitioner has filed two or more K-1 visa petitions at any time, or had a K-1 petition approved within two years prior to the filing of the current petition, a waiver is required. There is no particular form to apply for this waiver. The petitioner should enclose with the I-129F petition a signed and dated statement requesting the waiver and outlining the reasons why the waiver should be granted, while also attaching supporting evidence.

The adjudicator has the discretion to waive the applicable time and/or numerical limitations, except if the petitioner has a history of violent criminal offenses against a person, in which case IMBRA allows for an "extraordinary circumstances" exception (*see* INA §§214(d)(2)(B) and (C)(ii)). The cited USCIS memorandum provides examples of evidence and situations that could qualify for the "extraordinary circumstances" exception.

IMBRA also allows for a waiver if the petitioner with a criminal record has been battered or subjected to extreme cruelty and was

not the primary perpetrator of violence in the relationship (*see* INA §214(d)(2)(C)(ii)). The adjudicator should approve a waiver request if the petitioner can establish that he or she: (1) was subject to battery or extreme cruelty at the time he or she committed the violent offense; (2) was not the primary perpetrator of violence in the relationship; and (3) was acting in self-defense, among other factors.

IMBRA also requires K petitioners to inform USCIS if they have met their fiancé(e) or spouse through the services of an international marriage broker and to provide information about the broker. The numerical limitations and waiver provisions noted above do not apply to the K-3 petitioner.

The Adam Walsh Child Protection and Safety Act

The Adam Walsh Child Protection and Safety Act applies to family-based petitions pending and/or filed after July 27, 2006. It is intended to protect minors (under 18 years old) from sexual crimes, and bars petitioners convicted of certain specified crimes against a minor from petitioning for family members.

The act amends INA §§204(a)(1) and 101(a)(15)(K) to prohibit a USC or lawful permanent resident petitioner convicted of a "specified offense against a minor" from filing any family-based immigration petition for any beneficiary—regardless of age—such as a fiancé(e), spouse, minor children, unmarried son or daughter, and parent unless the secretary of the U.S. Department of Homeland Security determines that the petitioner poses no risk to the beneficiary. The term "specified offense against a minor" includes:

- Kidnapping;
- False imprisonment;
- Solicitation to engage in sexual conduct;
- Use in sexual performance;
- Solicitation to practice prostitution;
- Video voyeurism (use of a webcam to watch children);
- Possession, production, or distribution of child pornography;
- Criminal sexual conduct involving a minor, or the use of the Internet to facilitate, or attempt such conduct; and
- Any conduct that by its nature is a sex offense against a minor.

The USCIS guidance memo provides for the revocation of approved petitions if at any time prior to the adjustment of status or consular processing USCIS becomes aware that the petitioner has a conviction for a specified offense against a minor (*see* AILA InfoNet Doc. No. 07030669). If the petitioner's background check reveals a hit for an offense that qualifies as a "specified offense against a minor," a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) will be issued requiring the petitioner to provide certified copies of all police arrest records and court dispositions documents. The petitioner also will be scheduled for fingerprints.

The guidance memo provides →

procedures to assist the adjudicator in determining whether the petitioner has been convicted of a "specified offense against a minor," since the offenses are stated in broad terms and might be named or applied differently in the various jurisdictions.

According to the guidance memo, the adjudicators should consider the evidence. If the fingerprint results and evidence submitted indicate that the petitioner was not convicted of a specified offense against a minor, the adjudicator should proceed to adjudicate the case. If the adjudicator is unsure whether a conviction should be considered a specified offense, or the criminal case against the petitioner is still pending, or the disposition is unknown, the adjudicator should forward the file to USCIS counsel for review. If the adjudicator determines that the petitioner has been convicted of a specified offense, he or she must determine whether the petitioner poses a risk to the beneficiary.

In determining whether the petitioner poses a risk, the adjudicator should evaluate all known factors and evidence submitted. The petitioner has the burden to demonstrate beyond a reasonable doubt that he or she poses no harm. Considering the high burden of proof, the petitioner should submit with the initial filing or in response to an RFE or NOID all relevant evidence, including evidence of rehabilitation and any legal argument that USCIS should consider in evaluating his or her case.

If, after considering all the evidence, the adjudicator determines that the petitioner poses a risk, the adjudicator must deny the petition and state the reasons for the determination. If the adjudicator is uncertain about the risk posed, he or she should consult with a supervisor and/or USCIS counsel. If the adjudicator determines that the petitioner poses no threat, he or she must seek guidance and consent from USCIS headquarters and others before approving the petition. In practice, it appears that cases involving Adam Walsh offenses are being denied or are just not being adjudicated.

Better Safe than Sorry

Practitioners should discuss the IMBRA and Adam Walsh ramifications with the petitioner and the beneficiary prior to filing. In many instances, the parties might not be aware of the potential problems of the criminal convictions, the new filing limitations, and the high burden of proof for an Adam Walsh waiver. Going through the tenuous K visa process is stressful enough. It might alleviate some of the stress if the couple were told from the outset how these regulations may affect their petition rather than halfway through the process. ILT

GISELLE CARSON *is a partner at Marks Gray, P.A. in Jacksonville, FL, and has spoken at various AILA conferences regarding K visas and family-based petitions.*

PRACTICE PROFILE:

Meet Neil Dornbaum

Neil Dornbaum is a founding partner of Dornbaum & Peregoy LLC in Newark, NJ. Neil is chair of the American Bar Association's (ABA) Immigration Law Committee (General Practice Division) and has served three terms as the New Jersey AILA Chapter chair. He also is a past chair of the New Jersey State Bar Association's Immigration, Naturalization, and Americanism Section. Neil lectures nationally on various aspects of the immigration law practice for New Jersey Institute for Continuing Education (NJICLE), the federal bar, ABA, and AILA. He serves as NJICLE program chair/coursebook editor for *Advanced Immigration Law Issues for Attorneys, Human Resource Personnel and In House Counsel*, and the Annual Immigration Law Conference.

Neil is on the editorial board for *Immigration Law Today* and is a reviewer for *Kurzban's Immigration Law Sourcebook*. He currently serves as a commissioner on ABA's Commission on Immigration. He has been listed in "The Best Lawyers in America" for the last 15 years, "The International Who's Who of Business Lawyers," and *New Jersey* magazine's "Top Lawyers" and "Super Lawyers" publications for his work in immigration.

Dornbaum & Peregoy enjoys a national reputation and regularly and expertly handles complex matters. The firm has achieved Martindale-Hubbell's highest rating for legal ability and ethical standards and is listed in "The Bar Register of Preeminent Lawyers," 1994–present, under Immigration Law. Dornbaum & Peregoy is one of only a select number of law firms in New Jersey with a practice limited to immigration and nationality law to receive this honor.

GETTING PERSONAL

DATE & PLACE OF BIRTH: December 27, 1956; New York, NY

FAMILY: wife and daughter

FAVORITE TYPE OF FOOD: New discoveries—spends time during AILA's annual conference patronizing top-rated restaurants with colleagues who share a passion for food.

MUSIC CURRENTLY IN YOUR IPOD/MP3/IPHONE: Tony Bennett, Stan Getz, Thelonious Monk, Stevie Ray Vaughan, Norah Jones, Miles Davis, Chris Botti, Bob Dylan, John Lennon, Jethro Tull, Greatful Dead, Pink Floyd and Willie Nelson

FAVORITE BOOK/AUTHOR: Clive Cussler, Dan Brown, Robert Ludlum, and David Baldacci (Where the hero saves the day!)

MOST PRIZED POSSESSIONS: A 1978 Corvette Stingray (silver anniversary model)—Just returned from completing a two-day Corvette auto racing course.

MOST MEMORABLE PERSONAL MOMENT: On the way to Denver for an AILA conference to speak on a panel on Outstanding Researchers and Professors, a young attorney approached me at the airport and asked if he could share a taxi to the conference. Half way to the hotel he posed the question, "How much do you charge for an Outstanding Researcher petition?" I said I wasn't comfortable advising him on fees but went on to suggest how he could determine the appropriate fee to charge based on several factors he should take into account. Before I could finish, he quoted his fee, which was three times what I was charging for my firm's services. It was clear to me that AILA had invited the wrong person to speak.

MOST MEMORABLE PROFESSIONAL EXPERIENCES: I believe strongly in giving back to the profession and enjoy the opportunity to both teach and mentor younger attorneys in the field. One of the issues of greatest need in the immigration field is the lack of pro bono representation of both detained children and adults. I had the opportunity to visit several prisons housing both children and adults and met with Brad Smith, General Counsel for Microsoft, in Seattle. Over dinner, he reported that the company would be announcing its commitment to fund and support a multi-million dollar initiative to provide pro bono representation for all children detained in the United States.

When we work outside the box, we are able to bring together various organizations (religious, social, professional) to elicit major changes. This has been especially true with the pairing of corporate donors with immigration pro bono needs.

THREE TIPS FOR CONSULAR PROCESSING: We teach our new employees to work to the acronym SPA: Speed (fast turnaround and return calls, prompt case completion); Professionalism (show expertise, relate well to all parties involved, and seek client feedback to improve service); and Accuracy (careful document review, keep all parties informed, be frank about client's chances for success).

WORDS TO LIVE BY: Treat each client the way that you would like to be treated if you were engaging someone to perform a service for you.

STATUS CHECKS ✔

Honors and Appointments

Elizabeth Leigh Anne Garvish received the **H. Sol Clark Award** from the **State Bar of Georgia's Pro Bono Project** and **Access to Justice Committee** for her extensive pro bono work in coordinating and providing legal assistance to immigrants in Georgia who are on the path to U.S. citizenship.

Lori T. Chesser was named a **Woman of Influence** in Central Iowa by the ***Des Moines Business Record***.

Hugo R. Valverde was named the **2008 R. Edwin Burnette, Jr. Young Lawyer of the Year** by the **Virginia State Bar**.

Maria Aguila received the **Mayor's Asian American Advisory Board's Pro Bono Service Award** as well as an award from the **Jacksonville Asian American Bar Association** for her outstanding leadership and dedication.

Kristina Rost was named one of the **Up & Coming Lawyers 2008** by ***Massachusetts Lawyers Weekly***.

Michael Maggio and **Joseph Vail** were posthumous recipients of the **Carol King Award** at the **2008 National Lawyers Guild** convention.

Super Lawyers magazine recently selected **Navid Dayzad** as a "**Rising Star**" in Southern California.

Announcements

Maria Aguila performed "On My Own" from the Broadway musical *Les Miserables* at the first-ever **Jacksonville Bar Association lawyer variety show** fundraising event benefitting Jacksonville Area Legal Aid.

After practicing immigration law for the Choquette Law Group, P.S., **Sylvia A. Miller** has opened her **solo practice** in Seattle with a focus on immigration law. Sylvia is fluent in Spanish and represents clients in their applications and petitions with U.S. Citizenship and Immigration Services.

John Nechman joined Rep. Sheila Jackson Lee (TX-18) on a **panel** in Houston to discuss President Bush's recent signing of a bill that repeals the statutory **HIV immigration ban**.

Kristen Ness Ayers opened her law firm, **Ayers Immigration Law Firm**, in Charlotte, which focuses on business immigration matters.

On the Move

Hammond Law Group is pleased to announce that **Steven R. Solway** has joined the firm as partner-in-charge of its Toronto office. Steven has been practicing corporate immigration law since 1995, most recently as a partner with Gowling Lafleur Henderson LLP.

Kate Kunzman and **Ann Cun** have joined **Pearl Law Group**'s San Francisco office, concentrating on business immigration law services for esteemed global companies.

Fisher & Phillips LLP is pleased to announce the additions of **Kim Kiel Thompson** and **Shanon R. Stevenson** as partners in its Global Immigration Practice. They are joined by new associate, **Brock P. McCormack**.

Elise A. Healy has recently joined **Spencer Crain Cubbage Healy & McNamara pllc** to lead its business immigration practice. Spencer Crain is a Dallas-based, majority women-owned law firm specializing in commercial litigation, employment and labor, mediation, and business immigration.

Calling All Writers!

The skill of writing is to create a context in which other people can think.
— Edwin Schlossberg

Are you interested in writing for **AILA's *Immigration Law Today***, the premiere journal serving the immigration law field? We're **always in need of well-written, quality articles** on **matters of interest** to the immigration bar. Our team of **experienced legal editors** can help you shape your ideas and present them in a way that will **engage the reader** and **provide valuable insight and advice** to our audience of experienced practitioners. **For more information**, contact us to discuss your ideas and deadlines for submissions at ***ILT@aila.org***.

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