INSIDE: Foreign Trusts: Beware ♦ I-9 Penalties ♦ Maslow's Hierarchy

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

AN IMMIGRATION DIALOGUE

VOICE

JULY/AUGUST 2012

Vol. 3 Issue 4

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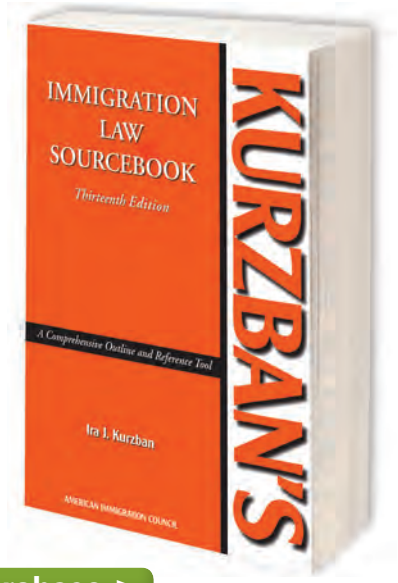

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CONTENTS

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COVER STORY

FEATURES

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"There was a turning point during the ceremony where I felt connected to this country in a way that I didn't quite expect. America has been really great to me and I have felt welcomed since the day I came here."
—**Alanis Morissette**, singer and Canadian dual citizen

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[Italy Must Sink Agreements With Libya on Migration Control](#)
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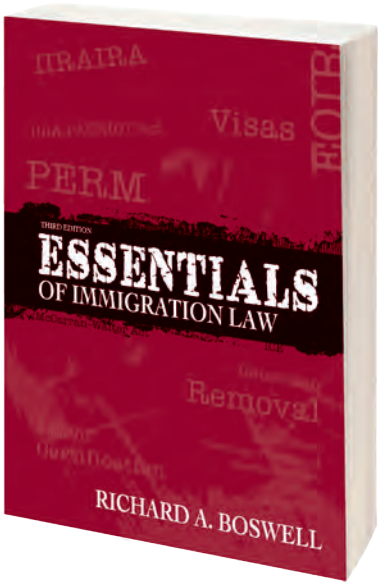

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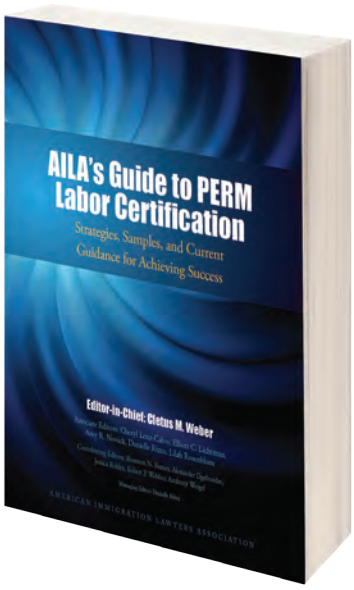

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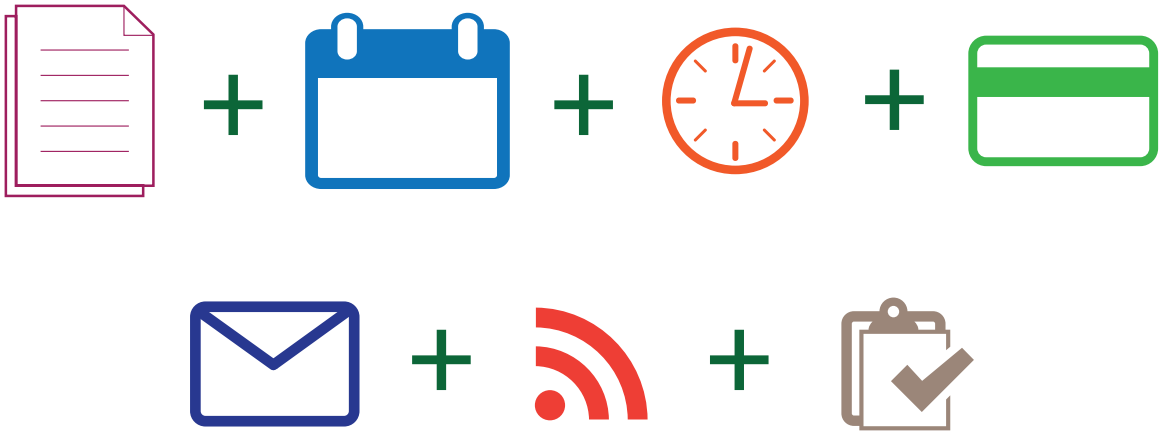

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from **Cletus M. Weber**

Benjamin Franklin, Maslow's Hierarchy, and Your Health

With so many deadlines, demanding clients, and difficult government agencies, it has never been easier to rationalize neglecting your health. But don't do it. Take steps now to stay healthy.

Convince yourself that health really is that important.

Among other things, both Maslow's Hierarchy of Needs—self actualization, esteem, social, security, physiological—and Benjamin Franklin's proverb, "Early to bed, early to rise makes a man healthy, wealthy, and wise," exemplify the belief that one's health has higher relative importance than other significant aspects of one's life.

Imagine losing just one of the myriad important things in your life: your house, your bar license, your job, etc. The loss of any of those would be detrimental, but if you instead lose your health, the relative importance of the others fades much more quickly.

Decide to be healthy.

It is not enough to know that health is important. You have to do something about it. Write down your goal to stay healthy—then do it.

Get a physical.

Don't assume you are healthy, or simply worry about whether you are. Find out. Get a physical, so you know your baseline on many of your key health metrics.

Eat right.

Eat better food—more fruits and vegetables, fewer fats and sugars. Organic is ideal. Many processed foods and restaurant foods focus on flavor not health. Moderation is key.

Calendar your exercise.

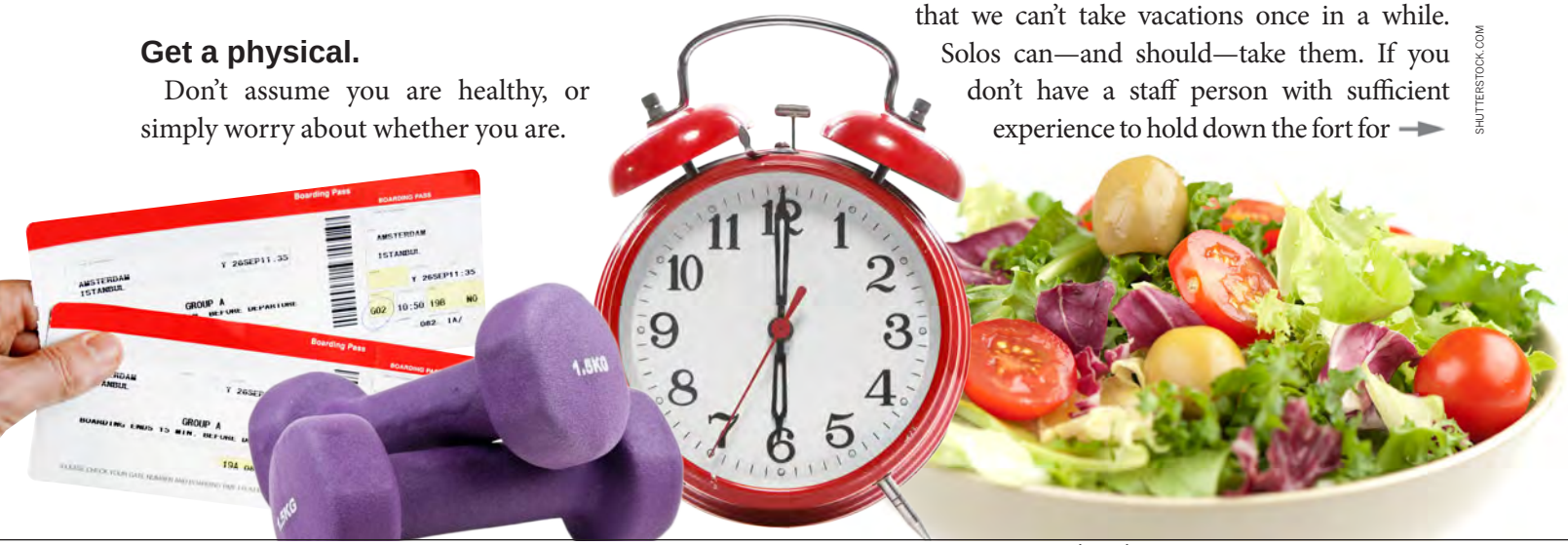
You meet your filing deadlines at work because you put them on your calendar and you create reminders about them. Do the same with your exercise. Calendar your exercise and make time for it. If your calendar is too full, remove something to make room for exercise.

Go to bed.

You need sleep. Make sure you're getting enough. According to a sleep specialist at the Mayo Clinic, you need seven to nine hours per night, not just four to five.

Take a vacation.

Mental health is important, too, so as much as we imagine our own greatness, we are not so important that we can't take vacations once in a while. Solos can—and should—take them. If you don't have a staff person with sufficient experience to hold down the fort for →



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a week or so while you're away, find a trusted fellow solo to cover each other's vacations.

Get professional help if you need it.

Life is not always easy, and everyone can become overwhelmed at times. If you start to suffer panic attacks, unexplained dizziness, etc., or consistently turn to drugs or alcohol to soothe your nerves or escape the pressures at work and home, consider getting professional help. Most bar associations—including AILA—have support systems in place to help you find the services you need in a caring and confidential manner. You just have to ask.

Keep trying, and stay positive.

We can always do better at everything we do, and taking care of our health is no exception. Don't worry about occasionally eating too much of the wrong foods, missing some exercise here or there, or shortchanging yourself on sleep occasionally. Just don't fall off the wagon altogether. Get back on track promptly and keep focused on building consistency.

By making your health a top priority—and doing something about it—you not only become healthier, but actually become better able to handle the ongoing deadlines, client demands, and difficult federal agencies you face everyday. And feel better and be happier in the meantime.

Related Resources

Podcast: "Understanding and Dealing with the Stress of Immigration Practice," with Lynn Calder, Laura Edgerton, and George Kaufman

"Retaining Your Clients and Law Practice Without Losing Your Mental Health," by Kristina Rost and Reid Trautz

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Cletus M. Weber *is co-founder of Peng & Weber, PLLC, based in Mercer Island, WA. He is editor-in-chief of* AILA's Guide to PERM Labor Certification. *The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

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POSTED BY Christine Mehfoud

How Bad Can It Get? *Penalties for Immigration Violations*

Employer clients often ask, "What's the risk of not complying with immigration laws? So, I thought it might be helpful to look at some recent immigration-related penalties to illustrate what's at stake. Sentences for employers can range from up to six months in prison for knowingly hiring an illegal worker to 10 years for harboring one. Also, other charges and additional penalties can be tacked on for crimes, such as tax evasion, money laundering, bank fraud, and false statements. An employer must also consider asset forfeiture, debarment, and reinstatement requirements, and there is the indirect damage from lost productivity, attorney's fees, and negative publicity. To put these penalties in real terms, see these examples from recent cases:

Company	Date	Charge	Prison Time	Monetary Penalties
HerbCo International, Inc.	May 2012	Knowingly hiring		$1,000,000
Atrium Companies (Champion Window and Advanced Containment Systems, Inc. (ACSI))	January 2012	Knowingly hiring		$2,000,000 forfeited funds (each company)
University of California San Diego Medical Center	January 2012	Discrimination in employment eligibility verification process		$115,000
Aguila Farms, LLC	November 2011	Knowingly hiring and aiding and abetting (owner) Harboring (company)	three years' probation (owners) five years' probation (company)	$2,000,000 in lieu of forfeiture (company) $234,000 fines (owners); $500,000 fine (company)
YCL, Inc. (The Gateway Hotel)	October 2011	Conspiracy to smuggle, transport and/or harbor, money laundering and tax fraud (owner) Conspiracy to smuggle and harbor (company)	15 years (owner); five years' probation (company)	More than $2,300,000 fine (owner); More than $481,000 restitution (owner); More than $870,000 money judgment (company); $5,000 fine (company)
Farmland Foods, Inc.	August 2011	Discrimination in employment eligibility verification process		$290,400
Howard Industries	February 2011	Conspiracy to conceal, harbor and shield		$2,500,000
Hi-Tech Trucking, Inc.	November 2010	Hire and harbor illegal aliens	18 months and two years' probation (owners)	More than $1,200,000 forfeit and $100,000 fine
Catholic Healthcare West	October 2010	Discrimination in employment eligibility verification process		$257,000
Abercrombie & Fitch	September 2010	Violations of obligation to verify employment eligibility of workers (technology-related deficiencies in I-9 verification system)		More than $1,000,000
Pilgrim's Pride Corp.	December 2009	Hiring and employment of illegal aliens		$4,500,000
Agriprocessors, Inc.	March 2009, June 2010	Aiding and abetting in harboring (supervisor); Bank fraud, false statements, money laundering (company)	27 years in prison and five years' supervised release(former CEO); 23 months (supervisor); one year and one day in prison and two years' supervised release (manager); one year and one day in prison and two years' supervised release (manager); two years' probation (former human resources assistant)	More than $26,000,000 restitution
IFCO Systems	December 2008	Hiring and employment of illegal aliens; Overtime violations; Conspiring to harbor illegal aliens (managers)	16 managers and executives convicted; five sentenced to pay a fine and the remaining 11 await sentencing	More than $20,000,000

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

SPOTLIGHT

by **Dr. Megan Seltz**

Nepali Cultural Norms: Why So Hush?

Nepali nationals began immigrating to the United States in large numbers as a result of a decade-long civil war that ended in or around 2006. However, significant political caste and ethnic divisions still persist today, causing Nepali clients profound hardship. They report instances of abduction, extortion, and abuse for political dissent or participation in democratic parties. Also, women recount being the victims of domestic violence.

Nepali cultural norms are quite different from what we as U.S. citizens know. Families may suffer significant hardship if they are deported to Nepal. For example, corporal punishment as a mode of discipline is reportedly common in Nepali schools. Nepali clients facing removal are often concerned about the difficulty their Nepali-American children will face as a result of their inability to speak the language, and failing students are strictly disciplined.

Clients with psychological disorders have added challenges. One U.S. citizen child with Attention Deficit Hyperactivity Disorder, which results in inattention, disorganization, and impulsivity, recalled being hit in the head regularly by his teachers while attending Nepali schools. His parents, who were living in the United States out of legal status, reported that because they could not find psychological services for their son in Nepal, they discontinued his treatment, causing him to become unruly. Now 11 years old and in the United States, this child, when asked about his parents' possible deportation, stated, "I want my family to stay together and am not sure what will happen to [my parents], but I am not going back to [Nepal]." Ultimately, his parents were granted cancellation of their deportation based on his hardship.

These hardships strengthen asylum claims. Many Nepali nationals, however, hesitate to communicate the extent of their turmoil during a psychological interview. In particular, there is a defensive style[1] of under-reporting of emotional symptoms to preserve an image of being "OK," when, in fact, suffering may be more pronounced. One client reported that "talking about your feelings makes you too open and that is bad." Furthermore, some individuals report withholding information about their struggles in the United States to protect family members in Nepal. One client lamented, "I was somebody in Nepal and had aspirations," but "now I am a nothing" and "have brought shame on my family." Another said, "I didn't speak to my parents in Nepal for six months because I cannot lie to my parents and they cannot know how depressed I am [in the U.S.]" One client with a history of tuberculosis shook and cried as she expressed her distress, saying, "I have never done anything without my family," and "I could never tell them about how sick and depressed I have become." Once she learned about the "one-year rule" for filing an asylum application, she "gave up" for awhile, but sought counsel after her depression abated.

An immigration attorney can facilitate a candid relationship between a client and a mental health professional, who can help the client articulate the hardships experienced in Nepal, and assist the immigration court in understanding consequences of forced return to Nepal.

Dr. Megan Seltz *is a bilingual clinical psychologist in Jackson Heights, NY. She specializes in psychotherapy, immigration and forensic consultations, and expert evaluations. She can be reached at* mseltzphd@hotmail.com. *Case examples are provided by clients, with permission, or are typical examples this author has encountered in her work in the Nepali community. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 J. Maxmen & N. Ward, *Essential Psychopathology and Its Treatment, Revised for DSM-IV* (New York, Norton & Co. 2d Ed. 1995) (sometimes called "coping mechanisms," defense mechanisms "are relatively involuntary patterns of feelings, thoughts, or behaviors that arise in response to an internal or external perceived psychic danger in order to reduce or avoid conscious or unconscious stress, anxiety, or conflict), at 74.

"Many Nepali nationals, however, hesitate to communicate the extent of their turmoil during a psychological interview. In particular, there is a defensive style of under-reporting of emotional symptoms to preserve an image of being 'OK,' when, in fact, suffering may be more pronounced."


THE TREASURY DEPARTMENT

PREEMPTIVE ACTION REQUIRED

The Foreign Trust and Its Consequences

by Richard Rubin

Of all the tax traps likely to ensnare immigrants as they transition to the U.S. tax system, foreign trusts top the list as the least expected and the most costly. All too often, the foreign trust problem is only recognized when the immigrant files his or her first U.S. resident tax return, but by then, it is usually a matter of dealing with consequences rather than avoiding the problem.

An immigrant is required to file a regular tax return (Form 1040) for the year in which he or she becomes tax resident in the United States. (Department of the Treasury, Internal Revenue Service, U.S. Tax Guide for Aliens (Feb. 7, 2012), at 44). The foreign trust problem is not generally obvious before filing a regular tax return, even if the immigrant has filed non-resident returns (Form 1040NR) in previous years. In many cases, the tax classification of the foreign trust changes the day the immigrant becomes a U.S. tax resident. Foreign trust classification can arise when the immigrant becomes a U.S. tax resident under the substantial physical presence test or under the green-card test.

Once immigrants become U.S. tax residents, they are generally taxed (sometimes with "penalty interest") on distributions received from foreign trusts. But the real surprise awaiting tax resident immigrants is that they may be taxed on the income *received by* the foreign trust rather than on the income they *receive from* the foreign trust. As a result, immigrants may be taxed on trust income even if they do not receive a distribution or any other payment from the foreign trust. This nightmare—tax without income—occurs because the immigrant is regarded as "owning" the assets of the foreign trust. An individual is regarded as "owning" trust assets for U.S. tax purposes where he or she is the grantor of the trust, and trust income can be used for his or her benefit or he or she retains certain powers over the trust.[1] The problem is exacerbated if the immigrant is unable to secure payment from the foreign trust to offset tax liability on trust income.

Anti-deferral Measures: Excessive and Harsh

The tax rules for foreign trusts are extreme both by design and effect, even by the standards of the Internal Revenue Code (IRC). These harsh measures are meted out to foreign trusts because they were perceived (and are still perceived) as a means by which taxpayers can avoid or at least defer their U.S. taxes. To prevent taxpayers from diverting income to a foreign trust that they would otherwise earn, the IRC was amended to include a string of "anti-deferral" measures aimed specifically at foreign trusts.[2]

As a result of these anti-deferral measures, in many cases, individuals are taxed on income earned by foreign trusts even if payment is not received by the individuals themselves. In other cases, individuals are taxed only on the distributions they receive from foreign trusts, but then "penalty interest" is imposed on the tax payable. The result is that the overall tax burden may be far heavier than if the income had been earned by the individuals directly.

It may be understandable that anti-deferral measures were enacted to prevent existing U.S. taxpayers from diverting their income to foreign trusts as a means to avoid U.S. tax. However, it comes as an unwelcome surprise that these same anti-deferral rules apply to foreign trusts with immigrant beneficiaries. Immigrants are often surprised that →

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the U.S. tax system can reach foreign trusts that have had no previous connection with the United States.

Comments? use your VOICE

The anti-deferral rules are intended to prevent all U.S. taxpayers (including immigrants once they become tax resident) from securing tax benefits through all foreign trusts (including those trusts that had no connection with the United States before the individual's immigration). The Treasury Regulations make it clear that the foreign trust rules are intended to apply to individuals who subsequently become tax resident in the United States. IRC §679(a)(4) specifically applies to a "foreign grantor who later becomes a United States person"; Treas. Reg. 1.679-5 specifically applies to "Pre-immigration trusts"; and Treas. Reg.1.679-5(c) Example 1 specifically applies to: "Nonresident alien (who) becomes resident alien." In the latter example, the nonresident alien becomes subject to the provisions of IRC §679 once he or she becomes tax resident in the United States.

Immigrants are not only subject to the same foreign trust tax rules as U.S. citizens, but they actually face additional tax rules aimed at "pre-immigration" trusts. The pre-immigration trust rules are aimed at preventing U.S. tax benefits from foreign trusts formed by immigrants before immigrating to the United States.

Spotting What Is or Isn't a Foreign Trust

A related problem is that it may not always be obvious that a foreign entity is a trust. This is unlikely to arise where the foreign entity is, by type and purpose, a trust (for example, a family trust). Foreign trusts can be insidious, however, especially where the foreign entity has some trust-like qualities, yet may be used in the foreign country as a vehicle for commercial purposes. For example, depending on the facts, a *Liechtenstein stiftung* is typically recognized by the IRS as a trust for U.S. tax purposes, while the agency typically does not recognize a *Liechtenstein anstalt* as a trust. In other cases, while the foreign entity is a trust, in the foreign country, it may be used as a vehicle for investment or retirement plans, and more commonly known by another name, such as a super fund (common in Australia), or provident fund (often used in countries that are members or former members of the British Commonwealth). Under certain circumstances, payments from these funds received by immigrants who are tax resident in the United States

"Immigrants to the United States foreign trust relationships are oft and that they may face heavy p

may be regarded as distributions from a foreign trust and subject to the anti-deferral rules discussed above.

The U.S. tax reporting requirements for foreign trusts also are onerous. While most people entering the U.S. tax system expect trust distributions they receive to be reportable, few realize that any payments they make to a foreign trust are generally reportable. Generally, Form 3520 must be filed for distributions from, and transfers to, foreign trusts. Perhaps more surprising, those tax resident immigrants regarded as owning the assets of a foreign trust are required to file annual tax information returns for the foreign trust, even though they may neither have received distributions from the trust nor had any other transactions with the trust during that year. Generally, Form 3520A must be filed for a foreign trust regarded as owned by U.S. tax residents.

need to be forewarned that
en heavily taxed in this country,
penalties for non-compliance."

How does an immigrant avoid the unfair extremes of the IRC aimed at foreign trusts? The answer lies in timing. As the saying goes, "Forewarned is forearmed." Therefore, immigrants with foreign trust relationships need to know before they become U.S. tax residents, and preferably before they leave their foreign country, of the tax issues they will encounter once they become tax resident in the United States. In most cases, early preemptive action can avert what will otherwise result in costly tax and penalty impositions.

The reach of U.S. tax rules to foreign trusts is surprisingly broad, considerably broader than under the tax rules of other countries. Immigrants to the United States need to be forewarned that foreign trust relationships are often heavily taxed in this country, and that they may face heavy penalties for non-compliance.

Perhaps even more importantly, immigrants should be aware that most, if not all, of these negative consequences can be avoided if the appropriate preemptive action is taken before they become U.S. tax resident and, ideally, before they leave their home country.

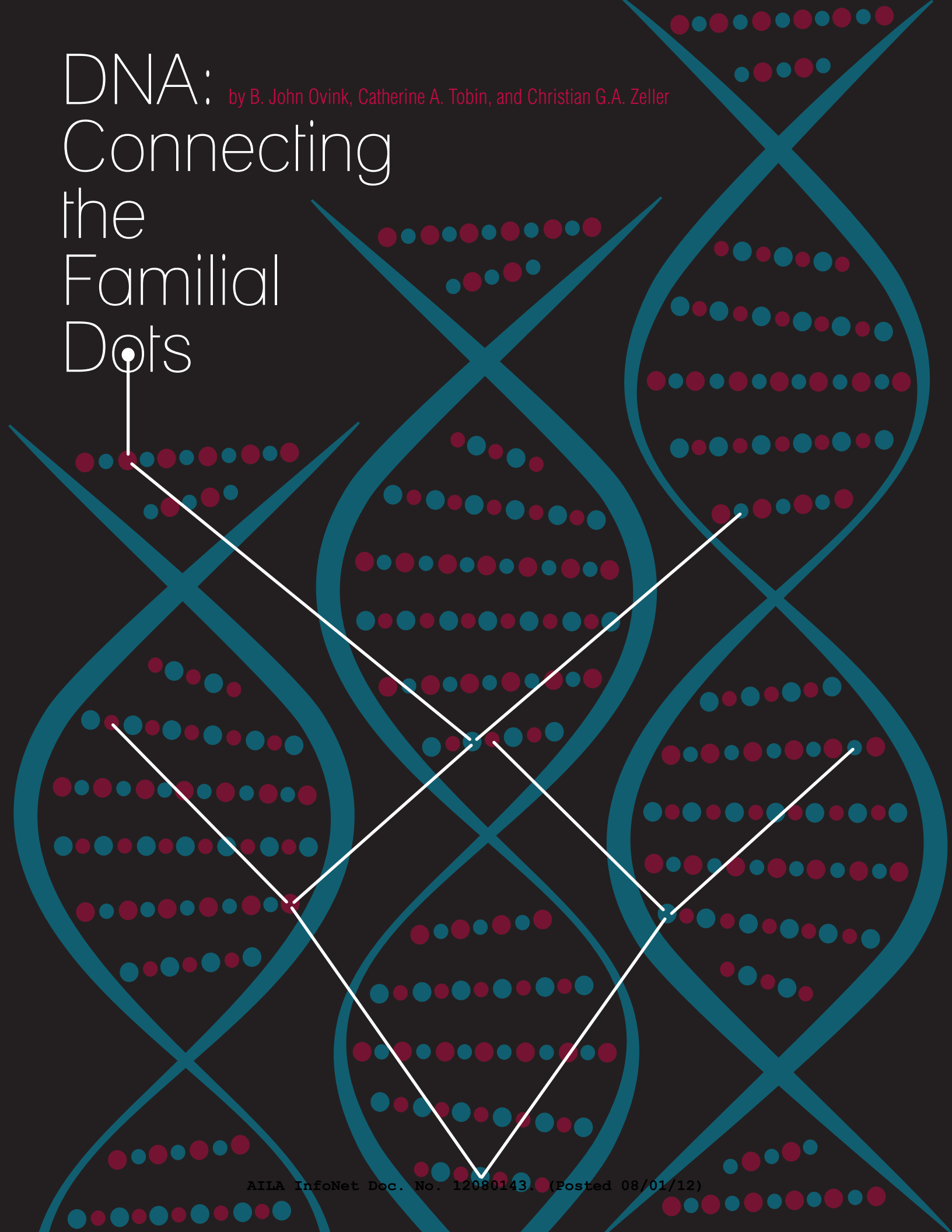
Richard Rubin *is a federal and international tax attorney in Alpharetta, GA. Formerly with Arthur Andersen, he focuses on the U.S. tax treatment of immigrants, their foreign trusts, and foreign companies. He can be contacted at* richard.rubin@rubinlaw.us.

1 IRC §677(a) provides that "The grantor shall be treated as the owner of any portion of a trust … whose income … is … or … may be … distributed to the grantor…." The grantor is also treated as the owner of a trust where he has a reversionary interest in trust corpus or income (IRC §673(a)), where he has the power of trust corpus or income disposition (IRC §674(a)), where he has any of a number of "administrative powers" in respect of a trust (IRC §675(1)–(4)), or where he has the power to revoke the trust (IRC §676(a)).

2 IRC §679 ("Foreign Trusts having one or more United States Beneficiaries") was introduced into the Internal Revenue Code by the Tax Reform Act of 1976, then amended by the Small Business Job Protection Act of 1996. The 1976 "Blue Book" of the Joint Committee on Taxation (Volume 5, page 17) commented as follows on the foreign trust tax provisions to be enacted in the Tax Reform Act of 1976: "The rules of present law permit U.S. persons to establish foreign trusts in which funds can be accumulated free of U.S. tax. ... it is contended that it is unfair to permit a grantor by using a foreign trust to provide a tax-free accumulation of income while the income remains in the trust."

DNA: Connecting the Familial Dots

by B. John Ovink, Catherine A. Tobin, and Christian G.A. Zeller



DNA testing is becoming an increasingly common way of establishing relationships for immigration purposes. Although no relationship test is 100 percent conclusive, DNA testing is considered the most accurate way to determine if two people are related.

DNA (deoxyribonucleic acid) first entered the scene of criminal investigation in 1988. Although it was welcomed by courts and the FBI, it faced many challenges at the outset. As the technical standards for DNA testing improved over the years, the use of DNA testing became widely accepted, both for criminal matters and in other areas of law. In fact, a study published by the National Research Council (NRC) in 1996 announced that DNA testing has progressed to the point where "the admissibility of properly collected and analyzed data should not be in doubt."

Soon after, legacy Immigration and Naturalization Service (INS) established its first official policies for DNA testing. Acting Executive Associate Commissioner Michael D. Cronin authored the "Cronin Memo" in 2000, which established guidelines for how legacy INS field offices could appropriately use DNA testing in immigration proceedings. The Department of State developed its own guidelines around the same time.

For practitioners today, DNA testing cannot be avoided. It is more likely than not that a relationship verification will come into play with one of your clients. The first step to advising your client on DNA matters is to understand how it works.

The DNA Testing Process

At each stage of development, every cell in the body contains the same DNA—half from the father and half from the mother. This makes it easy to capture and test a person's DNA. A tester can use any human cell, including loose cells from the cheeks, hair follicles, and blood.

When the relationship between two individuals is being determined through DNA testing, their genetic profiles are compared to see if they share the same inheritance patterns at a statistically conclusive rate.

The report shows the genetic profiles of each tested person. If there are markers shared among the tested individuals, the probability of a biological relationship is calculated to determine how likely the tested individuals share the same markers due to a blood relationship.

The process begins with a sample of an individual's DNA (typically called a "reference sample"). The most desirable method of collecting a reference sample is the use of a buccal (cheek) swab, as this reduces the possibility of contamination. When this is not available (*e.g.*, because a court order may be needed and not obtainable), other methods may need to be used to collect a sample of blood, saliva, semen, or other appropriate fluid or tissue from personal items (*e.g.*, toothbrush, razor, etc.), or from stored samples (*e.g.*, banked sperm or biopsy tissue). Samples obtained from blood relatives (biological relative) can provide an indication of an individual's profile, as could human remains that had been previously profiled.

A reference sample is analyzed to create the individual's DNA profile using one of a number of techniques. The DNA profile is then compared against another sample to determine whether there is a genetic match.

Legal Authority

The constitutionality of DNA sampling in the immigration context has never been tested, presumably because U.S. Citizenship and Immigration Services (USCIS) would only request DNA testing if there is insufficient evidence to prove the relationship, and refusal to provide DNA testing would result in USCIS having to make a decision on the previously submitted evidence alone. Genetic testing is a useful tool for verifying a stated biological relationship when no other form of credible evidence is available in conjunction with an immigrant visa (IV) application.

DNA analysis is widely applied to determine genetic family relationships such as paternity, maternity, siblingship, and other kinships. More distant relationships, such as grandparent-grandchild, first cousins, cannot be proven reliably using DNA testing; however, if one →

of the parents is deceased or missing (*e.g.*, in asylum cases), it may be the only option. DNA technology is the only non-documentary method accepted for proof of a biological relationship. Due to the expense, complexity, and logistical delays inherent in parentage testing, genetic testing should be used only if no other credible proof (documentation, photos, etc.) of the relationship exists.

The legal authority for DNA testing for consular use can be found in 9 *Foreign Affairs Manual* (FAM) 42.44. Once an embassy determines that it does not have sufficient evidence to determine the relationship, it may require that petitioner and beneficiary do a DNA test. Note that embassies may not request DNA testing to prove mala fides of a relationship, for instance, if the consular officer suspects that two spouses are related. Generally, the U.S. embassy will initiate the request. Of course, you may pre-empt this process by submitting the test results, especially if you are working with clients from one of the so-called "high fraud-risk" countries such as Nigeria, Haiti, etc. This might be useful in "following to join" scenarios, with immigration of fourth preference derivatives, or with derivatives of an I-140 petition. For cases where there is serious doubt about, or lack of evidence of, the required relationship between the petitioner and the beneficiary, we suggest that you submit DNA evidence to USCIS with the I-130 petition.

Here are the five steps your client needs to follow when the embassy requests a DNA test.

Step 1: Locating an Accredited Facility

The process starts when the embassy informs the petitioner that it is requesting a DNA test. The petitioner must then select an American Association of Blood Banks (AABB) accredited laboratory where the DNA sample will be collected. A list of laboratories can be found only on the official AABB website: www.aabb.org/Pages/Homepage.aspx. Beware of fraudulent DNA labs. Embassies can accept testing kits only from accredited laboratories! The lab generally requires payment; after which, the lab will schedule an appointment for testing.

Step 2: Collecting the DNA Sample

Testing will be done under supervision of the AABB-accredited lab. Petitioners should never directly receive test kits for themselves or their beneficiaries. At the appointment, the tester will take a buccal (cheek) swab. The AABB collection site or clinic must submit the test kit (sample) directly to its main AABB lab testing site, then directly to the U.S. embassy or consulate where the relatives/beneficiaries will be tested.

Step 3: Contacting the Applicant

Once the U.S. embassy or consulate abroad receives a DNA kit from an accredited laboratory in the United States, it will contact the visa applicant who needs to provide a DNA sample, and provide him or her with an appointment time.

Step 4: Paying the Fees Prior to Appointment

Before the appointment, the relatives/beneficiaries must arrange payment for the collection directly with the panel physician that will conduct the DNA sampling. They must bring the payment receipt with them to their appointment at the U.S. embassy or consulate. Failure to bring the receipt will result in a rescheduling of the DNA collection appointment.

Step 5: Appearing for Collection

All DNA collection for visa applicants is performed in the consular section of the U.S. embassy (or consulate) by a designated physician or medical technician and witnessed by embassy officers managing the process. The applicant must bring the following documents to this appointment:

1. His or her passport and two copies of the passport. If the applicant is an asylee or refugee family member, or applying for a consular report of birth abroad and does not have a passport, he or she should bring another form of a photo identification with two additional copies.
2. Two passport photographs.
3. The letter provided by the consular office suggesting DNA testing.
4. The receipt from the panel physician showing payment for the DNA collection.

After the collection has been taken, the embassy will use the applicant-supplied, pre-paid and pre-addressed envelope to send the test kit back to the accredited lab testing site in the United States, which will analyze both samples and send the results directly to the U.S. embassy or consulate. The lab testing site will not send a copy of

" ...[I]n immigration matters, DNA
and most accurate approach to
doubt ... turn to DNA testing to pre

Comments? use your VOICE

the results to the petitioner or the petitioner's attorney, unless a copy is specifically requested. Once the embassy or consulate receives the results, the applicant will be contacted in order to continue processing his or her visa application.

Although the Cronin Memo states that a director has no statutory or regulatory authority to require DNA testing, the regulations at 8 CFR §103.2(b)(8) state that where evidence submitted does not fully establish eligibility for the requested benefit or raises questions about underlying eligibility, adjudicators may request additional evidence (which may include blood tests), but are not limited or precluded from accepting other kinds of evidence, such as DNA test results.

In 2008, the USCIS *Adjudicator's Field Manual* (AFM) ch. 21.2(d)(1)(B) was changed to reflect the following:

1. DNA testing is absolutely voluntary.
2. The costs of DNA testing and related expenses (such as doctor's fees and the cost of transmitting testing materials and blood samples) must be borne exclusively by the petitioner.
3. DNA test results must be specific to the relationship in question.
4. DNA test results do not guarantee the approval of the petition.

Note that when an adjudicator requests DNA testing, the request must be specific as to the relationship. For example, asking if two people are related is insufficient, the adjudicator must specify whether he or she thinks they are siblings, father/son, grandparent/grandchild, etc. In some cases, it may be advisable for the attorney to contact an AABB-accredited laboratory before submitting the case to USCIS, obtain a DNA test result that confirms the existing relationship, and submit this result to USCIS.

Currently, 8 CFR §204.2(d)(2)(vi) is limited to requesting "blood tests," and refusal to submit a blood test may constitute a basis for denial of the petition, unless legitimate religious objection is established. Interestingly, a blood test may be required, whereas DNA testing remains voluntary.

If parental testing is submitted for legal purposes in the United States, including immigration, testing must be ordered through a lab that has AABB accreditation for Relationship DNA testing. In New York, only legally admissible testing is allowed and if the person to be tested is a New York resident, state law requires either a physician prescription or court order. Labs must have New York State Department of Health accreditation in addition to their AABB accreditation. Similar to the procedures at embassy-level, all test results must be submitted directly to USCIS by the accredited lab.

The Best and Most Accurate Approach

DNA testing in the immigration context is not a requirement or prerequisite; it is an opportunity. Because properly administered DNA tests provide irrefutable and credible results, it behooves all practitioners—who find themselves in a quandary of proving a certain familial relationship for lack of sufficient documentation—to take advantage of this worldwide-recognized proof mechanism. In an effort to win a case that hinges on DNA testing and its results, it is of utmost importance to adhere to a proper chain of custody methodology regarding documentation and evidence, heed the medically established rules of sample collection, and work only with accredited DNA laboratories. The significance and importance of this played out in open court and on nationwide television during *The People of the State of California v. Orenthal James Simpson*, where the defense successfully argued that blood samples were sloppily collected and poorly handled, rendering DNA results unreliable.

Just as in the criminal context, where DNA testing on biological samples can help convict or exonerate with great accuracy, in immigration matters, DNA testing may constitute the best and most accurate approach to winning a case. Thus, when in doubt, or when lacking documentation prescribed by regulation, turn to DNA testing to preempt the relationship question, so that science need not exonerate your client after a denial.

B. John Ovink *is a Tampa-based solo practitioner.* **Catherine A. Tobin** *is an associate with the Law Offices of Robert D. Ahlgren & Associates, P.C. in Chicago.* **Christian G.A. Zeller** *is a shareholder at Maney | Gordon, P.A., in Tampa. Originally published at AILA's* Immigration Practice Pointers *151 (2012–13 Ed.). The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

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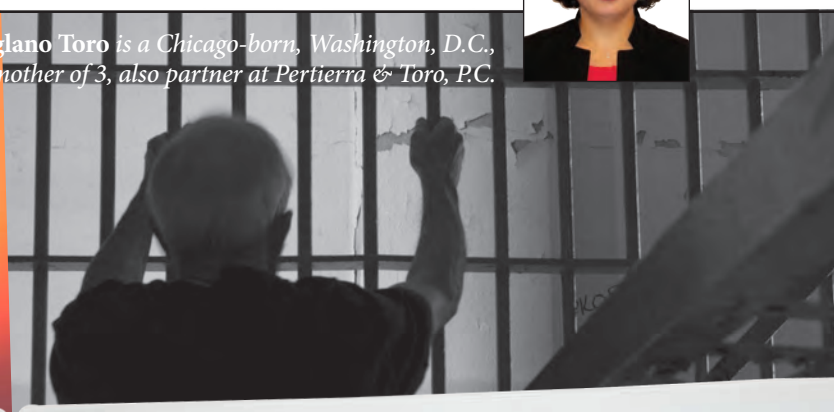
POETIC JUSTICE

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



Yesterday and Today

Just yesterday
Rising with the sun
Now today
Locked in a cell
Not a criminal

Just yesterday
Dressing for the day
Ready for school, work
Now locked in a cell
With no pay check in the mail

Just yesterday
Planning a birthday
Preparing a play date
Now locked in a cell
Far from family

From life
To no life
Having rights
To no rights
Human being
To being a number

The light of day
Brings no relief
Hope seems far from reach
Daily life is painful in a cell
The future is fearful

Light is still bright
Hope remains present
Rights exist
But tomorrow seems too far
The future has yet to be defined

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BEHIND THE CASE

by Sheeba Raj

CASE: ***In re Kagau***

ATTORNEY:
Nicolas Chavez,
Chavez & Valko LLP

BIA: IJ's Conclusion of Prior Marriage Fraud Erroneous

In an unpublished decision, the Board of Immigration Appeals (BIA) determined that an immigration judge (IJ) abused his discretion when he refused to grant a continuance pending the outcome of a Form I-130, Petition for Alien Relative, which had been filed by the respondent's second wife. The IJ refused the request after concluding that a prior I-130 filed on the respondent's behalf by his first wife had been denied because of marriage fraud. According to the BIA, however, there had been no determination that the "respondent and his [first] wife entered into their marriage for the purpose of evading immigration laws." Instead, the Board noted, "the petition was denied based on the parties' failure to submit sufficient evidence to establish a bona fide marriage." Therefore, "[T]he Immigration Judge's denial of the respondent's motion for a continuance rests upon a clearly erroneous factual finding."

A "failure to submit sufficient evidence to establish a bona fide marriage" is not a finding of marriage fraud, argued Texas chapter member Nicolas Chavez, of Chavez & Valko LLP, in In Re Kagau (Apr. 26, 2012). Chavez represents the respondent, Patrick Kagau. In his brief to the BIA, Chavez pointed out the IJ's erroneous reliance on U.S. Citizenship and Immigration Services's (USCIS) denial of the first I-130, given that the denial was unsupported by substantial and probative evidence. "The mere lack of evidence is not enough to meet the 'substantial and probative' threshold required for an affirmative finding that a marriage was fraudulent or entered into for the purpose of evading immigration laws," Chavez wrote. He also asserted that, under Matter of Hashmi, 24 I&N Dec. 785 (BIA 2009), awaiting the adjudication of the second I-130 petition was good cause for a continuance. The BIA ruled in Kagau's favor and remanded the case.

USCIS had rejected the I-130 petition filed by Kagau's previous wife under INA §204(c), but did not specify any evidence, statements made, or behavior that would suggest that Kagau intended to evade immigration laws. Chavez said his biggest difficulty was challenging the mindset of judges, who tend to deny continuances "on the mere fact that [US]CIS is producing a denial notice on §204(c). This decision

IJ Awaits *Dorman* Decision Before Ruling in Similar Case

A Denver immigration judge (IJ) has decided to administratively close an open case implicating the Defense of Marriage Act (DOMA) in order to await the Board of Immigration Appeals's decision in Matter of Dorman, 25 I&N Dec. 485 (AG 2011).

The IJ stated in a May 31, 2012, opinion that administrative closure was appropriate pending the outcome of *Dorman*. Colorado chapter member Bryon Large, of Joseph Law Firm, P.C., who represents the respondent in the closed case, is currently preparing for the government's appeal. He said he's been monitoring activity surrounding DOMA and its impact on immigration law, and followed Immigration Equality and AILA's Gay, Lesbian, Bisexual, and Transgender Interest Group (GLIG). "GLIG is

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"The Marriage Fraud Interview," VOICE, May/June 2011

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essentially allows immigration judges to consider the reasons for denying an I-130 petition under §204(c), instead of dismissing the opportunity to do so merely because the judge thinks it's not his place to adjudicate an I-130 petition, or that the petition is not approvable per se," Chavez said. "[US]CIS has the authority to supersede or reverse its previous §204(c) determination during the course of adjudicating the new petition, if it agrees that the §204(c) decision was not supported by substantial and probative evidence."

Chavez will continue to represent Kagau as they await the next hearing, which will be conducted by the same IJ.

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

an amazing resource at AILA," Large said. "The collegiality of the attorneys on the GLIG listserve is amazing. It's wonderful to have the opportunity to bounce ideas off each other and get an understanding of what everyone's working on."

The respondent, who was placed in removal proceedings, is seeking cancellation of removal. The question of whether the respondent's same-sex spouse is a qualifying relative for cancellation of removal is the same issue in *Dorman*.

Challenging DOMA and Downloadable)

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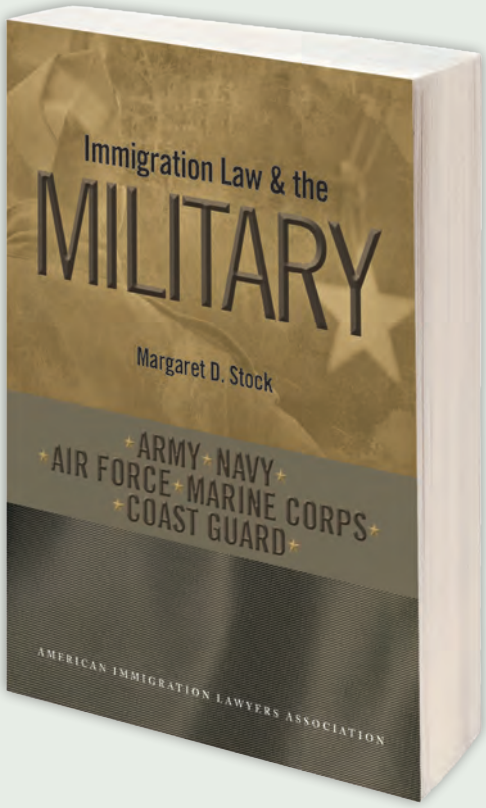

Immigration Law & the Military

by Margaret D. Stock

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

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AILA Publications— **AILA InfoNet Doc. No. 12080143. (Posted 08/01/12)**
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BALANCE

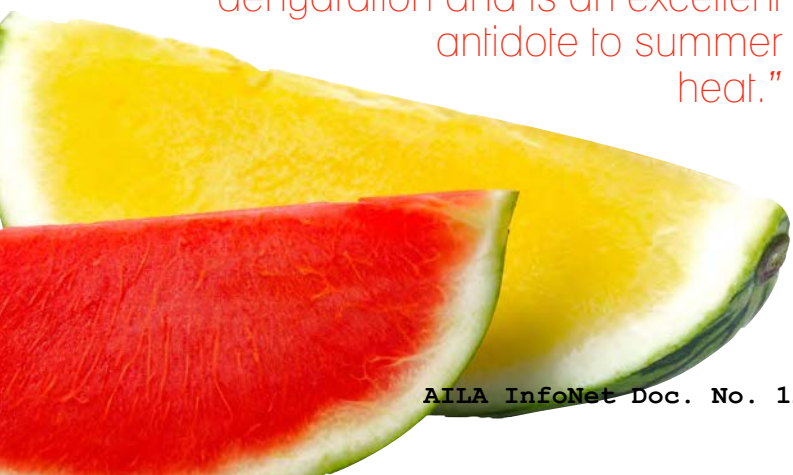
by Danielle Polen

Fired Up for Summer

Summer is the season of intensity for many of us—intense sunlight, intense heat, intense living. Both Traditional Chinese Medicine and Ayurveda, the traditional medicine of India, describe summer as the season of fire. Fire is symbolic of maximum activity—of extroversion, growth, and living life to its fullest. When in balance, the fire element can infuse us with a love of life and inspire us to connect—both with others and with our own innate creativity. Too much summer intensity, however, like too much of any good thing, can throw us out of balance. The following tips can help you harness the power of your fire energy without burning out.

To balance the heat of summer, we need a diet that is cooling and hydrating. If raw foods aren't already a part of your diet, summer can be a great time to begin incorporating more of them, as our bodies tend to crave lighter fare during the hot months. Look around for a local farmer's market where fruits and vegetables tend to be fresher than those in the supermarket. Whenever possible, choose organic. Caffeine, alcohol, and spicy foods should be avoided altogether or consumed in moderation.

"Indeed, watermelon juice has long been used as a remedy for dehydration and is an excellent antidote to summer heat."



Since fire is summer's element, we're instinctively drawn to its opposing element, water, as we head to the beach, or step into a cool shower, or reach for another slice of watermelon. Indeed, watermelon juice has long been used as a remedy for dehydration and is an excellent antidote to summer heat. Other cooling foods include cucumber, mint, coconut, summer squash, fennel, cilantro, and aloe vera.

In addition to adjusting our diet to maintain balance during the heat of summer, we can adjust our yoga practice by incorporating poses that are more cooling and grounding. Forward bends, such as the seated forward fold known as Intense Stretch of the West, Wide-Angle Seated Forward Bend, Wide-Legged Forward Bend, and Head-to-Knee Forward Bend can help cool the body and quench excess fire. Supported Bridge Pose and Legs-Up-the Wall Pose also are excellent, as is the yin yoga-style Butterfly Pose. Chandra Namaskar, or Moon Salutations, are a cooling, lunar variation of the more vigorous, heating sequence of poses known as Surya Namaskar, or Sun Salutations.

So even if global warming has you lip-syncing along to Disco Inferno this summer, there's no need to lose your cool … or your balance!

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

POTUS Gives Some DREAMers a Chance

The Department of Homeland Security has announced a plan to allow qualified undocumented youth to apply for deferred action. While the policy does not provide a path to lawful permanent residence, applicants may be eligible for work permits. The news bodes well for thousands of young people who were brought to and raised in the United States by their parents and, consequently, know no other country. The application process is still in the works. In the meantime, check out AILA and American Immigration Council's resources for comprehensive coverage, including a consumer advisory in English and Spanish.

SCOTUS and SB 1070: Three Provisions Die, One Lives On

In a long-awaited decision, the U.S. Supreme Court invalidated three provisions of Arizona's controversial immigration law, SB 1070, because they preempted federal law. The 5-3 vote, however, upheld the provision that authorizes law enforcement officials to question the immigration status of those whom they have a "reasonable suspicion" of being in the United States illegally. AILA and the American Immigration Council offer extensive resources chronicling the trajectory and implications of *Arizona v. United States*.

Visitors to U.S. Spend Big Bucks in May

New data released by the U.S. Commerce Department shows that international visitors spent nearly $14 billion on travel to, and tourism-related activities within, the United States in May—$1 billion more than was spent in May 2011—marking 29 straight months of growth.

Enter the 2012 'Change in Motion

The American Immigration Council is sponsoring a Multimedia Contest open plays in their lives and communities through video and other multimedia pro on our everyday lives. To learn more, visit AIC's "Change in Motion" webpag

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CIVIC Receives Fellowship from Echoing Green

Echoing Green, whose mission is "to unleash next generation talent to solve the world's biggest problems," has awarded a fellowship grant to Community Initiatives for Visiting Immigrants in Confinement (CIVIC). Its $2 million in seed funding will be dispersed among 36 recipients including CIVIC. "These social entrepreneurs will stop at nothing to achieve positive social change," said Cheryl L. Dorsey, president of Echoing Green and a 1992 Fellow. CIVIC is the first organization in the United States working to end the isolation and abuse of persons in immigration detention by building and strengthening community visitation programs across the United States. CIVIC was launched by Christina Fialho and Christina Mansfield, who are both on the Steering Committee of the Detention Watch Network, and they co-founded the first immigration detention visitation program in California prior to launching CIVIC.

June 13–16, 2012

AC180 nashville

Meet the AC180 Winners!

AC180 was AILA's first social media competition with the goal of promoting the use of social media within our membership, and culminating at our biggest event of the year—the 2012 Annual Conference in Nashville.

February

Lindsay Curcio for her award-winning blog.

March and April

Camille Mackler for her variety of advocacy activity, including tweets, Facebook posts, and blog posts; also for her commercial spoof for this year's Annual Conference.

May

Randall Caudle for his series of on-site Nashville videos highlighting the venue for this year's Annual Conference.

' Multimedia Contest

to young adults 14 to 25 years old. The competition challenges young adults to explore the role that immigration jects. Projects should focus on celebrating America as a nation of immigrants as well as immigration's impact e. Deadline has been extended to October 31.

WHAT'S HAPPENING!

THE 4-1-1:

Texas Chapter members **Edward Rios** and **Kathleen Campbell Walker** graduated from the Customs and Border Protection's Citizens Academy in the Port of El Paso on April 25. During the six-week course, participants learned, among other things, how to use a taser, inspect agricultural products, and detect fraudulent documents.

Southern California Chapter member **Victoria Duong** has become a partner at Stone & Grzegorek LLP.

Colorado Chapter member **Atim Otii** coaches a basketball team composed of Ugandan refugee teens.

Philadelphia Chapter members **Ron Klasko** and **Bill Stock** of Klasko, Rulon, Stock & Seltzer, LLP, have been named two of the "Most Powerful Immigration Attorneys" in the country by *Human Resource Executive* magazine. In the June 16, 2012, edition of the magazine, only 20 lawyers in the country received this distinction.

Reid Trautz, AILA's Practice and Professionalism Center Director, has been named one of the Fastcase 50 for 2012. The award honors "the fifty most interesting, provocative, and courageous leaders in the world of law, scholarship, and legal technology."

Washington State Chapter member **Lydia G. Tamez** has joined FosterQuan, LLP as partner. Previously, she served as associate general counsel for Microsoft Corporation.

AILA-DC Chapter Members **Andres Benach**, **Dree Collopy**, **Jennifer Cook**, and **Thomas Ragland** have opened Benach Ragland LLP in Washington, D.C., to focus on litigation before the immigration and federal courts.

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CELEBRATING 25+ YEARS OF AILA MEMBERSHIP

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Saiko Y. McIvor 7/25/1987
Marcia N. Needleman 7/27/1987
Ronald R. Rose 8/24/1987
Mary Corbett Stevenson 7/23/1987

Kathleen M. Weber 8/7/1987
David C. Whitlock 8/10/1987
Jimmy Wu 8/7/1987
Alfred Zucaro, Jr. 7/2/1987

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Carol Hildebrand 8/4/1982
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35 YEARS

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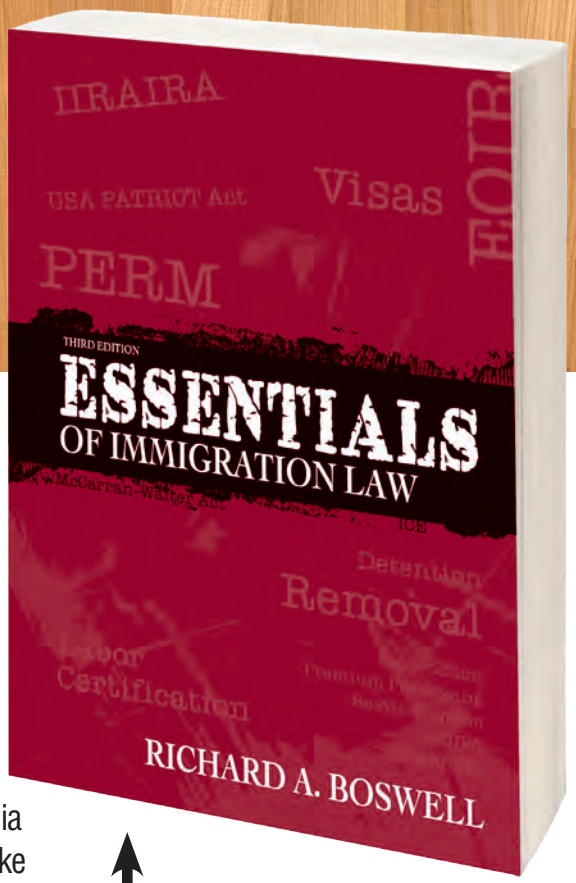

The third edition of ***Essentials of Immigration Law***, by University of California Professor Richard Boswell, will put you in step with all the elements that make up the complicated U.S. immigration system. It condenses the complexities of immigration law down to its foundational elements and principles—from its inception in the United States, to the system that practitioners work within today. An excellent reference for new immigration lawyers, law students, and paralegals, it covers everything from asylum to citizenship/naturalization, from consular processing to administrative/judicial review and everything in between.

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