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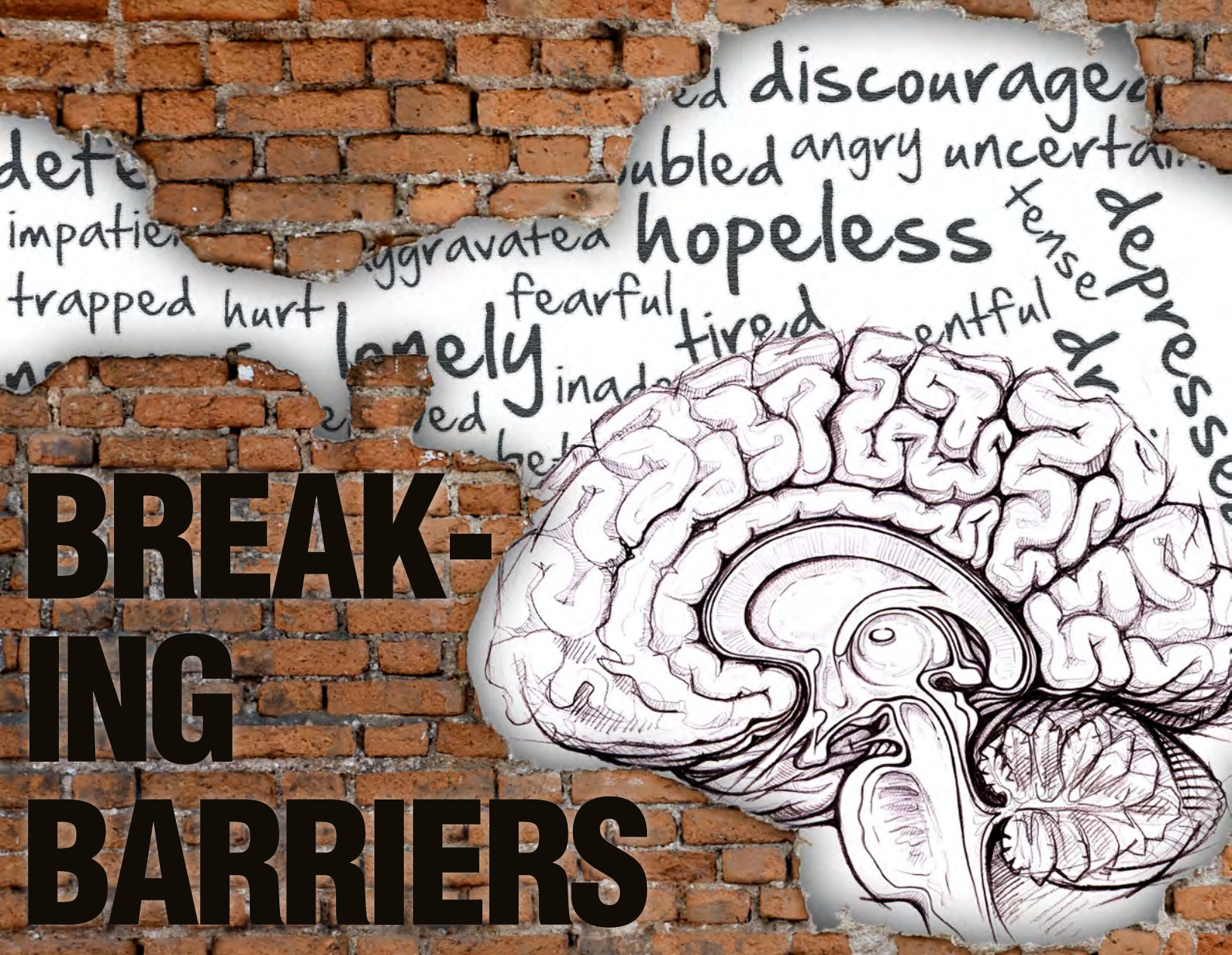

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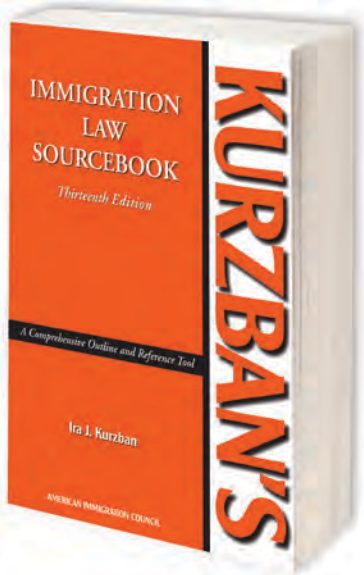

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—***Shirley MacLaine**, actress*

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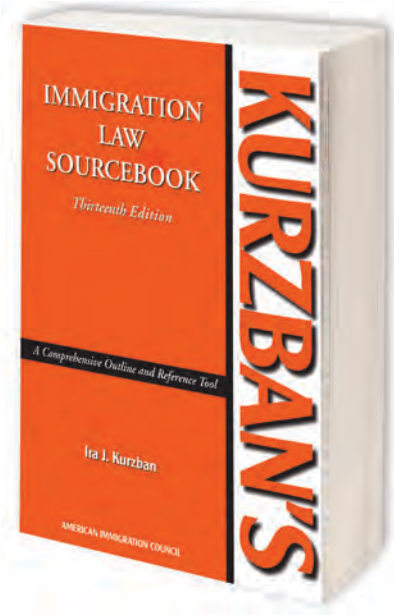

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Ethical Issues in Preparing for the Visa Interview

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When a lawyer declines to accept a legal matter, it is best to communicate that declination to the declined client in writing, by a non-engagement letter, to avoid any misunderstanding. Non-engagement letters should expressly inform the prospective client that the law firm has not provided any advice regarding the legal matter and will not represent the prospective client in that matter. The letter should make it clear that the prospective client should not rely on the lawyer for any advice or legal action, and, if appropriate, state that no confidential information was received.

When declining to represent a client in a legal matter, lawyers should be careful not to give any legal advice or opinion regarding the prospective client's claim. Any such advice can provide the basis for a later malpractice claim against the lawyer if it turns out that the advice or assessment was wrong and the prospective client relied on that advice to his or her detriment.

In addition, when representing a client in a matter in which there are unrepresented parties, make it clear to those unrepresented parties that you do not represent them and will not protect their interests. Sending non-engagement letters clarifying who is and is not your client may help prevent a claim.

If you are an AILA Professional Liability policy-holder already, you may access more information about risk management topics at the lawyers' risk management web site, which is provided to you by The Hanover as a value added service. Contact your agent to obtain your login and password. If you have not purchased professional liability coverage through your AILA program, contact Wells Fargo today at ***getquoted@aila.org*** *to obtain a quote.*

WELLS FARGO

AILA LAWYERS PROFESSIONAL LIABILITY INSURANCE
The Member Advantage

POSTED BY Christine Mehfoud

E-Verify Required: 17 States and Counting

As predicted in my May 2011 blog on the U.S. Supreme Court's decision upholding Arizona's E-Verify mandate, several states have followed suit and mandated E-Verify participation for certain private employers. E-Verify is a "free" and "voluntary" Internet-based system operated by U.S. Citizenship and Immigration Services in partnership with the Social Security Administration, which employers can use to electronically verify the employment eligibility of newly hired employees. Although there is no direct cost imposed by the government on employers for participating in E-Verify, the system's requirements add significant administrative costs for participants. Participation in E-Verify is still considered "voluntary," but many employers are now required to participate as a result of their federal contracts or mandates by the states within which they employ workers.

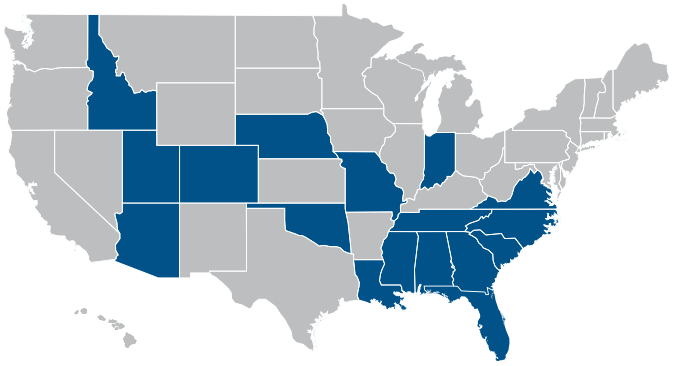
States Run Amuck

As of December 7, 2011, 42 states and Puerto Rico had enacted more than 300 new immigration-related laws or resolutions. Of most importance to employers and businesses are the states that enacted laws regarding E-Verify participation. At the start of 2012, E-Verify requirements for private employers became effective in Georgia, South Carolina, and Tennessee, and all employers in Alabama must implement E-Verify by April 1, 2012. According to the National Conference of State Legislatures, 17 states now require E-Verify for public or private employers.

While this list will not remain current for long, employers operating in at least the following states should pay attention to state E-Verify requirements: Alabama (2011); Arizona; Colorado; Florida (2011); Georgia (2011); Idaho; Indiana (2011); Louisiana (2011); Mississippi; Missouri; Nebraska; North Carolina (2011); Oklahoma; South Carolina (2011); Tennessee (2011); Utah (2011); and Virginia (2011).

While many of these states impose E-Verify requirements on state agencies and public contractors only, by my count, Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Utah require certain private employers to participate in E-Verify.

STATES WITH E-VERIFY REQUIREMENTS



Some States Still Holding Out

A few states are moving in the opposite direction. In 2011, Rhode Island rescinded a 2008 executive order requiring use of E-Verify, and California passed a law prohibiting all states and localities from mandating the use of E-Verify—except as required by federal law or as a condition of receiving federal funds.

Unfortunately for employers, this piecemeal implementation of immigration-related requirements means that many companies will have almost as many immigration-related policies and procedures as there are states with E-Verify mandates. Throw in federal contracts and private contract E-Verify mandates, and the number of different procedures applicable to one company quickly becomes unruly. Companies operating in multiple states need to become familiar with the nuances of each of those state's E-Verify mandates and develop procedures accordingly.

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 **Jonathan L. Moore**

Getting Queued Up: The Nuts and Bolts of 'Government Error' Motions

The PERM labor certification process is grueling and tedious. As a result, it is deflating for employers, beneficiaries, and counsel when the process culminates in a denial, especially when the denial is based on an obvious factual or legal error by the Department of Labor (DOL). An important tool for addressing these errors is the "government error" queue for motions to reconsider.

What is the Government Error Queue?

When an employer files a motion to reconsider a PERM denial, the motion goes into one of two DOL processing "queues"—the "government error" or the "regular" reconsideration queue. The "government error" queue is available for applications where clear error by DOL was the sole basis for denial. *See* DOL, Permanent Labor Certification FAQs: Appeals (Dec. 1, 2009). (These PERM Appeals FAQs are incorporated into the current PERM FAQs listed on DOL's website). DOL reviews each "government error" motion individually and assigns it to the queue it deems appropriate. DOL does not notify employers about which queue it assigns a motion. Instead, according to October 28, 2010, liaison minutes, unless DOL contacts an employer within 45 days of filing, the employer should assume DOL placed the motion in the "regular" processing queue.

The processing time for the "government error" queue is substantially shorter than the "regular" reconsideration queue. As of March 2012, the government error queue was "current," meaning that motions were being processed within 45 days. *See* DOL, Welcome to the iCERT Visa Portal System (This information is also located in the "PERM Fact Sheet."). By comparison, DOL was still processing "regular" reconsideration requests for PERM applications filed in October 2010. *Id.*

Defining Clear Government Error

What constitutes government error is open to interpretation—DOL's interpretation, that is. According to the PERM Appeals FAQs, DOL makes clear that "[t]he Department determines what constitutes a Department error." If the application was denied on multiple grounds, DOL must agree that each ground constitutes government error. *Id.* Otherwise, the motion is placed in the "regular" queue. *Id.*

Stakeholders may believe that most denial decisions are the result of government error. However, for purposes of the government error queue, DOL's definition is narrow. For example, DOL states that clear government error occurs if the denial is based on failure to respond to an audit, but the employer can prove that it filed an audit response or that it never received an audit response letter. *Id.* Another example is a denial due to a data entry error on a mailed-in PERM application. *Id.* In liaison minutes from January 2012, DOL stated that denials based on recruitment not containing the *Kellogg* language also qualify for the "government error" queue.

Unlike "regular" motions to reconsider or requests for review with the Board of Alien Labor Certification Appeals, government error motions are not explicitly enumerated in the PERM regulations. This presents a double-edged sword. On the one hand, there are no narrow regulatory limitations on what constitutes government error. Thus, a "government error" motion is possible whenever there is a reasonable argument—even a creative one—for why the denial was based solely on government error. On the other hand, the lack of regulatory guidance opens the door for inconsistent determinations, even in virtually identical cases.

Preparing the Motion

Aesthetics are important for government error motions. The DOL PERM Appeals FAQs suggest a "brightly colored cover sheet" stating that the basis of the appeal is government error. This cover sheet should include language, such as "GOVERNMENT ERROR QUEUE" in bold, large font, followed by identifying information about the PERM application being appealed. Similarly, the first page of the motion should include language clearly indicating that it is a government error motion. The first paragraph should succinctly summarize why the denial was erroneous, and why that error constitutes clear government error.

Counsel should consider what is submitted with the motion—DOL may scoff if numerous exhibits are needed to explain a "clear error." However, counsel must balance this concern with the need to include evidence in the record before the certifying officer for appellate purposes, consistent with the limits imposed by 20 CFR §656.24(g)(2). Also, some government error motions must include particular evidence. For example, the PERM Appeals FAQs state that when the denial was based on failing to respond to an audit request, the employer must provide "proof of its audit response or proof it never received an audit request letter."

Ultimately, whether DOL will cry "mea culpa" in response to a government error motion is anyone's guess, even in denials most practitioners would consider egregious. However, when used strategically and prepared properly, the government error motion can resolve in weeks what otherwise could take years.

Jonathan Moore *is an associate with McCandlish Holton, PC. His practice includes PERM filings, audit responses, and appeals. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

JUMP-S+

The Jumpstart Our Business Startups (JOBS) Act, signed by President Barack Obama on April 5, 2012, aims to ease the regulatory burden on small companies that are in the process of raising capital. This article analyzes the new law's impact on the EB-5 industry. It is a very general summary of many complex securities law issues. Please consult your own professional advisors for advice applicable to your particular circumstances.

EB-5 and Securities Law Before the JOBS Act

One immediate misunderstanding is that the JOBS Act gives a regional center (or other EB-5 practitioners) a green light to ignore a Securities and Exchange Commission (SEC) lawyer's ranting. Do regional centers no longer need to comply with the securities laws? While the JOBS Act gives the regional center more leeway to market EB-5 securities, it does not exclude regional centers and the principals of EB-5 projects from continuing to comply with securities law.

When you approach an investor to invest in your EB-5 project, you are engaged in the offer and sale of securities. This activity is regulated by state and federal securities laws, including the Securities Act of 1933 (1933 Act), which focuses on the offering and sale of securities; and the Exchange Act of 1934 (1934 Act), which addresses, among other things, the actions of issuers and broker-dealers in connection with selling securities.

A general misconception from companies seeking to raise money via the EB-5 program is that securities law compliance should be a low priority. No doubt companies with this attitude are unaware that they are placing the funds they raise via EB-5 at risk of forfeiture to SEC and/or recovery by their investors.

The 1933 Act requires that all offerings of securities be registered with SEC unless the offerings can be made pursuant to an exemption from registration. Registration

BY YI SONG // EDITED BY CLEM TURNER

What the

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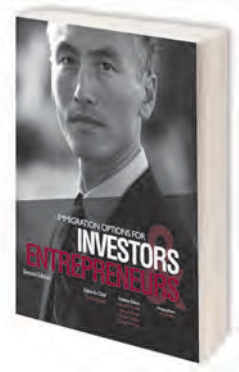

is an expensive, time-consuming process that imposes costly ongoing reporting requirements on issuers of securities. Most EB-5 projects (and, in fact, most companies that raise funds by selling securities) rely on exemptions to avoid registration. The most common exemption from registration under the 1933 Act is set forth in Regulation D. Regulation D outlines the rules for small private offerings. In addition to Regulation D, EB-5 issuers also are able to take advantage of Regulation S, which is an exemption exclusively for overseas offerings. It is possible to rely on more than one exemption, which is common practice in EB-5 issuances. Attempting to meet the criteria for two exemptions provides an EB-5 issuer with a back-up plan in case the requirements for one of the exemptions are inadvertently violated or unsatisfied.

Regulation D

Regulation D consists of several sub-exemptions based on the number of investors and the amount of the offering. An offering under Rule 506 of Regulation D is the most flexible, allowing an unlimited amount of "accredited investors" to participate in the offering (and 35 unaccredited investors, though it is generally not wise to sell to any unaccredited investors), with no limit on the amount of capital raised. Generally, an accredited investor has annual income greater than $200,000 (or $300,000 with his or her spouse) or a net worth of more than $1 million, not including his or her principal residence. Issuers relying on the Regulation D exemption could not engage in any general solicitations and advertising related to their issuance.

Regulation S

Under Regulation S, there is no prohibition on general solicitations, per se. However, there cannot be any "directed selling efforts" in the United States. Also, the securities cannot be sold to any "U.S. Persons." Regional centers typically use overseas brokers who can engage in solicitation activities abroad. To qualify for this exception, however, none of these activities can spill into the United States, and the actions of these broker/dealers are subject to the registration and anti-fraud provisions of the 1934 Act, to be discussed later in this article.

Understanding the JOBS Act

The JOBS Act is actually a collection of six separate acts that are categorized under the JOBS Act as "Titles." These Titles were promulgated to collectively ease the restrictions on the capital-raising activities of small companies. The provisions of the six Titles set forth in the JOBS Act are summarized generally below.

TITLE I—Reopening American Capital Markets to Emerging Growth Companies Act: This Act, dubbed the "IPO On-Ramp" by securities practitioners, facilitates and simplifies the registration rules and processes in connection with an initial public offering (IPO) for a newly created category of company. This new category is referred to as an "emerging growth company" and is generally defined as an issuer with total gross revenue of less than $1 billion. Because EB-5 projects are exclusively conducted as private offerings, this Title does not affect the existing EB-5 industry until some adventurers decide to complete an IPO. Registering one's securities publicly entails ongoing reporting requirements for both the →

JOBS Act Means for EB-5 Capital Raises

issuer (including the requirement to produce audited financials) and its principals, so it is doubtful that an EB-5 practitioner will consider entering the "IPO On-Ramp" in the near future.

TITLE II—Access to Capital for Job Creators Act: Title II of the JOBS Act (along with Title V) may be the most relevant for EB-5 projects. Title II provides a loosening of the rule, prohibiting general solicitation and advertising for Regulation D offerings. This new rule makes the prohibition on general solicitation inapplicable to Rule 506 offerings, so EB-5 issuers relying on Rule 506 of Regulation D will be allowed to market their offerings to the general public. One word of caution: remember that Regulation S requires that no sales efforts be directed within the United States. Therefore, regional centers or EB-5 project principals should not market EB-5 projects via any website or program that can be accessed or viewed in the United States. You should discuss any general solicitation plans with your securities attorney.

The removal of the general solicitation restriction mandates that all investors in the Rule 506 offering be accredited. Furthermore, the JOBS Act requires issuers to take "reasonable steps" to verify that the investor is actually accredited. Presently, EB-5 practitioners rely on investors' suitability questionnaires—an informal "check the box" self-reporting system. SEC has not yet provided guidance on the implementation of the new rules, so it is not clear if the present form of "check the box" suitability questionnaire will meet the "reasonable steps" requirement. Investors may be required to provide additional information on future suitability questionnaires. EB-5 issuers should continue to obtain representation and warranties from their investors regarding accreditation and other matters as the solicitation proceeds.

TITLE III—Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 or the "CROWDFUND Act": This Title is referred to as the "Crowdfunding" exemption. Title III permits securities registration exemptions for raising capital in

small amounts from large numbers of individuals via the Internet, including social media websites. The key provisions of Title III are:

- An issuer is permitted to sell up to $1 million in securities in any rolling 12-month period, provided the issuer has met certain requirements, such as initial and periodic disclosures to SEC; and
- Each investor may not purchase securities in excess of $2,000 or a percentage of such investor's annual income or net worth, up to a maximum of $100,000 (USD).

This section is not particularly relevant to the EB-5 industry because investors must invest a minimum of $500,000 for EB-5 projects in targeted employment areas (TEA) and $1 million for EB-5 projects in non-TEAs. These amounts exceed well beyond the $100,000 cap imposed by Title III. Therefore, an EB-5 issuer could only use crowdfunding as an alternate source of non-EB-5 capital.

TITLE IV—Small Company Capital Formation Act: This Title amends Regulation A of the 1933 Act. Regulation A allows a small company to offer shares to the public in a general solicitation without satisfying all of the onerous requirements of a normal IPO. Title IV increases the amount of capital that can be raised under Regulation A from $5 million to $50 million (USD). Under the current federal law, all securities offered under Regulation A can be freely resold and transferred.

Again, the applicability of Title IV to the EB-5 industry is limited. With the easing of the Regulation D to allow

"The consequences of failing to accurately and adequately disclose all material facts regarding an EB-5 capital raise in a PPM can be severe."

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for general solicitations, the main distinction between Regulation A and Regulation D is that Regulation D shares are not freely transferable. Given the very specific nature of an EB-5 security and the fact that EB-5 issuers promise EB-5 investors very little return after the return of principal, it is doubtful that a non-EB-5 investor would be interested in an EB-5 security. Furthermore, under immigration rules, the EB-5 investor cannot transfer the investment until after his or her I-829 is adjudicated.

EB-5 issuers considering a Regulation A offering due to its loosened rules on the transferability of the securities, and the fact that there is no prohibition on general solicitation, should keep in mind that an offering circular more expansive than a Regulation D private placement memorandum is required. Furthermore, after registration, Regulation A mandates ongoing disclosure requirements, including annual audited financials.

TITLE V—Private Company Flexibility and Growth Act: This Title also has significant consequences for the EB-5 industry. Before the JOBS Act, the 1934 Act required an issuer with more than $10 million in assets AND whose securities are held by 500 or more holders to register with SEC. The registration requires onerous disclosure documents. The issuer must also file annual and quarterly statements with SEC, as well as issue reports whenever any positive or negative newsworthy events occur. In addition, certain principals of the company are also subject to reporting obligations. Therefore, to avoid the registration requirement under the 1934 Act, no EB-5 project to date has had more than 499 investors. Since most EB-5 projects are located in TEAs that allow for an investment amount of $500,000, the de facto limit on EB-5 capital raises has been $249,500,000.

As a result of Title V, the threshold on the number of securities holders requiring a company to undergo SEC registration has been raised from 500 to 2,000, so long as not more than 499 shareholders are unaccredited. Assuming an EB-5 issuer does not sell to any unaccredited investors, an EB-5 capital raise for a project in a TEA area can now reach almost $1 billion before mandatory registration occurs. This makes it possible for much larger projects to avail themselves of EB-5 capital.

TITLE VI—Capital Expansion Act: This section has a similar effect to Title V, but it applies to banks and bank holding companies. Accordingly, it is inapplicable to EB-5 offerings.

What Remains the Same

Despite some relaxation in the marketing of securities and the increase in the maximum amount that can be raised, EB-5 issuers should note that neither the Anti-Fraud Provisions nor Potential Broker-Dealer Liability issues has changed.

SEC's requirements that issuers provide "full and fair disclosure" in compliance with Rule 10(b)(5) under the 1934 Act remains in full force and effect. What does "full and fair disclosure" require? Issuers must provide disclosure to potential investors before their investment decision of all "material facts" that a "reasonably prudent person" would consider important in making an investment decision. In addition, the issuer must not omit to disclose any material facts.

It is due to liability under Rule 10(b)(5) that creates the need for an EB-5 issuer to deliver a Private Placement Memorandum (PPM) to all potential investors. This PPM must not only be truthful, but it must be "complete" in terms of describing all material information about the issuer and the project. In addition, because this financing is being effectuated via EB-5, facts and circumstances about the EB-5 program and relevant immigration laws must →

also be disclosed and discussed in the PPM. Other key facts, such as the various entities and managers involved with the project and the regional center overseeing the project should also be described, and any inter-relationships and potential conflicts of interest should also be disclosed.

The consequences of failing to accurately and adequately disclose all material facts regarding an EB-5 capital raise in a PPM can be severe. SEC has very broad powers to ensure that all investors purchasing securities can do so based on adequate information. SEC can issue cease-and-desist orders, launch investigations, file injunctions, compel appearances by principals and witnesses, and issue civil and criminal fines and penalties. The penalties vary from $5,000 to $500,000 or can equal the gross amount of pecuniary gain to the issuer as a result of the violation.

Furthermore, SEC also has expansive power to criminally prosecute any person who willfully violates its rules and regulations, including 10(b)(5). Upon conviction of an SEC violation, a person can be fined up to$10,000 or imprisoned up to five years, or both.

Finally, the securities laws give investors who may have been provided with an inaccurate or inadequate PPM a private cause of action to sue in either state or federal court. These investors can recover the entire purchase price of the security, with interest, essentially giving them the right to recapture their entire subscription amount.

Unregistered Broker/Dealer Liability

The 1934 Act says it is unlawful for any broker/dealer to "effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security" unless that broker or dealer is registered with SEC. EB-5 issuers are still prohibited from utilizing unregistered brokers to solicit investors. Any third-party (including an attorney) who introduces investors to a regional center marketing an EB-5 offering and receives transaction-based compensation is regarded as a broker-dealer who must be registered with SEC.

Some regional centers simply label their unregistered broker as an "investor finder." This, however, will not shield them from liability. If a third-party participates in important parts of the securities transaction, including solicitation, negotiation, or execution of the transaction and/or receives compensation based on the number of investors he or she brings into the offering, it is likely that he or she will be regarded as a broker. A legitimate

"investor finder" merely introduces a potential investor to the regional center in exchange for a fee that is not contingent on whether that investor ultimately invests in the EB-5 offering.

All registered broker/dealers should be located on the Financial Industry Regulatory Authority's (FINRA) website. FINRA is the largest independent regulator for all registered broker and brokerage firms. In addition, some states also require registration of broker/dealers.

There are adverse legal consequences for unregistered broker/dealers engaged in the sale of securities, as well as for the EB-5 issuer. The unregistered broker/dealer could be subject to injunctive or disciplinary action, the prohibition of such person or company from registering as a broker-dealer in the future, and exposure to investor suits, fines, and penalties, and even criminal prosecution. An EB-5 issuer using an unregistered broker/dealer could be subject to fines, investor suits, and possibly criminal prosecution. In addition, SEC could subject such EB-5 issuers to increased scrutiny of future securities offerings.

The JOBS Act expands marketing opportunities and investment limits for small companies in regard to raising capital. This is good news for the EB-5 community. However, as projects and deal structures grow more complicated, securities compliance will be even more vital in EB-5 capital raises.

Comments? use your VOICE

For large scale investment projects, an EB-5 issuer may some day consider registering with SEC in order to access more investment options for its securities holders/investors. The fierce competition and ever-changing legal regime also mandate higher standards for EB-5 attorneys. EB-5 legal practice not only requires the comprehensive understanding of all relevant immigration laws, but it also increasingly requires a comprehensive understanding of the economic impact of each project, securities law, corporate law, and financial due diligence. The ultimate goal of any EB-5 attorney should be to advise regional centers and other EB-5 participants on how to build a long-lasting reputation and manage successful projects.

Yi Song *is an associate attorney at Mona Shah & Associates. Clem Turner is a business and corporate attorney and the managing shareholder of the New York office of Homeier & Law, P.C. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

Immigration law and the Psychologist

BY DR. MEGAN SELTZ

Psychological problems are rooted in a variety of strong biological, social, and behavioral bases.[1] Life stressors can exacerbate mental illness and result in protracted mental health problems. These problems can be particularly difficult to express when factoring in a person's cultural influences. And while immigrant clients and their relatives often face emotional and mental issues stemming from immigration proceedings, not all clients or their attorneys are aware of the value that a psychological evaluation can bring to their cases. When presented by a licensed professional, psychological evaluations can help immigration judges (IJs) evaluate cases more fairly.

Immigration attorneys often collaborate with expert psychologists in cases where presenting their clients' emotional and mental functioning is essential to a successful outcome. "I have used psychological evaluation of my clients in preparing cases for cancellation of removal and I-601 hardship waivers," said Carol Wolfenson, an immigration attorney. "I previously used social workers reports, but have found that the immigration judges are more impressed and influenced by the reports/testimony of a licensed clinical psychologist," Wolfenson added. "It is harder for an IJ to deny that there is extreme and unusual hardship where a doctor has assessed a family and found serious problems."

Alexis Pimentel, an immigration attorney in New York, believes a psychological evaluation is even more important when a client faces language barriers or the inability to express him- or herself. "The use of a psychologist is extremely important to ascertain the veracity of the client's claim," said Pimentel. "Quite often, clients have difficulty verbalizing their issues and conditions to the judge. The psychologist['s] report and testimony give credibility to the client's claim and assure the judge that there is concrete medical data to support [his or her] decision."

"The client is better prepared to explain the experience and its impact to the judge, because it has been processed through the evaluation and in therapy."

—Usman Ahmad

Case in Point: General Anxiety Disorder

A previously undiagnosed 5-year-old knows that his parent is "not legal" and "must go to court." He fears that his father will be returned to Ecuador, which he perceives to be a dangerous place. The child describes dreams involving monsters and forces that harm his family, causing him to wake up in the middle of the night. He stays in bed as not to disturb his parents, but is clingy and cries easily during the day. He is preoccupied at school about the whereabouts and fate of his parents, and worries that his siblings may suffer untimely death. The school officials notice that he appears distracted, but is unsure why and simply notes it in a report card. The child reports stomachaches and headaches, but his pediatrician can find no medical basis. When asked to draw a picture of what makes him happy and sad, he presents pictures of family together playing in the park for the former and pictures of his father leaving the family home with bags packed for the latter. If deported to Ecuador, the child's pre-existing anxiety, coupled with the real environmental dangers and lack of opportunity in Ecuador, could exacerbate the Generalized Anxiety Disorder, resulting in what may be lifelong impairment. This long-term damage could be averted by a psychologist's report or testimony, which can prevent deportation of the boy's father. →

ILLUSTRATION BY BRADLEY AMBURN
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"If a psychologist diagnoses a client as having a mental or emotional disorder, he or she can supply the client with appropriate referrals, or depending on the nature of the problem, the expert may treat the client."

BARRIERS TO SEEKING HELP

Many clients, even those with extreme psychiatric problems, may resist pursuing treatment based on personal or cultural factors.[2] For example, there may be a strong cultural stigma against emotional openness. Additionally, some clients may fear seeking help because they distrust Western mental health practices.

Others may be concerned that, by talking about their problems, the problems may worsen. They may prefer to confide in religious authorities or family members instead of clinicians. This, however, does not always properly address the illness in a medically appropriate manner. Still others lack health insurance or access to services in their native language. A client's symptoms may be misidentified by medical providers who are unaware of the person's background, and, thus, do not identify the symptoms to be part of a mental or emotional illness.

Other adult clients describe having an aversion to psychological evaluation because they want to "move forward" and "keep the past in the past." Others feel drained by the case and choose not to seek help for themselves or their children. This resistance to seeking psychological help for mental or emotional illness explains why many individuals' disorders are undiagnosed at the time attorneys refer them for a psychological evaluation, and why many do not follow through with treatment even after receiving a diagnosis. IJs often express curiosity about this lack of treatment follow-through, and some judges may even demand treatment compliance as a condition to granting requests.

"In cases of domestic violence and client trauma, the evaluation is likely the first time [when] the client has spoken about what happened," said Attorney Usman Ahmad, who uses psychological evaluations for many cases in which the immigrant client has suffered abuse or in which a U.S. citizen (USC) would suffer hardship if separated from an immigrant family member. "Psychological evaluation has value for court preparation and testimony," he added. "The client is better prepared to explain the experience and its impact to the judge, because it has been processed through the evaluation and in therapy."

Case in Point: Post-Traumatic Stress Disorder

A client, also a recent immigrant, suffered physical abuse at the hands of her USC spouse. He used his status to intimidate her. She was pushed, hit, humiliated, forced into sexual acts, and instructed to remain in the house. In her family of origin, subservience was expected, so she did not seek emotional support or contact authorities. After eventually leaving her husband, the client experienced chronic fearfulness, social isolation, suicidal ideation, and numbing. She also perceived that she was reliving her trauma. She has frequent thoughts that "life is not worth living" and overwhelming urges to stab herself. Also, she suffers insomnia, muscle tension, and chronic stress. In her situation, removal from the United States would almost certainly exacerbate her post-traumatic stress disorder (PTSD) or depression, and may lead to suicide.

TYPES OF ILLNESSES AND TREATMENT

Reactive (or exogenous) mental illness usually stems primarily from extreme outside stressors, which, for clients in immigration proceedings, often include the immigration cases in which they are involved.

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As a result, he or she may internalize the stress of the case, fear loss of resources or family, and exacerbate the pre-existing psychological conditions or distress due to detention.

Organic mental illness, by contrast, exists independent of an immigration case. A percentage of the population struggles with symptoms of psychosis, autism spectrum disorders, mental retardation, attention deficit/hyperactivity disorder, and other mental disorders that exist even without an external stressor. However, stress can easily worsen the symptoms of an individual with an organic disorder. Organic psychiatric problems often go undiagnosed due to failure to seek professional help.

Doctoral-level psychologists are trained diagnosticians, and they are often familiar with academic and legal literature that may be helpful when conducting a psychological evaluation for the purpose of an immigration proceeding. If a psychologist diagnoses a client as having a mental or emotional disorder, he or she can supply the client with appropriate referrals, or depending on the nature of the problem, the expert may treat the client. Recommendations may include future consultation, individual or family psychotherapy, neuropsychological evaluation, and/or school consultation.

Comments? use your VOICE

Attorneys should know that because length, type, and quality of training of mental health practitioners vary significantly, treatment requested for their clients should be goal-directed, empirically validated, and administered by a licensed professional. The attorney also can encourage his or her client to follow through with any treatment recommendations. A good treatment is designed to benefit the client and should be based on clinical necessity.

Dr. Megan Seltz *is an English– and Spanish-speaking 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. *The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 G. L. Engel, "The need for a new medical model: A challenge for biomedicine," *Science*, 196, 129–136 (1977).

2 *See* Surgeon General, Mental Health: A Report of the Surgeon General.

POETIC JUSTICE

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

Immigration Matters

mother of five
hard working builder
hotel maid or waiter
vegetable picker

engineer, doctor, nurse, entrepreneur

the job does not matter
the work hours do not matter
the size of the family does not matter
not even if you have an infant taken from your breast

government officers try to put on a friendly face
they ask for compliance, giving false hope,
they seek your obedience,
knowing they will separate you from your home

your family, your work, your money, your car
your community, your church, your children

none of that matters to anyone
no one
you don't matter to anyone

if it were Christ, born in Bethlehem
with no papers here
curing the sick
feeding the poor,
who would otherwise be on government welfare,
the government still would not care

they do not have to return to a country in disarray
a country full of poverty
a country where there is corrupt police
a home with a dirt floor
a home with a tin roof
next to a river filled with waste
next to an empty school because
parents are afraid to expose their kids to street violence

none of that matters to anyone
no one
you don't matter to anyone

after working here for years
after making a home however large or small
after establishing yourself in a faith community
after giving your heavy eyes and sweat and labor
this government does not care

if this government cared
if it mattered to focus on family unity
if individuals were treated like human beings

it would make a difference
you would matter
to everyone

your children doing well in school
being bilingual at home
would matter

your countless hours of work
seeking additional hours
would matter

your knowledge and research
for the non-discriminatory benefit of everyone
would matter

but today
none of that matters to anyone
no one
you don't matter to anyone

Attention AILA Members:

Fastcase Speeds Up Your Legal Research!

In an ongoing effort to provide AILA members with the latest tools and resources to assist in their practice, AILA is pleased to announce that all members have free access to Fastcase, including its database of decisions of the U.S. Supreme Court, federal circuit and district courts, as well as Board of Immigration Appeals precedent decisions.

AILA Executive Director Crystal Williams talks about Fastcase, AILA's newest member benefit!

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To start your research, log in to AILA InfoNet and click on the Fastcase icon on the right-hand side of the home page. If you've forgotten your InfoNet password, you can click on the "forgot password" link and AILA will e-mail your password to you. Once you've logged in to Fastcase, begin your research at the Fastcase "start page," which is customized for AILA members. At the top of the page, you can get started immediately with the Quick Caselaw Search option. This type of search works best with unique case identifiers such as reporter citations, docket numbers, or party names.

The Advanced Caselaw Search, also accessible from the start page, is Fastcase's full-featured search function. Here you can perform three different types of searches: keyword (Boolean), natural language, or citation searches. Advanced Caselaw Search also provides sophisticated searching and sorting tools to help you get the most from your research.

By default, your search results are sorted by relevance. However, you can also choose to sort by decision date, or by how often each case in your results list has been cited in other cases. Sorting your search results is a powerful way to bring your best results to the top of your list.

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Editorials, Comments, and Opinions

Senators, Stop Micromanaging L-1B

by
Cletus M. Weber

Weber is co-founder of Peng & Weber, PLLC in Seattle, is chair of AILA's Board of Publications, and editor-in-chief of AILA's Guide to PERM Labor Certification: Strategies, Samples, and Guidance for Achieving Success.

RELATED RESOURCES:
Sign-On Letter to President Obama Emphasizes the Importance of L-1 Visa Policy **(3/22/12) AILA Doc. No. 12032262**

WEB SEMINAR:
Intra-Company Transfer Visas: L-1s for Experienced Practitioners **(5/1/12)**

Senators Chuck Grassley (R-IA) and Dick Durbin (D-IL) sent U.S. Citizenship and Immigration Services Director Mayorkas a letter dated March 7, 2012 (AILA InfoNet Doc. No. 12030868), preemptively urging him "not to propose changes that would undermine the L visa program" and pushing him to let them know what changes he may have in the works. The concern, they wrote, is that "the L-1B program is harming American workers because some employers, especially foreign outsourcing companies, use L-1B visas to evade restrictions on the H-1B visa program."

The letter goes on to educate Director Mayorkas on the intricacies of "specialized knowledge" and to express their concern that "unscrupulous petitioners" may try to use the L-1B program for beneficiaries who "do not truly possess specialized knowledge." They also point out that L-1B beneficiaries may hold the status for "up to seven years," which is a legal error that only highlights the political, not legal, aim of the letter.

The essential point of the letter is a fallacious implication that "foreign" businesses that file L-1B petitions instead of H-1B petitions are somehow harming U.S. workers because such petitioners are doing what is legally less restrictive and financially less detrimental. Perhaps Senators Grassley and Durbin missed the guidance of Justice Learned Hand in *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934), aff'd, 293 U.S. 465 (1935): "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes."

Certainly, if there is no patriotic duty for individual Americans to increase their taxes, there is also no patriotic duty for U.S. businesses to choose the more costly and more restrictive H-1B path over the ostensibly less costly and less restrictive L-1B approach. Legitimately using the L-1B program does not "circumvent" the requirements imposed by the H-1B program. L-1B is simply another legitimate alternative.

In this regard, the senators' advice is at best contradictory. Most notably, the letter cites the January 11, 2011, Department of State "Guidance on L Visas and Specialized Knowledge" (AILA InfoNet Doc. No. 11012433) as the model USCIS should follow when interpreting "specialized knowledge," and that document states that the government should determine whether the L-1B beneficiary possesses "specialized knowledge" by comparing the beneficiary's experience, expertise, etc., against that of others in the company "or the field." But then the senators conclude their letter by complaining that a "comparison to the knowledge held by workers in the company's industry would be unacceptable and only undermine the specialized knowledge standard established by Congress"—a statement that directly contradicts the guidance they say USCIS should follow (emphasis added).

Rather than trying to use their fundamental misunderstandings of applicable law to preemptively impose upon Director Mayorkas's professional administrative judgment in developing and issuing guidance on the L-1B program, Senators Grassley and Durbin should focus their energies on other things.

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

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VOICE

BEHIND THE CASE

by Sheeba Raj

CASE: ***Vartelas v. Holder, No. 10-1211 (March 28, 2012)***

ATTORNEYS:
Stephanos Bibas and Nancy Morawetz

Argument Against Retroactivity Prevails Before Supreme Court

Lawful permanent residents who take short trips outside the United States may not be denied readmission because of criminal convictions that predate the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the U.S. Supreme Court held in Vartelas v. Holder, _ U.S. _ (No. 10-1211, Mar. 28, 2012). "The Government suggests that Vartelas could have avoided any adverse consequences if he simply stayed at home in the United States," the Court wrote. "But losing the ability to travel abroad is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members."

Stephanos Bibas, a professor at the University of Pennsylvania Law School and the director of its Supreme Court Clinic, offered representation to Vartelas, who was a pro se litigant at the time. Bibas and a large legal team took the case right after certiorari was granted last fall; they had only about a month and a half to prepare for oral argument.

"We actually changed the way the courts had been looking at it," Bibas said. "I think almost everybody, including [those who had written] the briefs below in our case and the opinions below, had been looking at the case issue solely as 'Is there reliance because of the plea bargain?' And, so, the new perspective we brought to the case was, 'Well, whether there's reliance or not, there's just a rule against retroactivity unless Congress is very clear, and the Court gives the benefit of that all the time to businesses and employers.'" Bibas added that immigrants should enjoy the same protections against retroactivity that everyone does, "and if Congress doesn't spell it out, then IIRAIRA in 1996 shouldn't change the consequences of pre-IIRAIRA convictions."

Not only did Vartelas's team face time constraints, but it also had to address the ineffective assistance of previous counsel. "The IJ had made findings that these lawyers had failed to show up and had failed to file briefs, so we had those findings down," Bibas said. He added that it was difficult to identify the different crimes to which Vartelas could have pled guilty. "And it's not always 100 percent clear whether a certain crime is a crime involving moral turpitude or not, so there was a lot of group brainstorming to come up with the right things that a good lawyer would have raised."

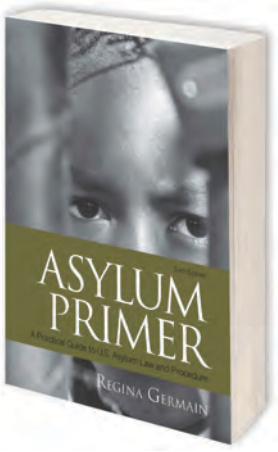
Bibas attributes the victory to his collaboration with immigration advocates. "We were blessed to have had the support of a lot of people in the immigrants rights community and we had worked with a lot of them on *Padilla*, so we knew them," he said. "The immigrants rights community was great in scrambling on very short notice. Each of us took perspectives and we really coordinated all those arguments. One person can't possibly do a good job on this."

Among those immigration advocates were Florida chapter member Ira Kurzban, New York chapter

BIA: IJ May Have Set Bar Too High

An immigration judge may have "imposed an unreasonable expectation" on a respondent to prove her persecutor's motive, the Board of Immigration Appeals (BIA) wrote in a March 30, 2012, unpublished decision involving an Egyptian woman and her minor son seeking asylum from persecution by Islamic fundamentalists.

"A persecutor may have several motives for harming a victim, and proving the exact reason for the past or feared persecution may be impossible in some cases," the BIA commented. In its determination, the BIA found that the IJ did not adequately consider whether the respondent's assertion that she was harmed because of her involvement in a religious organization that helped Christian girls who had been persecuted by Islamic fundamentalists, could give rise to a claim of persecution based on religion or other grounds.



In mounting the respondent's defense, David Cleveland, a staff attorney at Catholic Charities of Washington, D.C., consulted the Department of State's Human Rights Report and Religious Freedom Report. "We don't have a declaration from [the perpetrator], so, by circumstantial evidence, we try to demonstrate that he's probably mad at her because of her Christian church activities," Cleveland said.

Cleveland advises attorneys pursuing religious asylum cases to obtain corroborating evidence of "similarly-situated people suffer[ing] in the past 12 months]."

member Nancy Morawetz, and member-at-large Deborah Smith. Kurzban collaborated with Smith, on an amicus brief on AILA's behalf. Morawetz, cofounder of the NYU Immigrant Rights Clinic, and two of her students, Natasha Rivera-Silber and Jordan Wells, prepared another brief.

"Generally, every amicus brief is seeking to achieve a particular goal," said Morawetz. "[The purpose of] our brief was to try to achieve the particular goal of explaining how this works in practice, of making the technical aspects of immigration more accessible, and also making it real by really showing the court what happens to real people." To that end, law students Rivera-Silber and Wells put out a call to attorneys on several listserves and at the National Lawyers Guild Conference in Philadelphia last year for real-world anecdotes to support the legal arguments.

Bibas advises attorneys who are considering bringing a case before the Supreme Court to seek free consultations from clinics and law firms involved in the pro bono Supreme Court bar. "No matter how well you know the case, there is room for fresh perspective to help you package it in the best possible light," he said. Also, he recommends speaking with experienced practitioners during the earlier stages of a case.

Morawetz recommends attorneys contact the Supreme Court Immigration Law Working Group, which she chairs, and consult the practice advisory prepared by the American Immigration Council, the National Immigration Project of the National Lawyers Guild, and the Immigrant Defense Project.

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

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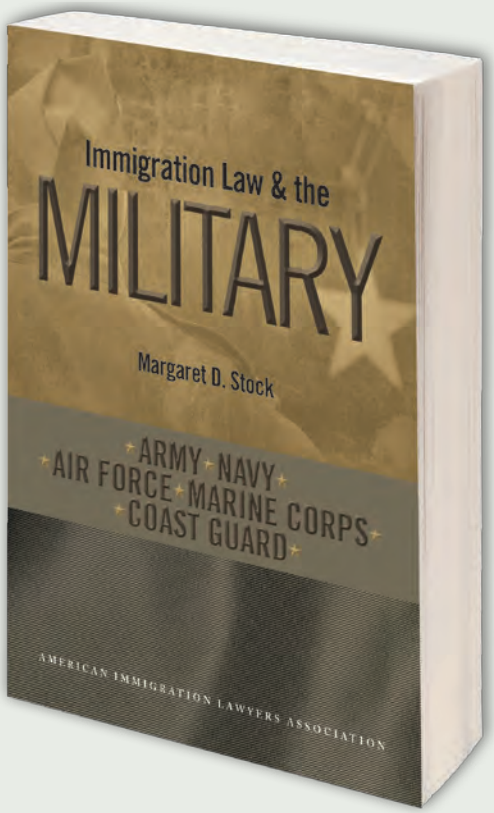
U.S. MILITARY IMMIGRATION PROCEDURES



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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BALANCE

by Danielle Polen

Smooth(ie) Operator

We've all heard that breakfast is the most important meal of the day, but how many of us actually carve out time to prepare and eat a balanced meal? A more likely scenario might be a quick pit-stop at Starbucks or McDonald's, followed by "dining" on the fly behind the wheel or in the subway.

One way for even the busiest of people to enjoy a nutrient-dense breakfast is to whip up a nourishing smoothie. Smoothies are healthy, portable, and easy to prepare—perfect for an on-the-go breakfast. Depending on the ingredients you choose, smoothies can provide important proteins, vitamins, minerals, and even fiber.

To add protein, you can select a base of milk (or a protein-rich milk alternative such as soy milk, almond milk, hemp milk, etc.), soft tofu, yogurt, or kefir. Then experiment with different ingredients to find the flavors you like best.

My smoothie of choice is a green smoothie—one that packs a punch by blending organic greens, such as kale, spinach, Swiss chard, arugula, etc., with fruit. Green smoothies are a great way to add raw greens to your diet. And while my ingredient list changes, depending on what's in my fridge, my "go-to" recipe includes a few handfuls of organic kale (especially, the Lacinato or "Dinosaur" variety), vanilla almond milk or coconut milk (experiment with adding the liquid a little at a time to find the consistency you like), 2–3 tablespoons of organic hemp protein powder, a banana, and some berries. I might even throw in a bit of wheatgrass powder for an added boost. Then, just blend and enjoy!

Whether you choose the green smoothie route or prefer to stick with fruit only, the recipe possibilities are endless! And there's no rule that says that smoothies are only for breakfast. They can make a great afternoon pick-me-up snack or even a light supper during the warmer months. Not sure your kids will go for that? Why not bring them around with a pizza smoothie or a cheeseburger chill?

BERRY PROTEIN SMOOTHIE

- 2 cups mixed berries, (fresh or frozen)
- 1 cup silken tofu
- 1/4 cup pomegranate juice
- 2 to 3 tablespoons honey
- 2 tablespoons ground flaxseed
- 1 teaspoon finely grated peeled ginger

Courtesy of wholeliving.com

DANIELLE'S GREEN SMOOTHIE

- organic kale *(see suggestion below)*
- vanilla almond or coconut milk
- organic hemp protein powder (2-3 tablespoons)
- 1 Banana
- your favorite mixed berries

DANIELLE'S KEY INGREDIENT:
LACINATO KALE

Lacinato kale has dark blue-green leaves and tastes slightly sweeter and more delicate than curly kale.

You might never be the kind of smooth operator that "places high stakes, and makes hearts ache," but you can still be at the top of your game with a morning smoothie.

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.

PHOTO BY ANU JOSHI, AILA GRASSROOTS ADVOCACY ASSOCIATE

Nation's Highest Court Weighs in on SB 1070

by Ben Winograd

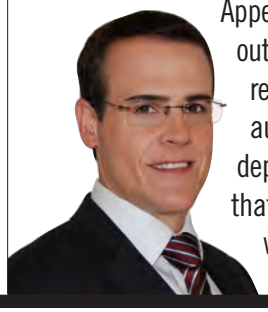
Almost two years to the day after Arizona enacted the notorious immigration law known as SB 1070, the U.S. Supreme Court heard arguments on April 25, 2012, in what could be the first of many cases over the validity of state immigration laws. Although most criticism of the law has focused on its potential for civil rights violations, the only question before the Justices was whether the Immigration and Nationality Act preempts four provisions of SB 1070 that were blocked by lower courts. While the ultimate fate of those provisions will not be known until a ruling is announced, a few preliminary observations can be made based on the questions posed by the Justices.

To begin with, the government's preemption arguments against Section 2(B)—which requires police to check the immigration status of all persons they stop if "reasonable suspicion" exists that they are in the country illegally—were met with great skepticism by the Court. Solicitor General Donald Verrilli had argued that requiring local officers to perform such checks would shift the federal government's resources to non-serious offenders, thereby disrupting its focus on noncitizens convicted of serious crimes. As Chief Justice John Roberts stated, however, simply asking immigration authorities whether a particular person is in the country illegally does not require the government to initiate removal proceedings against that person.

Even if the Court lifts the injunction against Section 2(B), numerous Justices expressed concern during the arguments about whether it would lead to widespread constitutional violations. (Between the Justices and the advocates, the term "Fourth Amendment" was mentioned a dozen times during the argument.) For example, Justice Sonia Sotomayor asked Arizona's lawyer,

AILA Member and TechnoGeek

Although we're sure digital dexterity wasn't the main reason Matt Muller's wife nominated him for America's Techiest Lawyer, it did, however, get him noticed as an attorney with innate technological prowess. Last month, the ABA Journal tapped Matthew as one of 12 archetypal techies in the United States. While Matt's résumé is quite impressive, what's more impressive is the skillful blend of technologies he employs to improve the outcomes for his clients. In the Journal, his wife, Asel Aliyasova, a Sullivan & Cromwell associate, boasts about his mobile suitcase—fully equipped, battery-powered computer, printer, scanner, and projector—ready anywhere, anytime. When an immigration judge ordered his client deported, Matt spared no time. Within five minutes, he scanned the judge's order, e-filed the petition for review with the U.S. Ninth Circuit Court of Appeals, and printed out the docket report with an automatic stay of deportation. Now, that's technology at work!



Paul Clement, how long officers would be able to detain people without violating the Constitution. And Justice Samuel Alito asked whether Arizona officers would have to check the immigration status of citizens from states that issue driver's licenses without proof of lawful presence.

While the discussion of Section 2(B) dominated most of the argument, signs emerged during other rounds of questioning that the injunctions may be upheld against parts of SB 1070 that create new immigration-related crimes. Under Section 3, for example, immigrants can be prosecuted under Arizona law for failing to obtain or carry registration papers from the federal government. But as Justice Alito noted, some immigrants—like pending asylum-seekers—may be ineligible for registration but nonetheless permitted to reside in the country. Under Section 5, meanwhile, immigrants can be imprisoned for performing or applying for work inside the state's borders. Yet as Justice Sotomayor pointed out, Congress has repeatedly rejected proposals to impose criminal penalties on unauthorized workers.

The one provision of SB 1070 that generated little discussion was Section 6, which allows local police to arrest legal immigrants who previously committed crimes that make them eligible for removal. Justice Ruth Bader Ginsburg noted that determining whether an offense makes someone "removable" can be a complex inquiry that local police could not practically make on the street. But the argument otherwise featured little dialogue about the provision, aside from a concession by Clement that it would not permit arrests simply for overstaying a temporary visa.

The bottom line is that while the argument represented the first time the Supreme Court considered the validity of a state immigration enforcement law, it may well not be the last. Even if the Court lifts the entire injunction against SB 1070, the Justices' questions indicated that it may be impossible to apply in practice without violating individuals' constitutional rights. Given the demonstrated policy drawbacks of state immigration enforcement laws, it remains possible that other states will decline to enact copycat measures in the future. But even if states do press forward, the recent Supreme Court argument showed that legal questions about such laws will continue to occupy courts for years to come.

The bottom line is that while the argument represented the first time the Supreme Court considered the validity of a state immigration enforcement law, it may well not be the last.

Ben Winograd *is a staff attorney for the American Immigration Council. A previous version of this article was posted on the Council's blog,* Immigration Impact.

WHAT'S HAPPENING!

THE 4-1-1:

Arizona Chapter member **Zada Edgar-Soto** died in a tragic car accident in April. Her friends, colleagues, and AILA mourn her unexpected loss and remember her kindness and generosity.

Rome District Chapter member **Nita N. Upadhye** has started a solo practice in London. Nita also has been nominated to the Rome District Chapter Executive Committee for the position of vice chair.

Mid-South Chapter member **Bruce E. Buchanan** has joined the Nashville office of Siskind Susser, where he continues to advise attorneys on ICE and internal audits.

Southern California Chapter member **Tien-Li (TL) Loke Walsh** recently established Loke Walsh Immigration Law with offices in Pacific Palisades, CA.

Carolinas Chapter member **Victoria Block** has relocated offices to 1315 S. Glenburnie Rd., in New Bern, NC.

Central Florida Chapter member **Elizabeth Ricci** of Rambana & Ricci, PLLC was named "25 Women You Need to Know" by *The Tallahassee Democrat*. She was also featured in *850: The Business Magazine of Northwest Florida* as a Rising Star under 40.

South Florida Chapter member **Nathan (Nate) T. Notkin** passed away on March 13. A long-time AILA member, Nate helped establish the Chicago chapter. He was also the father of New York chapter member and AILA past President **Deborah J. Notkin**.

Upstate New York Chapter member **Esra Gules-Guctas**, her husband, Yigit Guctas, and daughter Melisa welcomed a baby boy, Devin Mert Guctas.

Philadelphia Chapter member **H. Ronald Klasko** was a VIP speaker at the "Invest in America 2012 Summit and Exhibition" in Shanghai on January 26. Ron also addressed the Los Angeles County Bar Association on February 11.

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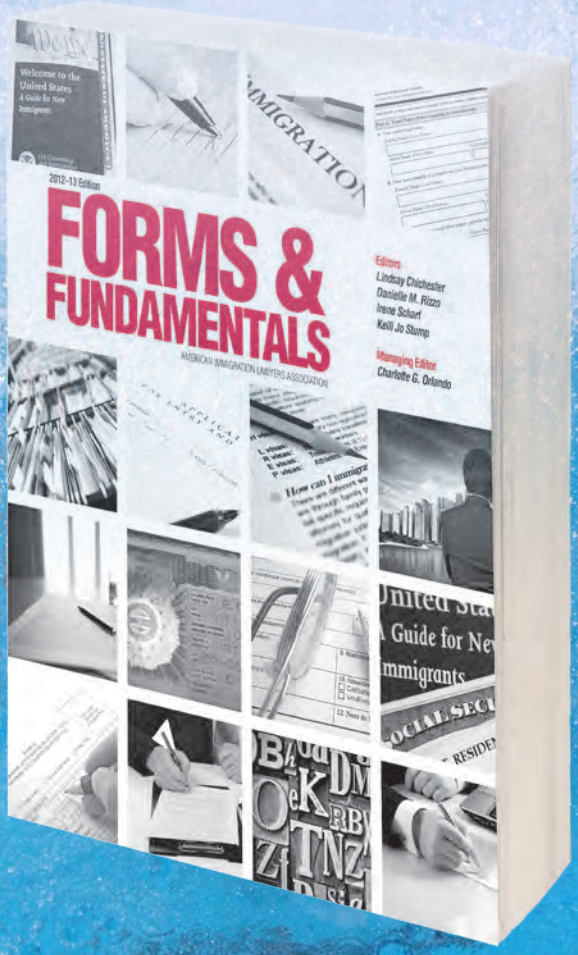

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