AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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VOICE

SEPTEMBER-OCTOBER 2013
Vol. 4 Issue 5

DACA
one year later

PLUS:

The International Student Minefield

Plugging into International Talent

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...diola, a DACA recipient, made the ...n she was offered a job to work for ...cratic Rep. Kyrsten Sinema. On that same ...gration officials took Andiola's mother and older ...ner into custody. "I'm not OK with just having a job. **I need to have my family with me to make sure I am as happy as I can be**," Andiola said while serving on a five-member panel convened on August 16, 2013, at the Center for American Progress in Washington, D.C. The memb... met to reflect on the progress of the DACA ... owing its one-year anniversary. .... The ...tatus in the households of many DACA recipients is one of the drawbacks **evoking mixed emotions** about the initiative implemented by U.S. Citizenship and Immigration Services (USCIS), said Tom K. Wong, assistant professor of political science at the University of California-San Diego and once an undocumented immigrant himself. Echoing that sentiment, Roberto G. Gonzales, assistant professor at the Harvard Graduate School of Education, called for greater social integration, saying, "**DACA recipients don't live in a vacuum**. They are part of families and communities and their fates are tied to what happens to their parents, neighbors, and so forth." ... As the second year of the DACA program gets underway, the panelists agreed that **progress has been made**, including the launch of a DACA app. Nevertheless, **more work lies ahead**. "[DACA is] at best a **temporary fix to a larger problem of a broken immigration system** and a lack of a pathway to

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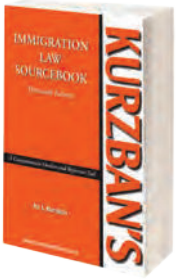

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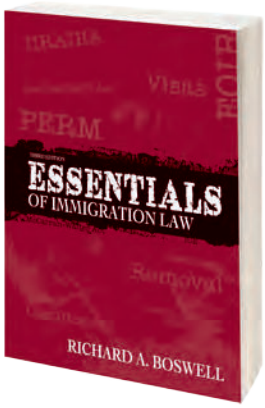

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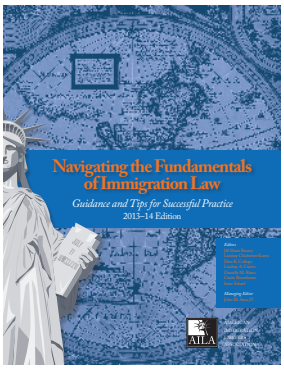

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AILA Names 2013 Pro Bono Heroes

AILA members have long been known for their dedication to providing expert immigration legal assistance to underserved members of the immigrant population of this country. And through a new program launched by AILA's National Pro Bono Services Committee, many of these members, as well as some nonmembers, will be recognized for their time spent in assisting the immigrant population in exchange for the sheer satisfaction derived from helping those less fortunate. Below are the four recipients of the inaugural "Pro Bono Heroes" Award, to be held quarterly.

New England Chapter member **Jennifer Archer** is a shareholder at Kelly, Remmel & Zimmerman in Portland. She has dedicated thousands of hours to pro bono work that impacts immigrants in Maine, including 10 years on the Immigrant Legal Advocacy Project (ILAP)'s pro bono asylum panel representing clients, recruiting and mentoring new attorneys, and presenting at ILAP trainings. Jennifer is also the president of ILAP's board of directors and is pro bono co-counsel with the ACLU of Maine and Maine Equal Justice Partners in *Bruns v. Mayhew*.

Prashant Khetan is a commercial litigation partner at the Washington D.C., office of Troutman Sanders LLP. He was nominated for his generous work with the Tahirih Justice Center in Falls Church, VA. For more than two years, Prashant has represented survivors of domestic violence seeking asylum in immigration court. He has represented clients in two local immigration courts, and he has recently taken on additional research work to assist Tahirih in a third appeal of a domestic violence asylum case.

Michigan Chapter member **Chris Schlegel** is an attorney with Miller and Johnson in Kalamazoo, MI, where she practices immigration law. She was nominated for her outstanding volunteer and pro bono efforts to help young immigrants apply for Deferred Action for Childhood Arrivals (DACA). After DACA was launched in 2012, Chris volunteered at almost every free DACA clinic in western Michigan, including five between the end of August and early November. She also personally represented individual DACA clients who could not otherwise afford counsel.

Diana Fakhrai devoted untold hours to Catholic Charities' Esperanza Immigrants' Rights Project, commuting long hours from Los Angeles to the now closed Mira Loma Detention Center in Lancaster, CA. At Mira Loma, Diana assisted detained asylum-seekers, lawful resident crime victims, and others. She gave her time and money to detainees' accounts to pay for documents critical to their defense. Diana organized the HELP Legal Aid Program in Los Angeles, providing immigration counseling and assistance to the homeless. She also has contributed innumerable hours to AILA's New Member Division and Pro Bono Committee.

Be sure to nominate your Pro Bono Hero for the fall 2013 awards today!

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UNSOLICITED ADVICE

from **Cletus M. Weber**

An Immigration Lawyer's Online Search for Computer 'Headware'

When Greg Walther[1] and I wrote a chapter for *AILA's Guide to Technology and Online Legal Research,* 3rd Ed. about 10 years, we mentioned the need for immigration lawyers to not only get appropriate computer hardware and software, but also to continually improve their "headware." By headware, we meant knowledge about how to use the infrastructure.

(I also recall another lawyer who wrote about technology, mentioning something to the effect of, "I used to practice law, but now I just learn new software.")

Increasing headware is easier said than done, though. First, learning new things can be time-consuming, and it competes with managing a busy practice. Second, there seems to be no "sweet spot" for training. Software manuals, "missing manuals," "bibles," "missing bibles," and so on, tend to be welfare projects for technical writers, the vast majority of which provide little more than feature-by-feature analyses. Only rarely do they teach you how to actually use the program.

On the other hand, in-person trainers tend to drown you with information like an "over your head" math class: it looks easy when the professor does it, but it all seems lost the minute you leave the classroom. Also, you cannot fast-forward through the parts you already know or linger longer on the things you truly want to know.

YouTube and similar online video services can be the best of all worlds. Not only are they free (except for your time), you can watch them whenever you want and repeat the parts you want whenever you need to. You also can easily compile libraries of videos to watch, review, or share with others on your team.

Some of the videos can be extraordinarily helpful, too, because they actually focus on how to use the software you are researching. For example, most people learn Outlook by starting with using the e-mail program and calendar, but then struggle to move beyond the basics, perhaps by making folders and creating a few e-mail-sorting rules. While searching for help on a particular Outlook feature, I found on YouTube an excellent five-part series by Surface7 Associates called "Maximizing Your Productivity with Outlook 2010," and surprisingly, it assumes you know how to use Outlook generally, but want to know how to use the program.

If you try out this series—or have other recommendations—please comment on this article, and perhaps a future article will provide a list of AILA's best free online headware videos.

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.*

by Alan B. Goldfarb, David G. Katona, and Douglas R. Penn

END OF THE LINE

Case Closure and File Retention

Lawyer-client relationships end when all work on a matter is complete. But it is surprisingly difficult to know when a current client becomes a former one, especially since immigration lawyers represent clients over extended periods for different processes. For example, a lawyer may complete an H-1B petition, but the employees might need help with maintaining status or seeking lawful permanent resident (LPR) status. Also, some LPRs who get status through marriage or investment must file petitions to remove conditions on their status, and many later apply for naturalization. Even after naturalization, they might hire lawyers to file family-based petitions. While there are good reasons to clarify when the lawyer-client relationship ends, some lawyers may still want to leave the question open. Nevertheless, some engagements may be more clearly limited to a specific matter. In those cases, the lawyer should indicate in writing to the client that the relationship ends when the matter has been resolved, thereby preventing the client from mistakenly assuming that the lawyer will continue to look after his or her affairs.

However difficult it may be to assess when a client matter ends, there are clear benefits to closing a case and transforming a current client into a former one. While the American Bar Association's (ABA) Model Rules of Professional Conduct do not specifically define current and former clients, they treat them very differently. For instance, under ABA Model Rule 1.7(a), a lawyer may not represent another client adverse to a current client even in a completely unrelated matter. Contrast with Rule 1.9(a), where a lawyer may represent a client adverse to a former client, except if the two matters are the same or substantially related. Closing a case, therefore, reduces potential conflicts of interests.

Final Communications with Clients

After completing a matter, lawyers should send a letter terminating the representation. It should be clear enough so that there is no ambiguity about the nature of the relationship, but also not so blunt as to offend the client and jeopardize future business. Without such clear evidence, whether the client is current or former remains uncertain. The answer would likely

depend on the client's reasonable belief —like the formation of the attorney-client relationship.

At the end of a case, attorneys should relay the following information in writing to clients:

First, attorneys should thank clients for hiring them because without clients, there would be no business.

Then, clients should be told about the nature of their immigration status, the rules about maintaining it, and ancillary issues concerning tax status, terms of employment, international travel, eligibility for driver's licenses, etc.

Attorneys also should say that their representation has ended, but that clients should keep in touch when circumstances that could impact immigration status arise, such as a change in job duties or arrests. This is an opportunity to tell clients about other types of immigration and nonimmigration cases that the firm handles.

Electronic copies of filings sent with a final e-mail are a viable alternative to paper copies and closing letters. From the client's perspective, electronic copies are easier to maintain and search using text recognition. Firms also benefit from the reduced use of paper and postage.

While it is acceptable to include a thank-you in a final e-mail, a paper thank-you card, especially when it is handwritten, is a powerful marketing statement.

Return, Preservation, and Destruction of Documents

Upon terminating a case, attorneys must protect clients' interests by, among other things, refunding unearned fees and returning or retaining client property, according to Model Rules of Prof'l Conduct R. 1.16(d). What comprises client property varies by state. The rule in most states is that a file belongs to the client, who presumptively has open access. In a minority of states, clients are only entitled to end–work product and client-provided documents, and in a handful of other states, there is even a presumption that a file belongs to the attorney. Even in the first scenario, however, not every single document in a file must necessarily be made accessible to the client. Attorneys should, therefore, consult their malpractice insurance carriers, state rules, case law, and ethics opinions in their jurisdictions to determine what constitutes client property and how to classify paperwork in their files.

"Attorneys should ... consult their malpractice insurance carriers, state rules, case law, and ethics opinions in their jurisdictions to determine what constitutes client property and how to classify paperwork in their files."

Once a firm determines what client property is within the firm's jurisdiction, it can create its document retention policy. As a general matter, documents not considered to be client property may be purged from a file, absent state rules to the contrary and assuming that such action does not prejudice a client's foreseeable interests. At the same time, according to ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1384 (1977), clients reasonably expect that useful information in their files, not otherwise readily available, should not be prematurely or carelessly destroyed, in case they lose their own copies and need to send documents to a government agency. Also, if clients know they can get their files from their attorney, they are more likely to hire him or her again. Of course, it is important to retain files in the →

event a client questions the attorney's work. Attorneys should elaborate their file retention and destruction policies in their engagement and closing letters, and seek clients' input regarding any ongoing need for documents.

There are a few models for maintaining old client files. Many attorneys who maintain physical files keep the files either in their offices or in off-site storage facilities. The tradeoff between on-site and off-site storage of physical files is mostly the ease of retrieval (on-site storage) versus more cost-effective use of funds (office rent being higher than storage facility rent). There are other considerations regarding security and ease of disposal over time.

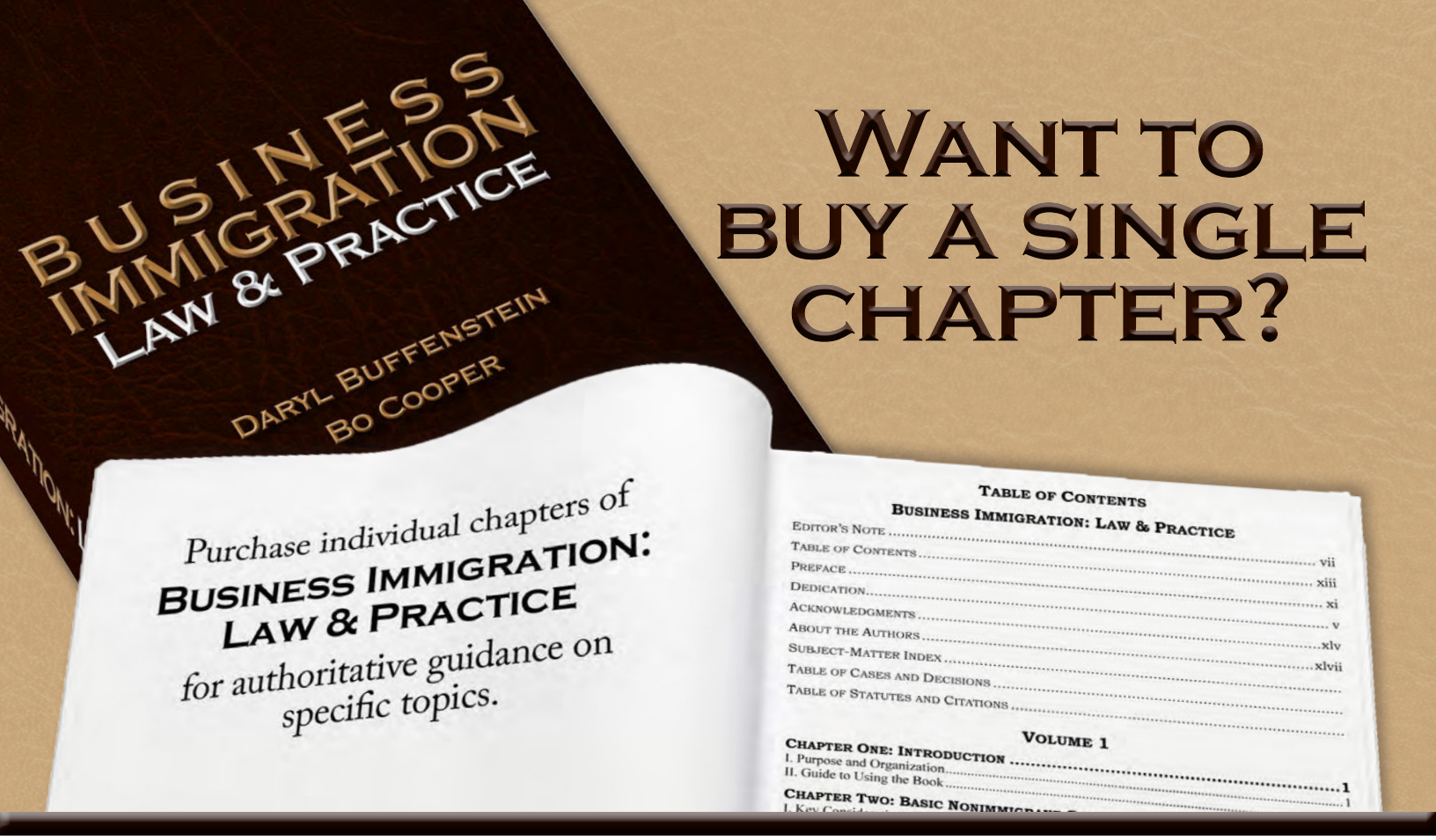
Maintaining electronic copies is another alternative, assuming that such practice complies with state and local bar requirements. This eliminates the need for rental space and generally will be less expensive to retrieve in the future. The copies should be backed up and free of manipulation. Also, an attorney's fiduciary obligation requires that such electronic storage not prejudice a client's interests. So, for example, attorneys should review the digital scans to ensure legibility and completeness before purging physical documents. If the entire file is not completely electronic, there will be some administrative costs in scanning and archiving the physical file. In these cases, if there is a physical file in addition to the electronic file, then disposing of the physical file will still be an issue.

Whether the firm maintains physical or electronic copies of files, procedures should be in writing and communicated with all attorneys and staff so that the rules will be followed. Firms should review their procedures on a regular basis to ensure that they still comply with the applicable ethical and legal rules.

When evaluating file retention policies and options, lawyers should consider what impact the choice will have on the firm's budget in future years.

For those attorneys who destroy files after meeting their retention requirements, ongoing confidentiality obligations must be considered. This means that physical documents may have to be shredded if they will be turned over to a third party, such as a recycling authority. Electronic documents should be deleted properly by using document scrubbing software; dragging files into a computer's trash generally is not enough. To minimize potential liability, attorneys may want to consider obtaining client authorization, when practicable, or at least putting clients on notice before destroying files. Regardless, they should maintain a permanent record of all destroyed files and appropriate dates.

Alan B. Goldfarb *is a partner in the Minneapolis-based law firm, Davis & Goldfarb, PLLC. He is a former chair of the Minnesota/Dakotas Chapter and a current member of the AILA Ethics Committee.* **David G. Katona** *is a founding partner of Katona & Mir LLP in New York City, and practices immigration law exclusively. Katona was named a "Rising Star" by Super Lawyers in 2011.* **Douglas R. Penn** *is an immigration attorney in Stamford, CT. He serves on AILA's Business Immigration and Practice Management Committees. The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*



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BLOGOSPHERE

by **Christine D. Mehfoud**

E-Verify Auditing: What to Audit, How Often, and by Whom?

You've made the decision to join E-Verify (or have been required to join by state law or federal contract). Now what? If you think registering and training your human resources staff to use E-Verify means you're finished, think again. An often overlooked, but important aspect of E-Verify participation is regular compliance auditing. The U.S. Citizenship and Immigration Services (USCIS) Monitoring & Compliance Branch of the Department of Homeland Security is monitoring your E-Verify usage for compliance, which means you should as well. So just what does an E-Verify audit entail? How frequently should you conduct one and who should oversee it?

Last summer, USCIS issued the M-1044, E-Verify Self-Assessment Guide, to help E-Verify employers in conducting compliance audits. Although the guide is helpful, consider the size of your company and number of new hires when determining the audit model that works for you. And consider these general tips, too.

How Often Should You Audit? At Least Annually.

We recommend that employers add E-Verify compliance to their regular Form I-9 audit schedule—meaning the compliance audit should occur at least annually. The federal government recommends tacking the audit onto the Form I-9 audit schedule as well.

Mark your calendars!

Who Should Conduct the Audit? Human Resources and Experienced Counsel.

By this point, most employers understand that immigration-related compliance can be complicated and that best practices change regularly. Therefore, it is important that you understand the current regulatory landscape and adjust accordingly. Also, because of the myriad restrictions not only on how you complete a Form I-9 or create an E-Verify case, but also on how you rectify any misuse or error, it is important to tread carefully. Penalties for incorrectly correcting an error can surpass those for the original error. Because of these hazards, we recommend that you engage experienced counsel in creating your E-Verify auditing procedures and in remedying any E-Verify misuse you uncover.

Depending on your size and available resources, once you create the auditing procedures (in consultation with experienced counsel), your E-Verify corporate administrator can conduct most of the audit by reviewing and interpreting the results of various reports (most of which can be run through E-Verify).

What Should the Audit Cover?

The following areas should be considered during an E-Verify audit. Although not comprehensive, this list covers key steps in the E-Verify system that should be audited and some pertinent questions to ask during the review:

Administrative Steps

1. Has each user completed the requisite E-Verify tutorial?
2. Are the relevant posters drafted in English and Spanish, and displayed in plain view at all hiring sites?
3. Does the program administrator regularly review and update users' information and terminate users' access once they no longer use the system and/or work for the employer?

Creating a Case

1. Is the Form I-9 completed before creating a case in E-Verify?
2. Is a new case created for all newly hired employees no later than the third business day after the employee starts work?
3. Is all personally identifiable information safeguarded?

Photo Matching

1. Are the required copies of documents maintained?
2. Does the user compare the photo displayed by E-Verify to the photo presented by the employee?

Tentative Nonconfirmation (TNC)

1. Does the user print the TNC notice and privately review it with the employee?
2. Do both the user and employee sign the TNC notice?
3. Does the user periodically check to ensure all TNCs have been contested or not contested?
4. Is the original signed TNC notice kept on file?
5. Does the user choose the correct case closure statement?

Referrals

1. Does the user promptly print the referral letter?
2. Does the user review the referral letter with the employee in private?
3. Do both the user and employee sign the referral letter?
4. Is the original signed referral letter kept on file?
5. Does the user correctly choose the correct closure statement?

Final Case Resolution

1. Does the user review the case status for those with pending cases before the Department of Homeland Security or Social Security Administration?
2. Does the user check E-Verify periodically for case resolution?
3. Does the user close all cases using the correct case closure statement once a Final Nonconfirmation is received?

Final Case Closure

1. Does the user close every case created in E-Verify?
2. Does the user select the appropriate case closure statement?

Other Common Issues

1. Have any E-Verify cases been created for employees hired before November 7, 1986?
2. Have any employees been immediately terminated after receiving a TNC?
3. Were cases created for employees hired prior to E-Verify enrollment?
4. Were relevant acceptable documents reviewed and, if applicable, were copies maintained?

What next? If the audit uncovers misuse, you should first consult experienced counsel to determine how to remedy any errors. Although detecting misuse is fairly straightforward, remedying the situation is not. Second, you should provide individualized training and feedback for the users implicated by the misuse to reduce the likelihood of repeat errors. Third, the results of the E-Verify audit should be used in preparing your next annual Form I-9/E-Verify training session.

Finally, repeat this audit process at regular intervals (at least annually).

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

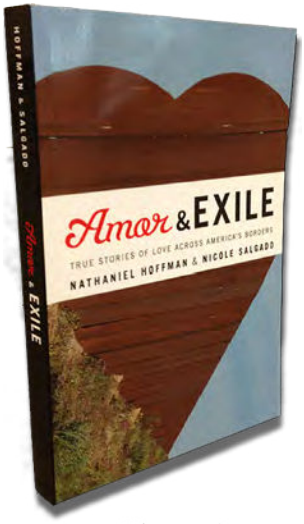
by Teresa A. Statler

'Love in the Time of Deportation' and Many More Heart-wrenching Stories

In Amor & Exile: True Stories of Love Across America's Borders, former Boise, ID, reporter Nathaniel Hoffman and expatriate American Nicole Salgado show us the current immigration law's detrimental effects on U.S. citizens and their undocumented foreign spouses. The stories of true love and true frustration contained in this book ring familiar to any immigration lawyer in the United States who handles family-based matters. However, the American public, and more importantly, many members of Congress, likely do not know or understand how U.S. immigration laws can keep families separated. Hoffman opens the book with a chapter titled, "Love in the Time of Deportation," in which he introduces the reader to six bi-national couples, all of whom are struggling with the daunting logistics and inhumanity of the unlawful presence bars. Nicole Salgado and her husband are one of them.

A Personal Account

In several chapters, Salgado describes her life in exile in Queretaro, Mexico. Her husband is subject to the permanent bar, so he must wait for 10 years before applying for a waiver. He has two more to go. Salgado tells of their financial struggles in Mexico and the difficulty in integrating with her husband's large family. Salgado has networked with other "families in exile" in Central Mexico, co-founding the online activist group, Action for Family Unity, to work for change in U.S. immigration laws. Salgado movingly speaks of her own and of other Americans' "disenfranchisement" and exile abroad due to the Illegal Immigration Reform and Immigrant Responsibility Act. The reader senses her frustration and, indeed, her anger, that her country has forced her to live in Mexico, rather than letting her and her husband choose where they will live.



Amor & Exile: True Stories of Love Across America's Borders

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She believes, however, that she is a "better person for all that I've endured—stronger, more resilient."

Amor & Exile also tells the story of J.W. and Gabriel, a gay couple who also now live in Mexico, having left Texas before Gabriel would have been eligible for Deferred Action for Childhood Arrivals. J.W., active in Texas Republican circles, has "conservative Republican friends"—Hoffman reports—who are "willing to make exceptions to their personal philosophies [regarding illegal immigration] and seek status for his undocumented boyfriend because J.W. is 'people like them.'" Anticipating the nullification of the Defense of Marriage Act by the U.S. Supreme Court, Hoffman sees some hope on the horizon for same-sex couples, which has seemingly now come to pass.

Throughout the book, Hoffman tells of American friends and family of the six couples who are astounded that the immigration laws are so harsh. He quotes many who are surprised that legal status is not "automatic" after marriage to a U.S. citizen. Hoffman's legal information is very accurate, →

thanks to several AILA members with whom he consulted while writing this book. However, other attorneys mentioned in the book—usually someone who was sought out by one of the six couples—come off as borderline incompetent for completely missing the issue of the permanent bar during consultations, among other reasons. Ever the optimist, Hoffman points out that the re-enactment of INA §245(i) would help several of the couples in the book, and that INA §245(i) and the DREAM Act "are two well-established ideas that would enjoy popular support" from the American people. He also pulls no punches and says that President Barack Obama, when compared to former presidents, is the "Deporter-in-Chief."

Limited in Its Scope

Although Mexicans are by far the group of immigrants most likely to be subject to the unlawful presence bars, there are people of many nationalities barred from the United States who have other serious immigration legal issues keeping them apart from their spouses. The book would have been even more compelling had Hoffman broadened his focus to tell us about at least one of them. A lay reader might think that only Mexican spouses of U.S. citizens are subject to harsh immigration laws.

A copy of *Amor & Exile* was delivered to each senator and member of the House of Representatives this year. Let us hope that in this time of potential immigration reform, members of the House especially read these gripping personal stories of immigration and feel moved to make changes in the law that are long overdue.

Teresa A. Statler *practices law in Portland, OR, with an emphasis on family-based, asylum, and removal cases.*

WHAT'S YOUR STORY?
VOICE is looking for immigration stories to publish. If you have a story to tell about a loved one, a friend, or yourself, send it to us, along with photos.

$500 for Freedom, Worth Every Penny

by Sheeba Raj

Top, clockwise: Vivian Szawarc, 18-19, in Argentina; Vivian, 20, after arriving in the United States; and Vivian now.

COURTESY PHOTOS

After enduring unrelenting physical and emotional abuse from her mother, Vivian Szawarc wanted out. Her then-husband and sister got Vivian her travel documents to help her flee Argentina for the United States. In 1986, at age 19, she flew on a plane for the first time. As Vivian and the other passengers disembarked from the plane in Tijuana, a Mexican immigration officer pulled her aside. The officer said she stood out because she was a white person with green eyes so he asked for her visa to the border. She simply replied, "How much?" He took her to his office where Vivian handed him a $50 bill. She was then allowed to leave the airport.

Vivian called her sister, who told Vivian to head to the house of someone her sister knew. When Vivian arrived there, she found no one. A neighbor across the street took her in for the time being. Vivian's sister then told her to check into a hotel, so the neighbor's son accompanied Vivian on a bus to that hotel. After spending the night there, Vivian learned the next morning that her sister had made arrangements for a coyote to smuggle her across the border. Vivian was told to go to a particular corner and look for a woman holding a piece of toilet paper. Afterward, Vivian and the coyote headed in an SUV to another house. As the day wore on, more young women entered the house. When night fell, all of them left and walked to the border. They crawled under the fence and then alternated between running and sitting. They continued until they reached another house, which was crowded. Vivian found some space to sit against a wall and was given a dirty, smelly blanket to warm herself.

The next morning, a man wearing a military uniform rounded up the people and told Vivian and two other young women to lie down on the floor of the car and keep quiet when the car was stopped or when they heard talking. Vivian was in the front and anxiously awaiting the reunion with her sister in the United States. "I was coming from a very bad emotional state, so I didn't allow myself to feel any fear," she said. →

"For me, it was relief more than anything to get away from that." After driving for a short while, the man reached the parking lot of Ralph's grocery store. He allowed the women to sit in their seats then he proceeded to drive to Los Angeles. They arrived at a two-story walk-up. Vivian's sister eventually showed up. When Vivian tried to hug her, the coyote got in between them and demanded money. Vivian handed him $500 that she had hidden in her swimsuit—"I wasn't sure if I had to go through the water"— then she was allowed to leave with her sister.

About a week after arriving in the United States, Vivian was hired as a doctor's assistant. Later, she started working for immigration attorneys. That was around two weeks before they passed a law barring employees from working without a work permit. An attorney filed a labor certification for her. Vivian also applied for the immigrant visa lottery for her sister and herself and both ultimately received their green cards.

Vivian, who runs her own practice in Los Angeles, says that her tumultuous journey to the United States helps her understand her clients' backgrounds. "I explain to my clients, 'You're talking to a judge and a trial attorney that probably never lived outside the United States and they don't understand how things work in other countries. … So, when they ask the questions, don't think they are being mean. They are just ignorant of the situation.'"

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Reflecting on DACA ...

PHOTO BY SHEEBA RAJ

"I'm not OK with just having a job. I need to have my family with me to make sure I am as happy as I can be."
–Erika Andiola

"DACA recipients don't live in a vacuum. They are part of families and communities and their fates are tied to what happens to their parents, neighbors, and so forth."
–Roberto G. Gonzales

"[DACA is] at best a temporary fix to a larger problem of a broken immigration system and a lack of a pathway to legal status for unauthorized immigrants"
–Philip E. Wolgin

... one year later

Progress Made, but Much More Work Remains

by Sheeba Raj

For many, a grant of Deferred Action for Childhood Arrivals (DACA) is a double-edged sword. Not only does it give recipients work authorization and a reprieve from deportation for two years, it also gives them an immigration status that might be different from that of other family members in the same household and brings some unwanted attention. For example, Erika Andiola, a DACA recipient, made the news recently when she was offered a job to work for Arizona Democratic Rep. Kyrsten Sinema. On that same day, immigration officials took Andiola's mother and older brother into custody.

"I'm not OK with just having a job. I need to have my family with me to make sure I am as happy as I can be," Andiola said while serving on a five-member panel convened on August 16, 2013, at the Center for American Progress in Washington, D.C. The members met to reflect on the progress of the DACA program following its one-year anniversary.

The hybrid immigrant status in the households of many DACA recipients is one of the drawbacks evoking mixed emotions about the initiative implemented by U.S. Citizenship and Immigration Services (USCIS), said Tom K. Wong, assistant professor of political science at the University of California-San Diego and once an undocumented immigrant himself. Echoing that sentiment, Roberto G. Gonzales, assistant professor at the Harvard Graduate School of Education, called for greater social integration, saying, "DACA recipients don't live in a vacuum. They are part of families and communities and their fates are tied to what happens to their parents, neighbors, and so forth." He added that an increase in mental health services is critical to the well-being of these DREAMers because they are entering adulthood with so much stress.

The panelists also expressed concern about the relatively low numbers of older applicants. According to data obtained by the Brookings Institution through a Freedom of Information Act (FOIA) request, only 24 percent of DACA applicants from August 15, 2012, to March 22, 2013, are 24 or older. But 36 percent were 18 or younger when they applied and 40 percent were between 19 and 23 years old. Audrey Singer, a senior fellow at the Brookings Institution, said that the data is skewed toward a younger population because it typically consists of students who hear the pitch for DACA being made by school administrators. And as they approach adulthood, the desire to drive and apply for college or the military motivates them to pursue DACA. On the other hand, older applicants are usually not matriculated, so they are more likely to miss out on the information and resources.

Watch the DACA Turns 1 panel discussion.

Assembling enough documents establishing eligibility proves challenging to many otherwise qualified candidates. For example, older candidates might have a difficult time properly documenting continuous presence in the United States since 2007, so they might think twice about applying for DACA, Singer said. Also, some might not have identity documents, such as a birth certificate, said Wong. He also noted that the denial rates for Mexicans are lower than those of other applicants because, among other reasons, the Mexican consulates have increased staff and hours to help applicants document their undocumented status. Wong said that he hasn't heard the same for other consulates, though.

But even if prospective candidates have ambition and the requisite documents, cost is often a barrier to a successful DACA application. Many families struggle to save the $465 fee per eligible child, as well as attorney's fees. "Flat fees would help more young people →

move through the pipeline," said Gonzales.

The panelists also analyzed the national origin of the applicants who applied between August 15, 2012, and March 22, 2013. While Mexicans have the highest application and lowest denial rates,[1] applicants from Central America, Europe, Asia, and Africa are underrepresented in the pool of applicants, Wong said. He emphasized the need for more outreach by immigrant-serving organizations and USCIS. Interestingly enough, however, is the fact that South Koreans placed fifth on the list, but Chinese applicants didn't even crack the top 25 countries from which DACA applicants hail, each of which have more than 1,000 applicants. Wong credited this relatively large share of South Korean applicants to the widespread campaigning by Korean ethnic media involving a discussion about the basic requirements and testimonials from DACA applicants. As for the Chinese applicants, he said there was a consensus among the organizations in the Los Angeles area, where a significant Chinese population lives, that greater outreach in Mandarin and Cantonese targeting eligible youth was necessary. Regarding Africans, Wong noted a dearth of organizations serving this population and stressed the need for increased availability of linguistically appropriate materials.

As the second year of the DACA program gets underway, the panelists agreed that progress has been made, including the launch of a DACA app. Nevertheless, more work lies ahead. "[DACA is] at best a temporary fix to a larger problem of a broken immigration system and a lack of a pathway to legal status for unauthorized immigrants," said Philip E. Wolgin, senior policy analyst for immigration at the Center for American Progress and moderator of the panel. Meanwhile, for Andiola, her family's fate weighs heavily on her mind. Her mother and brother remain in the United States because of prosecutorial discretion, but they are scheduled to report to U.S. Immigration and Customs Enforcement in January 2014.

Sheeba Raj *is a legal editor for AILA and reporter for VOICE.*

1"Undocumented No More: A Nationwide Analysis of Deferred Action for Childhood Arrivals or DACA," Center for American Progress, Sept. 2013, at 23.

Kurzban's is abundantly annotated with references to statutes, regulations, BIA decisions, federal court opinions, treaties, and legislative history. The sensible arrangement and the detailed index make it surprisingly easy to navigate ...
—Sarah Woelk, Texas Chapter member

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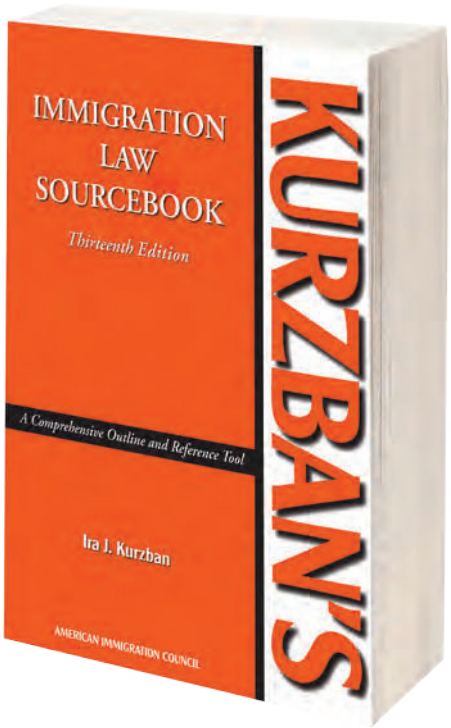

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RESTRICTING MOVEMENT OF ABORIGINAL CANADIAN TRIBES

Conflict Between the **WHTI** and the **Jay Treaty of 1794**

by Jordana A. Hart

A little known 18th-century treaty guaranteeing Native Canadians land and water passage to the United States with nothing more than a letter is at odds with an anti-terrorism push that has toughened the northern border.

Four years have passed since the United States launched the Western Hemisphere Travel Initiative (WHTI), requiring border crossers in Canada to show passports or other secure ID documents. The WHTI implements a section of the Intelligence Reform and Terrorist Protection Act of 2004. But it appears to violate the Jay Treaty of 1794, which guarantees Canada's First Nation (FN) or Indian tribes—whose sovereign lands and waterways straddle the international boundary—the right to visit, invest, study, work, and even live permanently in the United States.

"Many members of sovereign tribal nations have long resisted carrying Canadian passports because they identify first and foremost as FN, Metis, or Inuit."

Following the Revolutionary War (1775–1783), the new border split some Indian nations in two, with members suddenly finding themselves separated while still occupying their ancestral territory. In 1794, the U.S. government and the British enshrined Article III of the Jay Treaty, which states: "It is agreed that it shall at all times be free to his majesty's subjects, and the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land and inland navigation, into the respective territories and countries of the two parties, on the continent of America … ."

Futhermore, INA §289 briefly codified the Jay Treaty: "Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race." The provision excludes spouses and children of Indians "unless such person possesses at least 50 per centum or more of such blood." 8 CFR §289.1. The bulk of applicable law in this area comes from administrative and judicial decisions.

Under the treaty, aboriginal Canadians simply have to prove by way of a tribal letter that they have at least a 50 percent quantum of Indian blood. They do not need a visa, a job offer, or a U.S. spouse. In fact, aboriginal Canadians, including FN, Metis, and Inuit (known by the outdated term "Eskimo") can apply for a green card right at the border by declaring their intention, proving the blood quantum, and completing the Form I-485, Application to Register Permanent Residence or Adjust Status. "A Canadian-born American Indian cannot be denied PR status," according to information for First Nations posted on the website of the U.S. embassy in Ottawa.

An estimated 1.2 million of Canada's 35 million inhabitants identify as aboriginal (FN, Metis, or Inuit), according to the 2006 census. Canada issues status cards to qualifying FN and other Indian people. Many members of sovereign tribal nations have long resisted carrying Canadian passports because they identify first and foremost as FN, Metis, or Inuit.

Len Saunders, an attorney who advises FN clients at the busy Blaine, WA,-border crossings of Peace Arch and Pacific Highway, says, "It is inconsistent with the Jay Treaty" to require a passport or a secure ID card, adding that requiring anything more of FN travelers than a blood quantum letter is in violation. He says that many FN people continually have to educate CBP officers about the treaty, while others now carry Canadian passports to avoid post-WHTI border hassles.

U.S. officials have indicated that they will exercise common sense and discretion in implementing the WHTI at the U.S. land and water ports of entry, "which includes a period of flexibility after June 1, 2009," the date the WHTI became effective. Now, with some FN people carrying Canada's new status card as of 2010 and some presenting Canadian passports, CBP continues to use discretion to allow entry to FN people using the noncompliant ID.

Jordana A. Hart *is a Canadian-born immigration attorney practicing with the law firm of David J. Hart, P.A. in Miami. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

PLUGGING INTO INTERNATIONAL TALENT

The NIW Three-Prong Test as a PERM Alternative

by Peter B. Bade

For many attorneys practicing business immigration law, the traditional path of employment-based green-card sponsorship starts with the PERM labor certification process. However, in light of the recent economic struggles of the 2008 financial crisis, and, now the subsequent economic recovery presently taking root in the United States,[1] getting a successful PERM application approved by the U.S. Department of Labor (DOL) has faced significant challenges for those practitioners who prepare and submit PERM applications on behalf of company clients daily. In fact, the number of PERM audits, PERM-supervised recruitment cases, and denials issued by DOL has significantly increased in the past few years.[2]

Against this current reality, what alternatives can an employer consider besides trying to test the U.S. labor market as mandated by the PERM process? How can a company still retain its employees who may demonstrate exceptional talent and ability in the sciences, arts, professions, or business, and whose job opportunity may require similar criteria? Enter the National Interest Waiver (NIW) immigrant visa category.

The Three-Part Test: Matter of NYSDOT

The legal basis for the NIW can be found at INA §203(b)(2)(B)(i), as well as 8 CFR §204.5(k)(2). But the essential elements of the NIW application lay in the case Matter of New York State Department of Transportation *(NYSDOT)*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998). In that case, the legacy Immigration and Naturalization Service (INS) set out a three-part test for this immigrant visa category:

1. The foreign national must seek employment in an area of substantial intrinsic merit;
2. The proposed benefit will be national in scope; and
3. The national interest would be adversely affected if the foreign national were to undergo the labor certification route.

It is satisfying these three hurdles—particularly, the last part of the test—that has created tremendous consternation with the business immigration bar because of U.S. Citizenship and Immigration Services' (USCIS) requests for evidence (RFEs).

In essence, the first two criteria can be met by showing that the foreign national's proposed employment is of important, inherent value to the →

ILLUSTRATION BY BRADLEY AMBURN/SHUTTERSTOCK.COM

field, and that his or her contributions are of substantial national benefit. In *NYSDOT*, legacy INS held that the foreign national's field of structural engineering and subfield of bridge design and construction were fields of substantial intrinsic merit, and that the foreign national's engineering work in bridge construction and design served our national interest in achieving a safer and more effective national transportation system. Legacy INS took issue with the last prong: demonstrating that the national interest would be adversely affected if the foreign national were to undergo the traditional labor certification route. There, the agency held that the petitioner did not satisfactorily demonstrate that the foreign national, for all of his talents and engineering expertise, "will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications." *Id.* at 218.

The last part of this trinity has challenged many business immigration attorneys, including this author. What has seemed successful in overcoming this last obstacle of the three-part test has been to show that the foreign national is of such value and worth to the national interest, and to the field of merit, that there are no other potentially qualified workers out there who could fulfill the role. To meet this challenge, practitioners must be very creative and in tune with the "story" of their NIW case from the outset: what is it that makes this case of "intrinsic value," how is the "nation's interest served," and what is it about this particular foreign national that makes this all possible and worthwhile? When putting together this type of application, the evidence will need to be carefully considered and discussed with the client, and may include:

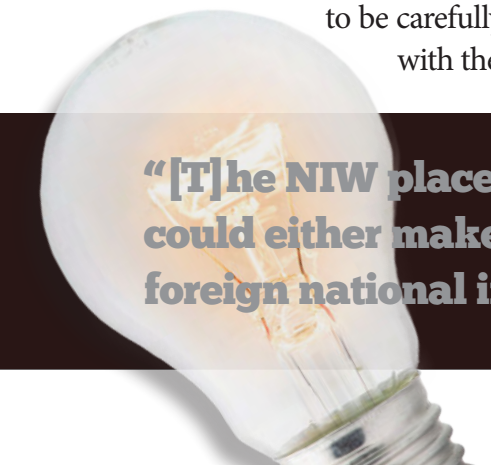
- expert opinion/testimonial letters;
- news or journal articles about the foreign national's work
- citations to the foreign national's published works
- authorship by the foreign national in prestigious scholarly publications
- evidence of the foreign national's peer review in heralded scholarly journals
- contracts evidencing that his or her services and expertise are sought
- photographs of his or her work, and anything else imaginable that would advance the case.

The potential benefit to our nation of the NIW category has even recently been highlighted by USCIS. In the agency's recent initiatives to promote startup enterprises and job creation in the United States, USCIS announced that foreign national entrepreneurs may obtain a green card through the NIW process "if they can demonstrate that their business endeavors will be in the interest of the United States."

Comparison with First-Preference Categories

Indeed, when preparing an NIW case, an attorney may feel as though he or she is treading across common ground in the first-preference employment-based categories of Extraordinary Ability and Outstanding Researcher/Professor. The NIW, like the Extraordinary Ability first-preference category, can be self-petitioned by the qualifying foreign national, as well as sponsored by an employer.

Unlike a PERM-based I-140, the NIW advanta-



"[T]he NIW places the foreign national in the EB-2 category, which ... could either make the applicant's priority date current ... or place the foreign national in a backlog queue. In either instance, time is saved ..."

geously does not force the employer to test the U.S. labor market (via recruiting and advertising the job) to ensure there are no minimally qualified U.S. worker applicants for the foreign national's position, nor is a minimum prevailing wage requirement mandated.

And unlike its employment-based first-preference category brethren, the NIW places the foreign national in the EB-2 category, which, depending on country of birth, could either make the applicant's priority date current (allowing for the foreign national to proceed concurrently in "one-step" with the adjustment of status application), or place the foreign national in a backlog queue. In either instance, time is saved over a PERM-based green-card process, as the applicant can proceed directly to the I-140 stage, without having to pursue the time-consuming PERM-related recruitment process.

Furthermore, at press time, the NIW cannot be filed with USCIS's Premium Processing service, unlike the EB-1 Extraordinary Ability and Outstanding Researcher categories.

Practitioners evaluating potential clients for either first-preference Extraordinary Ability or Outstanding Researcher/Professor also may have extra incentive to consider the NIW, as the employment-based first-preference categories have come under additional scrutiny with USCIS in light of the U.S. Court of Appeals for the Ninth Circuit's decision in *Kazarian*. See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

In this landmark case, the Ninth Circuit essentially created a novel two-part test for USCIS to adjudicate first-preference employment-based immigrant visa petitions in the Extraordinary Ability and Outstanding Researcher/Professor categories. First, the petitioner has the burden of demonstrating that it must meet at least the minimum regulatory required criteria at either 8 CFR §204.5(h)(3)(i)–(x), or 8 CFR §204.5(i)(3)(i)(A)–(F). Once that threshold requirement is met, the USCIS adjudicating officer must consider the totality of the application to determine if the application demonstrates the requisite "extraordinary ability," or "outstanding acclaim" on an international scale. If the application fails either part, an RFE or denial may be issued. Recent anecdotal evidence that this author has received from other practitioners also suggests that USCIS might be improperly applying the *Kazarian* analysis to recent NIW adjudications.

Taking the NIW route is well worth the effort, but be prepared: perform the necessary review of the case and make sure you have the documentation lined up to take on that third prong.

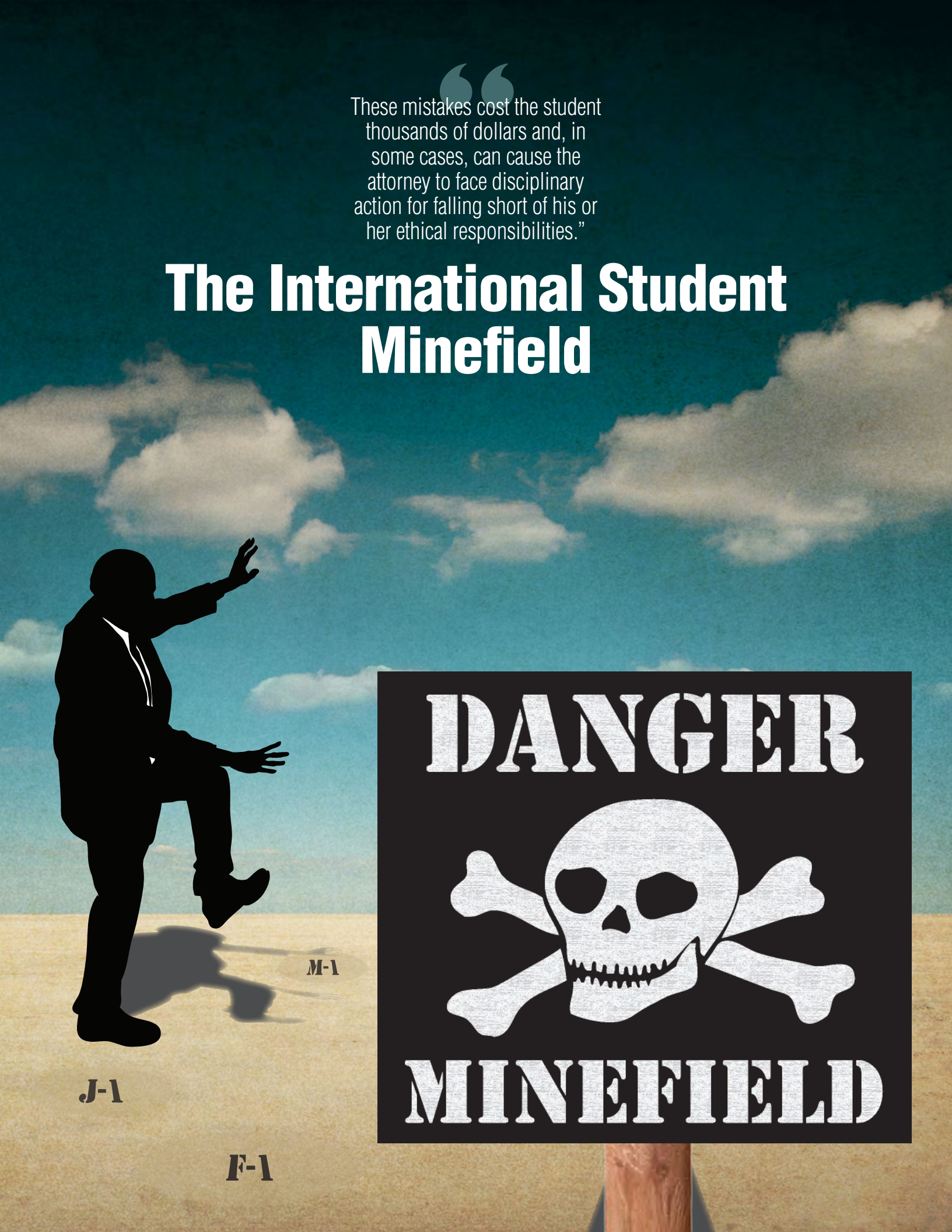
Peter B. Bade *is an associate with Berry Appleman & Leiden LLP in the firm's San Francisco office. He currently serves on AILA's Board of Publications. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 B. Appelbaum, "Optimistic Fed Outlines an End to Its Stimulus," *N.Y. Times*, June 19, 2013.

2 *See* U.S. Department of Labor, FY 2010 Annual Performance Report, at 49–50.

“These mistakes cost the student thousands of dollars and, in some cases, can cause the attorney to face disciplinary action for falling short of his or her ethical responsibilities.”

The International Student Minefield



by Robert V. Torrey

How many times have you had an international student in F-1, J-1, or M-1 status contact your office asking questions about working in the United States or obtaining lawful permanent resident (LPR) status? I am sure that this is a very familiar scenario for many immigration attorneys. Initially, the questions may seem fairly simple, but upon further reflection, you may find the questions contain multiple complex layers that demand close examination.

In online forums, at conferences, and in my former occupation as a Designated School Official (DSO), I have encountered questions from students regarding requests for evidences, changes of status, and adjustment denials because counsel failed to understand the complexities of F-1, J-1, or M-1 student status. These mistakes cost the student thousands of dollars and, in some cases, can cause the attorney to face disciplinary action for falling short of his or her ethical responsibilities.

For example, a J-1 student or a person in J-1 status wants to change his or her status to H-1B, is he or she subject to the two-year home return rule under INA §212(e)? Can you tell this from the documents? Is there a chance that the documents are not correct about the two-year requirement? Do you need an advisory opinion from the Department of State or can the J-1 exchange visitor produce an approved waiver from U.S. Citizenship and Immigration Services? Has the J-1 re-subjected him- or herself to the two-year rule *after* receiving the waiver? As you can see, you need to answer all of these questions to determine eligibility for a change of status.

In another example, a company contacts you about wanting to hire a recent graduate who is here as an F-1 student. Is the student still in status? If he or she is in post-completion Optional Practical Training status, did he or she not accrue more than 90 days of unemployment? Does he or she have work authorization? Did the J-1 re-subject him- or herself to the two-year rule after receiving a waiver? Do you have enough facts to allow you to explain to the potential employer the options for the employer to hire the student and for the student to work for the employer? Can you confirm that the position being offered is in a field that relates to the student's area of studies? Are you able to outline the pros and cons for the employer, including potential liability issues?

The realm between F-1, J-1, and M-1 student status and other nonimmigrant statuses as well as LPR status can be fraught with danger. Therefore, I encourage you to immerse yourself in the relevant regulations and guidelines and elicit critical facts from the student and potential employer before giving advice. When faced with such questions, knowing a competent, experienced DSO can be extremely valuable. Questions from F-1, J-1, and M-1 students may seem simple, but the advice almost never is.

Robert V. Torrey *is a former DSO who runs his own immigration and nationality law practice in Denton, TX. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

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BEHIND THE CASE

by **Sheeba Raj**

BEHIND THE CASE

CASE:

Flores v. USCIS, No. 12-3549 (6th Cir. June 4, 2013)

ATTORNEY:

Abraham Kay

CA6: 'The Statute Speaks for Itself'

The U.S. Court of Appeals for the Sixth Circuit attempted to cut through some of the "archaic and convoluted" language ingrained in our current immigration system, when in a recent opinion, it ruled that the plain language of 8 USC §1254a(f)(4) provides Temporary Protected Status (TPS) recipients a path to lawful permanent residence, thereby holding that a Honduran immigrant who entered the United States without inspection, but has held valid TPS since 1999, can adjust to LPR status on the basis of his marriage to a U.S. citizen.

The court's criticism was justified, according to Ohio Chapter Member Abraham Kay, who represented Saady and Stacey Leigh Suazos in Flores v. USCIS. "[O]ne of the odd things about this case is, as an attorney, you're going, 'Either, I'm a complete idiot for taking this case or I'm seeing something that nobody else seems to be arguing,'" he said. "To me, from the moment that I read the TPS statute, it seemed to me that an alien in TPS … for the purposes of adjustment of status, would be treated as if they were in lawful nonimmigrant status." He doubted himself because he thought nobody else was making that argument. Now he has affirmation.

For more on this topic, download the Litigation Track recordings from the 2013 AILA Annual Conference.

Kay says that 8 USC §1254a(f)(4) should be applied to every TPS recipient, even those with a prior deportation or removal order, provided that two criteria are met. First, the TPS beneficiary must have an independent basis of applying for adjustment of status, such as being the beneficiary of an approved I-130 petition of an immediate relative or being the beneficiary of a preference relative petition with a current priority date. Second, the TPS beneficiary must have disclosed the entry without admission, or the existence of the deportation/removal order, on his or her TPS application. For the TPS beneficiary who entered without admission, the attorney would always file the I-485 directly with USCIS. As for the one who was previously ordered deported or removed, Kay said that he would submit the I-485 and a Motion to Reopen to the immigration court, arguing that the TPS statute requires the reopening. He also says that another attorney might argue that the TPS statute allows the I-485 to be filed with USCIS, even without a Motion to Reopen, and "that may turn out to be the correct procedure."

Afterward, 8 USC §1254a(c)(2)(A)(ii) allows the attorney general to waive some grounds of inadmissibility, including both entry without admission and the existence of the prior deportation/ removal order, and grant TPS. Then, the TPS recipient becomes eligible for adjustment according to 8 USC §1254a(f)(4).

For other attorneys planning to litigate a case like this, Kay suggests that they file under the Administrative Procedure Act and the Mandamus Act, as he did, even though the Sixth Circuit never decided on the latter.

Sheeba Raj *is a legal editor for AILA and reporter for VOICE.*

PASS THE MIC

Editorials, Comments, and Opinions

by
Danielle M. Rizzo
Danielle M. Rizzo is an attorney with the Law Offices of James D. Eiss. She is the immediate past chair of AILA's Upstate New York Chapter and currently is serving as chair of AILA's Board of Publications and as a member of AILA Customs and Border Protection Liaison Committee. "How to Sleep at Night if You're an Attorney" is modified from a version initially published on her blog.

Don't Take It Home with You: Less Stress Equals More Sleep

I've been an attorney now for six years. The first couple of years were tough, but I have gradually learned that the key to minimizing the stress of my job lies in recognizing and operating within the parameters of my role, which, as I view it, is twofold: I am a counselor and an advocate.

As a counselor, my only job is to advise my clients. That is nothing more than researching all the options available to the clients and explaining the consequences that could flow from each one. Sometimes, options are limited and the results straightforward, but other times, the possibilities branch out in all directions. The most important thing to keep in mind is that the clients ultimately decide which way to go. Some clients ask me what I would do if I were in their shoes, and with some disclaimers, I explain what I'd do and why. These hypothetical situations sometimes help the clients choose an option. Whatever consequences flow from the clients' choices are theirs to bear. As long as I have provided the clients with accurate information, I have done my job. Recognizing that fact takes an enormous burden off of my shoulders.

As an advocate, I represent my clients before the government in whatever course of action they have chosen. Since I don't litigate, I present most of my cases in writing with no in-person appearance. However, I do represent clients in person at the border. My ability to understand how adjudicators evaluate applications has deeply influenced the way I represent clients in person, as well as on paper. That is, I refuse to submit a case that offends logic or would fail the sniff test of a seasoned government official.

"WHATEVER CONSEQUENCES FLOW FROM THE CLIENTS' CHOICES ARE THEIRS TO BEAR. AS LONG AS I HAVE PROVIDED THE CLIENTS WITH ACCURATE INFORMATION, I HAVE DONE MY JOB."

Often, the cases I present are clearly approvable. Other times, however, the adjudicator exercises a great deal of discretion. And some clients do choose to pursue cases that I have advised them are likely to be rejected. I often turn down the cases because the trouble of dealing with high-maintenance clients who might not want to pay the bills is not worthwhile. But, sometimes, if I believe that the cases should be approved under the law and yet probably won't be because of current adjudication trends, I accept those cases, assuming that the clients know the risks involved and choose to pursue the course of action anyway. I like to push the boundaries of current government opinion when it is wrong. →

My role as an advocate, then, is somewhat less clearly defined than my role as an advisor. However, the important thing to remember is that once I have chosen to represent certain clients, my job is to advocate zealously for them. I push aside all the what-ifs and pitfalls, and present each case as if it were unimpeachably logical. But once I submit it, I really don't think about it until I get a decision from the government, which I may or may not appeal.

As attorneys, it is tempting to overestimate the power that we have over others, but it is an illusion to think that we truly have control over what anyone else chooses. If someone gives you that kind of control, it's a mistake on their part that ultimately will harm you both. Everyone makes their own choices. The best we can do as attorneys is to tell our clients the consequences of their options. Recognizing the limitations of our roles is a way of letting go of things that were never in our control in the first place. I love my clients, but I don't carry their problems home with me, and I don't pin my happiness to case outcomes. I am happy when I have advised and advocated well.

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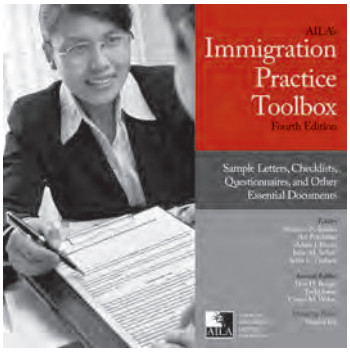

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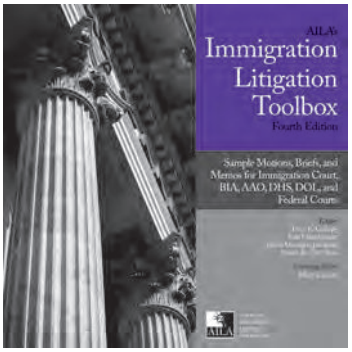

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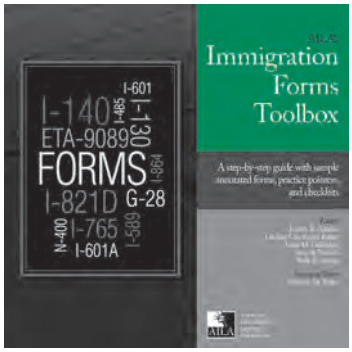

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by **Pamela Mafuz and Becki L. Young**

Attracting Foreign Talent and Investment to Spain

The financial crisis has decreased immigration to Spain during recent years. In response, Spanish authorities have introduced a bill that provides immigration benefits to foreigners who want to live and invest in the country, but also protects the local workforce. Although the bill is subject to amendments (the final text must be approved by Spanish Parliament), it is a step forward in the government's agenda to support entrepreneurs, foreign investors, and multinational companies with a presence in Spain.

The Spanish government wants to implement the following measures for non-European (EU) or European Economic Area (EEA) nationals:

Foreign Investors

The bill introduces a new visa valid for three months to five years that provides legal resident status to the investor involved in the following initiatives:

1. **Investment in the amount of, at least, €1 million.** The investment can consist of shares in Spanish companies or deposits in Spanish banks. The investment also may be made in national debt titles.
2. **Purchase of real estate in Spain.** The purchase value must be at least €500,000.
3. **Business projects and investments in the country considered of public interest.** For the project or investment to be considered of public interest, authorities must officially acknowledge that it meets any of the following criteria:
   - Creates significant employment in the province or region;
   - Produces a socioeconomic impact in the Spanish region where the activity will take place;
   - Contributes to scientific or technological innovation; or
   - Supports Spanish commercial policies and investment in the country.

Entrepreneurs

The bill introduces a visa that would allow entre-

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preneurs to set up a business in Spain, provided that Spanish authorities first issue a report approving the activity based on its potential economic benefit for the country. Under certain circumstances, the visa may lead to a resident permit in Spain when the business activity has effectively begun.

Intercompany Transfers

The bill facilitates the transfer of highly-skilled personnel among companies belonging to the same group of companies (to be defined) more easily than the existing, more rigid immigration regulations do.

Highly-Skilled Professionals

Currently, there is a fast-track procedure for the managerial or high-skilled personnel of companies to obtain work permits, depending on the number of employees in Spain, the amount of investment in Spain, or net turnover. But the bill is more flexible with respect to the conditions companies must meet to access the fast-track procedure to obtain work permits. For example, the bill establishes fast-track work permit processing for companies or groups of companies with at least 250 employees. (Currently, companies with more than 500 employees have access to expedited processing.)

The bill advances the government's goal of attracting foreign talent to Spain and stimulating necessary foreign investment there. We will have to stand by and await the final law to determine if the proposed measures come to fruition.

Pamela Mafuz *has more than 20 years of experience in corporate immigration law matters and Spanish nationality law. She is special counsel at Baker & McKenzie's Madrid office and leads the Global Immigration and Mobility (GIM) Group, which she implemented when she joined the firm in January 2000.* **Becki L. Young** *co-manages the GIM Group in Baker & McKenzie's Washington, D.C. office. The authors' views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

INTER ALIA

by **Jessica L. Marks**

Travel Issues for J-1 Physicians with Conrad Waivers

For international medical graduates (IMG) with a Conrad waiver, traveling abroad during the three-year J-1 waiver service period on an H-1B visa presents no issues other than those typically encountered in the visa application process and at the border. But if physicians use the advance parole document during this period, attorneys must discuss the possible consequences with both the waiver employer and the IMGs.

Conrad Waiver and Advance Parole

IMGs who complete graduate medical education in J-1 status may be granted a waiver of the two-year residency requirement of INA §212(e) under Pub. L. No. 103-416 through a Conrad State 30 or comparable federal agency program based on an agreement to provide at least three years of medical service. Although the statute does not require the physician to complete the J-1 waiver commitment in a particular visa status, federal regulations require that the three-year service period be completed in H-1B status. *See* 8 CFR §212.7(c)(9)(iii).

Many IMGs who are granted a Conrad waiver also pursue lawful permanent residence through the physician National Interest Waiver (NIW) process. *See* INA §203(b)(2)(B)(ii). Provided that an immigrant visa number is immediately available, a physician who is the beneficiary of an NIW petition filed pursuant to INA §203(b)(2)(B)(ii) may concurrently file Form I-140: Immigrant Petition for Alien Worker, and Form I-485: Application to Register Permanent Residence or Adjust Status, even before the physician completes the three-year J-1 waiver commitment.

A 2001 legacy INS memo (located on InfoNet at AILA Doc. No. 01101140) recognizes an exception to 8 CFR §212.7(c)(9)(iii)'s prohibition on the filing of an adjustment of status application until after the three-year J-1 waiver commitment is completed. NOTE: This exception is limited solely to those physicians filing I-485 applications based on a pending or approved physician NIW petition filed under INA §203(b)(2)(B)(ii). These physicians may *file* the I-485 before the completion of the J-1 waiver commitment, but USCIS may not *approve* the application until the physician has completed both the J-1 waiver commitment and five-year physician NIW commitment. All other physicians fulfilling a J-1 waiver commitment must wait until the three years of service is complete before applying for adjustment of status.

With the pending I-485, the physician also is eligible to apply for employment authorization and an advance parole travel document.

Cronin Memo vs. 8 CFR §212.7(c)(9)(iii)

The 2000 legacy INS memo issued by Michael D. Cronin provides that an H-1 or L-1 nonimmigrant may apply to extend that status after entering the United States with advance parole issued pursuant to a pending adjustment.[1] If the extension is approved, then it "will have the effect of terminating the grant of parole and admitting the alien in the relevant nonimmigrant classification." The memo, therefore, suggests that the applicant is both in nonimmigrant status *and* not in nonimmigrant status at the same time: a beneficiary must hold the relevant nonimmigrant status in order for a petition to extend that status to be approvable, yet the memo expressly states that approval of the exten-

sion petition is an admission in the requested nonimmigrant classification, thereby implying that the applicant *did not* hold that status prior to approval.

The implications of this conundrum for physicians completing the terms of their Conrad waiver are significant: if the physician provides three years of service in any status other than H-1B, then the conditions imposed on the waiver by 8 CFR §212.7(c)(9)(iii) have not been met, and, arguably, the physician again becomes subject to the two-year home residency requirement. *See* 8 CFR §245.18(b)(2). If U.S. Citizenship and Immigration Services (USCIS) determines that entering on advance parole, despite resuming employment with the waiver employer and completing the three years of service, caused the physician to violate 8 CFR §212.7(c)(9)(iii), then the I-485 application will be denied and the physician will be ineligible to adjust until the three years have been completed pursuant to a new H-1B petition.

On the other hand, the Cronin memo clearly indicates that an individual admitted on advance parole, who nonetheless maintains a valid underlying H-1B petition, and has not otherwise violated the terms or conditions of H-1B employment, is in H-1B status; otherwise, he or she would be ineligible to extend H-1B status as permitted by the memo. Furthermore, provided there is a valid H-1B petition in place during the entire three-year service period, there is a strong argument that the terms and conditions of the J-1 waiver have been satisfied notwithstanding use of advance parole for entry during the commitment period, particularly in light of the fact that the statute itself does not require that the physician complete the commitment in H-1B status. INA §214(l)(2) permits a physician to change status to H-1B to complete the J-1 waiver commitment, but does not require it. Only the regulation does that and is, therefore, arguably ultra vires. *See* 8 CFR §212.7(c)(9)(iii).

Conservative in Absence of Clear Guidance

Many physicians successfully enter the United States on advance parole during the three-year J-1 waiver service period without immediately filing an H-1B petition to formally reinstate H-1B status and have not experienced any subsequent problems extending H-1B status and/or adjusting status once the J-1 waiver commitment is completed. Nonetheless, in the absence of clear guidance, the most conservative approach is to advise a physician who has not yet completed the three-year commitment to file an H-1B petition upon returning to the United States using advance parole, and not count any service time done as a parolee toward the three years. Practitioners should advise physician clients and their H-1B–sponsoring employers of the potential consequences of a failure to file the H-1B petition, however unlikely those consequences are to arise.

Jessica L. Marks *is an associate attorney with Wolfsdorf Immigration Law Group in Santa Monica, CA.* *Thanks to the AILA Health Care Professionals/Physicians Committee for contributing to this article. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.*

1 Legacy INS, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum," (May 25, 2000), AILA Doc. No. 00052603.

POETIC JUSTICE

Desperate

by Julia Manglano Toro

Desperate
Making desperate calls
Going to appointments
With lawyers
Not knowing who to trust

Working
Anxious
Wondering how to help
How to pay for help
How to keep working and help

Relative detained
Can't communicate
Getting deported
One person worried
For the life of another
One person searching for more

Need for lawyer
Need for family support
Teachers to cooperate
Religious community to contribute
Employers to wait

Told you'll be fired
If you miss more work
Lawyers need more documents
Foreign documents
Letters from family and friends
Documents need to be translated

Still looking for money
Still borrowing
Still anxious
Still worried about the locked up relative
One person worried
One person searching for more

Asking for help everywhere
Not sleeping
Working
Worrying
Desperate

Desperate
Separated from family

Locked up, little communication
Depending on others
Finding little sympathy
No one outside has sympathy
No one inside has sympathy

Running from home
To work, to lawyer
Running and desperate
No one outside has sympathy
No one inside has sympathy

Waiting days
Days turn to weeks
Weeks turn to months
One locked up
One running circles

A lawyer
Government officers
Calls and calls and more calls
Talking to machines
Requests ignored
Requests rejected

Feeling rejected
No one cares
No one can help soon enough
Why wait
Why continue waiting
With your life in others' hands

Family is what keeps you waiting
Family is what brought you here
Family is why you look for work,
For pay,
To support your family

Desperate for your family
Desperate for family here and there
Desperate to return to your family
Not to your old family home
In another country
Waiting
Desperately
To return to your home here
To work here and
With your family here

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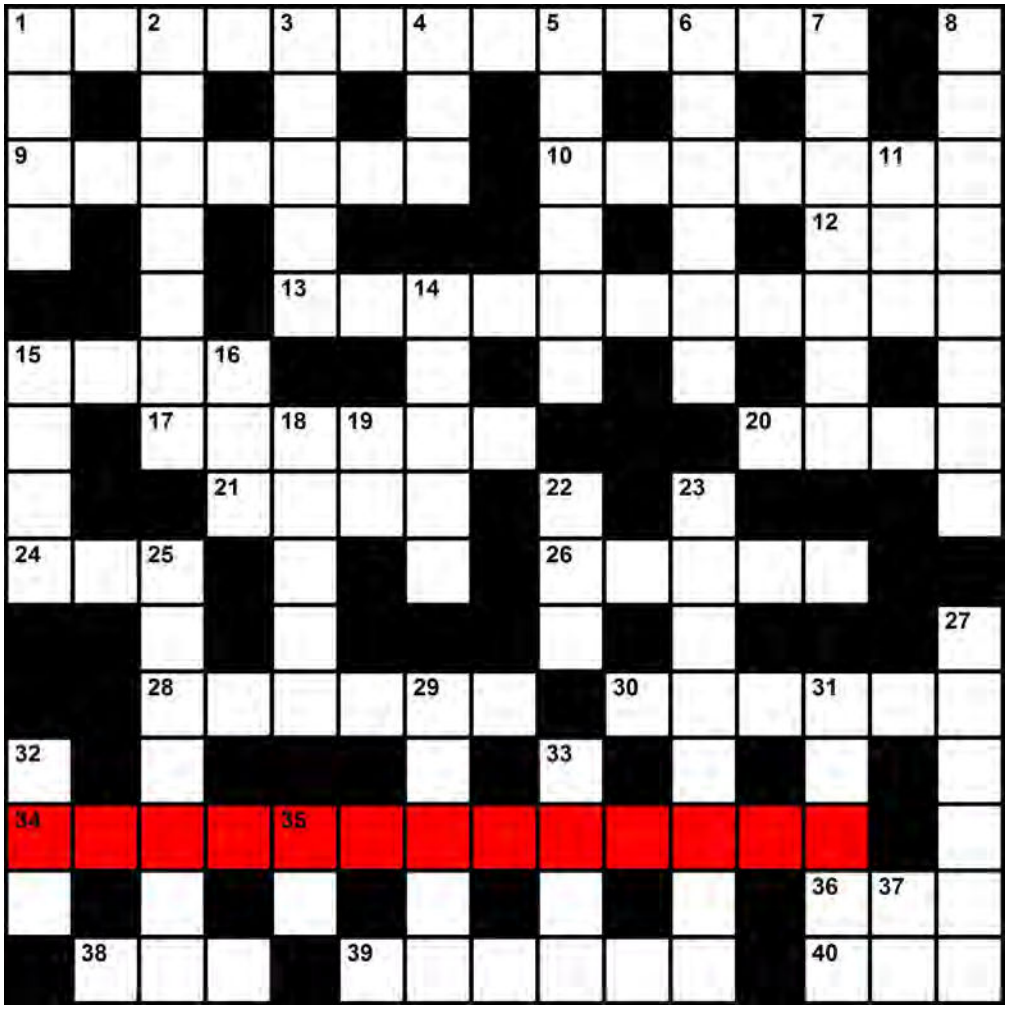

ACROSS

1. It allows a person, previously admitted to the U.S., to leave the country and return to continue processing his/her application (2 words)

9. This classification permits qualified Canadian and Mexican professionals to enter the U.S. to engage in business activities

10. Positions

12. The Immigration Nationality Act, for one

13. Workers in this field may enter the U.S. under the H-2A program, if approved

15. EOIR-29 is one

17. Adjustment of ____ processing

20. ____ficiary

21. Schedule position

24. Form information

26. Card that can be attained by a spouse of a U.S. citizen, for example

28. In FOIA requests, the Notice to Appear track allows accelerated access to this type of file

30. Provisional unlawful presence ____

34. Code word of the puzzle

36. Take advantage of

38. Chuck Schumer's title, for short

39. E-1 _____ , nonimmigrant classification permitting entry to the U.S. to carry on international trade (goes with 27 down)

40. File a suit using the wrong classification for example

DOWN

1. LIFE and VAWA are examples of these

2. Sellers

3. Free trade agreement that includes Mexico

4. Austin-Bergstrom board posting

5. Per se (2 words)

6. How many arguments are made

7. Remove as admissible evidence, for example

8. Responded

11. Attention

14. Path

15. Act that was passed to ensure openness and transparency in government, abbr.

16. Whitney and others, abbr.

18. Accused's defense

19. Towards

22. Earlier

23. Lawfulness

25. Not forthright

27. Goes with 39 across

29. African nation

31. Courtyard Marriott, for example

32. Legal section in USCIS that provides legal advice to immigration officials, abbr.

33. ____legal, administrator extraordinaire

35. Boston's state

37. Older of two sons

Get the answers to last issue's puzzle!

by Sheeba Raj

One of AILA's Own Nabs Coveted Ma

See AILA's interview with winner Margaret D. Stock.

For much of her career, retired Lieutenant Colonel Margaret D. Stock has been mentoring fellow AILA members handling immigration cases on behalf of U.S. military personnel. On Sept. 3, 2013, Stock was expecting a call from such an attorney seeking help. When the phone rang, someone else was on the other end of the line.

It was Cecilia Conrad, vice president of the MacArthur Fellows Program. "My first reaction was a brief, fleeting thought that one of my friends was playing a practical joke on me because I didn't immediately recognize the name," said Stock, now serving as counsel to Cascadia Cross-Border Law in Anchorage. "I didn't recognize the number, but I recognized that it was coming from Chicago."

After asking Conrad to repeat her name, Stock quickly learned that she had been awarded a prestigious MacArthur Fellowship for her steadfast commitment to reforming immigration and national security law through direct representation and policy. It was an honor recognizing her for having spearheaded such successful initiatives like the Military Accessions Vital to the National Interest, the Naturalization at Basic Training Initiative, and, of course, the AILA Military Assistance Program (MAP).

"I decided to establish the [AILA] MAP program because I was being inundated with calls from lawyers,

The AILA Military Assistance Program (MAP) is a collaborative effort between the American Immigration Lawyers Association (AILA) and the Legal Assistance Offices (LAO) of the U.S. Judge Advocate General's (JAG) Corps. The LAOs provide free assistance to active-duty service members and their families in order to maintain the highest level of readiness possible in the event that a military member is deployed. When JAG attorneys

cArthur Fellowship

military personnel, family members, veterans, and other people who had immigration problems that were related to the military," Stock explained. "And I was getting so many calls that I couldn't handle all the calls, and in the interest of reducing my workload, I called [then-president] Chuck Kuck at AILA [in 2007]." Stock proposed that AILA start a pro bono program for AILA members to volunteer to work on military-related immigration matters. And in 2008, MAP was launched.

During the first year or so of the program, Stock would screen phone calls and e-mails from people requesting help. She also recruited attorneys to handle these cases. Eventually, the intake process became formalized. Potential clients and volunteer attorneys can now visit MAP's website to learn more about the services, such as representing service members or mentoring a Judge Advocate General facing complex immigration issues. Volunteers also can tap into a listserve devoted to military-related immigration questions. The answers given by Stock to the myriad questions she has received over the years were finally memorialized in Stock's book, Immigration Law & the Military, published by AILA in 2012.

Since the MAP program's inception, a roster of 355 AILA members has helped more than 600 service members. "I've gotten to know a lot of my fellow AILA members who are AILA MAP volunteers," Stock said. "It has been tremendously rewarding to work with them. And I feel, in large part, a lot of them are responsible for the fact that I'm being recognized by the MacArthur Foundation."

Stock hasn't yet decided how she'll use the $625,000 MacArthur grant, which she will receive in quarterly payments starting next year.

Stock receives the Joint Forces Commendation Medal from Navy Captain Ann Kubera. Stock got this award for educating the U.S. Special Operations Command about immigration law.

PHOTOS COURTESY OF MACARTHUR FOUNDATION

Sheeba Raj *is a legal editor for AILA and reporter for VOICE.*

are inundated with complex immigration legal questions, they often need the assistance of seasoned immigration attorneys. MAP brings these two groups together to form a truly dynamic and effective partnership. For more information, contact Michelle Singleton.

AILA Military Assistance Program

WHAT'S HAPPENING

THE 4-1-1

Philadelphia Chapter Member **William A. Stock** presented "The Immigration Law Survival Guide for University Attorneys" at the National Association of College and University Attorneys' annual conference in June.

Northern California Chapter Member **Grace Hoppin** passed away on Sept. 28, 2013, after a long bout with cancer. She will be sorely missed by AILA National and her chapter colleagues.

New York Chapter Member **Roxanne Levine**, a partner at Tarter Krinsky & Drogin LLP in New York, has been nominated to Chambers USA 2013 as an exceptional lawyer in the U.S. immigration field.

Southern California Chapter Members **Lincoln Stone**, **Kathy Grzegorek**, and **Josie Gonzalez** have merged their respective law firms to create Stone Grzegorek & Gonzalez LLP.

New York Chapter Member **Jessica Palumbo** is an associate at de Moya and Associates, P.C. in New York City.

Bangkok District Chapter Member **Gary Chodorow's** U.S. and China Visa Law Blog is among the recipients of the 2013 Danwei Model Worker Award, which recognizes the best English-language websites about China.

Philadelphia Chapter Members (left to right) **Ebiho T. Ahonkhai**, **Jacob D. Cherry**, **Michelle T. Kobler**, **Anusree Nair**, and **Marc I. Walsh** have joined Klasko, Rulon, Stock & Seltzer LLP as associates.

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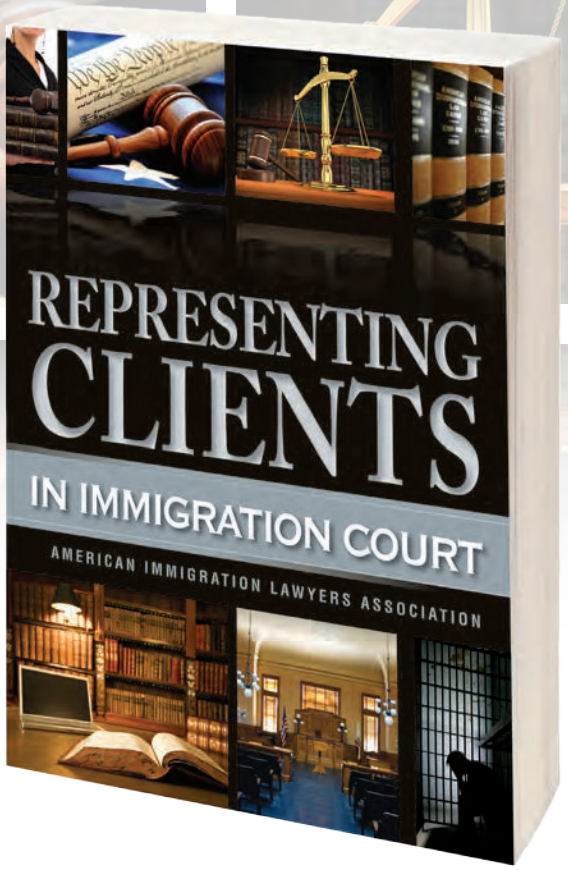

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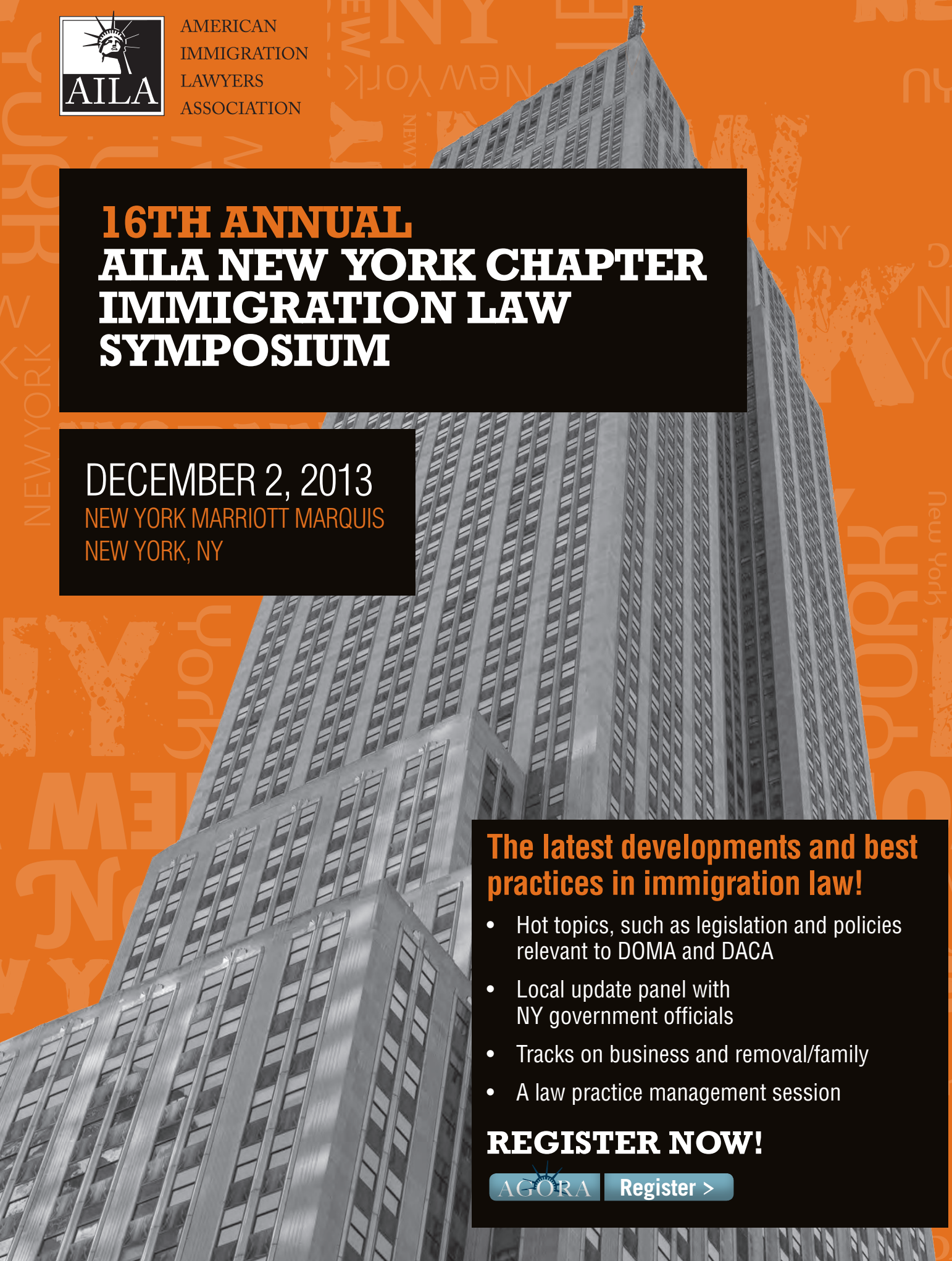

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