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Contesting Restitution, Loss Findings in Aggravated Felony Cases

by Mary E. Kramer

INA §101(a)(43)(M)(i) defines "aggravated felony" as an offense involving fraud or deceit where the loss to the victim(s) exceeds $10,000. Federal criminal judgments for fraud-related crimes often contain a finding of loss and/or restitution. What immigration lawyers often don't understand is that "loss" is a finding set by the criminal court to calculate an appropriate sentence; it may not necessarily represent the actual loss caused by the specific offense of conviction. Likewise, the amount of restitution ordered may be based on conduct connected to the overall scheme of criminal acts, rather than on an accurate measure of financial loss to a victim. Neither "loss" in the criminal sentencing context nor restitution are synonyms for actual loss.

Sentencing Factors: Established by a Preponderance of the Evidence

In a criminal case, the amount of loss and appropriate restitution are not litigated at the prosecution phase, but rather at the sentencing phase. The amount of loss serves as a guideline towards a certain sentence. If a defendant is contesting sentencing factors, the standard of proof is a preponderance of the evidence, and the judge makes discretionary determinations based on relevant conduct. 18 USC §3661.

"What immigration lawyers often don't understand is that 'loss' is a finding set by the criminal court to calculate an appropriate sentence; **it may not necessarily represent the actual loss caused by the specific offense of conviction."**

The sentencing guidelines at USSG §1B1.3(a)(1) also permit the criminal sentencing court to consider other conduct not included in the charge, verdict, or plea. Typically, the U.S. Probation Office prepares a pre-sentence investigation report (PSI) for the sentencing court's consideration. Parties can object to the findings of the PSI, but again, the standard of proof is a preponderance of evidence. Often, parties will stipulate to a loss amount in the plea agreement for sentencing purposes. The amount of loss stated in a plea agreement may reflect conduct outside the count of conviction, and represents a negotiated settlement by the parties.

Two Bites at the Apple: Sentencing and Removal Proceedings

In Nijhawan v. Holder, 557 U.S. 29 (2009), the U.S. Supreme Court ruled that the amount of financial loss to a victim requires a "circumstance-specific approach" considering all relevant information to determine whether it exceeds $10,000, and that this loss amount must be "tethered" to the offense of conviction; it cannot be based on acquitted or dismissed counts or general conduct. 557 U.S. at 42. The Court went on to say that "these considerations" mean that a noncitizen in removal proceedings has at least one, and possibly two opportunities, to contest the amount of loss: one at criminal sentencing; the second in immigration court. Clearly, an immigration court should not accept as proof of financial loss the judgment's loss and restitution amounts. Instead, it is required to consider all relevant evidence and hold U.S. Immigration and Customs Enforcement (ICE) to their burden of proof by clear and convincing evidence. INA §240(c)(3)(A).

Articulating 'Relevant Conduct' for the Immigration Court

A charging document's description of financial amounts, the judgment's loss amount, and the sentence's restitution constitute relevant evidence in immigration court, but not the only evidence. For instance, even before *Nijhawan*, the Board of Immigration Appeals (BIA) recognized in Matter of Babaisakov, 24 I&N Dec. 306, 319 (BIA 2007), that a restitution order might be indicative of the loss to a victim specifically on account of the conviction, but is not necessarily so. In *Babaisakov*, the BIA instructed immigration judges to consider all relevant material in a fundamentally fair manner, giving immigration defense counsel the opportunity to dispute the government claim that loss to a victim exceeded $10,000.[1] Attorneys should, therefore, carefully review the indictment or information to determine how restitution and loss were calculated. In addition, counsel must determine the actual loss amounts tied to the specific count of conviction because federal criminal sentencing findings are arrived at differently, for different purposes, than the loss amount referenced at INA §101(a)(43)(M)(i).

Singh v. Att'y Gen.: Who's the Victim, Where's the Loss, and What's the Harm?

In Singh v. Att'y Gen., 677 F.3d 503 (3rd Cir. 2012), the court dissected the "loss to a victim" phrase of

"Counsel must determine the actual loss amounts tied to the specific count of conviction, **because federal criminal sentencing findings are arrived at differently,** for different purposes, than the loss amount referenced at INA §101(a)(43)(M)(i)."

INA §101(a)(43)(M)(i). Singh tried to deceive the New Jersey Port Authority by diverting contracts intended for certain subcontractors to different contractors in exchange for money. While avoiding prosecution for deceit, Singh was criminally charged for failing to list the Port Authority's anticipated payments as an asset in unrelated, pending bankruptcy proceedings, thereby committing perjury.[2] Singh pled, and to avoid a sentence of incarceration, the parties negotiated a $54,000 loss amount into the plea agreement. There was no payment for actual loss to any victim.

The U.S. Department of Homeland Security (DHS) started removal proceedings after sentencing, citing the $54,000 restitution order as proof of a loss. However, the Third Circuit ruled that §101(a)(43)(M)(i) requires an actual loss, not an intended or potential one. Because the Port Authority's contract negotiations with Singh were associated with a sting operation, no funds were dispersed. Also, in the bankruptcy trustee's proceedings, no resources were expended or lost by the failure to declare the operation's hypothetical forthcoming payment. Thus, there was no victim, no harm was caused, and so DHS could not establish actual loss.[3]

Study the Criminal Record File!

It is important for counsel to understand the charges, ultimate conviction, and sentencing findings in a client's criminal case to defend against arguments that the restitution and/or loss reflected in the criminal sentence are the determining factors in establishing actual loss.

1 Obasohan v. U.S. Attorney General, 479 F.3d 785, 790 (11th Cir. 2007). *Obasohan* was abrogated in part by *Nijhawan,* to the extent that the Eleventh Circuit had adopted an elements-based approach to loss; however, the discussion of loss in the criminal sentencing context as determined by "relevant conduct" that may be outside the count of conviction, and, therefore, not determinative for immigration purposes, remains good law. Indeed, the discussion of what are sentencing factors is reiterated in *Matter of Babaisakov.*

2 To violate 18 USC §152(3), one must "knowingly and fraudulently make a false declaration . . . under penalty of perjury" in relation to a bankruptcy proceeding. The Third Circuit found that this offense involved deceit.

3 The Ninth Circuit, in Kharana v. Gonzales, 487 F.3d 1280, 1282 n.3 (9th Cir. 2007), found that removability under §101(a)(43)(M)(i) can be based on intended loss. Similarly, the BIA has held that §101(a)(43)(M)(i) may be based on a conspiracy charge with potential losses. Matter of S-I-K, 24 I&N Dec. 324 (BIA 2007).

MARY E. KRAMER is author of Immigration Consequences of Criminal Activity. The author's views do not necessarily represent the views of AILA, nor do they constitute legal advice or representation.

How Executive Action Could Heal Health Care-Related H-1B Petitions

by Jennifer A. Minear

In the wake of President Obama's November 20, 2014, announcement on executive action, immigration lawyers around the country formulated lists—or perhaps just blew the dust off lists created long ago—of steps the administration can and should take to help improve our immigration system as we continue to wait (and wait) for legislative reform. Here are two administrative fixes from my own wish list that would significantly improve the processing of health care-related H-1B petitions.

Administrative Fix #1: H-1B Cap Gap Protection

Many foreign physicians complete graduate medical education (residency or fellowship training) in H-1B status with cap-exempt nonprofit hospitals that are affiliated with medical schools. The academic medical year runs from July 1 through June 30—*i.e.*, physicians graduate in the summer, when there are no cap-subject H-1B numbers available. This leaves physicians who want to transition to private, cap-subject medical practice in a bind. Of course, there are many H-1B workers who experience this

problem, but physicians do so routinely because of the way the academic medical year is scheduled.

The problem could be eliminated by formalizing a notion suggested in the 2007 correspondence between AILA member Naomi Schorr and Efren Hernandez, then chief of the Business and Trade Branch of U.S. Citizenship and Immigration Services (USCIS). In response to Schorr's letter on the topic, Hernandez acknowledged that a beneficiary may port from a cap-exempt employer to a cap-subject employer under INA §214(n). This is because there is no statutory requirement that the beneficiary be in H-1B status in order to take advantage of portability, so long as he or she was previously issued an H-1B visa or provided H-1B status. That being the case, an H-1B beneficiary may begin work for a cap-subject petitioner on the basis of a pending petition.

There is less clarity regarding the intended duration of INA §214(n) work authorization. The statute states that employment authorization continues while the petition is pending and ceases if it is denied. It does not indicate what happens if the H-1B petition is approved before the effective date of the new petition, probably because, as Hernandez speculated, Congress did not consider the possibility that the petition might not be immediately effective upon approval. Hernandez acknowledged that it would be "logical" for employment authorization to continue through to the October 1 effective date of an approved petition rather than ending upon approval. He added that "USCIS will explore this position in future rulemaking." Well, the future is now! Let's get this done.

"We need a **sane and rational** definition for the terms 'affiliated' and 'related' such as the one previously proposed by AILA."

Administrative Fix #2: Affiliation-Based H-1B Cap Exemption

I wouldn't dare hope for actual regulations implementing the American Competitiveness in the Twenty-First Century Act of 2000. After all, it was only just signed into law 15 years ago. Still, I would be thrilled if we could get clear, simple guidance on what the terms "related or affiliated" mean in the context of INA §214(g)(5)(A), which provides for an H-1B cap exemption where the beneficiary will be employed by or at an institution of higher education or a related or affiliated nonprofit entity. This has a huge impact on, among others, nonprofit hospitals that operate residency/fellowship training programs in affiliation with medical schools.

It seems to me that "related' and "affiliated" are fairly common-sense terms. (I would gladly send USCIS my dictionary if that would help.) But the agency's history of applying this simple language is a nightmare of arbitrariness and inconsistency. Currently, USCIS uses a regulatory definition written to implement a completely different statute,[1] one that is utterly out of step with the way most academic affiliation agreements are structured. However, if the petitioner happens to have been approved previously as cap exempt sometime after June 6, 2006, USCIS will defer to that prior determination of cap exemption so long as the prior approval was not "clearly erroneous" and there has been no "significant change in circumstances" regarding the affiliation since the prior petition was approved. Got that? Of course, you don't. And neither does USCIS. We need a sane and rational definition for the terms "affiliated" and "related" such as the one previously proposed by AILA. Or, you know, just pick up that dictionary.

More Administrative Fixes Needed

I applaud the President's call for action. We in the immigration bar must respond by continuing to shed light on the problems and proposing solutions. What I've laid out above are just two of many steps the administration could take to improve the functioning of our employment-based immigration system.

1 8 CFR §214.2(h)(19)(iii)(B), implementing the fee exemption provisions of the American Competitiveness and Workforce Improvement Act of 1998.

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Strategies & Considerations for Gaining H-1B Cap Exemption
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AILA Doc. No. 15020246. (Posted 2/2/15)

Not Always a Carnival: Business Visitors in Brazil

by Heloisa L. Avila and Becki L. Young

Motivated by job opportunities, foreigners from all parts of the world are coming to Brazil. When the purpose of the trip is to evaluate Brazil's market, attend business meetings, or close business deals without establishing residency in the country, then the business visa will probably best suit those needs.

The Brazilian Business Visa

The business visa is usually valid for five years with a maximum length of stay of 90 days (or 180 days, if the extension is duly requested and granted by the Federal Police Department) per 12-month period, which starts on the day of the first entry of the foreign national in Brazil. A benefit for business visitors is that only the days actually spent in the country count for the 90-day period.

Based on the reciprocity agreements executed between Brazil and a number of countries, some foreign citizens may enter Brazil without first getting a visa stamp at a Brazilian consulate abroad. Business visitors from these countries simply present their passports to the Brazilian authorities when they enter the country and receive a stamp authorizing a 90-day stay. On the other hand, those business visitors from countries without reciprocity agreements, and who, therefore, require a business visa stamp, will have to obtain it from the Brazilian consulate before traveling to Brazil. To obtain the business visa, they must submit an invitation letter signed and notarized by a Brazilian notary public.

Limitations

Brazilian immigration legislation does not specifically address the limitations of the business visa. In practical terms, however, the use of this visa is not advisable for business activities that involve the performance of any management activities, technical assistance, training, consulting or other activities involving paid work. In fact, working for a Brazilian company with a business visa, even if for a short assignment, is illegal. In addition, if a business visitor stays in Brazil for more than 180 days, then he or she may face a fine of approximately $5 per illegal day spent in the country. The company could also be subject to a penalty of approximately $1,250. Attorneys should properly advise clients so they do not incur fines for the wrong visa or for overstaying an authorized period of stay.

Practice Tips

- Assess whether the employee will be engaging in legitimate business visitor activities or will require a work permit.
- Make this assessment at least 60 days before the employee needs to enter Brazil because it will take at least this long to get a work permit if one is required.
- Find out whether the employee is from a nation that allows for visa-free business travel to Brazil. If not, be aware that the business visitor visa application process may require legalized or authenticated documents that may take some time to obtain.
- If your client is an employee traveling to Brazil as a business visitor, advise him or her to keep close track of the allotted 90-day stay (or 180-day stay if an extension is granted) to ensure that the employee does not exceed it.
- Work with qualified local counsel to navigate the immigration laws of Brazil, which is one of the most complex jurisdictions in the world.

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ARB Decision Limits H-1B Back Wages

by Brian S. Green

After years of aggressive enforcement by the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD), the agency's Administrative Review Board (ARB) issued a decision introducing a welcome measure of flexibility into how an employer may terminate H-1B employees who port to another employer.

AC21 Porting Issues

In Batyrbekov v. Barclays, the employer failed to complete a "bona fide" termination as required by H-1B program regulations and DOL case law.[1] Deviating from recent decisions,[2] the ARB limited back wages to the point where U.S. Citizenship and Immigration Services (USCIS) approved a new H-1B petition for Batyrbekov's next employer.

The ARB weighed the facts of the case and the interplay of the American Competitiveness in the Twenty First Century Act (AC21) in rejecting a rigid application of the bona fide termination standard under prior case law, and created a more common sense approach.

Bona Fide Terminations

H-1B employers have been required to terminate H-1B workers through a process set forth in the regulations and as more fully explained in Mao v. Nasser and Amtel v. Yongmahapakorn. Briefly put, if an H-1B worker is terminated against his or her will, the employer must notify the worker and USCIS, and offer to pay the cost of the worker's return to his or her country of origin. On the other hand, if an H-1B worker voluntarily quits his or her employment, then the employer does not need to offer return transportation costs, but must still notify USCIS of the termination. *See Amtel* at 11; 20 CFR §655.731(c)(7)(ii).

Amtel Distinguished

In *Barclays*, Batyrbekov was terminated, but Barclays did not notify USCIS to withdraw the H-1B petition until almost one year later. After Batyrbekov filed a complaint with the WHD claiming back wages, a WHD investigator determined that he was owed required wages until March 31, 2009, the date when Batyrbekov said he entered into new H-1B employment. *Barclays*, at 3–5. Unsatisfied with the back wages calculated by the WHD and upheld by an administrative law judge, Batyrbekov appealed to the ARB.

> "In sum, **counsel should caution H-1B employers to comply with the bona fide termination requirements,** but recognize when the more limited termination described in Barclays is available. ..."

On appeal, the ARB reviewed the facts and law and then distinguished *Amtel*, noting that *Amtel* involved an H-1B worker who was not notified of her termination and did not have a new H-1B employer who sponsored her. In addition, USCIS was not notified of the termination. The ARB stated that the *Amtel* precedent does not allow the flexibility needed for the complexities that arise in cases involving multiple H-1B employers and AC21 portability. *Barclays*, at 9–10. A strict application of bona fide terminations under *Amtel* would lead to each H-1B employer in a succession of employers being required to owe overlapping back wages, which is likely not what Congress intended when it enacted AC21.

A New Standard for Bona Fide Terminations?

The ARB stated that in situations where H-1B workers use AC21 to port jobs, a bona fide termination may exist where: 1) the first employer expressly notifies the worker of the termination of employment; and 2) USCIS approves a "change of employer" H-1B petition. While not relieving employers of the requirement to notify USCIS of the termination of employment, the ARB accepted the fact that the H-1B employee had, in effect, notified USCIS of his intention to change employers, and that the original employment relationship ended when the work authorization was canceled. The ARB found that USCIS's approval of a change of employer H-1B petition ended Barclay's required wage obligation. *Barclays*, at 10–12.

In sum, counsel should caution H-1B employers to comply with the bona fide termination requirements, but recognize when the more limited termination described in *Barclays* is available based on approved change of employer H-1B petitions.

1 *See* Batyrbekov v. Barclays, ARB Case No. 13-013, at 8–9 (July 16, 2014), citing Mao v. Nasser, ARB No. 06-121 (Nov. 26, 2008) and Amtel v. Yongmahapakorn, ARB Case No. 04-087 (Sept. 29, 2006). See also 20 CFR §655.731(c)(7)(ii) (circumstances where required wages [to an H-1B worker] need not be paid).

2 *See generally* Limanseto v. Ganze, ARB No. 11-068 (June 6, 2013) (award of back wages limited without deciding whether strict bona fide terminations are required.)

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The H-1B Visa from LCA to Approval

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BIA Grants Suppression Hearing Due to 4th Amendment Violations

CASE: BIA, unpublished, November 25, 2014
ATTORNEY: Jonathan S. Greene

by Sheeba Raj

In an unpublished decision, the Board of Immigration Appeals (BIA) determined that the respondent was entitled to a hearing in support of his motion to suppress evidence because the alleged facts regarding an unlawful search and seizure constituted an egregious violation of the Fourth Amendment.

"[T]he respondent's account presents a scenario in which [U.S. Immigration & Customs Enforcement (ICE)] agents forcefully entered his home at an early morning hour and pursued him into his bedroom, where he was not fully clothed," the BIA said in its decision on November 25, 2014. "Moreover, based on the respondent's assertions, ICE agents used physical force both in arresting him and upon questioning him. Also, of significance to our inquiry is the respondent's assertion that, after he was arrested, he was taken from his home and forced to leave behind his young son, without knowing if the child would be in the care of a responsible adult." The BIA, therefore, remanded the case to the immigration judge for a hearing on the motion to suppress.

"Greene encourages fellow practitioners to handle suppression cases because, although they involve intensive preparation, **the rewards are tremendous and worthwhile.**"

Washington, D.C. Chapter member Jonathan S. Greene started representing the respondent pro bono in 2008, through his volunteer efforts with CASA de Maryland. To aid in the respondent's defense, Greene consulted, among other resources, a practice advisory issued by the former American Immigration Law Foundation (known as the American Immigration Council since 2009; its resources on motions to suppress are available here), as well as statutes and regulations.

Greene encourages fellow practitioners to handle suppression cases because, although they involve intensive preparation, the rewards are tremendous and worthwhile. He recommends that attorneys educate themselves on the laws governing suppression issues, as well as tactics to win cases involving them, by participating in AILA conferences and seminars. He also advises attorneys to seek meetings with the immigration court, which Greene did, calling it one of his "favorite moments" of the litigation process. In fact, during a meeting with the judge and one of the three assistant chief counsels who handled the case, the chief counsel initially rejected Greene's discovery requests, saying that there was nothing additional to turn over. But then, surprisingly, the chief counsel asked Greene what he wanted to see, to which Greene responded that he'd like to review his client's A file. He then received the file, sifted through its contents on the spot, and requested copies of evidence that had not been already provided to him. "I've never had an offer from an assistant chief counsel in any other case to look at chief counsel's file," Greene said. "Those kinds of moments can only occur when attorneys pursue all avenues of relief in litigation in these kinds of cases."

SHEEBA RAJ is the staff legal editor and reporter for VOICE.

New to Immigration? Get a Coach

Read how a new attorney's client interview with a hostile immigration officer turned into a valuable lesson with the help of a mentor.

by Alisa Z. Akst

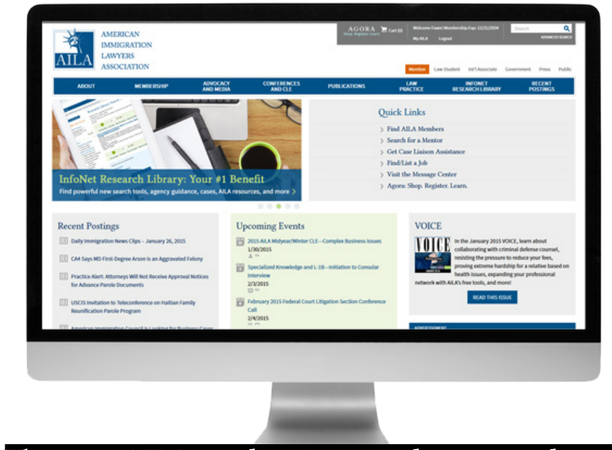
I know what you're thinking: "Another article touting the magnificence of having a mentor in your first few years of practice?" You're tired of those. This might be because you are experienced (and, as such, are in the position of being an amazing mentor yourself!). However, if you're hesitant because you just don't believe a mentor is necessary to further yourself and your career, then I submit to you that you have just not found the right mentor.

I got lucky in that respect: my mentor is my father (and my boss), so, our relationship is slightly unusual. But—as I had pause to remember recently—his mentorship has been incredibly important to my growth as an immigration lawyer and as a person.

A Hostile Immigration Officer

Case in point: In November 2014, I accompanied a client to a naturalization interview. Now, I have been to a number of these interviews in my career. But while I am always a little nervous on my client's behalf anyway, these interviews are not usually cause for profound learning and growth. This time, however, was different.

At first, the officer was strictly business-like. Things rapidly changed, however, when my client started to become visibly nervous and looked to me for help. As I tried to assuage an unnecessarily escalating situation,



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the officer loudly and sternly said to my client, "She can't help you now. This is my ballpark, my ball field, my ballgame." He then turned to me and, before I had a chance to say anything in response, said in the same obnoxiously loud voice, "As soon as you step through my door, your authority ends." Having never before encountered an officer quite so rude, I was taken aback and unsure of what to do in response.

My Mentor in Action

When I returned to the office later that day, I could not wait to talk to my father about what had happened. I wanted to know what he thought, and what he would have done in that situation. These two things are exactly what he provided once I told him my story, without being asked.

"I was intimidated by these officers sometimes, too, when I was your age, just starting out," he said. "But that will disappear the longer you practice." His sharing this sentiment with me has proven to be absolutely invaluable for my career and personal growth. It allowed me to know that what had happened not only wasn't my fault, it was something that many have gone through in the past and, unfortunately, will continue to go through in the future. And this is just one example, one reason, why it is important to have a mentor as you are starting out.

You could vent and commiserate with a friend about these situations. However, only a good, experienced mentor can help you deal with them properly and turn them into useful learning experiences—opportunities to grow and help you to prepare for the future.

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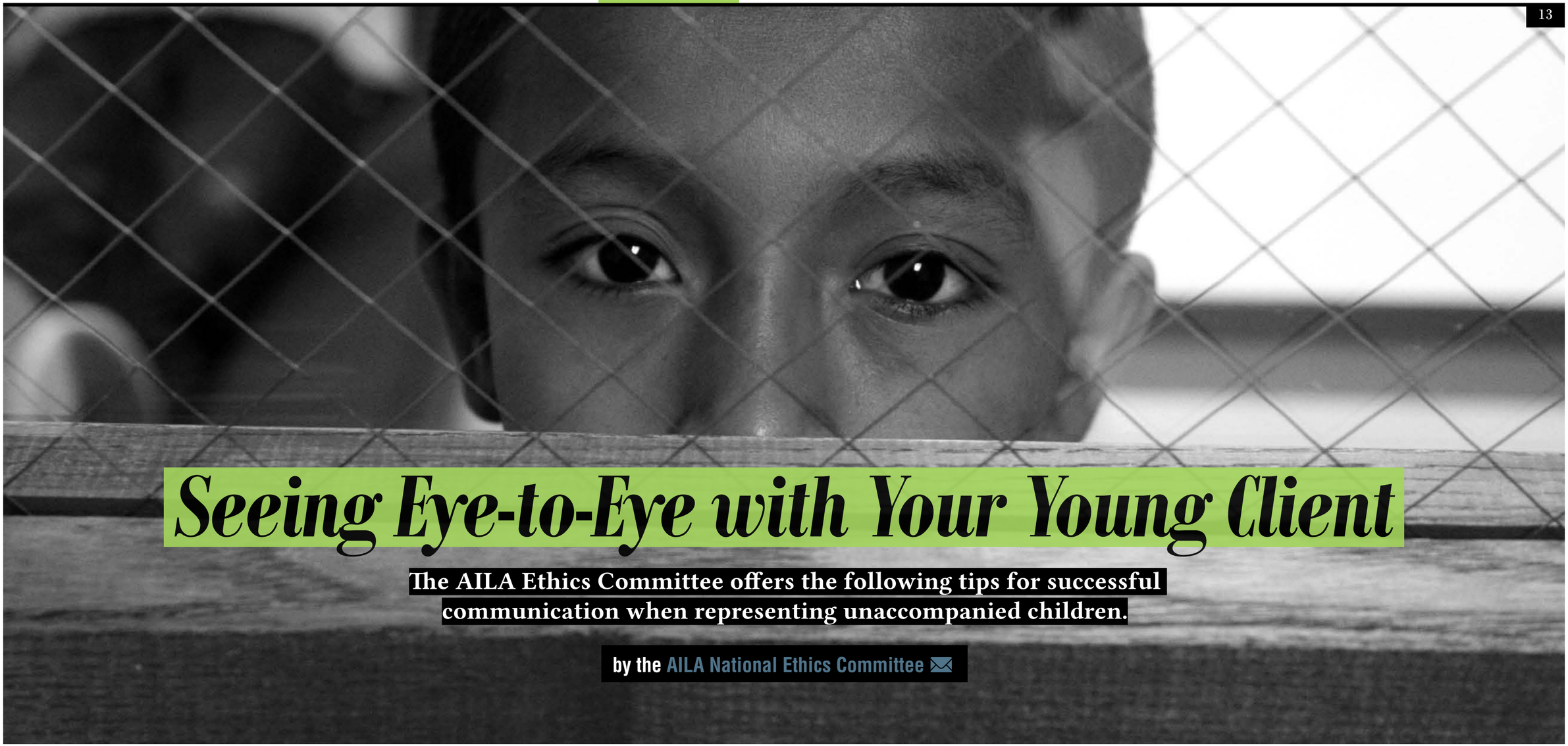


Seeing Eye-to-Eye with Your Young Client

The AILA Ethics Committee offers the following tips for successful communication when representing unaccompanied children.

by the AILA National Ethics Committee

With the recent increase in the number of minors in removal proceedings, the lawyers representing them have posed many questions to the AILA National Ethics Committee. As a result, the committee recently issued a practice advisory that provides a summary of ethical guidance on some of the more common questions that practitioners have raised. The practice advisory, in turn, relies on the American Bar Association's Model Rules of Professional Conduct (Rules or Rule). While our advisory can be used for general guidance, practitioners ultimately must refer to the rules of professional conduct as adopted in their respective jurisdictions, since those are the rules they are bound to follow for the purposes of professional discipline. Further, in certain states, there are special rules published about the obligations of attorneys representing children before the tribunals in those states.

Recognizing that claims of children in immigration court are raised in an adversarial setting, making special demands on all parties, the Executive Office for Immigration Review (EOIR) established special guidelines in 2007 for immigration court cases involving unaccompanied minor children. Cases of children in removal proceedings also pose special ethical challenges for the lawyers involved, requiring careful consideration of the appropriate ethics rules. To assist practitioners in dealing with these challenges, we provide here

Minors at the Immigration and Customs Enforcement (ICE) detention facility in Brownsville, TX.

an excerpt of our practice advisory. This excerpt addresses specifically the ethical issues stemming from communications between attorneys and child clients.

Are There Any Special Rules Regarding Communications with Children?

As the lawyer is expected (as far as is reasonably practicable) to maintain a normal lawyer-client relationship with a minor, the rules regarding communicating with clients under Rule 1.4 are applicable. However, a lawyer may have a heightened duty to communicate with a client with diminished capacity to allow him or her to make informed decisions about the objectives of the representation.[1]

Rule 1.4 provides:

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

On the one hand, lawyers should not assume that children lack capacity to make decisions or participate meaningfully in case preparation. The ABA Commission on Immigration, in establishing its 2004 standards for legal representation of unaccompanied children, explained that: "The Rule does not presume that children below a certain age lack competence

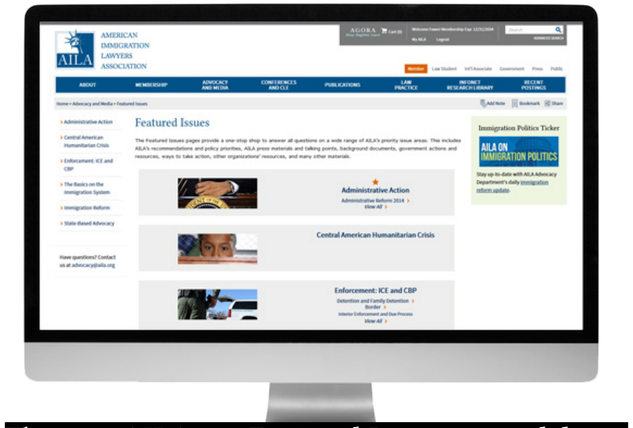
to determine their wishes in litigation. Competence is contextual and incremental, and may also be intermittent." With respect to explaining the matter that is the subject of the lawyer's representation to a child client, Comment 6 to Rule 1.4 is instructive:

> Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14.

Attorneys should research the law in their state to see if case law or statute creates a presumption of competence for a minor.[2]

On the other hand, Comment 3 to Rule 1.14 recognizes that a client with diminished capacity may wish to have family members or other persons participate in discussions with the lawyer, and the presence of such persons may generally not affect the attorney-client privilege. Still, the lawyer is required to keep the client's interest, not the family member's, foremost when making decisions on behalf of the client.

It is important that the attorney remember that there are very real differences between a child and an adult.



The new AILA.org Featured Issues pages deliver news on the hottest immigration topics, including the Central American Humanitarian Crisis.

The appearance of maturity may not be an indicator as to whether the child is competent to make the same decisions as an adult. The level of maturity may be in response to trauma at a young age. Children may also not be able to fully understand the nuances of the law or the long-term consequences, although they may say that they do. Using child-centered techniques, such as having the child explain to the attorney what the child thinks the consequences of a decision will be, is crucial to making sure the child understands.

Attorneys also must be sensitive to how the mind of an adolescent works, especially if he or she has undergone trauma. Data show that adolescents can make risky decisions, as they lack the development in the frontal cortex to make the same rational decisions as adults. *See* Nature Neuroscience 15(9): 1184–91 (Sept. 2012).

It is, therefore, critical that the attorney always keep the child's competence in mind when communicating and use techniques that are uniquely suited to dealing with children. For further guidance, Kids in Need of Defense's training manual for pro bono attorneys offers great advice on communicating with children.

According to 8 CFR §1003.102(r), regarding an attorney's duty to maintain communication with a client, "[i]t is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands." If the attorney cannot speak the language of the child client, it is imperative that the interpreter be fluent in the child's language and dialect to ensure that attorney-client communications meet the standard of adequate communication.

What Do You Do About Engagement Letters with Minors?

There is no minimum age regarding a child's ability to comprehend and sign an engagement letter. The

"Using child-centered techniques, such as having the child explain to the attorney what the child thinks the consequences of a decision will be, is **crucial to making sure the child understands**."

lawyer must make a determination on a case-by-case basis. In some cases involving pro bono representation, where the child is very young and there is no adult representative, it may be preferable not to have an engagement agreement with the child, but to advise the child verbally in such a way that the child will understand the nature of the matter. The effectiveness of an engagement letter may involve legal issues that are beyond the scope of the ethics rules. A contractual arrangement with a minor who is unable to comprehend its significance may be found to be unenforceable and voidable as a matter of law. *See* Restatement (Second) of Contracts §12 (1981).

If the child's adult representative enters into an engagement on behalf of the child, the lawyer must make clear that the child is the client and the adult is executing the engagement on behalf of the child. There may be situations where both the adult and the child can become clients, but the lawyer must be careful to ascertain that there are no conflicts of interest (refer to Rule 1.7).

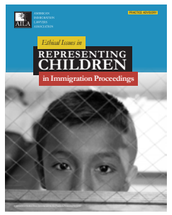
With respect to immigration applications that request benefits, under 8 CFR §103.2(a)(2), a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian, certifies under penalty of perjury that all evidence submitted with the application for the immigration benefit is true and correct.[3]

1 *See, e.g.*, In re K.G.F., 29 P.3d 485 (Mont. 2001); *Restatement (Third) of the Law Governing Lawyers* §24 cmt. C (2000) (when client with diminished capacity is capable of understanding and communicating, lawyer should maintain flow of information and consultation as much as circumstances allow; lawyer should take reasonable steps to elicit client's views on decisions necessary to representation).

2 In New York, for example, a child older than 14 is entitled to petition directly for the appointment of a guardian. *See* Surrogate's Court Procedure Act §1703.

3 Under INA §101(b)(1), a "child" is an "unmarried person under twenty-one years of age." Under 8 CFR §1236.3, a juvenile is defined as "an alien under the age of 18 years." The regulations also use the word "minor" when describing aliens under 14 years of age, yet do not precisely define this term. 8 CFR §1236.2. It is important to keep these legal definitions in mind when working with minors.

ADVISORY



Representing Children in Immigration Proceedings (FREE!)

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This article contains an excerpt from "Ethical Issues in Representing Children in Immigration Proceedings" written by the AILA National Ethics Committee. It was published originally by the AILA Practice & Professionalism Center. Readers should consult the Rules of Professional Conduct applicable to their situation, and not rely solely on the content of this advisory.

Help Combat Notario Fraud!

by Michelle N. Mendez

President Obama recently stated that attorneys were not needed to file for Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). This had the unintended consequence of bolstering the activity of unscrupulous notarios, who now are brazenly recruiting clients and misinforming immigrant communities about the requirements and timing for these programs, often through ads in foreign-language newspapers and other similar, deceitful methods.

AILA attorneys must heed the call and head to the front lines to battle against this. Now—before the administration rolls out these programs—is the time to defeat notario fraud once and for all!

Want to join the fight? Here are 10 tips to help you do your part to curb notario fraud:

1 Work with churches and legitimate organizations with strong ties to the immigrant community. They can organize an audience for your presentation on DACA, DAPA, and warnings of notario fraud.

HELP STOP NOTARIO FRAUD

Author Michelle Mendez, co-chair of the AILA National Consumer Protection & UPL Action Committee, shares information about combating notario fraud related to the new deferred action for parental accountability (DAPA) initiative. For more information, visit stopnotariofraud.org.

2 Download and disseminate AILA's multilingual notario fraud PSAs as they relate to both administrative reform and DACA renewals.

3 Publish an article in local foreign-language newspapers; the AILA Consumer Protection and Anti-UPL National Committee has a sample article to help get you started. Request a copy by e-mailing stopnotariofraud@aila.org.

4 Offer to discuss the issue on your foreign-language local radio and television stations.

5 Conduct outreach to and make friends with sympathetic prosecutors who may be willing to prosecute notario fraud.

6 If your state has a law targeting notario fraud, but it does not get much play, offer to make a presentation to the judges with jurisdiction so that they will be familiar with the law once the friendly prosecutor begins taking these cases.

7 Do not work with notarios or accept referrals from notaries. Doing so lends the notarios credibility.

8 When volunteering at legal clinics, complete and sign a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, and do not allow applicants to leave with incomplete paperwork. This eliminates an opportunity for notarios to become involved.

9 Report notario fraud to the Federal Trade Commission and to the relevant enforcement agency in your state. Your local AILA chapter UPL liaison can provide you with information on how to do this.

10 Work with your state bar's UPL committee to help pursue wrongdoers to the extent they are able.

Effective messaging to the immigrant community requires recognizing that they are hard-working people who want to be savvy consumers and don't want to just give away their limited cash to often predacious notarios. An empowerment approach instead of a paternalistic one will engender respect and trust between you and your audience, so give them the information they will need to make informed decisions. For example, explain the differences between a notary public and an attorney. In the United States, a notary public is not an attorney unless he or she has a U.S. license to practice law. Also, to drive home the point of the incompetence of notarios, discuss the requirements for becoming an attorney versus the minimal requirements for becoming a notary public, and ask the audience who they would prefer to represent them in their immigration case. Finally, explain that they have rights, and encourage reporting of notario fraud to enforce those rights.

No one knows better than those within the legal community the importance of properly analyzing each case and advising potential clients of possible risks—DACA and DAPA are no exception. Joining the fight against notarios not only helps you cut out these cheating competitors, it decreases the amount of potential clients with botched cases. Most importantly, it is also the right thing to do.

Stopnotariofraud.org, AILA's consumer protection website, has additional information. You can also reach out to the AILA National Consumer Protection Committee at stopnotariofraud@aila.org. Please note that AILA does not prosecute notarios or fraudulent practitioners of immigration law; it does, however, attempt to facilitate the complaint process through local chapters and available resources.

PODCAST

What You Need to Know About DACA Renewals and Other Developments

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MICHELLE N. MENDEZ is a senior managing attorney at Catholic Charities in Washington, D.C. She is also co-chair of the AILA Consumer Protection and Anti-UPL National Committee.

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The Long Journey to Prove Citizenship

by Raymond Lahoud

In September 2012, 94-year-old Anna Haight wanted to attend a group trip to Atlantic City. To receive a complimentary $25 from the casino to gamble, she first needed to show a government-issued photo ID. With only expired passports that U.S. Department of State (DOS) issued years before and possessing no other identification, Haight applied for an ID card at the local Division of Motor Vehicles (DMV). The DMV clerks attempted to verify her identity, but no match was found in the U.S. Department of Homeland Security's (DHS) computer system. The DMV instead issued her a temporary ID, which allowed Haight to go on the casino trip.

A few days later, DMV clerks called Haight to say that there was no evidence that she had any legal status, even though she was previously issued U.S. passports. According to them, the passports issued by DOS did not prove her status in the United States, and DHS had no records for her. The only record Haight did have was a certificate of naturalization, with her name and picture listed. That certificate, however, was issued to her mother, and DHS claimed that this was not sufficient to establish her status because the certificate predated the current version of the Immigration and Nationality Act, which does not recognize certificates like these. Therefore, they concluded, she technically was never a U.S. citizen.

USCIS Investigates … and an AILA Attorney Gets Involved

When U.S. Citizenship and Immigration Services (USCIS) was notified of Haight's unusual situation, it began investigating the matter. Ann Marie Ball, Haight's youngest daughter, then contacted me about her mother's very unique case. Moved by these circumstances, I took the case pro bono.

The process dragged on for many months. Haight often worried about the result. "All of my friends kept asking if they (the government) were going to ship me back to Italy," she said. Despite fearing the possibility of deportation, Haight knew that she was, in fact, a U.S. citizen. "I insisted that I was a citizen because I remember when my father went for his citizen papers in 1926 that I went with him," she explained, "and my name was on there."

LOOKBOOK

After living in the United States for more than 90 years, Anna Haight is a confirmed U.S. citizen with the help of AILA attorney Raymond Lahoud.

RECORDING

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Litigating Citizenship Issues in Federal Court

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"I insisted that I was a citizen because I remember when my father went for his citizen papers in 1926 that I went with him, and my name was on there."
—94-year-old Anna Haight

A Historic Beginning and a Happy Ending

Born in Italy to Angelo and Carmella Latrecchia, Haight arrived in the United States in 1920 as a four-month-old. Her father had come to America when he was 17 years old to find work. But the Italian government requested young men to return to Italy to defend the country in World War I. After the war, the Italian government provided a free passage to soldiers who wanted to return to the United States.

The Latrecchia family settled in West Virginia after arriving through Ellis Island. Haight and her three siblings received their citizenship when their father himself became a citizen in 1926. Many of the original documents from the family's journey can be found on the Statue of Liberty-Ellis Island Foundation's website.

I worked with USCIS in Philadelphia to secure Haight's certificate of naturalization. USCIS searched for her father's citizenship records in its computer system, but did so in vain because the information was so old. The necessary documents were eventually found months later on microfilm.

Then, on November 15, 2013, after living in the United States for more 90 years, the long-awaited moment finally arrived. Haight's friends and family, as well as my colleagues and me, gathered at Country Meadows Retirement Community in Bethlehem, PA to witness a USCIS officer deliver the oath of allegiance and present a certificate of citizenship to Haight.

Also on hand were fifth grade students from Green Street and Andover Morris Elementary Schools in Phillipsburg, NJ, where Ball teaches. The students, who were studying immigration, received a one-of-a kind lesson.

Happy to finally be officially recognized as a U.S. citizen but exhausted by the ordeal, Haight simply concluded, "I am very relieved that it is all over."

RAYMOND LAHOUD is an immigration law and deportation defense attorney at the Pennsylvania law firm, Baurkot & Baurkot.

The NMD Listserve: 'Worth the Entire Expense of an AILA Membership'

by Sean R. Hanover

While waiting for my case to begin in the Baltimore immigration court, I had the pleasure of speaking to an attorney practicing in the Washington, D.C.-metro area just like I do. Her bailiwick was actually criminal defense, but she found herself leaning more and more toward immigration law. That day, she was representing a convicted drug offender. As my firm deals with the same issues, our interests overlapped.

The attorney asked me how one could learn more about immigration procedures and types of relief available for tough cases. Naturally, Kurzban's Immigration Law Sourcebook and other guidebooks came to mind. But while those are helpful in their own way, I recommended a rather unconventional source: the AILA New Member Division (NMD) listserve. She hadn't seen that coming! She was surprised I would suggest joining a listserve as a way to learn more about tackling immigration challenges. She imagined it was a good place to ask questions, but could not fathom how it would help her if she did not know what to ask.

The new AILA.org has an array of resources for new members—including the AILA New Member Division listserve.

The NMD listserve is much more than a query service. It is a library, a living repository of sample documents, briefs, and experiences offered by seasoned attorneys. And because of the dynamic exchanges among colleagues, readers of the listserve can enjoy an array of opinions on almost every major topic. Also, the listserve is mutually beneficial because up-and-coming attorneys are less likely to "wander away" with wrong or irrelevant answers, and experienced attorneys feel satisfied after helping them, not to mention learning a new thing or two from this treasure trove of information!

The idea of a platform where immigration attorneys shared ideas and challenged each other intrigued her. She expressed concern, however, about the technology. Is it easy to use? I told her to simply enter the credentials and permit mail from AILA. I also suggested that she create a separate e-mail folder to receive the incoming NMD mail by creating a rule to move the messages from the general mailbox to a separate folder when NMD is in the subject line. Otherwise, her regular e-mail inbox could get over-loaded quickly.

From advice to sample documents, this vibrant sounding board is a boon for new and experienced practitioners alike. In many ways, it is worth the entire expense of an AILA membership. Members are added to the NMD listserve when they join AILA, and you can manage your preferences through My AILA.

Washington, D.C. Chapter member **SEAN R. HANOVER** is the principal attorney at Hanover Law, P.C.

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