
The 2020 Annual AILA New England Chapter Advanced Immigration Law Conference is designed to provide accurate and authoritative information with regard to U.S. immigration law. It is distributed with the understanding that this publication, these presentation materials, and any related information are not a substitute for legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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**Navigating the Landmines in the PERM Process: An Advanced Conversation**
*By Vincent W. Lau, Bennett R. Savitz, and Megan E. Kludt*

This practice pointer provides multiple perspectives on facets of the PERM process, including advising on minimum requirements, navigating pitfalls surrounding an employee's qualifying experience or degree, and considering options for the employer's recruitment and applicant screening process.

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**PREFACE**

Welcome to the 17th Annual AILA New England Immigration Law Conference. We hope you will enjoy the presentations and materials, and leave with useful information, insights, and connections.

As we have passed the midpoint of President Trump's term, the steady barrage of anti-immigrant efforts has not slowed. Complex policy changes, negative case law from the Attorney General and BIA, and intensified enforcement and removal operations continue to present roadblocks. Considering the daily changes that affect our practices and our clients' lives, it is crucial that we stay ahead of legal developments, collaborate to harness the power of our colleagues' experience and expertise, and look for creative paths through rapidly changing legal landscapes. We hope that, through this Conference, you are able to increase your legal knowledge, strengthen your personal and professional connections, and gain a sense of solidarity with your colleagues in our shared goals.

Through the AILA NE Annual Conference series, we are able to present some of the finest local and national speakers on topics that are both relevant and timely, as well as original practice pointer articles by our esteemed presenters. As in the past years, we have continued several panels which cover topics that are important to all immigration practitioners, including interagency government updates.

We have been honored to work with a wonderful group of fellow practitioners who took significant time out of their personal and business lives to write and present valuable material. And this conference, as always, would never happen without the great efforts of an extremely dedicated group of conference organizers and committee members. Thank you to Leslie DiTrani and Audrey Robert-Ramirez, who led the efforts to continue to improve our AILA NE annual conference, and to the wonderful committee who tended to the countless details required for an impactful and seamless conference. Special thanks also are due to Jennifer McGill for compiling the digital course book, now for multiple years running.

Thank you all.

And thank you to all readers; without your interest and support for this conference, none of this would happen. We welcome you to listen, to question, to network, and to enjoy.

Sara M. Mailander and Stephanie Marzouk
Editors
February 2020


**ACKNOWLEDGMENTS**

AILA New England Chapter would like to thank the following individuals, without whom this Conference would not have been possible:

***Conference Co-Chairs***

*Leslie Ditrani and Audrey Robert-Ramirez*

***Conference Committee***

*Sarah Aller - Tiffany Andrade - Sarah Candela - Alex Peredo Carroll - John Cayer - Madeline Cronin*

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*Stephanie Marzouk - Mitch Montgomery - Tania Palumbo - Vivian Ruiz - Ramey Sylvester*

*Adrienne Vaughan - Alison Howard-Yilmaz*

# 17th Annual AILA New England Immigration Law Conference

## Friday, February 28, 2020

## AILA Members, Conference Biographies

### Early Morning Ethics Forum

***Miki Kawashima Matrician*** is Partner at Chin & Curtis, LLP which specializes in U.S. and global immigration law. Miki's practice focuses on all aspects of U.S. employment-based immigrant and nonimmigrant options for multinational corporations as well as start-up and non-profit entities. She has presented on employment- and family-based immigration options to Japanese business groups in Boston, at AILA New England, and at Massachusetts Continuing Legal Education. She holds a J.D. from Boston College Law School and a B.A. in Government and East Asian Studies from Wesleyan University. A native of Nara, Japan, Miki immigrated to the United States as a child and is fluent in Japanese.

***Stacey A. L. Best*** has been a lawyer for more than 25 years. She is an assistant bar counsel in the Massachusetts Office of Bar Counsel, Board of Bar Overseers of the Supreme Judicial Court (BBO) for more than 15 years. At the Office of Bar Counsel, Attorney Best investigates alleged violations of the Rules of Professional Conduct, and litigates all stages of the disciplinary proceedings including all appeals. Ms. Best began her career as a staff attorney in the trial division of the Committee for Public Counsel Services (CPCS). She tried cases at the district and superior court levels representing indigent clients charged with felonies. Attorney Best is also a former clinical instructor at the Criminal Justice Institute at Harvard Law School. Several of her students obtained trial experience while under her direct supervision. Attorney Best is a regular faculty member of Harvard's Trial Advocacy Workshop, a three-week program taught by some of the best lawyers and judges around the country. Ms. Best is a "transplant" who moved from California to go to law school. She is a 1995 graduate of the Boston College School of Law.

### Welcome & Introductions

### Hot Topics & Current Trends in Immigration Today

***Mahsa Khanbabai*** is founder of Khanbabai Immigration Law and for the last 20 years has dedicated her legal career to immigration and naturalization issues, representing individual and corporate clients. Her passion stems from her own J2 to citizen experience in the U.S. Her legal advocacy and strategic use of an international media spotlight led to one of the first waivers of the Travel Ban, which prohibits travel to the US for nationals of several Muslim majority countries. Attorney Khanbabai has made regular appearances on national news shows including MSNBC's The Rachel Maddow Show, The Last Word with Lawrence O'Donnell, among others. Mahsa is Chair of the American Immigration Lawyers Association (AILA) New England chapter, a member of AILA National's Department of State liaison committee, the IMG Taskforce advocacy committee and is an editor of the AILA Law Journal. She is also very active in her local community, serving on numerous nonprofit and local government boards, including Save the

Children's Boston Leadership Council. Her most recent work for Save included a visit to refugee camps in Lebanon to observe educational programs.

***Benjamin Johnson*** is Executive Director of AILA and the former executive director of the American Immigration Council. He has studied and worked on immigration issues in Washington, DC for more than 20 years. A native of Arizona, Mr. Johnson was the co-founder and legal Director of the Immigration Outreach Center in Phoenix. Prior to becoming involved in immigration issues he was a criminal and civil litigation attorney in San Diego, CA. He earned a J.D. from the University of San Diego School of Law and studied International and Comparative Law at Kings College in London.

***Jennifer Minear*** is a Director with McCandlish Holton, PC in Richmond, Virginia. Her business immigration practice focuses on physician immigration as well as the representation of other professionals and their employers in employment-based immigration matters. She is a frequent panelist at national and international conferences and CLEs and the author of numerous articles on physician immigration and other topics. A cum laude graduate of Cornell Law School, Jennifer is listed among the Who's Who of Corporate Immigration Attorneys and was named an "Influential Woman of Virginia" by Virginia Lawyers Weekly. Jennifer is the 2014 recipient of the Susan Quarles AILA Service Excellence Award and currently serves as President-Elect on the AILA national Executive Committee. She earned a J.D. from Cornell Law School and studied English and History at University of Maryland.

***Beth Werlin*** is the Executive Director of the American Immigration Council. The Council, AILA's nonprofit partner, works to strengthen America by shaping how America thinks about and acts towards immigrants and immigration. Beth leads the Council's efforts to achieve a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. Beth previously served as Policy Director from 2015-2016 and in a variety of positions on the Council's legal team from 2001-2015. Over her career, she has worked to protect the rights of noncitizens and to ensure that the immigration agencies are held accountable for violations of the law. She has represented plaintiffs and amicus curiae in immigration litigation in the federal courts and before the Board of Immigration Appeals and is the author of numerous practice advisories. She was NAPIL (Equal Justice Works) fellow and before that was a judicial law clerk at the immigration court in Boston, Massachusetts. Beth earned her J.D. from Boston College Law School and her B.A. from Tufts University.

**Inadmissibility Issues: Marijuana & Public Charge**

***Leslie A. Holman*** served as the President of AILA from 2014 to 2015. She is the founder of Holman Immigration Law, a firm located in Burlington, Vermont and dedicated to the practice of immigration and nationality law. Ms. Holman is currently the Vice Chair of AILA's National CBP liaison committee and has previously served as chair of AILA's Admissions and Border Enforcement Committee, vice-chair of the National CBP Liaison Committee, and as a member of the National Interagency Committee. She continues to serve as liaison to the regional ports of entry for AILA's New England chapter. Ms. Holman is also a member of the Vermont State Advisory Committee to the U.S. Commission on Civil Rights and a member of the Programming Committee

of the Flynn Center for the Performing Arts. In 2008, she was awarded the Sam Williamson Mentor Award for excellence in mentoring and counseling.

***Heather Segal*** is the founding partner of Segal Immigration Law with over twenty years of experience in immigration law. She practices exclusively in the area of Canadian immigration law and American Consular and Border immigration law. Her experience includes sitting as an elected Director to the American Immigration Lawyers Association Board of Governors for the last ten years. She is a member of the Ontario Bar Association and the Canadian Bar Association and she currently volunteers on the American Immigration Lawyers Association Liaison Committee with US Customs and Border Protection, Department of Homeland Security. Heather is widely respected for her vast experience in cross border and consular work as well as Canadian immigration law. Prior to opening her own firm, Heather was a partner at one of the "Big 4" Law Firms in Canada for 20 years. Heather earned her law degree from Queen's University in 1994. She then completed her Master of Laws in Immigration from the University of California, Berkeley – School of Law in 1996.

***Daniel Parisi*** is a partner at TL Brill Parisi in London. Mr. Parisi has practiced immigration law since 2003, and has extensive experience with a wide range of business- and employment-related immigration with a particular focus on consular processing waivers of ineligibility for people seeking to enter the U.S. who are inadmissible for criminal/personal reasons. He is a graduate of West Virginia University (1998) with a BA in International Relations and Foreign Languages; however, he spent the majority of his undergraduate years in Europe where he became fluent in Spanish and French. Mr. Parisi received his Juris Doctor from New York Law (2003) and, upon graduation was inducted into the Order of the Barrister (US) for excellence in oral and written advocacy. He is admitted to practice law in New York.

**Break**

**Updates and Interactions from USCIS**

***Anthony Drago, Jr.*** is a sole practitioner with an office in Boston, MA. He is admitted to the bars in MA and NY and has been a member of AILA since 1996. Attorney Drago served as an elected Director on AILA's Board of Governors from June, 2011 through May, 2013 and was Chapter Chair of AILA NE from June, 2009 through May, 2010. He currently serves on the AILA national EOIR liaison committee and AILA New England Chapter EOIR and OCC liaison committees and is a regular speaker at AILA conferences.

***Denis C. Riordan,*** District Director, District 1, U.S. Citizenship and Immigration Services

***Meghann Boyle,*** Director, Boston Asylum Office, U.S. Citizenship and Immigration Services

**Lunch**

**Concurrent Workshop Tracks**

## TRACK ONE – REMOVAL DEFENSE

### Representing Youths and Families before EOIR

***Elizabeth Badger*** is the Senior Staff Attorney at the PAIR (Political Asylum/Immigration Representation) Project, where she manages the Access to Justice for Immigrant Families initiative. Elizabeth received her J.D. from Boston University Law School, after which she clerked at the Second Circuit Court of Appeals. Elizabeth has worked in immigration law for 15 years, focusing on representing non-citizen children, asylum-seekers, victims of crimes, and persons in prolonged immigration detention. From 2007-2008, Elizabeth managed the representation of over 100 individuals arrested in the New Bedford factory raid, for which she received the National Immigration Project's Daniel Levy Award. From 2010-2013, Elizabeth taught in the Boston University School of Law's Immigrants' Rights Clinic. Prior to coming to PAIR, Elizabeth was the Senior Attorney at the Boston Office of Kids In Need of Defense (KIND), from 2014-2018, where she argued two cases on Special Immigrant Juvenile issues before the SJC.

***Bradley Jenkins*** is the Federal Litigation Attorney at the Catholic Legal Immigration Network, Inc. (CLINIC). He coordinates CLINIC's advocacy before the federal courts. In addition to litigation, Jenkins contributes to CLINIC's manuals, practice advisories, and trainings, principally on the subjects of removal defense, immigration consequences of criminal convictions, appellate procedure, and trial advocacy. Mr. Jenkins is a graduate of the University of Notre Dame and Harvard Law School.

***Emily Leung*** is the supervising immigration attorney at the Justice Center of Southeast Massachusetts, a subsidiary of South Coastal Counties Legal Services, which provides civil legal aid to low-income individuals and families in Southeastern Massachusetts. Previously she worked as a staff attorney at Massachusetts Law Reform Institute focusing on immigration policy and advocacy and was the Albert M. Sacks Clinical & Advocacy Fellow at the Harvard Immigration Clinic. She has worked at numerous boutique firms and non-profit organizations focused on asylum law, family-based petitions, removal defense, and other humanitarian-based relief. Emily received her J.D. from Boston University School of Law and her M.A. in International Relations, also from Boston University.

### Relief from Detention and Deportation at EOIR

***Sarah Sherman-Stokes*** is a clinical instructor and law lecturer at Boston University School of Law. Ms. Sherman-Stokes teaches Immigration Law and is the associate director of the Immigrants' Rights & Human Trafficking Program, where she teaches seminars on Core Lawyering Skills and Advanced Trial Advocacy and supervises students representing newly arrived unaccompanied children facing deportation, refugees fleeing human rights abuses, and other vulnerable immigrants in court and administrative proceedings. Previously, Ms. Sherman-Stokes was an Equal Justice Works Fellow at the Political Asylum/Immigration Representation (PAIR) Project where she represented noncitizens in removal proceedings, with a special focus on the representation of detained, mentally ill refugees. Ms. Sherman-Stokes' scholarship explores the intersections of immigration law and mental health and disability, as well as the interactions between immigration and the criminal justice system. Her prior scholarship has been published in

the Hastings Law Journal and the Villanova Law Review. Ms. Sherman-Stokes graduated cum laude from Boston College Law School, where she was the recipient of a Public Service Scholarship.

***Christina Corbaci*** is the Founder and Managing Attorney at Corbaci Law. She obtained a Bachelor's degree in International Relations (Law and Diplomacy) and Spanish Studies from Brigham Young University, Utah in 2001. Then obtained her law degree (J.D.) from Benjamin N. Cardozo School of Law, Yeshiva University, in New York City in 2007. She speaks fluent Spanish, learning Turkish, and rusty with Greek, French and Portuguese. Christina spent eight years at Joyce & Associates in Boston being mentored and trained in the practice of immigration law by many experienced and dedicated attorneys. She then launched her own law practice in 2015 where she continued to focus on immigration representation. She regularly appears in immigration court, in matters before U.S. Citizenship and Immigration Services (USCIS) and assists clients with consular processing of visa applications. Christina also enjoys engaging with community organizations and often speak at local events.

***Elena Noureddine*** is a staff attorney at PAIR. Elena specializes in removal defense, criminal immigration, asylum, and Special Immigrant Juvenile Status. She is a recognized expert in detention and removal issues and often participates in legal training and immigration-related outreach events. She received her B.A. in Political Science and Criminology from the University of Florida and her J.D. from Boston University School of Law. In law school, Elena participated in Boston University's Asylum and Human Rights Clinic, representing clients in USCIS interviews and before the Executive Office for Immigration Review. She focused on the representation of juveniles facing deportation who, because of their age, are often neglected for services and go unrepresented. She is a native Spanish speaker and also speaks Arabic and Italian. Elena joined PAIR in 2014.

**Networking/Cookie Break**

**Using Federal Litigation to Your Clients' Advantage**

***Greg Romanovsky*** is a former Chapter Chair of AILA New England. He has practiced U.S. immigration law since 2001, representing clients before USCIS, EOIR, the U.S. District Courts, the Circuit Courts of Appeals, and the Supreme Court of the United States. From 2009 to 2013, Greg served as Chair of the AILA New England Litigation Committee and pioneered "1st Things First" - a quarterly review of court cases affecting practitioners in the 1st circuit. A frequent speaker at immigration law conferences and workshops, Greg has been repeatedly named by Super Lawyers Magazine as a New England Super Lawyer in the field of immigration law.

***Jonathan (Jon) D. Wasden*** is an Administrative Procedures Act (APA) litigation attorney, focusing on business immigration issues. His practice blends expertise in the Immigration and Nationality Act, Administrative Procedures Act, Separation of Powers Doctrine, and Federal Rules of Civil Procedure. He began his legal career as a trial attorney in the US Air Force, appearing in over fifty criminal trials in six years. He then joined the US Department of Justice, Civil Division, Office of Immigration Litigation-District Court Section, where he defended immigration regulations and decisions under the APA. He travelled extensively, and litigated cases in 17 district

courts and 3 circuit courts across the country. His last position in government was with the Administrative Appeals Office (AAO), focusing on employment based legal issues, and advising on litigation in these areas. Jon now works in private practice consulting with clients on strategies to overcome immigration denials, and appealing cases in federal court under the APA. He lives in the Washington, DC, area, with his family, and is still a member of the US Air Force Reserve.

***SangYeob Kim*** is an immigration staff attorney at the American Civil Liberties Union of New Hampshire (ACLU-NH). For the ACLU-NH, SangYeob is running the New Hampshire Immigrants' Rights Project, which is committed to providing legal services for bond representation and federal litigation, and Know Your Rights training for concerned communities. He earned his Bachelor of Arts degree in International Affairs from George Washington University and his Juris Doctor degree from the University of Iowa College of Law.

**Complimentary Conference Reception**

**TRACK TWO –BUSINESS IMMIGRATION**

**Avoiding an ICE Storm, Preparing for Increased I-9 Scrutiny**

***Katie Minervino*** is a partner at Pierce Atwood LLP where she has been practicing exclusively employment-based immigration law for over 10 ten years, helping employers and employees create and execute immigration strategies to meet their short- and long-term immigration needs and advising on employment verification compliance issues. Katie is the current Chair of the American Immigration Lawyers Association Verification & Documentation Liaison Committee. She has been a member of this committee since 2014. Katie obtained her law degree from the University of Miami School of Law and her Bachelor's degree from the University of Notre Dame.

***Amy L. Peck*** is a principal and co-leader of the immigration practice group of Jackson Lewis, P.C. Ms. Peck served 12 years as an elected member of the AILA Board of Governors and as a trustee of the American Immigration Council. Ms. Peck is a member of the AILA National Verification Committee, and is past Chair of the EOIR and ICE AILA national committees. She is a Great Plains Super Lawyer, American Lawyer Best Lawyer, Martindale-Hubbell Preeminent Woman Lawyer, The Legal 500 U.S., and Best Lawyers' Omaha Immigration Law Lawyer of the Year.

***Elise Fialkowski*** is a partner at Klasko Immigration Law Partners, LLP. She has provided immigration assistance to leading universities, research institutions, multinational corporations, startups & individuals for over 25 yrs. Ms. Fialkowski has long been active in AILA and is currently a member of the AILA National Verification Committee and AILA Philadelphia's CBP Liaison Committee. Elise has been recognized in Best Lawyers® in America, The International Who's Who of Corporate Immigration Lawyers and the International Who's Who of Business Lawyers. A Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill, Ms. Fialkowski received her law degree from Villanova Univ. School of Law (J.D. magna cum laude 1991).

**Options after Denial, MTR/Appeal/Federal Court**

***Josiah Curtis*** is a Senior Associate in the Boston office of Berry Appleman & Leiden LLP where he provides strategic guidance to employers on all facets of the complex US business immigration process. He represents employers in the information technology, energy, insurance, management consulting, and legal industries before the US Department of Labor, US Department of Homeland Security, and US Department of State in addition to providing counsel regarding immigration compliance, program management, and corporate reorganizations. Josiah is an active member of the American Immigration Lawyers Association where he serves on the national Department of Labor Liaison committee and the Steering Committee for AILA's New Members Division. He is a frequent speaker at the local and national level on business immigration matters.

***Leslie K. Dellon*** is the Staff Attorney (Business Immigration) at the American Immigration Council, where she encourages business immigration lawyers to consider litigation as another tool to serve their clients, engages in impact litigation and represents amicus curiae before courts and agencies. In addition to her extensive business immigration law experience, she previously handled general commercial and corporate matters, including civil litigation. She is a past AILA DC Chapter chair and has served on AILA National and DC Chapter committees. She has a J.D. from the George Washington University Law School.

***Cyrus D. Mehta*** is a graduate of Cambridge University and Columbia Law School, and is the Managing Partner of Cyrus D. Mehta & Partners PLLC in New York City. Mr. Mehta is a member of AILA's Administrative Litigation Task Force; AILA's EB-5 Committee; former chair of AILA's Ethics Committee; special counsel on immigration matters to the Departmental Disciplinary Committee, Appellate Division, First Department, New York; board member of Volunteers for Legal Services and board member of New York Immigration Coalition. Mr. Mehta is the former chair of the Board of Trustees of the American Immigration Council and former chair of the Committee on Immigration and Nationality Law of the New York City Bar Association. He is a frequent speaker and writer on various immigration-related issues, including on ethics, and is also an adjunct professor of law at Brooklyn Law School, where he teaches a course entitled Immigration and Work. Mr. Mehta received the AILA 2018 Edith Lowenstein Memorial Award for advancing the practice of immigration law and the AILA 2011 Michael Maggio Memorial Award for his outstanding efforts in providing pro bono representation in the immigration field. He has also received two AILA Presidential Commendations in 2010 and 2016. Mr. Mehta is ranked among the most highly regarded lawyers in North America by Who's Who Legal – Corporate Immigration Law 2019 and is also ranked in Chambers USA and Chambers Global 2019 in immigration law, among other rankings.

**Networking/Cookie Break**

**Navigating the Landmines in the PERM Process: An Advanced Conversation**

***Vincent W. Lau*** is the managing partner of Clark Lau LLC in Boston, Massachusetts and he counsels employers and employees on a range of temporary and permanent immigration options. He enjoys taking complex immigration legal concepts and breaking them down into tangible and

comprehensible ideas for employers and employees. It is with this same spirit that he speaks regularly at immigration conferences across the country, serves fellow immigration attorneys as one of the Vice Chairs of AILA's national liaison committee with the U.S. Department of Labor, and developed the curriculum for the business immigration course at New England Law Boston. Vince received his B.A., cum laude, in Political Science from Yale University, M.A. in Higher Education Administration from the Boston College School of Education, and J.D. from the Boston College School of Law. Vince has been voted among "The Best Lawyers in America" since 2010 and listed with "Who's Who Legal: Corporate Immigration" since 2015.

***Bennett Savitz*** has practiced exclusively in the area of immigration law since 1994. Since 2008, Bennett Savitz has been selected as one of Boston's Best Lawyers in Immigration Law by Best Lawyers of America. Best Lawyers of America is a trademarked publication described as "the leading referral list in the legal profession." Please go to the Best Lawyers website for the most recent listing. Best Lawyers selects attorneys for listings based upon nominations by and voting by attorneys in the field: "They must earn a spot through exemplary legal work that attracts the notice of their colleagues." Since 1994, Bennett Savitz has been an active member of the American Immigration Lawyers Association (AILA), serving on several local and national AILA committees, helping shape policies and procedures for the entire Immigration Bar. He has also served as the Chapter Chair of the New England Chapter of AILA. He is currently teaching Business Immigration Law at New England Law School, and a Graduate School course on Immigration Law and Policy at Lesley University.

***Megan Kludt*** specializes in complex immigration cases in the areas of business, academia, scientific research, and the arts. She also is an expert in client representation at USCIS interviews and in the Immigration Courts in Boston and Hartford. She has given presentations at academic institutions and spoken at local panels, and has co-authored an article on federal litigation in the context of DOL labor certification. Ms. Kludt is a member of the AILA National Board of Publications Committee for their 2014-2015 term. In August 2014 and April 2015, she was selected by AILA to provide emergency legal aid to children at the U.S./Mexico border, and in 2016, was honored as one of AILA New England's Pro Bono Champions. In addition to the Northampton office, Ms. Kludt manages Curran, Berger & Kludt's satellite location in Boston, MA. Ms. Kludt holds a BS in Foreign Service from Georgetown University, a Master of International Relations from Boston University, and a JD with an international concentration from Boston University School of Law. She is a member of American Immigration Lawyers Association and admitted to practice law in Massachusetts and Michigan (inactive), the U.S. District Courts for the state of Massachusetts and the Court of Appeals for the Second Circuit. Ms. Kludt is fluent in Spanish and Brazilian Portuguese.

**Complimentary Conference Reception**

**Ethical Considerations in Border Searches of Electronic Devices**

*by Miki Kawashima Matrician*

On November 12, 2019, the U.S. District Court in Massachusetts issued *Alasaad v. McALeenan*, advancing Fourth Amendment protections for travelers entering the United States.[1] This timely decision addresses Directive 3340-049A that U.S. Customs & Border Protection (CBP) issued in 2018 pertaining to border searches of electronic devices.[2] CBP searches of electronic devices have been on the rise in recent years. In 2016 and 2017, 18,400 and 30,200 travelers' devices were searched, respectively.[3] In 2018, 33,000 travelers were subjected to such searches.[4] The Court ruled that CBP officials must have a reasonable suspicion that the traveler's device contains contraband to search an electronic device.[5] This practice pointer will discuss the basis of the attorney's ethics obligations pertaining to clients' confidential information on electronic devices when crossing U.S. borders.

## Legal Basis for Border Searches

The U.S. Supreme Court has interpreted the Fourth Amendment to provide a "border search exception" to the standard warrant requirement.[6] Courts have held that CBP's interest in protecting the integrity of the border by enforcing immigration and customs laws outweighs an individual's privacy interests and thus CBP may conduct "routine" searches of the person and possessions.
In its 2018 Directive, CBP had affirmed its longstanding position that certain searches of electronic devices are routine and thus do not require a warrant. The Directive drew a distinction between ***basic*** and ***advanced*** searches. Basic searches were conducted with or without suspicion and involved review and analysis of information on stored on the device. The Directive limited CBP searches to information stored on the device and prohibited CBP officials from accessing information stored on the cloud.

Advanced searches involved connecting external equipment to a device to gain access, review, copy, or analyze the contents and were conducted only in the presence of a CBP supervisor. To conduct an advanced search, a CBP officer was required to have a reasonable suspicion of unlawful activity or cite to a national security concern.

In *Alasaad*, the Court declined to recognize any meaningful difference between CBP's basic and advanced searches. Instead, it drew the distinction at routine and non-routine searches as established by previous court decisions. A routine search, according to the court, would constitute "a brief look reserved to determining whether a device is owned by the person carrying it across

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[1] *Alasaad v. McAleenan*, No. 17-cv-11730-DJC (D. Mass Nov. 12, 2019).
[2] U.S. Customs and Border Protection, *CBP Directive No. 3340-049A* (Jan. 4, 2018), AILA Doc. No. 18010539.
[3] CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics (Jan. 5, 2018), www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and.
[4] American Civil Liberties Union, *Border Agents Violate Constitution When They Search Electronic Devices*, NATIONAL PUBLIC RADIO (May 2, 2019), www.npr.org/2019/05/02/719337356/aclu-border-agents-violate-constitution-when-they-search-electronic-devices.
[5] *See Alasaad* at 33-34.
[6] *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

the border, confirming that it is operational and that it contains data."[7] While it did not define what would constitute a non-routine search, it found that all searches beyond the brief look described above would be non-routine.

The Court stopped short of requiring a warrant for a search of electronic devices. However, it concluded that ***CBP must have a reasonable suspicion that the electronic device contains contraband*** (such as child pornography, counterfeit media, or evidence of other criminal or illegal conduct) for the search to fall under the border exception.[8] This standard is satisfied when the CBP agent "can point to 'specific and articulable facts' . . . considered together the rational inferences that can be drawn from those facts."[9]

**Attorney Obligations in International Travel**

Attorneys have an obligation to safeguard clients' confidential information. Therefore, attorneys must understand what type of CBP search is permissible and impermissible so that they may raise objections as appropriate. However, the ethical obligation does not stop there. Rule 1.6(c) of ABA Model Rules of Professional Conduct provides that "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client." In connection with an order to reveal confidential information by a government entity, Comment 15 indicates: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the confidential information sought is protected against disclosure by attorney-client privilege." The obligation to act competently to safeguard confidential information attaches before and during a search. Remember to also consult the applicable state rules.

**Before Arriving at the Border**

If you must travel with your client's information on your device, read CBP's Directive 3340-049A and *Alasaad* in preparation for travel. Before arriving at the border, it is best to minimize the data that you carry on any device, by doing the following:

- Leaving the device at home and instead carrying temporary devices, such as temporary mobile phones and Chromebooks.
- Moving content saved on the hard drive to the cloud. CBP searches of content stored in the cloud is subject to more legal safeguards – searches cannot be conducted without a warrant. Keep in mind that clients' confidential information must be stored via a secure provider.
- Backing up privileged data and delete them from your device. Note that completely wiping your drive may invite more attention by CBP.
- Encrypting the data stored on the device, using strong passwords.
- Powering off the devices to prevent access to RAM.

[7] *Alasaad* at 30.
[8] *Id.* at 21.
[9] *Id.* at 34.

- Logging out of your social media accounts on your device.[10]

**At the Border**

Avoid waiving constitutional protections through inadvertent consent to a search. It may be unclear whether the CBP officer is ***requesting*** consent or ***ordering*** the search. If it is a request, decline the request. If the CBP officer attempts to search the device beyond just the brief look without articulating specific facts that raise a reasonable suspicion that your device contains contraband, raise an objection by citing to *Alasaad*.

If the CBP officer still does not back down and orders a search, assert that the device contains confidential information protected by attorney-client privilege and that, while you will comply to a CBP order, you are ***not consenting*** to the search. By refusing to give consent, you preserve a future legal challenge against the government's claim that you gave consent. Remember to carry your bar license card.

Once you assert protection of information covered by attorney-client privilege or work product doctrine, CBP must follow the following protocols:

> **5.2.1.1**: ***The Officer shall seek clarification***, if practicable in writing, from the individual asserting this privilege ***as to specific files, file types, folders, categories of files, attorney or client names, email addresses, phone numbers, or other particulars*** that may assist CBP in identifying privileged information.
>
> **5.2.1.2**: ***Prior to any border search*** of files or other materials over which a privilege has been asserted, ***the Officer will contact the CBP Associate/Assistant Chief Counsel office*** . . . . ***Officers will ensure the segregation of any privileged material*** from other information examined during a border search to ensure that any privileged material is handled appropriately while also ensuring that CBP accomplishes its critical border security mission. This segregation process will occur through the establishment and employment of a Filter Team composed of legal and operational representatives, or through another appropriate measure with written concurrence of the CBP Associate/Assistant Chief Counsel office.
>
> **5.2.1.3**: At the completion of the CBP review, unless any materials are identified that indicate an imminent threat to homeland security, ***copies of materials maintained by CBP and determined to be privileged will be destroyed***, except for any copy maintained in coordination with the CBP Associate/Assistant Chief Counsel office solely for purposes of complying with a litigation hold or other requirement of law.[11]

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[10] *See* "Digital Privacy at the U.S. Border: Protecting the Data on Your Devices and In the Cloud" *available at* www.eff.org/wp/digital-privacy-us-border-2017; *see also* Border Searches of Electronic Devices: Legal and Ethical Implications and Solutions (Mar. 24, 2018), AILA Doc. No. 17090731.

[11] CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics (Jan. 5, 2018), www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and; *see also* CBP Directive No. 3340-049A: Border Search of Electronic Devices (Jan. 4, 2018), www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices.

Document the officer's name, badge number, and government agency. If CBP seizes a device, request a property receipt. Immediately afterwards, memorialize what transpired as soon as possible. Per *Alasaad*, seizure of an electronic device for non-cursory search must be for a reasonable period that allows for an investigatory search for contraband.[12] The court, however, did not define what constitutes a reasonable period of time.

Finally, consult Rule 1.4 of the ABA Model Rules of Professional Conduct and the applicable state rules, which requires attorneys to inform clients of the disclosure of confidential information in a border search. Note that there may be applicable state rules on this topic, for example, requiring you to file a notice to the state's attorney general.

**Advising Your Client**

It is important to consider that your client's status as an immigrant/nonimmigrant, U.S. lawful permanent resident (LPR), or U.S. citizen may influence the decision regarding how to approach a border search. CBP has the authority to deny entry to non-LPR foreign nationals who refuse to cooperate with a search. A lawful permanent resident may trigger a challenge to continued maintenance of permanent residence. In contrast, a U.S. citizen may not be denied entry into the U.S. for refusing to cooperate with the search, but that may result in a seizure of the devices. Furthermore, refusal to comply could result in being flagged for increased scrutiny and additional screening in future entries.

In addition to informing clients about the *Alasaad* decision discussed above, advise clients that they may raise an objection to a search of information protected by attorney-client privilege.
If the device belongs to the employer, they may also raise that objection and request that the CBP officer speak with the employer's attorneys prior to searching the device. The CBP Directive requires officers to follow special procedures to protect business information on devices:

> **5.2.3:** Officers encountering business or commercial information in electronic devices shall treat such information as ***business confidential information and shall protect that information from unauthorized disclosure***. Depending on the nature of the information presented, the Trade Secrets Act, the Privacy Act, and other laws, as well as CBP policies, may govern or restrict the handling of the information. Any questions regarding the handling of business or commercial information may be directed to the CBP Associate/ Assistant Chief Counsel office or the CBP Privacy Officer, as appropriate.[13]

Clients traveling with employer-owned devices containing business information should consult their employers in advance about any protocols related to protecting data on the device in case of a border search.

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[12] *Alasaad* at 42.

[13] CBP Directive No. 3340-049A at 6.

**When Yes means No – Admission consequences for truthfully acknowledging participation in seemingly lawful marijuana related activities**

*by Leslie A. Holman*

Over the past 22 years, 33 states have legalized marijuana for medical purposes, and over the past six years, 10 states and the District of Columbia have legalized its recreational use for adults.[1] Last year, Canada became the first country to legalize recreational marijuana use nationwide. While the legalization of recreational marijuana may be a benefit to U.S. citizens who imbibe for medical and/or recreational purposes, or who even peripherally engage in marijuana related business activities, the legalization of marijuana creates interesting, and unprecedented, challenges for seemingly law-abiding noncitizens seeking admission to the U.S. Acknowledging having engaged in marijuana related activities, even where such activities are legally permissible, can trigger certain grounds of inadmissibility. To paraphrase the late Timothy Leary, noncitizens who turn on, should tune in as they may drop (or be kept) out, of the U.S.

It seems incomprehensible, or at least counterintuitive, that an honest applicant for admission who believes that he or she has followed the law will, by truthfully acknowledging to have engaged in what was considered lawful activity in the jurisdiction where it occurred, make themselves inadmissible to the U.S. This is because marijuana remains a Schedule I controlled substance under the Controlled Substance Act (21 USC §802) and almost all activities directly or peripherally connected to it are considered criminal.[2] As individual states and the world continue to broaden their view[3] regarding acceptable marijuana related activities, adjudicatory trends in our extremely restrictive immigration environment are already showing us that the government will do the opposite.

Nothing brings this home more than the fact that on April 19, 2019 the U.S. Citizenship and Immigration Services (USCIS) issued a policy memo[4] to "clarify" (although obfuscate might be a better term) that following the laws of a jurisdiction where marijuana related activities are permissible will be an indication that one lacks good moral character for naturalization purposes. Specifically, the Policy Manual[5] was updated to provide that:

- Violations involving marijuana are generally a bar to establish good moral character for naturalization, even where that conduct would not be an offense under state law; and

- An applicant who is involved in certain marijuana related activities may lack good moral character if found to have violated federal law, even if such activity has been decriminalized under applicable state laws.

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[1] *See* State Marijuana Laws in 2018 Map, www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html.

[2] *See* 21 USC §§841, 842, 843 and 8 USC §863.

[3] *See* Pew Research Center, "Two-thirds of Americans support Marijuana Legalization" (Nov. 14, 2019), www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/.

[4] *See* USCIS Issues Policy Guidance Clarifying How Federal Controlled Substances Law Applies to Naturalization Determinations (Apr. 19, 2019), www.uscis.gov/news/alerts/uscis-issues-policy-guidance-clarifying-how-federal-controlled-substances-law-applies-naturalization-determinations.

[5] Conditional Bars for Acts in Statutory Period, USCIS Policy Manual vol. 12, chap. 5, www.uscis.gov/policy-manual/volume-12-part-f-chapter-5.

USCIS updated and added to Chapter 5 of the Policy Manual a section entitled: Conditional Good Moral Character Bar Applies Regardless of State Decriminalizing Marijuana. This new section reminds us that although states have legalized marijuana, it remains a "Schedule I" controlled substance under the Controlled Substances Act and states "[C]lassification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, is in violation of the CSA. Thus, it continues to constitute a conditional bar to GMC for naturalization eligibility, even where such activity is not a criminal offense under state law."

It states further that:

> "[s]uch offenses under Federal Law include, but are not limited to, possession, manufacture or production, or distribution or dispensing of marijuana. For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws.
>
> Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the applicant, may preclude a finding of GMC for the applicant during the statutory period.
>
> An admission must meet the long-held requirements for a valid "admission" of an offense. Note that even if an applicant does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense.

While it may be difficult to accept that following the law of a jurisdiction can nevertheless mean that one has engaged in unlawful activity that would bar him or her from the U.S., it is at least explainable as Federal law classifies marijuana as a "Schedule I" controlled substance the use of which is not permitted under any circumstances.

Good moral character, however, is different. Volume 12, Part F, Chapter 1 of the Policy Manual defines good moral character as "character which measures up to the standards of average citizens of the community in which the applicant resides.[6] It is unintelligible and intellectually impossible to conclude that "average citizens" residing in jurisdictions where marijuana related activities are legalized would not, if they so choose to engage in this legalized use of marijuana, engage in lawfully permissible activities. Yet, in the current climate such is the case. This overly restrictive and counterintuitive application of the good moral character requirement for naturalization should be viewed as a clear indication of where the government agencies are likely to go in the admission context.

Three areas of inadmissibility, criminal, medical and trafficking, are triggered by engaging in activities related to a Schedule I controlled substance, none of which requires a formal conviction.

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[6] *In re Mogus*, 73 F.Supp. 150 (W.D. Pa. 1947).

Thus, merely acknowledging that one has, even long ago, engaged in such activities or has engaged in them in a jurisdiction where they are considered legal can render them inadmissible. Further, even activities peripherally related to controlled substances can result in a finding of inadmissibility.

Under INA 212(a)(2)(A)(i)(II) admission to the essential elements of a crime or to violating any law or regulation of a state, the U.S. or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act), can render a noncitizen inadmissible to the U.S. To be found inadmissible under this ground: the individual must have been provided with the definition of the essential elements of the offense prior to the admission; the admission must constitute, thus reference, the essential elements of the crime, and the admission must have been voluntary. [Cite – Matter of K, 1 I&N Dec 594, BIA 1957]. In theory, this would appear to be a relatively rigorous standard such that merely stating that one engaged in marijuana related activities, should not, in and of itself, make the person inadmissible. In practice, such is not the case and findings of inadmissibility based merely on an affirmative answer to a question regarding engaging in marijuana related activities have occurred and appear to be occurring more frequently. Such findings are typically dispositive and almost impossible to overcome since there is no appeal of a denial of admission.

The seemingly rigorous requirements for determining whether a statement was an "admission" for the purposes of triggering the criminal ground of inadmissibility for marijuana use do not necessarily protect foreign nationals. Noncitizens can be found inadmissible for medically related reasons under INA 212(a)(1)(A)(iv), which renders drug users and abusers inadmissible. Drug use or abuse is not limited to illegal drugs. Rather, the use of substances, even legal ones, such as alcohol can lead to a finding that the individual has a physical or mental disorder which is a ground of inadmissibility under INA 212(a)(1)(A)(iii). Under this section, noncitizens are inadmissible to the U.S. if they are found to have, or previously have had, a physical or mental disorder and associated harmful behavior that poses or posed a threat to the property, safety, or welfare of themselves or others which is likely to recur or to lead to other harmful behavior.

There is no statutory definition of "abuse," but recent developments in admissibility determinations relating to alcohol use and DUI convictions, even ones occurring many years in the past, have shown that the standard can be low and encompass situations where an individual has only used a substance a few times.

Noncitizens can also be found inadmissible to the U.S. under INA 212(a)(2)(C) if the government knows, or has reason to believe, that the person is or has been an illicit trafficker in any controlled substance or they have knowingly aided, abetted, assisted, conspired, or colluded with others in illicit trafficking. Trafficking in this context is defined as having a commercial purpose. Noncitizens seeking entry to engage with businesses clearly involved in the legalized marijuana industry may know that their activities are prohibited. Those who are seeking to engage with businesses whose activities may in some way relate to the industry (i.e. a graphic designers for T-shirts sold by businesses either directly or indirectly related to the industry) may also be found inadmissible on this ground. Thus, the unwary applicant for admission could be found inadmissible for acknowledging what they believed to be an innocent and acceptable business purpose that is not even directly related to the sale or use of a Schedule I substance.

In addition, to the USCIS' update to its Policy Memo, each agency has updated its field guidance to specifically remind and indicate that marijuana related activities engaged in where lawfully permitted, may (and based on current reports, will) trigger inadmissibility. On October 17, 2018, CBP updated its website and issued a warning which also reminds that marijuana related activities remain illegal under federal law and stated that violations of these laws may result in "denied admission, seizure, fines and apprehension." CBP also references in its statement the medical and trafficking grounds of inadmissibility.[7]

Similarly, the Department of State updated its Foreign Affairs Manual at 9 FAM 302.4-2 Crimes Involving Controlled Substance Violations to include a specific note. It states, "Note whether or not a controlled substance is legal under a state law is not relevant to its illegality under federal law." Further, 9 FAM 203.4-3(B)(1)(b) identifies that the term "illicit trafficker" does not require that one has been "engaged" continuously in illicit trafficking. Rather, it denotes a person whose involvement with narcotic drugs includes trafficking, whether primary or incidental. The standard of proof for this provision "reason to believe" is substantially lower than that required for a conviction. It has been held that a consular officer may have reason to believe an alien is a trafficker even though criminal charges against the alien as a trafficker have been dismissed, or even if an alien has never been arrested."

The latitude possessed by adjudicating officers for questioning in this area coupled with the government's many indications that it will be as restrictive as possible, also creates a challenging and ethical dilemma for attorneys. Attorneys must uphold the law and are guided by the ABA Model Rules of conduct. ABA Model Rule 1.2(d) provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent… ." Thus, even if the marijuana use and related activities are legal in the state in which the attorney practices they are not as it relates to the lawyer's immigration practice. [look to Wilson Elser article for FN on individual state rules]

However, Rule 1.2 also provides that " [a] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Thus, this rule does not prevent an attorney from opining about and identifying potential consequences of a client's conduct. This is supported by Comment 9 to Model Rule 1.2 which states that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

Based on the fact that officers determining admissibility may, depending on the circumstances, ask about marijuana related activities (including seeing that someone's eyes are red, that may occur for no reason related to drug use (i.e. reading a phone for three hours while a passenger in a car)) it is imperative that we stay abreast of adjudicatory trends, remind our clients of their continuing obligation to speak the truth, and to advise them of the risks posed by engaging in even seemingly

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[7] *See* www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border; *see also* https://help.cbp.gov/app/answers/detail/a_id/3684/kw/marijuana.

lawful activities. Whether they then seek admission to the U.S., is a decision that they alone can and should make.

For the moment and foreseeable future, we will continue to live in an altered state that may have nothing to do with one's seemingly permissible use of a controlled substance. When it comes to controlled substances, rather than innocent until proven guilty, even innocent use or engaging in seemingly permissible marijuana related activities can nevertheless equal guilt and ultimately denial of admission to the U.S.

# INTERAGENCY PANEL – U.S. DEPARTMENT OF HOMELAND SECURITY

*Anthony Drago, Jr., Esq.*

The Homeland Security Act of 2002[1] created the U.S. Department of Homeland Security (DHS). The DHS agencies responsible for implementation and execution of U.S. Immigration law under the Immigration and Nationality Act (INA) remain unchanged, with the exception of their respective missions which have been altered drastically under the Trump Administration. The changes have been constant and in many ways have irreversibly changed the practice of immigration law. This practice pointer provides a general overview of each government agency invited to speak on the Local Interagency Panel.[2] The practice pointer will also touch on issues within the purview of each agency affected by the drastic changes in policy being instituted by the current administration.

## *I. OVERVIEW: U.S. DEPARTMENT OF HOMELAND SECURITY*

The creation of DHS involved the merger of 22 government agencies into one cabinet level agency. Understanding the roles and functions of each agency under DHS is essential to an effective immigration practice. Furthermore, adapting to, and following the changing policies within each agency under the Trump administration, while exhausting and frustrating, is essential to survival in the current political climate. Keeping up with the revolving door of personnel in charge of each agency given the constant turmoil in government is nearly impossible. Nevertheless, in order to effectively represent clients, attorneys must know the specific role of each agency and how that role is constantly changing. As with the past several years, by the time attendees of the AILA NE Conference read this article, the practices and policies of each agency will most likely differ in many ways from those in existence at the time this article was written. Attendees are reminded that diligent review of the changes being implemented by each agency is critical to effectively represent non-citizens.

## *II. U.S CITIZENSHIP AND IMMIGRATION SERVICES (CIS)*

The CIS is the agency responsible for adjudication of applications for immigrant and non-immigrant status in the United States. The CIS also adjudicates applications for asylum and ensures the proper operation of the electronic employment verification system known as E-Verify. Consistent with other governmental agencies under the Trump Administration the

[1] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[2] The U.S. Department of Justice, the Department of State and the Executive Office for Immigration Review are also engaged in immigration matters, but these agencies are not represented on the interagency panel or discussed in this practice pointer.

Director of this agency has changed many times. Keeping steady leadership at the top of the agency is not a stalwart of our government. Also, the mission and the attitude of this agency towards its customers has been drastically altered many times and now leans more towards law enforcement rather than consistent adjudication of immigration benefits.

The CIS Mission Statement currently noted on its website states, "U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values." This mission statement is significantly different from previous mission statements, yet it accurate reflects the agency's movement to an enforcement minded agenda under the Trump administration.

The most significant difference in this agency under the current administration is the constant change in adjudication methods and policy, all which seemingly stem from President Trump's "Buy American and Hire American" Executive Order, dated April 18, 2017. The Executive Order states it will create higher wages and employment rates for U.S. workers and protect their economic interests by rigorously enforcing and administering our immigration laws. It also directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries. By using policy memos, rather than the legislative process, the CIS has seriously altered administration of the INA. Much of the damage to our immigration system caused by the policy makers in the Trump administration is irreparable.

To say that the CIS is working on a combination of rulemaking, policy memoranda, and operational changes to implement the Buy American and Hire American Executive Order is an understatement. It is abundantly clear that the current administration is using all tools in its power to reduce immigration in this country and to discourage employers from hiring non-U.S. Citizens.

On a national level this agency continues to insulate itself from the general public through use of customer service by phone using call centers rather than permitting direct contact with adjudicators. Direct liaison between AILA and this agency on the national level is non-existent and leaders of the agency have effectively destroyed the local liaison process. Thus, litigation by attorneys challenging arbitrary and capricious decisions is now an essential tool for all immigration practitioners to fight back against this agency and its destructive policies.

The CIS continues to use a lockbox system to accept application filings from around the country then distributes its work load between service centers. As noted on the CIS website (www.uscis.gov) the Service Center Operations Directorate (SCOPS) has five service centers that process and adjudicate certain immigration applications and petitions. Service centers do not

provide in-person services, conduct interviews, or receive walk-in applications, petitions, or questions. They work only on certain applications or petitions that customers have mailed, filed online, or filed with a USCIS Lockbox.

Prior to October, 2017, local CIS field officers were responsible for adjudication of family based immigrant visa petitions, most non-business based applications to adjust status, applications for naturalization and other applications which required in person interviews. Effective October 1, 2017, the current administration required the CIS to interview all employment based applications to adjust status and all Refugee/asylee relative petitions (Form I-730, Refugee/Asylee Relative Petition) for beneficiaries who are in the United States and are petitioning to join a principal asylee/refugee applicant.[3] Because of this policy change local CIS offices have been inundated with thousands of interviews that were not required under the previous administration. Nevertheless, to date offices within District 1 have managed the additional work load.

Appointments at local CIS offices must now be made through the Infomod system. This new system is time consuming and inefficient for attorneys. Moreover, the system has completely insulated local offices from walk-in inquiries on cases that were common under the previous user-friendly environment in this agency. Information on the Infomod system and location and address of each local CIS office can be obtained on the CIS website located at www.uscis.gov.

One of the many notable policy changes under the current administration is the CIS policy memorandum that supersedes and rescinds prior guidance on providing deference to prior determinations of eligibility in the adjudication of petitions for extension of nonimmigrant status, including rescinding guidance from 2004 and 2015.[4] According to the CIS changes to its policies, "drive our benefit and services decisions and ensure that our guidance to USCIS officers who make those decisions reflects our agency's mission, and strategic vision. These policies also greatly affect our interaction with USCIS' diverse stakeholder community." The validity of this commentary is questionable given the clear anti-immigrant policies of the Trump administration.

Updates on new policies initiated by the CIS can be found at:
https://www.uscis.gov/policymanual/HTML/PolicyManual-Updates.html

The full policy manual can be found at:
https://www.uscis.gov/policymanual/HTML/PolicyManual.html

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[3] See AILA Document No. 17082900. The CIS noted that the change in policy complies with Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," and is part of the agency's comprehensive strategy to further improve the detection and prevention of fraud and further enhance the integrity of the immigration system.

[4] See AILA Doc. No 17102461.

Policy memos can be found here: https://www.uscis.gov/legal-resources/policy-memoranda

The CIS continues to have broad discretion to adjudicate applications and is also bound by the constant changes to its policies as set forth in the President's Executive Orders and Proclamations. Immigration attorneys are advised to review changes made by this administration on the CIS website and through AILA's resources in order to keep up with the frenetic pace of change. Immigration attorneys should continue to expect more drastic policy changes from the CIS in the future.

## *III. U.S CUSTOMS & BORDER PROTECTION (CBP)*

With more than 60,000 employees, CBP is one of the world's largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international travel and trade. CBP employees are primarily comprised of former employees from the U.S. Border Patrol, the U.S. Customs Service, the former U.S. Immigration and Naturalization Service, and the U.S. Department of Agriculture.

CBP is responsible to monitor and control all land and air ports of entry to the United States which includes securing and facilitating trade and travel while enforcing U.S. laws and regulations such as immigration, agriculture and drug laws. CBP has expertise in preventing the introduction of harmful pests into the United States and recognizing and preventing the entry of organisms that could be used for biological warfare or terrorism. CBP is also responsible for the inspection and admission of all foreign nationals seeking to enter the United States, but immigration issues are a small part of the agency's mission. The agency's mission statement on its website states its mission as, "to safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."

CBP officers must inspect and admit non-U.S. Citizens in accordance with the statutory requirements under the INA at all ports of entry to this country. CBP Officers have broad powers to determine whether non-U.S. Citizens should be admitted to this country or whether their admission should be denied or deferred pending further investigation. CBP officers are also permitted to arrest and detain non-citizens and to issue Notices to Appear thereby referring individuals to the Immigration Court for removal proceedings.

Non-citizens arriving at U.S. borders are not legally entitled to representation. Therefore, non-citizens can experience a variety of scenarios at U.S. borders in regard to their admissibility to this country. These individuals must prove their admissibility to a CBP officer and need to understand that criminal and immigration history is a critical issue during the admission process.

CBP has also become more vigilant at the borders in terms of searching electronic devices of travelers including both U.S. and non-US citizens. Searches of electronic devices and questions about social media including requiring passwords and web-sites visited are now common. In FY17, CBP conducted 30,200 border searches, both inbound and outbound, of electronic devices. CBP searched the electronic devices of more than 29,200 arriving international travelers, affecting 0.007 percent of the approximately 397 million travelers arriving to the United States. Of the more than 390 million arriving international travelers that CBP processed in FY16, 0.005 percent of such travelers (more than 18,400) had their electronic devices searched.[5]

Pursuant to its broad authority to inspect and admit all entrants to the U.S. at ports of entry, CBP officers may attempt to view content stored on phones, laptops, and other portable electronic devices. On many occasions CBP officers have examined electronic communications, social media postings, and ecommerce activity by obtaining social media identifiers or handle after confiscating electronic devices from a traveler. Attorneys should discuss use of social media and electronic devices with clients prior to their entry to this country and all non-US Citizens must be prepared to answer questions about the use of social media when seeking admission to the United States.

The primary port for CBP in the New England area is at Boston Logan International Airport. The CBP office at Logan International Airport, Terminal E in East Boston, MA 02128 can be reached by phone at (617) 568-1810. The CBP office for Boston is located at 10 Causeway Street, Room 603, Boston, MA 02222. For a list of all of the land, air and sea ports of entry in the New England area go to www.cbp.gov.

## *IV. U.S. Immigration and Customs Enforcement (ICE)*

The ICE website describes the agency mission as follows: "ICE'S mission is to protect America from the cross-border crime and illegal immigration that threaten national security and public safety. This mission is executed through the enforcement of more than 400 federal statutes and focuses on smart immigration enforcement, preventing terrorism and combating the illegal movement of people and goods."

ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 employees in more than 400 offices in the United States and 46 foreign

[5] *See* DHS/CBP/PIA-008 – Border Searches of Electronic Devices at https://www.dhs.gov/publication/border-searches-electronic-devices

countries. The agency has an annual budget of approximately $6 billion, primarily devoted to three operational directorates – Homeland Security Investigations (HSI), Enforcement and Removal Operations (ERO) and Office of the Principal Legal Advisor (OPLA).

Immigration related work performed by ICE consists of investigating violations of the INA and enforcing the INA within the borders of our country. ICE is responsible for immigration enforcement actions, including workplace violations, human trafficking and harboring, visa abuse, document fraud, and detention and removal of non-citizens. ICE must coordinate its enforcement efforts with the other immigration related agencies in DHS. Thus, the enforcement activity of ICE intersects with the work of the other DHS agencies on a daily basis.

### *(A) Homeland Security Investigations (HSI)*

Information on the agency website describes its overall mission and authority very well. HSI is the principal investigative component of DHS with more than 10,000 employees, including over 7,000 special agents and 700 intelligence analysts who are assigned to more than 200 cities throughout the U.S. as well as 69 overseas offices and 8 Department of Defense Liaisons in more than 51 countries. HSI's international presence represents DHS' largest investigative law enforcement presence abroad. HSI conducts transnational criminal investigations that protect the U.S. against threats to its national security and brings to justice those seeking to exploit U.S. customs and immigration laws worldwide.

HSI has broad legal authority to investigate all types of cross-border criminal activity. This includes investigations and intelligence efforts into a myriad of smuggling and cross-border criminal activity. Through its investigative efforts, HSI works with foreign, federal, state and local law enforcement partners to protect the national security and public safety of the United States by disrupting and dismantling transnational criminal organizations that engage in cross-border crime.

In addition to criminal investigations, HSI conducts employment related investigations concerning I-9's and employment of immigrants unauthorized to work in this country. It is important to note that while the function of HSI intersects with many immigration related issues, immigration comprises a small part of the agency's overall mission. HSI officers have authority to arrest immigrants in this country without authorization and can detain such individuals and initiate removal proceedings regardless of whether those individuals are engaged in criminal activity.

HSI is also charged with monitoring the Student and Exchange Visitor Program (SEVP) that manages SEVP-certified schools and nonimmigrant students in F and M status, and their dependents, using the Student and Exchange Visitor Information System (SEVIS). SEVIS is a part of the National Security Investigations Division and acts as a bridge for government organizations that have an interest in information on nonimmigrants whose primary reason for coming to the United States is to be students. Reporting requirements for schools subject to

SEVP are made to HSI and the information in SEVIS is accessible to other federal agencies, such as CBP and USCIS. Thus, the work of the DHS agencies intersects in this area since student visa violators must be reported to HSI which in turn would notify ERO and CIS of the situation if and when immigration benefits are sought or when apprehension and removal is appropriate.

Based on the enforcement heavy policies of the Trump administration, HSI will continue to be involved in more large scale investigations of fraud and other abuses associated with the programs HSI investigates. Attorneys should expect HSI and the other DHS agencies to share information and coordinate operations targeted at criminal enterprises operating in the United States. Students who violate the terms of their student visa or who are arrested and charged with crimes in the United States should expect HSI to investigate cases vigorously.

HSI's website is located at www.ice.gov. The Boston area HSI office is located at 10 Causeway Street, Room 722 Boston, MA 02222-1054.

### *(B) Enforcement & Removal Operations (ERO)*

ERO enforces the nation's immigration laws. ERO identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the United States. The ICE ERO website sets forth the following about the agency's mission and work:

The ERO directorate upholds U.S. immigration law at, within, and beyond our borders. ERO's work is critical to the enforcement of immigration law against those who present a danger to our national security, are a threat to public safety, or who otherwise undermine the integrity of our immigration system.

ERO operations target public safety threats, such as convicted criminal aliens and gang members, as well as individuals who have otherwise violated our nation's immigration laws, including those who illegally re-entered the country after being removed and immigration fugitives ordered removed by federal immigration judges. ERO deportation officers assigned to INTERPOL also assist in targeting and apprehending foreign fugitives or Fugitive Alien Removal (FAR) cases who are wanted for crimes committed abroad and who are now at-large in the U.S.

ERO manages all aspects of the immigration enforcement process, including identification and arrest, domestic transportation, detention, bond management, and supervised release, including alternatives to detention. In addition, ERO removes aliens ordered removed from the U.S. to more than 170 countries around the world.

In addition to the enforcement priorities requiring ERO to arrest and detain non-citizens, ERO officers effectuate the final removal of those ordered removed from this country. ERO transports removable aliens from point to point and manages non-citizens in custody or in an alternative to

detention program. In summary, ERO is an agency that detains and removes individuals from this country without exception or discretion.

The many problems with ICE policies regarding detention of children and separation of families at the southern border are well documented. Communication with the agency is difficult and officer discretion to release individuals from custody appears to be a thing of the past.

Although individuals who are subject to final orders of removal can apply for a stay of removal based on a variety of circumstances, the practice of filing stays has become non-existent. The local ERO office will accept bond payments for detained aliens, as well as stays of removal and/or deferred action requests for aliens who have already been ordered removed, but stays and deferred action are no longer a viable plan to keep non-citizens in the country after having been ordered removed.

The Boston Field Office for ERO (covering all of New England) is located at 1000 District Ave, Burlington, MA 01803. ERO does not detain aliens at this location. Rather, ERO conducts initial processing at this location before transferring aliens subject to detention to various facilities in the Commonwealth. The facilities currently used by ERO to house ICE detainees in Massachusetts are Plymouth County House of Corrections; and Bristol County House of Corrections. ICE no longer detains non-citizens at Suffolk County House of Corrections (South Bay). All ICE detainees at that facility were recently transferred to upstate New York, essentially without warning. This agency will continue to be difficult to communicate or negotiate with and attorneys should not expect much cooperation from ICE ERO in terms of getting detained people released from custody.

## V. CONCLUSION

The immigration functions for each DHS agency discussed in this article change consistently and leadership at each agency is in constant flux. The Trump administration is clearly intent on decimating immigration in this country. Until such time as the current administration is no longer in power, direct communication with DHS agencies will be difficult and limited. Although the practice of Immigration Law previously differed from jurisdiction to jurisdiction based on local leadership, the anti-immigrant policy of the Trump administration has invaded local offices and has eroded the relationship between attorneys and our government.

While each agency represented on the interagency panel has a specific role in the immigration system, they definitely work together by sharing information to perform their various duties. It is critical to know the role of each agency and how to contact them should an issue arise during the life cycle of a client's case. It is also incumbent on immigration attorneys to be prepared to litigate any and all issues when each agency acts arbitrarily and capriciously in carrying out their respective roles. Immigration attorneys must be diligent in keeping up with changes in the

agencies and adjust their practices to meet the needs of clients in the current political climate. Unfortunately, given the complete lack of Congressional action on immigration reform, further Executive action espousing anti-immigrant policies can be expected.

**Representing Youth & Families before EOIR**
**AILA New England Conference 2020**
*Elizabeth Badger, Emily Leung, Victoria Neilsen*

This document is intended to be a guide to the multitude of resources, case law, statutes and other necessary reading on the issues listed below. Because this document was submitted for print in November 2019, all citations should be researched to ensure that information is up to date.

## 1) Advanced Topics in Special Immigrant Juvenile Status Cases:

A. *AAO Decisions of October 11, 2019 and takeaways*:
- Matter of E-A-L-O-, Adopted Decision 2019-04 (AAO Oct. 11, 2019 ) (available at: https://www.uscis.gov/sites/default/files/USCIS/files/Matter_of_E-A-L-O-_Adopted_Decision_2019-04_AAO_Oct._11_2019.pdf)

- Matter of A-O-C-, Adopted Decision 2019-03 (AAO Oct. 11, 2019) (available at: https://www.uscis.gov/sites/default/files/USCIS/files/Matter_of_A-O-C-_Adopted_Decision_2019-03_AAO_Oct._11_2019.pdf)

- Matter of D-Y-S-C-, Adopted Decision 2019-02 (AAO Oct. 11, 2019) (available at: https://www.uscis.gov/sites/default/files/USCIS/files/Matter_of_D-Y-S-C-_Adopted_Decision_2019-02_AAO_Oct._11_2019.pdf)

- Catholic Legal Immigration Network, Inc. and Immigrant Legal Resource Center, "Practice Alert: SIJS Policy Updates And Proposed Regulations" (November 2019), https://cliniclegal.org/sites/default/files/resources/2019-1106-practice-alert-SIJS-policy-update.pdf

B. *Massachusetts General Law c. 119 § 39M*:
- Statute: https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVII/Chapter119/Section39M

- Probate & Family Court forms & protocol:
  - Complaint: https://www.mass.gov/files/documents/2019/03/28/jud-pfc-cjp35-complaint-for-dependency-c119-s39m.pdf
  - Judgment: https://www.mass.gov/files/documents/2019/03/28/jud-pfc-cjp37-judgment-of-dependency-c119-s39m.pdf
  - Protocol: https://www.mass.gov/doc/protocol-for-complaints-and-judgments-for-dependency-pursuant-to-g-l-c-119-ss-39m/download

- Practice Advisory: Implementation of M.G.L. c. 119 § 39M, by Anne Mackin (GBLS), Nancy Kelly (GBLS), and Jamie Sabino (MLRI) (April 5, 2019) (attached)

C. *Sample Orders of Special Findings*
- Sample Order in Complaint under M.G.L. c. 119 § 39M (attached)
- Sample Order in Complaint involving a custody adjudication in Massachusetts Probate & Family Court (attached)

D. *Maine Statute (passed June 18, 2019): 22 M.R.S.A. § 4099-I:* http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1155&item=1&snum=129

**2) <u>Procedural and Evidentiary Concerns before EOIR</u>:**

A. *Ensuring compliance with procedures specific to juveniles, the failure of which may be a basis to terminate proceedings and/or suppress evidence*:

- "Strategies for Suppression Evidence and Terminating Removal Proceedings for Child Clients," by Helen Lawrence, Kristen Jackson, Rex Chen, & Kathleen Glynn (March 2015): https://cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf.

B. *Relevant Authorities & Guidance for Clients Facing Visa Backlogs*:

- Catholic Legal Immigration Network, Inc., "Seeking Continuance in Immigration Court in the Wake of the Attorney General's Decision in *Matter of L-A-B-R-*," (December 6, 2018): https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/L-A-B-R-practice-advisory-12.6.2018.pdf

- Catholic Legal Immigration Network, Inc., "Practice Advisory: Status Dockets in Immigration Court" (October 1, 2019): https://cliniclegal.org/resources/practice-advisory-status-dockets-immigration-court

- Executive Office of Immigration Review, "Use of Status Dockets," (August 16, 2019): https://www.justice.gov/eoir/page/file/1196336/download

- *Zuniga Romero v. Barr*, No. 18-1850 (4th Cir. 2019) available at http://www.ca4.uscourts.gov/opinions/181850.P.pdf overturning Attorney General's decision in *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) available at https://www.justice.gov/eoir/page/file/1064086/download relating to the use of administrative closure in immigration court

- *Osorio-Martinez, et. al. v. Attorney General*, 893 F.3d 153 (3d Cir. 2018), available at http://www2.ca3.uscourts.gov/opinarch/172159p.pdf

C. *Considerations for Addressing Gang Allegations:*

- Sample Redacted Homeland Security Investigations (HSI) Packet from DHS (attached)

- Boston Police Department Rule 335 Gang Assessment Database: https://bpdnews.com/rules-and-procedures

- CUNY School of Law, "Toolkit to Challenge Gang Allegations Against Immigrant New Yorkers," (2019): https://www.law.cuny.edu/wp-content/uploads/media-assets/INRC_Toolkit_TOC_0729.pdf

- CUNY Materials on Gang Allegations and School Advocacy: https://www.law.cuny.edu/academics/clinics/immigration/challenging-gang-allegations-against-immigrant-new-yorkers-toolkit/know-your-rights-presentations-in-the-gang-allegations-context/#advocacy

- Immigrant Legal Resource Center, "The School to Prison to Deportation Pipeline," by Nicki Marquez and Rachel Prandini (February 2018): https://www.ilrc.org/sites/default/files/resources/school_delinq_faq_nat-rp-20180212.pdf

**3) Addressing Restrictions on Asylum Protections:**

- *Mendez-Rojas v. Johnson*, No. 2:16-cv-01024-RSM (W.D. Wash.) https://www.americanimmigrationcouncil.org/litigation/challenging-obstacles-meeting-one-year-filing-deadline-filing-asylum-application

- *J.O.P. v. U.S. Department of Homeland Security, et. al.*, Case 8:19-cv-01944-GJH (D. Md. 2019): https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/TRO-Memo-Opinion-JOP-DHS.pdf

    - USCIS guidance states that due to J.O.P. litigation, they have been enjoined from implementing the May 31, 2019 UAC asylum memo and must retract adverse decisions made under that memorandum and reinstate the May 28, 2013 memorandum
    - See USCIS guidance: https://www.uscis.gov/legal-resources/legal-settlement-notices/jop-v-us-dept-homeland-security-et-al-information
    - May 28, 2013 UAC Asylum Jurisdiction Memo: https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf)

- Penn State Law, Center for Immigrants' Rights Clinic, "Third Country Asylum Rule: What You Need to Know" (September 19, 2019), https://pennstatelaw.psu.edu/sites/default/files/Third%20Country%20Asylum%20Rule%20What%20You%20Need%20to%20Know.pdf

**4) <u>Formulating Particular Social Groups in Light of Recent Case Law</u>:**

- AILA Doc. No. 13010150: Asylum Cases on Social Group: https://www.aila.org/infonet/asylum-cases-on-social-group

- CLINIC, "Practice Pointer: *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)" (Aug. 2, 2019): https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf

- National Immigrant Justice Center, *Matter of A-B- and Matter of L-E-A-*: Information and Resources: https://www.immigrantjustice.org/for-attorneys/legal-resources/topic/matter-b-and-matter-l-e-information-and-resources

- Center for Gender & Refugee Studies (CGRS)
  - Unpublished Asylum Case Outcomes: https://cgrs.uchastings.edu/search-cases
  - Support upon Request: https://cgrs.uchastings.edu/search-materials/cgrs-litigation-support-materials
    https://cgrs.uchastings.edu/publications

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MLRI MASSACHUSETTS LAW REFORM INSTITUTE

# PRACTICE ADVISORY

# IMPLEMENTATION OF M.G.L. c. 119, § 39M

by Anne Mackin and Nancy Kelly (GBLS) and Jamie Sabino (MLRI)

April 5, 2019

## INTRODUCTION

On July 26, 2018, as part of the FY 2020 budget, Governor Baker signed into law an amendment to M.G.L. c. 119, called § 39M. On March 29, 2019, the MA Probate and Family Court posted a "Protocol for Complaints and Judgment for Dependency Pursuant to G.L. c. 119, § 39M", a form "Complaint", and a form "Judgment of Dependency" on its website for implementation of the new law. The documents were also sent by the Administrative Office to the judges, registers, chief probation officers, judicial case managers and first assistant registers of the Probate and Family Court. The purpose of this Practice Advisory is to explain the background of the law and to discuss some of the key points regarding its implementation in the Probate and Family Court.

## BACKGROUND

During the last ten years advocates had been trying to establish a statutory claim through which 18 – 21 year olds could present themselves to the MA state courts to seek protection from abuse, neglect, abandonment, an assessment of whether reunification with one or both of their parents is a "viable option", and whether the return to their or their parents' country of nationality is in their best interest. The new statute that was enacted in 2018 provides a new cause of action for this purpose and grants jurisdiction to the Court to make decisions concerning the protection, well-being, care and custody of a child, to issue findings, orders, or referrals to support the health, safety and welfare of a child, or to remedy the effects on a child or abuse, neglect, abandonment, or similar circumstances.

On March 4, 2016, the MA Supreme Judicial Court issued a decision in the case of Liliana Maribel Rivera Recinos v. Maria Isabel Recinos Escobar, 473 Mass. 734 (2016). This was a very important case because it affirmed that the Probate and Family Court has jurisdiction, under its broad equity power, over individuals between the ages of eighteen and twenty-one to make the findings necessary to apply for classification as a special immigrant juvenile. In its decision, the Court noted a gap between access to MA State Courts and the Federal statutory relief. The Court wrote: "In response to this gap, some States have enacted legislation to extend the juvenile court's jurisdiction to children up to the age of twenty-one for certain proceedings. [Note 8] Massachusetts has not yet passed legislation to extend the Probate and Family Court's jurisdiction over these individuals. [Note 9] The Probate and Family Court does, however, have broad equity powers pursuant to G. L. c. 215, § 6, and the court may invoke its equity power to fill in this gap." As of July 26, 2018, the Massachusetts "statutory gap" was eliminated.

Although the Recinos decision served our clients well, now that we have a statutory claim to go to court, it is no longer necessary or appropriate to invoke equity jurisdiction to bring most cases before the court.

## HIGHLIGHTS of M.G.L. c. 119, § 39M.

1. It is a new **statutory cause of action**.

2. It specifically **defines** "**child**" and "**dependent on the court**" (see § 39M (a) ).

3. It **defines** "**similar circumstances**" as conditions that have an effect on the child comparable to abuse, neglect or abandonment and **includes**, but is not be limited to, the **death of a parent**. (see § 39M (a) ).

4. The definition of "dependent on the court" specifically states that when issuing "special findings" pursuant to this section, the **court is acting as a "juvenile court"**.

5. In making determinations under this section, "the **health and safety of the child shall be of paramount concern**." (see § 39M (b) )

6. In addition to special findings, the Court has **jurisdiction to enter orders necessary to protect the child from further abuse or other harm** (see §39M (c) ).

7. The Court has **jurisdiction to make referrals for necessary services**. Participation shall be voluntary. (see § 39M (d) )

8. The Court is **required to hear, adjudicate and issue findings** of fact and ruling of law on any petition or complaint for special findings under this section as soon as it is administratively feasible and **prior to the child reaching the age of 21**. (see § 39M (e) )

9. **The petitioner is not required to name as a respondent a parent with whom reunification may be a viable option**. (see § 39M (f) )

10. **Findings** of fact and rulings of law similar to those in § 39M (b) **may be issued in other proceedings** including but not limited to guardianships, adoptions, complaints for custody-support-parenting time, complaints for paternity, complaints for divorce or separate support, modifications, equity complaints, etc. (see § 39M (g) ). If such findings are requested in another such action, the requirements as to who must be named as parties, who must be served and any filing fee for that action apply – not those applying to § 39M.

11. **Retroactive applicability**. Section 39M of chapter 119 of the General Laws **shall apply**: (i) to **all requests** for special findings as described in paragraph (1) of subsection (b) of said section 39M of said chapter 119 **pending in a juvenile court as of March 4, 2016 or commenced on or after March 4, 2016**; and (ii) ***retroactively to any special findings issued that form the basis of a child's petition for special immigrant juvenile classification if that petition is subject to denial or revocation based on the child's dependency status or age when the special findings were issued.*** This language is found in Chapter 154 of the Acts of 2018, Section 105, and the Statutory Note to M.G.L. c. 119, § 39M.

## WHO CAN UTILIZE M.G.L. c. 119, § 39M ?

Although 39M was originally envisioned as a statutory claim for individuals between 18 and 21, it **can be used by/for children of any age up until age 21**.

If the subject of the petition is under 18, there may be a preferable cause of action rather than 39M. For example, the child may need a legal guardian, or paternity needs to be established, or the findings may be sought as part of complaints for custody-support-parenting time, divorce or separate support, modifications, etc. **Even if the case is brought pursuant to some other cause of action, findings** similar to those in § 39M (b) **may be issued within the original case.**

## HOW TO BRING A "39M" ACTION IN THE PROBATE AND FAMILY COURT

The Probate and Family Court has issued three forms to be used in "39M" actions. They are:

1. Complaint for Dependency pursuant to G.L. c. 119, § 39M. Form No. CJ-P 35.

2. Summons for Complaint for Dependency pursuant to G.L. c. 119, § 39M. Form No. CJ-P 36.

3. Judgment of Dependency pursuant to G.L. c. 119, § 39M. Form No. CJ-P 37.

Forms 1 and 3, along with a Protocol issued by the Probate and Family Court for these types of actions, can be found in the "Miscellaneous" section of the "Forms" section of the Probate and Family Court website. It is very important to read the Protocol.

The Summons (sample attached) will be issued by the Probate and Family Court in each case. It is not available on the Court's website.

### Options:

### *A. Original Complaint for Dependency*:

1. A Complaint for Dependency can be filed if someone has suffered abuse, abandonment, neglect, or something similar under state law, and is seeking protection from same. Although the impetus for filing under "39M" is the desire for a judgment with special findings of fact and rulings of law that comports with the federal statute, "39M" contemplates **look**ing **at the child as a whole person, assess**ing **what the child needs to overcome the effects of abuse, abandonment and neglect, and what is in the child's best interest**.

2. The Plaintiff can be the child (**up to age 21**) or any person, such as a parent or guardian.

3. A Defendant is the offending parent(s). There can be one or two Defendants. **Only the offending parent(s) must be named as a defendant and served.** If both parents were abusive, neglectful, or abandoned the child, then both will be named as defendants, and both must be served. If an offending parent/defendant is deceased, then no service to that parent is necessary.

4. **DOCUMENTS** to be filed **TO START THE CASE**:

   a. the Complaint;

b. an affidavit from the child and/or from an adult with knowledge of the child's circumstances, sufficient for the Court to determine the issues at hand;

c. a copy (original not required) of the child's birth certificate (with translation, if needed; court certified interpreter not required);

d. a copy (original not required) of the death certificate of a parent (with translation, if needed; court certified interpreter not required), if applicable;

e. a proposed order;

f. any other relevant documents or evidence in support of the findings requested.

5. **NOTE THAT IT IS EXTREMELY IMPORTANT TO WRITE AND SUBMIT AFFIDAVITS THAT HAVE *FACTUAL* DETAILS ABOUT YOUR CLIENT'S PARTICULAR SITUATION. YOU NEED TO PROVIDE ENOUGH INFORMATION FOR THE COURT TO FORM AN OPINION AS TO THE FINDINGS YOU NEED. THE COURT NEEDS TO STATE THE *FACTUAL* BASES FOR THE FINDINGS IN THE JUDGMENT.**

6. The Court also needs to **state the *legal bases*** for the findings **in the Judgment**.

7. There is **NO FILING FEE** but payment (of $5.00) for each summons will be required.

8. At the time the summons is issued, a court date for your hearing will be included in the summons. The Defendant(s) must then be served unless the named defendant is deceased. Then no service is required. **Service is not required on a non-offending parent for a complaint pursuant to § 39M.**

9. When service is required, the Defendant(s) will have **SEVEN** days after the date of service to respond to the Complaint.

10. If you receive the summons at the time of filing, and know that you cannot make service before the assigned court date or there is some other reason that you and/or your clients can not appear on that date, you can ask for a later date at the time of filing.

11. If the scheduled court date is approaching and you have not been able to make service by the time of the hearing, you could file a motion in advance to request a new date for the hearing. If the hearing date arrives and you have not made service, then you need to attend the hearing, explain that service is not complete, and ask for a new date at the hearing. You may file a Motion for Alternate Service if necessary.

***B. Subsequent Action in an Existing Case***

1. **HOW TO SEEK "§ 39M" FINDINGS WITHIN AN EXISTING, PENDING CASE.**

If you already have an existing, pending case, and find that you need "§ 39M" orders, you can file a Motion to Amend the Complaint (if necessary) and a Motion for Special Findings of Fact and Rulings of Law as you would have done pre-implementation of "§ 39M". It would be advisable to cite "§ 39M" in your order and include findings in the style of a "§ 39M" order. Note that

"§ 39M(g)" gives the Court authority to issue "§ 39M" findings of fact and rulings of law similar to those in "§ 39M (b)" "in any other proceeding".

2. **HOW TO SEEK "§ 39M" FINDINGS IN AN EXISTING CASE THAT HAS ALREADY GONE TO JUDGMENT.**

If you have an existing case that has already gone to judgment but subsequently needs "39M" findings for the child, you can use the "§ 39M" complaint to get the findings you need in the original case. For example, if you have obtained a guardianship of a minor, and then realize you need "§ 39M" findings, you may file a Complaint for Dependency to get the necessary findings. You must disclose the prior case when filing the Complaint for Dependency so that the original case in which the order is needed can be associated with the "§ 39M" case. Note: if you need a custody order in an under-18 case, you need to specifically ask for it.

3. **HOW TO AMEND A PRIOR ORDER IN AN EXISTING CASE**.

If you already have an existing case through which you obtained your original Judgment and Findings of Fact and Rulings of Law, and you need to ***AMEND THE ORDER***, you could use the Complaint for Dependency and mark "amended" as the type of complaint in the heading. The retroactive effective date of "§ 39M" gives the court jurisdiction to amend prior orders retroactively in certain circumstances, if the original case was pending or commenced on or after March 4, 2016. For example, if you obtained your original order in an equity case, and then you receive a Request for Evidence, a Notice of Intent to Deny, or a Denial, stating you did not establish the court's jurisdiction, or the order does not include sufficient facts, or the law on which the court relied is not clear, or a variety of other reasons, you may want to return to Court to obtain an amended order. The same procedures listed above for an original complaint apply. ***BE SURE THE AMENDED ORDER IS DATED "NUNC PRO TUNC" TO THE DATE OF THE ORIGINAL ORDER***.

4. **NOTICE OF A "§ 39M" COMPLAINT TO AMEND A PRIOR ORDER.**

The "§ 39M' notice requirements apply. HOWEVER, if the underlying facts on which you are seeking an amended order have not changed, and you are not adding any new evidence, you might consider asking the court to waive notice of the "§ 39M" complaint to amend the prior judgment and order.

***C. Request for Special Immigrant Juvenile findings similar to § 39M findings in a non-§ 39M case***.

If you are bringing a child to court by using another cause of action such as guardianship, adoption, complaints for custody-support-parenting time, paternity, divorce, separate support, modification, etc., you may request findings similar to § 39M (b) as part of that cause of action. When filing under one of these causes of action, you must include the documents required for the separate cause of action, as well as the evidentiary documents that you would submit in a "39M" complaint and your proposed findings. See "§ 39M (g)".

**In addition, if you are using a cause of action other than "§ 39M", the service requirements for the underlying petition or complaint apply**. **The "§ 39M service requirements APPLY ONLY in "§ 39M" complaints.**

## COMPLETION OF THE "§ 39M" COMPLAINT AND JUDGMENT FORMS

The forms are fairly self-explanatory. They are designed to:

1. Meet the requirements for SIJ eligibility;

2. Address what protections the child needs due to abuse/abandonment/neglect;

3. Address any services for which the child may be eligible to remedy the effects of the child's history.

**NOTE: "§ 39M" does not create eligibility for any services, but gives the Court the authority to make referrals or recommendations for services for which the child may be otherwise eligible.**

The fill-in-the-blank boxes are the places to state the particulars of individual cases. If more space is necessary for your case, you can add additional pages to the form at the end.

**IMPORTANT: Par. 8 in the "39M" Complaint and Par. 7 in the "§ 39M" Judgment ask the Court for a "best interest" finding concerning with whom the child should live. If the child is over 18 and living with a friend, relative, prior guardian, is still in school, or otherwise living with some-one helping the child, the Court may find that even post-18 it is in the best interest of the "child" to continue residing with that person. If the child is living independently or the court has no opinion, this will likely remain blank. On the other hand, if you are using a "§ 39M" complaint for a child under 18, you need to specifically ask for a custody order if you want one in the "request for other relief" in the Complaint, and *STATE THE CUSTODY ORDER* in par. 8 of the Judgment, if needed.**

## JUVENILE COURT

At this time, there are no complaint or judgment forms designed specifically for use in the Juvenile Court. Nonetheless, "39M" findings can be requested in dependency proceedings – Care & Protection, Child Requiring Assistance ("CRA"), and Delinquency - in the Juvenile Court.

The Juvenile Court's jurisdiction over youth ends in all dependency cases at age 18, with two exceptions: (1) Permanency Young Adult (PYA) matters, through which the DCF, pursuant to G.L. c. 119, 23(f), continues its responsibility via a "voluntary placement agreement" to any young adult, between 18 and 22, who was under the custody, care, or responsibility of the Department prior to reaching age 18 or, (2) if counsel needs to return to a Juvenile Court to get an amended order in a case in which the court first issued Special Findings of Fact and Rulings of Law when the child was within its jurisdiction prior to his/her 18th birthday. Any amended orders should be dated "*nunc pro tunc*" to the date of the original order.

The Juvenile Court jurisdiction does not extend to "39M" initial complaints for 18 – 21 year olds.

## PLEASE, LET US KNOW WHAT'S HAPPENING!

**PLEASE LET US KNOW** how these procedures work for you and if there are any issues in implementation of "39M". We hope everything goes well, but there may be some glitches or issues not anticipated in development of the new mechanisms to be used for these complaints. The drafters of this advisory are willing to try to address appropriate matters with the Probate and Family Court's administrative office if issues arise. (Contact Information: Nancy Kelly: nkelly@gbls.org; Anne Mackin: amackin@gbls.org; Jamie Sabino: jsabino@mlri.org.)

**SAMPLE SPECIAL FINDINGS ORDER FOR A CHILD SEEKING ONLY A DEPENDENCY ADJUDICATION**

**COMMONWEALTH OF MASSACHUSETTS**
**THE TRIAL COURT**
**PROBATE AND FAMILY COURT DEPARTMENT**

**County, ss.** **Docket No.**

| | |
|---|---|
| **XXX,** | ) |
| **Plaintiff,** | ) |
| | ) |
| **v.** | ) |
| | ) |
| **XXX,** | ) |
| **Defendant.** | ) |

**SPECIAL FINDINGS OF FACT AND RULINGS OF LAW**

After hearing on the instant Complaint for Dependency and based on the Plaintiff's sworn affidavit, testimony of the Plaintiff, Plaintiff's birth certificate, memorandum of law, and other evidence presented, the Court makes the following Special Findings of Fact and Rulings of Law:

1. Child's Name ("XX"), the Plaintiff, was born on Date, in Place. XX is a Massachusetts resident living in Boston, Massachusetts in Suffolk County in the care of her mother, XX, and under the jurisdiction of this Court. XX is not married. She is a child as defined under G.L. c. 119 § 39M.

2. This Court has jurisdiction pursuant to G.L. c. 119 § 39M to make determinations about XX's dependency, as defined in that section to mean "decisions concerning the protection, well-being, care and custody of a child, for findings, orders, or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances." This Court finds that XX is dependent upon this court as defined under G.L. c. 119 § 39M.

3. Under the laws of the Commonwealth of Massachusetts, "neglect" is defined as "failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition." 110 Mass. Code of Regs. § 2.00. "Abandoned" is defined as "being left without any provision for support and without any person responsible to maintain care, custody, and control because the whereabouts of the person responsible therefore is unknown and reasonable efforts to locate the person have been unsuccessful." G.L. c. 210, § 3. The Probate and Family Court uses these definitions in the Massachusetts General

**Commented [MOU1]:** This paragraph articulates basic facts, including that the child is a resident of Massachusetts, which could help the child establish eligibility for benefits or entitlements, including health insurance coverage, school enrollment, etc. .

**Commented [MOU2]:** If applicable.

**Commented [MOU3]:** This paragraph articulates a finding of dependency.

**Commented [MOU4]:** Citation to definitions. While not used here, "abuse" is also defined at 110 Mass. Code of Regs. § 2.00. If applicable, one may choose to cite "similar circumstances" defined in G.L. c. 210 § 3 as "conditions that have an effect on the child comparable to abuse, neglect or abandonment including, but not limited to, the death of a parent."

Laws and Code of Massachusetts Regulations as clarified by case law to assess parental behavior and its impact on children in the cases before it.

4. XX's father, the Defendant, left COUNTRY, where XX was living, from the time XX was approximately age four until age nine. During that time, he maintained minimal contact with her by phone. When the Defendant returned to COUNTRY, he lived with XX and her paternal grandparents for approximately one month. He made no effort to form a relationship with XX. He witnessed the grandparents' heavy drinking and physically and verbally abusive behavior toward XX, but did not intervene. After approximately one month, he moved to a different town in COUNTRY, leaving XX with her grandparents. Around the age of 15, XX reached out to both her mother, who was living in the United States, and her father, who was living in COUNTRY, regarding her grandparents' abuse as well as the danger she was facing in her neighborhood. XX's father made no effort to protect XX or help her find a safer living arrangement. While XX's mother financially supported her, her father did not, eventually forcing XX to terminate her education for lack of financial resources. To this day, XX's father does not support her and fails to maintain a parental relationship with her.

**Commented [MOU5]:** Articulate detailed findings in support of abuse, abandonment, neglect, and/or similar circumstances.

5. The failure to maintain adequate communication or relationship with a child constitutes abandonment. *See* G.L. c. 210 § 3; *Matter of Astrid*, 45 Mass. App. Ct. 538, 544 (1998); *Guardianship of a Minor*, 19 Mass. App. Ct. 333, 336 (1985) (finding that a parent leaving a child with other caretakers and remaining out of touch with the child constituted abandonment). As such, XX's reunification with her father, the Defendant, is not viable due to his abandonment. In being absent from XX's life and failing to take action to protect her when she was living in an unsafe household, the Defendant further failed to provide XX with adequate care, supervision, or support, thereby constituting neglect. *See* 110 Mass. Code of Regs. § 2.00; *see also, e.g., B.K. v. Dep't of Children & Families*, 79 Mass. App. Ct. 777 (2001); *Adoption of Daniel*, 58 Mass. App. Ct. 195, 202 (2003). For these reasons, XX's reunification with her father, the Defendant, is not viable due to neglect.

**Commented [MOU6]:** Articulate how the factual findings amount to abuse, abandonment, neglect and/or similar circumstances, for which reunification not viable. Cite to statute, regulation, and case law.

6. Having considered the health, educational, developmental, physical and emotional interests of XX, this Court determines that it is not in XX's best interest to return to her or her parents' country of nationality, COUNTRY. *See, e.g., Custody of Kali*, 439 Mass. 834, 843-45 (2003) (in making a best interest determination, a judge must identify and weigh the pertinent factors). In the United States, XX has the emotional and financial support of her mother, as well as safety and access to education and healthcare, which she would lack if she returned to COUNTRY. In COUNTRY, XX lived in an unsafe neighborhood. If she returned, she would have nowhere to live but with her grandmother who was abusive and suffered from alcoholism and who remains in the same unsafe area of COUNTRY where XX grew up. Therefore, XX has no safe home to which she can return to in COUNTRY. XX has excelled in school in the United States and plans to attend college in the fall of 2020. She would lose the opportunities and support she has created for herself in the United States if she were to return to COUNTRY. For these reasons, it is in XX's best interests to

**Commented [MOU7]:** Articulate, with citation to case law, the findings in support of a best interest determination.

remain in the United States in the care of her mother, XX.

7. This order is entered in the Court's capacity as a court that has the authority to make decisions concerning the protection, well-being, care and custody of a child. G.L. c. 119 § 39M. The above findings were entered to provide XX with relief from the abandonment and neglect by her father, to provide for her health, safety, and welfare, to establish residence for the purpose of healthcare and other benefits for which she is eligible in Massachusetts, and to protect XX from future harm, in accordance with the laws of the Commonwealth of Massachusetts.

_____ _____

Date Justice of the Probate and Family Court

**Commented [MOU8]:** If applicable.

**Commented [MOU9]:** This paragraph articulates the purposes of the order. There might be other items here that the court could order, depending upon the circumstances of the child. It is important to emphasize how the court's order supports the safety and well-being of the child.

**SAMPLE SPECIAL FINDINGS ORDER FOR A CHILD FOR WHOM CUSTODY IS ADJUDICATED**

**COMMONWEALTH OF MASSACHUSETTS**
**THE TRIAL COURT**
**PROBATE AND FAMILY COURT DEPARTMENT**

**County, ss.** **Docket No.**

**XXX,**
**Plaintiff,**

**v.**

**XXX,**
**Defendant.**

## SPECIAL FINDINGS OF FACT AND RULINGS OF LAW

After hearing on the instant Complaint/Petition for XXX and based on the XXX sworn affidavit, testimony of the XXX, the child's birth certificate, memorandum of law, and other evidence presented, the Court makes the following Special Findings of Fact and Rulings of Law:

1. Child's Name ("XX"), the Plaintiff, was born on Date, in Place. XX is a Massachusetts resident living in Boston, Massachusetts in Suffolk County in the care of XX, and under the jurisdiction of this Court. XX is not married. He is a child as defined under G.L. c. 119 § 39M.

2. This Court has jurisdiction pursuant to [other statute] and G.L. c. 119 § 39M to make determinations about the dependency, custody, care and well-being of children. This Court places XX in the custody of XX. This Court further finds that XX is dependent upon this Court as defined under G.L. c. 119 § 39M to mean s/he is subject to "decisions concerning the protection, well-being, care and custody of a child, for findings, orders, or referrals to support the health, safety and welfare of a child or to remedy the effects on a child of abuse, neglect, abandonment or similar circumstances."

3. Under the laws of the Commonwealth of Massachusetts, "neglect" is defined as "failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition." 110 Mass. Code of Regs. § 2.00. "Abuse" is defined as the "non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury. . . ." *Id.* The Probate and Family Court uses these definitions in the Massachusetts General Laws and Code of Massachusetts Regulations as clarified by case law to assess parental behavior and its impact on

**Commented [MOU1]:** This could be custody, paternity, guardianship, separate support, divorce, modification of a foreign decree, etc.

**Commented [MOU2]:** This could be the Plaintiff or it could be the child and/or an adult.

**Commented [MOU3]:** This paragraph articulates basic facts, including that the child is a resident of Massachusetts, which could help the child establish eligibility for benefits or entitlements, including health insurance coverage, school enrollment, etc. .

**Commented [MOU4]:** This paragraph articulates a finding of dependency.

**Commented [MOU5]:** Enter the statute appropriate to the complaint or petition being filed, in the context of which findings are being entered.

**Commented [MOU6]:** Citation to definitions. While not used here, "abuse" is also defined at 110 Mass. Code of Regs. § 2.00. If applicable, one may choose to cite "similar circumstances" defined in G.L. c. 210 § 3 as "conditions that have an effect on the child comparable to abuse, neglect or abandonment including, but not limited to, the death of a parent."

children in the cases before it.

4. XX's father, the Defendant, physically beat him with a piece of wood. The Defendant also beat the Plaintiff, XX's mother, in front of XX and his younger siblings. These were non-accidental acts by the Defendant that create a substantial risk of and/or caused physical and emotional injury, thereby constituting abuse. *See, e.g., Tucci v. Dep't of Soc. Servs*., 70 Mass App. Ct. 1102 (2007); 110 Mass Code of Regs. § 2.00. For this reason, XX's reunification is not viable with his father due to abuse.

**Commented [MOU7]:** Articulate detailed findings in support of abuse, abandonment, neglect, and/or similar circumstances and how they amount to those definitions under the law.

5. Exposing a child to domestic violence in the home further constitutes neglect. *See Adoption of Terrence*, 57 Mass. App. Ct. 832, 835 (2003). Additionally, XX sought his father's help when he was threatened with violence in El Salvador, and his father refused to take any steps to protect him. The failure to make any effort to remedy conditions which create a risk of harm also constitutes neglect. *See, e.g., Adoption of Lorna*, 46 Mass. App. Ct. 134, 138, 140 (1999). XX's father did not financially support him, his siblings, or his mother in spite of having the ability to do so, and thereby fialed to provide XX with basic necessities. This constituted neglect. *See, e.g., B.K. v. Dep't of Children & Families*. For these reasons, XX's reunification with his father is not viable due to neglect.

**Commented [MOU8]:** same.

6. Having considered the health, educational, developmental, physical and emotional interests of XX, this Court determines that it is not in XX's best interest to return to his or his parents' country of nationality, COUNTRY. *See, e.g., Custody of Kali*, 439 Mass. 834, 843-45 (2003) (in making a best interests determination, a judge must identify and weigh the pertinent factors). In the United States, XX has the emotional and financial support of his mother, as well as safety and access to education and healthcare, which he would lack if he returned to COUNTRY. In COUNTRY, XX was threatened and his father refused to help him obtain any protection. The conditions to which XX would be subject if he had to return to COUNTRY are not conducive to his healthy growth and development. The only safe caretaker with whom he could live is in the United States. XX also relies heavily on the support of his uncle and guidance counselor in the United States, which are supports he would lose if returned to COUNTRY. For these reasons, it is in XX's best interests to remain in the United States in the care and custody of, XX.

**Commented [MOU9]:** Articulate, with citation to case law, the findings in support of a best interest determination.

**Commented [MOU10]:** If applicable.

7. This order is entered in the Court's capacity as a court that has the authority to make decisions concerning the protection, well-being, care and custody of a child. G.L. c. 119 § 39M. The above findings were entered to provide XX with relief from the abuse and neglect by his father, to provide for his health, safety, and welfare, to establish residence for the purpose of healthcare and other benefits for which he is eligible in Massachusetts, and to protect XX from future harm, in accordance with the laws of the Commonwealth of Massachusetts.

**Commented [MOU11]:** This paragraph articulates the purposes of the order. There might be other items here that the court could order, depending upon the circumstances of the child. It is important to emphasize how the court's order supports the safety and well-being of the child.

_____ _____

Date Justice of the Probate and Family Court

Sample "Gang Packet" cover sheet

Hom[redacted] Security Investigations
Spe[redacted]ent in Charge

10 Causeway Street, Suite 722
Boston, MA 02222

Homeland Security

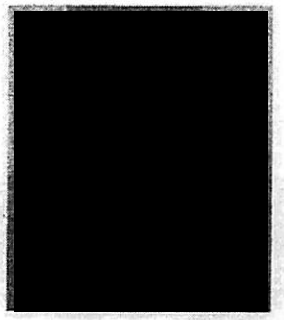
[redacted] 2017

MEMORANDUM: To Alien File A#[redacted]

FROM: Sean Connolly
Special Agent

SUBJECT: Verified Gang Affiliation of [redacted]

Name: [redacted]
DOB: [redacted]
A#: [redacted]
FINS#: [redacted]
COB: El Salvador
COC: El Salvador
LKA: [redacted] East Boston, MA 02128



[redacted] is a native and citizen of El Salvador who was initially apprehended by U.S. Border Patrol after having entered the United States illegally on [redacted] 2015, by crossing the southwest border at a place not designated as a port of entry having never been admitted or paroled by an Immigration Officer of the United States. [redacted] was served a Notice to Appear and released.

Homeland Security Investigations Boston Intelligence has determined [redacted] to be a Risk to Public Safety as a VERIFIED and ACTIVE member of the MS-13 gang in the Boston metro area.

The Mara Salvatrucha MS-13 gang is a large transnational criminal organization with thousands of members and associates throughout the United States. The MS-13 gang is among the most violent transnational street gangs in the United States specializing in crimes of violence including murder, attempted murder, violent armed assaults, firearms offenses, weapons related crimes, drug distribution, intimidation and robbery. In Massachusetts MS-13 operates in a number of communities including: Boston, Chelsea, East Boston, Somerville, Everett, Revere, Lynn and Nantucket.

1. [redacted] has been Verified as an MS-13 gang member by the Boston Police Department (BPD) / Boston Regional Intelligence Center (BRIC). (See the attached BPD/BRIC MS-13 gang member verification.)

2. [redacted] has been Identified as an MS-13 gang member by the Boston Police Department (BPD), Massachusetts State Police (MSP), and Boston School Police Department (BSPD). (See the attached BPD/ BSPD/MSP incident and intelligence reports/bulletins.)

3. [redacted] has been documented associating with verified MS-13 gang members by the Boston Police Department, Boston School Police Department and Massachusetts State Police. (See the attached BPD/BRIC/MSP incident and intelligence reports/bulletins.)

Supporting Information

Details of [redacted]s MS-13 membership and arrest history are contained within:

-Boston Regional Intelligence Center (BRIC) MS-13 Gang Member VERIFICATION: "[redacted]"
-Boston Police Department Field Interview Report # [redacted].
-Boston Police Department gang intelligence bulletins.
-Massachusetts State Police field interview & gang intelligence bulletin.
-Boston School Police Department gang intelligence bulletins.
-Boston School Police Department Intelligence Report.
-Boston Regional Intelligence Center (BRIC) MS-13 Gang Member VERIFICATION: [redacted]
-Boston Regional Intelligence Center (BRIC) MS-13 Gang Member VERIFICATION: "[redacted]"
-Boston Regional Intelligence Center (BRIC) MS-13 Gang Member VERIFICATION: "[redacted]"
-U.S. Border Patrol I-213 dated [redacted].

Notations, highlights, marks and labels made on the attached police reports, pictures and other supporting documents were made by HSI Special Agent Sean Connolly.

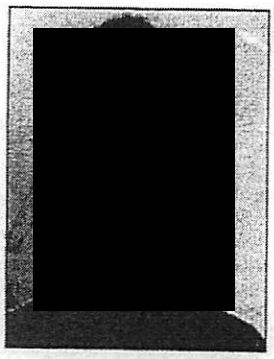
Sample Boston Regional Intelligence Center (BRIC) Gang Assessment with points assessment

UNCLASSIFIED//LAW ENFORCEMENT SENSITIVE//FOR OFFICIAL USE ONLY

# GANG ASSESSMENT DATABASE

version 4.1

Maintained by the Boston Regional Intelligence Center



(photo: 083434, 8/2/2017)

[redacted] LAST | [redacted] FIRST | [redacted] DOB (mm/dd/yyyy) | ACTIVE PERSON STATUS

**ALIASES** [redacted] [06/06/2017]

**NICKNAMES**

**GANG AFFILIATIONS & VERIFICATIONS**

MS-13 PRIMARY ACTIVE Member - Verified (13 points)

**ADDRESSES**

| | | | | |
|---|---|---|---|---|
| [redacted] | BSTN | MA 02128 | FIO | [redacted] 2017] |
| [redacted] | EAST BOSTON | MA 02128 | Manual | [redacted] 2017] |

(3 address records found) show more...

CR # [redacted] BOOKING # n/a

Moskos,Alexander IDENTIFIED BY

TAGS

**PHOTOS**

[redacted]

± | unset

**VERIFICATION REPORT DETAILS: MS-13**

- CONTACT WITH KNOWN GANG MEMBERS/ASSOCIATES (FIO) (2 points per interaction or transaction)
  - w/ [redacted] (FIOFS: [redacted] 2017)
  - w/ [redacted] and others (FIOFS: [redacted] 2017)
  - MSP FIO at revere Beach with: [redacted] and others (n/a ???????: [redacted] 2017)
  - w/ [redacted] (FIOFS: [redacted] 2017)
- INFORMATION DEVELOPED DURING INVESTIGATION AND/OR SURVEILLANCE (5 points):
  - School Police identifying him as a member and documenting his activities with other known members

 [083434 is currently logged on ([redacted] 2017 3:52:57 PM)]

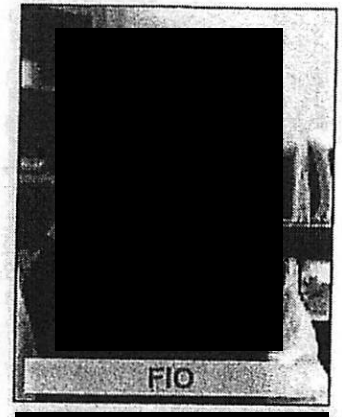
UNCLASSIFIED//LAW ENFORCEMENT SENSITIVE//FOR OFFICIAL USE ONLY

Sample Boston school police gang facesheets

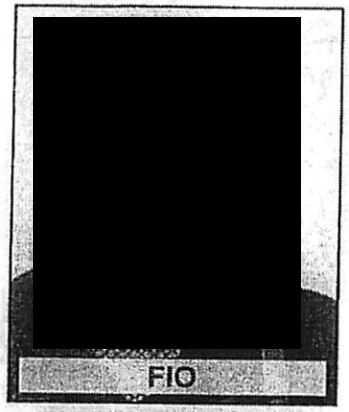
SCHOOL POLICE

## MS-13


[redacted]




[redacted]




[redacted]

On Thursday June 22, 2017 Officers observed [redacted] (D.O.B [redacted] verified MS-13 Gang member) near a rear door leading to the parking lot, when they observed other students meet up with him and left the School Building The students were:

[redacted] (D.O.B [redacted]),
[redacted] (D.O.B [redacted])
[redacted] (D.O.B [redacted])
[redacted] (D.O.B [redacted])

[redacted] Slide 22

Sample Boston School Police "Intelligence Report" on alleged gang activity

# Boston School Police- Intelligence Report

**To:** Lt. Badgett
**From:** Sgt. Gabriel Rosa/ Officer Roy Ercolano
**Re:** Ms-13 FIO Putnam Square Park
**Date:** [redacted]

On Wednesday [redacted] Officers received information by resident who lives in the area, of several students hanging out at the Putnam square dog park. Upon Officers arrival to the park they observed several students known to them as

[redacted] (D.O.B [redacted] verified MS-13 Gang member)
[redacted] (D.O.B [redacted] verified MS-13 Gang member)
[redacted] (D.O.B [redacted] verified MS-13 Gang member)
[redacted] (D.O.B [redacted] MS-13 Affiliation)
[redacted] (D.O.B [redacted] MS-13 Affiliation)
[redacted] (D.O.B [redacted] MS-13 Affiliation Address: [redacted]
East Boston 02128

Officers conducted a pat frisk of all students no weapon recovered. Officers having a conversation they stated that they have heard that 18-ST members are driving around in different cars looking for them. Officers asked if they got any make or model or plate numbers of cars but stated that they did not.

Cc: CHIEF WESTON
LT.GIARDINA
DONALD STONE

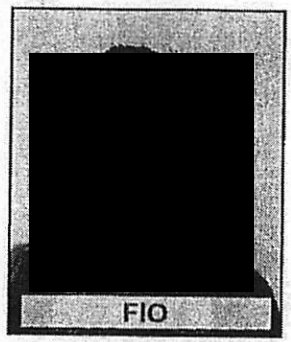
respectfully submitted

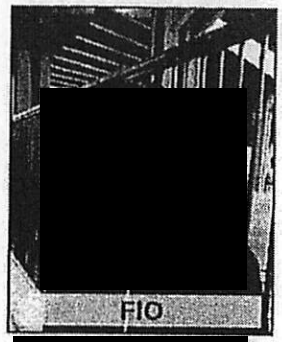
Signature

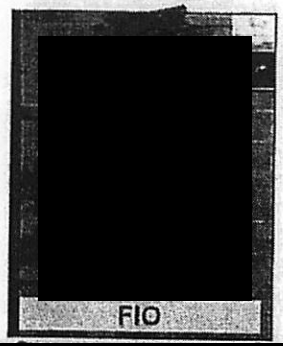
Sample Boston Police gang facesheet page/FIO (Field Interrogation and Observation Report)

# MS13 - FIO

Boston Police District A7




[redacted] @ 6:10 PM, officers FIO'd the above at [redacted] Cottage St., after a call for a group smoking marijuana at the Don McKay school parking lot. The group dispersed and half of them were observed going to [redacted]'s house ([redacted]), and the other half went to the stadium (99 Airport Rd).

[redacted] Slide 8

Sample Boston Police FIO report (Field Interrogation and Observation Report)

# FIELD INTERVIEW REPORT

Field Interview Number [redacted]

Interview Date and Time [redacted] 18:10

Officer SCANO,KARISSA N

## Stop Details

Street Address [redacted]

| City | State | Zip |
|---|---|---|
| BSTN | MASSACHUSETTS | 02128 |

Comments

☐ Frisked ☐ Search Person ☐ Search Vehicle ☐ Summons Issued

Duration: Five to Ten Minutes

| Circumstance Encountered | Basis Encounter |
|---|---|

## Person(s)

Name (Last, First Middle) [redacted] MS-13 Gang Member

Notations added by HSI and not in the original Boston Police report

Suffix

Alias/Nickname

Street Address [redacted]

| City | State | Zip |
|---|---|---|
| BSTN | MASSACHUSETTS | 02128 |

| Employer/School | Occupation |
|---|---|
| EAST BOSTON HIGH | |

Street Address

| City | State | Zip |
|---|---|---|
| | | |

| Home Phone | Work Phone | Cell Phone |
|---|---|---|
| [redacted] | | |

| Sex | Race | Date of Birth | Age | Height | Weight |
|---|---|---|---|---|---|
| Male | White | [redacted] | 17 | [redacted] | [redacted] |

| SSN | ID Type | ID Number | ID State |
|---|---|---|---|
| | | | MASSACHUSETTS |

| Build | Hair Color | Hair Style |
|---|---|---|
| Thin | Black | |

| Glasses | Complexion | Eye Color | Ethnicity |
|---|---|---|---|
| NO | Light Brown | Brown | Hispanic Origin |

Clothing Descripton

BLUE AND WHITE KANSAS CITY BASEBALL HAT, BLUE AND WHITE PATTERNED HOODIE

Name (Last, First Middle) [redacted] MS-13 Gang Member

Suffix

Alias/Nickname

Street Address [redacted]

| City | State | Zip |
|---|---|---|
| BSTN | MASSACHUSETTS | 02128 |

| Employer/School | Occupation |
|---|---|
| EAST BOSTON HIGH SCHOOL | STUDENT |

Page 1 of 5

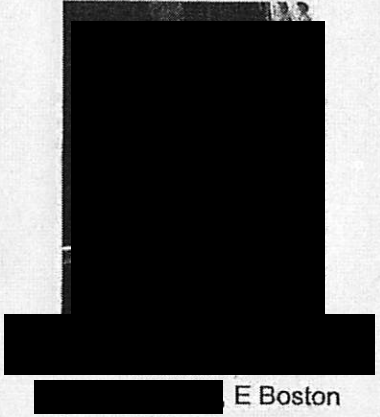
Sample Massachusetts State Police facesheet page/FIO Report

Massachusetts State Police
North Shore Gang Task Force

# MS-13 FIO's 2017

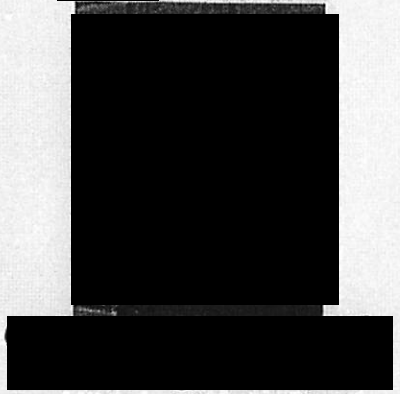
Notations added by HSI and not part of the original Massachusetts State Police FIO

[redacted], E Boston FIO [redacted]/17

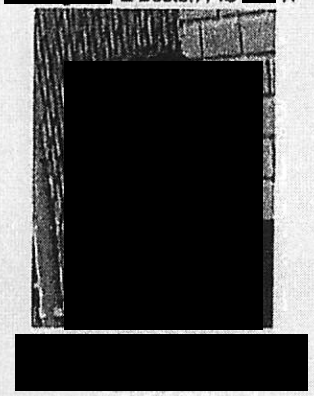


[redacted] E Boston

[redacted] E Boston FIO [redacted]/17

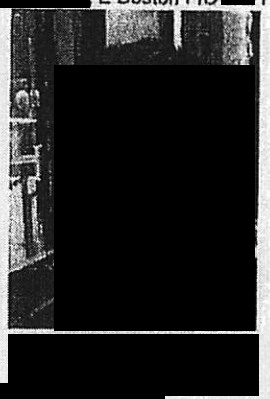


[redacted] E Boston FIO [redacted]/17



[redacted] E Boston

[redacted] E Boston FIO [redacted]/17



[redacted] E Boston

**Relief from Detention and Deportation at EOIR: Practice Pointers**

*By Christina Corbaci, Elena Noureddine, and Sarah Sherman-Stokes*

This article provides an overview of the following critical topics regarding relief from detention and deportation at EOIR: (1) Bond and the Burden of Proof; (2) Termination, Continuances, and Administrative Closure; and (3) Preserving the Record for Appeal.

## I. Bond: Whose Burden & How to Win?

A. The Legal Landscape:

*Who Can be Released from Detention? & How?*

The seemingly simple threshold question of bond eligibility often requires the most complex analysis.

**Tip # 1**: Get Familiar with the Statutes Governing Detention:

- INA § 235/ 8 USC § 1225- "applicants for admission" including "arriving aliens"
- INA §§ 236/8 USC § 1226(a), (c)- non-arriving aliens in removal proceedings
    - (a) General detention / bond provision, applies to individuals in removal proceedings, excluding arriving aliens and those subject to mandatory detention on criminal grounds
    - (c) "Detention of Criminal Aliens"
- INA § 241/8 USC § 1231- post final order

**Tip # 2**: Beyond the statutory arguments, there are substantive and procedural due process arguments – let's make them!

**Case Summaries**:

Recent case law has dramatically impacted the most fundamental questions in assessing bond:

1) Is my client eligible? & if Yes

2) Who has the burden?

*Damaging SCOTUS cases*:

Jennings v. Rodriguez, 138 S.Ct. 830 (2018)

This class action complaint alleged that prolonged detention under 8 USC §§ 1225(b), 1226(a), and 1226(c) is not authorized without an individualized bond hearing.

**Background**: The District Court (C.D. Cal.) had entered a permanent injunction requiring periodic bond hearings for noncitizens detained for six months or more. The Ninth Circuit had

affirmed, *relying on the canon of constitutional avoidance and construing the relevant statutory provisions as imposing an implicit six-month time limit on detention without a bond hearing.*

**Holding**: According to SCOTUS, §§ 1225(b), 1226(a), and 1226(c) do not confer an automatic statutory right to periodic bond hearings, and that the Ninth Circuit misapplied the constitutional avoidance canon in finding otherwise.

- *With regards to 1226(c) and 1225(b):* the plain language of these sections authorized detention without custody hearings until the conclusion of removal proceedings
- *With regards to 1226 (a)*: could not be read to require periodic custody hearings.

*Additional language pertaining to Section 1225(b):*
"In sum, §§1225(b)(1) and (b)(2) mandate detention of aliens **throughout** the completion of applicable proceedings and not just until the moment those proceedings begin." [emphasis added]

- Under §1225(b)(1) certain aliens claiming a credible fear of persecution "shall be detained for further consideration of the application for asylum."

**Recap**:

- To whom does the holding in Jennings apply?
    - Basically everyone!
        - 8 USC § 1225(b): "applicants for admission"
        - 8 USC § 1226(a): individuals in removal proceedings, excluding arriving aliens and those subject to mandatory detention
        - 8 USC § 1226(c): "Detention of Criminal Aliens" (aka Mandatory Detention)
- What is the impact of Jennings?
    - Jennings abrogates holdings in the First, Second, Sixth, and Eleventh Circuits construing § 1226(c) to authorize mandatory detention for only a reasonable period of time.
        - Reid v. Donelan, 819 F.3d 486 (1st Cir. 2016)
    - What about 8 USC § 1225(b)?
        - Problematic language in Jennings which states that asylum seekers initially detained pursuant to the expedited removal statute at 8 USC § 1225(b)(1) remain detained mandatorily under 8 USC § 1225(b)(1) throughout their asylum proceedings.
        - BUT argue that this is dicta!
            - The only question before the Court concerns a six-month limit on detention without Immigration Court review under INA§ 235(b)(1).
        - However, this has led to an ongoing court battle regarding bond eligibility for non-arriving alien asylum-seekers initially subject to expedited removal. See below.
- What doesn't Jennings do?
    - It does not foreclose constitutional arguments against indefinite and prolonged detention.

Nielsen v. Preap, 139 S.Ct. 954 (2019)

**Issue**: whether noncitizens who are arrested at a point in time well after their release from criminal custody rather than at the time of release are eligible for bond. The plaintiffs in the case had been taken into custody on immigration grounds between five and eleven years after their release from criminal custody. They argued that they were not subject to mandatory immigration detention but were instead eligible for bond hearings available to those held under the general arrest and release authority provided by 8 USC § 1226(a).

**Holding**: The judgments of the U.S. Court of Appeals for the 9th Circuit -- that respondents, who are deportable for certain specified crimes, are not subject to 8 USC §1226(c)(2)'s mandatory-detention requirement because they were not arrested by immigration officials as soon as they were released from jail -- are reversed, and the cases are remanded. Rejecting the plaintiff's textual arguments, the Supreme Court concluded that the "when release" directive applies whenever there is a release from criminal custody *regardles*s of the lapse of time between release from criminal custody and the immigration arrest. Accordingly, the Court held that the plaintiffs were ineligible for bond from immigration custody despite the fact that they were arrested between five and eleven years after their release from custody on criminal charges.

**Recap**:

- To whom does the holding in Preap apply?
    - 8 USC § 1226(c): "Detention of Criminal Aliens" (aka Mandatory Detention)

- Impact of Preap?
    - On June 24, 2019, following Preap, the District Court of Massachusetts dismissed Gordon v. Napolitano and as a result, noncitizens in Massachusetts who fall within the category described in 8 USC § 1226(c) may be detained by ICE **any time** after their release from criminal custody and held without bond for the duration of removal proceedings.
    - Additional Practical Impact?
        - Makes screening for bond more challenging in MA. Under Gordon a gap in custody of 48hrs+ between the release from criminal custody for a conviction and detention by ICE = Bond Eligible as a Gordon class member. Now, we will have to challenge the classification of a crime as subjecting someone to 8 USC § 1226(c), before pursuing bond.

*The battle for bond eligibility under 8 USC § 1225(b)(1) in the aftermath of Jennings:*

Matter of X-K-, 23 I&N Dec. 731 (BIA 2005):

**Holding**: non-arriving asylum seekers who pass a credible fear interview (CFI) are statutorily entitled to an Immigration Court custody redetermination hearing. The Court distinguishes non-arriving asylum seekers from arriving aliens based on 8 CFR §1003.19(h)(2)(i)(B), which excludes arriving aliens from custody redetermination hearings in Immigration Court by regulation.

So: EWI into the U.S., + apprehended and issued an expedited order of removal, + expressed fear and passed a CFI, + issued NTA & placed in removal proceedings = eligible for bond.

**Reasoning**: after a non-arriving asylum seeker passes a CFI, detention removal proceedings are initiated, and 8 USC § 1226(a) applies/governs at that stage, instead of 8 USC § 1225(b)(1).

Matter of M-S-, 27 I&N 509 (AG 2019):

Relying on Jennings, AG Barr unilaterally overturned Matter of X-K-.

"The Act provides that, if an alien in expedited proceedings establishes a credible fear, he "shall be detained for further consideration of the application for asylum." INA § 235(b)(1)(B)(ii).: "The Supreme Court recently held exactly that, concluding that section 235(b)(1) "mandate[s] detention throughout the completion of [removal] proceedings" unless the alien is paroled. Jennings v. Rodriguez, 138 S. Ct. 830, 844–45 (2018)."

Padilla, Et al v. ICE, Et al, 19-35565

On July 2, 2019 the U.S. District Court for the Western District of Washington issued an Injunction on the denial of bond under M-S- and included generous additional procedural safeguards for bond hearings.

Initially, the Ninth Circuit stayed the injunction. However, on July 22, 2019, the Ninth Circuit stayed the portion of the preliminary injunction requiring bond hearings within 7 days of a request and procedural protection for asylum seekers in bond hearings but did not stay the portion of the preliminary injunction requiring bond hearings. Essentially, the decision in Matter of M-S- is currently enjoined.

***At this time, the immigration courts must provide bond hearings for class members, but need not implement the timeline and procedural protections mandated by the original injunction.***

*D. Massachusetts comes through!:*

Reid v. Donelan, 390 F.Supp.3d 201 (D. Mass. 2019):

**Holding**: mandatory detention would violate due process once detention became unreasonably prolonged; alien would need to seek bond hearing via individual habeas petition; at bond hearing, government would bear burden of proving alien's dangerousness by clear and convincing evidence; at bond hearing, government would bear burden of proving alien's risk of flight by preponderance of the evidence; at bond hearing, immigration court would need to consider alien's ability to pay and alternative conditions of release.

- Who does the holding in Reid v. Donelan apply to?
    - Applies to the Class: "[a]ll individuals who are or will be detained within the Commonwealth of Massachusetts or the State of New Hampshire pursuant to 8 USC § 1226(c) for over six months and have not been afforded an individualized bond or reasonableness hearing."

- How do you get a bond hearing in Immigration Court for a Reid Class Member?
    - "Alien would need to seek bond hearing via individual habeas petition";

- If you get a bond hearing, who bears the burden?
    - The Government!
    - Dangerousness by clear and convincing evidence
    - Risk of flight by preponderance of the evidence

Pereira Brito v. Barr, 395 F.Supp.3d 135 (D. Mass. 2019):

Class action filed in June 2019 in D. Mass. by ACLU of Mass., ACLU of NH, National ACLU, and Mintz.

Classes certified August 6, 2019:

A. Pre-Hearing Class:
   All individuals who 1) are or will be detained pursuant to 8 USC § 1226(a), 2) are held in Immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and 3) have not received a bond hearing before an immigration judge.
B. Post-Hearing Class:
   All individuals who 1) are or will be detained pursuant to 8 USC § 1226(a), 2) are held in Immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston Immigration Court, and 3) have received a bond hearing before an immigration judge.

**Declaratory judgment:**
The Court declares that aliens detained pursuant to 8 USC § 1226(a) are entitled to receive a bond hearing at which the Government must prove the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence and that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community.

At the bond hearing, the immigration judge must evaluate the alien's ability to pay in setting bond above $1,500 and must consider alternative conditions of release, such as GPS monitoring, that reasonably assure the safety of the community and the alien's future appearances.

- Who does the holding in Pereira Brito v. Barr apply to?
    - Applies to the two classes certified

    - Only to 8 USC § 1226(a)
- If you get a bond hearing, who bears the burden?
    - The Government!
    - Dangerousness by clear and convincing evidence
    - Risk of flight by preponderance of the evidence
    - AND: that no condition or combination of conditions will reasonably assure the alien's future appearance and the safety of the community.

B. Putting the Law into Practice:

**The Basics**:

- Eligible under 8 USC § 1226(a) as a Pre-Hearing Class Member = Respondent must file Motion for Bond Reconsideration
    - *File with the Immigration Court*

- Eligible under 8 USC § 1226(a) as a Post-Hearing Class Member = check language of order BUT argue should not need to file Motion. Call Court and ask to speak to a detention clerk. Language in recent victory:
    - "The petition for a writ of habeas corpus is accordingly GRANTED. The Court ORDERS that Petitioner be released unless he receives, within ten calendar days, a bond hearing that complies with the requirements of Brito v. Barr , No. 19-11314, 2019 WL 6333093, at *8 (D. Mass. Nov. 27, 2019)."
    - *Need a Habeas before subsequent bond hearing in Immigration Court.*

- Eligible under 8 USC § 1226(c) = No need to file Motion. Call Court and ask to speak to a detention clerk.
    - "For the foregoing reasons, the Court ALLOWS the petition for a writ of habeas corpus (Docket No. 1) and orders the Government to conduct a bond hearing within seven calendar days of this order."
    - *Need a Habeas before getting bond hearing.*

- Currently, ALL bonds before Boston Immigration Court under 8 USC § 1226(a) AND 8 USC § 1226(c)) = Burden on the Government!
    - Dangerousness by clear and convincing evidence
    - Risk of flight by preponderance of the evidence

- The consideration is still: 1) Dangerousness; & 2) Flight Risk

- DHS burden = DHS argues first

**Tips- Criminal History**:

- It is NOT your burden. Generally, not in your favor to file police reports!
    - BUT- what if charge sounds worse than the facts? Could submit on rebuttal.

- Even if not going to be used to file, still need to obtain ALL criminal history as government often submits inaccurate information. Need to have all documents to rebut, if needed, and to know how to respond.
    - Is your Client's docket confusing/ unclear? Consider obtaining letter from PD as rebuttal.
- When appropriate, object to documents filed by DHS Trial Attorney (TA)
    - E.g., why is the DHS submitting a CORI when the Docket Sheet is the best source of information and available? → Best Evidence Objection
- When it's in your Client's best interest, ask for a continuance to review evidence submitted by the DHS.
- Did your Client have a bail hearing and was granted?
- Arguments against legal sufficiency of evidence by the DHS:
    - Criminal history is NOT sufficient for the government to meet its burden to demonstrate that Respondent is a danger to the community by clear and convincing evidence.
    - What is the document being provided by the DHS?
        - Is it result of an administrative process vs. a judicial procedure? (Ex. Red Notices)
        - Does it meet the probable cause standard?
        - No-Contact Order automatically issued in connection to arrest?
        - Opportunity to respond?
    - Is it even a conviction?
        - PTP?
        - Dismissed?
        - Nolle Prosequi?
        - NG?
        - Juvenile Offense?
        - Always argue, not a conviction = not legally sufficient!

- The Reality: Burden is on DHS, but this is still a VERY new concept in Immigration Court
    - Collect evidence of any past rehabilitation (e.g., treatment program completion- AA, anger management, residential program; probation compliance)
    - Testimony from family or community members regarding your Client's non-violent nature
    - **Reentry Plan**: Letter form org. saying they will provide needed services; info. about treatment program client intends to attend; letter from family/ friend committing to drive client around (in DUI cases).

**<u>Tips- Flight Risk:</u>**

- It is the DHS' burden and you should always argue accordingly, BUT many Judges will be quick to find that the DHS met their burden depending on the following factors: 1) **fixed address in the U.S.**; 2) the length of residence in the U.S.; 3) family ties; 4) employment history; 5) record of appearance in court; 6) history of immigration

violations; 7) attempts to flee prosecution; 8) manner of entry into the United States; 9) immigration relief avenues; 10) **Identity**

- Aside from the documents needed to prove or disprove the above, you may want to consider:
    - Limited* helpful country conditions to show strength of asylum claim (ex., reports on violence against LGBT community, indigenous communities, political violence in home country for political claim)
    - Agency letter agreeing to screen for possible free or low-cost representation if released
    - Evidence of medical need for release (letter from physician, medical records from the facility, medical records from home country, etc.)

- *Identity*:
    - Always argue Government burden. If they are charging your Client as removable under a certain name, DOB, and POB → Argue this cannot coexist with an argument that along the lines of "We don't know who this person is!"
    - However, important to do your due diligence to obtain identity documents if available OR other documents to corroborate your Client's identity-
        - If client entered with ID, don't assume it is in the TA file. DO a property pick-up at Burlington of your client's possessions on Tuesdays and Thursdays,12-3PM. Need client written release. ID often in property bag.

**<u>Additional Considerations/Tips</u>:**

- When to file evidence your evidence? The Government bears the burden of proof. This means that you can hold on to your evidence, like they did, and file it is as rebuttal evidence after they argue. Sometimes this is helpful. However, other times it gives the IJ time to closely pour over the DHS submission, with no documents relating to positive equites. Note: some IJs will request all evidence at outset.
- *Be prepared for your Client to be cross-examined more often with the burden on the DHS.*
- Submit alternatives to detention docs- ask the IJ to make a determination rather than leave it up to ICE.
- Ability to pay:
    - Length of detention; represented low-bono or pro-bono (letter from org.)?; develop the hardships on the family outside of detention.

## II. Termination, continuances, status docket and administrative closure

### Continuances under Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018)

Matter of L-A-B-R- addressed the factors that an IJ must consider when a respondent requests a continuance in order to await the resolution of a "collateral matter" (such as adjudications of visa petitions by USCIS, for priority dates to become current, or post-conviction relief). The case drastically changed established practices in the immigration court, removed the independence of immigration judges to manage their own dockets, and aims to limit respondents' ability to pursue relief for which they are eligible. Practitioners must arm themselves with tools to zealously advocate for their clients in the new continuance framework.

***Summary of Matter of L-A-B-R-***

The regulations provide that an immigration judge may grant a continuance in removal proceedings "for good cause shown." 8 C.F.R. § 1003.29. While there is a body of well-established case law interpreting this regulation, Matter of L-A-B-R- has sought to narrow and limit the use of continuances. Matter of L-A-B-R- set forth two specific criteria that it states should outweigh other factors in a continuance request analysis: (1) the likelihood that the "collateral" relief will be granted, and (2) whether the relief will materially affect the outcome of the removal proceedings. 27 I&N Dec. at 413. In addition to these two factors, it states that IJ's should consider other "secondary" factors, including:

1) Whether the respondent has exercised reasonable diligence in pursuing the "collateral" matter;
2) The Department of Homeland Security's (DHS) position on the motion;
3) The length of the requested continuance;
4) The procedural history of the case;, and
5) Administrative efficiency.

*Id.* at 413, 415.

Furthermore, L-A-B-R- provides specific examples of situations where "collateral" matters would likely ***not*** provide good cause for a continuance to be granted:

1) A continuance to apply for a provisional waiver from USCIS while in removal proceedings;
2) A collateral attack on a criminal conviction through post-conviction relief;
3) When the "collateral" relief has already been denied once and there are no relevant changed circumstances;
4) When the adjustment of status application filed by a respondent who is the beneficiary of a visa petition would be denied by the IJ anyway because of statutory ineligibility or as a matter of discretion; and
5) When a respondent's visa priority date is "too remote to raise the prospect of adjustment of status above the speculative level."

*Id.* at 415, 417-418.

***Tools to gain continuances despite Matter of L-A-B-R-***

Practitioners must be zealous, prepared, and persistent in requesting continuances in immigration court. Practitioners can no longer approach the request as routine. The following are practice pointers to consider when approaching a request for a continuance.

1. *Cite to the case law:*

Be familiar with L-A-B-R-'s standards and cite to them in your arguments. Remember, however, L-A-B-R- did not overrule previous BIA precedent governing continuances nor did it change the regulatory good cause requirement. Always refer back to these standards to preserve the record for appeal.

2. *Consider the length of continuance requested:*

Be prepared to make a reasoned calculation of the length of time needed for the "collateral" matter when requesting a continuance. Consider submitting evidence about the USCIS processing times, if applicable. If a lengthy continuance is required, consider making a motion to transfer the case to the court's status docket, if the court has one (see discussion below). Thoroughly document the need for the length of time you are requesting.

3. *Show due diligence:*

L-A-B-R- states that "the IJ should not grant a continuance merely because the respondent expresses the intention to file for collateral relief at some future date or where the respondent appears to have unreasonably delayed filing for collateral relief until shortly before the noticed hearing." *Id.* at 415-16. Thus, if seeking a continuance for USCIS adjudication of a visa petition, it is even more important now to file your petition with USCIS early, to have a receipt notice to show the judge, or be prepared to explain any delays in so doing.

If you are seeking a continuance to re-file a prior application that had been filed and denied, be prepared to explain what changed circumstances apply, such as if the prior petition was filed pro se and now is being filed with counsel, or any other relevant changes.

Be prepared to emphasize that delays caused by USCIS should not be held against the respondent and cite to Matter of Hashmi, which states that any delay in adjudication "that is not attributable to the respondent augurs in favor of a continuance." 24 I&N Dec. 785, 793 (BIA 2009).

4. *Address Discretionary Issues:*

Be prepared to explain to the judge why the court will likely be able to grant relief both as a statutory and discretionary matter. If there are any negative discretionary factors (such as criminal history or fraud) that would bear on the Court's ultimate decision, be prepared to address these.

The Attorney General stated in L-A-B-R- that "the IJ must deny a continuance if he concludes that, even if USCIS approved the respondent's visa petition, he would deny adjustment of status as a discretionary matter or because the respondent is statutorily ineligible for adjustment." 27 I&N Dec. at 418. If the IJ is refusing to grant a continuance on the theory that the court would be unlikely to approve even if the collateral matter is approved, request an individual evidentiary hearing to address the matter and develop the record. Ask that the court not make a decision at master hearing where it will be difficult for the judge to make a reasoned decision and where the respondent may not have had the opportunity to rebut DHS allegations. Assert that the denial of the continuance, or right to an evidentiary hearing, will deprive the respondent of a full and fair hearing.

5. *Considerations for Detained Clients:*

With Matter of L-A-B-R-'s emphasis on "efficiency" it may be even harder now to obtain continuances for detained clients. One aim of L-A-B-R- appears to be preventing respondents from seeking continuances simply to delay their cases. Argue that in the detention context, respondents have little incentive to delay their cases while in custody unless he or he has a strong claim for relief that will change the outcome of proceedings. Seek to distinguish L-A-B-R- because none of the cases analyzed therein involved detained respondents. Consider contacting USCIS to notify the agency of the respondent's detention status and request expedited treatment of the application or petition and then inform the Court that you have done so.

6. *Use the Status Docket, if available:*

Many immigration courts have begun to implement status dockets for cases where a respondent is pursuing a benefit over which the court does not have jurisdiction. Practices appear to vary from court to court and judge to judge. Generally, if the respondent is awaiting adjudication of a petition or application by USCIS, or is awaiting a current priority date, the respondent may be eligible to be placed on the status docket. The court will then instruct the respondent's attorney to update the court on the progress of the pending application by a specified dated in order to remain on the status docket.

7. *Alternatives to a Continuance: Seek Termination*

In cases where pleadings have not yet been taken, practitioners should consider denying the allegations and charges in the NTA and holding DHS to its burden of proof to demonstrate alienage and to prove charges of deportability under INA § 237 for those who have been admitted to the U.S. By doing so this may force DHS to request a continuance to seek evidence to meet its burden and could achieve termination if DHS cannot.

***Preserve the Record for Appeal:***

Given the likelihood of more denials of continuance requests, attorneys should build the record to preserve the matter for appeal to the BIA, and if unsuccessful, to the U. S. Court of appeals. The following are practice pointers to consider in building and preserving the record.

1. *Don't just say it, put it in writing:*

Put the motion for continuance in writing wherever practicable. Attach evidence to document the factors set forth in L-A-B-R.

2. *Ensure the record is complete if the IJ goes off the record:*

The practitioner should ask the IJ to note statements made off the record. If the IJ refuses the practitioner should wait for the IJ to go back on the record, summarize what happened off the record, and note the objection into the record citing INA § 240(b)(4)(C), 8 CFR § 1240.9, and OPPM 03-06. If the IJ does not go back on the record the practitioner should submit the objection in writing. Such occurrences should also be explained in the Notice of Appeal.

3. *Be prepared for Interlocutory Appeals:*

DHS may feel emboldened to file interlocutory appeals where IJ's grant continuances. Interlocutory appeals are generally disfavored. However, counsel for respondents can and should file interlocutory appeals of denied continuances while the case moves forward with any other relief the respondent is seeking. Meanwhile, counsel should diligently continue to pursue the "collateral" benefit with USCIS and ensure evidence makes it into the record of how the denial of the continuance would prejudice the respondent.

4. *Appeal at the conclusion of the case.*

The BIA reviews an IJ's denial of a continuance *de novo*. *See* 8 CFR § 1003.1(d)(3)(ii). The respondent can continue to pursue the collateral matter with USCIS while appealing the IJ decision and file a motion to remand if the collateral matter is approved while the appeal is pending, or a motion to reopen if meeting the statutory requirements. Be prepared to appeal to the U.S. Court of Appeals by filing a Petition for Review if the BIA denies. Courts of appeal generally review denials of continuances under an abuse of discretion standard.

**I-601A Provisional Unlawful Presence Waivers post-Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)**

Matter of Castro-Tum removed immigration judges and the BIA's general authority to administratively close cases, with some exceptions. Administrative closure is now only available in situations where specifically authorized regulations from the Department of Justice or judicial settlement agreements provide for it. Prior to Matter of Castro-Tum, administrative closure was an important docket-management tool used by the Immigration Court to remove a case from the active docket in order to appropriate prioritize caseloads.

The biggest effect of Castro-Tum has been felt when it comes to individuals eligible to pursue I-601A waivers but who are also in removal proceedings. Immigrant visa applicants who have an approved petition may qualify to "provisionally waive" the unlawful presence ground of inadmissibility prior to departing the country to consular process, however, persons in removal proceedings are only eligible to apply for a provisional unlawful presence waiver if proceedings

are administratively closed. *See* 8 CFR § 212.7(e). Thus, most courts are not administratively closing cases for individuals who wish to file I-601A waivers.

*1. Seek administrative closure for filing of the I-601A anyway*

Some New England attorneys have reported success in requesting administrative closure for a brief and finite period before the Boston Immigration Court by arguing that the court still has authority to briefly administratively close a case long enough for the I-601A application to be receipted by USCIS, and then to re-calendar the case and grant a continuance for adjudication of the I-601A. Practitioners should be creative in efforts to persuade the judges that they can still use the administrative closure tool.

Practitioners may want to argue that the regulation establishing the I-601A procedure expressly references administrative closure for provisional unlawful presence waiver applicants and thus is tantamount to regulatory authority to administratively close the case for purposes of pursuing this remedy.

*2. Preserve the record for appeal.*

Issues surrounding Matter of Castro-Tum are ripe for litigation in the Circuit courts. The Fourth Circuit Court of Appeals has already favorably found for I-601A applicants in Zuniga Romero v. Barr (4th Cir. 8-29-19). Zuniga Romero v. Barr found that 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confer upon IJs and the BIA the general authority to administratively close cases and that Castro-Tum (1) breaks with decades of the agency's use and acceptance of administrative closure and (2) fails to give "fair warning" to the regulated parties of a change in a longstanding procedure.

*3. Advise clients about the advantages and disadvantages of alternate strategies to pursue consular processing of visa petitions.*

Attorneys should discuss various options with their clients. Respondents may opt to request voluntary departure from the Immigration Court, depart the U.S., and pursue the traditional I-601 application for unlawful presence from abroad, understanding the processing times and chances of success with such a course of action. Alternatively, respondents may wish to accept a removal order and then first file an I-212 Application for Permission to Reenter after Removal, then an I-601A application, and then depart the U.S. for consular processing. Consideration should be given for likelihood of removal while the applications are pending (including likelihood of obtaining a stay of removal, if needed, or other protection under pending federal court litigation), and likelihood of success on the waivers.

## III. Preserving the Record for Appeal

### General Principles

- Your access to federal court review depends on the decisions you make before the Immigration Court and the Board of Immigration Appeals ("BIA")
- Preserve evidentiary objections, as well as legal and constitutional claims
- Make a written and oral record of any off the record conversations, rulings or agreements
- Contest removability whenever possible
- The Federal Rules of Evidence do not strictly apply in Immigration Courts; fundamental fairness and relevance are the only bars to the admissibility of evidence in Immigration Court
- There is no discovery (though there is FOIA; use it)

### What do to in Court

- Challenge the Notice to Appear ("NTA")
    - Are there deficiencies on the face of the NTA? Was service proper?
    - Are the factual and legal allegations proper?
    - Are there suppression issues or due process violations?
- Have a colleague take comprehensive notes at hearing
- Raise all non-frivolous arguments
- Hold DHS to their burden
- Note anything unfair or improper to your client on the record by objecting
- Interpreter issues: object right away if you believe there are errors or inconsistencies in interpretation
- Reserve appeal whenever the Immigration Judge's decision is not in your favor, or when the reasoning appears flawed or incomplete
- If DHS reserves appeal, you should also reserve appeal
- Prior to appeal, consider whether a Motion to Reopen or a Motion to Reconsider may be proper

**PRACTICE POINTER:**
**LITIGATION AS A PART OF YOUR OVERALL STRATEGY**

*Jonathan Wasden, SangYeob Kim, Gregory Romanovsky*

In the immigration context there are only two types of APA litigation: challenging delays (mandamus-type actions); and challenging denials. This practice pointer will provide a brief overview of the key elements of each type of APA litigation.

## I. Delay Suits

The Administrative Procedure Act ("APA") provides a basis for the suit when the government unreasonably delays action or fails act. 5 USC § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.").

In your initial petition letters, you should explain your client's individual "convenience and necessity." You should also give an actual date by which the client needs an answer and justify it (e.g., in an H-1B case, you need an answer by July 1 so that the beneficiary can start working by October 1).

5 USC § 706(1) provides a remedy for the court to "compel agency action unlawfully withheld or unreasonably delayed." "Unlawfully withheld" could be a delay or a rejection / return of the petition on erroneous grounds.

To determine whether the delay is reasonable, courts generally adopt the factors articulated in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"):

(1) the time agencies take to make decisions must be governed by a "rule of reason";

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

- Courts do consider nonbinding expectations of Congress (e.g., 30 days for a non-immigrant visa and 180 days for an immigrant visa, but pay most attention to whether there are any statutory or regulatory deadlines.

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

- It is hard for USCIS, as a fee-based agency, to make that claim because it is required to set fees to cover the cost of the congressionally mandated adjudication. The agency

keeps raising its fees while the processing times keep keeping longer. Attorneys can also use the official agency personnel's time required to process various petition types. For example, an I-129 petition takes 0.89 hours of agency personnel's time. In light of this, can the agency justify its massive delays in I-129 processing?

(5) the court should also consider the nature and extent of the interests prejudiced by delay;

- For example, an H-1B delay causes prejudice because the employee can't start working and loses days on the requested visa. An I-130 delay separates families. A delayed I-829 ties up capital.

(6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

- Remember that the court is not required to find the agency acted improperly (but it certainly helps if it did!)

## II. Arbitrary and Capricious Decision Challenge Suits

5 USC § 706(2) provides that courts can "hold unlawful and set aside agency action, findings and conclusions" that meet one or more of the following criteria:

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- Contrary to constitutional right, power, privilege or immunity;
- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- Without observance of procedures required by law.

5 USC § 706(2)(A)-(D); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion or otherwise no in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.").

Arbitrary and Capricious is a term of art defined in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29 (1983). The focus is on the way the agency made its decision. Important factors to evaluate in each case are as follows:

- Did the decision focus on the right factors that Congress intended it to consider?
- Is the decision consistent with law?
- Is the decision consistent with facts in the record?

Practitioners should identify any purely legal or procedural failure in the decision. In doing so, they should consider the following:

- Standard of Proof in administrative proceedings;
- Are there any specific steps required under the INA or the CFR that the agency failed to perform?
- Does the agency interpretation of the statute/regulation contradict the plain language of the statute or regulation?

A regulation or decision is *ultra vires* if it contradicts the plain language in statute (e.g., *Shalom Pentecostal Church v. Acting Secreta*ry *DHS*, 783 F.3d 156 (3d Cir. 2015). Further, a policy or decision "unlawfully amends the regulation" if it contradicts the plain language of the regulation (e.g., the agency's interpretation of the employer-employee relationship). Practitioners should also identify factual errors in the decision or disregarding the evidence. If you are arguing about whether the agency properly *weighed* the evidence you will likely lose; but if the agency did not consider a key piece of evidence or incorrectly stated the facts, you have a much better chance.

## III. Behind the Scenes

It is beneficial to know factors considered behind the scenes. Litigation costs the agency significant time and personnel resources. Extra work is required and there is no extra pay (the agency runs on a production quota, and if you spend time on litigating cases you are not going to hit your quota of denials). The agency hates litigation and tries to avoid it if possible. Clients who have sued have consistently reported that their approval rates have increased subsequent to the first suit. The Justice Department hates delay lawsuits; they are embarrassing and time-consuming. As a result, they lean hard on the agency to take action before they are required to answer. The vast majority of all applications and petitions in delay lawsuits are approved before the government has to file its answer.

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

# Practice Pointer

## Advising Clients Regarding Social Security (SSA) "No-Match" Letters

**By AILA's Verification and Documentation Liaison Committee[1]**

In March 2019, the Social Security Administration (SSA) began mailing Employer Correction Request (EDCOR) Notices (commonly known as "no-match" letters) to employers around the country. To date, more than 500,000 letters have been mailed. SSA plans to mail more letters to the remaining U.S. employers who reported at least one name and Social Security Number (SSN) combination on its wage report[2] that did not match SSA records in 2018. Approximately three percent of all wage reports each year cannot be matched to its records, according to SSA.[3]

Although these letters are aimed at assuring employees are credited with the correct earnings, they create thorny compliance questions for employers. AILA's Verification and Documentation Liaison Committee provides this practice pointer in order to help AILA members identify legal issues that their clients should consider when deciding how to respond to an SSA no-match (no-match) letter.

### What is a no-match letter?

Each no-match letter simply states that a certain number of wage reports were for name and SSN combinations that did not match SSA records. It provides instruction about how to make corrections to wage reports[4] using SSA's Business Services Online (BSO). It also advises:

> "IMPORTANT: This letter does not imply that you or your employee intentionally gave the government wrong information about the employee's name or SSN. This letter does not address your employee's work authorization or immigration status.
>
> You should not use this letter to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her SSN or name does not match our records. Any of those actions could, in fact, violate State or Federal law and subject you to legal consequences."

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[1] Special thanks to AILA members Lori Chesser, Dawn Lurie, Amy Peck, and Nici Kersey

[2] *See* Form W-2

[3] *See* SSA Responds to Representative Costa's Letter on SSA No-Match Letters, available at https://www.aila.org/advo-media/whats-happening-in-congress/congressional-updates/ssa-responds-ssa-no-match-letters

[4] Made on Form W2-C.

As background, a slightly different version of these letters was issued by SSA from tax year 1993 through tax year 2005.[5] In tax year 2006, the letters were suspended "due to litigation concerning a proposed Department of Homeland Security (DHS) regulation".[6] They were formally discontinued in 2011.[7] The letters being issued for tax year 2018 (being sent in 2019) are a new version with "key differences"[8] as follows:

- They do not include SSNs, consistent with the Social Security Number Fraud Prevention Act of 2017 (P.L. 115-59);
- They are mailed to all employers who submit at least one name and SSN on a Form-W2 for an employee that does not match SSA records; and
- They refer to online services available through Business Services Online (BSO) to help them submit accurate wage reports by reducing the instances of no-matches before, during, and after they submit wage reports.[9]

**What does the SSA instruct the employer to do when a no-match letter is received?**

The letter instructs employers to access BSO to find out which employee records do not match and make corrections within 60 days.[10]

SSA also provides a sample letter to affected employees. This letter instructs the employee to check the name and SSN reported and, if correct, contact the nearest SSA office to resolve the issue. It does not provide a time frame for doing so. This letter appears to be optional and is not referenced in the no-match letter itself but is provided as an additional resource on the webpage with information about the notices.

SSA also suggests that employers consider using the "free Social Security Number Verification Service (SSNVS) through BSO that allows you to verify employees' names and SSNs in our records in advance of filing your annual Forms W-2 submissions."

**What are the consequences of non-compliance?**

The answer to this question depends on the government agency considering an employer's non-compliance and many other circumstances.

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[5] See "RM 01105.027 Educational Correspondence (EDCOR) and Decentralized Correspondence (DECOR) Letters Mailed when Names and SSNs Do Not Match Our Records," available in the SSA Program Operations Manual System (POMS) at https://secure.ssa.gov/poms.nsf/lnx/0101105027 (effective dates 03/22/2019 - Present).
[6] *Id.*
[7] *Id.*
[8] See SSA Responds to Representative Costa's Letter on SSA No-Match Letters
[9] *Id.*
[10] Note that BSO shows only the last four digits of the SSN for each employee listed. SSA claims to be using the information provided in the employer's wage report. However, the employer has no way to determine if the discrepancy was the result of an SSA clerical error if the error does not occur in the last four digits of the SSN. SSA uses 25 automated program routines to catch common errors, such as number transposition, however (per the SSA Letter to Rep. Costa), making a clerical error of this sort unlikely.

To start with the easy answer, SSA is not a law enforcement agency. In response to an inquiry from Rep. Jim Costa regarding the effect of an employer not responding in 60 days, SSA Acting Commissioner, Nancy A. Berryhill stated, "[W]e ask employers to take timely action on no-matches to ensure their employees' wages are posted correctly to our records. However, we do not take any action, nor are there any SSA-related consequences, for employers' non-compliance with our letters."[11]

However, SSA processes wage reports as an agent of the Internal Revenue Service (IRS) and shares all Forms W-2 information with IRS on a daily basis, including an indicator code when the name and SSN do not match its records.[12] The IRS has authority to penalize employers for failure to report correct wage information. Employers should consult a tax lawyer to advise regarding risks of IRS penalties.

The Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER) published a fact sheet for employers regarding how to respond to no-match letters. If an employer's response violates the anti-discrimination provisions of the employment verification law, IER may impose fines or back-pay within its jurisdiction.[13] Examples of such violations could include firing all employees for whom a discrepancy was identified without further investigation or treating certain employees differently with regard to the discrepancies based on characteristics such as national origin or accent.

More concerning to many employers is whether their actions in response to a no-match letter will have adverse consequences in the event of an I-9 audit or result in an Immigration and Customs Enforcement (ICE) action. The remainder of this practice advisory will address this concern and related worksite compliance issues.

**Was Department of Homeland Security (DHS) involved in the decision to resume issuance of no-match letters?**

The short answer is possibly. In response to Rep. Costa's inquiry on this point, SSA noted that it vetted the letters with the IRS and, "[c]onsistent with longstanding SSA practice . . . engaged in pre-deliberative discussions both internally and externally with relevant stakeholders throughout the executive branch."[14]

**Does SSA report the fact of no-match letters being sent or information gained in reported corrections (or failure to report corrections) to ICE?**

[11] See SSA Responds to Representative Costa's Letter on SSA No-Match Letters
[12] *Id.*
[13] See 8 U.S.C. § 1324b
[14] *Id.*

While SSA routinely shares certain wage and other information with DHS (and ICE specifically)[15], according to its Program Operations Manual entry on the topic:

> "DHS has responsibility for making determinations regarding an employee's legal status. We do not disclose information regarding our W-2 suspense file or any information concerning whether a particular employer would have received, did receive, or was qualified to receive, an Educational Correspondence (EDCOR) letter or a Decentralized Correspondence (DECOR) letter identifying employees whose names and SSNs may not match our records."[16]

Additionally, ICE Homeland Security Investigations (HSI) confirmed in a recent liaison meeting with AILA that it does not have a memorandum of understanding (MOU) with SSA regarding no-match letters.[17]

**Could an employer's response or lack of response to no-match letters have adverse consequences in an I-9 audit?**

Administrative subpoenas related to Notices of Inspection (NOI) in I-9s audits have long included a request for copies of no-match letters. If such letters were disclosed, auditors could inquire into the employer's response to determine the employer's knowledge regarding employment of unauthorized workers.

As background, on August 15, 2007, ICE issued a proposed regulation[18] regarding the effect of an employer's response to a no-match letter in relation to establishing "constructive knowledge" and proposing a "safe harbor" process for employers to avoid a constructive knowledge finding.

The concept of "constructive knowledge" is found in the regulation defining "knowing" as it relates to the prohibition against hiring or recruiting or referring for a fee for employment in the United States an alien "knowing" she is unauthorized to work.[19]

"Knowing" is defined to include:

> "[N]ot only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

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[15] See RM 01105.027 Educational Correspondence (EDCOR) and Decentralized Correspondence (DECOR) Letters Mailed when Names and SSNs Do Not Match Our Records," available in the SSA Program Operations Manual System (POMS) here, https://secure.ssa.gov/poms.nsf/lnx/0101105027 (effective dates 03/22/2019 - Present).
[16] *Id.*
[17] *See* AILA Minutes from Joint Liaison Meeting with ICE HSI and DOJ IER (5/20/19), available at https://www.aila.org/infonet/aila-minutes-from-joint-liaison-meeting-5-20-19
[18] 72 Fed Reg. 45611.
[19] See 8 U.S.C. §274a(a)(1)(A).

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf."[20]

The safe harbor proposed by ICE was that the employer would check its records within 30 days of receipt of the letter. If not resolved, it was to ask the employee to confirm the accuracy of the information. If inaccurate, the employer was to instruct the employee to resolve the issue within 90 days. If resolved, the employer was to notify SSA. If not resolved, employment was to be terminated or, if not, actual knowledge would be assumed.

For numerous reasons, including litigation and rigorous public comments, ICE withdrew the proposed rule but continued to request no-match letters in I-9 audits. Now that issuance of no-match letters has resumed, it is reasonable to assume that whether and how an employer responds to the letters will be considered in an I-9 audit.

**How can an employer respond to a no-match letter to avoid a finding of constructive knowledge of unauthorized workers?**

It is not recommended that employers ignore no-match letters. Complete failure to respond would be difficult to defend in an audit, particularly if the workers identified by SSA turned out to not be authorized to work.

At minimum, AILA recommends that members advise their clients to login to BSO to see which employees' records are identified as not matching and check its records to verify that it reported accurate information to SSA.

If the last wage report matches other employer records regarding name and SSN, employers should contact the affected employees. Employees whose records do not match are not being credited with their earnings. This will affect their Social Security benefits. Employees working legally have an interest in correcting their records.

How an employer makes this contact, the substance of the contact, whether employees are given a deadline, and whether or how an employer follows up with affected employees - or ultimately terminates employment - depends on the facts and circumstances of each situation.

[20] See 8 C.F.R. §274a.1(l)(1).

One option is to use the sample letter to affected employees provided by SSA. This letter has no timeline for resolution or employer follow up. In some situations, providing this letter and keeping a copy of it may be all an employer needs do to comply.

Another option is to follow the steps provided in the DOJ IER fact sheet, which suggests giving the employee a "reasonable period of time" to contact SSA and "[p]eriodically meet[ing] with or otherwise contact[ing] the employee to learn and document the status of the employee's efforts to address and resolve the no-match." During the most recent liaison meeting with AILA, DOJ IER indicated that it has not issued specific guidance on what will be considered a "reasonable period".[21]

In other situations, employers may wish to impose a specific timeline and follow up procedure, perhaps the same as that proposed by ICE as a safe harbor in its regulation. So long as this procedure is adhered to consistently for all workers, this approach is also reasonable.

Whether an employer's actions are defensible against a finding of constructive knowledge also will depend on the employees' actions and reactions. For example, when confronted with the no-match letter, if an employee admits to working without being authorized, the employer must terminate employment. If an employee offers new identity documents, the employer must carefully assess if those documents are valid for employment to continue.

Another consideration to be made is whether the employer has any other indication of unauthorized employment. For example, if the employer received an Affordable Care Act (ACA) notice of SSN discrepancy for the same employee in the past, that employee should be given more scrutiny. Similarly, if no deadline is provided to employees and no-match letters are received the following year for the same employees, the employer should consider taking additional action.

**Must an employer review an employee's I-9 if it receives a no-match letter?**

Although an employer is not required to review the I-9 if a no-match letter is received, it is advisable to do so. The I-9 and payroll information should contain consistent information, and inconsistency could be the cause of the no-match letter.

**Does the no-match letter or SSA advice raise other compliance concerns?**

Both the no-match letter and the related SSA website advise employers to use the Social Security Verification System (SSNVS) as part of BSO to prevent errors in making wage reports. Employers who misunderstand this advice may use SSNVS for pre-screening or as a substitute for E-Verify, rather than only for post-hire purposes. Additionally, employers may be tempted to complete a

[21] *See* AILA Minutes from Joint Liaison Meeting with ICE HSI and DOJ IER (5/20/19), available at https://www.aila.org/infonet/aila-minutes-from-joint-liaison-meeting-5-20-19

new I-9 or re-verify an I-9 based solely on receipt of a no-match letter or ask for more or different work verification documents. These actions could violate anti-discrimination laws.

If a no-match correction is made, the law requires notification to correct the mistake. The employer must:

1. File a W-2c (Corrected Wage and Tax Statement) for each year of employment in the previous three years (i.e., 2016, 2017, and 2018);
2. File a W-3c (Transmittal of Corrected Wage and Tax Statement) for each tax year a W-2c will be filed; and,
3. The employee should amend his or her personal income tax return for each year corrected with the new W-2c form(s).

**Conclusion**

It is imperative that practitioners providing guidance in this area understand the impact of the letters and the legal nuance lurking behind the surface of the letters' statements. These letters can, in the event of an inspection by ICE, give rise to significant consequences for clients if not properly investigated.

Reasonable investigations will vary and must take into account anti-discrimination regulations, state law, union agreements, Form I-9 and E-Verify considerations, and other areas of federal law. Counsel should be well-versed in the Form I-9, E-Verify, ICE investigations, and related compliance matters to ensure that clients prepare a proper response to any received no-match letters and to properly advise on possible strategies for limiting the number of employees affected by these notices moving forward.

**PRACTICE ADVISORY**[1]
August 20, 2018

# LITIGATION FOR BUSINESS IMMIGRATION PRACTITIONERS

By Leslie K. Dellon[2]

## I. Introduction

Filing suit can be a powerful tool that can prompt U.S. Citizenship and Immigration Services (USCIS) to issue an approval notice soon after the complaint is filed or lead to a judicial decision holding that USCIS was wrong as a matter of law. This Practice Advisory provides information practitioners need to assess whether a lawsuit in federal court is the right option for a client that has reached its limit with USCIS' overly restrictive interpretations of legal requirements, shifting adjudications standards and general lack of transparency in decision-making.

This Practice Advisory addresses federal court challenges to an erroneous business-related USCIS decision under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*., the Declaratory Judgment Act, 28 U.S.C. § 2201, and/or the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. The APA is the most commonly used cause of action to overturn an agency decision that is contrary to statutes or regulations, as it provides far-reaching injunctive relief. The Declaratory Judgment Act can be used to obtain a court order stating that a particular action by USCIS violates the applicable law or regulations. The Mandamus and Venue Act can be used to obtain an order requiring USCIS to adjudicate a petition or application that has been pending for an unreasonably long time—but not to order the agency to make a particular decision. The Council has additional advisories—referenced and linked to throughout—which expand upon many of the topics discussed here. Attorneys considering federal litigation for the first time are encouraged to review all the relevant advisories.

## II. A Solid Administrative Record is a Litigation Prerequisite

Judicial review under the APA generally is limited to the administrative record that was before the agency when it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

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 This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Practitioners are strongly encouraged to conduct independent research to determine if there have been subsequent developments in the law since the publication date of this practice advisory.

[2] The author wishes to acknowledge the contributions of Denyse Sabagh of Duane Morris, LLP, Christina C. Haines of Erickson Immigration Group, and Melissa Crow, former Legal Director of the American Immigration Council, to an earlier version of this Practice Advisory, and Emily Creighton and Mary Kenney, who assisted with editing this update.

402, 414, 420 (1971); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review [in an APA suit] should be the administrative record already in existence, not some new record made initially in the reviewing court."). There are, however, several exceptions to this rule.[3]

In most cases, though, the court will decide the legality of USCIS' decision based on the record before the agency. An attorney cannot supplement that record to strengthen a client's position during litigation. Thus, a solid record in support of the immigration benefit the client seeks is critical. Practitioners should prepare the petition and supporting evidence with an understanding of the statutory and regulatory requirements for the immigrant or nonimmigrant classification or other benefit.

Additionally, the source of the evidence provided will affect the weight the decision maker gives in assessing veracity. The petitioner must present all relevant facts about the petitioner and the beneficiary (in the petition and supporting documentation, which may include a petitioner letter). The attorney then can discuss the law and apply the statutory and regulatory standards to the facts in a separate attorney letter or memorandum.

Read all Notices of Action thoroughly. When responding to a Request for Evidence (RFE), a Notice of Intent to Deny (NOID) or a Notice of Intent to Revoke (NOIR), practitioners must answer each query, either by providing a complete response or stating why a particular query is unwarranted or irrelevant. If USCIS has made a false assumption in its query, such as asking for evidence of recruitment for the job when the petitioner is a multinational company seeking to transfer a manager from its foreign subsidiary, then identify the agency error and re-direct the agency to the proper standard and the evidence that supports petition approval based on the petitioner's intended employment of the beneficiary. With gaps in the evidence, a court is more likely to find that USCIS' decision was reasonable. With a thorough response, a petitioner will have a much stronger foundation for demonstrating to the court that USCIS ignored or mischaracterized the evidence.

[3] The primary exceptions to this rule are when there is no administrative record for the court to review or the record is insufficient with respect to the claims in the suit. Such an incomplete record may "frustrate effective judicial review," *Camp*, 411 U.S. at 142-43, and the court may expand review beyond the record or permit discovery. *See also Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *as corrected by* 867 F.2d 1244 (9th Cir. 1989) (court may inquire outside the record when necessary to explain the agency's action or when the agency has relied on documents not in the record). Additionally, the Ninth Circuit has recognized the following exceptions: 1) if discovery is necessary to determine whether the agency has considered all relevant factors and has explained its decision; 2) if the agency has relied on documents not in the record; 3) when supplementing the record is necessary to explain technical terms or complex subject matter; or 4) when plaintiffs make a showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

## III. Deciding Whether to File a District Court Action

Several factors will influence a client's and attorney's decision about whether to challenge an agency decision in federal court. Initially, it is important to review the agency decision to identify the errors that might be challenged. For all denials, attorneys can compare the reasons USCIS asserted to the requirements in the applicable section(s) of the Immigration and Nationality Act (INA) and regulations. Is the decision based on a legal error? Has USCIS tried to impose a requirement that does not exist? For example, did USCIS violate the statute and regulations when it denied an H-1B petition because the agency erroneously decided that the job offered was not in a specialty occupation because there was no "specifically tailored and titled degree program" typically available to enter the field.[4] Or, is the issue a factual one? For example, has USCIS erroneously stated that the beneficiary does not have the degree required by the employer for an H-1B specialty occupation when a copy of the beneficiary's diploma was submitted with the petition? Finally, was the decision based upon the exercise of discretion? If so, there may be a jurisdictional bar to the court's review under 8 U.S.C. § 1252(a)(2)(B).[5]

Generally, in a mandamus case, there will be no decision to review since the issue usually is the agency's delay in deciding. In such a case, the primary considerations will be the length of time that the agency has delayed and whether it is outside of the normal processing time.

When reviewing the strength of the record presented to USCIS or the legal errors that the agency may have committed, weigh the likelihood of making "bad law" if the court rules against the client. Remember that when a federal court reviews a denial, the court is not deciding whether USCIS made the best decision or the same decision the court would have reached—only whether USCIS' decision was correct legally and whether it acted reasonably in denying the petition based on the evidence presented.

## IV. Factors to Consider Before Filing Suit

### A. Exhaustion of administrative remedies

Generally, before seeking federal court review of an agency's decision, a party must exhaust all administrative remedies. Otherwise, the court may find that it has no jurisdiction or otherwise refuse to review the decision. For this reason, lawyers often ask whether they must appeal to USCIS' Administrative Appeals Office (AAO) before filing suit in federal court.

If, as usual, the APA is the basis for challenging a denial of an employment-based visa petition, then the answer is "no." The Supreme Court held in *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993), that in federal court cases brought under the APA, a plaintiff can be required to exhaust only administrative remedies that are mandated by either a statute or regulation—establishing a major exception to the exhaustion requirement. At least two decisions involving the denial of a

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4 *See Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191, 1198 (W.D. Wash. 2015).

5 *See* Section V(A) *infra*. For additional discussion of this provision, *see* the Council's Practice Advisory, *Immigration Lawsuits and the APA: The Basics of a District Court Action*, at 8-10 (June 20, 2013).

nonimmigrant employment-based petition concluded, per *Darby*, that an appeal to the AAO is not a prerequisite because there is no statute or regulation mandating an administrative appeal. *See Ore v. Clinton*, 675 F. Supp. 2d 217, 223-24 (D. Mass. 2009) (L-1A petition denial); *EG Enters. v. DHS*, 467 F. Supp. 2d 728, 732-33 (E.D. Mich. 2006) (H-1B petition denial; USCIS agreed in its cross-motion that exhaustion not required).[6]

In recent years, USCIS is more likely to move to dismiss for lack of a final decision (see § IV(B) *infra*), than to claim that the plaintiff failed to exhaust by not appealing to the AAO. However, if the government raises failure to exhaust, practitioners can explain why exhaustion is not required under *Darby*, relying both on the relevant immigration cases and non-immigration cases within the same circuit that have found that the *Darby* exception applies in similar contexts. *See* the Council's Practice Advisory, *Failure to Appeal to the AAO: Does It Bar All Federal Court Review of the Case?* (Sept. 26, 2016) (explaining in more detail the *Darby* holding and citing both immigration and non-immigration cases from different circuits). While the risk of bypassing the AAO appears quite small, there is at least one unreported decision in which the federal district court concluded that the regulation for appeal of an I-140 denial is mandatory and, therefore, the *Darby* exception did not apply. *See ASP, Inc. v. Holder*, No. 5:12-CV-50-BO, 2012 U.S. Dist. LEXIS 188426, *8 (E.D.N.C. Dec. 11, 2012). The decision appears to be an aberration, and its reasoning has not been followed by other courts.[7]

An appeal to the AAO can delay a case considerably, particularly when the result is that the AAO simply rubberstamps the decision below. Another concern is the AAO may affirm the denial on a different ground that would be more difficult to overcome than the original denial.

Despite these concerns, one practical reason to appeal to the AAO is that—unlike in an APA challenge in federal court—a petitioner *can* supplement the record before the AAO. *See* 8 C.F.R. § 103.3(a)(1)(iii)(C); AAO Practice Manual § 3.8 ("Appellants may . . . submit a supplemental brief or additional evidence."). When reviewing a denial, practitioners should consider whether

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[6] *See also Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (per *Darby*, no statutory or regulatory mandate requiring administrative appeal of spousal immigrant visa petition denial before filing APA action in federal court); *Mantena v. Hazuda*, No. 17cv5142, 2018 U.S. Dist. LEXIS 132826, *10-11 (S.D.N.Y. Aug. 7, 2018) (citing *Darby*, court denied agency request to dismiss by exercising judicial discretion to require exhaustion, after USCIS' second re-opening of employment-based adjustment application denials while suit pending; "it is hornbook law APA claims are not subject to exhaustion requirements unless specifically required by statute.")

[7] *ASP* misapplies *Darby* on two grounds. First, the court disregards permissive language in 8 C.F.R. §§ 103.3(a)(1)(iii)(A) ("may seek judicial review") and 204.5(n)(2) ("right to appeal"). Second, even assuming the regulation mandated an appeal, *Darby* still provides an exception when, as with the I-140 denial in *ASP*, the agency does not stay its decision pending administrative appeal. *Darby*, 509 U.S. at 153. The district court also cites as authority cases that are distinguishable: *Howell v. INS*, 72 F.3d 288, 293 (2d Cir. 1995) (exhaustion required because plaintiff was in deportation proceedings and could renew her adjustment application before the immigration judge); *Oddo v. Reno*, 17 F. Supp. 2d 529, 531 (E.D. Va. 1998), *aff'd without opinion*, 175 F.3d 1015 (4th Cir. 1999) (*dicta* because plaintiff did exhaust, filing suit only after appeal denied at AAO).

additional evidence would significantly improve the likelihood of prevailing in an administrative appeal or in court if the AAO ultimately dismisses the appeal. *See Matter of* _____, ID# 12521 (AAO Sept. 15, 2015) (record, as supplemented on appeal, "now contains sufficient evidence to overcome the basis" for the L-1B petition denial), AILA Doc. No. 15092101 (posted Sept. 21, 2015). If so, this might be a reason to consider an administrative appeal to the AAO.

### B. Final Agency Action

The APA also requires that the challenged agency decision be "final." 5 U.S.C. § 704; *see also Darby*, 509 U.S. at 144 (distinguishing between doctrines of finality and exhaustion of administrative remedies). A decision is final when a "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby*, 509 U.S. at 144 (internal citation omitted). In most cases, a USCIS decision denying a petition (or application) will be a final decision under this standard.

However, several courts have held that the agency's decision was not "final" when there was a pending administrative appeal. In these family-based immigration cases, the courts refused to apply the *Darby* exception where a party pursued an optional administrative appeal to the Board of Immigration Appeals and then also filed an APA action while the administrative appeal remained pending. *See, e.g.*, *Bangura*, 434 F.3d at 501; *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir. 1997); *Naik v. Renaud*, 947 F. Supp. 2d 464, 472 (D.N.J. 2013), *aff'd*, 575 Fed. Appx. 88 (3d Cir. 2014). Presumably, if the party had only filed suit without taking an administrative appeal, the courts in these cases would not have been able to require exhaustion, per *Darby*, since administrative review was optional. Because the administrative review was underway, however, each court dismissed the suit on the basis that there was not yet a "final" agency decision. Applying the same reasoning, a court would likely find that a USCIS decision on an employment-based petition was not final if an AAO appeal was pending at the time an APA suit was filed.

Unlike USCIS, the Department of Labor (DOL) specifies that a failure to timely request administrative review of a labor certification application denial "constitutes a failure to exhaust administrative remedies." 20 C.F.R. § 656.24(e)(3). DOL also specifies that a timely-filed appeal to the Board of Alien Labor Certification Appeals (BALCA) of the Certifying Officer's denial makes the denial non-final. *See* 20 C.F.R. § 656.24(e). *Darby* would not provide an exception because DOL regulations mandate administrative review and non-finality while a timely-filed administrative appeal remains pending.

USCIS sometimes reopens a case that it denied while the federal court action is pending. The agency then argues that the court lacks jurisdiction because the decision is no longer final so the petitioner cannot seek APA review. In an unpublished decision, one appellate court upheld the district court's grant of summary judgment to USCIS after USCIS *sua sponte* reopened the H-1B petition denial and issued a request for evidence. *See 6801 Realty Co., LLC v. USCIS*, 719 Fed. Appx. 58, 59, 61 (2d Cir. 2018). The court concluded that by requesting more evidence, the reopening "nullified the prior denial and left nothing for the district court to review." *Id*. at 60.

A few federal district courts have dismissed for lack of jurisdiction complaints challenging H-1B petition denials on USCIS' motion after USCIS reopened and issued a new RFE. *See Utah Life Real Estate Group, LLC v. USCIS*, 259 F. Supp. 3d 1294, 1296, 1299-1300 (D. Utah 2017) (dismissing suit after USCIS issued second RFE after suit filed, petitioner refused to respond or stipulate to litigation stay, and USCIS denied again); *Net-Inspect, LLC v. USCIS*, No. C14-1514JLR, 2015 U.S. Dist. LEXIS 24951, *3-4, *10-11 (W.D. Wash. March 2, 2015) (USCIS issued third RFE thirty days after suit filed); *True Capital Mgmt. v. DHS*, No. 13-261 JSC, 2013 U.S. Dist. LEXIS 87084, *3-4, *8 (N.D. Cal. June 20, 2013) (USCIS issued second RFE after suit filed).[8] The *Net-Inspect* court acknowledged that its decision "might very well be different" if the agency was found to be avoiding judicial review through "repeatedly reopening" its decision. 2015 U.S. Dist. LEXIS 24951, *17 n.7.

In *Utah Life*, the court held that the APA's finality requirement was jurisdictional and thus it dismissed for lack of subject matter jurisdiction. For this reason, the court also rejected Utah Life's request that it be permitted to amend its complaint to challenge USCIS' second denial of the H-1B petition. *See Utah Life*, 259 F. Supp. 3d at 1299. In contrast, however, a number of courts have held that the APA's finality requirement is *not* jurisdictional or have left the question open.[9] For instance, in *6801 Realty*, the federal district court denied USCIS' motion to dismiss for lack of subject matter jurisdiction on the ground that the APA's finality requirement was not jurisdictional. *6801 Realty*, 719 Fed. Appx. at 59 n.1. The appellate court declined to resolve the "open question" in the Second Circuit as to whether the APA's finality requirement is jurisdictional. *Id*. This approach allowed the appellate court to review whether the district court correctly decided, as a matter of law, that the decision was no longer final. Without a final decision, the plaintiff would not have a claim that the APA was intended to protect.[10] The District of Columbia Circuit went further, deciding that pursuant to Supreme Court pronouncements, 5 U.S.C. § 704 is not jurisdictional. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established.").[11]

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[8] *See also Shihuan Cheng v. Baran*, CV 17-2001-RSWL-KSx, 2017 U.S. Dist. LEXIS 122696, *3, *19 (C.D. Cal. Aug. 3, 2017) (USCIS issued RFE two months after an immigrant investor filed suit based on adjudication delay of more than two years. Court dismissed for lack of jurisdiction finding delay not unreasonable and finality lacking.)

[9] *See, e.g.*, *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (assuming, without deciding, that under Supreme Court precedent for determining whether requirements are jurisdictional, the APA finality rule is not); *Trudeau v. FTC*, 456 F.3d 178, 183-85 (D.C. Cir. 2006) (holding that the APA finality requirement is not jurisdictional); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) (same); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) (*dicta*, APA finality requirement not jurisdictional). Not all courts have ruled on the issue yet. *See, e.g.*, *Sharkey v. Quarantillo*, 541 F.3d 75, 87-88 (2d Cir. 2008) (finding it unnecessary to resolve the issue in case presented).

[10] See § V(D) *infra*, for more information on standing to sue.

[11] Prior to 2006, the District of Columbia Circuit repeatedly concluded that the APA review provisions were jurisdictional. *See id*. However, the court's change in position was cemented by *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). While *Arbaugh* did not involve a cause of action under the APA, the Court made clear that lower courts err when they treat statutory

At least one court has held that USCIS has no authority to decide an issue after it is pending with the federal district court, *see Otero v. Johnson*, No. CIV 16-090-TUC-CKJ, 2016 U.S. Dist. LEXIS 151961, *23-25, *35-38 (D. Ariz. Nov. 2, 2016) (USCIS' regulations did not permit the agency to reopen on its own motion after the court had jurisdiction over the denial of an application to adjust status to lawful permanent resident).[12] *See also Mantena*, 2018 U.S. Dist. LEXIS 132826, *17-18 (citing *Otero*, court found USCIS denials of employment-based adjustment applications final, distinguishing *6801 Realty* because USCIS did not identify issues requiring further development or request additional evidence and circumstances "suspect" due to prior re-openings, followed by denials.)[13]

While USCIS does not always reopen a denial after a plaintiff files a federal action, attorneys need to advise their clients of the possibility that they will be back before the agency. If a court decides to dismiss for lack of finality, attorneys should consider asking the court to retain jurisdiction. If the APA's finality requirement is only a statutory limitation on review, then the court could retain the case so that the client can seek relief without refiling if the agency upholds the denial.[14]

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restrictions as jurisdictional where Congress has declined explicitly to identify the restrictions as jurisdictional. *Id*.

[12] Although INA § 242(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief under section …245," a number of courts have held that this prohibition does not apply when the claims do not rest on the exercise of the agency's discretion. These include constitutional questions, questions of law, or challenges to the agency's failure to comply with procedural requirements. *See Mantena v. Johnson*, 809 F.3d 721, 730 (2d Cir. 2015) (procedural requirements not shielded from review); *Ramalingam v. Johnson*, Civ. No. 13-7416 KM, 2016 U.S. Dist. LEXIS 43003, *10-11 (D.N.J. Mar. 30, 2016) (due process challenge to USCIS procedures not barred from review).

[13] After denying the motion to dismiss, the court stayed the action because it could not provide relief until USCIS resolved an administrative appeal concerning its revocation of a related immigrant visa petition. The adjustment applicant had relied on that petition to "port" to new employment and to provide an earlier priority date for another approved immigrant visa petition filed by the new employer. (The "priority date" refers to the date an immigrant visa number would be available to her and is crucial given the lengthy backlog the applicant faces to adjust her status due to her nationality and visa category). *See id*. at *5-6, *18.

[14] *See Gracious Ark Church v. United States*, No. CV 12-3990 GAF (SSx), 2013 U.S. Dist. LEXIS 192042, *21 (C.D. Cal. May 15, 2013) (Case stayed pending final agency action after court concluded agency action no longer final; AAO *sua sponte* reopened denials of religious worker and spouse's applications to adjust status to lawful permanent resident while cross-motions for summary judgment pending). The plaintiff may need to file an amended complaint if USCIS asserts new reasons to deny rather than simply affirming its prior decision.

### C. Timing

When a civil cause of action against the government is not subject to a separate statute of limitations, the general six-year limitation in 28 U.S.C. § 2401(a) applies. Where the issue has arisen, courts have applied the general limit to the APA, which does not have a statute of limitations, including in the immigration law context. *See Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014); *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000).[15]

## V. Preparing the Complaint

### A. Jurisdiction

In an APA case for the review of agency action, subject matter jurisdiction is based on 28 U.S.C. § 1331, the "federal question" statute. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).[16] Although the APA does not confer jurisdiction but instead serves as a cause of action (see Section V(C) *infra*), attorneys often list it in the jurisdictional section of a complaint because it also provides a waiver of sovereign immunity that allows a party to sue the federal government over unlawful agency action for non-monetary damages. *See Bowen*, 487 U.S. at 891-92 (undisputed that Congress intended to expand judicial review of agency action by amending § 702 to eliminate sovereign immunity defense). Such a waiver is necessary for the court to exercise jurisdiction. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("[S]overeign immunity is jurisdictional in nature.").

The APA is not available as a cause of action to the extent that another statute precludes judicial review. *See* 5 U.S.C. § 701(a)(1). Since the INA contains provisions that bar judicial review, attorneys should confirm that the client's claims do not fall within these provisions. The government most frequently asserts the bar on review of discretionary decisions, 8 U.S.C. § 1252(a)(2)(B)(ii). Importantly, most courts have held that statutory eligibility determinations are not discretionary and thus do not fall within § 1252's bars to review of discretionary decisions.[17] In most employment-based cases, the statutory eligibility requirements for visa classifications are sufficiently specific to overcome this threshold. *See, e.g.*, *Fogo de Chao (Holdings) Inc. v. USDHS*, 769 F.3d 1127, 1138 (D.C. Cir. 2014) (no jurisdictional bar to challenging L-1B visa classification denial because the criteria for L-1B visa determinations are

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[15] However, be aware of an exception that imposes a four-year statute of limitations for suits that arise under a statute adopted after December 1, 1990. 28 U.S.C. § 1658; *see Middleton v. City of Chi.*, 578 F.3d 655, 665 (7th Cir. 2009). While this exception would not apply to the APA, which was enacted before 1990, it is unclear whether § 1658 would apply if the APA-based suit challenged conduct as violating a statute enacted after December 1, 1990. In that case, the prudent practice would be to file within four years when possible.

[16] *See also Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *ANA International Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) ("default rule" that agency actions are reviewable under federal question jurisdiction applies in the immigration context).

[17] For more information on jurisdictional concerns regarding an APA suit, see the Council's Practice Advisory, *Immigration Lawsuits and the APA: The Basics of a District Court Action* (June 20, 2013).

laid out in the statute, including specifically a definition of "specialized knowledge"); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (the statute setting forth eligibility requirements for immigrant investor visas provided meaningful standards to review petition denial). In any case, practitioners should always be prepared for the government to file a motion to dismiss for lack of jurisdiction.

In some cases, the mandamus statute, 28 U.S.C. § 1361, which gives a federal court authority to compel a federal agency or officer to perform a nondiscretionary duty owed to the plaintiff, provides an alternative basis for jurisdiction. *See Sawan v. Chertoff*, 589 F. Supp. 2d 817, 822 (S.D. Tex. 2008); *Kim v. USCIS*, 551 F. Supp. 2d 1258, 1261-62 (D. Colo. 2008); *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1161 (N.D. Cal. 2007). In cases involving delay, it makes sense to include both an APA and mandamus claim, and then also to include the mandamus statute as a basis for jurisdiction. However, there is "little practical difference" as to whether jurisdiction rests on the federal question statute or mandamus, assuming that the relief requested under the APA and mandamus statute is identical—namely, to compel agency action that has been unreasonably denied. *See Dong*, 513 F. Supp. 2d at 1161-62 (N.D. Cal. 2007) (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997)).[18]

In contrast, the Declaratory Judgment Act, 28 U.S.C. § 2201, is a procedural statute that does not confer jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *see also Fleet Bank, Nat'l Ass'n v. Burke*, 160 F.3d 883, 886 (2d Cir. 1998); *Missouri ex rel. Mo. Highway and Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1334 (8th Cir. 1997). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 U.S.C. § 1331.

### B. Venue: Where to File

APA and mandamus actions arising from employment-based immigration petitions (or applications) must be filed in federal district court. Whether a case is filed in the correct district court depends upon venue—the location over which the court has jurisdiction. Venue for challenging federal agency action is based on 28 U.S.C. § 1391(e), which provides that a suit against the federal government or a federal official acting in his or her official capacity can be brought in any judicial district where (1) a defendant resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or (3) the plaintiff resides if no real property is involved in the action.[19] For a business that is legally able to file suit in its own name, the residence would be its principal place of business. 28 U.S.C. § 1391(c). *See Blacher v. Ridge*, 436 F. Supp. 2d 602, 608 (S.D.N.Y. 2006).

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[18] Relief is discussed at Section VI *infra*.

[19] Be aware that even when venue is proper, a court may grant a motion to transfer "in the interest of justice" to any jurisdiction where the suit "might have been brought." 28 U.S.C. § 1404(a). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981) ("Congress enacted § 1404(a) to permit change of venue between federal courts.").

### C. Causes of Action

The APA is the most common statutory basis for challenging the denial of an employment-based petition. *See, e.g., Shalom Pentecostal Church v. Acting Sec'y USDHS*, 783 F.3d 156 (3d Cir. 2015) (APA challenge to denial of special immigrant religious worker visa classification); *Spencer Enters., Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003) (APA challenge to denial of immigrant investor visa classification); *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191 (W.D. Wash. 2015) (APA challenge to denial of specialty occupation visa classification); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (APA challenge to denial of nonimmigrant religious worker visa classification). The APA creates a "cause of action" because it provides a basis to sue a federal agency where Congress has not provided a basis elsewhere in the law. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997). Specifically, the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

Although the APA does not explicitly provide for a private right of action, it "permits the court to provide redress for a particular kind of 'claim.'" *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 188 n.15 (D.C. Cir. 2006). Accordingly, the Supreme Court has repeatedly held that a separate indication of Congressional intent of the right to sue is not necessary. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that a private right of action is not necessary because review is available under the APA).

The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361, may provide an additional cause of action. Congress has given federal district courts the authority to compel a federal officer or employee, including those who work for federal agencies, to carry out a non-discretionary duty clearly owed to the plaintiff, who has no other adequate remedy. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Since mandamus only applies to actions that *must* be performed and do not require the exercise of discretion, courts often describe the duty as "ministerial." *See Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003).[20]

[20] Even when an agency is not subject by law or regulation to a specific deadline, the reasonableness requirement of the APA, 5 U.S.C. § 706(1), can be asserted. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189-90 (10th Cir. 1999); *Kim*, 551 F. Supp. 2d at 1263. For more information about mandamus suits, see the Council's Practice Advisory, *Mandamus Actions: Avoiding Dismissal and Proving the Case* (March 8, 2017).

## D. Parties

### 1. Plaintiffs

In all federal court litigation, Article III of the Constitution requires that a plaintiff have standing, or legal capacity, to sue. To this end, a plaintiff must have suffered 1) an "injury in fact," *i.e.*, harm to a legally protected interest that is "concrete and particularized" and "actual or imminent"; 2) "fairly traceable to" the challenged conduct; and 3) "likely to be redressed" by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). Several courts have held that beneficiaries of employment-based visa petitions satisfy this test. *See, e.g*., *Shalom Pentecostal Church*, 783 F.3d at 162-63; *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *but see id.* at 642 (Dougherty, Cir. J., dissenting) (arguing that beneficiary failed to show necessary redressability because he could not get an approved I-140 unless the employer first obtained a labor certification from DOL, neither of which were parties).

For APA claims, a plaintiff also must establish that her claim falls within the relevant "zone of interests." As discussed above, the APA provides that a person who has suffered a "legal wrong" or been "adversely affected or aggrieved by" agency action within the meaning of a relevant statute is entitled to judicial review. 5 U.S.C. § 702. The Supreme Court has interpreted this language to require a showing that the plaintiff 's claim falls within the "zone of interests" that the statute was intended to protect and has suffered injuries "proximately caused" by the alleged statutory violation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 1390 (2014) (internal citation omitted).[21]

To fall within the "zone of interests," the plaintiff's claims must be among those the statute "arguably" was intended to protect or regulate—a broader category than those Congress specifically intended to protect. *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Lexmark*, 134 S. Ct. at 1388-89 (internal citations omitted); *see Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("[T]here need be no indication of congressional purpose to benefit the would-be plaintiff"). In the APA context, the test is not "especially demanding," since the "benefit of any doubt goes to the plaintiff" and the APA has "generous review provisions." *Lexmark*, 134 S. Ct. at 1389 (internal citations omitted). The zone of interests test would preclude an APA claim "only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

[21] Until recently, the "zone of interests" also was considered to be jurisdictional and often was characterized as "prudential standing." *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210-11(2012). While explicitly citing to *Match-E-Be-Nash-She-Wish Band* for the application of the zone of interests test in the APA context, the Supreme Court in *Lexmark* rejected the "prudential standing" label. *See Lexmark*, 134 S. Ct. at 1387, 1389. The Court further indicated that the zone of interests test is not jurisdictional since whether a party has a valid cause of action is a question of the court's "statutory or constitutional *power* to adjudicate the case" and not of subject matter jurisdiction. *Id*. at 1387 n.4 (emphasis in original, internal citations omitted). Whether analyzed as a jurisdictional or a substantive issue, the test is applied as described above.

assumed that Congress authorized that plaintiff to sue.'" *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210) (internal citation and quotations omitted).

Normally, the plaintiff in a suit challenging the denial of an employment-based visa petition in federal court is the petitioning employer. At the administrative level, a regulation bars an appeal by a beneficiary for purported lack of standing. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).[22] However, this regulation does not apply to the standing analysis in a federal court case and some noncitizen beneficiaries have brought successful challenges to denials of employment-based visa petitions.

Courts that have ruled favorably have held that a beneficiary of an employment-based immigrant visa petition (Form I-140) is within the zone of interests of the applicable sections of the INA and thus has standing to sue to challenge the petition denial. *See Patel v. USCIS*, 732 F.3d at 637 (beneficiary has standing to challenge I-140 denial because his interest in receiving visa places him within the zone of interests); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (holding that where DOL has certified that the employment of the foreign worker would have no adverse impact on U.S. workers and the prospective employer had filed the I-140, then the beneficiary has an interest in the visa classification.)[23] *See also Shalom Pentecostal Church*, 783 F.3d at 164 (noting that for various reasons special immigrant religious workers have an even greater interest in the petition than foreign nationals in some of the other employment-based categories). *But see Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 131-32 (D.D.C. 2012) (beneficiary not within the zone of interests because his interests were "inconsistent with" congressional intent in protecting U.S. workers with the labor certification requirement applicable to his employment-based visa category); *Pai v. USCIS*, 810 F. Supp. 2d 102, 107, 111 (D.D.C. 2011) (beneficiary abroad lacked concrete injury because uncertain when/whether could enter the United States to work for the petitioner; not within the zone of interests because Congress intended that the labor certification requirements applicable to her employment-based visa category primarily protect "American labor" and protect employers' right to hire foreign workers if no qualified/available U.S. workers.)

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[22] In November 2017, USCIS created a limited exception to its regulatory prohibition against the participation of beneficiaries in administrative proceedings involving petitions filed by employers. *See Matter of V-S-G, Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf; *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G, Inc*. ("VSG PM"), PM-602-0152 (Nov. 11, 2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0152-Guidance-Beneficiary-Standing-Matter-of-V-S-G.pdf. USCIS now will give notice of its intent to revoke or notice of revocation of an I-140, if a beneficiary previously submitted a porting request which USCIS "reviewed and favorably adjudicated." *See* VSG PM, *id*. at 9, revision to AFM, ch. 20.3(b), (b)(1).

[23] For practitioners in a circuit where the issue of beneficiary standing has not been decided, it may be helpful to draw analogous arguments from cases where the courts have held that beneficiaries of family-based visa petitions are within the "zone of interests." *See, e.g.*, *Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).

With respect to the revocation of a previously-approved employment-based immigrant visa petition (I-140), courts have held that the beneficiary falls within the zone of interests and thus has standing to sue over USCIS' failure to comply with procedural prerequisites for revocation. *See, e.g.*, *Mantena v. Johnson*, 809 F.3d 721, 731-32 (2d Cir. 2015) (I-140 beneficiary who "ported" to new employer has a statutory interest in receiving notice (either to her or her new employer) of USCIS' intent to revoke the petition); *Kurapati v. USBCIS*, 775 F.3d 1255, 1261 (11th Cir. 2014) (per curiam) (beneficiaries of an approved I-140 (not limited to only workers who "port") have standing because of their statutory interest in receiving an immigrant visa) (citing *Patel*, 732 F.3d at 636-38). *See also Musunuru v. Lynch*, 831 F.3d 880, 888, 890-91 (7th Cir. 2016) (beneficiary had standing to raise pre-revocation procedural claims, but only his current employer was entitled to notice).

Reported cases addressing whether beneficiaries of employment-based nonimmigrant petitions have standing are scarce. At least one court found that beneficiaries of H-1B visa petitions have standing because they were within the statute's zone of interests. *Tenrec, Inc. v. USCIS*, No. 3:16-cv-995-SI, 2016 U.S. Dist. LEXIS 129638, *21-22 (D. Or. Sept. 22, 2016) (H-1B petition beneficiaries have constitutional standing and are within the zone of interests because approval gives them "the right to live and work in the United States and imposes obligations such as complying with "extensive regulations" on their conduct; they also have the potential for future employment with a new petitioner). Still another court found that an L-1A petition beneficiary had standing because of the harm he would suffer from a denial of the petition. *Ore*, 675 F. Supp. 2d at 223 (L-1A petition beneficiary had constitutional standing because he would benefit from being able to enter the United States to work, which the petition denial harmed, and the court could redress).

However, other courts have found that beneficiaries of nonimmigrant visa petitions do not have standing. *See, e.g.*, *Commonwealth Utils. Corp. v. Johnson*, 245 F. Supp. 3d 1239, 1255-58 (N. Mar. I. 2017) (CW-1 petition beneficiaries are not within the zone of interests because nothing in the law indicates congressional intent authorizing them to challenge the agency's petition selection process; they have no right to be admitted to this U.S. territory to work temporarily); *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 368 (D.D.C.) (H-2A sheepherders not within the zone of interests because congressional intent was to protect U.S. workers), *modified*, 319 F.R.D. 3 (D.D.C. 2016);[24] *Cost Saver Mgmt., LLC v. Napolitano*, No. CV 10-2105-JST, 2011 U.S. Dist. LEXIS 156096, *11-12 (C.D. Cal. June 7, 2011) (L-1A petition denial did not injure beneficiary outside the United States because only the prospective employer had a legally protected interest in the petition).

[24] The district court concluded it was bound by *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), which held that Congress clearly intended to protect U.S. workers from being adversely affected by the employment of H-2A workers. *Id*. at 368. (The court granted reconsideration as to the plaintiff association's standing to sue on its members' behalf because it had U.S. worker members, specifically lawful permanent residents. *See* 319 F.R.D. at 7-8.) But there were no H-2A worker plaintiffs in *Mendoza*, and their interests are not mutually exclusive of U.S. workers' interests. *See Tenrec*, 2016 U.S. Dist. LEXIS 129638, *25 ("The D.C. Circuit did not, however, find that the INA's H–2A provisions were *only* concerned with American workers.") (Emphasis in original).

A few courts have held that the beneficiary of a labor certification application has standing. *See De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (finding standing where there was no statutory indication that Congress intended to preclude beneficiaries from suing; but affirming petition denials because employers did not comply with DOL review requirements); *Stenographic Machines, Inc. v. Reg'l Adm'r Employment & Training*, 577 F.2d 521, 528 (7th Cir. 1978) (noting that the test is whether plaintiff is within the zone of interests to be *protected or regulated*, and finding that beneficiary satisfied both) (emphasis added).[25] In so holding, the Seventh Circuit emphasized that the test could be met by showing that the plaintiff fell within the zone of interests either "protected" or "regulated" by the statute. *Id*. (citing *Data Processing*, 397 U.S. at 153).

Even though a beneficiary may be found to have standing to sue, he or she nevertheless may lose an appeal if the visa category requires continued sponsorship, but the employer (or prospective employer) is no longer committed to hiring the beneficiary. Since an I-140 beneficiary who has "ported" to new employment does not require the petitioning employer's continued support, the beneficiary's independent interest in the approved I-140 is easier to establish in these cases.

2. Defendants

The APA specifies that an action seeking mandatory or injunctive relief "shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." 5 U.S.C. § 702. Accordingly, an APA action would name as a defendant the specific individual within DHS who is authorized to carry out any injunction or other mandatory order of the court. In the case of visa petition denials, this individual usually would be the Director of USCIS.[26] Similarly, a mandamus action could name the official with ultimate authority over the action that the suit seeks to compel (such as, for example, the Director of USCIS), as well as the director of the particular office responsible for taking the action. In both types of cases, the defendants are named in their official capacities.

## VI. Relief

### A. Non-Monetary Damages

A prevailing party in an APA or mandamus action does not receive money damages. The relief sought will depend upon the nature of the claim. If the USCIS denial was wrong as a matter of law, the court can vacate the denial and approve the petition. If the challenge is to USCIS'

[25] As these decisions predate *Lexmark*, 134 S. Ct. at 1386-89, they discuss whether the beneficiaries had "prudential standing." *See* n.21, *supra*. They also predate the current system for permanent employment certification. *See* 20 C.F.R. Part 656. However, the regulatory change in the certification process does not affect whether the beneficiary's interest falls within the statute's zone of interests.

[26] Some attorneys also name the Director of the Service Center who issued the denial. For further information on who should be named as defendants, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, *Whom To Sue and Whom To Serve in Immigration-Related District Court Litigation* (May 13, 2010).

findings of fact or application of the law to the facts, then the court can remand with specific instructions as to how the agency must correct its errors. If mandamus is sought, the complaint should make clear the duty that the court should order USCIS to perform. If applicable, a complaint should include a request for reasonable attorney's fees under the Equal Access to Justice Act[27] and a "catch all" provision, asking the court to order any other relief that the court deems appropriate.

### B. Standard of Review

The standard applied by the court can be critical in a case; among other things, it will determine the level of deference that the court gives to the agency's interpretation of applicable statutes or regulations. While the relevant standard of review can be specified in a complaint, parties most often urge the court to apply a particular standard in their briefs filed in support of summary judgment.

The applicable standard of review under the APA with respect to factual findings and application of the law to the facts depends upon whether agency action is taken after a formal hearing on the record. *See* 5 U.S.C. § 706(2)(E). Since USCIS' denial of an employment-based petition does not involve a formal hearing, the standard of review should be whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the "arbitrary and capricious" standard, the court reviews whether an agency "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). *See also Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 996-97 (S.D. Ohio 2012) (USCIS made "inexplicable errors" constituting a "litany of incompetence that presents fundamental misreading of the record…" and thus failed to articulate "an untainted, satisfactory explanation for the denial that rationally connected the facts to the decision").

However, some courts describe the standard as whether an agency's findings are supported by "substantial evidence"—which is the standard when the agency decision follows a formal hearing on the record. *See* 5 U.S.C. § 706(2)(E); *Family Inc. v. USCIS*, 469 F.3d 1313, 1315-16 (9th Cir. 2006) (USCIS' finding that the beneficiary was not engaged in primarily managerial duties, and thus not eligible for a multinational manager classification, "is supported by substantial evidence.")

Some federal circuit courts have held that there is not much difference between these two standards. *See, e.g., ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071 (9th Cir. 2015) (defining and comparing the two standards); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) ("the distinction between the substantial evidence test and the arbitrary or capricious test is 'largely semantic'") (citations omitted). Under the "substantial evidence" standard, the court is reviewing whether, based on the record before the agency, a reasonable fact finder would be compelled to reach a different result. *See Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 & n.4 (9th Cir. 2011) (arbitrary

[27] *See* Section VI(C) *infra*.

and capricious standard "incorporates" substantial evidence standard, so use substantial evidence standard to review informal agency proceedings); *Family Inc.*, 469 F.3d at 1315. *See also Fogo de Chao (Holdings)*, 769 F.3d at 1147 (substantial evidence standard "not boundless," but agency not allowed to "close its eyes to on-point and uncontradicted record evidence" without explanation).

When reviewing the agency's factual findings, a federal court is not acting as a fact finder itself. "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (footnote and citation omitted).

In contrast, a federal court exercises de novo review under the APA over purely legal issues. *See Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996). One example of an error of law would be USCIS's application of an incorrect standard of proof. USCIS is supposed to apply the "preponderance of the evidence" standard of proof in deciding whether a party has submitted sufficient proof of eligibility for the visa classification. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (noting that preponderance of the evidence is the standard of proof in administrative immigration proceedings unless a different standard is specified by law); *see also* USCIS Adjudicator's Field Manual (AFM), ch. 11.1(c). To satisfy the "preponderance" standard, a petitioner or applicant must show that it is "more likely than not" a claim is true based on "relevant, probative and credible evidence." *Matter of Chawathe*, 25 I&N Dec. at 376; AFM ch.11.1(c). If USCIS erroneously held a petitioner or applicant to a higher standard, he or she may have a strong basis for arguing that the agency erred as a matter of law and the court would review this issue de novo.

Where the issue involves the interpretation of a statute or regulation, the first step is for the court to consider the statutory or regulatory language. Where the language is plain, the court is bound to implement it as written. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (explaining deference with respect to agency interpretation of a statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining deference with respect to agency interpretation of a regulation). Where the language is ambiguous, the court only can defer to the agency's interpretation if it is reasonable and if such interpretation falls within the authority Congress gave to the agency. *Id*. at 843-44. In general, courts are more deferential to agency interpretations issued through a formal binding rule, such as a regulation or a precedent decision. *See generally United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

In contrast, courts are less deferential to agency actions that are not formal, binding statements of the agency's interpretation of the law. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In such cases, the level of deference depends upon "the thoroughness evident in [the agency's] consideration [of the issue], the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. *See also Fogo de Chao (Holdings)*, 769 F.3d at 1136 (finding USCIS' interpretation of its specialized knowledge regulation did not merit deference, in part, because the regulation "largely parrots" the statute).

As noted, courts must consider the consistency of an agency's position. Where an unexplained, abrupt change in policy has occurred, a court may find the change arbitrary and capricious, and thus not entitled to deference. A new agency policy may be arbitrary and capricious if it represents an abrupt change in an agency's pattern of decision-making and is adopted without an adequate explanation of its rationale. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (finding that in administrative rulemaking, agency must give adequate reason for changing its position, particularly when affected parties have substantial reliance interests in the prior position); *Davila-Bardales v. INS*, 27 F.3d. 1, 5 (1st Cir. 1994) (holding that BIA's change of position, even from decisions not formally designated as precedent, which court described as a "zigzag course," is not permissible where "the agency has failed to explain why it is changing direction…"); *Omni Packaging, Inc. v. USINS*, 733 F. Supp. 500, 504 (D.P.R. 1990) (in denying immigrant visa petition, INS failed to satisfactorily explain why beneficiary was not a manager, when the agency previously approved an initial nonimmigrant petition and extensions as a manager). *See also INS v. Yang*, 519 U.S. 26, 32 (1996) ("If an agency announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned."). Thus, in reviewing any decisions that apply a new policy, a court will have to consider whether the abrupt policy change was rationally explained.

### C. Attorneys' Fees under the Equal Access to Justice Act

While a request for attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq*., should be listed in the complaint as part of the relief sought, practitioners must file a separate motion for fees and costs with the court within the statutory deadline (unless the parties settle the fee issue). The following are the general requirements for recovering fees and must be included in the motion:

- A showing that the client is the prevailing party, *i.e.*, that the party was awarded some relief by the court. 28 U.S.C. § 2412(d)(1)(A); *Buckhannon Board of Care & Home Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001).[28] Examples would include:
    - Enforceable judgment on the merits.
    - Consent decree enforceable by the court in which the government agrees to stop the alleged illegal activity, even without an admission of guilt or wrongdoing.
    - Order granting mandamus to adjudicate application to adjust status to lawful permanent residence.
- A showing that the client meets the "net worth" requirements. 28 U.S.C. § 2412(d)(2)(B).
    - For an individual, net worth cannot exceed $2 million when suit filed.

[28] While *Buckhannon* did not involve EAJA, it applies to EAJA motions. *See Aronov v. Napolitano*, 562 F.3d 84, 89 (1st Cir. 2009) (en banc) ("*Buckhannon* sets the minimum standards for prevailing party status under the EAJA.").

  - For an owner of an unincorporated business, a partnership or a corporation, with certain exceptions, net worth cannot exceed $7 million and cannot have more than a maximum 500 employees when suit filed.

- A showing that the government's position, either pre-litigation or during litigation, was not substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (holding that government's position must be reasonably based in law and fact); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (recognizing court's obligation to consider both the underlying agency action and the agency's litigation position).

- A showing that there are no special circumstances to make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The burden of proof is on the government to establish the existence of special circumstances. *United States ex rel. Wall v. Circle C Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017).

- A statement that includes the total amount of fees and costs requested, accompanied by an itemized account of the time spent and rates charged. Attorneys must take the time to prepare contemporaneous time records, which describe the work accomplished and the cost incurred. Attorneys also can submit time records for law clerks and paralegals.

Practitioners also need to have a written assignment of fees agreement with the client and, if there are co-counsel, a separate agreement on how the fees will be allocated if awarded by the court or in a settlement agreement. The best practice would be to enter into these agreements at the same time the engagement letter is signed. Without a fee assignment agreement, EAJA fees will belong to the client. *See Astrue v. Ratliff*, 560 U.S. 586, 596-97 (2010). Finally, motions for fees and costs under EAJA must be filed within 30 days of the entry of final judgment. *See* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G).[29]

## VII. Conclusion

Federal court litigation is an important tool in reaching the goal of more consistent, less restrictive agency decisions. In particular, federal court litigation is an important way to check the agency's misapplication of the law, which happens all too often in immigration cases. Any attorney who would like to discuss the viability of a federal court challenge in an employment-based immigration case may contact the American Immigration Council at clearinghouse@immcouncil.org.

[29] For more information on the EAJA requirements, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, *Requesting Attorneys' Fees Under the Equal Access to Justice Act* (June 17, 2014).

**Navigating the Landmines in the PERM Process: An Advanced Conversation**

*by Megan E. Kludt, Vincent W. Lau, and Bennett R. Savitz*

When approaching the PERM process, resources available to every practitioner include the relevant regulations[1], FAQs found on the U.S. Department of Labor's website[2], and decisions issued by the Board of Alien Labor Certification (summaries are also offered by monthly on AILA Infonet[3]). Even so, there are some issues that practitioners face where answers are not so clear. In fact, some seasoned practitioners will take different approaches in addressing these issues. Below are thoughts from three different practitioners for your consideration.

- **What tips do you have in walking the employer through enumerating the minimum job requirements?**

The underlying principle of the PERM process is to test the U.S. labor market to determine whether there are any qualified, available, and willing U.S. workers for the offered position. The requirements must be clear and must be the actual minimum requirements. They must also be justified by the employer's business need.

Often, the employer or the foreign national will have the mistaken notion that they should have as many requirements as possible and/or have the most difficult requirements. To avoid this, a practitioner should spend the time with the employer, and sometimes not in the presence of the PERM beneficiary, to discuss what the employer would seek in a candidate if it were to replace the beneficiary. Additionally, if there are other positions comparable to the position that is the subject of the PERM application, is there consistency in the requirements? If other PERM applications have been filed by the employer for similar positions, are those requirements comparable? The U.S. Department of Labor (DOL) has the ability to cross reference job descriptions and job requirements from one application to the next. It behooves the practitioner to alert the employer that, at the end of the day, the employer must be able to justify the requirements. In fact, justifying job requirements is one of the issues raised in PERM audits.

From a practical perspective, take the time to discuss the requirements with the employer. One should put the employer on notice that the enumerated job requirements should not be for the "star" employee. Instead, what must someone have at a minimum before the employer would consider the applicant? Look also at the employer's job postings to see if there are similar openings. What requirements are there? Further, have the employer sign off on the list of requirements. This helps the employer take the requirements and the process more seriously.

- **How do you draft minimum job requirements, i.e., do you quantify the requirements?**

Once the employer can articulate what the minimum requirements are for the offered PERM position, the next challenge is how one should draft such requirements. Regulations require that an employer be clear of its requirements, and avoid vague descriptions. The DOL has denied many applications on this basis.

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[1] *See* 20 CFR §656.10(a).

[2] *See* www.foreignlaborcert.doleta.gov/faqsanswers.cfm.

[3] *See* BALCA Briefings by Harry Sheinfeld, https://aila.org/infonet/harrys-balca-briefs.

In 2017, DOL issued an FAQ regarding how an employer should quantify its requirements. This generated a heated discussion among seasoned practitioners as to how to approach drafting an employer's requirements. In fact, AILA's DOL Liaison Committee issued a position paper on this very topic.[4] Shortly thereafter the DOL pulled the FAQ and it has not since reappeared.

Nonetheless, the debate continues. Should the employer should quantify a requirement? That is, is it enough to say that the employer seeks candidates who are "proficient in X" or have "demonstrated knowledge in Y?" Does an employer have to go further and say that one must have "demonstrated knowledge in X gained through 5 years of work experience?"

Where a specific experience is required, some practitioners recommend that employers describe the experience in terms of months and/or years. For those special skills and knowledge requirements, one could try quantifying them in the following manner:

- knowledge demonstrated by the completion of at least three courses in X
- ability gained though developing and deploying 18 Y reports to production over a 12 month period
- ability gained through developing and deploying 15 code enhancements of reports and/or data integration solutions to production over a 12 month period
- knowledge gained through having responsibility for the successful execution of at least one partnership agreement
- working knowledge of skillset Z acquired through experience or coursework

As for those knowledge or skill sets that cannot be quantified, practitioners who recommend quantifying PERM experience may leave those unquantifiable aspects out.

Other practitioners, however, believe that there is no sense in "forcing" an employer to quantify a requirement because some truly are not quantifiable. Instead, an employer is seeking a candidate to have a general level of competency achieved or skillset acquired.

Another consideration is that the employer may limit its stated minimum requirements to some of the top requirements an employer seeks in a candidate. While there may be many factors in determining whether an applicant is qualified for the position, some requirements may be harder to quantify or articulate. The employer may just list those that are among the top. This allows an employer to leave out those that it cannot be quantified as readily. Of course, the employer can only use the enumerated requirements to evaluate U.S. worker candidates in the PERM process.

- **How do you handle an employee who has no experience other than that gained with the employer?**

As a general rule, the beneficiary cannot use the experience that he/she gained with the employer to qualify for the PERM position. The rationale is that if the employer was willing to accept the individual without the experience then the employer cannot use that against U.S. applicants.

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[4] *See* AILA Position Paper on PERM FAQ on H.14 (Mar. 15, 2017), AILA Doc. No. 17031538.

An employer will frequently list "mandatory" experience requirements for the position, when in fact the beneficiary did not have this experience prior to working for the employer. There are a few options to explore in this scenario:

- Ask the employer what relevant experience or skills the beneficiary acquired before starting work with the employer. Were there any special skills that the beneficiary obtained during coursework in school that could be added to the minimum requirements in lieu of an experience requirement? If the employer found the beneficiary qualified when the employer hired him/her, there must have been some reasons for that determination? Find out what those are and determine whether they are legitimate business reasons that can be used as requirements for the PERM application.
- Ask whether there have been major changes to the company/institution that would make it no longer feasible to hire someone without the skill sets that the beneficiary possesses. It is permissible to use experience acquired with the employer if it would no longer be feasible to re-train someone at this stage. However, as a practical matter, one will probably want to avoid this strategy unless absolutely necessary because it may be denied at the Certifying Officer level at DOL, forcing one to present arguments at the review level, which may cause delays, uncertainty, and additional cost to the employer.
- Due to the fact that PERM is for *prospective* employment, in some cases the employer may wish to sponsor the individual for a prospective role and prepare the application for a *future* higher-level position, or even a completely different position, within the company once the beneficiary has enough experience to qualify for it. (Please note that the beneficiary must have the requisite experience at the time of filing the PERM, even if the PERM-sponsored role is a future position.) In this case, one may be able to use the beneficiary's experience with the employer gained up to the point of filing the PERM application if the following conditions are met:
    (1) the future PERM position is not substantially comparable to the current position (the beneficiary will be spending more than 50% of his/her time on duties in the future PERM position that are different from the job duties of the current position);
    (2) the future position reasonably requires the skills/experience that the beneficiary is acquiring in the current position;
    (3) the employer will be able to establish its ability to pay the wage for the future position at the time of filing the PERM application. In most cases, the future position will come with a substantially higher wage and the employer may not be able to show "ability to pay" simply by showing the beneficiary's current salary. The employer may need to show net profit or assets to cover the difference.

  Examples of this kind of scenario would be a promotion from Sales Worker to Sales Manager; Computer Programmer to Computer Systems Analyst; Cook to Head Chef; Home Health Aid to Health Service Manager.

  If the employer is planning to pursue this strategy, first verify that the positions are not substantially comparable. This verification can be done by sending the employer the following instructions or something similar:

> "In order to be able to use the experience X gained with you in the current position as part of the qualifications for the PERM filing for the future higher-level position, you will have to show that there is at least a 51% difference between the current position and the future PERM position. We have therefore attached a template of a chart for you to complete. The final versions of both job descriptions are also attached to this message for your reference and to use to complete the chart. Please note that the total percentage of duties for Job A must add up to 100% and the total percentage of duties for Job B must add up to 100%."

Please also note that while experience gained with the same employer in the same position cannot be used to qualify the beneficiary, experience gained with a "different" employer can. That is, the DOL has indicated that whether one employer is the same employer is determined by the Federal Employer Identification Number (FEIN). For example, where an individual may have gained experience with the U.S. employer's affiliate, parent, or subsidiary abroad, such experience can be used to qualify a beneficiary.

- **What concerns are there with foreign degrees?**

In addition to experience, skills, and knowledge, one of the basic requirements for a job is the degree requirement. When speaking to an employer, it is important to discern how important the degree is. If a degree is required, it is also imperative to make sure that the requirement is properly stated and that the beneficiary had such a degree prior to being hired into the PERM position (assuming the PERM-sponsored position is not a prospective role). Unlike the H-1B process, having at least a bachelor's degree in a specific field is not required for the PERM process. Yet, if the employer requires it and/or if the PERM application sets it out as a requirement, it is important to be able to document that the beneficiary had it as of the time of hire (if the PERM position is not prospective) and at the time of filing the PERM application.

One common challenge with degree requirements arises when the beneficiary has a foreign degree, especially a 3-year foreign degree, which is common in certain countries such as India. When faced with a foreign degree, one should first have the beneficiary's degree and experience professionally evaluated to see if the beneficiary actually has the equivalent of a U.S. bachelor's degree. Once it is ascertained as to what the beneficiary has, then pitfalls down the road, including at the Form I-140 stage later, can be avoided. (As a practical point, it is best to evaluate the education of the employee separately from the experience to determine how many years of post-secondary education the person has completed and whether the employee has the equivalent of a U.S. bachelor's degree. Please be advised that the 3-for-1 formula, where three years of work experience is equivalent to one year of education in a degree program, is only relevant in the H-1B context, not for PERM. Also, check to see whether the individual has actually completed the degree program.)

If the beneficiary does not have the equivalent of U.S. bachelor's degree, the practitioner should talk to the employer to determine whether the position truly requires a bachelor's degree. Unlike in the H-1B context, the PERM process allows an employer to require either a 3-year or 4-year bachelor's degree. The employer may also be open to accepting someone with a bachelor's degree that is either completed in four years of education or some combination of education and

experience. The employer may also be open to accepting someone with a degree or the equivalent of a degree, where equivalency is evaluated by a professional. In fact, an employer may require "2 years of college education" or "3 years of college education." Whatever the employer requires, or is open to requiring, can be spelled out clearly. Articulating the requirement avoids problems. At the same time, however, one must take into consideration the I-140 category one is hoping to use. Where the actual requirement is not at least a standalone four-year bachelor's degree, one may not be able to seek employment-based second preference (EB-2).

For EB-2, the job must require the attainment of a U.S. advanced degree or "foreign equivalent degree."[5] A bachelor's degree "or foreign equivalent degree" plus 5 years of progressive experience is deemed to be the equivalent of an advanced degree under 8 CFR §204.5(k). Due to the words "foreign equivalent *degree*," USCIS adopted its "single source rule," whereby it does not consider a 3-year foreign bachelor's degree to be an "equivalent foreign degree" to a U.S. bachelor's degree and will not consider any combination of experience and education to equal a foreign degree equivalent for this section, regardless of any professional evaluation.[6] Hence, if the beneficiary has a 3-year bachelor's plus 5 years of progressive experience, this will not be sufficient for EB-2, regardless of how you word the minimum requirements and regardless of any evaluation.

Note that if the beneficiary has a foreign advanced degree but it follows a 3-year bachelor's degree, this does not necessarily equate to the equivalent of a U.S. advanced degree either. If a 3-year bachelor's degree is followed by a 3- year advanced foreign degree in the same field as the bachelor's degree, this should be considered the equivalent of a U.S. advanced degree. If the beneficiary has a 3-year foreign bachelor's degree, followed by a 1- or 2-year advanced degree in the same field, this may, in some cases, qualify as the equivalent of a U.S. *bachelor's* degree for purposes of "bachelor's plus 5." For a more in-depth discussion of degree equivalency, check out Ron T. Wada, "AILA's Focus on EB-2 and EB-3 Degree Equivalency" and the corresponding supplement.

If one does not qualify for EB-2, consider the employment-based third preference (EB-3). In this preference category, there are different options. The position could qualify either as "skilled," requiring at least 2 years of training or experience, or "professional," requiring a bachelor's degree. In this scenario, once again, the 3-year bachelor's degree will not qualify the beneficiary for the "EB-3-Professional" category because of the single source rule. However, one can still draft the minimum requirements to require a bachelor's degree with annotation of "employer will accept a 3- or 4- year bachelor's degree" or "employer will accept the professionally evaluated equivalent of bachelor's degree," as appropriate. USCIS will accept such cases for the EB-3-Skilled Worker category. If the employer does not require a bachelor's degree or 2 years of experience, one can and may have to file the I-140 in the EB-3- Unskilled Worker category. Based on the current immigrant visa availability, there is practically no difference in wait times among the different EB-3 categories.

- **What strategies do you have for recruitment?**

[5] 8 CFR §204.5(k).
[6] *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

*What recruitment sources do you use? Or are not willing to use?*

The required recruitment efforts for any PERM application include a Notice of Filing at the job site, posting with the relevant State Workforce Agency, and placing two Sunday advertisements in "a newspaper of general circulation in the area of intended employment." Regarding this last requirement, BALCA has clarified that it does not matter where the newspaper is actually published, as long as it is a newspaper of general circulation in the area of intended employment.[7] The regulations do not require that it be the newspaper of highest circulation in that area, but it is advisable that one choose the most prominent newspaper or at least one of the most prominent newspapers in the region. If the offered job is to be advertised in an area unfamiliar to the practitioner, check with other AILA practitioners in the area to determine what newspapers have been successful.

For professional PERM positions, in addition to the above, an employer must also employ three other recruitment efforts from the regulatory menu. Below are some tips regarding which options to employ.

(1) Employer's Website
The employer website can be an easy and inexpensive step, but one should definitely check with the employer because much will depend on the size of the company, the amount of traffic on its website, its history of advertising on its website, and its history of responses to website ads. Please also make sure that the content of the posting is consistent with the employer's normal text, while also complying with PERM requirements. Also note that some job search websites, such as www.Indeed.com, scrub employer websites for job postings and therefore the job posting may also end up elsewhere.

(2) Job Search Website
The online job search option is very popular because there are a large number of job search websites that can meet this criterion, with some having costs that are quite reasonable, including free.

(3) Employee Referral Incentive Program
This option is available where the employer meets the following three criteria: (1) there is a program that offers incentives (financial) to employees, (2) the program is in effect during the recruitment period of the PERM process, and (3) employees are on notice about the PERM job opening.[8]

(4) Local/Ethnic Newspaper
The local or ethnic ad is very straightforward. Most towns have a locally circulated, low cost paper that would work for this purpose. Be careful of using ethnic newspapers however if it does not make sense to have the job posted in such an ethnic paper.

(5) On-Campus Recruiting

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[7] *Matter of Hoffman Enclosures Inc., d/b/a Pentair Technical Products*, BALCA No. 2011-PER-01754 (Aug. 5, 2015).
[8] *See* Matter of Sanmina-Sci Corporation, 2010-PER-00697 (Jan. 19, 2011).

This option is more appropriate for jobs that are available for recent graduates. If the position requires more than just a degree, ensure that alumni are invited to attend the event as well. As with all efforts, please make sure to document the effort well, including having some indication that the PERM position is among the openings.

(6) Trade/Professional Organization
Advertising in a professional journal is another option. This however is limited in that it is not available for all professions and can be more costly than other forms of advertisement. One should also be careful to ensure that the publication is truly a professional journal, and not just one filled with job postings.

(7) Private Employment Firm
Evidence of using a private employment firm, a/k/a "recruiter" or "headhunter," must show that the firm was hired to recruit for the PERM position.

(8) Campus Placement Office
Similar to on-campus recruitment, please make sure that there is sufficient documentation to show that the PERM position is included in the openings.

(9) Radio or TV Advertisements
Such advertisements vary a lot in pricing and as with all recruitment efforts evidence is key. For such advertisements, one can ask the station to provide affidavits of the content of the advertisement and the date and time the advertisement ran. Please note that DOL, and USCIS, can only take print evidence, and therefore audio or visual recordings must be reflected in print.

*How long do you run your advertisements?*

The Notice of Filing must be posted for at least ten consecutive business days. The State Workforce Agency posting must be up for at least thirty days. (Please note that some states have "Veterans Hold" which keep postings from the public for a few extra days and therefore it is advisable to discount those days when counting.) The other efforts however do not have any regulatory requirements. That said, one strategy is to complete all of the recruitment during the 30 days that the Job Order is posted with the State Workforce Agency. Another consideration is to have those recruitment steps that do not have any specific timeframes to span at least the two Sunday newspaper advertisements. At the end of the day, DOL is looking for the employer's good faith efforts. Having a recruitment effort up for one day, while not against regulations, begs the question of how much good faith was involved.

- **How do you help your client through applicant evaluation issues?**

The ultimate question in reviewing applications from U.S. workers is "What is a lawful, job-related reason to disqualify an applicant?" Remind the employer that it can only screen out applicants based on the minimum requirements established in the very beginning of the process. The employer cannot come up with other requirements at this stage. Practically, consider the following approach. Provide the employer with the following instructions:

*Carefully review each resume that you receive to determine whether the individual meets the requirements for the position that are listed on the PERM application. Unless the candidate is clearly unqualified for the position, i.e., does not meet all of the requirements (and just those) listed, you must call the candidate to verify his/her qualifications. Each time you contact a candidate keep a detailed record that includes the following:*

- *when or how many times you attempted to contact the candidate;*
- *whether the attempted contacts were to the candidate's place of business, home or cell phone;*
- *with whom a message was left, if any, and what the message was; and*
- *whether you attempted alternative means of communication, such as e-mail.*

*If you are unable to contact the candidate by telephone, you must send a certified letter asking the candidate to contact you. If you speak with the candidate over the phone and it is still unclear whether the individual is qualified, please schedule an in-person interview with the candidate. For any candidate you interview and find not to meet the listed requirements, notify the candidate that he/she is not qualified for the position.*

*As you receive these resumes and contact candidates, please fill out the attached spreadsheet accordingly with the name of each candidate and note why the candidate was found to be unqualified for the position. You must note on this spreadsheet the exact times and dates that you contacted each candidate and keep receipts of all certified letters you send to them. Please note that the spreadsheet contains information regarding whether the candidate is authorized to work in the U.S. without sponsorship by the employer for an employment visa status (i.e., H-1B). In order to determine this last qualification, you may ask the following two questions:*

- *Are you legally authorized to work in the United States?*
- *Will you now or in the future require sponsorship for an employment visa status?*

*You must compile all of the resumes you received, all of information that you have that documents how and when you contacted each candidate, such as the certified mail receipts, etc.; and the spreadsheet that indicates why each candidate was not qualified for the position.*

The practical take away from the above is that an employer must be responsive to all applicants and must take the time to review the applications against the established minimum requirements. Where there is any uncertainty as to the qualifications of the applicant, the employer cannot make assumptions but must contact the applicant to be sure. Both DOL and USCIS have asked employers to provide hard evidence of the evaluation process as well as a full report of each of the applicants, how the employer responded to them, and why each applicant was disqualified. DOL and USCIS take this process quite seriously, and so should the employer.

There are many ways to approach the PERM process. The above are tips for one to consider. Make use of the resources that the DOL offers as well as the many resources that AILA provides, including its training programs, subject-matter conferences, and the regular practice alerts and minutes shared by AILA's DOL Liaison Committee.