Immigration 101: Immigration Law for Non-Immigration Attorneys

Friday, September 16, 2016

Albany Marriott
Albany, NY

CLE Course Materials and NotePad®

Complete course materials distributed in electronic format online in advance of the program.

Sponsored by the

New York State Bar Association and the Committee on Legal Aid

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Immigration 101: Immigration Law for Non–Immigration Attorneys,
Friday, September 16, 2016 | New York State Bar Association's Committee on Legal Aid,
Albany Marriott, Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Immigration 101: Immigration Law for Non-Immigration Attorneys

Program Code: FRIMAGA1

Program Location: Albany Marriott, Albany - NY

Program Date: September 16, 2016

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Hasan Shafiqullah, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Camille Mackler, Esq.	☐	☐	☐	☐	☐	☐	☐	☐
Jorge Montalvo	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

_____

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

_____

_____

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, NY 12207
Phone: 518-463-3200 | Secure Fax: 518.463.5993

Immigration 101: Immigration Law For Non-Immigration Attorneys

2.0 MCLE credits in Areas of Professional Practice for both experienced and newly-admitted attorneys

AGENDA

Introduction and Overview of Agenda

Agency Structure and Document Identification

Avenues to Obtaining Residency/Grounds of Inadmissibility

Deferred Action for Childhood Arrivals ("DACA")

Citizenship: Naturalization and Derivation

Benefits for Citizens, etc.

Table of Contents

Immigration 101: Immigration Law for Non–Immigration Attorneys

Topic 1

Basics of Immigration Law

The Legal Aid Society
New York Immigration Coalition
NYS Office For New Americans

Why is immigration status important – what does it determine?

- Vulnerability to removal
- Right to work legally
- Ability to petition for family members
- Right to get Social Security number
- Eligibility for public benefits
- Right to vote

Sources of Law

- Immigration and Nationality Act
- Code of Federal Regulations
- Court decisions

Department of Homeland Security (DHS)

- **ICE** – U.S. Immigration and Customs Enforcement
- **USCIS** - U.S. Citizenship and Immigration Services
- **CBP** – U.S. Customs and Border Protection

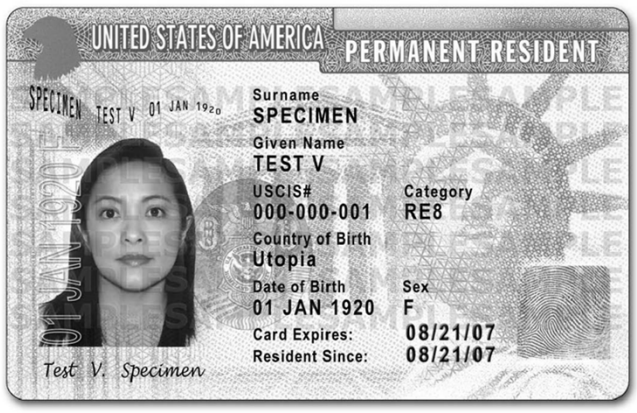
Different Immigration Statuses

- United States Citizen – USC
- Legal Permanent Resident - LPR
- Humanitarian categories: Refugee/Asylee, TPS
- Nonimmigrant status (visitor, student, fiancé, U, etc.)
- Undocumented persons

U.S. Passport

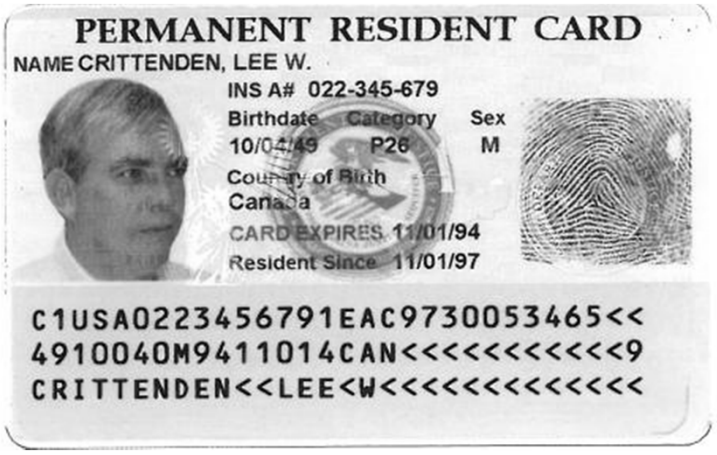
U.S. Certificate of Naturalization

Permanent Resident (Green) Card



Old Green Cards

Old Green Cards



Old Green Cards

Old Green Cards

Immigrant Visa

- Registration number = A number

Non-Immigrant Visa

- B1/B2 = visitor (tourist)
- Expiration date not controlling – look at I-94 date instead

I-94 Arrival/Departure Record

- June 25, 2006 = entered
- April 23, 2009 = authorized to stay until
- L-1 = visa type
- ATL = Atlanta Airport
  - NYC or MIA
- After April 2013, need to download from CBP


Departure Number

OMB No. 1651-0111

626633123 12

ADMITTED ATL JUN 25 2006 Class. L-1 Until April 23, 2009

I-94
Departure Record

14. Family Name
SAMPLE

15. First (Given) Name
JANE

16. Birth Date (Day/Mo/Yr)
23 03 68

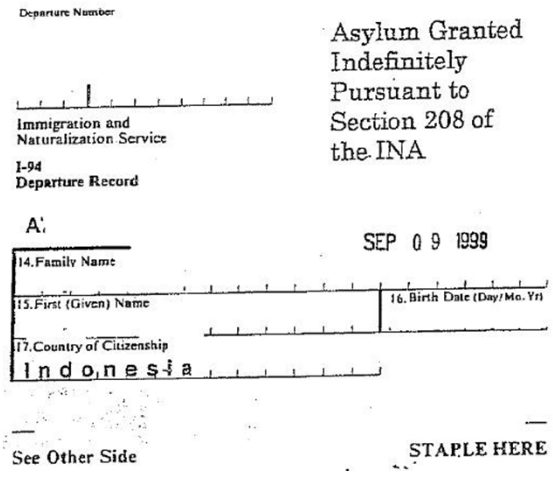
17. Country of Citizenship
NEW ZEALAND

See Other Side

CBP Form I-94 (10/04)

STAPLE HERE

I-94 for Asylee/Refugee


Departure Number

Asylum Granted Indefinitely Pursuant to Section 208 of the INA

Immigration and Naturalization Service

I-94
Departure Record

A

SEP 09 1999

14. Family Name

15. First (Given) Name

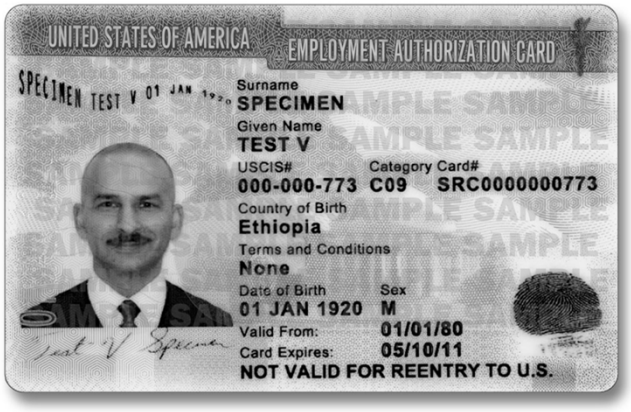
16. Birth Date (Day/Mo. Yr)

17. Country of Citizenship
Indonesia

See Other Side

STAPLE HERE

Employment Authorization



Employment Authorization

Becoming a Lawful Permanent Resident (Getting a Green Card)

Avenues for obtaining Legal Permanent Resident (LPR) Status

- Family based immigration
- Employment based immigration
- Self-petitions
- Diversity lottery
- Registry
- Humanitarian entrants

To become an LPR or non-immigrant

- Grounds of inadmissibility:
  - crimes committed and/or convictions
  - Health – TB, SARS, etc.
    - HIV is no longer an issue
  - immigration violations/illegal entry
  - public charge

- Counting towards admissibility:
  - Good Moral Character ("GMC")

Avenues for obtaining Legal Permanent Resident (LPR) Status

1. Family-based

- Step 1: Petitioner establishes qualifying relationship
- Step 2: Beneficiary submits application to adjust status

Relatives: Immediate versus Preference

- Immediate relatives:
  - Spouses of USC
  - children of USC (unmarried and under 21)
  - parents of USC (21 or older)

- Preference relatives:
  - 1st = sons & daughters of USC (21 or older, unmarried)
  - 2A = spouses and children (under 21, unmarried) of LPR
  - 2B= sons & daughters of LPR (21 or older, unmarried)
  - 3rd = sons & daughters of USC (any age, married)
  - 4th = siblings of USC

Visa Bulletin – priority dates

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	15JAN09	15JAN09	15JAN09	22FEB95	22DEC04
F2A	08NOV14	08NOV14	08NOV14	01SEP14	08NOV14
F2B	22OCT09	22OCT09	22OCT09	08SEP95	01JUN05
F3	01DEC04	01DEC04	01DEC04	22OCT94	01FEB94
F4	08AUG03	01JAN03	01JAN01	15APR97	01DEC92

- Visa filing date (before priority date)
- Visa final action date (on or after priority date)
- travel.state.gov > Immigrant Visas

Adjusting Status vs. Consular Processing

- "Adjustment of Status" – process of applying for green card while living **in** the United States
  - USCIS
- "Consular Processing" – process of applying for green card while living **outside** the United States
  - USCIS, National Visa Center and Dept. of State

Conditional Permanent Residence

- Only if got green card based on marriage to a U.S. citizen or lawful permanent resident within 2 years or less after the date of marriage
- Green card expires in two years instead of ten years.

Conditional Permanent Residence

- 90 days before green card expires, spouses must jointly file a petition to remove the conditions
- Waiver of the joint filing requirement:
  - entered marriage in “good faith” but then divorced
  - entered marriage in “good faith” but spouse died
  - victim of domestic violence
  - extraordinary circumstances

Conditional Permanent Residence

- Same for dependent children of the conditional resident who also received their green card through the marriage
  - granted conditional residence
  - need to lift their conditions as well
  - proof of parents’ good faith marriage

Avenues for obtaining Legal Permanent Resident (LPR) Status

2. Employment based

- Step 1: Employer establishes qualifying relationship
- Step 2: Beneficiary submits application to adjust status

- Similar to family based, but petitioner is employer
- Same inadmissibility issues apply

INA § 245(i)

- Sort of amnesty program
- Allowed certain otherwise-ineligible individuals to get their green cards without first having to leave the U.S.
- Expired April 30, 2001
  - Grandfathered in, if had certain family- or employment-based petitions filed on or before that date

Avenues for obtaining Legal Permanent Resident (LPR) Status

3. Self-petitions

- Widow(er)s of U.S. citizens
- Violence Against Women Act ("VAWA")
- Battered Spouse Waiver
- Special Immigrant Juvenile Status ("SIJS")

Avenues for obtaining Legal Permanent Resident (LPR) Status

4. Diversity & 5. Registry

- Diversity Lottery – for nationals of countries that have low numbers of immigrants
- Registry – persons who entered before Jan. 1, 1972 and lived in U.S. continuously

Avenues for obtaining Legal Permanent Resident (LPR) Status

6. Humanitarian

- Country specific – Cuba, Nicaragua, Haiti
  - TPS and other programs
- Refugees, asylees
  - Race, religion, national origin, membership in a particular social group, political opinion
- U visas – crime victims
- T visas – victims of human trafficking

Deferred Action for Childhood Arrivals– DACA

- At least 15 years of age now
  - Born on or after June 16, 1981
- Entered US before 16
- Continuously in US since June 15, 2007
- Out of status since June 15, 2012
- Enrolled in school, graduated from HS, GED or honorable discharge from military
- No felonies, “significant misdemeanors”, or 3 misdemeanors of any kind

Deferred Action (cont.)

- If approved – Deferred Action for 2 years
  - possibility of renewal
- Work permit for 2 years
  - possibility of renewal
- Still "out of status," just free from threat of deportation and allowed to work
- Can obtain Social Security Number and driver's license (in some States)
  - but no Federal Financial Aid

Deferred Action for Parents of Americans and LPRs (DAPA)

- Have U.S. citizen or legal permanent resident child
  - Child born on or before Nov. 20, 2014
  - Child can be any age, and married or single
- Entered on or before Jan. 1, 2010
- Were physically present on Nov. 20, 2014
- Don't have certain criminal issues
- Lacked legal status from Nov. 20, 2014 to present
- Pay taxes, prospectively

US vs. Texas

- Expanded DACA and DAPA announced Nov 20, 2014
- Enjoined by federal judge in Texas
  - Injunction upheld by 5th Circuit Court of Appeals
  - Does not affect original DACA
- Supreme Court tied 4-4 in June 2016, so injunction stands
- DOJ asked Supreme Court to hear case again once there's a 9th Justice

Cancellation of Removal for Non-Lawful Permanent Residents

- In U.S. continuously for 10 years
- Good moral character
- Certain crimes make you ineligible
- Demonstrate exceptional and extremely unusual hardship to USC or LPR spouse, parent, or child

**Only available in removal proceedings

Becoming a U.S. Citizen

Becoming a U.S. Citizen

- LPR for 5 years
- LPR for 3 years, if married to USC
- No wait, if enlist in armed forces during time of hostilities
- Good moral character
- Physical presence
- Continuous residence
- Pass civics exam
- Pass English exam
- Selective Service registration

Citizenship test in native language

- 50 years old, green card for 20 years
- 55 years old, green card for 15 years
- 65 years old, green card for 20 years
  - Easy questions

Deriving citizenship

- The following eligibility requirements pertain to children turning 18 after 2/27/2001:
  - Child was less than 18 years old
  - Had green card
  - One or both parents was U.S. citizen
  - Child was in legal and physical custody of that parent

Why immigrants should apply for U.S. citizenship

- Cannot be deported
- Petition for relatives (petitioner 21 or over)
  - Did relative enter U.S. with or without a visa?
- Vote
- Receive government benefits
- Can travel and live abroad longer than a year
  - Get help from U.S. Embassies abroad
  - Stay abroad for as long as you want

Benefits for U.S. citizens

- Food stamps
- Medicaid
- Subsidized housing
  - Section 8
  - NYCHA Projects
- Social Security, SSI
- Unemployment
- State disability

What if I am undocumented?

Benefits for undocumented individuals

- Emergency Medicaid
- Children's Health Insurance Plus (CHIP)
- ADAP

- If PRUCOL:
  - Medicaid
  - HASA

What is PRUCOL?

- DHS knows person is here
- Permission or acquiescence by DHS
- Not enforcing removal
  - Order of Supervision
  - Pending or approved application
  - Deferred action
  - Administrative closure

- HRA PRUCOL Eligibility Desk Aid

Working if undocumented

- Not authorized to work
- If working anyway, pay taxes
  - Good moral character
- Tax ID number
  - IRS Form W-7
  - Current passport

Going to school if undocumented

- Primary and secondary school (K-12)
  - Plyler v Doe (U.S. Supreme Court decision)

- NYS colleges and universities
- Some private schools
- No federal financial aid
- Some scholarships and grants

Miscellaneous

How do I get an A number?

- When file an application, USCIS will assign you an A number
- Until then, you won't have one
- A# Hotline (800) 898-7180

Warnings

Common criminal convictions that could result in deportation:

- Theft or fraud offense
- Controlled substance offense
  - Including marijuana
- Sex offense
- Assault offense
- Firearm offense
- Domestic violence offense
- Violation of order of protection
  - Civil or criminal
- Prostitution offense

Warnings

Immigrants with criminal record(s) should speak with an immigration attorney before:

- Applying for a green card
- Renewing a green card
- Applying for work authorization
- Applying for citizenship
- Filing any other application or petition with USCIS
- Traveling outside the U.S.

Certificate of Disposition

- Clients who have criminal arrests or convictions should obtain a certificate of disposition for each arrest

ICE Online Detainee Locator System

- www.ice.gov/locator
- Two ways to search:
  - A-Number and country of birth, or
  - Last name, first name and country of birth
- Detention Hotline
  - (212) 577-3456, Wed 1-5pm

Questions?


THE
LEGAL
AID
SOCIETY
NEW YORK STATE
OFFICE for
NEW AMERICANS
E PLURIBUS UNUM
nyic
NEW YORK IMMIGRATION COALITION

Biographies

Speaker Biographies

Hasan Shafiqullah, Esq.

Hasan Shafiqullah is a supervising attorney at the Legal Aid Society's Immigration Law Unit. Previously, he was a staff attorney in the same unit, and before that was a staff attorney in the HIV Unit at Legal Aid's Harlem Community Law Office, and in the HIV Unit at Queens Legal Services. He began is legal career representing tenants in San Francisco. Over the past nineteen years, he has represented clients in a range of matters, including immigration, housing, family, consumer, name change, divorce and probate, and has given numerous trainings to clients and staff at nonprofit organizations and hospitals, on issues such as immigrant rights, housing rights, HIV confidentiality, attorney-client confidentiality and permanency planning. He is a graduate of the University of California Hastings School of Law and of the University of Arizona, and holds a certificate in French to English legal translation from New York University.

Camille Mackler, Esq.

Camille J. Mackler, Esq. is the Director of Legal Initiatives at the New York Immigration Coalition, where she works with NYIC members and a variety of stakeholders on issues relating to immigration law in New York. Before joining the NYIC in March 2013, Ms. Mackler worked in private practice representing immigrants before US Immigration Courts and Federal Courts of Appeals. She focused primarily on asylum and refugee, deportation proceedings, immigration detention, and family-based immigration issues.

Ms. Mackler is currently the co-chair of the Media and Advocacy committee for the NY Chapter of the American Immigration Lawyers Association. She has a Juris Doctor. from New York Law School and a Bachelor of Science in Foreign Service from Georgetown University's Walsh School of Foreign Service. She is also a frequent lecturer on immigration law and advocacy issues surrounding the practice of immigration law.

Jorge Montalvo

Jorge Montalvo currently serves in New York Governor Andrew Cuomo's administration as the top policy advisor to the New York Secretary of State. In this role, he has created the New York State Office for New Americans. The Office's recently opened Opportunity Centers - 27 in total - have been heralded as the model for immigrant integration policy in this country. In their first year alone, the Centers have served more than 34,000 immigrants with English-for-Speakers-of-Other-Languages training; naturalization and Deferred Action for Childhood Arrivals assistance; federal immigration law and policies information and referrals; and business development.

Among his many accomplishments, Montalvo developed the state's Opportunity Agenda to ensure those living in poverty were included in the state's economic revitalization, helped merge the state's consumer protection and occupation licensing agencies and created the Empire State Fellows program — an innovative approach to attracting and training cross-sector leaders for public service. Montalvo collaborates with economic, environmental, justice and industry groups, state and local agencies, and the members of the state legislature on the New York State CFP.

Previously, Montalvo helped lead two state government agencies, created and oversaw the state's *Safe Toy NY* toy testing program and served as the policy advisor to the NYS Council on Interactive Media and Youth Violence. Additionally, he managed New York City's 2012 Olympic Bid's corporate relations and volunteerism efforts and served in New York City Mayor Bloomberg's Economic Development Office. Montalvo graduated from Dartmouth College with a degree in chemistry and spends his weekends teaching free GED and SAT prep classes to disconnected youth in the South Bronx.

ASYLEES, REFUGEES, AND SPECIAL PROGRAM PARTICIPANTS

by

JEFFREY A. HELLER, ESQ.

Attorney at Law
New York City

and

WALTER H. RUEHLE, ESQ.

Legal Aid Society of Rochester
Rochester

OUTLINE- ASYLUM, WITHHOLDING AND CAT
NEW YORK STATE BAR ASSOCIATION TRAINING 5/6/14

I. ELEMENTS OF ASYLUM - definition at 8 U.S.C. §1101(a)(42)(A)

A) What (Persecution)
1) defined - infliction of suffering or harm required, which is more than harassment/discrimination. Ivanishvili v. USDOJ, 433 F.3d 332, 341 (2nd Cir. 2006). Physical harm not required. Manzur v. DHS, 494 F.3d 281, 291 (2nd Cir. 2007)
3) types of harm which may qualify are
a) arrest
b) detention
c) physical harm
d) threats - can be anonymous
e) economic - test is severe economic disadvantage or deprivation of food, housing, employment and other life essentials. Matter of T Z, 24 I&N Dec. 163 (BIA 2007)
f) mental (PTSD)
g) surveillance
4) aggregate - all harms must be added together to determine whether client has suffered persecution. Manzur, 494 F.3d at 290.

B) When (Past v. future persecution)
1) fear must be "well-founded" (objectively speaking)- 10% probability sufficient. INS v. Cardoza-Fonseca, 480 U.S. 421, 431, 440 (1987)
2) past persecution - establishes required "well-founded fear"[1] unless rebutted. 8 CFR 208.13(b)(1)
a) rationale - past is a predictor of future
b) presumption of well founded fear rebutted. 8 CFR 208.13(b)(1)(i) - by either
(i) fundamental change in circumstances which is not transitory (e.g. change in government) or
(ii) internal relocation, if it can be reasonably accomplished
3) future persecution - 8 CFR 208.13(b)(2)(iii). Can be shown by either proof of
a) being singled out for persecution OR a
b) pattern and practice of persecution suffered by

[1]If the who, what reason, and why elements, discussed later in the outline, are satisfied.

group which applicant included in

4) "humanitarian asylum" - 8 C.F.R. 208.13(b)(1)(iii). if presumption flowing from past persecution is rebutted, can still get asylum if either
   a) persecution severe enough (Matter of Chen, 20 I&N Dec. 16 (BIA 1989)(15 year victim of Chinese cultural revolution) or
   b) other serious harm would be suffered on return which is not due to membership in protected group. Matter of L S , 25 I&N Dec. 705 (BIA 2012)(civil strife, severe economic, mental or emotional harm)

C) Who - the persecutor must be
   1) government OR a
   2) person or group government is unable or unwilling to control (rebel organizations, gangs, abusers). Rizal v. Gonzales, 442 F.3d 84 (2nd Cir. 2006); Matter of O Z and I Z , 22 I&N Dec. 23 (BIA 1998)

D) What reason (one suffices) - protected groups are
   1) race
   2) religion
   3) nationality
   4) political opinion - need not be member of political party. Osorio v. INS, 18 F.3d 1017, 1030 (2nd Cir. 1994). Includes action exposing official misconduct. Zhang v. Gonzales, 426 F.3d 540 (2nd Cir. 2004)
   5) membership in a particular social group
      a) origin - 1951 Refugee Convention but not defined; "immutability" test created. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)
      b) definition in flux - is "social distinction" required? Matter of W G R, 26 I&N Dec. 208, 215-218 (BIA 2014)
      c) examples
         (i) yes - sexual orientation, family, gender-defined, ex-police officers, parents of Burmese dissidents, former child soldiers
         (ii) no - deportees from U.S., mentally ill, affluent
         (iii) current issues - gang cases, victims of domestic violence/ Mexican drug wars
   6) imputation by persecutor of protected ground qualifies. Rizal

E) Why (on account of)
   1) must show that the persecutor harmed the applicant because of the applicant's membership in a protected group - fact that persecutor may have a motive that falls within five grounds does not suffice. INS v. Elias-Zacarias, 502 U.S. 478, 482-3 (1992)(attempt by guerilla organization to recruit applicant who resisted due to fear government would harm family, not because of any political reason he held; fact that guerillas had political motive, which was to increase their ranks, is irrelevant)
   2) at least one central reason - would not have harmed applicant, were it not for reason, but it need not be the most important or only reason. 8 USC §1158(b)(1)(B)(I); Parussimova v. Mukasey, 555 F.3d 734, 740-1 (9th Cir. 2009)
   3) proof - circumstantial evidence suffices. INS v. Elias-Zacarias, 502 U.S. at 483

F) Bars. 8 USC §1158(a)(2),(b)(2)
   1) one year filing deadline - exceptions are "changed" or "extraordinary" circumstances, e.g. minors, PTSD, in valid legal status, ineffective assistance of counsel, changed country conditions
   2) firm resettlement
   3) aggravated felony conviction
   4) particularly serious crime conviction
   5) serious non-political crime (commission of)
   6) persecutor
   7) terrorist or danger to security of U.S.
   8) filed before and denied
   9) safe 3rd country agreement with Canada - asylum seeker must, in general, apply in first country they enter and cannot apply in both

II. PROVING THE CASE - CREDIBILITY

A) What can be considered - 8 USC §1158(b)(1)(B)(iii) Demeanor, candor, responsiveness of witness, inherent plausibility of claim, consistency of application with testimony and other statements, internal consistency of claim, consistency with country conditions, and any inaccuracy or falsehood.

B) Adjudicator dilemna - consequences of erroneously denying a meritorious case (Xue v. INS, 439 F.3d 111, 113-4 (2nd Cir. 2006) vs. ensuring that the correct facts are being presented (Singh v. Holder, 638 F.3d 1264, 1270

(9th Cir. 2011 which describes the application process as an "honor system")

C) Inconsistencies - most common adverse credibility factor
   1) are they the sign of a liar? (errors can be due to memory and trauma). Ren v. Holder, 648 F.3d 1079, 1085-6 (9th Cir. 2011)
   2) immaterial inconsistencies/lies - can doom a case. However, the statute uses a "totality of the circumstances" and "all relevant factors" language which controls whether immaterial inconsistencies are fatal. Lin v. Mukasey, 534 F.3d 162, 167 (2nd Cir. 2008). Put differently, a "rule of reason" and "common sense" must be applied. Shreshta at 1044; Matter of JYC, 24 I&N Dec. 260, 262 (BIA 2007)(also must consider applicant's individual circumstances); Slyusar v. Holder, 740 F.3d 1068, 1075 (6th Cir. 2014)(should exercise "due care" when denying claim based on inconsistencies unrelated to claim)

D) Demeanor - good witness preparation can avert these issues

E) Plausibility - truth sometimes stranger than fiction, as Lord Byron noted; use country conditions to prove that the surreal is real. See Ruehle, "To Speculate Or Not to Speculate - The Search For Plausibility:" Immigration Briefings (West: February, 2009)

III. PROVING THE CASE - CORROBORATION

A) Is it required? - credible testimony alone can suffice if persuasive and referring to specific facts. However, if adjudicator determines that applicant should provide corroborating evidence to buttress credible testimony, such evidence must be provided unless the applicant does not have it and cannot reasonably obtain it. 8 USC §1158(b)(1)(B)(ii). Alternatively, if the applicant's testimony is not credible, corroboration may be used to establish credibility.

B) What to provide? - legislative history of REAL ID Act refers to Matter of S M J, 21 I&N Dec. 722, 725(BIA 1997). SMJ said that proof of nationality, media accounts of large demonstrations, evidence of public office, medical records, and other evidence central to the claim and easily subject to verification should be produced. At a minimum, relevant human rights information about the

applicant's country should be produced.

C) What need not be provided
   1) Corroboration of corroboration. Marynenko v. Holder, 592 F.3d 594, 602 (4th Cir. 2010)
   2) Duplicative corroboration not required. Secaida - Rosales v. INS, 331 F.3d 297, 311-312 (2nd Cir. 2003)

D) What cannot be reasonably obtained
   1) note from persecutor. Secaida-Rosales, 331 F.3d at 311; Matter of SMJ, 21 I&N Dec. at 725
   2) arrest warrant
   3) statement from relative in native country (under some circumstances)
   4) medical records from government facility
   5) HINT: for certain biographic records (birth, marriage, divorce, death, etc.)the U.S. State Department Foreign Affairs Manual will tell you if they are available

E) Evidentiary issues - rules of evidence do not apply. Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988). However, IJ may, when deciding whether to consider a document, look at such issues as
   1) authenticity
   2) chain of custody
   3) best evidence rule
   4) with affidavits/statements, the source of the information - double+ hearsay is not favored

IV. WITHHOLDING OF REMOVAL. 8 USC §1231(b)(3)

A) Significance - if subject to one of the asylum bars which do not apply to withholding (i.e. I F(1), 2, or 8) or if asylum denied as a matter of discretion

B) Elements - same as asylum except
   1) burden of proof - at least 50% possibility of persecution.
   2) level of harm required - threat to life or freedom
   3) no humanitarian grant
   4) does not lead to permanent status

C) Mandatory relief - as opposed to asylum, which can be denied as a matter of discretion (rarely done)

V. CONVENTION AGAINST TORTURE (CAT). 8 CFR 1208.18

A) Significance - person barred from asylum or withholding can obtain. There are no bars to the type of CAT relief known as deferral of removal

B) Elements
1) burden of proof - at least 50% chance of torture
2) protected grounds - do not apply
3) harm feared - torture
4) state involvement - higher standard if the torturer is not a state actor

C) Mandatory

VIII. RESOURCES

A) Asylum Officer Basic Training Course - found at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2a1d1a877b4bc110VgnVCM1000004718190aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD

B) Well Founded Fear documentary http://www.pbs.org/pov/wellfoundedfear/

C) Germain, Regina AILA's Asylum Primer

D) Anker, Deborah Law of Asylum in the U.S.

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DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

I. ORIGIN - DREAM Act (proposed legislation allowing certain youth to become permanent residents through a two step process)

II. DEFERRRED ACTION (THE BALANCE SHEET)

A) Pros
1) benefit which prevents, for at least two years, commencement of removal proceedings
2) employment authorization can be obtained
3) with employment authorization, can get Social Security number and driver's license
4) applying will not jeopardize undocumented relatives
5) can apply for advance parole, which permits travel legally outside U.S.

B) Cons
1) Subject to revocation at any time without any prior notice
2) Does not lead to any permanent status
3) Cannot get federal or NY subsidized student loans
4) cannot apply for relatives who themselves are not eligible for deferred action
5) person, by applying, makes themselves known to Immigration. **NO ONE WHO HAS EVER BEEN ENCOUNTERED BY THE POLICE OR BY IMMIGRATION, OR INVOLVED IN GANG ACTIVITIES, SHOULD APPLY FOR DEFERRED ACTION UNLESS THEY FIRST CONSULT AN IMMIGRATION ATTORNEY.**

III. DACA ELIGIBILTY/DOCUMENTATION REQUIREMENTS

A) Age (maximum)
1) requirement - must have been born on or after 6/16/81 (under 31 as of 6/15/12)
2) documentation - the instructions to the application form (I-821D) list a requirement for identity, but not age documents. These include:
   a) passport;
   b) birth certificate along with photo ID;
   c) foreign national ID with photo and/or fingerprint
   d) federal or state ID with name and photo;
   e) school ID with photo;
   f) military ID with photo;
   g) any other relevant document other than an affidavit (sworn statement).

B) Age (minimum) when filing application
1) not in removal - at least 15
2) in removal or have final order - can be younger than 15

C) Age upon initial entry to U.S.
1) requirement - before 16
2) documentation
a) passport with entry date stamp
b) I-94/I-94W/I-95 (card stapled in passport)
c) other Immigration document
d) travel records
e) school records
f) hospital or medical records
g) records from house of worship
h) any other relevant document (but not affidavit)
3) departure after entry - if applicant entered before age 16, and then left U.S., must show that they returned to the U.S., and established residence here, before 16

D) No immigration status as of 6/15/12
1) why 6/15/12? - date policy announced
2) requirement - as of that date, must have no status, so either
a) entered the U.S. without inspection and still have no status or
b) if entered with visa, authorized stay must have expired before 6/15/12 and did not obtain some other status
3) other pending application - if pending as of 6/15/12, can still apply for DACA.
3) documentation - if entered illegally, do not have to prove illegal entry unless you are in removal proceedings (in that case, provide removal papers if they show pre 6/16/12 entry). If entered legally, but status expired, provide I-94/I-94W/I-95 showing expired status, deportation documents from Immigration, or other relevant documents.

E) Continuous residence in the U.S.
1) from when - 6/15/07 to date application filed
2) absences
a) prior to 8/15/12 - do not disqualify if the absence was “brief, casual and innocent”
b) after 8/15/12 - any absence disqualifies

ANYONE WHO LEFT THE U.S. AFTER 6/15/07 SHOULD CONSULT WITH AN IMMIGRATION ATTORNEY BEFORE APPLYING

3) documentation of continuous residence - rent receipts, rental agreements, deeds, mortgages, utility bills, employment, school, medical, religious or military records, money order receipts, passport entries, birth certificates for children, bank records, letters, car documents, or any other relevant document. Each document should have the applicant's name, address and date on it. Need at a document for each year of the five+ year period. Include documents that show any noteworthy achievements or activities (i.e. volunteering) by the applicant. Affidavits from other persons can be used to prove this requirement (but only if the applicant has some of the documents listed previously).
4) documentation of absences - plane, train or bus tickets, passport entries, hotel receipts, and documents showing purpose of trip. Affidavits can be used to prove this requirement.

F) Presence in the U.S.
1) when - on 6/15/12 and on date application filed. Reason why applicant must have been here on 6/15/12, even though brief absences after 6/15/07 allowed, because USCIS does not want to grant a benefit to someone who illegally re-entered U.S. to take advantage of this benefit
2) documentation - documentation noted under III(E)(3). Not necessary to have a document showing in the U.S. as of 6/15/12, if you have documents with dates near that date, both before and after.

G) Educational/military requirement - must, when filing application have
1) high school diploma or
2) GED certificate or
3) enrollment in a program for obtaining a GED (to enroll, must show at least 8th or 9th grade equivalency) or high school diploma or
4) currently enrolled in school, including college or
5) enrollment in an education, literacy (including ESL) or career training program (including vocational training) designed to lead to placement in college, job training or employment. If program is not funded by federal or state money, it must show "demonstrated effectiveness" in placing students in order for the applicant to qualify for DACA.
6) an honorable discharge from the Coast Guard or other

branch of the U.S. Armed Forces. NOTE - since undocumented persons are not eligible to enlist, such a situation will be rare.

H) Criminal bars - unless "exceptional circumstances" exist, the following convictions disqualify a person from DACA:
   1) felony conviction - a felony is a criminal offense, the possible sentence for which is imprisonment for more than one year
   2) three separate misdemeanor convictions - a misdemeanor is a criminal offense, the possible sentence for which is imprisonment for one year or less, but more than five days. If the misdemeanors occurred on the same date, and were part of the same act, then they will not count as "separate" misdemeanors. Minor traffic offenses also do not count.
   3) a "significant" misdemeanor conviction - these are any misdemeanor conviction
      a) for domestic violence, sexual abuse or exploitation, burglary, illegal possession or use of a firearm, DWI/DUI, or drug distribution or trafficking OR
      b) for which the applicant was actually sentenced to imprisonment of more than 90 days.

I) Threat to national security and public safety - includes gang activities, arrests that did not result in convictions, and any terrorist activities.

J) "Exceptional circumstances" test - even if the applicant is barred on criminal, national security or public safety grounds, can still be granted DACA if they can show "exceptional circumstances" (term not defined).

K) Totality of the circumstances" test - conversely, even if the applicant satisfies all the eligibility requirements, they can be denied DACA based on the "totality of the circumstances." This conduct can, but does not necessarily, include: arrests which did not lead to convictions, multiple traffic violations, fraud committed on prior immigration applications and false claims to U.S. citizenship. Whether it includes other factors (use of false immigration/Social Security documents, use of false documents to enter the U.S. or other immigration violations) is not yet clear. **FOR THIS REASON, ANYONE WHO HAS EVER ENGAGED IN ANY TYPE OF QUESTIONABLE BEHAVIOR, EITHER IN GENERAL OR WITH IMMIGRATION, SHOULD**

NOT APPLY FOR DEFERRED ACTION UNLESS THEY FIRST CONSULT AN IMMIGRATION ATTORNEY.

IV. APPLICATION PROCESS

A) What must be filed
1) I-821D
2) I-765 request for Employment Authorization (must be filed even if the applicant does not need to work)
3) I-765 Worksheet (must have an economic necessity to work, even if not planning to work)
4) two passport pictures
5) documents proving identity, age at entry to U.S., required residence, school/military requirement, and out of status as of 6/15/12 (unless entered illegally)
6) money order for $465 payable to U.S. Department of Homeland Security

B) Fee exemption
1) who is eligible - income less than 150% of poverty and either
   a) under 18 and homeless, in foster care or lacking parental support
   b) have a serious, chronic disability
   c) medical bill for either self or immediate family member of more than $25,000 in last year
2) how to apply - must request in letter. If approved, can then send in rest of application with approval letter

C) After application filed
1) will get a receipt from USCIS
2) will receive later a fingerprint appointment notice
3) if more documents required, USCIS will send request
4) if USCIS plans to deny application, it appears they will first send a letter which gives the applicant a chance to respond
5) if approved, get approval letter, and then within 90 days, work permit. Applicant will not be placed in removal proceedings, and no information about their family members will be provided to Immigration and Customs Enforcement (ICE) or the Border Patrol (BP).
6) if denied, no appeal but can ask for review if you responded to a document request which USCIS says you did not respond to, or if evidence request was mailed to wrong address
7) AR 11 required for address change ***VERY IMPORTANT***

V. CONFIDENTIALITY

A) application denied - none of the information will be shared with either ICE or the BP for purposes of starting a removal proceeding unless the applicant has a serious criminal record, has committed immigration fraud, has a history of immigration violations, or is a threat to national security. Even if a removal proceeding is started against the applicant, information in the application will not be used to start a proceeding against family members.

B) non-removal purposes - information about the applicant can be shared with ICE or BP to determine whether the applicant is eligible, to identify or prevent fraudulent DACA claims, for national security (this also applies to family members), or for the investigation or prosecution of a criminal offense (this also applies to family members).

VI. TRAVEL OUTSIDE U.S. - if application approved, applicant can apply for advance parole, which permits travel outside the U.S. and return. Parole is granted sparingly, and only for humanitarian, employment or educational reasons. **ANYONE WHO WANTS TO APPLY FOR ADVANCE PAROLE SHOULD SPEAK TO AN IMMIGRATION ATTORNEY BEFORE APPLYING - IN SOME CASES, LEAVING THE U.S. CAN JEOPARDIZE A FUTURE IMMIGRATION APPLICATION.**

VII. RENEWAL OF DACA

A) can be renewed
B) applicant can request renewal even if then over 31

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U.S. Citizenship and Immigration Services

Temporary Protected Status

What is TPS

The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. USCIS may grant TPS to eligible nationals of certain countries (or parts of countries), who are already in the United States. Eligible individuals without nationality who last resided in the designated country may also be granted TPS.

The Secretary may designate a country for TPS due to the following temporary conditions in the country:

- Ongoing armed conflict (such as civil war)
- An environmental disaster (such as earthquake or hurricane), or an epidemic
- Other extraordinary and temporary conditions

During a designated period, individuals who are TPS beneficiaries or who are found preliminarily eligible for TPS upon initial review of their cases (*prima facie* eligible):

- Are not removable from the United States
- Can obtain an employment authorization document (EAD)
- May be granted travel authorization

Once granted TPS, an individual also cannot be detained by DHS on the basis of his or her immigration status in the United States.

TPS is a temporary benefit that does not lead to lawful permanent resident status or give any other immigration status. However, registration for TPS does not prevent you from:

- Applying for nonimmigrant status
- Filing for adjustment of status based on an immigrant petition
- Applying for any other immigration benefit or protection for which you may be eligible

PLEASE NOTE: To be granted any other immigration benefit you must still meet all the eligibility requirements for that particular benefit. An application for TPS does not affect an application for asylum or any other immigration benefit and vice versa. Denial of an application for asylum or any other immigration benefit does not affect your ability to register for TPS, although the grounds of denial of that

application may also lead to denial of TPS.

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Countries Currently Designated for TPS

Select the country link for additional specific country information.

Designated Country	Most Recent Designation Date	Current Expiration Date	Current Re-Registration Period	Current Initial Registration Period	Employment Authorization Document (EAD) Automatically Extended Through
El Salvador	March 9, 2001	March 9, 2015	May 30, 2013 through July 29, 2013	N/A	March 9, 2014
Haiti	July 23, 2011	January 22, 2016	March 3, 2014 through May 2, 2014	N/A	January 22, 2015
Honduras	January 5, 1999	January 5, 2015	April 3, 2013 through June 3, 2013	N/A	January 5, 2014
Nicaragua	January 5, 1999	January 5, 2015	April 3, 2013 through June 3, 2013	N/A	January 5, 2014
Somalia	September 18, 2012	September 17, 2015	November 1, 2013 through December 31, 2013	N/A	NO Automatic Extension* *Sufficient time was deemed available to issue new EADs.
Sudan	May 3, 2013	November 2, 2014	January 9, 2013 through March 11, 2013	January 9, 2013 through July 8, 2013	NO Automatic Extension* *Sufficient time was deemed available to issue new EADs.
South Sudan	May 3, 2013	November 2, 2014	January 9, 2013 through March 11, 2013	January 9, 2013 through July 8, 2013	NO Automatic Extension* *Sufficient time was deemed available to issue new EADs.
Syria	Octopber 1, 2013	March 31, 2015	June 17, 2013 through August 16, 2013	June 17, 2013 through December 16, 2013	N/A

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Eligibility Requirements

To be eligible for TPS, you must:

- Be a national of a country designated for TPS, or a person without nationality who last habitually resided in the designated country;
- File during the open initial registration or re-registration period, or you meet the requirements for late initial filing during any extension

of your country's TPS designation (Late initial filers see 'Filing Late' section below);
- Have been continuously physically present (CPP) in the United States since the effective date of the most recent designation date of your country; and
- Have been continuously residing (CR) in the United States since the date specified for your country. (See your country's TPS Web page to the left). The law allows an exception to the continuous physical presence and continuous residence requirements for brief, casual and innocent departures from the United States. When you apply or re-register for TPS, you must inform USCIS of all absences from the United States since the CPP and CR dates. USCIS will determine whether the exception applies in your case.

You may **NOT** be eligible for TPS or to maintain your existing TPS if you:

- Have been convicted of any felony or two or more misdemeanors committed in the United States;
- Are found inadmissible as an immigrant under applicable grounds in INA section 212(a), including non-waivable criminal and security-related grounds;
- Are subject to any of the mandatory bars to asylum. These include, but are not limited to, participating in the persecution of another individual or engaging in or inciting terrorist activity;
- Fail to meet the continuous physical presence and continuous residence in the United States requirements;
- Fail to meet initial or late initial TPS registration requirements; or
- If granted TPS, you fail to re-register for TPS, as required, without good cause.

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What to File

You must include the necessary forms, evidence, fees or fee waiver when filing your TPS application. Below is information about what you must include in your TPS package. Please also check your country's specific TPS page to the left to see if there are any special filing instructions specific to your TPS designated country.

Forms

To register or re-register for TPS you must file:

1. Form I-821, Application for Temporary Protected Status
2. Form I-765, Application for Employment Authorization

PLEASE NOTE: Both I-821 and I-765 forms must be filed even if you do not want an Employment Authorization Document.

If you are aware when you apply that a relevant ground of inadmissibility applies to you and you need a waiver to obtain TPS, please include a Form I-601, Application for Waiver of Grounds of Inadmissibility, and fee or fee waiver request, with your TPS application package. However, you do not need to file a new Form I-601 for an incident that USCIS has already waived with a prior TPS application. USCIS may grant a waiver of certain inadmissibility grounds for humanitarian purposes, to assure family unity, or when it is in the public interest.

These forms are **free** and available on the forms section of the USCIS website at: www.uscis.gov/forms or by calling the toll-free USCIS Forms Hotline at 1-800-870-3676. Please look below at the fee chart to see what fees you must pay (a properly documented fee waiver request may be submitted. If you do not pay the proper fees (or submit a proper fee waiver request), your application will be rejected.

Evidence

When filing an initial TPS application, you must submit:

- **Identity and Nationality Evidence**: to demonstrate your identity and that you are a national of a country designated for TPS (or that you have no nationality and you last habitually resided in a country designated for TPS)
- **Date of Entry Evidence**: to demonstrate when you entered the United States
- **Continuously Residing (CR) Evidence**: to demonstrate that you have been in the United States since the CR date specified for your country (See your country's TPS Web page to the left)

Any document that is not in English must be accompanied by a complete English translation. The translator must certify that:

- He or she is competent both in English and the foreign language used in the original document; and
- the translation is true and correct to the best of his or her ability, knowledge and belief.

Identity and Nationality Evidence

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We encourage you to submit primary evidence, if available. If USCIS does not find that the documents you submit with your application are

sufficient, we will send you a request for additional evidence. If you cannot submit primary evidence of your identity and nationality, you may submit the secondary evidence listed below with your application.

The following table explains the different types of evidence you can provide.

Primary Evidence	• A copy of your passport • A copy of your birth certificate, accompanied by photo identification • Any national identity document bearing your photograph or fingerprint (or both) issued by your country, including such documents issued by your country's Embassy or Consulate in the United States. Such as a national ID card or naturalization certificate
No Primary Evidence	If you do not have any of the primary evidence listed above, you must submit an affidavit with: • Proof of your unsuccessful efforts to obtain such documents; and • An explanation why the consular process for your country was unavailable to you, and affirming that you are a national of your country. USCIS will interview you regarding your identity and nationality, and you may also submit additional evidence of your nationality and identity then if available.
Secondary Evidence	• Nationality documentation, such as a naturalization certificate, even if it does not have your photograph and fingerprint • Your baptismal certificate if it indicates your nationality or a parent's nationality • Copies of your school or medical records if they have information supporting your claim that you are a national from a country designated for TPS • Copies of other immigration documents showing your nationality and identity • Affidavits from friends or family members who have close personal knowledge of the date and place of your birth and your parents' nationality. The person making the affidavit should include information about how he or she knows you or is related to you, and how he or she knows the details of the date and place of your birth and the nationality of your parents. The nationality of your parents is of importance if you are from a country where nationality is derived from a parent.

You may also provide any other document or information that you believe helps show your nationality.

PLEASE NOTE: Birth in a TPS designated country does not always mean you are a national from that country. Please see your TPS designated country's nationality laws for further information.

Date of Entry Evidence

- A copy of your passport
- I-94 Arrival/Departure Record
- Copies of documents specified in the 'Continuous Residing Evidence' section below

Continuously Residing (CR) Evidence

- Employment Records
- Rent receipts, utility bills, receipts or letters from companies
- School records from the schools that you or your children have attended in the U.S.
- Hospital or medial records concerning treatment or hospitalization of you or your children
- Attestations by church, union or other organization officials who know you and where you have been residing

Please see the I-821 Form Instructions for more details on acceptable evidence.

Fees for Registering for TPS for the First Time

Applicant Age	Form I-821 Fee	Biometrics Fee	Requesting EAD	Form I-765	Total
under 14	$50	$0	Yes	$0	$50
under 14	$50	$0	No (You still must file the I-765)	$0	$50
14-65 (inclusive)	$50	$85	Yes	$380	$515
14-65 (inclusive)	$50	$85	No (You still must file the I-765)	$0	$135
66+	$50	$85	Yes	$0	$135
66+	$50	$85	No (You still must file the I-765)	$0	$135

NOTE: If you do not want an EAD, *do not* check any of the three boxes at the top of Form I-765 where it states "I am applying for:"; leave all three boxes blank. Only check one of these boxes if you want an EAD (and then look to the above chart for proper fee).

Fees for Re-registering for TPS

If you are re-registering for TPS you must include the following fees:

1. A biometric services fee of $85 (if you are 14 years of age or older)
2. The Form I-765, Application for Employment Authorization fee of $380, if you wish to receive an EAD

If you are not seeking an EAD, you must still submit Form I-765 without fee (and *do not* check any of the three boxes at the top of Form I-765 where it states "I am applying for:"; leave all three boxes blank). There is no fee required to submit Form I-821, Application for Temporary Protected Status.

Please check your country's specific TPS page to see if there is any special fee information specific to your TPS designated country.

Fee Waiver

If you cannot afford the costs associated with filing, please make sure to include a fee waiver request on Form I-912, Application for Fee Waiver (or other written request). For more information about filing a fee waiver request, visit the Fee Waiver Guidance Web page.

If you are filing an initial application and USCIS denies your fee waiver request on or before the registration deadline, you may re-file and pay the correct fees either before the registration deadline or within 45 days of the date on the fee waiver denial notice, whichever is later. For more information see http://www.uscis.gov/feewaiverin the TPS section.

If you are filing a re-registration application and USCIS denies your fee waiver request on or before the re-registration deadline, you are urged to re-file and pay the correct fees before the re-registration deadline or within 45 days of the date of the fee waiver denial notice, whichever is later. If you are unable to file before the re-registration deadline, you may still re-file after the deadline and this will be reviewed under good cause for late re-registration.

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When and Where to File

For information about when and where you must file your TPS application, please see the country specific pages to the left.

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Application Process

Step 1: File Your Petition
Once you have prepared your TPS package with the forms, evidence and filing fees (or request for a fee waiver), you will need to send it to the address indicated on your TPS country page to the left. Please make sure you **sign your application** and include the **correct fee** amount (or fee waiver request). These are the two of the most common mistakes USCIS receives on TPS applications. Please look above at the fee chart to see what fees you must pay (a properly documented fee waiver request may be submitted). If you do not pay the proper fees (or submit a proper fee waiver request), your application will be rejected.

Step 2: USCIS Receives Your Application
When USCIS receives your application, we will review it for completeness and for the proper fees or a properly documented fee waiver request. If your case meets the basic acceptance criteria, your application will be entered into our system and we will send you a receipt notice. At the top of this notice you will find a receipt number which can be used to check the status of your case online.

If you do not receive your receipt notice within three weeks of filing, you can call Customer Service at 1-800-375-5283 to request assistance. If your application is rejected at the initial review stage, you may re-file within the registration period after correcting the problems described in the USCIS notification.

If your application was rejected because we determined you were not eligible for a fee waiver, you may submit a new TPS package. Go to the 'Fee Waiver' section above for more information.

Step 3: USCIS Contacts You
If USCIS needs to collect your photograph, signature, and/or fingerprints (these are called biometrics), USCIS will send you an appointment notice to have your biometrics captured at an Application Support Center (ASC). Every TPS applicant over 14 years old must have their biometrics collected. Biometrics are required for identity verification, background checks and the production of an EAD, if one has been requested.

In certain situations, such as when it's impossible to take a fingerprint, USCIS can waive the collection of biometrics. In some cases, we may be able to reuse the biometrics previously collected in association with your previous TPS application. Even if you do not need to attend an ASC appointment, you still need to pay the biometrics fee (if required) to help cover costs associated with reusing your biometrics.

Step 4: Go to the ASC
When you report to an ASC, you must bring:

1. Evidence of nationality and identity with a photograph of you, such as a passport
2. Your receipt notice
3. Your ASC appointment notice
4. Your current EAD, if you already have one

If you cannot make your scheduled appointment, you may reschedule. To reschedule an ASC appointment, make a copy of your appointment notice to retain for your records, then mail the original notice with your rescheduling request to the ASC address listed on the notice. You should submit your request for rescheduling as soon as you know you have an unavoidable conflict on your scheduled ASC date. A new appointment notice will be sent to you by mail. Please note that rescheduling a biometrics appointment may cause the adjudication of your application to be delayed.

If you need an accommodation due to a disability that affects your ability to go to the ASC, please go to the Requesting Accommodations for Disabilities webpage for more information.

WARNING: If you fail to appear for your ASC appointment without rescheduling, or if you repeatedly miss scheduled ASC appointments, your TPS application could be denied for abandonment.

If there is an emergency need for you to travel abroad for humanitarian reasons, you may request expedited processing on your advance parole application (Form I-131) after you have appeared at an ASC for your biometrics appointment. Please see the travel section below for more information.

Step 5: USCIS Determines Work Eligibility
If you are not seeking an employment authorization document (EAD), skip to Step 6.

If you are ...	Then...
Applying for	USCIS will review your case to determine whether you are eligible to work before we make a final decision on your

TPS for the first time and seeking an EAD	TPS application. If you are found to be eligible upon initial review of your TPS application (prima facie eligible) you will receive an EAD. *Note*: If your application is denied and you choose to appeal to the USCIS Administrative Appeals Office (AAO) or request review of your application by an immigration judge, your EAD will be extended while you are waiting for a decision. If your EAD expires, to request an extension of your EAD, you must file a Form I-765 along with evidence of your appeal to the AAO or that you have requested an immigration judge to review your TPS application.
Re-Registering for TPS and seeking an EAD	You will receive your new EAD when your entire TPS package is adjudicated.

USCIS makes every effort to avoid backlogs at this step, but we urge you to remember that USCIS may experience a higher volume of applications in the first few months of a registration period.

Step 6: USCIS Adjudicates the Application
During this phase, we may ask you for additional documents to establish your eligibility for TPS. If you receive a request for evidence (RFE) or a notice of intent to deny, it is extremely important that you respond immediately to avoid processing delays and possible denial for failure to timely respond. Upon completion of your case, USCIS will notify you if your request for TPS is granted or denied. If one of the waivable grounds of inadmissibility applies to you, USCIS will give you an opportunity to submit a Form I-601, Application for Waiver of Grounds of Inadmissibility if you did not include this with your TPS package. Please submit this form within the time frame specified in the USCIS notice, or your case will be denied.

Step 7: USCIS Approves or Denies the Application

If your application for TPS is…	**Then…**
Approved and you filed an initial application	USCIS will send you an approval notice and an EAD, if you requested one and haven't received it before this step.
Approved and you filed a re-registration application	USCIS will send you an approval notice if you do not request an EAD. USCIS will send you a new EAD if you do request one.
Denied	USCIS will send you a letter indicating the reason for your denial and, if applicable, provide you with the opportunity to appeal the denial.

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Maintaining TPS

Once you are granted TPS, you must re-register during each re-registration period to maintain TPS benefits. This applies to all TPS beneficiaries, including those who were initially granted by USCIS, an Immigration Judge, or the BIA. Follow the instructions above to apply for re-registration.

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Automatic Employment Authorization Document (EAD) Extension

Sometimes DHS must issue a blanket automatic extension of the expiring EADs for TPS beneficiaries of a specific country in order to allow time for EADs with new validity dates to be issued. If your country's EADs have been automatically extended, it will be indicated on your country specific pages to the left.

Filing Late

Late Re-Registration for TPS
USCIS may accept a late re-registration application if you have good cause for filing after the end of the re-registration period of your country. You must submit a letter that explains your reason for filing late with your re-registration application.
If you file your TPS re-registration application late, processing may be delayed and can lead to gaps in your work authorization.

Late Initial Filing for TPS
You can apply for TPS for the first time during an extension of your country's TPS designation period. If you qualify to file your initial TPS application late, you must still independently meet all the TPS eligibility requirements listed in the Eligibility section above.

To qualify to file your initial TPS application late, you must meet at least one of the late initial filing conditions below:

- During either the initial registration period of your country's designation or during any subsequent initial registration period if your country was re-designated you met one of the following conditions, and you register while the condition still exists or within a 60-day period immediately following the expiration or termination of such condition
    - You were a nonimmigrant, were granted voluntary departure status, or any relief from removal
    - You had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which was pending or subject to further review or appeal
    - You were a parolee or had a pending request for re-parole
    - You are a spouse of an individual who is currently eligible for TPS

  OR

- During either the initial registration period of your country's designation or during any subsequent initial registration period if your country was re-designated you were a child of an individual who is currently eligible for TPS. There is no time limitation on filing if you meet this condition. So if your parent is currently eligible for TPS and you were his or her child (unmarried and under 21 years old) at any time during a TPS initial registration period for your country, you may still be eligible for late initial filing even if you are now over 21 years old or married. You may file during an extension of your TPS designated country.

Please check your country-specific Web page for the dates of the initial registration period or periods that apply for late initial filing.

PLEASE NOTE: You cannot obtain TPS as a derivative because your parent or child has TPS.

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Travel

If you have TPS and wish to travel outside the United States, you must apply for a travel authorization. Travel authorization for TPS is issued as an advance parole document if USCIS determines it is appropriate to approve your request. This document gives you permission to leave the United States and return during a specified period of time. To apply for advance parole, you must file Form I-131, Application for Travel Document (see form on right). If you leave the United States without requesting advance parole, you may lose TPS and you may not be permitted to re-enter the United States.

If USCIS is still adjudicating your TPS application, you may miss important USCIS notices, such as Requests for Additional Evidence, while you are outside the U.S. Failure to respond to these requests may result in the denial of your application.

We encourage you to read and understand the travel warning on Form I-131 before requesting advance parole, even if you have been granted TPS. If you have been unlawfully present in the U.S. for any period of time, you may want to seek legal advice before requesting advance parole for travel.

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Change of Address

If your address changes after you file your application, you must notify USCIS immediately. For information about how to notify USCIS go to www.uscis.gov/addresschange.

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Help Filing an Application

Please be aware that some unauthorized practitioners may try to take advantage of you by claiming they can file TPS forms. These same individuals may ask that you pay them to file such forms. We want to ensure that all potential TPS applicants know how to obtain legitimate, accurate legal advice and assistance. A list of accredited representatives and free or low-cost legal providers is available on the USCIS website on the finding legal advice Web page.

TPS Granted by an Immigration Judge or the Board of Immigration Appeals

Step 1: If an Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) granted you TPS, you must provide USCIS with proof of the TPS grant (such as a final order from the IJ or final decision from the BIA) when you file for your first TPS benefit (such as an EAD, travel authorization, or with your first TPS re-registration application filed with USCIS). You should also submit a copy of the I-821 TPS application that the IJ or the BIA approved.

Step 2: See the table below for filing information based on the first TPS benefit you are requesting after an IJ or BIA granted you TPS.

If the first TPS benefit you are requesting is...	**Then you must...**	**And...**
Your first EAD,	File Form I-765 only with required fee(s) or fee waiver request. You must also submit a cover sheet that states "DO NOT REJECT - TPS GRANTED BY IJ/BIA."	Send your Form I-765 to the mailing address on your country specific page to the left.
Travel Authorization	Form I-131 with required fee	Send your Form I-131 to the mailing address in the form instructions.
Your first re-registration NOTE: Even if you were granted TPS by an IJ or the BIA, you must re-register with USCIS during each future extension period for your country.	File Form I-821 and Form I-765 with required fee(s) or a fee waiver request. See re-registration instructions above.	Send your TPS package to the mailing address on your country specific page to the left.

Step 3: USCIS will send you a receipt notice. Once you get the receipt notice, immediately send an email to the TPS IJ grant email box at the Service Center processing your application.
When emailing the appropriate TPS IJ grant email box, please include the following information:

1. Your name
2. Your date of birth
3. The receipt number for your application
4. Your A-number
5. The date the IJ or BIA finally granted you TPS (Note: To be final, your IJ order granting TPS must not be subject to further appeal, or your BIA decision granting TPS must not be subject to further review.)

If your receipt number starts with…	**Send your email to…**
EAC	TPSijgrant.vsc@uscis.dhs.gov

WAC	TPSijgrant.csc@uscis.dhs.gov
LIN	TPSijgrant.nsc@uscis.dhs.gov

These email addresses are only for individuals granted TPS by an IJ or the BIA who are requesting their first EADs, travel authorization, or re-registration. The email address is not for individual case status inquires.

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Appealing a Denial

If USCIS denies your application, you will be informed in the denial notice whether you have 30 days to appeal to the USCIS Administrative Appeals Office (AAO). In some cases, such as when TPS is denied on certain mandatory criminal or security grounds, you may not have AAO appeal rights, although you can request an immigration judge to review your TPS request if you are in removal proceedings (see below).

You may also choose to file a motion to reconsider with the Service Center that adjudicated your TPS application by submitting:

1. A Notice of Appeal or Motion, Form I-290B
2. $630 filing fee, or Form I-912, Application for Fee Waiver (or written request) if you are unable to pay

If USCIS denies your TPS application, we recommend that you consult with an accredited legal representative to determine whether you should pursue an appeal or motion. If you have been placed in removal proceedings, you may request that the immigration judge adjudicate your TPS application. If an immigration judge denies your request for TPS, you may file an appeal with the BIA.

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This page can be found at http://www.uscis.gov/tps

Last Reviewed/Updated: 03/03/2014

U.S. Citizenship and Immigration Services

Nicaraguan Adjustment and Central American Relief Act (NACARA) 203: Eligibility to Apply With USCIS

Eligibility To Apply For NACARA 203 Relief

To be eligible to apply for NACARA 203 relief, you must be one of the following:·

- A Guatemalan who first entered the United States on or before October 1, 1990 (ABC class member); registered for ABC benefits on or before December 31, 1991; applied for asylum on or before January 3, 1995; and was not apprehended at time of entry after December 19, 1990. For more information on ABC benefits, see the "American Baptist Churches v. Thornburgh (ABC) Settlement Agreement to the right.
- A Salvadoran who first entered the United States on or before September 19, 1990 (ABC class member); registered for ABC benefits on or before October 31, 1991 (either directly or by applying for Temporary Protected Status (TPS)); applied for asylum on or before February 16, 1996; and was not apprehended at time of entry after December 19, 1990.
- A Guatemalan or Salvadoran who filed an application for asylum on or before April 1, 1990 and have not received a final decision on your asylum application.
- An individual who entered the United States on or before December 31, 1990; applied for asylum on or before December 31, 1991; and at the time of filing the application was from one of the former Soviet bloc countries (Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Lithuania, Estonia, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, Yugoslavia, or any state of the former Yugoslavia).

You must not have been convicted of an aggravated felony to qualify for NACARA 203.

A qualified family member of an individual in one of the above categories is also eligible under NACARA 203.

Battered or subjected to extreme cruelty by an individual above, may be eligible to apply for NACARA 203 relief with an Immigration Judge (IJ). If you believe you may fall into this category, you should consult an immigration attorney or accredited representative to help you assess whether you may be eligible to apply for NACARA 203 relief.

Final Orders of Deportation or Removal

- If you would qualify for NACARA but have received a final order of deportation or removal, you must have filed a motion to reopen with the Executive Office for Immigration Review (EOIR) by September 11, 1998.
- If you did not file a motion to reopen by that date or do not believe you are still subject to the final order of deportation or removal, you should consult an immigration attorney or accredited representative to determine if it is still possible to file a late motion to reopen and to help you assess whether you may be eligible to apply for NACARA 203 relief.

Suspension of Deportation or Special Rule Cancellation of Removal

- After you determine that you are eligible to apply for NACARA 203 relief with the USCIS you must also show.
- Seven years of continuous physical presence in the United States;
- Good moral character during those seven years.·
- That you are not removable under certain criminal grounds (certain criminal convictions will result in different eligibility requirements for this relief).
- That your deportation or removal would result in extreme hardship to you or to your spouse, child, or parent who is a U.S. citizen or permanent resident.·
- That you deserve the benefit.

If you have been convicted of certain crimes, you may still be eligible to apply under a heightened standard, depending on the type of crime committed. If you applied with USCIS and you are subject to the heightened standard, we will refer your NACARA application to the Immigration Court for a decision.

Filing for NACARA 203 benefits with USCIS

File Form I-881, Application for Suspension of Deportation or Cancellation of Removal. For more information on how to file, see the “Form I-881, Application for Suspension of Deportation or Cancellation of Removal” link to the right. For more information on what happens after you file Form I-881, see the “NACARA 203 Decision Making Process” link to the right.

Last Reviewed/Updated: 09/03/2009

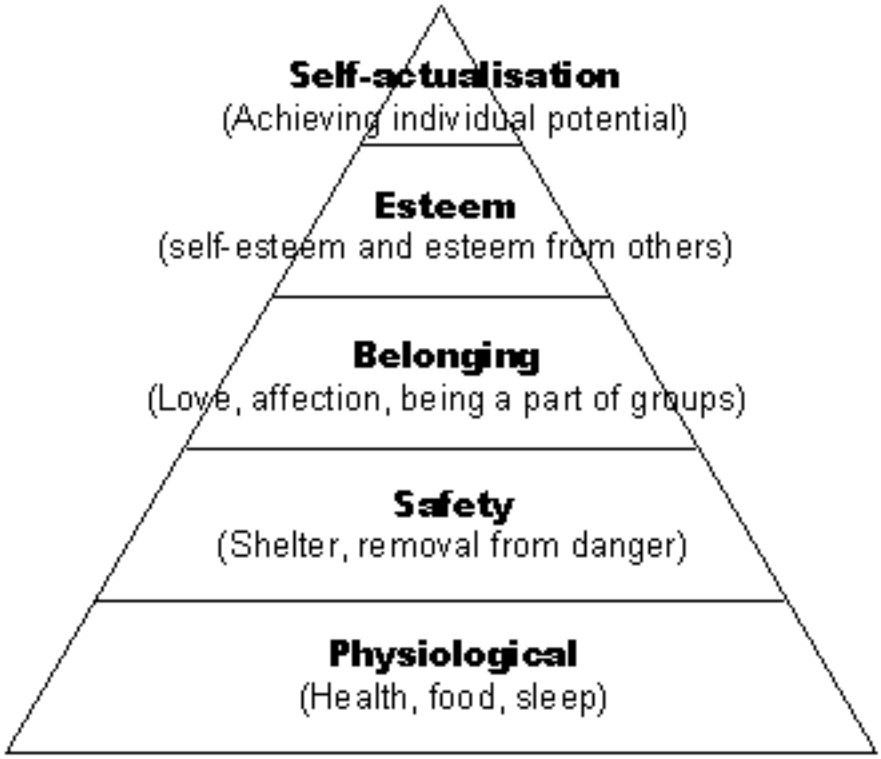
ASYLUM IN THE UNITED STATES
ART AND SCIENCE

Every word is like an unnecessary stain on silence and nothingness.
Samuel Beckett

Death and life are in the power of the tongue.
Proverbs 18:21

When Chiune Sugihara (1900-86), who defied his superiors to issue thousands of transit visas to Jews fleeing Hitler in 1940, was asked in 1985 why he risked his career to save other people, he quoted an old samurai saying, "**Even a hunter cannot kill a bird which flies to him for refuge.**"
See *http://en.wikipedia.org/wiki/Chiune_Sugihara*

Maslow's Hierarchy of Needs
After immediate biological needs, safety is the most important.



Enforcement and Immigration

“I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”

Ulysses Grant, First Inaugural Address, March 4, 1869

"[F]or the first time in decades, we've succeeded in changing the dynamic and [are] actually beginning to reduce illegal immigration. Unfortunately, unless you counterbalance that with a robust system to allow people to come in temporarily and legally, you're going to wind up with an economic problem. . . . We're enforcing the law as it is, but Congress has not yet given us the authority to really expand the temporary worker program. If we could do that, then most of these businesses [that complain of worker shortages] could find legal solutions. . . . I would be delighted to see Congress give us a way to bring workers in legally. Those workers would then be able to address the economic needs . . . and they would do it in a legal way. But as long as the law is as it is, I will enforce the law as it is."

Homeland Security Secretary Michael Chertoff, April 2008

With the Obama administration deporting illegal immigrants at a record pace, the president has said the government is going after “criminals, gang bangers, people who are hurting the community, not after students, not after folks who are here just because they’re trying to figure out how to feed their families.” But a New York Times analysis of internal government records shows that since President Obama took office, two-thirds of the nearly two million deportation cases involve people who had committed minor infractions, including traffic violations, or had no criminal record at all.

The New York Times, April 6, 2014

On Immigration Judge “Intemperance”

Selemawit F. GIDAY, Petitioner, v. Alberto R. GONZALES, Respondent

United States Court of Appeals, Seventh Circuit. - 434 F.3d 543

Argued January 11, 2005 • Decided January 5, 2006 [**Emphasis** added]

* * *

We have previously given impatient and inappropriate judges a pass on the theory that "[a]n immigration judge is permitted to interrogate, examine, and cross-examine the alien and any witnesses." *See Diallo v. Ashcroft,* 381 F.3d 687, 701 (7th Cir.2004), citing 8 U.S.C. § 1229a(b)(1). An immigration judge, unlike an Article III judge, is not merely the fact-finder and adjudicator but also has an obligation to establish the record. *Hasanaj v. Ashcroft,* 385 F.3d 780, 783 (7th Cir.2004). But **when the questioning becomes so aggressive that it frazzles applicants and nit-picks inconsistencies, any benefit that the barrage of questions contributes to the development of the record may be lost in the distortion it creates**. And by the end of the hearing, Giday became so distraught that the immigration judge was forced to pause the proceedings to give "the respondent a chance to collect herself, since the respondent is emotional." (R. at 114). This case presents a close call and one we need not make, for in any case this matter must be remanded to rectify issues with the immigration judge's credibility determinations. We note, however, that **the volume of case law addressing the issue of the intemperate, impatient, and abrasive immigration judges should sound a warning bell to the Department of Homeland Security that something is amiss**. *Diallo,* 381 F.3d at 701, *Hasanaj,* 385 F.3d at 783, *Kerciku,* 314 F.3d at 918, *Podio,* 153 F.3d at 510. As we have said before, **an immigration judge, like any judge, must display the "patience and decorum befitting a person privileged with this position**." *Diallo,* 381 F.3d at 701.

"Disturbing Factors" of Broad Applicability in the Adjudication of Immigration Cases

400 F.3d 530

Zhen Li IAO* Petitioner,
v.
Alberto R. GONZALES, Respondent.

United States Court of Appeals, Seventh Circuit.

Argued January 26, 2005 • Decided March 9, 2005. [**Emphasis** added.]

* * *

We close by noting **six disturbing features** of the handling of this case **that bulk large in the immigration cases that we are seeing**:

1. *A **lack of familiarity with relevant foreign cultures**. Yi-Tu Lian v. Ashcroft,* 379 F.3d 457, 459 (7th Cir.2004); Joanna Ruppel, "The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants," 23 *Colum. Human Rts. L.Rev.* 1, 14-15 (1992). The immigration judge offered no justification for regarding a person's lack of knowledge of Falun Gong doctrines as evidence of a false profession of faith. Different religions attach different weights to different aspects of the faith. Falun Gong, remember, is not theistic; nor is it hierarchical. So far as appears, what is central is neither doctrine nor symbol, but the exercises. Benoit Vermander, "Looking at China Through the Mirror of Falun Gong," 35 *China Perspectives* 4 (May-June 2001), http://www.cefc.com.hk/uk/pc/articles/art_ligne.php?num_art_ ligne=3501 ("the absence of any formal rituals and organisation would make it impossible to consider Falun Gong precisely as a religion. Where rituals are concerned, however, it seems to us that one must consider the communal practice of exercises, alternated with peaceful protests, as the movement's own ritual arsenal"); Anne S. Y. Cheung, "In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong," 13 *Pac. Rim L. & Policy J.* 1, 28 (2004) ("those who believe in Falun Gong dedicate themselves to the exclusive practice of this exercise as a means to achieve enlightenment. In this sense, manifestation and belief are united").

2. *An **exaggerated notion of how much** religious **people know** about their religion. Muhur v. Ashcroft, supra,* 355 F.3d at 959-60. Of course a purported Christian who didn't know who Jesus Christ was, or a purported Jew who had never heard of Moses, would be instantly suspect; but many deeply religious people know very little about the origins, doctrines, or even observances of their faith.

3. *An **exaggerated notion of the availability, especially in poor nations, of documentary evidence** of religious membership. Id.; Qiu v. Ashcroft,* 329 F.3d 140, 154 (2d Cir.2003). An acephalous, illegal religious movement is particularly unlikely to issue membership cards. The immigration judge's zeal for documentation reached almost comical proportions when after Li had testified at length and in considerable detail about locations, including the street in front of the Chinese consulate in Chicago, in which she had participated in demonstrations against the persecution of Falun Gong, he upbraided her for having "failed to submit to the Court any letters or photographs or any other evidence whatsoever to corroborate these claims." Since the demonstrators are mainly Chinese who might one day want or be

forced to return to China, they are hardly likely to be taking photos of each other demonstrating, or to be creating other documentary proof of participating in demonstrations of which the Chinese government deeply disapproves.

4. ***Insensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages*** such as Chinese, and relatedly, ***insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American,*** such as the Chinese. E.g., *Lin v. Ashcroft,* 385 F.3d 748, 756 n. 1 (7th Cir.2004); *Ememe v. Ashcroft,* 358 F.3d 446, 451-53 (7th Cir.2004); *Mendoza Manimbao v. Ashcroft,* 329 F.3d 655, 662 (9th Cir.2003); *He v. Ashcroft,* 328 F.3d 593, 598 (9th Cir.2003); Deborah E. Anker, "Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment," 19 *N.Y.U. Rev. L. & Social Change* 433, 505-27 (1992); Neal P. Pfeiffer, "Credibility Findings in INS Asylum Adjudications: A Realistic Assessment," 23 *Tex. Int'l L.J.* 139 (1988). Behaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect.

5. ***Reluctance to make clean determinations of credibility***. *Gontcharova v. Ashcroft,* 384 F.3d 873, 877 (7th Cir.2004); *Diallo v. Ashcroft, supra,* 381 F.3d at 698-700; *Mendoza Manimbao v. Ashcroft, supra,* 329 F.3d at 660-61; *Diallo v. INS,* 232 F.3d 279, 287 (2d Cir.2000). When an immigration judge says not that he believes the asylum seeker or he disbelieves her but instead that she hasn't carried her burden of proof, the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason.

6. ***Affirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion,*** even when, as in this case, the immigration judge's opinion contains manifest errors of fact and logic.

We do not offer these points in a spirit of criticism. The cases that we see are not a random sample of all asylum cases, and the problems that the cases raise may not be representative. Even if they are representative, given caseload pressures and, what is the other side of that coin, resource constraints, it is possible that nothing better can realistically be expected than what we are seeing in this and like cases. But we are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned. . . .

Who's the immigration judge? Who's the asylum officer?

The article abstracted below, and the detailed report on individual immigration judges of the Transactional Records Access Clearinghouse at Syracuse University (**http://trac.syr.edu/immigration/reports/judgereports/**), show a great disparity in IJs' grant rates that is difficult to explain in a manner consistent with "the rule of law." In one U.S. city, a particular immigration judge grants 3% of asylum claims, while another grants 59%. In that same city, one judge grants 5% of Columbian asylum claims, another grants 88%. Chinese asylum applicants may win 7% of their cases, or 76%, depending on venue. A Haitian is almost twice as likely to win in New York as in Miami. Hence the expression

REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION

Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag

60 STAN. L. REV. 295 (2007)

Available at SSRN: http://ssrn.com/abstract=983946.

Abstract:

This study analyzes databases of merits decisions from all four levels of the asylum adjudication process: 133,000 decisions by 884 asylum officers over a seven year period; 140,000 decisions of 225 immigration judges over a four-and-a-half year period; 126,000 decisions of the Board of Immigration Appeals over six years; and 4215 decisions of the U.S. Courts of Appeal during 2004 and 2005. The analysis reveals significant disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country. In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge.

Using cross-tabulations based on public biographies, the paper also explores correlations between sociological characteristics of individual immigration judges and their grant rates. The cross tabulations show that the chance of winning asylum was strongly affected by whether or not the applicant had legal representation, by the gender of the immigration judge, and by the immigration judge's work experience prior to appointment.

In their conclusion, the authors do not recommend enforced quota systems for asylum adjudicators, but they do make recommendations for more comprehensive training, more effective and independent appellate review, and other reforms that would further professionalize the adjudication system.

A Lodestar

Following are some tips on the preparation of an asylum application, to wit, form I-589, the applicant's affidavit, supporting evidence, and a brief if appropriate. The idea is to establish your client's well-founded fear of persecution — on account of race, religion, nationality, membership in a particular social group, or political opinion — in writing, in a way that will engage the adjudicator, no matter how rushed or bored, and that will make a good record even if your client chokes or freezes when it's time to testify. Putting the essence of the application on the form will ensure that a hurried adjudicator sees the outline of a *prima facie* case; elaborating in an easy-to-read affidavit will appeal to the adjudicator who likes to sit back and savor a well-constructed narrative.

Remember that you are a member of a learned profession. Do not treat asylum work like a business. Do not treat asylum applicants like customers. You must believe in the rightness of their cases if you expect an adjudicator to be convinced and to grant relief. If you don't believe in your client — if you are taking a case only for money — perhaps you should find a different client.

To begin:

Consult the outline in these materials prepared by Walter Ruehle, Esq. That outline addresses asylum and related relief including withholding of removal and relief under the Convention Against Torture.

Check for recent changes in the law.

Understand the big picture; details matter, but don't miss the forest for the trees.

Interview your intending client carefully. Understand the background, the claim, the relevant history and geography. Is the client truly afraid (subjective fear)? Is there good reason to be afraid (objective fear)? Is your client's fear on the short "approved" list: on account of race, religion, nationality, social group membership, political opinion?

Whether or not you charge a fee, it is wrong to bring a client to ICE attention unless the client understands both risks and potential rewards. Sometimes the best thing for your client is to do nothing.

Who's the adjudicator?

What's the appropriate venue? Some tribunals are so harsh that it is better for your client to move elsewhere, even if that means you will

forego a fee, rather than initiate a case locally.

Which way are the political winds blowing?

Make documents user-friendly.

Write clearly.

Be concise.

Tell the client's story in a compelling way.

Back the story with evidence, or explain why you can't. Country condition evidence, and documents to substantiate whatever you can of your client's personal story, are essential.

Make a complete record, but don't beat a dead horse.

A short brief can help by setting out concise statements of law and how that law applies to your client's facts. If the adjudicator is knowledgeable and the case is "classic," a brief may be superfluous. Yet if the case does not fit the mold, a brief is vital.

An affirmative asylum interview follows an "affirmative" filing with a USCIS Service Center. In theory, the interview is non-adversarial; provides a second chance to make your case before an immigration judge if needed; and if the client is in status, a Notice of Intent to Deny may be issued, which is a great advantage.

If asylum is not granted, or if client already is in removal proceedings, the case is referred to immigration court.

IJ hearing: beware *Immigration Court Practice Manual*.

Know your adjudicator! Visit http://trac.syr.edu/immigration/reports/judgereports. Consult your colleagues.

Post-IJ, both ICE and client can appeal to BIA. Government appeals once were rare, now are common.

Beware BIA rules, deadlines!

Post-BIA, the Circuit will hear a petition for review. There are limits to *Chevron* "deference" that Circuits accord the BIA. There also are limits to relief a Circuit can grant (see *INS* v. *Ventura*, 537 U.S. 12 [2002]; often the best you can expect is remand to BIA for a do-over; sometimes BIA then will remand to the IJ.

If asylum is granted, your client can provide derivative asylum status to qualifying family members, and can adjust to lawful permanent residence after a year.

There's more! Much more! Go forth and learn by doing!

# # #

Department of Homeland Security
U.S. Citizenship and Immigration Services

U.S. Department of Justice
Executive Office for Immigration Review

OMB No. 1615-0067; Expires 11/30/2014

I-589, Application for Asylum and for Withholding of Removal

START HERE - Type or print in black ink. See the instructions for information about eligibilty and how to complete and file this application. There is NO filing fee for this application.

NOTE: Check this box if you also want to apply for withholding of removal under the Convention Against Torture. ☒

Part A.I. Information About You

1. Alien Registration Number(s) (A-Number) *(if any)*	2. U.S. Social Security Number *(if any)*
none	none

3. Complete Last Name	4. First Name	5. Middle Name
BOONE	Daniel	none

6. What other names have you used *(include maiden name and aliases)?*
none

7. Residence in the U.S. *(where you physically reside)*

Street Number and Name	Apt. Number
777 Seventh Avenue	7

City	State	Zip Code	Telephone Number
Brooklyn	NY	10000	(917) 000-0000

8. Mailing Address in the U.S. *(if different than the address in Item Number 7)*

In Care Of *(if applicable):*	Telephone Number
	( )
Street Number and Name	**Apt. Number**
City	**State** / **Zip Code**

9. Gender: ☒ Male ☐ Female

10. Marital Status: ☒ Single ☐ Married ☐ Divorced ☐ Widowed

11. Date of Birth *(mm/dd/yyyy)*	12. City and Country of Birth
01/01/1984	Capital City, Tackystan

13. Present Nationality *(Citizenship)*	14. Nationality at Birth	15. Race, Ethnic, or Tribal Group	16. Religion
Tackystani	Tackystani	Tackystani	Christian

17. *Check the box, a through c, that applies:* **a.** ☒ I have never been in Immigration Court proceedings.
b. ☐ I am now in Immigration Court proceedings. **c.** ☐ I am **not** now in Immigration Court proceedings, but I have been in the past.

18. *Complete 18 a through c.*

a. When did you last leave your country? *(mmm/dd/yyyy)* 08/08/2002 **b.** What is your current I-94 Number, if any? 11111111111

c. List each entry into the U.S. beginning with your most recent entry. *List date (mm/dd/yyyy), place, and your status for each entry. (Attach additional sheets as needed.)*

Date	Place	Status	Date Status Expires
09/09/2009	JFK, New York	F-1	06/30/2015
08/08/2001	Houston, TX	J-1	

19. What country issued your last passport or travel document?	20. Passport Number 77777777 / Travel Document Number	21. Expiration Date *(mm/dd/yyyy)*
Tackystan		01/01/2020

22. What is your native language *(include dialect, if applicable)?*	23. Are you fluent in English?	24. What other languages do you speak fluently?
Tackystani	☒ Yes ☐ No	Siamese

For EOIR use only.

For USCIS use only.
Action:
Interview Date: _____
Asylum Officer ID#: _____

Decision:
Approval Date: _____
Denial Date: _____
Referral Date: _____

Part A.II. Information About Your Spouse and Children

Your spouse ☒ I am not married. (Skip to **Your Children** below.)

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Date of Birth *(mm/dd/yyyy)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Maiden Name
9. Date of Marriage *(mm/dd/yyyy)*	10. Place of Marriage	11. City and Country of Birth	
12. Nationality *(Citizenship)*	13. Race, Ethnic, or Tribal Group	14. Gender ☐ Male ☐ Female	

15. Is this person in the U.S.?
☐ Yes *(Complete Blocks 16 to 24.)* ☐ No *(Specify location):* _____

16. Place of last entry into the U.S.	17. Date of last entry into the U.S. *(mm/dd/yyyy)*	18. I-94 Number *(if any)*	19. Status when last admitted *(Visa type, if any)*
20. What is your spouse's current status?	21. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	22. Is your spouse in Immigration Court proceedings? ☐ Yes ☐ No	23. If previously in the U.S., date of previous arrival *(mm/dd/yyyy)*

24. If in the U.S., is your spouse to be included in this application? *(Check the appropriate box.)*
☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*
☐ No

Your Children. List **all** of your children, regardless of age, location, or marital status.

☒ I do not have any children. *(Skip to Part A.III., **Information about your background.**)*

☐ I have children. Total number of children: _____.

(**NOTE:** *Use Form I-589 Supplement A or attach additional sheets of paper and documentation if you have more than four children.)*

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*
☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*
☐ No

Part A.II. Information About Your Spouse and Children (Continued)

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female
13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):*			
14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)* ☐ No			

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female
13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):*			
14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)* ☐ No			

1. Alien Registration Number (A-Number) *(if any)*	2. Passport/ID Card Number *(if any)*	3. Marital Status *(Married, Single, Divorced, Widowed)*	4. U.S. Social Security Number *(if any)*
5. Complete Last Name	6. First Name	7. Middle Name	8. Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	10. Nationality *(Citizenship)*	11. Race, Ethnic, or Tribal Group	12. Gender ☐ Male ☐ Female
13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):*			
14. Place of last entry into the U.S.	15. Date of last entry into the U.S. *(mm/dd/yyyy)*	16. I-94 Number *(If any)*	17. Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	19. What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	20. Is your child in Immigration Court proceedings? ☐ Yes ☐ No	
21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)* ☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)* ☐ No			

Part A.III. Information About Your Background

1. List your last address where you lived before coming to the United States. If this is not the country where you fear persecution, also list the last address in the country where you fear persecution. *(List Address, City/Town, Department, Province, or State and Country.)*
(**NOTE:** *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street *(Provide if available)*	City/Town	Department, Province, or State	Country	Dates From *(Mo/Yr)*	To *(Mo/Yr)*
1 Main Street	Siam City	Central Province	Siam	08/02	09/09

2. Provide the following information about your residences during the past 5 years. List your present address first.
(**NOTE:** *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Number and Street	City/Town	Department, Province, or State	Country	Dates From *(Mo/Yr)*	To *(Mo/Yr)*
2 Center Street	Bronx	New York	USA	09/09	present
1 Main Street	Siam City	Central Province	Siam	08/02	09/09

3. Provide the following information about your education, beginning with the most recent.
(**NOTE:** *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name of School	Type of School	Location *(Address)*	Attended From *(Mo/Yr)*	To *(Mo/Yr)*
Fordham University	law school	New York, NY	09/09	present
Christian University	university, law school	Siam City, Siam	08/02	06/09
Capital High School	high school	Capital City, Tackystan	09/98	06/02
Oklahoma High School	high school	Oklahoma City, OK	08/01	06/02

4. Provide the following information about your employment during the past 5 years. List your present employment first.
(**NOTE:** *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Name and Address of Employer	Your Occupation	Dates From *(Mo/Yr)*	To *(Mo/Yr)*
none	student		

5. Provide the following information about your parents and siblings (brothers and sisters). Check the box if the person is deceased.
(**NOTE:** *Use Form I-589 Supplement B, or additional sheets of paper, if necessary.)*

Full Name	City/Town and Country of Birth	Current Location
Mother Mary Boone	Capital City, Tackystan	☒ Deceased
Father Pat Boone	Capital City, Tackystan	☒ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased
Sibling		☐ Deceased

Part B. Information About Your Application

*(**NOTE:** Use Form I-589 Supplement B, or attach additional sheets of paper as needed to complete your responses to the questions contained in Part B.)*

When answering the following questions about your asylum or other protection claim (withholding of removal under 241(b)(3) of the INA or withholding of removal under the Convention Against Torture), you must provide a detailed and specific account of the basis of your claim to asylum or other protection. To the best of your ability, provide specific dates, places, and descriptions about each event or action described. You must attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim. If this documentation is unavailable or you are not providing this documentation with your application, explain why in your responses to the following questions.

Refer to Instructions, Part 1: Filing Instructions, Section II, "Basis of Eligibility," Parts A - D, Section V, "Completing the Form," Part B, and Section VII, "Additional Evidence That You Should Submit," for more information on completing this section of the form.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the INA, or for withholding of removal under the Convention Against Torture? Check the appropriate box(es) below and then provide detailed answers to questions A and B below.

I am seeking asylum or withholding of removal based on:

- ☐ Race
- ☒ Political opinion
- ☒ Religion
- ☒ Membership in a particular social group
- ☐ Nationality
- ☒ Torture Convention

A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

☒ No ☐ Yes

If "Yes," explain in detail:

1. What happened;
2. When the harm or mistreatment or threats occurred;
3. Who caused the harm or mistreatment or threats; and
4. Why you believe the harm or mistreatment or threats occurred.

In the spring of 1999, I began to receive death threats by telephone on account of my Christian religion. I do not know who were the callers. In Tackystan, where the regime holds cheap the lives of Christians like me, such threats are very serious. My response was to hide my Christian observance. The calls then ceased. I could not fully practice my religion for fear the threats would resume and be carried out. For details, see my affidavit.

B. Do you fear harm or mistreatment if you return to your home country?

☐ No ☒ Yes

If "Yes," explain in detail:

1. What harm or mistreatment you fear;
2. Who you believe would harm or mistreat you; and
3. Why you believe you would or could be harmed or mistreated.

The Tackystan regime persecutes Christians, religious believers of all sorts, and anyone who opposes the regime or believes in the principles of majority rule and protection of minority rights. As a devout Christian, the regime regards me as an enemy and its agents will arrest, jail, torture and likely kill me. What's more, I have earned advanced degrees in U.S. law and will (rightly) be regarded as a believer in democracy. That alone is almost certain to lead to my arrest, imprisonment, torture, and/or death. For details, see my affidavit.

Part B. Information About Your Application (Continued)

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

☒ No ☐ Yes

If "Yes," explain the circumstances and reasons for the action.

3.A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

☐ No ☒ Yes

If "Yes," describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

I have been a member of Christian churches since 1999, when I was 14 years old. I continue to attend church and to practice my religion. I have led youth groups and participated in humanitarian and missionary work. See my affidavit for details.

3.B. Do you or your family members continue to participate in any way in these organizations or groups?

☐ No ☒ Yes

If "Yes," describe for each person your or your family members' current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

I attend church every week. I am an assistant director of the Church of Christ Youth Assembly at the Manhattan Christian Church, and have been for 4 years. See my affidavit for details.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☒ Yes

If "Yes," explain why you are afraid and describe the nature of torture you fear, by whom, and why it would be inflicted.

The Tackystan regime tortures those it perceives as enemies. The torture involves beating, electric shocks, waterboarding, suffocation with plastic bags, and other horrors. It would be inflicted to punish me for my Christian beliefs and my democratic beliefs, and for my actual and imputed opposition to the Tackystani regime. See my affidavit for details.

Part C. Additional Information About Your Application

(**NOTE:** *Use Form I-589 Supplement B, or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.*)

1. Have you, your spouse, your child(ren), your parents or your siblings ever applied to the U.S. Government for refugee status, asylum, or withholding of removal?

☒ No ☐ Yes

If "Yes," explain the decision and what happened to any status you, your spouse, your child(ren), your parents, or your siblings received as a result of that decision. Indicate whether or not you were included in a parent or spouse's application. If so, include your parent or spouse's A-number in your response. If you have been denied asylum by an immigration judge or the Board of Immigration Appeals, describe any change(s) in conditions in your country or your own personal circumstances since the date of the denial that may affect your eligibility for asylum.

2.A. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren) who are now in the United States travel through or reside in any other country before entering the United States?

☒ No ☐ Yes

2.B. Have you, your spouse, your child(ren), or other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum?

☐ No ☒ Yes

If "Yes" to either or both questions (2A and/or 2B), provide for each person the following: the name of each country and the length of stay, the person's status while there, the reasons for leaving, whether or not the person is entitled to return for lawful residence purposes, and whether the person applied for refugee status or for asylum while there, and if not, why he or she did not do so.

I have come to the United States twice. I was here as a J-1 exchange student in 2001-02, and have been here as an F-1 graduate student from 2009 to the present. I did not apply for asylum before because I hoped to be able to return safely home by the time my status here ended. For details, see my affidavit.

3. Have you, your spouse or your child(ren) ever ordered, incited, assisted or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

☒ No ☐ Yes

If "Yes," describe in detail each such incident and your own, your spouse's, or your child(ren)'s involvement.

Part C. Additional Information About Your Application (Continued)

4. After you left the country where you were harmed or fear harm, did you return to that country?

☒ No ☐ Yes

If "Yes," describe in detail the circumstances of your visit(s) (for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s).)

Although my lawful address was in Tackystan during my studies in Siam, I have not been physically present in Tackystan since I left for Siam in 2002.

5. Are you filing this application more than 1 year after your last arrival in the United States?

☐ No ☒ Yes

If "Yes," explain why you did not file within the first year after you arrived. You must be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question, see Instructions, Part 1: Filing Instructions, Section V. "Completing the Form," Part C.

I was in lawful status during the first year after I arrived. Also, I was hopeful that the Tackystan dictator would be turned out in elections that were held in April 2014, and that it then would be safe for me to return home. The results of the election dashed those hopes; I applied for asylum within days thereafter. My lawful status, and these changed circumstances, justify my late filing. See my affidavit for details.

6. Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted, or sentenced for any crimes in the United States?

☒ No ☐ Yes

If "Yes," for each instance, specify in your response: what occurred and the circumstances, dates, length of sentence received, location, the duration of the detention or imprisonment, reason(s) for the detention or conviction, any formal charges that were lodged against you or your relatives included in your application, and the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

Part D. Your Signature

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it are all true and correct. Title 18, United States Code, Section 1546(a), provides in part: Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact - shall be fined in accordance with this title or imprisoned for up to 25 years. I authorize the release of any information from my immigration record that U.S. Citizenship and Immigration Services (USCIS) needs to determine eligibility for the benefit I am seeking.

Staple your photograph here or the photograph of the family member to be included on the extra copy of the application submitted for that person.

WARNING: **Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an asylum officer or an immigration judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. You may not avoid a frivolous finding simply because someone advised you to provide false information in your asylum application. If filing with USCIS, unexcused failure to appear for an appointment to provide biometrics (such as fingerprints) and your biographical information within the time allowed may result in an asylum officer dismissing your asylum application or referring it to an immigration judge. Failure without good cause to provide DHS with biometrics or other biographical information while in removal proceedings may result in your application being found abandoned by the immigration judge. See sections 208(d)(5)(A) and 208(d)(6) of the INA and 8 CFR sections 208.10, 1208.10, 208.20, 1003.47(d) and 1208.20.**

Print your complete name.	Write your name in your native alphabet.
Daniel Boone	

Did your spouse, parent, or child(ren) assist you in completing this application? ☒ No ☐ Yes *(If "Yes," list the name and relationship.)*

(Name)	*(Relationship)*	*(Name)*	*(Relationship)*

Did someone other than your spouse, parent, or child(ren) prepare this application? ☐ No ☒ Yes *(If "Yes," complete Part E.)*

Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim? ☒ No ☐ Yes

Signature of Applicant *(The person in Part A.I.)*

[_____]

Sign your name so it all appears within the brackets

_____

Date *(mm/dd/yyyy)*

Part E. Declaration of Person Preparing Form, if Other Than Applicant, Spouse, Parent, or Child

I declare that I have prepared this application at the request of the person named in Part D, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant, and that the completed application was read to the applicant in his or her native language or a language he or she understands for verification before he or she signed the application in my presence. I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324c and/or criminal penalties under 18 U.S.C. 1546(a).

Signature of Preparer		Print Complete Name of Preparer Jeffrey A. Heller	
Daytime Telephone Number (212) 000-0000	Address of Preparer: Street Number and Name [address]		
Apt. Number	City New York	State NY	Zip Code 10000

Part F. To Be Completed at Asylum Interview, if Applicable

NOTE: *You will be asked to complete this part when you appear for examination before an asylum officer of the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS).*

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are ☐ all true or ☐ not all true to the best of my knowledge and that correction(s) numbered ____ to ____ were made by me or at my request. Furthermore, I am aware that if I am determined to have knowingly made a frivolous application for asylum I will be permanently ineligible for any benefits under the Immigration and Nationality Act, and that I may not avoid a frivolous finding simply because someone advised me to provide false information in my asylum application.

Signed and sworn to before me by the above named applicant on:

Signature of Applicant

Date *(mm/dd/yyyy)*

Write Your Name in Your Native Alphabet

Signature of Asylum Officer

Part G. To Be Completed at Removal Hearing, if Applicable

NOTE: *You will be asked to complete this Part when you appear before an immigration judge of the U.S. Department of Justice, Executive Office for Immigration Review (EOIR), for a hearing.*

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are ☐ all true or ☐ not all true to the best of my knowledge and that correction(s) numbered ____ to ____ were made by me or at my request. Furthermore, I am aware that if I am determined to have knowingly made a frivolous application for asylum I will be permanently ineligible for any benefits under the Immigration and Nationality Act, and that I may not avoid a frivolous finding simply because someone advised me to provide false information in my asylum application.

Signed and sworn to before me by the above named applicant on:

Signature of Applicant

Date *(mm/dd/yyyy)*

Write Your Name in Your Native Alphabet

Signature of Immigration Judge

A-Number *(If available)*	Date
Applicant's Name	Applicant's Signature

List All of Your Children, Regardless of Age or Marital Status

(NOTE: *Use this form and attach additional pages and documentation as needed, if you have more than four children)*

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Marital Status *(Married, Single, Divorced, Widowed)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	**10.** Nationality *(Citizenship)*	**11.** Race, Ethnic, or Tribal Group	**12.** Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	**15.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**16.** I-94 Number *(If any)*	**17.** Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*

☐ No

1. Alien Registration Number (A-Number) *(if any)*	**2.** Passport/ID Card Number *(if any)*	**3.** Marital Status *(Married, Single, Divorced, Widowed)*	**4.** U.S. Social Security Number *(if any)*
5. Complete Last Name	**6.** First Name	**7.** Middle Name	**8.** Date of Birth *(mm/dd/yyyy)*
9. City and Country of Birth	**10.** Nationality *(Citizenship)*	**11.** Race, Ethnic, or Tribal Group	**12.** Gender ☐ Male ☐ Female

13. Is this child in the U.S. ? ☐ Yes *(Complete Blocks 14 to 21.)* ☐ No *(Specify location):* _____

14. Place of last entry into the U.S.	**15.** Date of last entry into the U.S. *(mm/dd/yyyy)*	**16.** I-94 Number *(If any)*	**17.** Status when last admitted *(Visa type, if any)*
18. What is your child's current status?	**19.** What is the expiration date of his/her authorized stay, if any? *(mm/dd/yyyy)*	**20.** Is your child in Immigration Court proceedings? ☐ Yes ☐ No	

21. If in the U.S., is this child to be included in this application? *(Check the appropriate box.)*

☐ Yes *(Attach one photograph of your spouse in the upper right corner of Page 9 on the extra copy of the application submitted for this person.)*

☐ No

Additional Information About Your Claim to Asylum

A-Number *(if available)*	Date
Applicant's Name	Applicant's Signature

NOTE: *Use this as a continuation page for any additional information requested. Copy and complete as needed.*

Part _____

Question _____

DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
ASYLUM OFFICE
NEW YORK DISTRICT

In the Matter of	:	
	:	AFFIDAVIT IN SUPPORT OF
Daniel BOONE,	:	APPLICATION FOR ASYLUM
	:	IN THE UNITED STATES
Applicant.	:	

State of New York)
) ss.:
County of New York)

Daniel Boone deposes and says:

1. I am a native and citizen of Tackystan.

2. I reside at 777 Seventh Avenue, Brooklyn, NY 10000.

3. I can be reached by telephone at (917) 000-0000.

4. I am 30 years of age.

5. I make this affidavit in support of my application for asylum in the United States.

MY ASYLUM REQUEST FALLS WITHIN THE "EXTRAORDINARY CIRCUMSTANCES" EXCEPTION TO THE ONE YEAR FILING DEADLINE

6. Events or factors in an asylum applicant's life that caused the applicant to miss the filing deadline may except the applicant from the requirement to file within one year of the last arrival. *See*, 8 C.F.R. § 208.4(a)

(5). The regulations list six categories of events or situations which will demonstrate the existence of extraordinary circumstances, one of which is when the applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application. I was admitted to the United States, in F1 status, on February 30, 2012. I currently am in valid immigration status and will continue to be until my studies end on June 31, 2015.

7. I ask that the 1-year bar be waived, and my application considered on the merits, because my current nonimmigrant status qualifies as an "exceptional circumstance" exception to the one year filing deadline.

8. I understand that the intent of the 1-year bar is to prevent persons who have long been in the United States from applying for asylum, not due to a fear of persecution, but as a delaying tactic. According to Human Rights First (*see* http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf and an excerpt at **Exhibit A**) (footnotes omitted):

> When the filing deadline was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) . . . the former [INS] had stressed that the imposition of a filing deadline was a response to a problem that had already been addressed through its reforms — reforms that U.S. immigration authorities subsequently reported had successfully addressed abuse in the asylum system. . . .
>
> In cases where an asylum seeker has not applied within one year of arrival, or is determined not to have established that he or she applied within one

year of arrival, the asylum seeker may be able to secure an exemption from the one-year bar if he or she can demonstrate either "changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing," and can establish that he or she filed within a reasonable time given the exception. Congress intended these exceptions "to provide adequate protections to those with legitimate claims of asylum."

So as you consider whether to bar my asylum application, please keep this principle in mind. My application is NOT being submitted for purpose of delay, because I am in valid immigration status and will continue to be in status until my studies end in June 2015.

MY ASYLUM REQUEST ALSO FALLS WITHIN THE "CHANGED CIRCUMSTANCES" EXCEPTION TO THE ONE YEAR FILING DEADLINE

9. Federal regulations provide a non-exhaustive list of the types of changed circumstances that may provide an exception to the one-year filing rule, as long as those circumstances materially affect the applicant's eligibility for asylum. *See,* 8 C.F.R. § 208.4(a)(4)(i)(A). Developments in my country justify my delay in requesting asylum.

10. When I last arrived in the United States — as when I last left Tackystan in 2005 — Tackystan was brutally persecuting Christians like me, democrats like me, dissidents like me, government critics like me, and persons with foreign ties like me. But hope springs eternal. I came to the United States to develop my legal expertise so that I can return to my country and help it grow according to American principles of majority rule,

respect for minority rights, and freedom of conscience. I also recognize that I am now one of the most highly educated Tackystanis in the world; unlike the United States, which has many educated lawyers (some say too many!), in Tackystan I will have rare skills and talents that should be much in demand as we build our country. So it is natural that I looked with hope to the elections to be held in April 2014. There was a chance that the regime would change, that people like me would be welcome to come home to build Tackystan, and that my future would unfold as I hoped and planned.

11. Unfortunately, the same regime was returned to power in the March elections. The hope I had for reform, and for being able to return to Tackystan safely, was destroyed. The situation, already bad, has become intolerable as the regime is energized by the supposed mandate of its rigged electoral triumph. That is why only a few weeks ago it became clear that I cannot go home. As soon as I saw this, as soon as I gave up my hope, I began to prepare my asylum application. I am filing now within one month, a reasonable time after these changed circumstances.

12. For these reasons, I ask that you consider my asylum application on its merits despite the date on which it is filed since I meet the requirements for the exceptions to the one year filing deadline.

THE U.S. STATE DEPARTMENT'S VIEW OF HUMAN RIGHTS IN TACKYSTAN

13. The Executive Summary of *Country Reports on Human Rights Practices for 2012: Tackystan*, gives a perspective that you should remember as you consider my particular circumstances [**emphasis** added].

Tackystan is an **authoritarian state**.

The most significant human rights problems included **torture and abuse of detainees and other persons by security forces**, **restrictions on freedoms of expression and the free flow of information**, the **erosion of religious freedom**;, and **violence against women**.

Other human rights problems included **arbitrary arrest**; **denial of the right to a fair trial**; **harsh and life-threatening prison conditions**; **limitations on children's religious education**; **corruption**; and **trafficking in persons**, including sex and labor trafficking.

Officials in the security services and elsewhere in the government acted with impunity, and committed abuses under the orders of, and with the encouragement of, the Prime Minister.

MY FAMILY BACKGROUND AND CHILDHOOD

14. I was born in Capital City, Republic of Tackystan, on January 1, 1984. *See* a copy of my Tackystan passport, attached in support of my form I-589.

15. My father and mother were factory workers. We three were poor. We shared an apartment with another family. In order to get a loaf of bread for the day, we would wake up at 3 or 4 am and get in line at a government aid office, which would start giving away the bread at 5 am on a first come, first served basis. Tea with sugar was a luxury we could not afford.

16. My mother knew that education was my only hope to escape poverty. She wanted to find a good school for me. One of her former high school classmates, Jane, suggested that my mom place me in a private school that had a good reputation. Although the school was founded by Christian missionaries from Siam, the education was not religious. We did have a "World Religions" class to familiarize the students with major religions but that was the extent of the religious education provided by the school.

I CONVERTED TO CHRISTIANITY

17. Jane also was a Pastor of a Siamese Protestant church, God's Love Congregation. The church was founded by the same Siam missionaries who founded the school. A few weeks after I started attending the private school, Jane invited my family to her church. We went the following Sunday. It would have been rude for my family to refuse her invitation.

18. At the church we were kindly welcomed by the Christians. The believers even sang a blessing song to us as newcomers and prayed for us. That was the first and the last time anyone else from my family went to church.

19. After our Muslim neighbors found out that we had visited the church, they criticized us. We were a Muslim family. Although we did not pray five times a day, we did observe the holy days and the traditions of

Islam. My parents decided that to avoid conflicts with others, it would not be proper to get involved with Christians.

20. I did not quit. I continued going to church because I made good friends and the people were nice. My parents did not oppose my attendance as long as I went to church quietly, but asked me not to preach to them about Jesus.

21. I went to church for almost a year before I truly accepted Jesus as my Savior and Lord. The triggering moment for coming to my faith in Jesus was the healing that I received. I had a severe form of asthma. There were days when my parents thought I was going to suffocate in the middle of the night. In my poor country, medical supplies were limited and my condition could not be treated properly. I suffered throughout my childhood.

22. The day the miracle happened, we had a special evening service. At that service, Pastors were praying for the healing of disease. It was very exciting to attend the service. Some people were skeptical that anyone would be healed.

23. After singing praise and worship, the Pastor delivered a sermon. I do not remember what the Pastor preached about. I was waiting for the healing prayer portion of the service.

24. After the sermon was over, the Head Pastor invited those who

wanted healing to come forward and receive a prayer. Suddenly, I do not know why, I stood up and walked up front. Preachers and Pastors walked around praying for the people. In our church people pray in tongues, so it was very loud. As the Pastors were laying their hands on people, one by one, people started falling on the ground unconscious. Later people reported seeing visions. One old lady testified that her joint pain was healed and an old man said his eye cataracts disappeared and he could now see!

25. I asked the Pastor to pray for my asthma and together we prayed. At that moment, never before have I felt so much faith that God can heal me. A few moments later I started breathing easier and my lungs felt very light.

26. Still in doubt, I went home thinking that it must have been fresh air from the window that made me breathe easier. But as time went on, my asthma attacks did not happen again. I realized that I was healed that night. My faith in God, and in Jesus his Son, became absolute.

PERSECUTION BEGINS

27. Matthew 5:10: *Blessed are those who are persecuted because of their righteousness, for theirs is the kingdom of heaven.*

28. Being joyful about what God had done for me, I started sharing this healing experience, this feeling of God's love, with my neighbors and

some friends at school. Many laughed at me and could not believe my testimony. After all, I did not have any obvious signs of healing like the old man whose cataracts were cured.

29. After sharing my testimony, I shared the Gospel with them and told them that Jesus is the Way and the Truth and the Life and that only through Him people can receive salvation from their sins. That part they did not like. Muslims believe that Jesus (Isa) was just a prophet. They do not believe that He is a Son of God or that He died and was resurrected for the people's sins. It is very difficult to tell the Gospel to a Muslim, because their understanding of Jesus already is engraved on their minds and hearts. Any other message about Him is considered a heresy by Muslims.

30. My belief in God and my innocent sharing of the Gospel with non-believers ignited hatred from the people around me. I noticed hostility toward me whenever I went out of home. People I knew would no longer greet even though I greeted them first. They would avoid me or look at me with disgust.

31. A few weeks later some unknown people started calling my house and asking for me on the phone. When I spoke with them, their voices sounded strange as if modified with some device. They asked me personal questions, such as how old I am, what my parents do, if I had any siblings, why I went to church and why I was a Christian. They would advise me not

to attend church and called me "kafir" (infidel). They told me that if I continued going to church, I would get in trouble. They told me that they were watching me.

32. The Tackystan government tries to suppress religion altogether and encourages violence against believers — *see* a copy of the *New York Times* article, "Takystan Prime Minister Calls for Death for Believers" at **Exhibit B** — so like any sensible person threatened as I was, I became afraid for my safety and would go to church cautiously, making sure that there were no policemen, soldiers, or suspicious-looking civilians around. I varied the same route I took to church. I no longer carried my Bible in my hands; I kept it in my backpack.

I LEAVE HOME

33. God provided not only for my physical needs. He also blessed me financially. In 2001, I won a United States Department of State sponsored Future Leaders Exchange competition, where the winners would receive a scholarship to spend a year living with a host family in the United States and attend a local high school. In August 2001 I left for the United States.

34. For the 2001-02 academic year, I lived in Oklahoma City as an exchange student, learning about American culture and history. I learned about the American principles of freedom of religion, freedom of speech, the

right to equal justice, and the right to enjoy many other freedoms. No country is perfect, but I saw how much progress there is in United States and I became very jealous for my country. Why cannot we enjoy the many freedoms that American people have?

35. I became determined to do something about that when I return home. I do not want to waste my life on living for myself and my family only. Instead I desire to do good for my people and my country.

36. After briefly returning to Tackystan from the U.S.A. in 2002, I went to study in Siam in August of the same year. I was given a scholarship to attend Siam's Christian University. The university's motto is, "Make a Better World". After what I had seen in America during my exchange year, I was excited to attend a university that wanted to teach me how to make a difference.

37. I majored in U.S. law. I chose the law major because I believe that American law is a great model for our legislature and that someday I will be able to influence the laws of my country in a positive way. I continued studying American law after undergraduate studies by going to Siam's Christian University Law School, where I received the equivalent of a United States J.D. degree. *See* copies of my diplomas at **Exhibit C**.

38. While at university I was heavily involved in church ministry. I was a member care deacon at on-campus International Fellowship church for

one semester. I participated in mission trips to Fiji, Chile and Estonia. I was a staff member two times at the church's Children's School. I have continued my church involvement here in New York, where I am Assistant Director of Christ Youth Assembly at Manhattan Christian Church. *See* letters from Pastor Jones, a professor and chaplain at Christian University, and from Reverend Isaacs at Manhattan Christian Church, at **Exhibit D**.

39. When I graduated from law school in 2009, I decided to continue my legal education. I applied for the Doctor of Laws (SJD) program, specializing in American Legal Studies, at Fordham University, a Catholic institution. I currently am enrolled there.

WHY I FEAR GOING BACK TO TACKYSTAN

1. FEAR OF RELIGIOUS PERSECUTION

40. I fear returning home because of the government's draconian laws and aggressive behavior towards religious community. I am a Protestant Christian and I cannot hide this fact. I want to be able to share my faith freely and participate freely in religious services. As I mentioned earlier, it is not possible to do so without jeopardizing my own and my family's safety. Over the years I have established relationships with many missionaries in Siam and the United States. If I go back home, the government will persecute me for my ties to foreign missionaries. Aside from those contacts, the fact that my education was at Christian universities

puts me in danger.

41. The United States Commission on International Religious Freedom ("USCIRF"), in its 2013 report, names Tackystan as a country that engages in "'particularly severe' violations of religious freedom." It keeps company with China, Iran, North Korea, Saudi Arabia, and other known persecutors designated or recommended to be designated under the International Religious Freedom Act ("IRFA") of 1998. *See* uscirf.gov/images/2013%20USCIRF%20Annual%20Report%20(2).pdf [1] (**Exhibit E**.)

42. These are some of the findings of the USCIRF's findings (*see* excerpts at **Exhibit F**) [**emphasis** added]:

Tackystan's restrictions on religious freedom remained in place during the reporting period, and **systematic, ongoing, and egregious violations of freedom of religion or belief continue**.

The government suppresses and punishes all religious activity independent of state control, and imprisons individuals on unproven criminal allegations linked to religious activity or affiliation.

These restrictions and abuses primarily affect the country's majority Muslim community, but also **target minority communities, particularly Protestants** and Jehovah's Witnesses. The Jehovah's Witnesses community

[1] **TIER 1 COUNTRIES OF PARTICULAR CONCERN**

IRFA requires the President, who has delegated this authority to the Secretary of State, to designate as "countries of particular concern," or CPCs, those governments that have engaged in or tolerated "particularly severe" violations of religious freedom. IRFA defines "particularly severe" violations as ones that are "systematic, ongoing, and egregious," including acts such as torture, prolonged detention without charges, disappearances, or "other flagrant denial[s] of the right to life, liberty, or the security of persons." After a country is designated a CPC, the President is required by law to take one or more of the actions specified in IRFA, or to invoke a waiver if circumstances warrant.

For the 2013 Annual Report, USCIRF recommends that the Secretary of State re-designate the following eight countries as CPCs: Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, and Uzbekistan. USCIRF also finds that eight other countries meet the CPC threshold and should be so designated: Egypt, Iraq, Nigeria, Pakistan, Tackystan, Tajikistan, Turkmenistan, and Vietnam.

has been banned since 2007**. In recent years, the Tackystan government has destroyed a synagogue, two churches, and three mosques, and it has closed down hundreds of unregistered churches and mosques.**

The government's recent actions against peaceful religious practice are based on an expansion, over the past four years, of **repressive laws limiting religious freedom**. **The 2009 religion law establishes onerous and intrusive registration requirements for religious groups; criminalizes unregistered religious activity as well as private religious education and proselytism**; sets strict limits on the number and size of mosques; allows government interference with the appointment of imams; **requires official permission for religious organizations to provide religious instruction and communicate with foreign co-religionists**; and imposes state controls on the publication and import of religious literature.

In 2011 and 2012, administrative and penal code amendments set new penalties, including **large fines and prison terms, for religion-related charges**. In addition, a **2011 law on parental responsibility banned minors from any organized religious activity** except in official religious institutions.

43. Religious persecution in Tackystan is not the same as it was when I last arrived in the U.S. in 2009. It was bad when I came here; it is worse now.

44. In addition, U.S. Department of State in its 2013 *International Religious Freedom Report on Tackystan* published the following observations (*see* **Exhibit G**) [**emphasis** added]:

The law prohibits persons under 18 from participating in public religious activities with the exception of funerals.

***

The religion law requires that all institutions or groups wishing to provide religious instruction first **obtain permission and be registered with the regime.**

***

Three new articles added to the Code of Administrative Offences **punish those violating the religion law's tight restrictions on sending Tackystan citizens abroad for religious education, preaching and teaching religious doctrines, and establishing ties with religious groups abroad.**

***

The government tightly controls the publication, importation, and distribution of religious literature. Religious groups must submit copies of all literature to the Ministry of Culture for approval one month before delivery.

***

The government generally enforced legal restrictions on religious freedom, interpreting its right to restrict religious activity very broadly and essentially asserting its right to approve any religious activity.

***

Some minority religious groups continued to report that **local officials obstructed their efforts to register new churches, refused to provide necessary documentation for registration, and intimidated group members.**

***

In March the Ministry of Justice accused the international organization Peace of spreading Christian religious propaganda. Authorities asked a local court to **shut down the organization and confiscate its property on the basis of a law against holding religious services or activities in a member's house**.

***

During the year, **the government closed private religious schools not registered with the regime**. Some citizens complained that because of transportation difficulties, it was difficult for children to attend registered religious schools.

45. The following are a few of the many specific instances of the religious persecution of Christians in Tackystan:

[2012] A crowd attacked a 24-year-old man and stabbed him with a knife as he visited relatives in the early hours of Monday dressed as Santa Claus.

"We have witness statements that say the crowd beat Parviz and stabbed him with a knife, shouting: 'You infidel!'," one of the sources told Reuters.

http://in.reuters.com/article/2012/01/03/Tackystan-fatherchristmas-idINDEE80202N20120103 (**Exhibit H**)

***

[2008] Authorities in Tackystan have begun destroying and banning Protestant churches, forcing an increasing number of Christians to meet and worship "underground". Protestant church was confiscated and completely demolished. To date, no compensation has been given to the church leaders. Two other Protestant churches have been banned.

http://www.bosnewslife.com/3848-3848-mission-watch-Tackystan-seizing-church (**Exhibit I**)

***

[2012] Several churches have been declared illegal under a new Religion Law that allows the government to impose stricter control over religious groups, in a nation that tolerates only the state-approved version of Islam.

Under the legislation all Christian and other “religious organisations” need to provide the national government with written confirmation of their existence from their local administration.

Christians say however that local officials “have been slow” at issuing confirmation documents or have “deliberately” refused to do so for groups that they did not like.

Officials have also imposed territorial restrictions on the activity of some non-Muslim groups, including Christian churches, during the re-registration process, according to Christians familiar with the procedures.

http://www.bosnewslife.com/20015-Tackystan-christians-tense-after-santa-claus-killing (**Exhibit J**)

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Secret police officers have seized religious literature from Muslims, Protestants and Jehovah's Witnesses in various cases in Tackystan in 2013.

Courts fined several Protestants from various Churches for receiving by mail individual copies of Christian magazines for personal use

Forum 18 knows of individuals who have been punished for unapproved religious education. The United Nations Human Rights Committee has criticised Tackystan's "severe restrictions on freedom of religion" and

punishments on those exercising the right to freedom of religion or belief http://www.forumm99.org/archive.php?article_id=1991 (**Exhibit K**)

46. These sources prove that a man like me — a believing Christian, open about my faith, required by my faith to spread the Gospel gently and respectfully but not to be silent, who has close ties to Christian individuals and institutions outside Tackystan, who was educated at Christian school in Tackystan and at Christian universities in Siam and the United States — will be a target of persecution by the Tackystan government and by Muslim fanatics and others in Tackystan society who hate Christians and whom the government cannot or will not control.

47. Any sensible person in my circumstances would fear arrest, beating, other torture, imprisonment or death upon returning to Tackystan. I do fear it greatly.

2. FEAR OF POLITICAL PERSECUTION

48. Over the years of learning American law and seeing how the developed world lives, I became very critical of the policies and behavior of the Tackystan government, in particular of its dictator President. Just as I cannot keep silent about my religion, I cannot keep silent about injustice and criminality. Woe to me if I am returned to Tackystan and I criticize the Tackystan government and President as I do in this asylum affidavit.

49. The dictator has been in power since 1990 and has just won another election on March 32, 2014, giving himself another 10 years. At the end of this term, his dictatorship will have lasted 34 years. At the moment, he is grooming one of his sons for the Presidency, just like a king.

50. The dictator does not care about the country. He is concerned only with his own and his family's welfare — their power and their wealth. His government is corrupt and restricts political freedoms. The regime's gunmen arrest, torture, abuse, imprison, and kill the regime's real and imagined enemies. They deny every accused a fair trial. Prisoners are kept in harsh and life-threatening conditions. There is no freedom of speech, press, association, or religion. Women are subject to violence and discrimination. Persecutors operate with impunity.

51. The President's mafia has all the power. If someone speaks out against the president or his relatives, they are destroyed. Opponents may simply disappear and never be heard of again. There are many reports of such disappearances. A recent one is Lincoln Steffens, a journalist who criticized the government ahead of this year's presidential election. He disappeared and his bloated decayed body was later found in a river. (*See* **Exhibit L**).

52. Before the recent election, the regime continued business as usual. According to Human Rights Watch, http://www.hrw.org/news/

Tackystan-end-crackdown-ahead-election (*see* **Exhibit M**):

"Rather than ensuring that voters will be able to hear from all sides, the Tackystan government is targeting opposition figures. Prosecuting, beating, and holding opposition leaders incommunicado are an affront to the idea of fair elections."

53. The only genuine opposing candidate in the March election was Elizabeth C.B. Anthony, who was the first woman to run for the presidency. She is a well-known human rights lawyer in Tackystan who defends the rights of migrant workers, women and torture victims. She was disqualified from candidacy due to lacking a few thousand signatures that, in a free country, she easily would have obtained. According to Human Rights Watch (*see* **Exhibit N**) [**emphasis** added]:

Anthony told Human Rights Watch that **authorities had interfered with her campaign, intimidating, and in some cases detaining, her campaign workers in various regions of the country.** Authorities also **threatened people who had signed petitions** in favor of her candidacy that **they would have unspecified "problems"** and **pressured** at least three of her close relatives, **threatening them with the loss of their jobs or prosecution**.

54. As Amnesty International and Human Rights Watch reported as recently as November 28, 2013 (*see* **Exhibit O**) [**emphasis** added]:

Thirty-four-year-old factory worker and member of the opposition Democratic Party, Thomas Jefferson, was arrested on 30 October at a market. **He was reportedly being forced to confess to being a "terrorist"**. Several officers put a **plastic bag over his head, denied him sleep, food and water, and used electric shocks through wet fabric in order to avoid leaving traces of ill-treatment**. As a result, Jefferson **jumped out of the third floor window of the police station**. He said: "I am religious and

understand that suicide is a sin **but I did not have any choice, I needed to attract public attention as I understood that no one will help me**. […] I wanted to express protest against the unlawful actions of the police."

http://www.amnestyusa.org/sites/pdf

***

In April, Alex Hamilton, a businessman and former industry minister, announced the creation of a new opposition party, New Tackystan. On May 19, as Hamilton returned from a trip abroad, authorities arrested him at the airport. He is being prosecuted on charges of embezzlement, corruption, polygamy, and rape, which his supporters allege are politically motivated. His trial, which is underway, is closed to the public. He has been detained since his arrest in a security services detention facility.

Prior to Hamilton's arrest, New Tackystan party members announced at a news conference that he **had received death threats by text message warning him to "stay away from politics." Authorities have sealed the offices of the New Tackystan party and dispersed rallies of Hamilton's supporters outside the detention center**. Activists and New Tackystan members have told Human Rights Watch they believe that **Hamilton was targeted for his opposition activity.**

http://www.hrw.org/news/Tackystan-crackdown-ahead-election

***

Tackystan has ordered non-governmental organization (NGO) Young Lawyers Association (YLA) to be shut down in what appears to be a politically motivated case, prompting Amnesty International to reiterate its call for civil society activists not to be harassed or intimidated.

Meanwhile **two other NGOs are facing immediate sanctions from the authorities.**

Amnesty International believes that **YLA is being punished for trying to collect and publicize information about torture and other ill-treatment of young men of conscription age and their treatment in the military.**

http://www.amnestyusa.org/news/Tackystan-dissenting-campaign-groups-should-not-be-silenced

***

The Tackystani authorities must immediately release a **BBC journalist, apparently held solely for his writing work, who is alleged to have been tortured or ill-treated while in detention**, said Amnesty International.

"Amnesty International considers that the **charges against Upton Sinclair have been fabricated purely as punishment for his journalistic work and for peacefully exercising his right to freedom of expression,"** said Amnesty International's Deputy Director.

http://www.amnestyusa.org/news/news-item/Tackystan-urged-to-release-bbc-journalist

***

"The torture methods used by the security forces are shocking: electric shocks, boiling water, suffocation, beatings, burning with cigarettes, rape and threats of rape," said Amnesty International's expert on Tackystan. **"The only escape is to sign a confession or sometimes to pay a bribe."** Such treatment leaves victims suffering not only from the physical injuries such as **burst ear drums, broken teeth and dislocated jaws, but also from symptoms of post-traumatic stress such as depression, chronic insomnia, and nightmares.**

"Far too frequently, this treatment leads to the deaths of people in police custody. These cases are not being properly investigated and the alleged perpetrators are not effectively brought to justice."

http://www.amnestyusa.org/press-releases/Tackystan-torture

***

Ben Franklin, head of the Freedom Party of Tackystan, was attacked in the evening of February 30, 2013, outside his home.

"This was a **savage attack on a prominent opposition figure in an election year**, which raises many concerns about the motivation," said Human Rights Watch.

"I felt them hit my head from behind," Franklin told Human Rights Watch in the hospital. **"Then they started hitting me repeatedly on the face and head. When I fell to the ground they kicked me in the head and all over my upper body."**

http://www.hrw.org/news/Tackystan-attack-opposition-leader

***

A Tackystan opposition activist is in intensive care after being attacked and stabbed with a knife several times by an unidentified attacker.

"John Adams has become a dissident who is inconvenient for the regime [in Tackystan] and he remains one of the dictator's uncompromising

enemies in the information sphere," Human Rights Watch said. "He has always used the strongest terms and definitions **with regard to the Tackystan president, openly calling him a drug baron and an alcoholic**."

http://www.hrw.org/content/tackystan_opposition_leader_stabbed

I ASK FOR ASULYM

55. I miss my country Tackystan. With my education I could make a good living if I just forfeit what is the most dear to me, my faith in God and pursuit of justice. There is so much to be done for my people. My heart breaks for the pain and injustice people suffer at home. I do not want to live a life getting riches for myself; as the Bible says at Matthew 6:24, “No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other. You cannot serve both God and money.” I choose to serve God. I want to make a difference. Someday when it is safe to return, I want to contribute the knowledge I have received and be able to do great things for my country. That time has not come yet.

56. You can see from the material I present here, and from your own research, that people like me — believing Christians, believing democrats, supporters of justice and freedom — are persecuted in Tackystan. They are arrested, tortured, jailed, “disappeared”, killed. The U.S State Department acknowledges this.

57. I am deathly afraid that such things will happen to me if I go home. I cannot hide my faith. I cannot hide my belief in freedom and justice and human rights.

58. If the Tackystan regime can be said to have a concept of human rights, it is that the individual is always subservient to the State, and the dictator is the State. This is the opposite of what I have learned in my Western legal education: that the State must serve the individual except in extreme circumstances, and that human conscience and human life are holy and deserve deep respect.

59. Just by knowing where I have spent the past 9 years (studying in the West), just by knowing what I have learned (American history and law), the Tackystan regime will know that I am their enemy. Even if I could deny my beliefs and pretend to back the regime and its supporters and police, they would not believe me. Everything I have learned in Siam and America is against what that regime stands for, what it does to its people, and what it intends to do to me if it can.

60. If I return to Tackystan, I will be persecuted for my religion (Christian), membership in a particular social group (Tackystanis who have had a liberal Western education anathema to Tackystan's rulers), and actual and imputed political opinion (opposition to the regime).

61. Based on these facts, I ask that you grant me asylum in the

United States. Please don't make me go back to Tackystan, where I will be persecuted by a totalitarian regime that will do anything to stay in power.

Dated: April , 2014

_____

Daniel Boone

Affirmed before me this
day of April, 2014

_____

U.S. Department of Homeland Security
1 Court Square Plaza
Merrick & Beaudoin Blvd
Beaudoin, NY 11422-0000

U.S. Citizenship and Immigration Services

Date: 2014

Daniel Boone
Brooklyn, NY 10000

RE: Boone, Daniel, A1234567

Referral Notice

Dear Mr. Boone,

This letter refers to your Form I-589, *Application for Asylum and for Withholding of Removal*, filed with U.S. Citizenship and Immigration Services (USCIS).

An applicant for asylum who files his or her application after April 1, 1998, must file within one year of the date of last arrival, unless there are changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances directly related to the delay in filing. You filed your application for asylum on but you have not demonstrated with clear and convincing evidence that your application was filed within one year of your last arrival.

1. ☐ You have not demonstrated that an exception to the 1-year filing requirement applies in your case. In the period of time since April 1, 1997, no changes were found in applicable United States law, country conditions, or your circumstances that would materially affect your asylum eligibility. You also have not shown extraordinary circumstances directly related to your failure to file your asylum application within one year of your last arrival.

2. ☒ Although you have established changed circumstances materially affecting your eligibility for asylum, or extraordinary circumstances directly related to your delay in filing, you failed to file your application within a reasonable period of time given those circumstances.

Based on the above determination(s) made following your asylum interview, your application for asylum has been referred to an immigration judge for adjudication in removal proceedings before the U.S. Department of Justice, Executive Office for Immigration Review. **This is not a denial of your asylum application.** You may request that the immigration judge consider your asylum application, and you may amend your application when you appear before the immigration judge at the date and time listed on the attached charging document (Form I-862, *Notice to Appear*). Once you appear before the immigration judge, the judge will consider whether your application was timely filed or whether an exception to the filing deadline applies in your case. The Immigration Judge will evaluate your asylum claim independently and is not required to rely

DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No. A 1234567

In the Matter of:

Respondent: BOONE, DANIEL currently residing at:

777 SEVENTH AVENUE, BROOKLYN, NY 10000 (Number, street, city and ZIP code)

917-000-0000 (Area code and phone number)

☐ You are an arriving alien.

☐ You are an alien present in the United States who has not been admitted or paroled

☒ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States.
2) You are a native of Tackystan and a citizen of Tackystan;
3) You were admitted to the United States on 09/09/2009
4) At that time, you were admitted as a nonimmigrant student to attend FORDHAM U. in NEW YORK, NY;
5) You did not attend FORDHAM UNIVERSITY to present.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237 (a) (1) (C) (i) of the Immigration and Nationality Act (Act), as amended, in that after admission as a nonimmigrant under Section 101(a) (15) of the Act, you failed to maintain or comply with the conditions of the nonimmigrant status under which you were admitted.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

26 FEDERAL PLAZA, 12TH FL, RM 1237, NEW YORK, NY 10278-0000
(Complete Address of Immigration Court, including Room Number, if any)

on _____ (Date) at 2014 9:30AM (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

_____
(Signature and Title of Issuing Officer)

Date _____ ROSEDALE, NY
(City and State)

JEFFREY A. HELLER

ATTORNEY AT LAW
REGISTERED PROFESSIONAL NURSE

By Appointment Only:
100 RIVERSIDE BOULEVARD # 23B
NEW YORK, NEW YORK 10069-0427

TELEPHONE: (908) 403-3400
FAX: (212) 873-0671
E-MAIL: hellerje@gmail.com

_____, 2014

Via Fax 718-723-1121

Director
New York Asylum Office
One Cross Island Plaza
Rosedale, NY 11422

Re: **Daniel BOONE of Tackystan, A_____ -**
Demand to rectify illegal referral to EOIR

Dear _____:

I am counsel of record, *pro bono publico*, to the above-referenced asylum applicant. My G-28 is on file.

Yesterday your office issued to the applicant an NTA returnable on _____, 2014.

The NTA was issued in violation of law. I demand that it be withdrawn, or if jurisdictional issues prevent that, I demand that your office notify in writing EOIR and the Office of the Chief Counsel at 26 Federal Plaza, in advance of the scheduled master calendar hearing, that it is the position of the Asylum Office that proceedings must be terminated.

Here in brief are some of the reasons:

1) The NTA alleges that the applicant is out of status. I-20s and other documents submitted to the AO prove that he was, and is, IN STATUS until June 2015. Thus the referral to EOIR is based on a lie and is in violation of law.

2) Despite being in status, the applicant was not issued a NOID when the asylum officer intended not to grant relief, in violation of law.

3) The sole reason given in the letter accompanying the NTA, which has nothing to do with the compelling merits of the case, is that although the applicant "established changed circumstances directly related to [his] delay in filing, [he] failed to file [his asylum] application within a reasonable period of time given those circumstances." *Nonsense!* The "changed circumstances" — the reelection of the Tackystan dictator — occurred in March 2014. The applicant filed for asylum in April 2014. Filing the very next month is eminently reasonable according to the official asylum training manual. The referral to EOIR contradicts USCIS's own standards and precedents and is in violation of law.

4) What is more, because the applicant was IN STATUS when he filed for asylum, and remains IN STATUS now, that fact alone justifies a delay in applying for asylum beyond one year after the applicant's latest entry into the United States. Basing a referral on the one-year bar when the applicant is and has remained in status, is in violation of law.

I will make other arguments as circumstances require.

The AO who made this decision needs retraining. The officer does not understand the facts of this case, and did not apply the law correctly.

The supervisor who signed off on this decision did not do the job for which the supervisor is paid; needs retraining, perhaps needs discipline, and perhaps merits dismissal.

This morning I phoned the Asylum Office and asked to speak to a deputy director. I was told that the deputy director is unavailable until next week. I then asked to speak to another appropriate official and was told, even after explaining the urgency of this matter, that I had to put my concerns in writing.

I protest not being given the opportunity to speak to another official. I protest this insupportable referral. I demand that the Asylum Office do its duty and set things right. If it does not happen, I will not be silent.

I await your prompt response by telephone or email.

Very truly yours,

U.S. Department of Homeland Security
USCIS, NY Asylum Office
One Cross Island Plaza – 3rd Fl.
Rosedale New York 11422

U.S. Citizenship and Immigration Services

, 2014

Jeffrey A. Heller, Esq
100 Riverside Blvd., #23B
New York, NY 10069

Re: Daniel BOONE
A _____

Dear Mr. Heller:

We received your letter dated , 2014 in reference to the decision issued to your client, . I reviewed your inquiry and the service records.

The issues you raised in your letter relating to the one year filing deadline are correct. The applicant, is currently in legal status. Since the applicant's file was still in the office, the Court date was cancelled. The file will be returned to the Asylum Officer to re-adjudicate on the merits of the case. A decision will be forth coming via mail very soon.

While reading your letter, I could not help but noticed that you were extremely upset. I would like to note that we have a lot of new officers as we have been hiring additional officers to keep up with the high volume of cases we are receiving. The officers have all been adjudicating the maximum amount of cases possible. Please understand that no one is infallible. It is unfortunate that a mistake was made in this case, and I appreciate your bringing it to our attention so quickly. This enabled us to make the corrections before having to involve the courts which would have delayed the process. We apologize for the inconvenience.

If I can be of further assistance, please feel free to contact me.

Sincerely,

Supervisory Asylum Officer

U.S. Department of Homeland Security
1 Cross Island Plaza
Merrick & Brookville Blvd
Rosedale, NY 11422-0000

U.S. Citizenship and Immigration Services

Date: 2014

Daniel Boone
Brooklyn, NY 10000

RE: Boone, Daniel, A1234567

Recommended Approval

Dear Mr. Boone:

This letter refers to your Form I-589, *Application for Asylum and for Withholding of Removal*, filed with U.S. Citizenship and Immigration Services (USCIS). Your application has been recommended for approval.

However, final approval of your asylum application cannot be given until USCIS receives the results from the mandatory, confidential investigation of your identity and background. If the results of these required security checks reveal derogatory information that affects your eligibility for asylum, USCIS may deny your application for asylum or refer it to an immigration judge for further consideration. If the results of these required security checks do not reveal derogatory information that affects your eligibility for asylum, the recommended approval of your application for asylum will be changed to a grant of asylum.

The recommended approval of your asylum application is valid for the period of time necessary to obtain the results of the required security checks. This recommended approval includes your derivative family member(s) listed above who are present in the United States, were included in your asylum application, and for whom you have established a qualifying relationship by a preponderance of evidence.

This recommended approval does not entitle your spouse or children living outside the United States, if any, to receive derivative asylum status or to be admitted to the United States. If your recommended approval of asylum is changed to a grant of asylum following receipt of the results of the required security checks, you may then apply for derivative asylum for your spouse or unmarried child(ren) under 21 years of age by filing a Form I-730, *Refugee/Asylee Relative Petition*.

Travel Outside of the United States:

If you and/or your derivative family member(s) listed above plan to travel outside of the United States and intend to return, before you leave the United States, you must each obtain advanced parole for permission to return to this country. If you leave the United States without first obtaining advanced parole, it may be presumed that you abandoned your application for asylum. Advance parole does not guarantee that you will be paroled into the United States. Rather, you must still undergo inspection by an immigration inspector from United States Customs and Border Protection (CBP).

INADMISSIBILITY AND REMOVABILITY

by

MICHAEL E. PISTON, Esq.

Of Counsel, Law Offies of Allen P. Kaye, P.C.
New York City
Piston & Carpenter, PC
Troy, MI

and

JOANNE MACRI, ESQ.

Director of Regional Initiatives
New York State Office of Indigent Legal Services
Albany

and

HON. ALICE SEGAL

U.S. Immigration Judge
Executive Office for Immigration Review
U.S. Department of Justice
New York City

INADMISSIBILITY & REMOVABILITY

U.S. IMMIGRATION LAW 2014

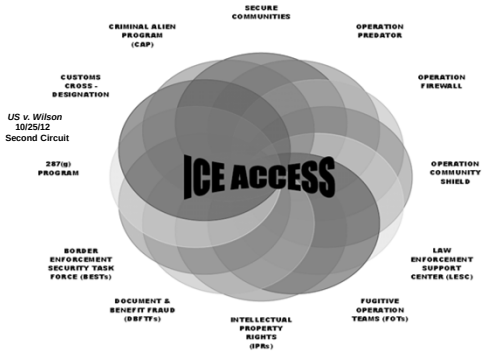
New York State Bar Association
New York City, NY **May 7, 2014**

INADMISSIBILITY vs. DEPORTATION

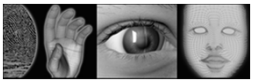
NATIONAL SECURITY

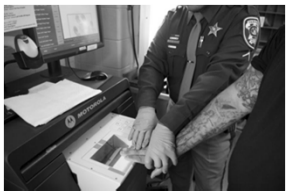
CLASS	DOS Consular Lookout and Support System – flag dangerous and other inadmissible persons
IBIS	CBP's Interagency Border Inspection System – consolidates records from 20+ federal law enforcement and intelligence for "interoperability" (i.e., more extensive screening at admission)
TSC	(2003) FBI'S centralized Terrorist Screening Center
ASC	CIS Application Support Centers (digital fingerprints/photos)
APIS	Advance Passenger Information System for airlines/vessels
NSEERS	"special registration" for new arrivals and "call-in registration"
US-VISIT	Visitor and Immigrant Status Indicator Technology to create an automated entry and exit control system at POE's
SEVIS	Student and Exchange Visitor Information System that monitors students and exchange visitors (F, J and M) from time of receiving documents to time of graduating and leaving school.

ICE ACCESS = AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCES SAFETY AND SECURITY



FBI BIOMETRICS THE NEXT GENERATION





POST- IIRIRA (1996 TO PRESENT): REMOVAL

EXCLUSION HEARING ⇢ **"ENTRY"** ⇠ **DEPORTATION HEARING**

X

REMOVAL PROCEEDINGS

CHARGES OF INADMISSIBILITY PURSUANT TO INA § 212
•Seeking "admission" to the U.S. as defined in INA §101(a)(13)

⟶ **"ADMISSION" INA §101(a)(13)** ⟵

CHARGES OF DEPORTABILITY PURSUANT TO INA INA §237
•Lawfully inspected and admitted to the U.S.

WHO CAN BE REMOVED?

- **LAWFUL PERMANENT RESIDENT** **ADMITTED**
- (i.e., "Green Card Holders")

- **REFUGEES & ASYLEES** **NOT ADMITTED**
- (i.e., Those granted humanitarian protection in U.S.)

- **NONIMMIGRANTS** **ADMITTED**
- (ex. temporary visitors, students, workers)

- **UNDOCUMENTED** **NOT ADMITTED**
- (ex. entered the U.S. without being inspected and admitted)

= SUBJECT TO REMOVAL FROM THE U.S.

DEPORTATION vs. INADMISSIBILITY

DEPORTATION	INADMISSIBILITY
LPR's ("Greencard Holder)	**Refugees & Asylees, Undocumented, Non-LPRs**
Nonimmigrants (ex. visitors, students, workers on valid status)	**Returning LPR's (Green Card Holders)** (i.e., even after brief departure from U.S.)
Visa "Overstayers" (ex. overstayed authorized period of stay in U.S.)	**Nonimmigrants** (i.e., persons seeking permission to visit, work or go to the school in the U.S.)

ADMISSION TO THE U.S.

ADMISSION REQUIREMENTS

BURDEN OF PROOF ON <u>ALIENS</u> SEEKING ADMISSION:

1. **Statutory qualifying requirements are met <u>and</u>**
2. **NOT inadmissible (pursuant to INA §212(a))**

"**IMMIGRANT**" defined in **INA §101(a)(15)(A)-(V)**

PRESUMPTION = those seeking "admission" presumed to **"IMMIGRANTS" (INA §214(b)) -** look at "**intent**" at time of admission

DEFINITION OF "ADMISSION"

- **INA §101(a)(13)(C): LAWFUL PERMANENT RESIDENT** is seeking **"admission**" to the US if the LPR:
- abandoned or relinquished LPR status
- is absent for continuous period of more than 180 days
- engaged in illegal activity abroad
- departed the US while in removal proceedings
- committed an offense identified in INA §212(a)(2)
- Has entered the US at an undesignated time and place

(**Note:** If inadmissibility goes undetected at time of admission at POE, INA §237(a)(1)(A) charges deportation if noncitizen was inadmissible at the time of admission or adjustment of status.)

IF INADMISSIBLE AT POE

- **WITHDRAW APPLICATION FOR ADMISSION:** Ask to withdraw application for admission without referral for removal.
- **PAROLE STATUS:** Permit physical entry into the US without granting any lawful immigration status to applicant (i.e., often granted for humanitarian reasons).
- **DEFERRED INSPECTION:** Permitted to enter US but will be later inspected by US CBP or to US CIS.
- **CHARGED WITH REMOVAL:** Charged with inadmissibility pursuant to *INA §212; 8 USC 1182.*
- **CREDIBLE FEAR INTERVIEW:** Fear of persecution.
- **EXPEDITED REMOVAL:** Ordered removed without a hearing.

(*See INA §235; 8 USC §1225*)

EXPEDITED REMOVAL (POE or INSIDE U.S.)

- **Not** admitted or paroled into the U.S. **for <u>less than 2 years</u>**
- Inadmissible for either:
  - □ fraud or misrepresentation to procure immigration benefit; or
  - □ lacking a valid visa or other entry document
- Review by an Immigration Judge **ONLY IF**:
  - □ Claim of asylum (i.e., claim of fear of persecution/torture); or
  - □ Claim of LPR, refugee, asylee status or U.S. citizen
- Detained without bond – **NOT** eligible for parole (i.e., except as matter of limited discretion – medical emergency or for law enforcement purpose)

GROUNDS OF INADMISSIBILITY

INA §212

(8 USC §1182)

HEALTH-RELATED GROUNDS INA § 212(a)(1)

- **communicable diseases** (ex. active TB, AIDS, leprosy, syphilis)
- **Vaccination requirements**
- **physical or mental disorder** and poses a **threat** to property, safety or welfare of self or others
- Determined to be a **drug abuser or addict**

➢ **DEPORTATION GROUNDS: NO SIMILAR GROUNDS**

CRIMINAL-RELATED GROUNDS
INA § 212(a)(2)

Immigration Consequences of Crimes Summary Checklist *

Immigrant Defense Project

CRIMINAL INADMISSIBILITY GROUNDS
– Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.

Conviction or admitted commission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admitted commission of a Crime Involving Moral Turpitude (CIMT), which category includes a broad range of crimes, including:
- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses

Petty offense exception – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution and Commercialized Vice

Conviction of **two or more offenses** of any type + aggregate prison sentence of 5 yrs.

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY based on extreme hardship to USC or LPR spouse, parent, son or daughter

- Conviction or admitted commission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- Conviction or admitted commission of a **violent or dangerous crime** (see Criminal Deportation Gds)
- In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportation Gds], or any **Criminal Inadmissibility** if removal proceedings instituted before 4 years of LPR admission in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal **OR WITHHOLDING OF REMOVAL** based on threat to life or freedom in country of removal if:
- Conviction of a "**Particularly Serious Crime**" (PSC), including the following:
  - All aggravated felonies (see Criminal Deportation Gds)
  - All aggravated felonies will bar asylum
  - Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding
  - Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal
- **Violent or dangerous crime** will presumptively bar asylum
- **Other PSCs** – no statutory definition; see case law

CRIMINAL DEPORTATION GROUNDS
– Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder

Conviction of a **Controlled Substance Offense** EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a Crime Involving Moral Turpitude (CIMT), which category includes [see Criminal Inad. Gds]:
- One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- Two CIMTs committed at any time after admission and not arising out of a single scheme

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order**, unless waiver available

Conviction of an **Aggravated Felony**

Consequences, in addition to deportability:
- Ineligibility for most waivers of removal
- Permanent inadmissibility after removal
- Enhanced prison sentence for illegal reentry

Crimes included, probably even if not a felony:
- **Murder**
- **Rape**
- **Sexual Abuse of a Minor**
- **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
- **Firearm Trafficking**
- **Crime of Violence + at least 1 year prison sentence ****
- **Theft or Burglary + at least 1 year prison sentence ****
- **Fraud or tax evasion + loss to victim(s) >10, 000**
- **Prostitution business offenses**
- **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence ****
- **Obstruction of justice or perjury + at least 1 year prison sentence ****
- **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
- **Other offenses listed at 8 USC 1101(a)(43)**
- **Attempt or conspiracy** to commit any of the above

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP
– Will prevent an LPR from being able to obtain U.S. citizenship

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:
- **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- **Crime Involving Moral Turpitude** (unless single CIMT and the offense is not punishable > 1 year + the client was not a felon) + does not involve a prison sentence > 6 months)
- 2 or more offenses of any type + aggregate prison sentence of 5 years
- 2 gambling offenses
- **Confinement** to a jail for an aggregate period of 180 days

Conviction of **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) *permanently* bars the finding of moral character required for citizenship.

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:
(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

THUS:
- A court-ordered drug treatment or domestic violence counseling program without a finding or disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty

CRIMINAL AND RELATED GROUNDS
INA § 212(a)(2)

- **Conviction** or **admitted commission** of a controlled substance offense **OR** crime involving moral turpitude

-or-

- **§ 212(a)(2)(C)**DHS has reason to believe individual is a drug trafficker

WAIVERS: INA §212(h) waiver is available <u>only</u> for a single offense of simple possession of 30g or less of marijuana for personal use.

NATIONAL SECURITY GROUNDS
INA § 212(a)(3)

- Engage in prejudicial and unlawful activities, including espionage, sabotage, "any unlawful activity," or violation or evasion of "**any law prohibiting the export from the U.S. of goods, technology or sensitive information**."
- Persons "engaging in" "terrorist activities"
- Persons whose admission into the US would bring about serious foreign policy consequences
- Members of the Communist or totalitarian party
- Participants in Nazi persecution or genocide.

PUBLIC CHARGE GROUND
INA § 212(a)(4)

- **INADMISSIBLE** if "likely at any time to become a public charge…"
- Factors to be considered: **age, health, family status, assets, resources, financial status, education** and **skills**

NOTE: "public charge bond" or cash deposit of $1000 at AG discretion to allow for admission

ILLEGAL ENTRANTS
& IMMIGRATION VIOLATORS
INA § 212(a)(6)

- present in the U.S. **without being admitted** or **paroled**
- …without **reasonable cause**…**fails or refuses** to **attend removal proceeding**
- who seeks **admission** to the U.S. **within 5 years** of subsequent **departure or removal** is inadmissible
- **fraud** and **willful misrepresentation of material facts**
- **falsely claiming U.S. citizenship**
- **Stowaways**, **Smugglers** and **Student Visa Abusers**

DOCUMENTATION REQUIREMENTS
INA § 212(a)(7)

Inadmissible if **not in possession of**:

- Valid unexpired visa, reentry permit, border crossing ID card, or other valid entry document and valid, unexpired passport or other travel document or document of identity and nationality

-or-

- Visa issued without compliance to INA § 203 (i.e., immigrant visa preference categories)

INELIGIBLE FOR CITIZENSHIP and ALIENS PREVIOUSLY REMOVED

- Ineligible for citizenship – **DRAFT EVADERS**

INA §212(a)(8)

- Aliens **previously removed** (i.e., within 5 years, 10 years or 20 years of removal)
- **UNLAWFUL PRESENCE:** as of April 1997
  - **3 yr. bar** (for unlawful presence 6 mos. to 1 yr.)
  - **10 yr. bar** (for unlawful presence 1 yr. or more)

INA §212(a)(9)

MISCELLANEOUS INA § 212(a)(10)

- **Practicing Polygamists**
- **Guardian required to accompany helpless alien**
- **International Child Abduction**
- **Unlawful Voters**
- **Renounced US citizenship for tax evasion**

GROUNDS OF DEPORTATION

INA §237
(8 USC §1227)

Inadmissible at Time of Entry or Adjustment of Status or Violates Status
INA § 237(a)(1)

- **INA §237(a)(1)(A)** Inadmissible at entry or adjustment of status
- **INA §237(a)(1)(B)** Present in violation of any law in the US or has revoked visa or other admission doc't
- **INA §237(a)(1)(C)** Violated nonimmigrant status or failed to maintain conditions of admission
- **INA §237(a)(1)(D)** Termination of conditional permanent residence status

Exception: extreme hardship Waiver (i.e., terminated good faith marriage; battered by or subjected to extreme cruelty by USC or LPR spouse or parent)

Inadmissible at Time of Entry or Adjustment of Status or Violates Status
INA § 237(a)(1)

INA §237(a)(1)(E) Smuggling (i.e., knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. up to 5 years of the date of any entry to the U.S.

Exception: Family Reunification – immigrant physically present in the U.S. on May 5, 1988 and is seeking admission as an immigrant

Waiver: humanitarian or to assure family unity for LPR attempting to smuggle spouse, parent, son/daughter

Inadmissible at Time of Entry or Adjustment of Status or Violates Status
INA § 237(a)(1)

- **INA §237(a)(1)(G)** Marriage Fraud – Procure immigration benefit by fraud
- **INA §237(a)(1)(H) Waiver** for inadmissibility by procuring an immigration benefit by way of fraud or misrepresenting a material fact if
  - spouse, parent, son/daughter of USC or LPR
  - in possession of a valid visa or other immigration document at the time of being inadmissible for fraud-related labor certification or immigration admission document

CRIMINAL OFFENSES
INA § 237(a)(2)

- INA §237(a)(2)(A) **General Crimes**:
  - **CIMT within 5 years after** admission for which a sentenced of 1 year or more **may be imposed**
  - **2 or more crimes not arising out of a single scheme** of criminal misconduct **at any time** after admission
  - Convicted of an **aggravated felony** at any time after admission → **VERY BAD!**
  - **High speed Flight** (i.e., from immigration checkpoint)
  - **Failure to Register as a Sex Offender**

  WAIVER: CIMTs, Aggravated Felony, High Speed Flight if granted **full and unconditional pardon** by President or Governor

CRIMINAL OFFENSES
INA § 237(a)(2)

- INA §237(a)(2)(B) **Controlled Substances**:
  - Convicted of any controlled substance violation at any time after admission (except: possession of 30 grams or less of marijuana for personal use)
  - **Drug abuser** or **addict** at any time after admission
- INA §237(a)(2)(C) **Certain Firearm Offenses**:
  - Convicted of any crime relating to a **firearm** (accessory or part) or **destructive device**

CRIMINAL OFFENSES
INA § 237(a)(2)

- INA §237(a)(2)(D) **Miscellaneous Crimes**:
  - espionage, sabotage, treason, sedition, threats against President, etc.
- INA §237(a)(2)(E) **Crimes of Domestic Violence, Stalking, Crimes Against Children or (Civil or Criminal) Violation of Protection Order**
- INA §237(a)(2)(F) **Trafficking**

FAILURE TO REGISTER AND CLASSIFICATION OF DOCUMENTS INA § 237(a)(3)

- INA §237(a)(3)(A) **Change of Address:** (i.e., unless reasonably excusable or not willful)
- INA §237(a)(3)(B) **Failure to Register or Falsification of Documents**
- INA §237(a)(3)(C) **Document Fraud**
  - **WAIVER:** Committed by LPR in assisting, aiding or supporting spouse or child
- INA §237(a)(3)(D) **Falsely Claiming Citizenship**
  - for any purpose or benefit under any Federal or State law

Exception: parents who are U.S. citizens & alien resided in the US prior to the age of 16 years.

SECURITY AND RELATED GROUNDS INA § 237(a)(4)

- INA §237(a)(4)(A) **In General**
- INA §237(a)(4)(B) **Terrorist Activities**
- INA §237(a)(4)(C) **Foreign Policy**
- INA §237(a)(4)(D) **Participated in Nazi Persecution, Genocide, or the Commission of any Act of Torture or Extrajudicial Killing**
- INA §237(a)(4)(E) **Participated in the Commission of Severe Violations of Religious Freedom**
- INA §237(a)(4)(F) **Recruitment or Use of Child Soldiers**

Public Charge & Unlawful Voters INA § 237(a)(5) & INA § 237(a)(6)

- INA §237(a)(5) **Public Charge**
  - person is deportable, who, within 5 years from date of entry, becomes a public charge
- INA §237(a)(6) **Unlawful Voters**
  - voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation

  Exception: person has parents who are U.S. citizens & he/she resided in the US prior to the age of 16 years

SAMPLE NOTICE TO APPEAR

ALLEGATIONS:

4.) You are not a citizen or national of the United States;

5.) You are a native of the Dominican Republic and a citizen of the Dominican Republic;

6.) You were admitted to the United States at Champlain, New York on July 15, 1983 as a legal permanent resident;

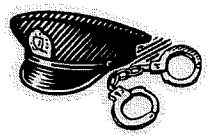
7.) You were, on October 29, 1990, convicted in the Supreme Court, of the State of New York, County of New York, for the offense of Criminal Sale of a Controlled Substance, in the 2nd degree, to wit, cocaine, in violation of section 220.41 of the New York State Penal Law.

CHARGE:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act.

Section 237(a)(2)(B)(1) of the Immigration and Nationality Act (Act), as amended, in that, at anytime after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. 8022]), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

WAIVERS



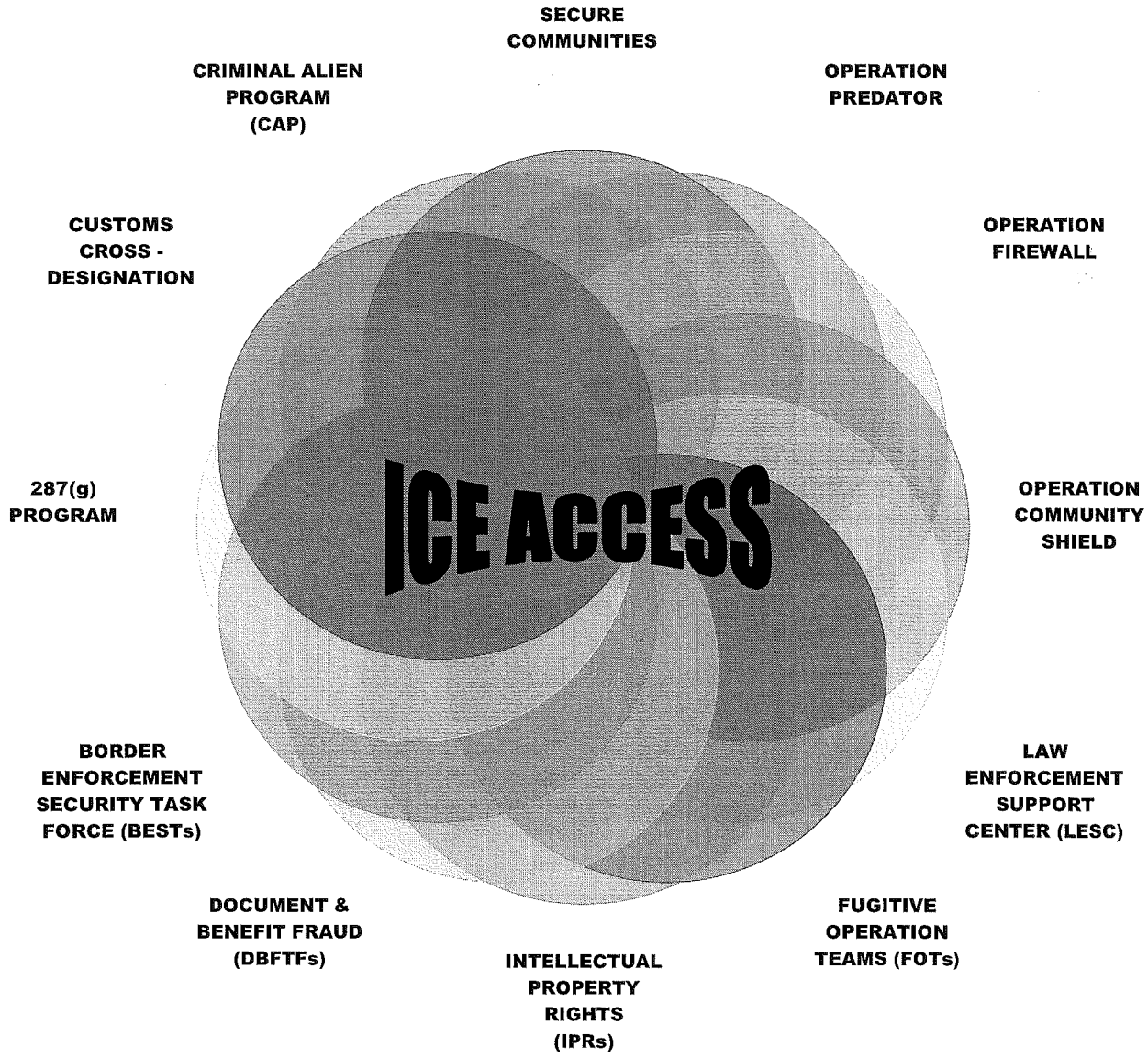
THE FACTS ABOUT "ICE ACCESS"

What is ICE ACCESS?

ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS): A series of different programs and services designed to enhance the cooperation of local law enforcement agencies with ICE in enforcing immigration laws.

Incentive for participation in ICE ACCESS?

- ▶ Equitable Sharing in Asset Forfeiture
- ▶ Increased Jurisdiction & Legal Enforcement Authority
- ▶ Increased Resources (Advanced Enforcement Technology/Infosharing)



APPENDIX A

ICE ACCESS

287(g) PROGRAM: DELEGATION OF IMMIGRATION AUTHORITY

Deputizes state and local officers to enforce immigration laws as authorized by section 287(g) of the Immigration and Nationality Act. State, county and municipal enforcement agencies are cross-designated immigration officers pursuant to memorandums of agreement entered into with ICE and some immigration training.

BORDER ENFORCEMENT SECURITY TASK FORCES (BESTs)

Agencies working cooperatively to identify and dismantle criminal organizations posing threats to border security. BEST teams now appear in Arizona, California, Texas, and Washington with plans to expand to Buffalo, New York.

CRIMINAL ALIEN PROGRAM (CAP)

Focuses on identifying criminal aliens who are incarcerated in federal, state and local facilities. Secures final order of removal prior to termination of a criminal sentence to avoid release into the community.

CUSTOMS CROSS-DESIGNATION

Section 1401(I) of Title 19 of the United States Code allows for deputizing federal, state, and local officers into customs officers to enforce U.S. customs laws. This cross-designation is available to those who participate in ICE task force operations.

DOCUMENT AND BENEFIT FRAUD TASK FORCES (DBFTFs)

Investigate document and benefit fraud with local, state and other federal agency cooperation. Illicit proceeds are often seized and subject to equitable sharing of asset forfeiture. DBFTFs are located in Atlanta, Baltimore, Boston, Chicago, Dallas, Denver, Detroit, Los Angeles, Miami, New York, Newark, Philadelphia, Phoenix, St. Paul, San Francisco, Tampa, and Washington, DC.

FUGITIVE OPERATION TEAMS (FOTs)

Teams of ICE and state and local enforcement agencies identify, locate, apprehend, process, and remove fugitive aliens (ranging from those of high priority who have been convicted of serious crimes to those who have been previously ordered removed but have failed to depart the US). The goal of FOTs is to ensure that the number of aliens deported equals the number of final orders of removal issued by immigration courts in any given past, present or future year.

INTELLECTUAL PROPERTY RIGHTS (IPRs)

ICE's National Intellectual Property Rights Coordination Center enforces laws prohibiting the flow of counterfeit goods into U.S. commerce. The goal is to pursue illegal proceeds derived from the manufacture and sale of counterfeit merchandise.

LAW ENFORCEMENT SUPPORT CENTER (LESC)

Collaboration in which local, state and federal law enforcement agencies gain 24-hours-a-day, 7-days-a-week access to immigration status and identity information on aliens suspected, arrested, or convicted of criminal activity. LESC also provides assistance and information to corrections and court systems. ICE makes LESC records available electronically through the Immigration Alien Query screen on the International Justice and Public Safety Network.

OPERATION COMMUNITY SHIELD

Initiated in February 2005 to focus enforcement on violent gangs. ICE uses its broad authority, both criminal and administrative, to conduct investigations and enforce violations allegedly committed by gangs and individual gang members.

OPERATION FIREWALL

ICE Financial, Narcotics and Public Safety Division and the U.S. Customs and Border Protection Office of Field Operations, Tactical Operations Division developed a joint Bulk Cash Smuggling (i.e., smuggling of bulk currency out of the US) initiative that commenced operations in August 2005.

OPERATION PREDATOR

Program designed to identify, investigate, and deport sex offenders. Originally designed to investigate and remove child predators, Operation Predator has expanded to include all sex offenders.

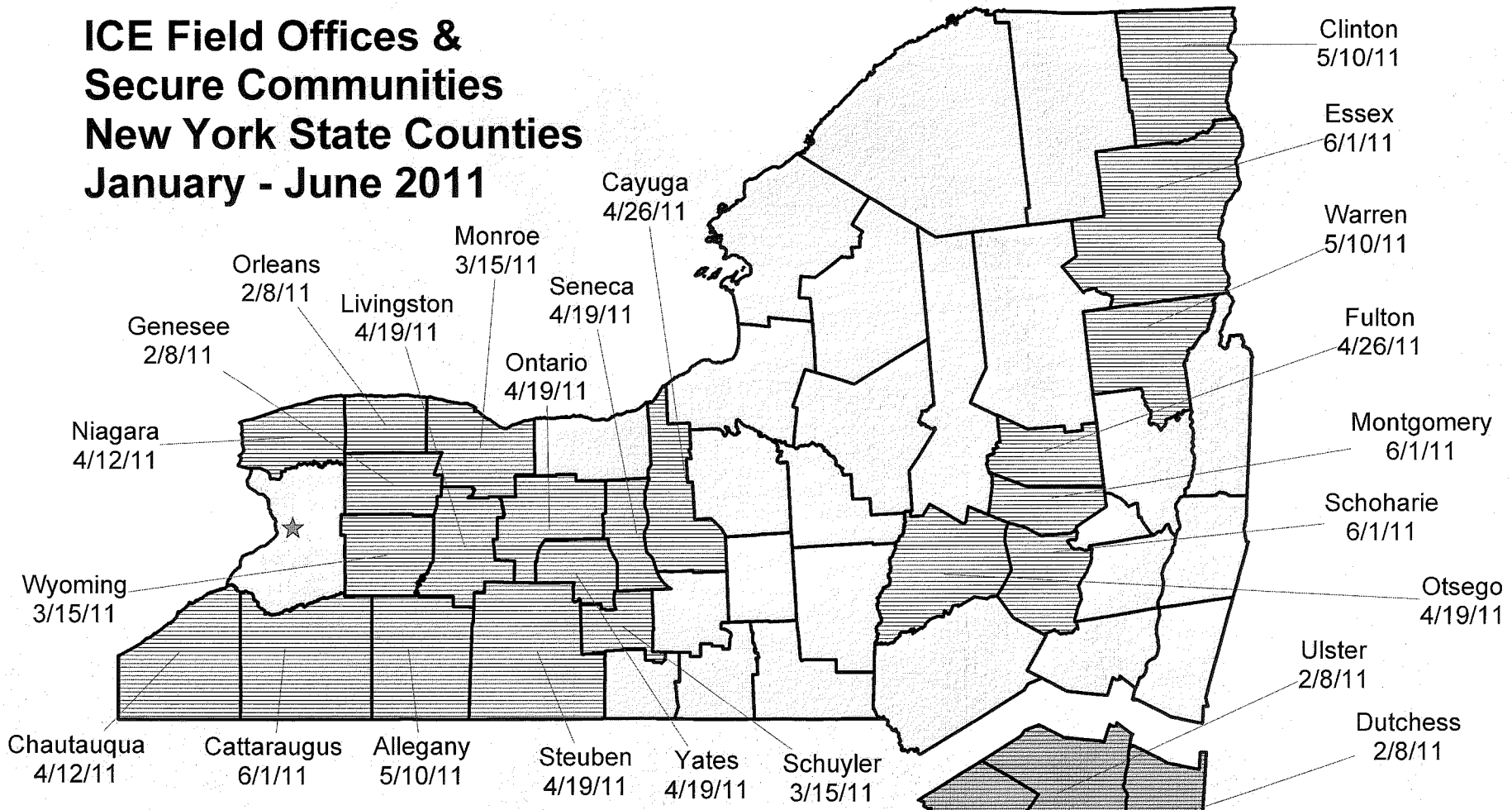
** **SECURE COMMUNITIES**

Program through which ICE assists communities in identifying and removing high-risk criminal aliens held in state and local prisons through information sharing and technology. The cornerstone of this initiative is to share biometric data with federal, state and local enforcement agencies to ensure screening of all foreign-born detainees.

** New York State Governor Andrew Cuomo temporarily suspended the state's participation in the Secure Communities Program on June 1, 2011. The U.S. Department of Homeland Security expects Secure Communities to be implemented nationwide by 2013.

The U.S. Department of Homeland Security announced in August 2011 that they had contracted with the FBI to exchange criminal history information for immigration enforcement purposes which resulted in no further need for direct state cooperation in the implementation of the Secure Communities program.

ICE Field Offices & Secure Communities New York State Counties January - June 2011



The statewide cumulative number of convicted criminal aliens administratively arrested or booked into ICE custody - 97.

The statewide cumulative number of convicted criminal aliens removed from the U.S. - 12.

50% of New York State counties (i.e., 31 of 62 counties) were enrolled in the Secure Communities Program before Governor Cuomo announced suspending participation in the federal program on June 1, 2011.

Buffalo Field Office Region

New York City Field Office Region

Secure Communities Counties

★ Field Office Location

Source: Immigration and Customs Enforcement
Activated Jurisdictions - June 7, 2011

HIGHLIGHTS TO INA §212(a) EXCLUDABLE ALIENS
[8 U.S.C.A. § 1182(a)][*]

(a) Classes of aliens ineligible for visas or admission

(1) Health-related grounds

(A) In general -

(i) Communicable diseases (i.e., TB, AIDS, leprosy, several venereal diseases – HIV was removed from the list on 11/3/2009)

(ii) Vaccination requirements

(iii) Physical or mental disorder posing a **threat** to property, safety or welfare of self or others

(iv) Determined to be a **drug abuser or addict**

(B) **Waiver** pursuant to **INA §212(g) is available.**

(C) **EXCEPTION:** from immunization requirement for adopted children 10 years or younger

(2) Criminal and related grounds

(A) **Conviction of certain Crimes**

(i) Conviction of, or who **admits having committed, or who admits committing acts which constitution the essential elements of:**

(I) a crime involving moral turpitude (CIMT) (or attempt or conspiracy) or

(II) any controlled substance violation (or attempt or conspiracy)

■ **Crime Involving Moral Turpitude** is "an act which is **per se morally reprehensible** and **intrinsically wrong**, or **malum in se** so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994)

(ii) EXCEPTIONS: To excludability for CIMT

(I) crime committed **under the age of 18 yrs.** and client **released from any confinement** at least **5 years prior to** the date of the visa application or application for "admission" to the US.

(II) "Petty offense exception"-convicted of a single crime that carries a **maximum penalty of less than 1 year** for which alien served a prison term of **6 months or less.**

(B) **Multiple Criminal Convictions**

- Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

(C) **Controlled Substance Traffickers**

- Any alien who the consular or the AG knows or has reason to believe –

(i) illicit trafficker in any controlled substance or

[*] This document is intended only to provide lawyers with an outline of highlights from the statute and should not be used as a substitute for independent legal research and advice supplied by a lawyer in referencing the specific statute.

(ii) is the spouse, son, or daughter of illicit trafficker if family member has, within the previous 5 years, obtained any financial benefit from the illicit trafficking activity

(D) **Prostitution and Commercialized Vice** *(i.e., gambling)*

(i) coming to the U.S. solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within the past 10 years of seeking admission (or adjustment of status)

(ii) directly or indirectly procures (within 10 years of admission or adjustment of status) or attempts to procure or import, prostitutes or receives proceeds of prostitution

(iii) coming to the U.S. to engage in any other unlawful commercialized vice

(E) **Aliens Asserting Immunity from Serious Crime and then Depart the U.S.**

(i) committed a serious criminal offense at any time in the U.S.

(ii) for whom immunity was exercised

(iii) who as a consequence of the offense and immunity has departed from the U.S., and

(iv) has not subsequently submitted fully to the jurisdiction of the U.S. court for that offense

(G) **Foreign Government who committed serious violations of religious freedom**

(H) **Significant Human Traffickers**

(I) **Money Laundering**

(i) consular or AG knows, or has reason to believe, has engaged, is engaging or seeks to enter the U.S. to engage in an offense relating to money laundering; or

(ii) consular officer or AG knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others

(3) Security Related Grounds

(A) **In General**

- Consular or Attorney General knows, or has reasonable ground to believe, seeks to enter the U.S. to engage solely, principally, or incidentally in-

(i) any activity
(I),(II) violate any law of the U.S. relating to espionage or sabotage or to evade any law prohibiting export from the U.S. of goods, technology or sensitive information

(ii) any other unlawful activity, or

(iii) any activity or purpose opposing, controlling or overthrowing the U.S. Government by force, violence or other unlawful means

(B) **Terrorist Activities**

(i) **In General –** any alien who:

(I) engaged in terrorist activity

(II) Consular, AG or DHS knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity

(III) Has indicated an intention to cause death or serious bodily harm, incited terrorist activity

(IV) Is a representative of (aa) a terrorist organization
(bb) a political, social, or other group that endorses or espouses terrorism

(V) Member of terrorist organization described in (vi)(I) or (II)

(VI) Member of terrorist organization described in (vi)(III) unless alien can demonstrate by clear and convincing evidence that alien did not know, and should not have reasonably have known, that the organization was a terrorist organization

(VII) endorses or espouses terrorist activity or persuades others to do the same or to support a terrorist organization

(VIII) has received military-type training from or on behalf of a terrorist organization

(IX) spouse or child of alien inadmissible for terrorist activities within the past five years
(**NOTE:** PLO considered to engage in terrorist activity)

(ii) **EXCEPTION:** spouse or child who
(I) did not know or should not reasonably have known
(II) renounced the activity

(iii) "Terrorist Activity" defined

(iv) "Engage in terrorist activity" defined

(v) "Representative" defined

(vi) "Terrorist organization" defined

(C) **Foreign Policy**

(i) **In General -** excluding aliens when admission will result in **clear negative for foreign policy impact** associated with their admission

- Secretary of State must have **<u>reasonable ground to believe</u>** alien's entry/proposed activities within the US would have **potentially serious adverse foreign policy consequences**

(ii) **EXCEPTION: Political figure** (i.e., foreign government, candidate for election, etc.) not excludable solely because of any past, current or expected beliefs, statements or associations = lawful in the US

(iii) **EXCEPTION: Alien's past, current or expected beliefs, statements or associations** = lawful in the US (*unless the Secretary of State personally determines that the alien's admission to the US would compromise compelling US foreign policy interest, and so certifies to the relevant Congressional Committee*)

(D) **Immigrant Membership in totalitarian party**
(E) **Participants in Nazi persecutions or genocide, or the commission of any act of torture or extrajudicial killing**
(F) **Association with Terrorist organizations**
(G) **Recruitment or use of child soldiers**

(4) Public Charge
(A) **In General -** "likely **at any time** to become a public charge…"
(B) **Factors to be taken into account:** age, health, family status, assets, resources, and financial status, and education and skills
(C) **Family-sponsored immigrants**
- computation of 125% above the Federal Poverty Guidelines
- Must show proof of adequate financial support (i.e., a Form I-864, Affidavit of Support is often used to evidence financial support for aliens seeking immigrant status) – *See Matter of Kohama*, 17 I&N Dec. 257 (1978) (Affidavit of support provided by supporting daughter should be given **due consideration** and should not make alien elderly parents subject to public charge provision.)
- **NOTE:** If the sponsor is an active military officer - it is 100% above the federal poverty guidelines

(D) **Certain employment-based immigrants**
(E) **Special rule for qualified alien victims** (ex. VAWA or victim of crime)

(5) Labor Certification and qualifications for certain immigrants

(A) **Labor Certification**
(i) requires labor certification for skilled or unskilled labor from the U.S. Department of Labor
(I) not sufficient workers able, willing, qualified and available at the time of the application to perform such skilled or unskilled labor, and
(II) the employment will not adversely affect the wages and working conditions of US workers similarly employed
(ii) certain aliens subject to special rules that do not require proof of unavailable US workers
(I) teaching profession
(II) exceptional ability in the sciences or the arts
(iii) professional atheletes
(iv) long delayed adjustment applicants – original labor certification shall remain valid with a new job after change of employers if the new job is the same or similar occupation classification as the job for which the certification was issued

(B) **Unqualified physicians**
(i) must pass parts I and II of the National Board of Medical Examiners Examination or equivalent; and

(ii) is competent in oral and written English

(C) **Uncertified foreign health-care workers**

- Requires a certificate from the Commission on Graduates of Foreign Nursing Schools or equivalent

(D) **Application of Grounds**

(6) Illegal Entrants and Immigration Violators

(A) **Aliens present without admission or parole**

(i) In General - present in the U.S. **without being admitted** or **paroled** or who arrived in the U.S. at any time or place other than designated by the Attorney General

(ii) **EXCEPTION:** certain battered women and children who demonstrates that

(I) **VAWA self-petitioner**

(II) **alien or alien's child has been battered or subjected to extreme cruelty** by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household and alien spouse or parent consented or acquiesced to such battery or cruelty

(B) **Failure to attend removal proceeding**

- fails or refuses to attend removal proceeding without **reasonable cause** and seeks admission to the U.S. **within 5 years** of subsequent **departure** or removal

(C) **Misrepresentation**

(i) fraud or willfully misrepresents material facts to procure an immigration benefit

- "**WILLFUL**" = "**knowingly**" or "**intentionally**" made misrepresentation
- The misrepresentation must be made or offered to a U.S. government authority alien is fully aware of information sought and knowingly, intentionally or deliberately made an untrue statement
- (*i.e., includes instance where alien acts on advice of another and is consciously aware of the untruthfulness but does <u>NOT</u> include accidental, inadvertent or honest belief made*)
- **Misrepresentation** defined:
  - Assertion or manifestation not in accordance with the facts
  - Requires an **affirmative act** taken by the alien (silence or failure to volunteer information is NOT misrepresentation)
  - Must be made before a U.S. official (i.e., C*onsulate officer, CIS adjudicator, CBP or ICE officer, etc.*)
  - Must be made in alien's own application

- Misrepresentation made by applicant's attorney or agent is also misrepresentation.

- **WAIVERS: INA §212(i) waiver is available** in the discretion of the Attorney General to waive the application of INA §212(a)(6)(C)(i) in the case of an immigrant who is the **spouse, son, or daughter of a United States citizen or** of an **alien lawfully admitted for permanent residence** if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of the alien would **result in extreme hardship** to the citizen or lawful resident spouse or parent of the alien.
- *Matter of Cervantes-Gonzales*, BIA 22 I&N Dec. 560 (1999) **Extreme Hardship** - includes unusual or beyond that which normally be expected upon deportation (*i.e., common results of deportation are insufficient and uprooting family and separation from friends is not extreme hardship*). The elements to establish such hardship are dependent upon the facts and circumstances of each case. *See Matter of Pilch*, 21 I&N Dec. 627, 630 (BIA 1997).

(ii) falsely claiming citizenship

(I) **In General -** falsely representing to be a U.S. citizen for any purpose or benefit under the INA or under State or Federal Law.

(II) **EXCEPTION:** alien has U.S. citizen parent and resided in the U.S. prior to age16 and "reasonably believed" at the time of making the representation that he/she was a citizen.

(iii) **Waiver authorized**

(D) **Stowaways**

(E) **Smugglers**

(i) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the U.S. in violation of the law

(ii) **Special Rule: Family Reunification**

(iii) **Waiver:** AG for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive smuggling inadmissibility for LPR who temporarily proceeded abroad voluntarily (not under an order of removal), if the alien encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter to enter the United States in violation of law.
(*See* INA §212(d)(11))

(F) **Subject of civil penalty**

(G) **Student Visa Abusers**

- Violates conditions of nonimmigrant student status is inadmissible to the U.S. until he/she has been outside of the U.S. for a continuous period of 5 years after the date of the violation

(7) Documentation Requirements

(A) **Immigrants**

(i) At the time of application for admission

(I) not in possession of a valid unexpired visa, reentry permit, border crossing ID card, or other valid entry document and valid, unexpired passport or other travel document or document of identity and nationality, or

(II) has an issued visa that does not comply with INA §203 (i.e., immigrant visa preference categories)

(ii) **Waiver:** See INA §212(k) **waiver is available.**

(B) **(i)** In General - Any nonimmigrant who:

(I) not in possession of a passport valid for a minimum of six months from the date of expiration of initial period of admission or contemplated period of stay

(II) not in possession of a valid nonimmigrant visa or border crossing ID card at the time of applying for admission

(ii) **Waiver authorized** for (i): See INA §212(d)(4)

(iii) **Waiver authorized** for (i) for visitors of Guam or the Commonwealth of the Northern Mariana Islands: See INA §212(l)

(iv) **Visa waiver program** for (i) – includes a list of several designated European countries exempt from obtaining a visitor visa for admission to the U.S.

(8) Ineligible for Citizenship

(A) In General – any immigrant permanently ineligible to citizenship

(B) **Draft Evaders** – departed the U.S. to avoid or evade training or services in the armed forces in time of war or a period declared by the President of a national emergency

(9) Aliens previously removed

(A) **Certain Aliens previously removed**

(i) Arriving alien previously ordered removed or who seeks admission within 5 years of date of removal (or within 20 years of second or subsequent removal or at any time in the case of an aggravated felony)

(ii) other aliens who –

(I) has been ordered deported or

(II) departed from the U.S. while an order of removal was outstanding and who seeks admission within 10 years of departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony)

(iii) **EXCEPTION:** (i) and (ii) shall not apply if AG has consented to alien's reapplying for admission to the U.S.

(B) **Aliens unlawfully present**

(i) In General – any alien who was

(I) Unlawfully present in the U.S. for more than 180 days but less than one year voluntarily departs the U.S. prior to commencement of removal proceedings is barred from seeking admission to the U.S. for 3 years or

(II) Unlawfully present in the U.S. for one year or more is barred from seeking admission to the U.S. for 10 years

(ii) **Construction of "unlawful presence"** – unlawfully present in the U.S. after expiration of period of authorized stay or is present in the U.S. without being admitted or paroled

(iii) **EXCEPTIONS:**

(I) **Minors** under the age of 18 years

(II) **Asylees** during period of pending bona fide application for asylum unless employed without authorization in the U.S.

(III) **Family Unity** applied to beneficiary of family unity protection pursuant to INA §301

(IV) **Battered Women and Children**

(V) **Victims of a Severe Form of Trafficking**

(iv) **Tolling for Good Cause** – in the case of an alien who –

(I) was lawfully admitted or paroled into the U.S.

(II) has filed a nonfrivolous application for extension or change of status before expiration date of authorized stay, and

(III) has not been employed in the U.S. without authorization during pendency of such application, time will be tolled during pendency of application, but **shall not exceed 120 days**

(v) **Waiver: extreme hardship waiver** if refusal of admission to such immigrant would result in extreme hardship to USC or LPR spouse or parent

(C) **Aliens Unlawfully Present After Previous Immigration Violations**

(i) **In General** – any alien who

(I) has been unlawfully present in the U.S. for an aggregate period of more than 1 year

(II) has been ordered removed and who enters or attempts to reenter the U.S. without being admitted

(ii) **EXCEPTION:** (i) will not apply if DHS has consented to the alien's reapplying for admission to the U.S.

(iii) **WAIVER:** DHS may waive (i) if the alien is a VAWA self-petitioner if there is connection between –

(I) the alien's battering or subjection to extreme cruelty, and

(II) the alien's removal, departure from the U.S., reentry or reentries to the U.S.; or attempted reentry into the U.S.

(10) Miscellaneous

(A) **Practicing Polygamists**

(B) **Guardian required to accompany helpless alien** who is inadmissible

(C) **International Child Abduction**

(i) In General – detains, retains or withholds custody of child outside of the U.S. after custody order is granted

(ii) supporting abductors and relatives of abductors

(I) Secretary of State knows to have intentionally assisted in (i);

(II) Secretary of State knows to intentionally assist or providing material support or safe haven

(III) is a spouse, child, parent, sibling or agent of child abductor may be deemed inadmissible until child is returned by designation of the Secretary of State

(D) **Unlawful Voters**

(i) In General - in violation of any Federal, State or local constitutional provision, statute, ordinance or regulation

(ii) **EXCEPTION:** voter had U.S.C. natural or adoptive parent(s) or voter permanently resided in the U.S. prior to age of 16 and reasonably believed authorized to vote.

(E) **Former Citizens who renounced citizenship to avoid taxation**

HIGHLIGHTS TO INA § 237 ON DEPORTABLE ALIENS
[8 U.S.C.A. § 1227][*]

(a) Classes of deportable aliens

(1) Inadmissible at time of entry or adjustment of status or violates status

(A) **Inadmissible aliens**

- Any alien who, at the time of entry or adjustment of status, was inadmissible by the law existing at such time is deportable

(B) **Present in violation of law**

- Present in violation of the law or has nonimmigrant (or other admission documentation) revoked

(C) **Violated nonimmigrant status or condition of admission**

(i) Failed to maintain nonimmigrant status or comply with conditions of that immigration status

(ii) Failed to comply with any terms, conditions and controls imposed by a waiver issued for inadmissibility based on communicable disease of public health

(D) **Termination of conditional permanent residence**

(i) Termination of conditional permanent resident status for spouses and children or for entrepreneurs

(ii) **EXCEPTION: Extreme hardship waiver** (i.e., terminated good faith marriage; battered by or subjected to extreme cruelty by USC or LPR spouse or parent)

(E) **Smuggling**

(i) Knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the U.S. up to 5 years of the date of any entry to the U.S.

(ii) **Special Rule: Family Reunification** – immigrant physically present in the U.S. on May 5, 1988 and is seeking admission as an immigrant

(iii) **Waiver:** For humanitarian purposes, to assure family unity or it is within the public interest to waive deportation for LPR attempting to smuggle spouse, parent, son or daughter

(F) **Repealed**

(G) **Marriage fraud**

- Procured a visa or other document by fraud or misrepresentation if

(i) Admission based on immigrant visa or other documentation procured on the basis of marriage entered into less than 2 years prior admission and within 2 years is judicially annulled or terminated unless evidence substantiates that the marriage was not contracted the for purpose of evading immigration laws, or

(ii) It appears that the alien failed or refused to fulfill the marital agreement which was made for the purpose of procuring admission to the U.S.

[*] This document is intended only to provide lawyers with an outline of highlights from the statute and should not be used as a substitute for independent legal research and advice supplied by a lawyer in referencing the specific statute.

(H) **Waiver authorized for certain misrepresentations**

- **Waiver** of deportation for alien who was inadmissible at the time of admission for procuring an immigration benefit by way of fraud or misrepresenting a material fact if the alien is:

(i)(I) A spouse, parent, son or daughter of USC or LPR; and

(II) was in possession of a valid visa or other immigration document and was otherwise admissible at the time of such admission except for grounds of inadmissibility regarding labor certification or invalid immigration admission document which were a direct result of that fraud or misrepresentation

(ii) Is a VAWA self-petitioner

(2) Criminal offenses

(A) **General Crimes**

(i) Crimes of moral turpitude

(I),(II) any alien who is convicted of a crime involving moral turpitude committed **within five years after the date of admission** for a crime for which a sentence of **one year or longer may be imposed**, is deportable

(ii) Multiple criminal convictions

- any alien who **at any time after admission** is convicted of **2 or more CIMT's, not arising out of a single scheme of criminal misconduct**, regardless of whether he is confined for the offenses or if the convictions arise from a single trial, is deportable
- **CIMT** has been defined as a crime that is "inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general"
- The "base, vile, or depraved" conduct must be found within the elements of the statute
- There must be a "conviction" of a statute defined to be a CIMT

(iii) Aggravated felony

- any alien who is convicted of an **aggravated felony** at **any time after admission** is deportable
- Defined in **INA §101(a)(43); 8 USC §1101(a)(43)**
- Aggravated felony creates a statutory bar to most forms of relief from removal can be an aggravated felony. *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000)
  - A misdemeanor can be an aggravated felony. *Id.*
- A crime need not be committed "with aggravation" for it to be an aggravated felony (i.e., includes most NY felonies and several NY class A misdemeanor offenses).
- **Avoid "AGGRAVATED FELONY"** conviction because it:
  - Bars almost all forms of relief from removal available from an immigration judge so that deportation is a near certainty
  - Triggers mandatory detention without bond
  - Permanently bars return to the US after deportation

(iv) High Speed Flight
- High speed flight from an immigration checkpoint

(v) Failure to register as a sex offender
- Sex Offender Registration and Notification Act by reason of a conviction under Federal law

(vi) Waiver: of CIMT, multiple crimes, aggravated felony and high speed flight if granted a full and unconditional pardon by the President or by a state Governor

(B) **Controlled Substances**

(i) any alien who at **any time after admission** has been convicted of a violation of …**any law or regulation** of a State, the United States, or a foreign country **relating to a controlled substance**, other than a **single offense** involving **possession for one's own use of 30 grams or less of marijuana**, is deportable.

(ii) any alien who, is, or at **any time after admission** has been, a **drug abuser** or **addict** is deportable.

(C) **Certain Firearm Offenses**
- Convicted of any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer to sale, exchange, use, own, possess, or carry any weapon, part or accessory which is a firearm or destructive device.

(D) **Miscellaneous Crimes**
- Convicted of a conspiracy or attempt to violate:

(i) any offense relating to federal espionage, sabotage, treason, sedition for which a term of 5 years or more of imprisonment may be imposed

(ii) any offense under Threats against President and successors to the Presidency or Expedition against friendly nation

(iii) a violation of any provision of the Military Selective Service Act or the Trading with the Enemy Act, or

(iv) a violation of travel restriction by entering in to or departing from the U.S. in violation of Presidential regulations, or aiding another to do so, or making a false statement in application for permission to enter or leave with intent to secure granting of permission for herself or another, or furnishing entry or exit permit to another not issued for another's use, or falsifying entry or exit permit, or attempting to use or furnish false entry or exit permit or importing, holding, or harboring noncitizen for prostitution or any other immoral purpose punishable by up to 10 years imprisonment

(E) **Crimes of domestic violence, stalking, or violation of protection order and crimes against children**

(i) Domestic violence, stalking, and child abuse

(ii) Violators of protection orders - any alien who at **any time after admission is enjoined under a protection order** issued by a court and **whom the court determines** has engaged in conduct that **violates the protection order** that involves protection against credible **threats of violence, repeated harassment, or bodily**

injury to the person or persons for whom the protection order was issued is deportable….issued by **civil or criminal court**….

- Deportable for conviction of any **"crime of violence"** against a person committed by:
  - Current or former spouse;
  - Individual with whom person shares a child in common;
  - Individual now or before cohabiting with person as a spouse;
  - Individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs; or
  - Any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the US or any State, Indian tribal government, or unit of local government.
- Domestic violence offenses have **ALL** of the following elements:
  - a conviction;
  - after lawful admission to the U.S.;
  - occurring "after" September 30, 1996;
  - listed as a **crime of violence offense**, i.e.,
    - a crime of violence which is a crime against the person as defined in 18 U.S.C. §16(a) or 18 U.S.C. §16(b),
    - committed against:
      (a) a DV protected person, or
      (b) stalking, or
      (c) child abuse, neglect, or abandonment.

(F) **Trafficking**

- Beneficiaries of trafficking activities

(3) Failure to register and falsification of documents

(A) **Change of Address**

- fails to report change of address unless such failure was reasonably excusable or was not willful

(B) **Failure to register or falsification of documents**

- convicted of:

(i) failing to file an application for registration of files an application pursuant to the Alien Registration Act, 1940 that contains statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud

(ii) a violation of, or attempt or conspiracy to violate Foreign Agents Registration Act of 1938

(iii) a violation of, an attempt or conspiracy to violate a federal offense relating to fraud and misuse of visas, permits, and other entry documents

(C) **Document Fraud**

(i) In general – an alien who is subject to a final order of for a document fraud violation

(ii) **Waiver:** for lawful permanent resident with no prior civil penalty for document fraud violation and the offense was incurred solely to assist, aid, or support alien's spouse or child

(D) **Falsely claiming citizenship**

(i) any alien who falsely represents, or has falsely represented, himself to be a U.S. citizen for any purpose or benefit under the INA or **any Federal or State** law is deportable.

(ii) **EXCEPTION:** Making such representation if each natural or adoptive parent is or was a U.S. citizen, the alien permanently resided in the U.S. prior to age 16 and the alien reasonably believed he/she was a U.S. citizen at the time of making the representation

(4) Security and related grounds

(A) **In general** – engage in:

(i) espionage or sabotage or violate or evade any law prohibiting the export from the U.S. of goods, technology or sensitive information

(ii) any other criminal activity that endangers public or national security, or

(iii) any activity with purpose to control or overthrow the U.S. government by force, violence or other unlawful means

(B) **Terrorist activities** – any alien engaging in terrorist activities or associating with terrorist organizations

(C) **Foreign Policy**

(i) **In general** - ground to believe that presence would have potentially serious adverse foreign policy consequences for the U.S.

(ii) **EXCEPTION:** official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(C) **Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing**

(D) **Participated in the Commission of severe violations of religious Freedom**

(E) **Recruitment or use of child soldiers**

(5) Public Charge

Any Person is deportable, who, within 5 years from date of admission, becomes a public charge

(6) Unlawful voters

(A) Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation

(B) **EXCEPTION:** parents who are U.S. citizens & alien resided in the US prior to the age of 16 years.

(7) Waiver for victims of domestic violence

(A) **In general -** Deportation for crime of domestic violence may be waived if the alien has been battered or subjected to extreme cruelty and who is or was not the primary perpetrator of violence in the relationship

(i) Upon a determination that:

(I) acting in self-defense

(II) violated a protection order intended to protect him/her

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime

(aa) that did not result in serious bodily injury; and

(bb) crime connected to the battery or extreme cruelty

(B) **Credible evidence considered - t**he Attorney General shall consider any credible evidence relevant to the application. Credibility determination and the weight evidence given shall be within the sole discretion of the Attorney General.

(b) Deportation of certain nonimmigrants - An ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government and the members of the alien's immediate family or a designated principal resident representative of a foreign government, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act, accredited resident members of the staff of such representatives, and members of his or their immediate family **shall not be** required to depart the U.S. without approval of the Secretary of State unless subject to deportation for security related grounds.

(c) Waiver of grounds for deportation - Special immigrants not subject to deportation for inadmissibility at the time of entry or of adjustment of status or violation of status (except smuggling) and failure to change address if circumstances existed before the date special immigrant status was granted

(d) Administrative Stay

(1) If DHS determines that alien has established prima facie eligibility for U or T nonimmigrant visa pursuant to INA § 101(a)(15)(T) or (U), DHS may stay the final order of removal pursuant to INA §241(c)(2) until:

(A) the T or U nonimmigrant visa is approved; or

(B) there is a final administrative denial of the T or U visa and all administrative remedies are exhausted

(2) A denial of a request for administrative stay of removal shall not preclude alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the U.S. immigration laws

(3) While administrative stay of removal is in effect, the alien shall not be removed

(4) Nothing in this subsection shall limit the authority of the Secretary of DHS or the Attorney General to grant a stay of removal or deportation.

(e) Redesignated

(f) Repealed

(g) Repealed

(h) Redesignated

NYSDA Criminal Defense Immigration Project
Sample Waivers Under INA §212 and §237

INA §212(d)(1)

- Waives inadmissibility under INA §212(a) for S (i.e., informant) visas.

- Note: unavailable to Nazis.

INA §212(d)(3)(A)

- General waiver for nonimmigrant visas.

- INA §212(d)(3)(A)(i): This application is made at a consular office and requires the concurrence of DHS.
- INA §212(d)(3)(A)(ii): This application may be made to the US Customs and Border Protection at the border and does not require Department of State approval for those with a valid entry document.

- DHS follows the criteria established in *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978) to determine the waiver:

(1) the risk of harm to US society if applicant is granted admission;
(2) assess the seriousness of the applicant's criminal law or immigration law violation; and
(3) assess the basis/ reasons for applicant's request for admission to the US.

- Waivers for HIV incorporate the following criteria:

(1) whether the person is currently afflicted with the symptoms of the disease;
(2) the length of the visit to the US;
(3) whether the applicant has insurance or assets to pay for medical care; and
(4) whether there is reason to believe that the person's trip poses a danger.
(*See* 71 No. 19 *Interpreter Releases* 653 (May 16, 1994)).

- Note: cannot waive political or security grounds (INA §212(a)(3)(A)(i)(I));

espionage or sabotage (INA §212(a)(3)(A)(ii));
any unlawful activity (INA §212(a)(3)(A)(iii));
overthrow of the government by force (INA §212(a)(3)(c);
foreign policy grounds (INA §212(a)(3)(E)(i)); or
Nazi and genocide (INA §212(a)(3)(E)(ii)).

INA §212(d)(3)(B)

- Waives inadmissibility pursuant to the "unreviewable discretion" of the US Customs and Border Protection authorities of:

(1) a person who is a representative of a political, social or other group that endorses or espouses terrorist activity;
(2) a person who has received military training;
(3) a person who commits an act he knows or should know provides material support to an organization or individual who has engaged in a terrorist activity; or
(4) a person who engages in terrorist activity with respect to a subgroup of a group of two or more individuals.

INA §212(d)(4)

- Waives inadmissibility of a person not in possession of a valid nonimmigrant visa, border crossing card, passport valid for 6 months or temporary waiver of visa if:

(1) there is an unforeseen emergency (i.e., may include but is not limited to a medical emergency, rescue worker response in the US, accompanying or following to join a person with a medical emergency, visiting a spouse, child, parent, or sibling who became critically ill or died within the past 5 days, appearing without a passport or visa because they were lost or stolen within 48 hours of departing the last port of embarkation to the US or an unforeseen emergency exists and a visa has been cancelled for previous unauthorized status in the US pursuant to INA §222(g)).
(2) on the basis of reciprocity with country of origin;
(3) on the basis of a contract with the transportation line to permit temporary waivers of visas; and
(4) the country is not prohibited from temporary waiver of a visa.

INA §212(d)(11)

- The Attorney General in his discretion for humanitarian purposes, to insure family unity, or when it is otherwise in the public interest, may grant a waiver of inadmissibility where the person is smuggled into the US was the "spouse, parent, son or daughter" of the inadmissible person at the time of the smuggling incident.

INA §212(d)(12)

- Waiver of inadmissibility as a result of having a final order of removal pursuant to INA §274C and is for humanitarian purposes or to ensure family unity if the applicant is an LPR or is seeking immigrant status where no previous civil money penalty was imposed under INA §274C and the offense was committed solely to assist and/or support a spouse or child and no other persons.

INA §212(d)(13)

- This waiver is available for persons who are eligible for a T visa pursuant to Trafficking Victims Protection Act of 2000 permitting the Attorney General, if he considers it to be in the national interest, to waive health related and public charge grounds and any other ground of inadmissibility if the activities rendering the T visa applicant inadmissible were caused by, or were incident to, a severe form of trafficking in persons.

- Note: cannot waive security and related grounds, international child abduction, and former citizen renunciation based on tax evasion.

INA §212(d)(14)

- This waiver is for a U visa for victims of specific crimes which allows for most grounds of inadmissibility to be waived if the Attorney General finds it to be in the national or public interest to grant the waiver. No connection of victimization is necessary for this waiver.

- Note: exception for Nazis.

INA §212(e)

- This waiver is for exchange student J visa holders who seek to waive country-return requirement where there is:

(1) an exceptional hardship to USC or LPR spouse or child;
(2) fear of persecution to the applicant if returned to country of origin;
(3) no objection from home country (i.e., inapplicable to foreign doctors practicing medicine);
(4) US government agency claims admission to be in the public interest; or
(5) a foreign physician is recommended for the waiver by a state department of health.

INA §212(g)

- This waiver is for persons who are determined to have a disease of public interest significance or fails to obtain vaccination or has a physical or mental disorder as defined pursuant to INA §212(a)(1)(A)(i), (ii) or (iii).

- If the waiver is sought to waive a communicable disease, it is applicable only to an alien who is the spouse, unmarried son or daughter, or the minor unmarried lawfully adopted child of a USC or person issued an immigrant visa or who has a son or daughter who is a USC or LPR or has been issued an immigrant visa (i.e., including battered spouse/child who is self-petitioning for immigrant status).

- If the waiver is sought to waive documentation of vaccination, the applicant must establish:

(1) that the applicant actually had the vaccination;
(2) the vaccination is medically inappropriate; or
(3) the Attorney General establishes regulations exempting people from the vaccination based on religious or moral grounds (i.e., religious objection waiver).

- Note: not available to waive drug abuse or drug addiction under INA §212(a)(1)(A)(iv).

INA §212(h)

- This waiver is available for persons who have been rendered inadmissible because of certain criminal offenses, if:

(1) Not a drug offense (except for one time simple possession of 30 grams or less of marijuana)
(2) Not murder or torture
(3) Applicant is spouse, parent, son, or daughter of USC or LPR and denial of applicant's admission would be an extreme hardship for relative (exception: VAWAs do not need to show hardship to relative).
(4) AG must consent
(5) If LPR, needs 7 years residence + no aggravated felony

INA 212(i)

- This waiver is for those charged with violating INA §212(a)(6)(C)(i) for fraudulent, or material misrepresentation if the applicant is a spouse or son or daughter of a USC or LPR and only if the applicant can establish "extreme hardship" to the US or LPR spouse or parent. In addition, the waiver is available to a battered spouse/child who has been granted status as a self-petitioner if he/she can demonstrate "extreme hardship" to her/himself or her/his USC or LPR parent or child.

- Factors of "extreme hardship" to the USC or LPR relative include consideration of:

(1) the presence of LPR or USC family ties to the US;
(2) the qualifying relative's family ties outside of the US
(3) the country conditions in the country of relocation and the qualifying relative's ties to that country;
(4) the financial impact of departure from the US;
(5) significant health conditions, particularly when tied to unavailable suitable medical care in the country of relocation; or
(6) the nature of the fraud that requires the waiver.

- Note: not available to waive inadmissibility pursuant to INA §212(a)(6)(F) because of a final order for document fraud in violation of INA §274C and to waive false claim to US citizenship status pursuant to INA §212(a)(6)(C)(ii).

INA §212(k)

- This waiver is for a person with an immigrant visa who is not in possession of a labor certification or is in possession of an immigrant visa that was not issued in compliance with the law (i.e., if Attorney General is satisfied that the applicant did not know, nor could have known by exercise of reasonable diligence, that he/she was inadmissible at the time of entry).

INA §237(a)(1)(E)(ii)

- This waiver is available if an alien is charged with deportability for smuggling. This waiver is available on a discretionary basis "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest," and is only available in connection with smuggling an individual who "at the time of the offense was the applicant's spouse, parent, son or daughter (and no other individual)." This waiver can be granted by an immigration judge in removal proceedings.

FORMS OF RELIEF TO PREVENT REMOVAL*

The chart referenced below is not an exclusive list and does not expressly provide all requirements and bars to the forms of relief discussed above. Further analysis is recommended when seeking to pursue any of the below-listed forms of relief. The original below-referenced chart was originally produced by Bryan Lonegan, Immigration Law Unit of the Legal Aid Society of New York. Revisions of the chart were provided by Paromita Shah of the National Immigration Project and the New York State Defenders Association Immigrant Defense Project.

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

· A child is eligible for SIJS if:
The child is deemed to require long term foster care (i.e., under age of 18 yrs and a juvenile court has determined that family reunification is no longer viable) or
· Child was committed to the custody of a state agency or dep't due to abuse, neglect or abandonment.

· The applicant must also be under 21 yrs of age and unmarried at the time of obtaining SIJS.

·If a juvenile is in DHS custody, DHS' consent to the juvenile court's jurisdiction must be obtained before dependency proceedings are initiated.

·Must establish:
·juvenile's date and place of birth
·date and manner of entry into US
·current immigration status
·whereabouts and status of parents
·evidence of abuse, neglect or abandonment
·reasons why not in child's best interest to return to native country
·type of proceedings before the juvenile court.

SPECIAL VISAS

T VISA: TRAFFICKING VICTIMS PROTECTION ACT OF 2000
· Subject to "severe trafficking"
· Agree to assist in enforcement or
is less than 18 yrs old and
· Would suffer "extreme hardship involving unusual and severe harm upon removal"
·Limited waiver for crimes

S VISA: INFORMANT VISA
·For alien who provides important information on a criminal org or terrorist org
·Need written agreement with law enforcement

U VISA: VICTIM OF A CRIME
· Suffered substantial physical or mental abuse as a result of being a crime victim for certain crimes
(i.e., trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation)
· Possesses information of crime
· Helpful in prosecution as certified by gov't official

ADJUSTMENT OF STATUS

If the alien is admitted, paroled and has an approved petition, he/she may adjust if:
· The alien is eligible to receive an immigrant visa
· The alien is admissible, and
· An immigrant visa is immediately available
**NOTE:* If alien entered without inspection, petition must be filed on or before April 30, 2001 pursuant to INA §245(i)

FAMILY PREFERENCE CATEGORIES:
·Spouse of USC
·Parent of USC (USC child +21 yrs)
·**Child of USC (child unmarried & -21 yrs)

****AGING OUT PROBLEM:**
**Immediate Relative Child must be -21 yrs of age ONLY at the time petition (i.e., Form I-130 Petition) is filed pursuant to CSPA

OTHER FAMILY PREFERENCES:
1st ·Unmarried child (+21 yrs) of USC
2A ·Spouse of LPR and unmarried child (-21 yrs) of LPR
2B ·Unmarried child (+21yrs) of LPR
3rd ·Married child of USC
4th ·Siblings (+21 yrs) of USC

CANCELLATION OF REMOVAL FOR LPRs

· **LPR for 5 yrs**
· **7 years residence in US before:**
  * **served Notice to Appear or**
  * **commits inadmissible or deportable offense**
· **No Aggravated Felony conviction**
· **Positive outweighs negative factors**

WAIVERS

INA §212(c) WAIVER FOR LPR

· **LPR**
· **7 yrs domicile in US**
·**Pled guilty before 4/24/96 to an inadmissibility or deportable offense referred to in inadmissibility grounds**
· **Not served 5 yrs or more term of imprisonment**
· **Positive outweighs negative factors**

INA §212(h) WAIVER

· **If a crime renders alien inadmissible, waiver is available for certain inadmissible offenses if**
• **Not a drug offense (except for one time simple possession of 30 gms of marihuana)**
• **not murder or torture**
* **Alien is spouse, parent, son or daughter of USC or LPR and**
* **Denial of alien's admission would be an extreme hardship for relative**
* **AG must consent**

-OR-

· **Activities of inadmissibility occurred more than 15 years before the date of admission, visa application or adjustment of status and admission is not contrary to the national welfare, safety or security of the US. Applicant must show rehabilitation. (*exception: 15 years not required to waive inadmissibility for prostitution*).**

• **If LPR, needs 7 yrs. residence + no Agg Fel**
• **VAWAs don't need to show hardship to relative**

CANCELLATION OF REMOVAL FOR NON-LPRs

· **10 years presence required:**
· **10-yr presence stops when:**
  * **served Notice To Appear or**
  * **commits inadmissible or deportable offense**
  * **single absence of +90 days or**
  * **aggregate absence of +180 days**
· **Good moral character for 10 yrs**
· **To depart would cause extreme hardship to LPR/USC spouse, child, parent**

VAWA CANCELLATION

· **If USC or LPR spouse or parent is abusive, alien can get cancellation**
· **Continuous presence for 3 years**
· **Good moral character**
· **Be admissible and no Aggravated Felony**

ASYLUM	**WITHHOLDING OF REMOVAL**	**CONVENTION AGAINST TORTURE**
· Unable or unwilling to return where alien persecuted or has a well founded fear of persecution on account of: · race, · religion, · nationality, · membership in a particular social group, or · political opinion · Generally, rule requires that an application be filed within one year of arrival in US (absent certain exceptions such as "changed circumstances") · Barred if convicted of an Agg Fel · Barred if convicted of "particularly serious crime" (drug trafficking is presumptively a PSC) · Asylees can apply to adjust status after one year and use 209(c) waiver of inadmissibility, if necessary	· Prohibits return of alien where life or freedom would be threatened because of: · race, · religion, · nationality, · membership in a particular social group, or · political opinion · Barred by PSC · Barred by Agg Fels w/ aggregate sentence of five years	· Would suffer severe pain and suffering · Intentionally inflicted · For an illicit purpose · By or at the instigation of or with acquiescence of a public official who has custody and control of victim · Not arising from lawful sanction
TEMPORARY PROTECTED STATUS (TPS)	**VOLUNTARY DEPARTURE**	**MANDATORY DETENTION**
· For designated countries · Must be admissible · Barred by felony or any 2 misdemeanors	· Not for arriving aliens · No Aggravated Felony conviction · No prior removal order · Granted up to 120 days to depart *If requested at end of proceedings*: · Physically present for 1 yr+ · Good moral character for 5 yrs+ · Granted up to 60 days to depart	· Applies only to those released from custody after 10/9/98 * **Arriving aliens** are ineligible for bond * **For LPR** * 2 CIMTs * 1 CIMT w/1yr sentence within 5 years of admission * Agg Fel * Controlled substance offense * Firearms offense * **For EWI** * One CIMT (subject to petty offense exception) * Controlled substance offense * Drug trafficking offense * 2 or + offenses with aggregate of 5 yrs * Prostitution * Domestic violation or violation of protection order

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Domestic Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

HQ 70/6.1.8
HQ 70/6.1.1
AD09-48

OCT - 9 2009

Memorandum

TO: Field Leadership

FROM: Donald Neufeld
Acting Associate Director, Domestic Operations Directorate

SUBJECT: Adjudication of Form I-751, *Petition to Remove Conditions on Residence* Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions

Additions to *Adjudicator's Field Manual*, Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX (AFM Update AD09-48)

1. Purpose

This memorandum provides detailed guidance to USCIS Immigration Services Officers (ISOs) on the adjudication of I-751 petitions filed by a conditional permanent resident (CPR) who is the subject of a final order of removal, is in removal proceedings, has filed untimely, or has filed multiple petitions.

2. Background

A CPR who obtained his or her status through marriage of less than two years to a U.S. citizen or lawful permanent resident must file Form I-751, *Petition to Remove the Conditions on Residence*, in order to remove the conditions on his or her residence. Section 216(c)(1)(B) of the Immigration and Nationality Act (INA) states, in part, that the CPR must appear for an in-person interview and, if the I-751 is jointly filed, must appear with his or her U.S. citizen or lawful permanent resident spouse. However, section 216.4(b)(1) of Title 8, Code of Federal Regulations (8 CFR) permits the Service Center Director to waive the interview if he or she is satisfied that the marriage was not entered for the purpose of evading the immigration laws.

In a memorandum issued on January 30, 2006 entitled, "*Delegation of Authority for I-751, 'Petition to Remove Conditions on Residence,'*" Acting Associate Director of Domestic Operations, Michael Aytes, authorized service centers to deny an I-751 petition if the Service Center Director is satisfied that the marriage was entered for the purpose of evading the immigration laws, without having to relocate the case

to a field office for an interview. That guidance did not, however, address additional instances warranting possible denial of an I-751 petition. Specifically, the guidance did not address cases in which the CPR has a final order of removal, is in removal proceedings, has filed multiple petitions, or failed to timely file.

Statute and regulations allow for distinctly different treatment of jointly filed and waiver request petitions. Jointly filed petitions must be filed within the 90-day period immediately preceding the second anniversary of the CPR's admission or adjustment to permanent residence. USCIS may excuse an untimely filing of a jointly filed petition only if it is accompanied by a reasonable explanation demonstrating extenuating circumstances. See INA § 216(d)(2)(B). There is no specified filing period for a waiver request petition.

3. Current Process

Currently, if a CPR is the subject of a final order of removal or is in pending removal proceedings, the service center relocates the petition to a field office for an interview and adjudication. This is the case with both jointly filed and waiver request petitions. This occurs even if the CPR appears clearly ineligible based on information available to the service center. Relocating unadjudicated I-751 petitions from the service centers to field offices often contributes to delays in removal proceedings, as Immigration Judges (IJs) must wait for USCIS to make a final determination on the I-751 petition before continuing with the removal hearing. Multiple filings of I-751 petitions by individuals in pending removal proceedings also contribute to delays in the proceedings.

The filing period for jointly filed I-751 petitions is within 90 days before the second anniversary of the CPR's admission or adjustment. Any failure to file during this period is evaluated for good cause by an Immigration Services Officer (ISO) at the service center. When a CPR does not submit an explanation for the late filing, the ISO sends the CPR a request for evidence (RFE) requesting a reasonable explanation for the late filing. The CPR's response is reviewed and, if it does not demonstrate good cause for the late filing, the I-751 petition is relocated to a field office.

4. Process Changes

~~The following sections provide guidance on process changes in the adjudication of I-751 petitions where~~ the CPR is the subject of a final order of removal, is in pending removal proceedings, has unexcused untimely filed petition, or is filing multiple petitions.

A. I-751 petition filed by a CPR with a final order of removal

A CPR loses his or her status as a lawful permanent resident if an Immigration Judge issues a final administrative order of removal. See 8 C.F.R. § 1.1(p), and 1001.1(p). If a CPR is the subject of a final order of removal, he or she no longer has a status for which to seek removal of the conditions because that status has been terminated. If an ISO determines that a CPR is the subject of a final order of removal, the ISO will deny any I-751 filed by that CPR, regardless of whether it is a jointly filed or waiver request petition. The denial notice must clearly indicate that the denial is based on a final order of removal (see sample denial attached). The ISO will route the file to the ICE Office of Detention and Removal having jurisdiction over the individual.

B. I-751 petition filed by a CPR currently in removal proceedings

USCIS has original jurisdiction over all pending I-751 petitions. An IJ cannot review an I-751 petition pertaining to a CPR in proceedings unless USCIS has first adjudicated the petition on its merits. If a CPR is in proceedings and USCIS has not yet adjudicated an I-751 filed by that CPR, USCIS must first adjudicate the petition. An I-751 petition should not be held in abeyance or denied by a service center solely because the CPR is in pending removal proceedings. If the IJ has administratively closed the proceedings to await a decision by USCIS on the I-751 petition, the ISO will expedite adjudication and route the file through appropriate channels to the ICE Office of Chief Counsel having jurisdiction over the proceedings.

An ISO can determine whether a CPR is in removal proceedings by reviewing the file for Form I-862, Notice to Appear (NTA), by checking the Executive Office for Immigration Review (EOIR) screen of the Central Index System (CIS), or by checking the Interagency Boarder Inspection System (IBIS) or Enforce Alien Removal Module (EARM). If the IJ has administratively closed the proceedings so that USCIS can adjudicate an I-751 petition, the EARM notes or the IJ decision should explain the reason and reference an I-751 petition pending with USCIS.

C. Evaluating Good Cause for Untimely Jointly Filed I-751 Petitions

A jointly filed I-751 petition must be filed within the 90-day period immediately preceding the second anniversary of the CPR's admission or adjustment. A jointly filed I-751 petition filed after the second anniversary of the CPR's admission or adjustment may be considered only if the CPR is able to demonstrate good cause and extenuating circumstances for the failure to timely file.

If a jointly filed I-751 petition is not filed within the required period, the ISO must determine whether the failure to file the petition was based on good cause and extenuating circumstances. The instructions to the Form I-751 clearly state that a CPR may file a petition untimely only if he or she includes a written explanation for his or her failure to timely file and a request that USCIS excuse the late filing. When an ISO encounters an untimely jointly filed I-751 petition, the ISO will check for a written explanation of the late filing. If the CPR did not submit a written explanation with the untimely filed petition, the ISO cannot evaluate good cause and is to deny the petition without first sending an RFE. The denial notice must clearly indicate that the case is denied based on an unexcused untimely filing (sample denial attached). The ISO will route the file to the appropriate unit for issuance of an NTA.

If the untimely jointly filed I-751 petition is accompanied by a request to excuse the late filing, the ISO will evaluate the explanation for good cause and extenuating circumstances. The law provides for broad discretion as to what constitutes good cause and extenuating circumstances. Some examples of what constitutes good cause and extenuating circumstances may include but are not limited to: hospitalization, long term illness, death of a family member, the recent birth of a child (particularly if there were complications), and a family member on active duty with the U.S. military.

D. Multiple Filings

There are no regulatory limitations on how many times a CPR may file an I-751 petition. For example, a CPR who initially files a jointly filed I-751 petition may subsequently file an I-751 waiver request

petition. However, if an ISO encounters a subsequent I-751 petition that is appears identical to a previously denied petition, the ISO will defer to the previous decision and will review the new petition for additional evidence that may overcome the previous basis for denial.*

a. **Jointly filed I-751 Petitions**

If an ISO encounters a jointly filed I-751 petition subsequent to the denial for cause of a previous jointly filed I-751 petition, the ISO will first determine if the filing is timely. * If the subsequent filing is untimely, which in most cases a jointly filed petition would be untimely, the ISO will review for good cause and extenuating circumstances. If the ISO does not find good cause and extenuating circumstances, the ISO will deny the I-751 as untimely. If the subsequent filing is timely, and if the ISO finds good cause and extenuating circumstances, the ISO will review the petition to determine if the applicant has presented additional evidence different from the first petition. If there is no different or additional evidence the ISO will issue a denial notice incorporating by reference the grounds of previous denial (sample denial attached). If the subsequent filing contains additional or different evidence from the first petition, and the ISO finds that the additional or different evidence does not establish the bona fides of the marriage, the ISO will issue a denial notice stating why the evidence fails to establish the bona fides of the marriage. If the I-751 is denied, the ISO will route the file to the appropriate unit for issuance of an NTA (if the CPR is not currently in removal proceedings).

b. Waiver Request I-751 Petitions

If an ISO encounters a waiver request petition subsequent to the denial of a previous waiver request petition based on the same ground (termination of a marriage entered in good faith, extreme hardship, or battery or extreme cruelty), the ISO will review the new petition to determine if the applicant has presented additional evidence different from the first petition.* If there is no additional evidence, the ISO will issue a denial notice incorporating by reference the failure to establish eligibility for the requested waiver in the first petition (sample denial attached). If the subsequent filing contains additional evidence from the first petition, and the ISO finds that the additional or different evidence fails to establish the bona fides of the marriage and/or eligibility for the requested waiver, the ISO will issue a denial notice stating why the evidence fails to establish the bona fides of the eligibility for the waiver. If the I-751 is denied, the ISO will route the file to the appropriate unit for issuance of an NTA (if the CPR is not currently in removal proceedings).

If a waiver request I-751 petition filed subsequently to a previously denied waiver request petition is based on a different ground than the previous petition, the ISO will evaluate the new petition separately from the previous denial. Similarly, if a waiver request petition follows the denial of a jointly filed petition, or a jointly filed petition follows the denial of a waiver request petition, the ISO will evaluate the new petition separately from the previous denial.*

NOTE:

The ISO should request all prior related filings pertaining to the case before making a final decision.

Adjudication of Form I-751, *Petition to Remove Conditions on Residence* Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions

Additions to *Adjudicator's Field Manual*, Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX (AFM Update AD09-48)

E. Possible Fraud Vetting

ISOs should be aware that cases in the categories identified above (cases involving final orders, pending removal proceedings, unexcused untimely filings, or successive or multiple filings) may be more likely to exhibit fraud indicators. Such cases should be thoroughly checked against all relevant systems and vetted for possible fraud in accordance with established procedures.

If petitions cannot be adjudicated at the service center level, and it involves fraud, the ISO will relocate the petition to a field office for interview and final adjudication. The ISO should complete any other adjudicative actions, such as an RFE, prior to referring the petition to the field office.

5. Adjudicator's Field Manual Update:

The AFM is revised to add Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX

25.1 Immigration Marriage Fraud Amendments of 1986.

* * *

(g) Adjudication of the Joint Petition

* * *

(6) Adjudication of Form I-751, *Petition to Remove Conditions on Residence Conditions*, Where the CPR Has a Final Order of Removal, Is in Removal Proceedings, or Has Filed an Unexcused Untimely Petition or Multiple Petitions. [Chapter added on (date memo signed)]

When adjudicating a Form I-751 filed by a conditional permanent resident (CPR), who is the subject of a final order of removal, is in removal proceedings, has filed untimely, or has filed multiple petitions, the ISO must follow the steps below:

A. I-751 petitions filed by CPR with a Final Order of Removal

If the ISO	Then the ISO
confirms a final order of removal in the file	will deny any I-751 petition, jointly filed or hardship waiver filed, clearly indicating why, and route the file through the chain of command to ICE Office of Detention and Removal having jurisdiction over the CPR (see denial sample attached to this memo)

B. I-751 petitions filed by CPR currently in Removal Proceedings

If the ISO	Then the ISO
confirms a Form I-862, Notice to Appear (NTA) in the file through EOIR, CIS, IBIS, and EARM	Will adjudicate the I-751 petition first based on the merits, and route the file through the chain of command to the ICE Office of Chief Counsel having jurisdiction over the proceedings.

C. Evaluating Good Cause for Unexcused Untimely Jointly Filed I-751 Petitions

If the ISO	Then the ISO
confirms that the jointly filed I-751 petition is not filed within 90 day period before the second anniversary of the CPR's lawful admission or adjustment for permanent resident.	will review the late filing for a written explanation for good cause and extenuating circumstance. If the CPR does not submit a written explanation and a request to excuse the late filing, the ISO will deny the case, clearly indicating untimely filing (see denial sample attached to this memo), The ISO will route the file to the appropriate unit for issuance of a NTA. If the CPR does submit a written explanation and a request to excuse the late filing, the ISO will evaluate the explanation for good cause and extenuating circumstances and make a final determination on accepting the untimely jointly filed petition.

Note
In evaluating good cause and extenuating circumstances, the ISO will refer to memo entitled Adjudication of *Form I-751, Petition to Remove Conditions on Residence, Where the CPR Has a Final Order of Removal, Is in Removal Proceedings or Has Filed an Unexcused Untimely Petition or Multiple Petitions.* See *Appendix XXXX*;

Additions to *Adjudicator's Field Manual*, Chapter 25.1(g)(6) and 25.1(h)(4) and Appendix XXXX (AFM Update AD09-48)

D. Multiple Filings

Jointly Filed I-751 petitions

If the ISO	Then the ISO
encounters a jointly filed petition submitted subsequent to the denial for cause.	will review the petition to determine if the petition was filed timely. If the subsequent filing is timely, the ISO will review the petition to determine if the additional evidence is sufficient to overcome the reasons for the prior denial If the CPR does not submit any additional evidence , the ISO will deny the second petition incorporating by reference the reasons for the denial of the first petition (see denial sample attached) **and** will route the file to the appropriate unit for issuance of an NTA addressing both decisions and place the CPR in removal proceedings (if the CPR is not currently in removal proceedings) If the CPR does submit additional evidence and the adjudicator finds the evidence sufficient to establish eligibility for removal of conditions, the ISO will approve the petition.
	If the subsequent filing is untimely, which in most case it would be, the ISO will review for good cause and extenuating circumstances. If the CPR does not submit a written explanation for good cause and extenuating circumstances, the ISO will deny the petition as untimely. If the CPR does submit a written explanation for good cause and extenuating

	circumstances and submits additional evidence sufficient to establish eligibility for removal of conditions , the ISO will approve the petition.

Appendix 22-xx Form-751 Adjudication Steps for USCIS Immigration Services Officers (ISOs) Appendix added [date memo signed; AD09-48]

I-751 Hardship waiver request petition

If the SC ISO	Then the SC ISO
encounters a hardship waiver petition submitted subsequent to the denial of the previous hardship waiver based on the same ground.	will review the new petition to determine if the applicant has presented additional evidence sufficient to overcome the prior denial. If the CPR does submit additional evidence sufficient to establish eligibility for removal of conditions, the ISO will approve the petition. If the CPR does not submit additional evidence, the ISO will deny the second petition incorporating by reference the reasoning for the denial of the first petition (see denial sample attached) **and** will route the file to the appropriate unit for issuance of an NTA addressing both decisions and place the CPR in removal proceedings (if the CPR is not already in removal proceedings)

***AFM* Transmittal Memoranda Revisions.** The *AFM* Transmittal Memoranda button is revised by adding new entries, in numerical order, to read:

AD09-48 **[dated memo signed]**	**Chapters:** • **25.1(h)(4)** • **25.1(g)(6)** **Appendix 22-XX**	This memorandum revises AFM 25.1 to add Chapter 25.1 (g)(6) and 25.1(h)(4) and provide guidance on "Adjudication of Form I-751, Petition to Remove Conditions on

		Residence, Where the CPR has a Final Order of Removal, Is in Removal Proceedings or Has Filed an Unexcused Untimely Petition or Multiple Petitions".

6. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

7. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to Felicia Cameron, Program Manager, Office of Service Center Operations or to the Office of Field Operations' mailbox "OFO AOS & Legalization."

Distribution List:
Service Center Directors
Regional Directors
District Directors
Field Office Directors
National Benefits Center Director

Office of Adjudications

U.S. Department of Homeland Security
Office address:

Date:

Name of applicant/ petitioner
Address:
City, State, zip code

File No.: A

Dear Ms/ Mr.:

The record shows that you were granted the status of a conditional permanent resident on _____, as the spouse of _____, a citizen of the United States. Your record also shows that your status was terminated upon entry of a final administrative order of exclusion, deportation, or removal pursuant to 8 CFR, Section 1.1 (p), which states in part:

> The term lawfully admitted for permanent residence means the status having been lawfully accorded to the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminated upon entry of a final administrative order of exclusion, deportation, or removal.

A final order of removal was issued to you on_____. As of that date, your conditional permanent residence was terminated and thus you do not have a basis from which to seek removal of the conditions on your permanent residence. Accordingly, your petition is hereby denied.

Sincerely,

Name of District Director/ FOD

cc: name of atty

Prepared by: name of ISO

Office of Adjudications

U.S. Department of Homeland Security
Office address:

Date:

Name of applicant/ petitioner
Address:
City, State, zip code

File No.: A

Dear Ms/ Mr.:

The record shows that you were granted conditional permanent resident (CPR) status on _____, as the spouse of _____, a citizen of the United States or a lawful permanent resident. On _____, you filed a hardship waiver request Form I-751, Petition to Remove the Conditions on Residence, required by Section 216(c)(4) of the Immigration and Nationality Act (the Act). That petition was denied based on (failure to establish good faith, failure to establish that you were a battered spouse, failure to establish extreme hardship, or failure to establish that you were divorced).

Section 216(c)(4) of the Act states in part as follows:

Hardship Waiver. – "The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that-

(A) extreme hardship will result if such alien is removed,
(B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1), or
(C) the qualifying marriage was entered into good faith by the alien spouse and during the marriage the alien spouse or child was battered by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements in paragraph (1)

On _____, you filed another waiver petition, Form I-751 on the same ground as your first waiver petition. United States Citizenship and Immigration Services (USCIS) has reviewed the newly filed waiver petition and the supporting evidence submitted with the new petition. You failed to submit additional evidence different from your first filing. Therefore, incorporating by reference the reasoning contained in the denial decision dated _____ your waiver petition is hereby denied.

In accordance with section 216(b)(2) of the Act, your status as a lawful permanent resident was terminated as of (date of first decision).

You were placed in removal proceedings in accordance with 8 C.F.R. 216.4(d)(2) where you may continue to request review of the USCIS decision denying your petition.

Sincerely,

Name of Director/ FOD

cc: name of atty

Prepared by: name of ISO

Office of Adjudications

U.S. Department of Homeland Security
Office address:

Date:

Name of applicant/ petitioner
Address:
City, State, zip code

File No.: A

Dear Ms/ Mr.:

The record shows that you were granted conditional permanent resident (CPR) status on _____, as the spouse of _____, a citizen of the United States or a lawful permanent resident. On _____, you and your spouse/ stepparent _____jointly filed Form I-751, Petition to Remove the Conditions on Residence, required by Section 216(b) of the Immigration and Nationality Act (the Act). That petition was denied on _____based on failure to establish the bona fides of marriage.

Section 216(b)(1) of the Act states in part as follows:

Termination of status if finding that qualifying marriage improper. -

> (1) In General. - In the case of an alien with permanent resident status on a conditional basis under subsection (a), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence-
>
> > (A) the qualifying marriage-
> >
> > > (i) was entered into for the purpose of procuring an alien's admission as an immigrant, or
> > > (ii) has been judicially annulled or terminated , other than through the death of a spouse; or
> >
> > (B) a fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a)...
>
> the Attorney General shall notify the parties involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

On _____, you and your petitioning spouse/ stepparent jointly filed a second Form I-751. United States Citizenship and Immigration Services (USCIS) has reviewed the newly filed petition and the evidence submitted therewith. In this second I-751 filing you have failed to submit any additional evidence different from your first filing . Therefore, incorporating by reference the reasoning contained in the denial of your first Form I-751, this second filing is hereby denied.

.

In accordance with section 216(b)(2) of the Act, your status as a lawful permanent resident was terminated as of (date of first decision).

In accordance with section 216(b)(2) of the Act, you were placed in removal proceedings where you may continue to request review of the USCIS decision denying your petition.

Sincerely,

Name of Director/ FOD

cc: name of atty

Prepared by: name of ISO

Office of Adjudications

U.S. Department of Homeland Security
Office address:

Date:

Name of applicant/ petitioner
Address:
City, State, zip code

File No.: A

Dear Ms/ Mr.:

The record shows that you were granted conditional permanent resident (CPR) status on _____, as the spouse/ stepchild of _____, a citizen of the United States or a Lawful Permanent Resident (LPR). You were required to file Form I-751, Petition to Remove the Conditions on Residence no later than _____. You filed your Form I-751 on _____. You failed to timely file Form I-751 as was required by Section 216(d)(2) of the Immigration and Nationality Act (the Act), which states in part:

(2) Period of filing petition.

> (A) 90-day period before the second anniversary. The petition must be filed during the 90-day period before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence.

And

> (B) [Date] petitions for good cause. Such a petition may be considered if filed after such date, but only if the alien establishes to the satisfaction of the Attorney General good cause and extenuating circumstances for failure to file the petition during the period described in subparagraph (A).

Section 216(c) of the Immigration and Nationality Act (the Act) states in part as follows:

(2) Termination of permanent resident status for failure to file petition or have personal interview. -

> (A) In General. - In the case of an alien with permanent resident status on a conditional basis under subsection (a), if -
>
> (i) no petition is filed with respect to the alien in accordance with the provisions of paragraph (1)(A)...
>
> the Attorney General shall terminate the permanent resident status of the alien as of the second anniversary of the alien's lawful admission for permanent residence.

You have failed to comply with your obligation to file Form I-751 pursuant to section 216(d)(2) of the Act. Furthermore, you have failed to establish good cause or extenuating circumstances to excuse the late filing of your petition. Therefore, in accordance with section 216(c)(2) of the Act, your status as a lawful permanent resident is terminated as of (the second anniversary of alien's lawful admission or adjustment for permanent resident).

In accordance with section 216(c)(2)(B) of the Act, you may request a review of this determination while in removal proceedings. f you choose so, you may be represented in such proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office of Immigration Review (EOIR). Your attorney or authorized and qualified person may assist you in the preparation of your request for review and hearing, and may examine the evidence you wish to consider during the hearing.

Sincerely,

Name of District Director/ FOD

cc: name of atty

Prepared by: name of ISO

Immigration Law: On Your Turf

By Anna K. McLeod

In our profession there is increasing pressure to specialize in a particular practice area. While dedication to one practice area may build expertise more quickly and avoid the skepticism met by "jack-of-all-trades" lawyers, ample exposure to other relevant practice areas is necessary to best serve your client. U.S. immigration law is one such body of law that intersects with a variety of other disciplines. We need not stumble across these intersections, but rather we should see them up ahead and prepare for the ways they may complicate our devised strategy for accomplishing our clients' goals.

This article intends to better prepare young lawyers to see the intersections between their practice areas and immigration law, demystify immigration law (to a degree), and urge diligent study of these intersections and others to protect your client.

Immigration Law Today: Overview of the Law and Agencies

The basic body of our nation's immigration laws is the Immigration and Nationality Act (INA).[1] It was passed by Congress in 1952 and consolidated and codified many existing provisions regarding immigration. It has been amended several times since 1952, most notably by the Immigration Reform and Control Act of 1986[2] (IRCA), and with the latest overhaul in 1996, known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[3] (IIRAIRA).

Generally speaking, our U.S. immigration system is divided into three parts: family-based immigration, employment-based immigration, and miscellaneous (nonimmigrants). Foreign nationals (here to mean everyone but U.S. citizens and U.S. nationals) may immigrate to the U.S. on the basis of a qualifying familial relationship, qualifying employment relationship, or due to particular individualized circumstances which provide for nonimmigrant status for a period and eventual eligibility to apply for lawful permanent residence on the basis of the nonimmigrant status.[4] To immigrate is to come to the U.S. with the intent to permanently reside here.[5]

However, nonimmigrants are generally defined by the fact that they have a foreign residence that they do not intend to abandon.[6] The dichotomy between immigrants and nonimmigrants is an important one because of the rights generally available to each group. Lawful Permanent Residents (LPRs), or green card holders, have the right to live and work freely in the U.S. and apply for citizenship once they meet the several requirements, including the accrual of the requisite time in the U.S. as a lawful permanent resident.[7]

By way of example, the three facets of our immigration system include the following scenarios:

(1) John Smith, U.S. Citizen, petitions for his wife, Bella Italiana, a national of Italy. John Smith and Bella Italiana's marriage provides a qualifying relationship that is the basis for a family-based green card case for Ms. Italiana.[8]

(2) Ms. Bella Italiana is employed as a doctor for a U.S. employer; the U.S. employer may file a petition for her establishing the foundation for an employment-based (EB) green card case.[9]

(3) Lastly, the miscellaneous category I mentioned above includes an alphabet soup of nonimmigrant visa categories with a variety of requirements. One such nonimmigrant status is the U visa.[10] The U visa provides nonimmigrant status to undocumented victims of certain qualifying crimes following cooperation with law enforcement in the investigation of the crime committed against them.[11] The U nonimmigrant status is not lawful permanent residence, but after 3 years of continuous presence in the U.S. in U nonimmigrant status, he or she may apply for lawful permanent residence based on his or her U nonimmigrant status.[12] This lawful immigration status is independent of her employer or her family members; rather, the U visa, like other nonimmigrant visas in the alphabet soup, is based on a particular set of individualized circumstances.

There are several federal agencies which handle various aspects of the immigration system. For example, the Department of Labor manages the Program Electronic Review Management (PERM) process, a necessary step for many employment-based lawful permanent resident cases, or "green card" cases. The Department of Homeland Security houses several component agencies, including the United States Citizenship and Immigration Service (USCIS), U.S. Customs and Border Patrol (CBP), and U.S. Immigration and Customs Enforcement (ICE). In addition to these agencies, the Department of State is typically involved in an immigrant's lawful journey to the U.S. Each agency's functions affect the lives of immigrants in different ways.

Family Law

Our family-based immigration system is predicated upon familial relationships, formed through birth, marriage, and adoption.[13] The INA defines "child," "spouse," "parent" and other key terms for the purposes of determining qualifying relationships.[14] To derive a benefit from a child, the parent must meet the INA definition of parent.[15] "She has his eyes" just will not cut it. Therefore, a paternity action or court action to legitimate the child under state law of the child's domicile may be necessary to establish the parent-child relationship under the INA.[16]

Marriage has long been recognized as a "social relation subject to the State's police power"[17] and so marriage is largely a matter of state law. For immigration purposes, the analysis of whether a marriage is valid for immigration purposes hinges on whether the marriage is valid according to the laws of the place of celebration.[18] Also, when assessing the validity of a marriage, any prior divorces must be valid, that is, the divorce must be valid under the laws of the jurisdiction granting the divorce.[19] The validity of remarriage depends on the laws of the state of remarriage, and depending on said state's laws, if the prior divorce was not final at time of remarriage, the remarriage may be voidable not void.[20] Each formation and dissolution of a marriage must be done correctly according to state law or there are profound limitations to family-based immigration options. Also, few shocks are as problematic as learning a U.S. citizen spouse is not actually a spouse.

I can recall an instance when I was representing a couple who were victims of a qualifying crime for U nonimmigrant status. The woman was the principal applicant, and she planned to petition for her husband to be granted derivative U nonimmigrant status. However, after obtaining the signed U visa law enforcement certification, we learned that the couple was not in fact legally married. The "husband" was still married to his estranged wife. They had been living separate lives for over 15 years and he had fathered three children with his current "wife," though they were not legally married. "Husband" needed to divorce and remarry within 6 months in order to be the beneficiary of a derivative U visa petition as planned. A U visa certification, which is signed by law enforcement, expires after 6 months, so time was of the essence.[21] It was critical that we find a family lawyer who could swiftly assist the client in filing for divorce and see the matter to its conclusion. For this and many other reasons, family lawyers must ensure that their clients' marriages and divorces comply with the relevant state law or else a family-based petition will not be granted for lack of a qualifying relationship. The burden of proof is on the petitioner[22] and the qualifying relationship must be established by "clear and convincing evidence."[23] Often there is no time for hiccups.

Domestic violence is another relevant family law topic. It intersects squarely with immigration law due to the previously mentioned U visa and the Violence Against Women Act (VAWA) self-petition.[24] In the case of the U, filing a Domestic Violence Protective Order is cooperation with a qualifying "certifying agency"[25] (court) and assists in the detection of a qualifying crime (domestic violence). Also, a VAWA self-petition is available for an abused spouse of a U.S. citizen or LPR.[26] Child custody is another family law matter that can substantially affect a child's immigration options. For example, changes in child custody may provide the basis for automatic U.S. citizenship for certain minors under the Child Citizenship Act of 2000.[27] Needless to say, quality representation in the family law arena can profoundly affect foreign nationals' immigration options.

Criminal Law

The U.S. Supreme Court recognized in *Padilla v. Kentucky* that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[28] When deportation is one of the most severe consequences of a criminal conviction, and is swiftly handed down under today's immigration laws Sixth Amendment protection against ineffective assistance of counsel is triggered for the non-citizen client. Therefore, when criminal counsel advises her non-citizen criminal defendant client regarding the consequences of a particular plea deal, she must provide assistance that does not run afoul of the standard set out in *Strickland v. Washington*.[29] Under *Padilla*, when the consequences are clear, criminal defense counsel must provide correct advice to her noncitizen criminal defendant client regarding the immigration consequences of the particular plea deal. Also, when the consequences are not clear, criminal defense counsel has a duty to inform her client that the consequences are not clear but the plea deal in question "may carry a risk of adverse immigration consequences."[30] Although the duty of criminal counsel established under *Padilla* is not retroactive,[31] as of the *Padilla* decision, criminal counsel must familiarize themselves with the immigration consequences of criminal activity and be prepared to advise their client correctly.[32] Increased cooperation between the criminal defense bar and the immigration bar is crucial to ensure the full protections guaranteed by the Sixth Amendment are available to each represented criminal defendant. With deportation and exile on the line, the stakes are high.

Business Law

Within the alphabet soup of nonimmigrant visas, there is a core group of visas (E, H, L) based on an employer-employee relationship.[33] For example, where Alpha U.S. Company is 100% owned by Alpha Foreign Company, the predicate ownership relationship exists between a foreign entity (sending company) and a domestic entity (receiving company). After Mr. High Achiever has been with Alpha Foreign Company for a year in a qualifying position, he may qualify to be an "intra-company transferee," the shorthand term for an L visa.[34] Due to the ownership relationship between the foreign entity and the U.S. entity, the U.S. entity can petition for Mr. Achiever to work in the U.S. in a qualifying position on L nonimmigrant status. However, if Alpha Foreign Company is bought by another U.S. company, then there is no requisite foreign entity, even though Mr. Achiever may already be working the U.S. for Alpha U.S. Company. This sale undermines Mr. Achiever's status and he is no longer authorized to work in the U.S. on the L visa. Additionally, any filed green card case based on this intra-company transferee status has vanished. This is just one example of how corporate ownership structures

are foundational components to certain immigration benefits. Therefore, U.S. employers of foreign national workers must carefully assess how business decisions create or limit opportunities for their foreign national workers and at what cost.

Employment Law

In 1986, IRCA created the obligation for employers to verify the identity and work authorization of their employees and prohibited them from hiring unauthorized aliens.[35] Thus, the I-9 form is born.[36] The form has various fields for the employee and the employer to complete. It is very important for companies to properly train their human resources personnel to manage I-9 compliance.[37] Employers have responsibilities with regards to the proper completion, handling, updating, and retaining of an I-9 form. Writing "U.S. Gov" instead of "SSA" or "Social Security Administration" as the issuing authority on List C of the form is considered a technical violation, one that can be remedied, but when uncorrected and appearing throughout the entire batch of I-9s, the civil fines could quickly add up. The form I-9 is a liability minefield for employers who neglect to properly train their human resource personnel.

Involved in verifying identity and work authorization of a new hire is the examination of documents. Foreign nationals will have more documents to present because U.S. citizens can prove identity and work authorization with one document: a U.S. passport. When asking a new hire to complete the I-9, the employer should merely give the I-9 form (with instructions) to the employee, and complete Section 2 of the form with the documents the employee chooses to provide. Requiring certain documents or more documents than necessary ("document abuse") is a recipe for possible civil liability under the anti-discrimination law.[38]

The key is for companies to establish consistent HR practices with regards to the I-9 completion process. There are ample tools available online to do this.[39] Multiple individuals with disparate practices generate incomplete and incorrect I-9s and in the event of an ICE audit, only 3 days' notice is required before the I-9s must be produced pursuant to a Notice of Inspection.[40] Therefore, centralizing the I-9 management process is recommended in order to avoid costly errors and potential liability for discriminatory practices.

Generally speaking, consistency is the name of the game with foreign national workers. Employers should apply the same policies and procedures to foreign national workers as to U.S. citizens in order to avoid exposure to discrimination liability. Establishing and abiding by procedures is crucial in other contexts, too (e-verify compliance, employment contracts, and applicable federal and state labor laws). Be correct in your I-9 practices, but if you cannot be correct, be consistent. With documented efforts at correct procedures and consistent application of the procedures the employer believes to be correct, the employer may be able to negotiate a reduced fine from ICE following an ugly audit.

Tax Law

Tax law and immigration law commonly intersect because each actor, be it a company or a foreign national, wishes to understand the tax consequences of a particular action. Confusion regarding the tax treatment of foreign nationals begins with the fact that the same key terms in each realm have different meanings. For example, a basic tax treatment inquiry is whether the individual is a U.S. resident or a U.S. non-resident under the Internal Revenue Code (I.R.C.). I.R.C. § 7701(b) defines each of these terms. However, U.S. resident under the I.R.C. is not exclusively applicable to U.S. citizens and "lawful permanent residents" (LPRs). In fact, a U.S. resident under the I.R.C. includes U.S. citizens, lawful permanent residents, and individuals who meet the substantial presence test[41] set forth in the I.R.C.[42] Further complicating the issue, there are exceptions to the substantial presence test.[43]

The U.S. resident versus U.S. nonresident distinction is crucial because U.S. residents are taxed on their worldwide income, while U.S. nonresidents are solely taxed by the Internal Revenue Service on their U.S. earned income. Another term affecting tax deductions which has a different definition under the INA is "dependent." In immigration law, one's dependents may include spouse or children who are going to piggy-back onto a particular immigrant visa petition, for example, or who are considered "derivatives" of the principal applicant for a particular visa application. It is possible for someone to be a dependent of a foreign national for immigration purposes but not her dependent for tax purposes.

Because tax treatment often is a factor in foreign nationals' decision-making, companies and others transacting with these individuals need to be conscious of the issue. Finally, the tax treatment of foreign nationals is relevant to employers for W-4 compliance and withholdings purposes, since "foreign persons" receive different withholding treatment than "U.S. persons."[44] Again, the immigration categories are imperfect indicators of tax treatment.

Conclusion

As you can see from this sampler of intersections between immigration law and other bodies of law, there is need for study and collaboration. When distinguishing yourself in your respective practice area, please remember that the trust your client places in you is not bound to one practice area, but demands that you keep your eyes ahead and do your best to anticipate issues, even if you must call on a colleague to fully address the issue.

Endnotes

1. 8 U.S.C. § 1101-1537.
2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 STAT. 3445.

3. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 STAT. 3009.
4. 8 U.S.C. § 1153.
5. 8 U.S.C. § 1101 (a)(15)(B).
6. *Id.*
7. 8 U.S.C. § 1427(a)(1); 8 U.S.C § 1430(a).
8. This is an example of an Immigrant Visa Petition filed pursuant to INA § 204(a)(1)(A) on behalf of an "immediate relative" as defined under INA 201(b)(2)(A).
9. Green card cases, by their very nature, require an immigrant visa number. However, the speed at which a beneficiary can obtain an immigrant visa number depends on the type of qualifying relationship she has with a U.S. employer or family member (U.S. citizen or LPR). *See* 8 U.S.C. § 1153 for annual allocation of visas per year.
10. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 22 U.S.C. § 7101 et seq.
11. 8 U.S.C. § 101(a)(15)(U).
12. 8 C.F.R. § 245.24(b).
13. The Hague Adoption Convention entered into force in the U.S. on April 1, 2008, so petitions filed with USCIS after that date must conform to the Hague process, where home country is also a party to the Convention, in order for the immigration benefits to follow based upon the familial relationships established in the INA. *See* http://www.uscis.gov/adoption/immigration-through-adoption/hague-process.
14. 8 U.S.C. § 1101(a).
15. 8 U.S.C. § 1101(b).
16. *See* 8 U.S.C. § 1101(b) and (c) for definitions of child use within the various titles of the INA.
17. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888)).
18. *See* 9 FAM 40.1 N1.1(b); see also *U.S. v. Gomez-Orozco*, 289 F. Supp. 2d 1092 (C.D. Ill. 1998), *rev'd on other grounds*, 188 F.3d 422 (7th Cir. 1999); *In re Ceballos*, 16 I&N Dec. 765 (BIA 1976); *see also* http://www.uscis.gov/family/same-sex-marriages, USCIS's Statement on July 1, 2013 from Secretary of Homeland Security Janet Napolitano regarding USCIS's implementation of U.S. Supreme Court decision in *U.S. v. Windsor*, 570 U.S. __ (2013), confirming that, generally, the place of celebration determines the validity of a marriage for immigration purposes.
19. *In re Hamm*, 18 I&N Dec. 196 (BIA 1982); *In re Miraldo*, 14 I&N Dec. 704 (BIA 1974); *In re Karim*, 14 I&N Dec. 417 (BIA 1973); *In re Darwish*, 14 I&N Dec. 307 (BIA 1973).
20. *In re Arenas*, 15 I&N Dec. 385, 386 (BIA 1983).
21. http://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf.
22. *In re Brantigan*, 11 I&N Dec. 493 (BIA 1966); *In re Ma*, 20 I&N Dec. 394 (BIA 1991).
23. *Id.*
24. 8 U.S.C. § 1154(a)(1)(A)(iii).
25. 8 C.F.R. § 214.14(a)(2).
26. *Id.*
27. *See* 8 U.S.C. § 1431; s*ee also* 8 C.F.R. § 320.2.
28. *Padilla v. Kentucky*, 559 U.S. 356, 6 (2010).
29. *Strickland v. Washington*, 466 U.S. 668 (1984).
30. *Padilla*, 559 U.S. at 12.
31. *Chaidez v. U.S.*, 568 U.S. __ (2013).
32. *See* INA § 212(a) and INA § 237(a) for the criminal grounds of inadmissibility, applicable to individuals not "admitted" to the U.S., and the criminal grounds of deportability, applicable to lawful permanent residents, respectively.
33. 8 U.S.C. § 1101(a)(E), (H), (L).
34. 8 U.S.C. § 1101(a)(L).
35. Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 359.
36. 8 C.F.R. Part 274(a)(2)(a)(2). Employer must complete the I-9 form for every new hire after November 6, 1986.
37. 8 U.S.C. § 1324(a) establishes the imposition of civil penalties for various specified unlawful acts related to the employment eligibility verification process (i.e. Form I-9) and the employment of unauthorized aliens.

    ICE conducts an investigation or "audit" and initiates the process for imposing civil monetary penalties with respect to employer sanctions under section 274A of the INA and 8 C.F.R. Part 274a. 8 U.S.C. § 1324(b) establishes the imposition of civil penalties for specified actions constituting immigration-related unfair employment practices. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is responsible for investigating alleged violations of § 1324(b), and is authorized to file a complaint to initiate a civil penalty proceeding. 8 U.S.C. § 1324(c) provides for imposition of civil penalties for specified actions relating to immigration-related document fraud. ICE conducts the investigations and initiates the process for imposing civil money penalties with respect to document fraud under section 1324(c) and 8 C.F.R. part 270.
38. Immigration Act of 1990, Pub. L. 101-649, Sec. 535(a), created the prohibition of document abuse, which prohibits discriminatory documentary practices during the employment eligibility verification process.
39. United States Citizenship and Immigration Service, M-274 (Rev. 04/30/13), Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form), available at http://www.uscis.gov/sites/default/files/files/form/m-274.pdf.
40. United States Immigration and Customs Enforcement, I-9 Inspection Fact Sheet, http://www.ice.gov/news/library/factsheets/i9-inspection.htm.
41. Internal Revenue Service, "The Green Card Test and the Substantial Presence Test," http://www.irs.gov/Individuals/International-Taxpayers/The-Green-Card-Test-and-the-Substantial-Presence-Test (Page Last Reviewed or Updated: 22-Apr-2013).
42. I.R.C. § 7701(b)(3).
43. The exceptions to the substantial presence test available to aliens are found at I.R.C. § 7701(b)(3)(B) and (C) and I.R.C. § 7701(b)(5)(D) and (E). For foreign nationals, the most common exceptions are for certain students (e.g., F or J nonimmigrant status) who meet certain requirements and I.R.C. § 7701(b)(5)(D) and (E).
44. I.R.C. §§ 1441-1443.

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NEW YORK STATE BAR ASSOCIATION

NYSBA

Standards for Providing Immigration Representation

Prepared by the Special Committee on Immigration Representation

Adopted by the New York State Bar Association House of Delegates on June 23, 2012

NYSBA

Standards of Representation of Clients in Immigration Cases

Preamble

In May 2011, the New York State Bar Association formed the Special Committee on Immigration Representation to address the need for quality representation in immigration cases in New York State. Under the Immigration and Nationality Act ("INA"), there is no statutory right to government-appointed counsel in immigration cases because the proceedings are civil.[1] Instead, immigrants may be represented by attorneys, "accredited representatives," or other "qualified representatives" at their own expense.[2] For those immigrants who have been able to secure representation, however, the quality of representation has varied greatly.[3] As the need for representation has grown, so has the need for guidance to ensure effective representation.

In light of this need, the Special Committee on Immigration Representation was tasked with the responsibility of drafting written standards to guide the quality of representation in immigration cases in New York State. Cognizant of the complexity of immigration law and the differences in practices and resources across the state, the committee consulted numerous stakeholders and researched the legal, ethical, and practical norms that have governed diligent and competent immigration representation. The standards set out below are the results of these efforts.

The purpose of these standards is to provide representatives with a starting point in their efforts to provide competent, quality representation in immigration cases. These standards should be viewed as minimum standards, which alone do not establish the ideal model or the perfect case.

Representatives are encouraged to follow both the text and the spirit of these standards—and strive beyond them—to ensure quality representation in immigration cases.

These standards are intended to build upon, not displace, existing rules and norms governing representation. Some of these rules and norms are referenced below. Regardless of whether they are specifically referenced, representatives must be aware of these rules and norms. All

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1 INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (stating that "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.")

2 *Id.*; 8 C.F.R. §§ 1292.1-1292.2 (specifying which individuals are qualified to represent noncitizens in immigration cases, including attorneys, "accredited representatives," and "other qualified representatives").

3 The New York Immigrant Representation Study, *supra* note 1.

representatives must comply with existing federal rules governing immigration representation. All attorney representatives must comply with the New York Rules of Professional Conduct, which govern the conduct of attorneys in this state.

These standards are designed to apply to all attorneys, accredited representatives, law offices and law firms engaged in providing immigration representation as authorized by federal law. No individual who is unauthorized to represent immigrants should engage in any such representation in an immigration case. Representatives who work with staff not authorized to represent immigrants in an immigration case should ensure that all staff are properly supervised and do not engage in the unauthorized practice of immigration law themselves.

Definitions

- A-File or Alien File: The record compiled by the U.S. Department of Homeland Security on all matters relating to an individual's Alien Registration Number.

- Immigration case: Refers generally to any proceeding involving an immigration matter before an agency within the U.S. Department of Homeland Security, U.S. Department of State, the U.S. Department of Justice's Executive Office for Immigration Review (including Immigration Court and the Board of Immigration Appeals), and any other administrative or federal petitions or appeals. Includes affirmative petitions and applications for immigration benefits, as well as defenses and applications for relief made in removal proceedings.

- Removal proceedings: Immigration court proceedings and appeals before the U.S. Department of Justice's Executive Office for Immigration Review that determine whether a noncitizen is in violation of U.S. immigration laws and subject to removal from the United States.

- Representative: For purposes of these standards, a "representative" refers to any individual authorized to represent an individual in an immigration case by filing an official Notice of Entry of Appearance (i.e., Form "G-28", "EOIR-28", "EOIR-27", or federal court appearance form) with the appropriate agency or court.

List of Standards

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A. Role of a Representative in an Immigration Case

A-1. A representative in an immigration case shall advocate diligently for the client's interests and provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[4]

A-2. A representative has a duty to inform the client of all available defenses and/or forms of relief in an immigration case, including the filing of applications and petitions. A representative has a duty to inform the client of the consequences of pursuing or foregoing defenses and/or forms of relief, including applications and petitions. A representative shall not substitute his or her judgment as to the choice of defenses, relief, and applications/petitions to file for that of a client, except as provided herein.[5] Representatives should take special care in their duty to inform clients who are not currently in removal proceedings of the consequences of pursuing affirmative applications and petitions for immigration benefits where doing so may place the client at risk of removal or other adverse consequences. Representatives may

4 *See* N.Y. Rules of Professional Conduct Rule 1.1(a) (regarding competence).

5 Exceptions include where the client seeks the representative's assistance to file an application that the representative knows is frivolous or fraudulent, or where the client seeks the representative's assistance to engage in conduct that the representative believes to be unlawful. *See* N.Y. Rules of Professional Conduct Rule 1.2 (d), (f). Moreover, a representative "may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client." *Id*. Rule 1.2(e).

file such affirmative applications or petitions only with the client's informed consent.[6]

A-3. If, after fully counseling and conferring with the client, a representative believes the client is not capable of exercising appropriate and reasoned judgment on his or her own behalf— due to age, mental illness or incapacity, or other mental or physical infirmity—the representative should consider and, if appropriate, consult with the client regarding moving the court for a guardian ad litem or other appropriate recourse to ensure the client's best interests.[7]

A-4. Under no circumstances may a representative counsel a client to engage, or assist a client, in conduct that the representative knows is illegal or fraudulent, except that the representative must discuss the legal consequences of any proposed course of conduct with a client and also explore and advise on better options that may not be readily obvious.[8]

Commentary:

The role of a representative in an immigration case should be understood within the confines of a representative's general ethical duties. Representatives should be familiar with the local rules of any court, agency, or tribunal before which they appear, including ethical rules and decisions. Attorney representatives must abide by all applicable rules governing attorneys' professional responsibilities and rules of professional conduct and other applicable codes/rules. Accredited representatives must also abide by all applicable rules governing the Board of Immigration Appeals' Recognition and Accreditation Program.[9]

B. Training and Experience

B-1. Immigration law is a highly complex field. Representatives must be adequately versed in the procedural and substantive law relevant to a client's specific immigration needs or associate with an experi-

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6 Under the N.Y. Rules of Professional Conduct Rule 1.0(j), "informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." For purposes of "informed consent" as used in these standards, we adopt this definition for all representatives in immigration cases.

7 For further guidance, representatives should refer to the standard on client competency below. See also New York Rules of Professional Conduct Rule 1.14 (regarding clients with diminished capacity).

8 *See* N.Y. Rules of Professional Conduct Rule 1.2(d) (regarding scope of representation and allocation of authority between client and lawyer). Nothing in this standard should be read to prevent a representative from counseling or representing a noncitizen who is unlawfully present in the U.S.

9 *See* 8 C.F.R.§ 292.1.

enced practitioner who is competent to handle the matter.[10] Representatives of clients in removal proceedings should familiarize themselves with the requirements of immigration court practice as well as the substantive legal areas involved in the case.

B-2. Because the field of immigration law is complex and constantly changing, all representatives who are involved in providing immigration representation should be required to complete a minimum of four hours annually of continuing legal education (CLE) and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical responsibilities relevant to the area of immigration law in which they will be practicing are sufficient to enable them to provide quality representation. Attorneys who provide representation in areas that include, but are not limited to immigration law, should allocate a significant portion of their annual mandatory continuing legal education credits towards courses directly related to the area of immigration law and should continue to have access to updates and training as required.

B-3. Areas involving complex issues, such as criminal grounds of removal, require special expertise and representatives should have considerable experience in the area or seek mentorship from an experienced immigration law practitioner. Representatives should consider attending additional CLE courses and other training programs for such complex issues if they arise in their clients' cases.

B-4. All representatives shall supervise staff closely, conduct appropriate training, and protect against the unauthorized practice of immigration law.

Commentary:

This standard reflects the minimum amount of CLE training related to immigration law and practice that a representative should seek annually. By no means should a representative assume that fulfilling this minimum requirement will ensure that he or she is fully versed in the many issues that may arise in immigration cases. Representatives should seek regular and ongoing training in immigration representation and developments in law and practice.

Moreover, the Special Committee on Immigration Representation recognizes that CLE and training programs should be made available and affordable for all representatives providing immigration representation and that public funding should be provided to enable all nonprofit representatives to attend such programs to ensure that they will provide quality representation to indigent clients.

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10 *See* N.Y. Rules of Professional Conduct Rule 1.1(b) ("A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.").

C. Caseload

C-1. A representative shall not carry a caseload that, by reason of its excessive size or representation requirements, interferes with the provision of quality legal representation and the satisfaction of ethical obligations to his or her clients.

C-2. A representative shall maintain a caseload that allows for competent, quality representation. Therefore, before agreeing to act as a representative, the representative has an obligation to ensure that he or she has sufficient time, knowledge, available resources and experience to offer quality legal services. In practice, this means that:

(1). A representative shall act with reasonable diligence and promptness in representing a client.[11]

(2). A representative shall not neglect a legal immigration matter entrusted to the representative.[12]

C-3. A representative shall not intentionally fail to carry out the written agreement entered into with a client for professional services as required by these standards (i.e., section D-1(1) below), but the representative may withdraw with proper notice to the client and as permitted under the rules and regulations, including the requirements of the Immigration Court Practice Manual.[13]

D. Scope of Representation

D-1. A representative has the duty to ensure the client understands the scope of representation and that the client's rights are duly protected. This includes the following aspects of representation:

(1). Initiation of representation: At the initiation of representation, a representative has a duty to confirm the scope of the representation with the client through a written agreement.14 In particular, the representative should provide clear notice of what aspects of the immigration case the representative will be

11 *See* N.Y. Rules of Professional Conduct Rule 1.2 (regarding diligence).

12 *Id*.

13 *See* Immigration Court Practice Manual, "Appearances Before the Immigration Court" ch.2.3(i)(ii), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%202.pdf.

14 In New York, current law does not require that representatives execute a written agreement with respect to the scope of representation in all cases. *See* N.Y. Rules of Professional Conduct, Rule 1.5 (specifying communication requirements for the scope of representation); *see also* 12 N.Y.C.R.R. §§ 1215.1 & 1215.2 (requiring a written letter of engagement where fees are expected to equal or exceed $3,000). New York has required written agreements for certain types of matters, such as in cases involving fees for domestic relations matters. *See* N.Y. Rules of Professional Conduct Rule 1.5(d)(5). As explained in the commentary, the drafters of these standards have concluded that written agreements should be required in all immigration cases, to protect the interests of both client and representative.

handling and whether the representation agreement will include any appeals.

(2). Conflicts of interest: Where a representative is approached by multiple individuals seeking representation in an immigration case (such as spouses or other family members, or an employer/employee), a representative has a duty to investigate any conflicts of interest. If a potential or actual conflict of interest exists, a representative shall not represent the multiple clients unless the representative reasonably believes that he or she will be able to provide competent and diligent representation to each affected client and the representative obtains informed consent confirmed in writing from each of the individuals accordingly.15 A representative's obligation to investigate conflicts extends beyond new conflicts to ensure that the representative does not take on the representation of a new client whose interests are materially adverse to a former client.16

(3). Withdrawing or Terminating Representation: Where a representative must withdraw from representation before completion of the tasks outlined in the written agreement on scope of representation, the representative must provide reasonable notice to the client and advise the client on how to obtain another legal representative. The representative must also notify the agency or court in a manner that complies with applicable rules and practices (including, for court matters, with the Immigration Court Practice Manual). The representative must return any advanced fees, costs, or payments provided to him or her by the client for the tasks not completed.

Where a representative terminates representation after completion of the tasks outlined in the written agreement on scope of representation, the representative has a duty to inform the client of the outcome of his or her efforts and clearly specify that the representative is no longer representing the client. The representative must follow all other standards herein triggered by the closing of a case.

If the representative receives any other correspondence, notices, order, decisions, or any other materials from an agency

15 *See* N.Y. Rules of Professional Conduct Rule 1.7 (regarding conflict of interest).

16 *See* N.Y. Rules of Professional Conduct Rule 1.9 (regarding duty to former clients).

or court regarding a client whose representation has been terminated, the representative must make every reasonable effort to forward the materials to the client and must inform the agency or court that he or she is no longer representing the client.

Commentary:

Issues of scope of representation are particularly important in the immigration context because some immigration cases involve multiple agencies and courts. For example, a detained noncitizen facing removal proceedings may be eligible for affirmative immigration benefits adjudicated by various agencies. Full representation might require representation in immigration court on removal proceedings and on bond, before the Department of Homeland Security's Immigration and Customs Enforcement to negotiate bond, and before the Department of Homeland Security's Citizenship and Immigration Services to file certain affirmative applications for relief. Before the initiation of representation, a legal representative has a duty to investigate and explain to the client the various forms of advocacy that will be necessary or beneficial to his or her immigration case. The representative must then discuss and clarify with the client which forms of advocacy the representative will pursue as part of their written agreement.

The requirement of a written agreement on scope of representation stems in part from Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). In that case, the Board of Immigration Appeals determined that a claim of ineffective assistance of counsel is required to be supported by an affidavit from the client detailing the agreement between counsel and client concerning representation, that counsel must be informed of the allegations against him or her and given an opportunity to respond, and that the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. Requiring all representatives to execute a written agreement for services in an immigration case ensures that the rights of both representative and client are protected.

E. Client Competency

E-1. If there are indicia that a client lacks competency to understand the nature and object of the immigration case and cannot participate in his or her defense, a representative has a duty to discuss such issues with the client and should present this evidence to the judge/adjudicator in the immigration case so that appropriate steps may be taken to safeguard the client's rights. In documenting evidence of the client's lack of competency, a representative should interview the client and his or her family members or friends, gather any medical or psy-

chological records, request production of relevant documents from the U.S. Department of Homeland Security (if necessary, by subpoena), and seek a competency determination.

Commentary:

Issues concerning a client's competency may raise issues concerning continuing representation. A representative should be wary of proceeding on a client's behalf when there are serious competency issues in the absence of a guardian.[17]

An Immigration Judge's duties to address issues of competency are addressed in Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011). Representatives should be familiar with this and other cases discussing competency.

Where necessary, representatives should consult with disability advocacy agencies in their jurisdiction for assistance.

F. Fees

F-1. A representative shall not make an agreement for, charge, or collect an excessive or illegal fee or expense.[18]

F-2. A representative shall communicate in writing to a client at the beginning of the representation or within a reasonable time thereafter the fee for such representation and any expenses associated with the representation for which the client is responsible.[19]

A representative shall promptly communicate and obtain written informed consent from the client to any changes in the fees or expenses associated with the representation.

A representative shall not charge or collect a nonrefundable retainer fee. A representative shall not charge or collect a contingency fee.[20]

F-3. Where the representation concludes without completion of the services agreed upon in the written scope of representation agreement, a representative shall render an account of time spent on a client's case and refund any unearned fees. A representative shall under such circumstances issue the refund with a letter memorializing the reason for termination of services.

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17 *See* N.Y. Rules of Professional Conduct Rule 1.14 (regarding clients with diminished capacity).

18 *See* N.Y. Rules of Professional Conduct Rule 1.5(a) (regarding excessive fees).

19 Although not always required under New York law, see 12 N.Y.C.R.R. §§ 1215.1 & 1215, a written fee agreement is of particular importance in immigration matters due to the requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). For further discussion of these requirements, please refer to the commentary for the preceding standard on scope of representation.

20 The New York Rules of Professional Conduct recognize circumstances where nonrefundable retainer fees and contingency fees may be appropriate. *See id*. Rule 1.5(d). As explained in the commentary, however, the drafters of these standards have concluded that immigration cases are ill-suited for nonrefundable retainer fees and contingency fees.

F-4. A representative should resolve fee and expense disputes promptly and in advance of court appearances.

Commentary:

Over the years, many clients in immigration cases have expressed concerns about the excessiveness and uncertainty regarding the fees charged by and owed to their representatives. Because of these concerns, and the particular vulnerability of many noncitizens who seek representation, it is advisable to require a written fee agreement.[21]

A written fee agreement can be a valuable tool to avoid misunderstanding and may also clarify other concerns that commonly arise in immigration cases. For example, it is not uncommon for legal fees to be paid by a client's relatives or friends, rather than the client. However, the client must be fully informed of the fees for representation and any disputes regarding payment. A representative's duties are to the client and not to the individual providing payment for the legal services.[22]

G. File Maintenance

G-1. A representative has the duty to maintain his or her client's file. This includes keeping in a secure and confidential place: (a) all paper and electronic correspondence to and from the relevant government agencies; (b) all paper and electronic evidentiary records—documents, certificates, letters of support, declarations or affidavits, and any other records—from the client, his or her friends and family, the A-File, government agencies, criminal/family/other courts, medical professionals, and any other individuals, agencies, and institutions; (c) all correspondence, motions, briefs, evidence, and other attachments filed with the relevant court/agency or sent to/from opposing counsel; and (d) all notices, correspondence, and decisions received from the relevant court/agency.

G-2. In many immigration cases, the court or agency will require the client, supporting petitioners or witnesses, and others involved in a case to provide certain types of original or certified documents. A representative has a duty to determine when original or certified documents, rather than copies/facsimiles, are required. When handling original documents, a legal representative shall take special care to secure those documents and keep them for only as long as necessary for representa-

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21 A client is "entitled to be charged a reasonable fee and to have [his/her] lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. [A client] is entitled to request and receive a written itemized bill from [her/her] attorney at reasonable intervals." *See Statement of Client's Rights*, #44, 22 N.Y.C.R.R. § 1210.1

22 *See* N.Y. Rules of Professional Conduct Rule 5.4 (regarding professional independence of a lawyer).

tion. The legal representative shall return all originals as soon as is practicable after such documents are no longer needed for the case.

G-3. A representative also has a duty to keep an adequate record of developments in the immigration case. This includes keeping notes of telephone conversations, meetings, and hearings with opposing counsel, the court, or agency officials. A representative shall include these notes as part of the file.

G-4. At all times the client has a right to the file in his or her case, except for any documents that belong solely to the representative, such as internal memoranda that are intended for the benefit of the representative rather than the client, or documents the disclosure of which would violate a duty of nondisclosure owed to a third party.[23]

G-5. A representative must maintain the file for the pendency of the case. Unless the client provides informed consent, a representative should not destroy or discard any information or documents that the lawyer knows or should know may be necessary or useful in the assertion of a client's defense or right to relief in an immigration case.

G-6. Upon termination of representation, a representative should make a good faith effort to provide the client with a complete copy of any documents in the file that the representative has not previously provided, including all notices, forms, applications, motions, briefs, exhibits, decisions, and other materials prepared or received for the client's case. A representative should also retain a copy of the file in his or her records for a reasonable period of time. In determining the length of time that is reasonable for file retention, a representative should exercise discretion based on the nature and contents of the file and the client's objectives following the disposition of the immigration case. For example, if a client intends to pursue an immigration benefit in the near future, the files should be maintained for a sufficient period with the relevancy and materiality of the records in mind.

G-7. A representative must maintain any documents or records relating to the retainer, any costs or fees, and any invoices and receipts for payments for at least seven years after the events that these documents record.[24] A representative should make a good faith effort to keep these records beyond this seven-year period for as long as is reasonably possible given the representative's hard file and electronic storage capacities.

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23 *See Sage Realty Corp v Proskauer, Rose, Goetz & Mendelsohn*, 689 N.E.2d 879 (N.Y. 1997) (leading case on client's right to his or her file in New York).

24 *See* N.Y. Rules of Professional Conduct Rule 1.15(d)(1) (requiring that a lawyer maintain bookkeeping records for seven years).

G-8. If a former client retains a new representative to handle the immigration case or future matters, the previous representative has a duty to provide that new representative with a copy of the client's file upon consent by the former client.[25]

G-9. Where a representative destroys or discards any documents or other records in a file (or the file as a whole), the representative should maintain an index of the documents or records destroyed or discarded. The representative should provide that index to his or her client or former client upon request.

Commentary:

The general rules for the retention of legal documents under New York law are the starting point for this standard. Stricter standards have been set here, where specified, given the importance of such records for clients whose immigration cases are still pending and/or for clients and representatives who must address fee disputes or ineffective assistance of counsel claims. Given the significant stakes in immigration cases—including loss of status, detention, or deportation—representatives should strive to meet and exceed any and all applicable standards for document retention, record keeping, and file sharing. Electronic storage, through conversion and scanning of hard file documents into electronic formats, is one means by which representatives may be able to expand the size and duration of their file retention capacity.

H. Meeting and Communicating with the Client

H-1. To ensure effective communication with and participation by the client, a representative shall take all appropriate and reasonable measures to:

(1) Meet with the client as necessary to prepare for his or her case;

(2) Meet with the client in a location where the representative and the client can discuss the case in confidence;

(3) Secure the assistance of a competent interpreter when the client and the representative cannot effectively communicate in the same language;

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25 Under New York law, when a client owes an attorney payment of fees, the duty of an attorney to provide a new representative or the client with a file is, generally speaking, subject to any valid retaining lien absent a showing of exigent circumstances or undue hardship, such as prejudice to the client's case and an inability to pay. See, e.g., *Pomerantz v. Schandler*, 704 F.2d 681, 683 (2d 1983); *Hoke v. Ortiz*, 632 N.E.2d 861, 865 (N.Y. 1994); *Cohen v. Cohen*, 183 A.D.2d 802, 803 (N.Y. Sup. Ct., App. Div., 2d Dep't 1992). In many immigration cases, where the client's case is still pending before an agency or federal court, the retention of file documents is likely to be prejudicial and otherwise cause hardship to the client. For these reasons, retaining liens generally should not be used to settle payment disputes in immigration cases, particularly in cases where the client is indigent.

(4) Explore the client's objectives and goals in the representation;

(5) Keep the client informed about the status of his case on a reasonable basis, including informing the client of all court dates and explaining the nature of each court appearance and the client's role;

(6) Provide the client with copies of all documents obtained on the client's behalf and all documents submitted to the government counsel, agencies, and courts regarding the client's case on a reasonable basis;

(7) Promptly inform the client of any decisions that the client needs to make involving material developments in the case;

(8) Explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation;

(9) Consult with the client about the means by which the client's objectives are to be accomplished;

(10) Promptly comply with reasonable requests for information;

(11) Meet with the client and witnesses well in advance of agency appointments and court hearings to prepare for oral testimony;

(12) Meet with the client after any agency or court renders a decision in the client's case to discuss the appeal process and other options.

H-2. If the client is incarcerated or otherwise detained, a representative shall:

(1) Endeavor to meet with the client as often as reasonably possible in light of the distance between the detention facility and the representative's office;

(2) Establish effective ways to communicate by telephone or in writing on a regular basis.

Commentary:

A representative should endeavor to make the client a full participant in the litigation of the client's case. This often requires special care where the client and representative cannot speak the same language. In such cases, the representative must secure the assistance of a competent translator who is sufficiently

proficient in each language and in the legal terms and expressions necessary to ensure effective representation.

In some cases, a client may prefer to use a family member or other potentially interested party to translate. A representative has a duty to ensure that there is no conflict of interest presented by such an arrangement and should proceed only after obtaining informed consent from the client of waiving his/her rights of confidentiality as to the translated information. Even where no conflict of interest is apparent, a representative must also assure that the party is competent in providing translations and that such translations do not impede the client-representative relationship due to sensitivity of issues or other concerns. All written translations must comply with immigration regulations and the Immigration Court Practice Manual to ensure proper certification for submission in court, if required.

I. Investigation

I-1. A representative has a duty to investigate each case thoroughly and to identify and obtain any documents reasonably necessary to provide diligent and competent representation of the client. A representative's investigation should include the following steps:

Interview the client;

(1) Interview potential witnesses who may provide affidavits, declarations or testimony relevant to the client's case;

(2) Review documentation and records provided by the client, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records relevant to the case;

(3) Request and review relevant records not in the client's possession but relevant to the immigration case, including educational, tax, employment, medical, psychological, psychiatric, criminal and other court records. To obtain these records, a legal representative may need to secure the client's written authorization or a court issued subpoena;

(4) Obtain and review a copy of the client's A File from the government either by requesting the same from the Office of the Chief Counsel or in the alternative through a Freedom of Information Act request;

(5) Review any records of prior proceedings by making a request with the Immigration Court in compliance with the Immigration Court's procedure and rules or in the alternative through a Freedom of Information Act request;

(6) Evaluate, in consultation with the client, the need for outside expert testimony or evaluations and discuss benefits and need for such expertise.

I-2. A representative also has a duty to research thoroughly the law applicable to the client's case, including all applicable legal precedent, statutory and regulatory provisions.

Commentary:

Immigration law is an area of practice in constant change. A representative must keep up to date on changes in the law, including precedent decisions of the Board of Immigration Appeals and the Courts of Appeals, statutory and regulatory changes, policy shifts on the part of the applicable agencies, international law. A representative should seek out consultation or mentoring by a more experienced practitioner where a matter involves novel or complex issues.

J. Affirmative Applications

J-1. A representative has a duty to inform the client of any affirmative applications for immigration benefits for which the client may be eligible. A representative shall be familiar with the statutory and regulatory eligibility requirements, deadlines, filing procedures, any applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with such applications. A representative shall educate his or her client on the eligibility requirements, deadlines, filing procedures, filing fees or waivers thereof, and supporting evidentiary requirements that are associated with seeking the available applications.

J-2. A representative must inform the client of the consequences of filing such affirmative applications, including the risk that the Department of Homeland Security may initiate removal proceedings if applicable. A representative shall not file an affirmative application for an immigration benefit without the informed consent of the client.

J-3. In preparing to submit an affirmative application for an immigration benefit, a representative shall prepare and carefully review with the client the proposed submission and supporting documents in a manner and language that ensures the client's comprehension of the submission and documents and the benefit sought.

J-4. No representative shall file an application or provide material information therein that he/she knows to be false. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.[26] Representatives shall advise clients of the consequences that may arise from filing a false or frivolous application with a federal agency.

Commentary:

Affirmative applications generally involve seeking a benefit on behalf of a client and can be as simple as seeking a replacement document or as complex as a request for asylum or complicated employment based visa. An inaccurate or baseless application may have significant and continuing adverse consequences to a client. The filing of any application for a client who is not in removal proceedings may trigger removal proceedings and/or detention if the government believes that the client is removable and decides to pursue removal charges. Preparation and filing of these applications, even when not filed with the court, should be accorded the same care and consideration as court filings.

K. Review of Government Submissions and Pre-Hearing Preparation

K-1. In advance of all court hearings and agency appointments/interviews, a representative shall promptly review all documents and evidence submitted and filed by the Department of Homeland Security for proper service, factual accuracy, and legal sufficiency. A representative must also research and assess the burden of proof and the evidence needed by the parties to meet that burden. If the client is subject to removal, a legal representative shall investigate and identify forms of relief for which the client may be eligible.

Commentary:

A representative should discuss the representative's best judgment about the strength of the government's case with his/her client in a way that enables the client to be a full participant in the strategic decision to be made in immigration court or before the agency.

L. Bond Hearings

L-1. A representative shall ascertain and discuss with every detained client his/her custody status and eligibility for bond. A representative shall be fully familiar with the Immigration Court's jurisdic-

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26 *See* N.Y. Rules of Professional Conduct Rule 3.3 (proscribing the offer or use of material evidence that the lawyer knows to be false, and specifying the lawyer's obligation to "take reasonable remedial measures including, if necessary, disclosure to the tribunal"). *See also* NY Ethics Opinion 837 (2010) (finding that if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure).

tion to conduct a bond hearing and with the requirements for seeking a bond redetermination hearing, including the contents of a request, evidence to be submitted in support of a bond request and the scope of a hearing.

L-2. For clients who are eligible for bond, a representative shall ascertain the client's financial ability to pay a bond and shall explain to the client all possible outcomes of a bond redetermination hearing, including the court setting an unaffordable bond, the appeal process and the possibility of a stay pending appeal.

L-3. Where appropriate, and in consultation with the client, a representative should attempt to negotiate a reasonable bond or alternatives to bond (intensive supervision appearance program- ISAP) with the government.

Commentary:

Immigration courts treat bond matters and removal charges as separate proceedings. However, generally, once a representative enters an appearance in Immigration Court, that appearance is for all proceedings before the court, including bond. Therefore, a representative in removal proceedings for a detained client should be familiar with bond matters so that he or she may advise the client appropriately.

In some circumstances, however, a representative may seek permission to enter a limited appearance for the bond proceedings only. This may be particularly appropriate where there is a risk of transfer and the representative would be unable to fulfill representation in the removal proceedings if the detained client will be transferred to a facility in another jurisdiction. The immigration court makes the final determination as to whether it will permit such limited representation, and different courts have different approaches to the issue.

Representatives should also be aware of the relevant immigration and federal court case law governing an individual's eligibility for bond. Representatives should familiarize themselves with legal arguments regarding eligibility for bond and the appropriate forums for raising such arguments (including petitions for writs of habeas corpus in federal court). Representatives who practice in federal court should consider seeking the mentorship of experienced federal court practitioners when filing petitions. Where representatives are unable to bring federal court challenges to bond ineligibility, representatives should, at a minimum, inform clients of the option of challenging their detention in federal court.

M. Pleadings in Removal Proceedings

M-1. Before answering to exclusion, deportation or removal allegations and charges (i.e., often referred to as "entering pleadings") during a master calendar hearing, a representative has the duty to discuss the

removal charges and allegations with the client, including the technicalities of the hearing as well as the legal implications of admissions and denials of factual allegations and grounds for removal and relief requests.

M-2. At the master calendar hearing a legal representative must be reasonably prepared to:

(1) Concede or deny service of the Notice to Appear;

(2) Review, ask for more time to review, or raise objections to the evidence offered by the government in support of the Notice to Appear;

(3) Admit or deny factual allegations and charges contained in the Notice to Appear where appropriate;

(4) Designate or decline to designate a country for removal;

(5) State which applications for relief, if any, a client intends to file;

(6) Identify and narrow factual and legal issues;

(7) Estimate the amount of time (hours) needed to present the case;

(8) Request a date for filing applications for relief; and

(9) Request an interpreter if the client or potential witnesses need one.

Commentary:

A representative has the duty to discuss all strategic decisions with the client in advance of taking the pleadings. A representative must provide the client with information that will allow the client to participate intelligently in all decisions to be made during the course of the representation. The choice regarding how to proceed belongs to the client.[27]

A representative shall not request relief from removal that cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Nor shall a legal representative advise a client not to seek a form of relief from removal solely because the chance of success on the merits is slim where the request is not frivolous. Such strategic disagreements about whether a proposed course of action violates one or the other of these dictates may, if they cannot be resolved, form the basis for ending the legal representation .

27 *See* N.Y. Rules of Professional Conduct Rule 1.4 (regarding duty to communicate).

N. Pre-Hearing Motions and Briefing in Removal Proceedings

N-1. A representative should consider filing an appropriate motion where the applicable law entitles the client to do so and the court has the power to grant such motion. Among the issues that a representative should consider addressing in a pre-hearing motion are:

(1) Possible defects in the issuance of the charging document;

(1) Legal sufficiency of the charging document;

(1) Suppression of evidence.

N-2. A representative shall be fully familiar with and in compliance with the practices and local rules of the court or agency adjudicating the motion/briefing, including the Immigration Court Practice Manual and its provisions regarding motions and briefing requirements, or affiliate with a representative knowledgeable in these practices and rules.

N-3. Motions and all submissions in support of the motions should be filed in a timely manner and should comport with the requirements set forth in the Immigration Court's Practice Manual and/or the local rules of the Immigration Court or applicable tribunal. When the tribunal requires an evidentiary hearing on a motion, a representative should fully prepare for the hearing, such preparation should include understanding the burden of proof, conducting investigation and research on the claim advanced, and preparing all helpful witnesses.

N-4. A representative shall discuss the advantages and disadvantages of pre-hearing motions with the client, taking into account the possible benefits and the client's ultimate goal in the proceedings.[28] A representative may also consult with opposing counsel before making a formal motion.

O. Requesting Continuances in Removal Proceedings

O-1. Unreasonable delays due to a representative's inability to promptly act on a client's behalf should be avoided. No representative shall accept an immigration matter that is before the Executive Office for Immigration Review unless that representative unless that represen-

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28 In New York current law does not require a lawyer to consult with clients on all strategic decisions, although lawyers are obligated to pursue clients' goals. *See* N.Y. Rules of Professional Conduct Rule 1.2 and 1.4 (regarding scope of representation and allocation of authority between client and lawyer and a lawyer's duty to communicate respectively). For example, N.Y. Rules of Professional Conduct Rule 1.4(2) imposes a duty on the lawyer to "reasonably consult with the client about the means by which the client's objectives can be accomplished."

tative is confident that he/she can provide competent and diligent representation.[29]

O-2. A representative shall work diligently to complete all necessary investigations to be fully prepared for each court proceeding. A representative shall attend each scheduled immigration court proceeding. In the event that a representative is unable to attend a hearing, he/she shall promptly notify the client of his/her unavailability and make a timely request (i.e., motion) to the immigration court for a continuance to a date and time that accommodates both the representative and the client. If the immigration court denies a request for continuance, the representative shall make all necessary accommodations that will ensure that his/her client is effectively represented at each immigration hearing.

O-3. Effective representation during removal proceedings, at a minimum, also requires that the representative obtain all available and relevant information concerning the client's background and circumstances for purposes of determining removability and/or any available relief from removal. Investigating the facts concerning the client's immigration matter and any relevant available remedies while also thoroughly researching the law and applicable supporting factual information is crucial to providing high quality representation. If a representative finds it necessary to seek additional time and/or resources to ensure adequate investigation, research and preparation of a removal proceeding, the representative should first consult with the client and discuss the process involved, the benefits and any potential consequences that may result from requesting a continuance in the removal proceedings. Representatives should also obtain informed consent from the client before seeking a continuance from the Executive Office for Immigration Review. In addition, representatives of detained clients must be particularly diligent in assessing the need for a continuance with his/her client while balancing the representative's needs with the client's liberty interest.

O-4. A representative shall be fully familiar with and shall follow all necessary requirements for filing a motion for continuance of removal proceedings. The motion should be filed only after the representative has obtained informed consent from the client. A representative shall provide his/her client with a copy of the motion for continuance and inform the client of any decision issued by the immigration court in response to the filed motion. Before the filing of a motion for continuance, the client should be notified that the mere filing of the motion does not excuse the appearance of the client and/or representative at

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29 *See* N.Y. Rules of Professional Conduct Rule 1.1(b) (regarding competence).

any scheduled hearing. All parties must appear as scheduled unless and until a motion for a continuance is granted.

Commentary:

When seeking continuances, representatives shall consult with local court rules and practices, including the Immigration Court Practice Manual.

P. Applications for Relief in Removal Proceedings

P-1. A representative shall thoroughly investigate a client's eligibility for all possible forms of relief from removal. Representatives shall be fully familiar with the legal requirements and evidence necessary to support any and all applications for relief from removal. The representative shall prepare and carefully review with the client all available applications and their statutory and regulatory criteria for relief from removal in a manner and language that ensures the client's comprehension of the potential defense strategies and available applications for relief from removal being discussed.

P-2. A representative shall be familiar with the filing procedures, the applicable filing fees or waivers thereof, and supporting evidentiary requirements associated with all of the forms of relief from removal available to and sought on behalf of his/her client. A representative shall educate his/her client on the application filing procedures, supporting evidentiary requirements and filing fees or waivers thereof, that are associated with seeking the available applications for relief from removal.

P-3. In consultation with a client, the representative and client shall agree upon which applications for relief from removal, if any, will be sought on behalf of the client with the immigration court and/or Department of Homeland Security.

P-4. A representative shall properly notify a client of all necessary filing requirements and any deadlines that will preserve any and all applications for relief from removal. A representative shall also advise his/her client of the consequences involved in failing to timely file any and all necessary applications, supporting evidence, motions and filing fees or waivers of filing fees with the immigration court and/or relevant agency.

P-5. In consultation with the client, representatives shall seek evidence in support of any and all applications for relief from removal that are being sought on the client's behalf before the immigration court and/or the Department of Homeland Security including, but not limited to, applying for a subpoena for production of documents or witnesses, when necessary.

P-6. All applications, supporting evidence, any motions and/or any necessary filing fees or waivers of filing fees shall be submitted to the immigration court or the Department of Homeland Security in a timely manner. A representative shall notify a client immediately of any inability to timely file an available application for relief from removal and shall advise the client of the likely consequence that may arise from failure to timely file an available application for relief from removal.

P-7. Representatives shall provide all clients with copies of any and all submissions made to the immigration court and/or the Department of Homeland Security on a client's behalf.

P-8. Representatives shall advise all clients of the benefits awarded for all applications of relief from removal that are granted. Representatives shall also advise all clients of the immigration consequences that may arise if any application for relief from removal sought is denied.

P-9. No representative shall file an application or provide information therein that he/she knows to be false. Representatives shall advise all clients of the consequences that may arise from filing a frivolous or fraudulent application with the immigration court and/or Department of Homeland Security. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.[30]

P-10. A representative shall provide the client with any information necessary to ensure that the client is informed of any and all benefits that are available following the grant of relief from removal.

P-11. A representative shall timely inform of the client of his/her right to appeal any denial of a request for relief from removal, where applicable.

Commentary:

Where an application for relief from removal is filed, a representative must file the most updated version of the application for relief from removal, and shall consult with the Executive Office for Immigration Review and/or the U.S. Department of Homeland Security to ensure that the appropriate forms, supporting evidence, and filing fees/fee waivers are submitted in a timely manner. The most updated versions and filing fees are published at the EOIR website at http://www.justice.gov/eoir/formspage.htm and USCIS at the "Forms" section of http://www.uscis.gov.

30 *See* N.Y. Rules of Professional Conduct Rule 3.3, *supra*; *see also* NY Ethics Opinion 837 (2010), *supra*.

Q. Individual Hearings in Removal Proceedings

Q-1. In preparation for an individual hearing on any applications for relief from removal, a representative shall be fully familiar with trial procedures set forth in the Immigration Court Practice Manual, including but not limited to making opening and closing statements, raising objections to opposing counsel's evidence, presenting witnesses and evidence on all issues, cross examining opposing witnesses and objecting to unlawful or inadmissible testimony. Representatives shall also be fully familiar with Immigration Court Practice rules and local rules regarding the submission of applications for relief, proposed exhibits and motions. Representatives who lack experience in these matters should affiliate with experienced representatives.

Q-2. A representative shall explain to the client the nature of the proceedings, including the format of the individual hearing. In consultation with the client, the representative should develop a theory of the case, timely submit documentary evidence in support of the application(s) for relief, consider the need for and secure lay and expert witnesses, and fully prepare the client and all witnesses for testimony at the hearing. Preparation for testimony should include a discussion of the direct examination questions that the representative plans to ask the client and witnesses, anticipation and discussion of the possible questions that the opposing counsel may ask during cross examination, and anticipation and discussion of the possible questions that the Immigration Judge may ask. The representative should endeavor to moot the hearing with the client and witnesses through mock direct and cross examination before the hearing.

Q-3. Throughout the individual hearing, a representative should endeavor to establish a proper record for appellate review. As part of this effort, representatives should request, whenever necessary, that every part of the proceedings be recorded by the tribunal.

Q-4. A representative must be fully familiar with the ethical rules regarding the consequences of presenting false documents or making a false statement to the tribunal and discuss them with the client and all witnesses. Representatives shall inform clients of the representative's obligations to correct false information to the tribunal.[31]

Q-5. When working with limited English proficiency clients, a representative shall ascertain the client's best language and use a competent interpreter in preparing the client to testify. In addition, when the court provides an interpreter, the representative shall ensure that the client fully understands the interpreter provided by the court.

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31 *See* N.Y. Rules of Professional Conduct Rule 3.3, *supra*; *see also* NY Ethics Opinion 837 (2010), *supra*.

Q-6. Upon obtaining client consent, representatives are encouraged to discuss the relative merits of the client's case with opposing counsel in advance of the individual hearing for the purpose of discussing sensitive matters, narrowing issues, or stipulating to issues such as statutory eligibility for the relief sought.

Commentary:

The Immigration Court Practice Manual governs most of the practices relating to individual hearings. However, some Immigration Judges may take varying approaches to how they conduct individual hearings and what types of evidence they may deem appropriate. Before representing a client in an individual hearing before an Immigration Judge with whom the representative is unfamiliar, the representative should endeavor to observe an individual hearing before the Immigration Judge or speak with representatives who have appeared before the Immigration Judge.

R. Right to Appeal

R-1. At the time of the issuance of any appealable order, a representative must, in a timely manner, provide the client with a copy of the decision and any accompanying instructions for appeal. Even when a representative is not representing a client on appeal, the representative has a duty to inform the client of his or her right to appeal. This means that the representative must provide the client with a written or oral explanation of his or her right to appeal, including any deadlines and other pertinent rules. Special care should be taken if the client no longer has access to representation. In such cases, the representative should explain the client's right to file the appeal *pro se*.

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Practice Advisory: Unlawful Presence and INA §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I): A summary of the May 6, 2009 Interoffice Memorandum from Donald Neufeld, Lori Scialabba, and Pearl Chang revising the Adjudicator's Field Manual.

By Laura L. Lichter and Mark R. Barr

On May 6, 2009 USCIS issued an Interoffice Memorandum on the "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act." The memo, co-authored by Donald Neufeld, Acting Associate Director of the Domestic Operations Directorate, Lori Scialabba, Associate Director of the Refugee, Asylum and International Operations Directorate, and Pearl Chang, Acting Chief of the Office of Policy and Strategy, aims to provide "comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility," with the policies previously articulated in a variety of Service memoranda on the subject incorporated into a newly designated section of the Adjudicator's Field Manual (AFM).

For the most part, the comprehensive memo simply reiterates guidance previously provided on the subject over the course of the last 10+ years, however there are some troubling departures from prior practice. This advisory is designed as a summary of the lengthy (51 pages) memo, but with additional practice pointers sprinkled throughout addressing items that are new, noteworthy, controversial, or, in at least one instance, simply erroneous.

While the Service should be applauded for its helpful re-packaging of various agency policies into one comprehensive document, practitioners should also be on the alert for those issues in the memo that revamp prior agency interpretations without the issuance of formal regulations, with their attendant notice and comment periods, a practice increasingly relied upon by USCIS. Practitioners are urged to raise this issue in all appropriate circumstances, and not simply allow the agency to skirt its obligation to follow formal rule-making procedures.

I. The Three and Ten Year Bars

→ Section 212(a)(9)(B)(i)(I) makes inadmissible any alien who "was unlawfully present in the United States for a period of more than 180 days but less than 1 year . . . [who] again seeks admission within 3 years of the date of such alien's departure or removal." Likewise, section 212(a)(9)(B)(i)(II) makes inadmissible any alien who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's removal or departure."

Practice pointer: The detailed memo pointedly leaves out any discussion of whether or not a person subject to either bar can "cure" her inadmissibility through time spent inside the U.S.

Such guidance would have been helpful, since the statute itself is silent on the question of whether an alien subject to either bar can wait for the requisite three or ten years to pass while inside the U.S.

In an unpublished decision, the Service's Administrative Appeals Office (AAO) interpreted the statute to mean that an applicant for adjustment of status can satisfy the three year bar to admission through time spent outside or inside the U.S. *See In re Salles-Vaz* (AAO, Feb. 22, 2005). In *Salles-Vaz*, the AAO held that an adjustment application initially inadmissible under 212(a)(9)(B)(i)(I) was no longer barred by that provision, as more than three years had passed from the date of his last departure to the date of its decision. The AAO stated:

> The passage of time has created a new circumstance which renders the applicant free from any bar to inadmissibility based upon his unlawful presence. [. . .] It is apparent, therefore, that the applicant's period of inadmissibility has now expired and he is no longer subject to the bar. Consequently, although the AAO does not agree with counsel's arguments as to why the bar never applied to the applicant in the first place, at this point the bar has lapsed and no longer affects the applicant's admissibility. Therefore, unless he has departed from the United States within three years prior to the date of this decision, the applicant is no longer required to seek a waiver of inadmissibility in connection with his adjustment of status application.

In correspondence with private counsel, the Service has similarly confirmed this view, as its' Chief Counsel has written that "the inadmissibility period continues to run even if the alien is paroled into the United States or is lawfully admitted as a nonimmigrant under section 212(d)(3), despite his or her inadmissibility under section 212(a)(9)(B)." *See* Letter from Lynden Melmed to Daniel C. Horne, January 26, 2009, and from Robert Divine to David P. Berry, July 14, 2006, posted at AILA InfoNet as Doc. No. 09012874.

The Service' curious decision not to incorporate this guidance into its latest re-packaging of interpretations on ULP is hopefully a passive endorsement of the above view, and not an indication that the policy will be revamped in the coming days.

→ An individual must leave the U.S. after accruing the requisite period of unlawful presence (ULP) in order to trigger either bar. Departures include those made under advance parole or with a valid refugee travel document.

→ For both bars, any period of ULP accrued prior to April 1, 1997 will not count towards the period of time needed to trigger the bars.

→ For both bars, the filing of a Notice to Appear (NTA) does not stop the accrual of ULP.

→ Both bars can be waived pursuant to INA § 212(a)(9)(b)(v).

→ Despite a finding of inadmissibility under either bar, an individual may still be eligible for the following benefits:

  → Registry under INA § 249.

  → Adjustment of status under section 202 of NACARA.

  → Adjustment of status under section 902 of HRIFA.

  → Adjustment of status under INA § 245(h)(2)(A).

  → Change to V nonimmigrant status under 8 CFR § 214.15.

  → LPR status pursuant to LIFE Legalization, under which provision a LIFE Act applicant may travel with authorization during the pendency of the application without triggering the three or ten year bar.

A. The Three Year Bar

→ For the three year bar to apply, the individual must have accumulated at least 180 days, but less than one year, of ULP, and then voluntarily departed the U.S. prior to the commencement of removal proceedings. There is no requirement for a formal grant of voluntary departure.

→ For the three year bar to apply, the individual must have departed prior to the filing of an NTA with the Immigration Court. An individual who voluntarily depart after the NTA was filed with the court is not subject to the three year bar (but may become subject to the ten year barif she fails to leave before she accumulates more than one year of ULP)[1].

B. The Ten Year Bar

→ For the ten year bar to apply, the individual must have accumulated more than one year of ULP, and then either voluntarily departed the U.S. or been removed from the U.S.

→ Unlike the three year bar, the ten year bar applies even if the individual leaves after the commencement of removal proceedings.

II. The Permanent Bar

→ Under INA § 212(a)(9)(C)(i)(I), an individual is who has been ULP in the U.S. for an aggregate period of more than one year and who enters, or attempts to enter, the U.S. without being admitted is permanently inadmissible.

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[1] Note: the person may also become subject to inadmissibility if s/he departs without first terminating removal proceedings or receiving a grant of Voluntary Departure under INA § 240B(a) if the Immigration Judge enters an *in abentia* removal due to the person's failure to appear at his or her removal proceeding.

→ For purposes of the permanent bar, an individual's ULP is counted in the aggregate. Therefore, if a person accrues a total of more than one year of ULP, whether during a single stay or multiple stays, she will be subject to the permanent bar if she departs the U.S. and then enters, or attempts to enter, without inspection.

→ Any period of ULP accrued prior to April 1, 1997 will not count towards the period of time needed to trigger the permanent bar.

→ An individual cannot violate the provision unless she departs the U.S. and then returns or attempts to return without being admitted.

→ An individual subject to INA § 212(a)(9)(C)(i)(I) may seek consent to reapply for admission after having been outside of the U.S. for at least ten years, pursuant to INA § 212(a)(9)(C)(ii) and 8 CFR § 212.2.

  → INA § 212(a)(9)(C)(i)(I) is considered by the Service to be a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. *Matter of Torres-Garcia*, 23 I & N Dec. 866 (BIA 2006). Under this interpretation, while the regulation at 8 CFR § 212.2 continues to dictate the filing procedures of a Form I-212 waiver, the substantive requirements are governed by INA § 212(a)(9). Therefore, an I-212 applicant must be physically outside the U.S. for a period of at least ten years since her last departure before becoming eligible to be granted consent to reapply.[2]

→ An individual who accumulated more than one year of ULP, but is later paroled into the U.S. (but not "admitted") is <u>not</u> subject to the permanent bar as a result of the parole entry. Where an individual has made prior entries, or attempted entries, without inspection prior to the entry on parole, however, that individual would be subject to the ten year bar.

→ The requirement for a ten year absence does not apply to a VAWA self-petitioner seeking a waiver under INA § 212(a)(9)(C)(iii).

→ Despite a finding of inadmissibility under the permanent bar, an individual may still be eligible for the following benefits:

  → Registry under INA § 249.

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[2] See related practice advisory regarding *Duran Gonzales*, a circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzales*, the Ninth Circuit overturned *Perez-Gonzalez*, deferring to the BIA's holding that individuals who have previously been removed or deported are not eligible to apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. See http://www.ailf.org/lac/lac_lit_92806.shtml.

Practice Pointer: Perhaps destined to be the memo's most controversial item is the agency's explicit instruction to its adjudicators to ignore controlling circuit court precedent regarding the availability of section 245(i) relief for those individuals subject to the permanent bar under section 212(a)(9)(C)(i)(I).

As practitioners are aware, adjustment under INA § 245(i) allows a person to adjust status notwithstanding the fact that he or she entered without inspection, overstayed, or worked without authorization. However, section 245(i) does not necessarily waive every ground of inadmissibility, and questions arise where that provision conflicts with a ground of inadmissibility under section 212(a) that relates to entry without inspection.

In *Matter of Briones*, 24 I & N Dec. 355 (BIA 2007), the Board ruled that section 245(i) does not cure a person's inadmissibility under the permanent bar, at section 212(a)(9)(C)(i)(I). Prior to the Board's decision, however, both the Ninth and Tenth Circuit Court of Appeals had come to the opposite conclusion, holding that section 245(i) does apply to people inadmissible under section 212(a)(9)(C)(i)(I). *See Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), *Padilla-Caldera v. Gonzale*s, 453 F.3d 1237 (10th Cir. 2006).

Now, understandably, both decisions are likely to come under increasing attack by ICE, and are likely to face a *Brand X*[3] type argument in future litigation. *Acosta* is particularly vulnerable to future judicial review, as it was based on a case that was subsequently reversed. *See Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) (reversing the court's prior decision in *Perez-Gonzales v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004)).

However, unless and until *Acosta* and *Padilla-Caldera* are overturned, they remain controlling law in their respective circuits. Therefore, it comes as quite a shock that the Service would explicitly instruct its examiners to ignore the law. The memo states:

> USCIS adjudicators will follow *Matter of Briones* and *Matter of Lemus* in all cases, regardless of the decisions of the 9th Circuit in *Acosta v. Gonzales* . . . or of the 10th Circuit in *Padilla-Caldera v. Gonzales*. Following these Board cases, rather than *Acosta* or *Padilla-Caldera*, will allow the Board to reexamine the continued validity of these court decisions.

Again, the desire of the Service to have a uniform policy is understood, and ICE litigators, operating within an adversarial process, would arguably have good-faith reasons for seeking

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[3] In *Brand X*, the Supreme Court reviewed the issue of deference to an agency interpretation of a statute that conflicts with a circuit court's prior interpretation of a statute. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). According to *Brand X*, in limited circumstances, an agency may disagree with a circuit court decision and offer a different interpretation of a statute where the prior court decision was based on an ambiguous statute.

appellate review of future Immigration Judge decisions based on *Acosta* or *Padilla-Caldera*. Yet this should not deter practitioners from resisting the Service policy to ignore existing precedent in their circuits. It is another thing altogether for Service adjudicators—who should apply the existing law in a neutral fashion within a non-adversarial examination procedure—to advance the government's litigation tactics.

III. Unlawful Presence

→ Unlawful presence (ULP) is defined as presence after the expiration of the period of stay authorized by the Secretary of Homeland Security (formerly "POSABAG," when authorized under the authority of the Attorney General), or any presence without being admitted or paroled.

  → An individual who is present in the U.S. without inspection accrues ULP from the date of the unlawful arrival, unless she is otherwise protected from the accrual of ULP.

  → Similarly, an individual paroled into the U.S. will accumulate ULP once the parole is no longer in effect, unless she is otherwise protected from the accrual of ULP.

  → Note that an individual who obtained permission to come into the U.S. by making a knowingly false claim to U.S. citizenship has not been inspected and admitted, and thus accrues ULP from the date of arrival.

→ For many individuals, the "POSA" is noted on the I-94. Other POSAs have been created by statute or by USCIS policy.

→ Unlawful status and ULP are related, but distinct, concepts. On the one hand, a person in lawful status cannot accrue ULP. However, a person not in lawful status may or may not accumulate ULP.

A. No ULP due to lawful status

→ A person in any of the following lawful statuses cannot accumulate ULP:

1. **Lawful permanent residents**. An LPR does not accrue ULP, unless the individual becomes subject to an administratively final order of removal—at which point she will begin to accumulate ULP the day after the order becomes administratively final.

2. **Lawful temporary residents**. A lawful temporary resident does not accrue ULP unless and until DHS issues a notice of termination following proper notice. If the person appeals the termination, ULP does not accrue during the appeal process. However, because termination cannot be reviewed by an Immigration Judge, ULP would accrue during removal proceedings or while a Petition for Review was pending in federal court.

3. **Conditional permanent residents**. A conditional permanent resident will only begin to accrue ULP after the following:

   → The entry of an administratively final order of removal.

   → Automatic termination of status pursuant to INA §§ 216(c)(2), 216A(c)(2), 216(c)(4) for failure to file a petition to remove the conditions in a timely manner, or failure to appear for the personal interview in connection with that petition. However, if a late petition is subsequently accepted and approved, no ULP will have accrued.

   → Termination following notice by DHS, where the individual does not seek review of the termination in removal proceedings.

   → The issuance of an administratively final removal order affirming DHS termination of conditional resident status.

4. **Persons granted Cancellation of Removal or Suspension of Deportation**. An individual who had already acquired LPR status and is then granted Cancellation of Removal (or Suspension of Deportation) will retain her LPR status. Therefore, no period of ULP would accrue. An individual who was not already an LPR and is then granted Cancellation of Removal (or Suspension of Deportation) becomes an LPR on the date of the grant and will stop accumulating ULP. Any ULP that accrued prior to the grant is eliminated for purposes of future applications for admission.

5. **Lawful nonimmigrants**. Such individuals only begin to accrue ULP as follows:

   → Nonimmigrants admitted until a certain date will generally begin to accrue unlawful presence the day following the date noted on the I-94.

   → If USCIS finds, while adjudicating a request for an immigration benefit, that the individual has violated her nonimmigrant status, ULP will begin to accrue the day after USCIS denies the benefit, or the day after the I-94 expires, whichever is earlier. If an Immigration Judge makes a determination of status violation, then ULP begins to accrue the day after the I-94 expires, or the day after the order becomes final (i.e., after appeal is waived or dismissed)—not the date of any interim finding on the matter, whichever is earlier.

   → Nonimmigrants admitted for duration of status or "D/S" will begin to accrue ULP the day after USCIS denies a request for an immigration benefit if the USCIS finds an immigration status violation while adjudicating the request. If an Immigration Judge makes a determination of status violation, then ULP begins to accrue the day after the order becomes final.

   → Nonimmigrants not issued an I-94 will be treated the same as nonimmigrants admitted for duration of status for ULP purposes.

Practice Pointer: Taking guidance from the Department of State (DOS), the memo makes it clear that Canadians, and other non-controlled nonimmigrants, who are inspected at the border but not given I-94s, are treated as nonimmigrants admitted for the duration of status for purposes of determining ULP. *See* section (b)(1)(E)(iii). While this has been an unarticulated Service policy for some time, the only prior written statement of the policy came in a DOS cable from 1999. *See* Cable, DOS, 97-State-23545, *reprinted in* 76 No. 41 *Interpreter Releases* 1552-53 (Oct. 25, 1999). The memo's clear statement on the issue should hopefully prevent any future confusion with Service examiners unfamiliar with the previously unwritten policy.

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6. **Refugees**. For refugees, the POSA begins on the date of admission as a refugee. ULP begins to accrue on the day after refugee status is terminated. For a derivative refugee, the POSA begins on the day she enters the U.S. as an accompanying or follow-to-join refugee. If the derivative refugee is already inside the U.S., her POSA begins when USCIS accepts an I-730 filed on her behalf. If the I-730 is subsequently denied, ULP will begin to accrue on the day after the denial. While the filing of an I-730 will stop the accrual of ULP, it does not eliminate any previously accumulated ULP. Therefore, the beneficiary of an I-730 who accrued ULP prior to the petition's filing may be inadmissible if she travels while the petition is pending, even with advance parole.

7. **Asylees**. For asylees, the POSA begins on the date a bona fide asylum application is filed. Prior periods of ULP, however, are not eliminated by either the filing of an asylum application, or a grant of asylum. If asylum status is later terminated, ULP begins to accrue the day after termination. The POSA for a derivative asylum applicant begins on the date the principal applicant begins her POSA. Finally, a derivative beneficiary not initially included on the principal's asylum application will start her POSA on the date a qualifying asylee files an I-730.

8. **Individuals Granted Temporary Protected Status (TPS)**. Individuals granted TPS are deemed to be in lawful status for the duration of the grant for the purposes of adjustment of status and change of status. A TPS grant, however, does not cure any previous accumulations of ULP. Accordingly, a person granted TPS who travels outside the U.S. may nonetheless trigger the ULP bars if she had accrued sufficient ULP prior to the TPS grant. Additionally, a waiver granted for inadmissibility under INA §§ 212(a)(9)(B) or (C) for purposes of the TPS application would not cure inadmissibility for a subsequent adjustment of status, since the standards for the TPS waiver are different than those used for adjustment.

9. **Parolees**. Individuals paroled into the U.S. do not accumulate ULP for the duration of the parole period, unless parole authorization is revoked or terminated prior to its expiration date. An individual paroled for removal proceedings will begin to accumulate ULP the day after the issuance of an administratively final removal order (unless otherwise protected from ULP accrual). Practitioners should take note that where an individual is paroled in for a particular purpose (e.g., adjustment of status) that the underlying parole be maintained through the pendency of the application.

B. No ULP despite unlawful status

→ There are a variety of situations where a person may not be in lawful status, but is still not accumulating unlawful presence.

Practice Pointer: The memo emphasizes the point that while an individual may be in a POSA, she may not necessarily be in status. This distinction can be found in several Service memos over the years.

Of course, lurking beneath the POSA/lawful status distinction has been the more critical question of whether someone not in a lawful status, but otherwise POSA, has a "right" to remain in the U.S., especially an individual with a pending application for benefit (including changes or extension of status, or adjustment). Officials at Immigration and Customs Enforcement (ICE) have maintained—with a notably increased frequency—that such individuals are only allowed to remain in the U.S. as a matter of agency grace, and that nothing prevents their referral in removal proceedings due to their status violations, notwithstanding their authorized periods of stay.

With the issuance of this memo, USCIS has clearly joined with ICE, stating that the Department of Homeland Security "may permit" an out-of-status individual to remain in the U.S., where that person has a pending application that stops the accrual of ULP. According to the memo, such a decision is entirely a "matter of prosecutorial discretion."

One hopes that the memo's clarification on this point is simply a matter of more formally stating a previously held position, and not, as some fear, an indication that the Department will increasingly choose not to exercise its prosecutorial discretion, placing people with pending adjustment applications in removal proceedings.

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1. **No ULP by operation of statute**

→ In some cases, an out-of-status individual does not accrue ULP by operation of statutory exceptions in INA § 212(a)(9)(B). The Service has interpreted these exceptions to only apply to inadmissibility under the three and ten year bars and not to the permanent bar.

Practice Pointer: The memo makes clear that the exceptions to ULP, at INA § 212(a)(9)(B)(iii), apply only to the grounds of inadmissibility listed in section 212(a)(9)(B), and not section 212(a)(9)(C). In other words, an individual who does not accumulate ULP for purposes of the three and ten year bars, by operation of the statutory exceptions, does accumulate ULP for purposes of the permanent bar.

On the one hand, this is a longstanding agency interpretation, articulated as far back as 1997 in an Office of Programs memorandum. *See* "Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)," June 17, 1997, Office of Programs.

On the other hand, as many practitioners are well aware, many U.S. consulates—most notably the consulate in Ciudad Juarez—made an exception to the interpretation as it related to minors. In recent practice at CDJ, the "minor exception" was applied to the permanent bar. Under that interpretation, for example, a child who was unlawfully present in the U.S. longer than one year, then taken back to Mexico by his parents and subsequently brought back into the U.S. without inspection—while still a child—did not face inadmissibility under either the 10-year bar or the permanent bar.

In the summer of 2008, the Visa Office directed CDJ to cease applying the "minor exception" to ULP findings under the permanent bar, relying principally upon INS guidance on the issue. *See* "Practice Alert – Unlawful Presence Under INA § 212(a)(9)(C) Applied to Minors," August 18, 2008, posted on AILA InfoNet as Doc. No. 08081872. The current memo's reiteration of this "old" policy, therefore, minimizes any possibility of the Visa Office reversing course in the near future.

The statutory exceptions include the following:

a. **A minor under the age of 18** does not accrue ULP for purposes of the three and ten year bars until the day after her 18th birthday.

b. **An individual with a pending bona fide asylum application**—affirmative or defensive--does not accrue ULP for purposes of the three and ten year bars unless she works without authorization.

→ A bona fide application is non-frivolous, properly filed, and one with a reasonably arguable basis in fact or law. A later denial of the claim is not determinative of whether the claim was bona fide. Similarly, an abandoned claim is not automatically deemed not bona fide.

→ The pendency of a bona fide asylum application includes administrative and judicial review.

→ A person included on the principal's asylum application is in a POSA as of the date the principal enters a POSA, unless the derivative beneficiary works without authorization or the application for the derivative is not bona fide.

→ A derivative beneficiary's asylum claim is no longer considered pending once: (1) the principal applicant informs USCIS that the dependent is no longer a part of the application; or (2) USCIS determines that the dependent relationship no longer exists. In these cases, the derivative will begin to accrue ULP once USCIS removes her from the principal application. If the derivative later files her own, bona fide asylum application, ULP will stop accumulating on the date of the filing.

→ Note that under the Child Status Protection Act, a derivative child who turns 21 while the asylum application is pending (and is unmarried) will continue to be classified as a child and will therefore not accrue any ULP.

→ An derivative beneficiary who was not included on the principal's asylum application will enter a POSA when the qualifying asylee files an I-730.

c. **An individual with a pending I-730** does not accumulate ULP for purposes of the three and ten year bars. If the I-730 is later denied, ULP accrual would begin, unless the individual was otherwise protected from ULP. The filing of a bona fide I-730 does not, however, cure any prior accumulation of ULP. Therefore, a person with a pending I-730 who had previously accumulated the requisite periods of ULP may be inadmissible upon return to the U.S. and need to file an I-602.

d. **A beneficiary of Family Unity Protection (FUP) under the Immigration Act of 1990 § 301** is protected from accruing ULP for purposes of the three and ten year bars. If the FUP application is approved, ULP is deemed to stop as of the date of filing. However, the filing of the FUP application by itself does not stop the accrual of ULP. Finally, a grant of FUP protection does not cure prior periods of ULP.

e. **Certain battered spouses, parents and children** are protected from accumulating ULP. An approved VAWA self-petitioner, and her children, can claim an exception from the three and ten year bars where there is a substantial connection between the abuse, the ULP, and her departure from the U.S.

f. **Victims of severe form of trafficking in persons** do not accumulate ULP towards the three and ten year bars. Similar to VAWA beneficiaries, a trafficking

victim must demonstrate that the trafficking was at least once central reason for the ULP.

g. **A nonimmigrant with a pending extension of status (EOS) or change of status (COS) request**, according to the statute, does not accrue ULP for a period of up to 120 days for the purpose of the three year bar only, so long as: (1) the application was timely, (2) the individual was lawfully admitted or paroled into the U.S., and (3) the individual did not engage in unauthorized employment.

By operation of Service policy, however, this exception has been extended to cover the entire period during which an EOS or COS is pending, and to the ten year bar.

2. No ULP under Service policy

→ In some cases, an out-of-status individual does not accrue ULP by operation of USCIS policy. These policy exceptions, which apply to both the three and ten year bars and the permanent bar at INA § 212(a)(9)(C)(i)(I), include the following:

a. **An individual with a properly filed, pending application for adjustment of status or registry** does not accumulate ULP as of the date the application is properly filed. The accrual of ULP is tolled until the application is denied.

→ The adjustment application can be under INA §§ 209, 245, or 245(i), Public Law 99-603 § 202, NACARA § 202(b), or HRIFA § 902.

→ Except for a NACARA or HRIFA application, the application must be filed affirmatively to stop the accrual of ULP. However, ULP will continue to be tolled where an application initially denied by USCIS is renewed in removal proceedings.

b. **A nonimmigrant with a pending extension of status (EOS) or change of status (COS) request** does not accrue ULP for a period of up to 120 days for the purpose of the three year bar only according to the statute. But as a matter of USCIS policy, ULP is tolled for the entire period during which an EOS or COS is pending, and also covers the ten year bar and the permanent bar under INA § 212(a)(9)(C)(i)(i). The EOS/COS applicant must show that: (1) the application was timely; (2) she maintained her status prior to filing the request, and (3) she did not engage in unauthorized employment.

→ If the EOS/COS request is approved, the individual is granted a new POSA, retroactive to the date the prior POSA expired.

→ If the EOS/COS is denied because it was frivolous, or because the applicant worked without authorization, ULP will be deemed to begin after the expiration date marked on the I-94. If the individual was previously admitted

for duration of status, ULP will begin to accrue the day after the EOS/COS denial.

→ If the EOS/COS is denied because it was untimely, ULP will be deemed to begin on the date the I-94 expired. If the individual was admitted for duration of status, ULP will begin to accrue on the day after the EOS/COS denial.

→ If the EOS/COS request is denied for cause, ULP will begin to accrue on the day after the denial.

→ If the individual then files a motion to reopen or reconsider, the mere filing of the motion will not stop the accrual of ULP. However, if the motion is successful and the benefit granted, the individual will be deemed to not have accrued ULP during the pendency of the motion. If the motion is successful but the benefit is still denied, ULP will only accrue from the date of the last denial, as long as the initial request was timely and non-frivolous.

→ If the denial of the underlying petition, upon which an EOS/COS is based, is appealed to the Administrative Appeals Office, the mere filing of the appeal will not stop the accumulation of ULP. However, if the petition denial is reversed on appeal, and EOS/COS subsequently granted, no ULP will be deemed to have accrued between the denial of the petition and request for EOS/COS and the subsequent grant of the EOS/COS.

→ An individual who files an initial, timely and non-frivolous EOS/COS request will stop the accumulation of ULP but may still fall out of lawful status during the pendency of the request. Therefore, any subsequent, untimely EOS/COS request made after the expiration of her POSA will not stop the accrual of ULP if the first, timely EOS/COS is denied.

c. A nonimmigrant with a pending EOS/COS request who departs the U.S. while the request is pending does not accrue ULP, so long as the request was timely and non-frivolous, and the individual did not work without authorization.

d. An individual with a pending Legalization, Special Agricultural Worker, or Life Legalization application does not accrue ULP. Accrual stops on the day of filing and resumes the day after denial. If the denial is appealed, the POSA continues throughout the administrative appeal process, but not during removal proceedings or judicial review.

e. An individual granted Family Unity Program (FUP) benefits under the LIFE Act Amendments of 2002 § 1504 does not accrue ULP. Note that the statutory exception to ULP for FUP grantees only applies to those individuals covered under the Immigration Act of 1990 § 301. As a matter of policy, USCIS treats

section 1504 cases the same as section 301 cases for purposes of ULP. As with section 301 FUP cases, if the application is approved, no ULP will accrue from the date of filing throughout the FUP grant. If, on the other hand, because the mere filing of the application does not stop ULP, if the application is denied, ULP will continue to accrue as if no application had been filed. Finally, a grant of FUP benefits under section 1504 does not cure any previously accumulated ULP.

f. **An individual who files an application for Temporary Protected Status (TPS)** will not accrue ULP while the application is pending provided it is ultimately approved, and the POSA will continue until TPS is terminated. If the application is denied, however, or if prima facie eligibility is not established, ULP will begin on the date the individual's previous POSA expired.

g. **An individual granted voluntary departure (VD) under INA § 240B** will not accrue ULP. ULP stops accruing on the date an individual is granted VD and resumes on the day after VD expires if the individual has not departed the U.S.

→ If an Immigration Judge denies VD and the decision is reversed on appeal by the BIA, the time from the denial to the reversal will be considered a POSA.

→ If an Immigration Judge or the BIA reinstates voluntary departure in a removal proceeding that was reopened for a purpose other than solely making an application for VD, and if the reopening was granted prior to the expiration of a previous grant of VD, then the time from the initial VD expiration to the grant of reinstatement is not considered a POSA. However, the period of time encompasses by the new grant of VD is considered a POSA.

→ An individual granted VD before January 20, 2009 who seeks a review of a final removal order in a Petition for Review, where the circuit court stays the running of the VD period while the case is pending, does not accrue ULP.

→ On the other hand, for any EOIR VD grant after January 20, 2009, the mere filing of a Petition for Review will automatically terminate the VD and make the underlying alternate removal order effective. Therefore, that person will not be protected from accruing ULP during the pendency of the Petition for Review if she remains in the U.S. The accrual of ULP will begin on the day after the Petition for Review is filed. On the other hand, if the individual leaves within 30 days of filing the Petition for Review, she will not accumulate any ULP between the filing of the Petition and her departure.

→ A person granted VD by the Immigration Judge or the BIA before January 20, 2009 who later requests withdrawal of that order in connection with a motion to reopen or reconsider will accrue ULP as of the date of the administratively

final order of removal, as if VD had never been granted, unless the individual is otherwise protected from the accrual of ULP.

→ Under the new VD regulations, effective January 20, 2009, the mere filing of a motion to reopen or reconsider during the VD period automatically terminates the VD order. Therefore, ULP would accrue on the day after the individual files a motion to reopen or reconsider.

h. **An individual granted an administrative or judicial stay of removal**, either automatic or discretionary, does not accumulate ULP. The issuance of a stay, however, does not erase prior periods of ULP.

Practice Pointer: The memo appears to give erroneous advice regarding the issuance of an automatic stay of removal in connection with the filing of a motion to rescind an *in absentia* order of removal. The memo correctly notes that the filing of such a motion will stay an individual's removal until the motion is decided. *See* section (b)(3)(I). However, it then goes further, noting that "[t]he order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal Court." (emphasis added). Unfortunately, the regulations make clear that motions to rescind *in absentia* removal orders provide an automatic stay only through review by the Immigration Judge. 8 CFR § 1003.23(b)(4)(ii). Even motions to rescind *in absentia* deportation or exclusion orders only carry automatic stays through an administrative appeal—not judicial review. 8 CFR § 1003.23(b)(4)(iii)(C).

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i. **An individual granted deferred action** does not accumulate ULP. Accrual of ULP stops on the date an individual is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not cure any prior periods of ULP.

j. **An individual granted withholding of removal (or deportation)** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.

k. **An individual granted withholding or deferral of removal under the Convention Against Torture** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.

l. **An individual granted deferred enforced departure (DED)** does not accrue ULP. The accrual stops on the date of the grant and continues through the period of the grant.

m. **An individual admitted under the Visa Waiver Program and granted satisfactory departure under 8 CFR § 217.3** does not accrue ULP. A person granted satisfactory departure by ICE who leaves during the requisite period is deemed to not have violated her VWP admission, and therefore ULP does not accrue during the satisfactory departure period. On the other hand, if the person granted satisfactory departure does not leave the U.S. on time, ULP will accrue the day after the expiration of the satisfactory departure period.

C. Common situations that have no bearing on the accrual of ULP

→ The memo makes clear that certain steps in the removal process have no effect on the accrual of ULP. They include:

1. **The initiation of removal proceedings** does not stop, or start, the accrual of ULP.
2. **The filing of an appeal or Petition for Review** does not affect an individual's position in relation to the accrual of ULP.
3. **The issuance of an Order of Supervision** does not stop, or start, the accrual of ULP.

IV. Relief from ULP Inadmissibility

A. Waiver of the three and ten year bars

1. **Nonimmigrants**. A nonimmigrant subject to the three or ten year ULP bar may seek a discretionary waiver under INA § 212(d)(3).
2. **Spouses, sons or daughters of USCs or LPRs, and Fiancé(e)s of USCs**. An immigrant subject to the three or ten year bar may, in certain circumstances, apply for a waiver under INA § 212(a)(9)(B)(v).

→ The individual must first have a qualifying relative, which would include a spouse or parent who is a USC or LPR. The waiver applicant must then demonstrate that the denial of admission would result in extreme hardship to the qualifying relative(s).

→ Note that a USC or LPR child is not a qualifying relative under the statute.

→ For waiver applicants seeking admission on a K-1 or K-2, the extreme hardship showing would be in relation to the K-1 nonimmigrant's USC fiancé(e).

3. **Asylees and refugees seeking adjustment of status**. An asylee or refugee subject to the three- or ten-year bar can seek a waiver under INA § 209(c). The waiver is submitted on Form I-602, although USCIS retains the discretion to grant the waiver without the application.
4. **TPS applicants**. A TPS applicant subject to the three- or ten-year bar may be granted a waiver for humanitarian purposes, to assure family unity, or in the public interest.

→ Note that a waiver granted under the TPS provisions will not waive the same grounds of inadmissibility in the immigrant context. This is because the standard for the TPS waiver differs from than the "extreme hardship to a qualifying relative" standard used in waiving inadmissibility for applicants seeking admission as immigrants.

5. **Legalization under INA § 245A, legalization applicants under 8 CFR §§ 245a.2(k) and 245a.18, and any legalization-related class settlement agreements**. Like the TPS waiver, this waiver can be granted for humanitarian purposes, to ensure family unity, or when it would be in the public interest.

B. Waiver of the permanent bar under INA § 212(a)(9)(C)(i)(I)

→ While there is generally no waiver of inadmissibility under INA § 212(a)(9)(C)(i)(I), certain small categories of individuals may be admitted in spite of the bar.

1. **HRIFA and NACARA applicants.** USCIS retains jurisdiction to consider a waiver application from a HRIFA or NACARA applicant. The waiver is submitted on Form I-601, although the standard for adjudicating the waiver is the same as if the person filed Form I-212.

2. **Legalizations, SAW, LIFE Act Legalization, and Legalization class settlement agreement applicants.** These individuals may be granted a waiver based on humanitarian reasons, to ensure family unity, or because it would be in the public interest. The waiver is submitted on Form I-690.

3. **TPS applicants** The permanent bar for a TPS applicant may be waived for humanitarian reasons, to ensure family unity, or because it would be in the public interest.

→ Note that a waiver of the permanent bar granted under the TPS provisions will not waive the same grounds of inadmissibility in connection with a subsequent application for adjustment of status, because a normal adjustment applicant does not have an available waiver of the permanent bar. A person previously granted TPS with a waiver of the permanent bar would still have to wait ten years from the date of her last departure.

4. **Certain battered spouses, parents, and children** An approved VAWA self-petitioner and her children can be granted a waiver under INA § 212(a)(9)(C)(i) if there is a connection between the abuse, the ULP and departure (or removal), and the subsequent entry, or attempted entry, without inspection.

5. **Asylee and refugee adjustment applicants** The ten year absence normally imposed on applicants for consent to reapply does not apply to asylee and refugee adjustment applicants. Therefore, such individuals may obtain a waiver of inadmissibility in lieu

of consent to reapply. The waiver is filed on Form I-602, although USCIS retains the discretion to grant the waiver without the application.

6. **Nonimmigrants** A nonimmigrant subject to INA § 212(a)(9)(C)(i)(I) may be admitted as a matter of discretion pursuant to INA § 212(d)(3). However, obtaining a waiver under this section would not relieve the same individual of the need to obtain consent to reapply if she later sought permanent residence.

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/23.1-P

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

April 6, 2001

MEMORANDUM FOR ALL REGIONAL DIRECTORS
ALL SERVICE CENTER DIRECTORS
ALL DISTRICT DIRECTORS
ALL OFFICERS IN CHARGE

FROM: William R. Yates /S/
Deputy Executive Associate Commissioner
Office of Field Operations
Immigration Services Division

SUBJECT: Field Guidance for Adjustment of Status applications filed under section 245(i), as amended by the Legal Immigration Family Equity Act Amendments of 2000.

On March 26, 2001, an interim rule was published in the Federal Register (66 FR 16383) to amend the regulations at 8 CFR 245.10 establishing eligibility for adjustment of status under section 245(i) of the Immigration and Nationality Act (INA). This regulation implements some portions of the Legal Immigration Family Equity Act Amendments of 2000 (the LIFE Act) signed into law on December 21, 2000. Certain provisions became effective on that date, including re-authorization of section 245(i) of the INA.

This memorandum supplements the memorandum of January 26, 2001 issued by the Office of Programs.

- **New sunset date for aliens with current priority dates and physical presence requirement.**
  The LIFE Amendments of 2000 (the LIFE Amendments) changed the sunset date of the section from January 14, 1998, to April 30, 2001 and added a new requirement that all aliens who seek to adjust on the basis of a visa petition or application for labor certification filed after January 14, 1998, must have been physically present in the United States on December 21, 2000. Visa petitions filed with the Attorney General and applications for labor certification filed with

the Department of Labor on or before April 30, 2001 will serve to grandfather the alien beneficiary(s) for use of section 245(i) of the INA when they file for adjustment of status.

- **Evidence of physical presence on December 21, 2000**
  The memorandum of January 16, 2001 detailed the type of evidence the Immigration and Naturalization Service (the Service) will consider in determining whether the alien was physically present on December 21, 2000 as required.
  Note: The physical presence requirement only applies to principal applicants for adjustment of status under section 245(i) of the INA. Dependent spouses and children do not need to demonstrate physical presence on December 21, 2000.

- **Determining if the Immigrant Visa Petition is "Approvable When Filed"**
  Not all immigrant visa petitions that are properly filed on or before April 30, 2001 will serve to grandfather the alien beneficiary for purposes of 245(i). The interim rule interprets the language of Section 245(i) since it was amended in 1997 to also require that the visa petition must have been "approvable when filed" to qualify the alien beneficiary for grandfathering. "Approvable when filed" is defined in the regulations to mean that on the date of filing, the immigrant visa petition was properly filed, meritorious in fact, and non-frivolous.

  Immigrant visa petitions may be filed initially without all of the necessary information for the Service to adjudicate the petition. However, a visa petition will not qualify an alien for grandfathering unless the Service is able to determine, based on the available information, that the petition was approvable when filed.

- **Timely Filings**
  The new regulation requires an immigrant visa petition to be "properly filed" before or on April 30, 2001 for the purpose of grandfathering. This means that the immigrant visa petition must either be **physically received** by the Service prior to the close of business on April 30, 2001, or if mailed to the Service, **postmarked** before or on April 30, 2001. It is important that field offices either stamp the actual receipt date on the immigrant visa petitions or retain evidence of the postmark with each petition. In the case of an envelope containing multiple petitions, evidence of the postmark must be attached to each petition.

  Visa petitions which meet the threshold filing requirements of 8 CFR 103.2(a) will not be rejected. However, petitions without the names of the petitioner and beneficiary, the proper fee, and the signature of the petitioner will not be accepted for filing.

- **Receipt and Tracking of 245(i) Penalty Sum**
  The priority date of the underlying immigrant visa petition upon which the Form I-485 is filed is a determining factor as to whether Supplement A is filed under the "old" Section 245(i) provision or under the Section 245(i) provisions included in the LIFE Act Amendments.

  "Old" 245(i)
  If the priority date of the immigrant visa petition that serves as the basis for the adjustment of status application is on or before January 14, 1998, then Supplement A is considered filed under the "old" Section 245(i) provisions. Supplement A to Form I-485 filed under the "old" provisions of Section 245(i) must be receipted and the $1000 penalty sum deposited under the existing instructions (Attachment 1).

  Life Act 245(i)
  If the priority date is between January 15, 1998 and April 30, 2001, inclusive, Supplement A is considered filed under the 245(i) provisions in the LIFE Act Amendments.

The LIFE Act Amendments mandate that the penalty sum be divided differently for accounting purposes than the penalty sum submitted under the "old" Section 245(i). Until registers are updated and CLAIMS 3 changes have been completed, Supplement A to Form I-485 filed under the LIFE Act Amendments must be receipted and the $1000 penalty sum deposited as if it were filed under the "old" provisions. However, the office that deposits the penalty sum under Section 245(i) of the LIFE Act Amendments must keep a separate log (spreadsheet) of all LIFE Act Amendments 245(i) applications.

By the **5th business day of each month**, each District Office and Service Center shall report to their assigned HQISD contact, the number of $1000 penalty sums collected under the LIFE Act Amendments 245(i) provision in the preceding month. EXCEL spreadsheets (Attachment 2) must be forwarded via E-mail to the appropriate point of contact listed below. For further information regarding the handling of 245(i) penalty sums or for an electronic copy of the required spreadsheet: Service Centers should contact Laura Carney of the Service Center Operations Division of ISD at 202-305-3676, and District Offices should contact Kathy Dominguez of the Field Services Operations Division of ISD at 202-616-1050.

- **Office Openings on April 30, 2001**
  There is no requirement that District Offices remain open beyond normal operating hours on April 30, 2001. However, it is recommended that offices follow the same procedures instituted for the last 245(i) sunset date, January 14, 1998. The use of postmark for a timely filing may impact the volume of applicants seeking to file in person at District Offices on April 30, 2001. It is up to individual District Offices to determine what can be done to best meet the anticipated response in their local communities. HQISD asked the Regional Offices to survey District Offices as to their operating hours for the sunset date, and it appears that most will remain open until midnight to accept in person filings. It is important that District Offices convey information to the public about extended office hours for April 30, 2001.

The regulation and other LIFE Act related documents are on the LIFE ACT Bulletin Board. In addition, Service personnel may use the Intranet to send questions and comments for consideration by the LIFE Act Project Team. Service personnel with questions should go through appropriate supervisory channels. For questions relating to operational procedures, contact Kathy Dominguez, HQISD via e-mail. For policy questions relating to section 245(i) adjustments, contact Michael Valverde at HQADN via e-mail.

Attachments