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Shoba Sivaprasad Wadhia
Editor-in-Chief

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Letter from the Editor-in-Chief

Shoba Sivaprasad Wadhia

I am pleased to bring you the Fall 2020 issue of the *AILA Law Journal*. I am grateful to Managing Editor Danielle Polen, Full Court Press Publisher Morgan Morrissette Wright, and members of the Board of Editors who worked tirelessly to read, select, and edit articles during the long days of the COVID-19 summer, albeit within a short timeframe. Thanks, too, to the editorial expertise of Richard Link, Kritika Agarwal, and Paige Britton. I am thrilled to showcase six articles in this volume who, together, cover a wide range of immigration topics beyond borders.

In their article "Acquiring and Presenting Digital Evidence in Immigration Practice," Andrew H. Wellisch and Gabriela M. Pinto Vega provide an innovative analysis of the California Consumer Privacy Act of 2018 and link it to how it applies to presenting digital evidence in the immigration space. Sarah J. Diaz describes the Hague Convention on the Civil Aspects of International Child Abduction and its intersection with immigration law in her piece entitled "Hague Abduction Law for the Contemporary Immigrant Parent and Child." The article illuminates the issues so that immigration practitioners can think critically about the relationship between the Hague Convention and the immigrant parent and child.

In her article "From Caravans to the Courts: A Practical Guide to *Matter of A–B–*'s Implication for Transgender Women of the Northern Triangle," Sarah Houston proposes an alternate framework for practitioners to use for overcoming the highly controversial *Matter of A–B–* decision when representing transgender women who often suffer gang- and gender-based violence on account of their gender identity. Kaelyn M. Mostafa, in her piece entitled "The Effect of States' Legalization of Marijuana on Good Moral Character and Eligibility for U.S. Citizenship," explores the legal injustices suffered by green card holders in the wake of the U.S. Citizenship and Immigration Services' (USCIS) April 2019 policy directing immigration officers to deny citizenship to immigrants employed in state-legal marijuana industries, and ultimately recommends legislation.

In her article "*IT Serve Alliance v. Cissna*: A Victory—Perhaps Temporary—for H-1B Beneficiaries and Petitioners," Kaitlyn Box provides an overview of USCIS memoranda laying out new criteria about the factors to weigh to determine a qualifying "employer-employee relationship" for H-1B petitions and litigation that followed. Box examines the limits of litigation and the role of notice and comment rule-making. Nathan J. Chan's paper, "He Loves Me . . . He Love Me Not Anymore?! How the Bona Fides of a Marriage for an Approved Spousal Petition Can Depend on Whether the Burden of Proof

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in Revocation Proceedings Under INA § 205 Is on USCIS or the Petitioner," examines the possible arguments and/or justifications for placing the burden of proof in revocation proceedings on the petitioner to "re-prove" a bona fide marriage, rather than on USCIS to prove a sham marriage.

We are living in uncertain times. In the wake of a global pandemic, immigration practitioners have adapted to new ways of practice delivery while facing the challenges of still-open immigration courts, clients who remain detained by Immigration and Customs Enforcement (ICE), furloughed USCIS employees, and proposals to overhaul asylum in ways that guarantee more denials and increase fees on most applications. In the courts, we saw a victory at the Supreme Court in the Deferred Action for Childhood Arrivals (DACA) case in June. DACA is a policy instituted in 2012 by the Department of Homeland Security (DHS) that protects those who entered the United States as youth through a tool called "deferred action." While the Supreme Court decision should have reinstated DACA to how it functioned on September 4, 2017, DHS departed from this ruling and instead issued a DACA memo that, far from abiding by the Supreme Court ruling and order by a federal court to start processing new requests for DACA, slashes DACA renewals to one year and refuses to process first-time DACA requests. In the backdrop of immigration law in the time of COVID-19 is a reckoning that all people, including immigration attorneys and advocates, are having about race following the visible killings of innocent and unarmed Black men and women at the hands of police officers. We need more conversations and actions about the parallels between the immigrants' rights movement and Black Lives Matters, the lived experiences of BIPOC immigration attorneys who continue to endure challenges in a field of law that is purportedly more culturally sensitive, and solutions that include, but are not limited to, structural changes and accountability when racism is overlooked.

Thank you for reading. Please share your comments and ideas for the *AILA Law Journal* and consider submitting a piece for the Spring 2021 edition by November 15, 2020. I'd also love to hear from authors writing at the intersection of immigration, COVID-19, and race. I hope you and your families stay safe and healthy.

Shoba Sivaprasad Wadhia, Esq.
Editor-in-Chief

Acquiring and Presenting Digital Evidence in Immigration Practice

Andrew H. Wellisch and Gabriela M. Pinto Vega*

Abstract: In the digital age, immigration counsel can wield electronic evidence to prove eligibility for immigration relief. This article discusses a new way for immigration counsel to procure and present data in connection with the representation of foreign nationals by exploring the California Consumer Privacy Act of 2018.

Introduction

Zealous and competent[1] immigration counsel should consider technology and cutting-edge strategy by utilizing digital evidence to prove immigration relief on behalf of foreign nationals before the United States Citizenship and Immigration Services (USCIS) and immigration courts.

Immigration counsel can harness electronic evidence as part of a new defensive or offensive litigation strategy. The former occurs when immigration counsel discover data to learn what particular information the U.S. government could learn about a foreign national through, for instance, a review of their social media or a subpoena of their cell phone records. An offensive strategy arises when immigration counsel deploys digital evidence to prove immigration relief in practice.

This article addresses how immigration counsel can prove facts such as physical presence of a foreign national in the United States in removal proceedings or a bona fide relationship in a family-based marriage case in today's world, where clients sign leases by DocuSign, make purchases online, or lead their lives on social media. As an alternative to subpoenaing the evidence from its custodians, the California Consumer Privacy Act of 2018 (CCPA) may provide a creative way to obtain electronic data in connection with the representation of foreign nationals. The CCPA, effective as of January 1, 2020,[2] is a comprehensive state privacy law that creates new rights and responsibilities in the digital ecosystem.

The CCPA provides immigration counsel with the opportunity to apprise foreign nationals about their data rights in an ever-expanding digital world. It may also offer immigration counsel a window into refined strategies regarding the procurement and filing of novel digital evidence for foreign nationals who are California residents requesting relief before the Department of Homeland Security (DHS) or facing removal proceedings before immigration court.

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A Challenge of Gathering and Presenting Evidence in Practice

Immigration counsel face many challenges when trying to defend clients in practice. One challenge is gathering and presenting evidence to help clients pursue relief under immigration law when traditional evidence is not available in immigration court. One type of relief is Cancellation of Removal for Non-Lawful Permanent Residents (Non-LPR Cancellation), which allows foreign nationals to obtain lawful permanent resident status in the United States.[3] To prove Non-LPR Cancellation, immigration counsel, on behalf of their clients, must generally show, among other elements, that the foreign national has "been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application. . ."[4]

A question may arise as to what types of information counsel can present before an immigration court to display the foreign national's continuous presence for at least 10 years of the foreign national's residence in the United States pursuant to the Immigration and Nationality Act of 1952 (INA) § 240A(b)(1)(A). For instance, immigration counsel often point to "traditional evidence," including, but not limited to, affidavits; birth certificates of U.S. citizen children; criminal records; date-stamped photographs of foreign nationals at recognized sites in the United States; divorce records; education records; employment records; immigration records; income tax records; financial records; government records; legal records; marital records; medical records; purchase records; social media records; household records; and travel records to prove that the foreign national satisfied the continuous presence element.

In many instances, it becomes daunting, time-consuming, and almost impossible to obtain evidence going back 10 years, which clients are often unable to produce. In some instances, counsel have had to resort to the use of private investigators to dig up elusive evidence in order to meet this element before court.

In addition to evidentiary conundrums in court, immigration counsel may face extraordinary hurdles with obtaining traditional evidence for applications such as marriage-based petitions, removal of conditions on conditional lawful permanent residents, or relief under Deferred Action for Childhood Arrivals (DACA) before USCIS.

For example, in the marriage-based visa petition context, a petitioner must prove bona fides of the marriage by a preponderance of the evidence for marriages entered into before the initiation of removal proceedings,[5] or by clear and convincing evidence for marriages entered into during removal proceedings.[6] To satisfy the preponderance of the evidence standard, the petitioner must show that it is more likely than not, or more probable than not, that the marriage was entered into in good faith.[7] Counsel may see challenges related to the unavailability of traditional evidence in the form of joint ownership of assets, joint bank accounts, leases, or utilities. After all, how does counsel

demonstrate joint ownership of a home paid by millennials via bitcoin or burgeoning alternative digital currencies? Electronic data might be a source of evidence to demonstrate good faith marriage in this particular context.

Digital evidence may also be considered in the removal of conditions context of immigration practice. A foreign national who adjusts her or his status through marriage to a U.S. citizen obtains conditional permanent resident status if the marriage is less than two years old on the date the adjustment is approved.[8] The conditional resident and her or his spouse must jointly apply to remove the conditions, or the conditional resident must request a waiver of the joint filing requirement. As part of the process, a conditional resident and her or his spouse must continue to prove that the marriage is in good faith by submitting evidence of commingled assets. A problem, however, arises when traditional evidence of commingled assets is unavailable. In this particular situation, counsel may also look to data as a solution.

The breadth of electronic evidence to solve problems related to the unavailability of traditional evidence in immigration practice does not stop there. In the DACA context, on June 15, 2012, then DHS Secretary Janet Napolitano issued a memorandum to U.S. Customs and Border Protection (CBP), USCIS, and U.S. Immigration and Customs Enforcement (ICE) explaining how prosecutorial discretion should be applied to individuals who came to the United States as children. Among other elements, each applicant must show that she or he came to the United States before reaching her or his sixteenth birthday, she or he was physically present in the United States before June 15, 2012, and she or he has continued to maintain physical presence at the time of filing for DACA.[9] At bottom, in all these different immigration practice areas, including DACA, electronic data may generate an innovative solution as part of a comprehensive new strategy for immigration counsel.

To implement this new strategy, immigration counsel may look to social media companies. But why? Social media companies in cyberspace may provide extraordinary evidentiary data trails—such as geolocation data—that can be collected and presented to zealously defend a client in immigration court or before USCIS. For example, a client's Facebook "location history" reveals her or his location from devices (if the client's location history setting is toggled "on" in Facebook to the extent that Facebook provides such geolocation data). Additionally, Uber gathers location data[10] from its riders to the extent that riders have enabled Uber's collection of location data from their mobile devices and the Uber application is running in the foreground of those devices. This location data might be helpful to prove up missing time periods of the continuous presence requirement in DACA or Cancellation of Removal applications, presuming a user maintains their Uber account and has not made a request to delete such data.

Every day, a proliferation of data pervades public and private spheres of life, and daily living is inundated with a vast quantity of social media applications. The list is endless, with popular communication platforms such as

Facebook, Instagram, Twitter, Pinterest, Snapchat, YouTube, and LinkedIn. The enhanced level of social media participation in the digital world will drive the conversation as to the type of evidence that may be obtained online when traditional evidence may not be available to prove elements of immigration relief including, but not limited to, the existence of a good faith marriage. And so, it is in the best interests of immigration counsel to consider the CCPA as an additional tool in their toolbox to gather and present missing evidence that may not only expedite the evidentiary collection process, but also help their clients prove the relief sought in immigration practice.

An Exploration of the CCPA's Provisions and Regulations[11]

Consumer

The CCPA defines a "[c]onsumer" as "a natural person who is a California resident . . . however identified, including by any unique identifier."[12] But what is the meaning of a California resident under this law?

A California resident "includes (1) every individual who is in the State [of California] for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State [of California] who is outside the State [of California] for a temporary or transitory purpose."[13]

Some clients of immigration counsel will likely live in California for a non-transitory purpose and with non-temporary intentions for a long time. The analysis depends on the facts.[14] Unlike vacationers who temporarily visit the Golden State to, for example, hike through Yosemite National Park, many foreign nationals are domiciled[15] in California. And many have family and loved ones in California, which makes the Golden State a true place of fixed habitation.[16] Indeed, the Golden State is home to more than two million unauthorized foreign nationals.[17] If clients of immigration counsel are consumers under the CCPA, the next question will be whether this law applies to a particular business entity.

Business

The CCPA applies to a for-profit business entity doing business in California "that collects consumers' personal information" if that business has "annual gross revenues in excess of twenty-five million dollars ($25,000,000)" or it "annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes . . . the personal information of 50,000 or more consumers, households, or devices" or it "[d]erives 50 percent or more of its annual revenues from selling consumers' personal information."[18]

An example of a business under the CCPA might include a social media company depending on the facts within the contours of the law. For instance, although a court has not found Facebook to be a "business"[19] pursuant to the CCPA as of the date of the submission of this article, it appears that a court would look to the text of the CCPA, which refers to "… sells, or shares for commercial purposes … the personal information of 50,000 or more consumers, households, or devices."[20] Nonetheless, an interpretation of words such as "sells" or "shares" as applied to a social media company in a particular fact pattern is better explored elsewhere. If a court finds that Facebook is a business under this law, what types of data can be obtained from a social media company to defend a foreign national who faces removal proceedings in immigration court or interviews before USCIS?

Personal Information

"Personal information"[21] includes "… information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[22] Personal information also includes "[g]eolocation data."[23] The CCPA does not explicitly define "geolocation data," though the law excludes "deidentified or aggregate consumer information"[24] and "publicly available information"[25] from "[p]ersonal information."[26]

A client's location history as downloaded from a social media company might be one example of geolocation data. But what things can immigration counsel do related to the client's geolocation data?

The Right to Request to Know Personal Information

Informing Clients About the Right to Request to Know Personal Information

Immigration counsel might inform their clients who are consumers[27] that they have a right to request to know personal information from a business under the CCPA. Each consumer might want a copy of their personal information to help them present continuous physical presence or gather nontraditional forms of evidence for their immigration case. Consumers can ask for "specific pieces of personal information"[28] (*e.g.*, geolocation data,[29] professional or employment-related information,[30] driver's license number[31]) that a business has collected about them.

To do so, a consumer must send a "verifiable consumer request" to the business.[32] For a business that has a "password-protected account with the consumer,"[33] the business might verify the consumer based on "the business's existing authentication practices for the consumer's account."[34] For

example, a business may require the consumer to enter her or his password for authentication.

After the business verifies the requestor's identity, it must generally deliver "specific pieces of personal information"[35] by using "reasonable security measures."[36] According to a provision in the regulations, the information will generally be that which the business has collected about the consumer in the preceding "12-month period" from the date the business receives the consumer's request.[37] Nonetheless, it is possible that a business may provide a consumer with data beyond one year depending on the business and its particular operations.

For instance, a consumer could download a copy of her or his geolocation data, photos, videos, messages, or other posts by following Facebook's instructions.[38] Indeed, some social media companies may allow consumers to download a zip file with geolocation data, if such data is available depending on the consumer's privacy settings and the particular social media company's operations. The consumer can then share that location history with their immigration counsel for their pursuit of relief under the INA. If the geolocation data or metadata displaying the client's location from photos are not readily accessible, immigration counsel may consider obtaining cell-site location information (CSLI)[39] from a wireless carrier to reveal a client's continuous location in the United States. To that end, immigration counsel might file a motion to subpoena digital-related records with the immigration court.[40] But, what happens when a client feels confused or frustrated with using technology to access and download their personal information under the CCPA?

Helping Clients by Serving as an Authorized Agent Under the CCPA

From time to time, immigration counsel may encounter a client who wants to exercise their right to request to know personal information under the CCPA, but the client may feel confused or frustrated with technology. One possible solution is that immigration counsel may serve as an "authorized agent"[41] to submit a request to know personal information to the business on behalf of their client. Immigration counsel may look to the business entity's privacy policy to the extent that it provides "[i]nstructions on how an authorized agent can make a request under the CCPA"[42] on behalf of their client.

A provision in the regulations says that, an "authorized agent shall not use a consumer's personal information . . . for any purposes other than to fulfill the consumer's requests, verification, or fraud prevention."[43] If immigration counsel's actions are consistent with fulfilling the consumer's request, counsel may first want to obtain a power of attorney[44] or "signed permission"[45] by the client providing her or him with lawful authority to submit a request to know her or his client's personal information on behalf of the client.

In the absence of a power of attorney, counsel's procurement of a signed permission from the client is only the first step. It is possible that a business

may require that the consumer submit additional proof that the immigration counsel is an authorized agent. A consumer may be required to submit verification of her or his identity directly[46] with the business, and "directly confirm with the business that they provided the authorized agent permission to submit the request."[47]

Once those steps have occurred, immigration counsel might look to the steps noted earlier in this article to attempt to obtain geolocation data or other data on behalf of her or his client. If that personal information is received, immigration counsel must continue to "implement and maintain reasonable security procedures and practices to protect the consumer's information."[48]

While this article focuses on data rights under the CCPA, it does not foreclose the possibility that foreign nationals residing in states other than California may possibly obtain their geolocation data or other relevant data to the extent that laws from other states confer such data rights or social media companies provide such data at their discretion.

Conclusion

The jury is still out as to how things will shake up in court regarding future challenges concerning the meaning of words like "sell"[49] under the CCPA. This law, however, generates an opportunity for immigration counsel to educate their clients about data rights, and obtain and present digital evidence in immigration practice.

Notes

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1. Model Rules of Prof'l Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2018).

2. Cal. Civ. Code § 1798.198(a); The California Attorney General's Office has commenced enforcement of the CCPA since the date of publication of this article is

after July 1, 2020. *See* David M. Stauss & Malia Rogers, *Insight: Responding to CCPA Requests During the Coronavirus Pandemic*, Bloomberg Law News (Mar. 27, 2020), at https://news.bloomberglaw.com/privacy-and-data-security/insight-responding-to-ccpa-requests-during-the-coronavirus-pandemic ("On March 19, 2020, the attorney general's office responded, stating that it does not have any current plans to delay enforcement. According to reports in Forbes, the Wall Street Journal and Corporate Counsel, an adviser to Becerra sent an email to reporters, stating 'Right now, we're committed to enforcing the law upon finalizing the rules or July 1, whichever comes first .... We're all mindful of the new reality created by COVID-19 and the heightened value of protecting consumers' privacy online that comes with it. We encourage businesses to be particularly mindful of data security in this time of emergency.'"); *see also* Cal. Civ. Code § 1798.185(c).

3. INA § 240A(b); 8 U.S.C. § 1229b.
4. INA § 240A(b)(1)(A); 8 U.S.C. § 1229b(b)(1).
5. *Matter of P. Singh*, 27 I&N Dec. 598, 605 (BIA 2019).
6. 8 C.F.R. §§ 245.1(c)(8)(iii)(F), 1245.1(c)(8)(iii)(F).
7. *Matter of Rehman*, 27 I&N Dec. 124, 125 (BIA 2017).
8. 8 C.F.R. § 216.1.
9. *See* DHS, Memo, Napolitano, Secretary, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012); *see also* Memo, Morton, Director ICE (June 15, 2012); *see also* Memo, Aguilar, Acting Comm. CBP (June 15, 2012).
10. *See* Uber Privacy Notice, at https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=privacy-notice (last visited on July 23, 2020) ("We collect precise or approximate location data from a user's mobile device if enabled by the user to do so."); *see also* https://privacy.uber.com/privacy/california/?uclick_id=034aa8a7-be97-4e98-82ec-450634e057c6 (last visited on July 23, 2020) ("What personal information is Uber collecting, and what do you use it for? We cover collection and many other aspects of using consumer data in our Privacy Notice.")
11. The authors offer a few disclaimers. First, this article is not legal advice. Readers should consult with and retain independent legal counsel to advise them on the CCPA, regulations, and other applicable laws, including, but not limited to, the INA. Laws, regulations, and technical standards may change over time. Second, this article references the final text of proposed CCPA regulations. The Office of Administrative Law approved the final text of proposed CCPA regulations on August 14, 2020, and the regulations are effective immediately, according to the CCPA, https://oag.ca.gov/privacy/ccpa/regs (last visited on Aug. 19, 2020). Since those regulations may not necessarily be the final published regulations, certain provisions and terms in the regulations may change over time. Third, although this article hopes for transparency in the marketplace of data, it does not guarantee that each business will, in fact, disclose personal information to every consumer under the CCPA.
12. Cal. Civ. Code § 1798.140(g).
13. 18 C.C.R. § 17014.
14. 18 C.C.R. § 17014(b).
15. 18 C.C.R. § 17014(c).
16. 18 C.C.R. § 17014(c).
17. Pew Res. Ctr.: Hispanics (Feb. 5, 2019), at https://www.pewresearch.org/Hispanic/interactives/u-s-unauthorized-immigrants-by-state/; *see also* Daniel Costa, *California Leads the Way: A Look at California Laws That Help Protect Labor Standards*

for Unauthorized Immigrant Workers, Economic Policy Institute, 4 (Mar. 22, 2018), at https://www.epi.org/files/pdf/143988.pdf.

18. Cal. Civ. Code § 1798.140(c)(1)(A)-(C); *see also* Tanya Forsheit, *Negotiating with Service Providers and Third Parties Under CCPA, in Data Processing Agreements* (International Assoc. of Privacy Professionals, 2nd Edition).

19. Cal. Civ. Code § 1798.140(c); *see generally* Facebook's California Privacy Notice, at https://www.facebook.com/legal/policy/ccpa (last visited on Apr. 19, 2020) ("We don't sell any of your Personal Information, and we never will.")

20. Cal. Civ. Code § 1798.140(c)(1)(B).

21. Cal. Civ. Code § 1798.140(o)(1).

22. 11 C.C.R. § 999.301(k) ("Household" is defined as "a person or group of people who: (1) reside at the same address, (2) share a common device or the same service provided by a business, and (3) are identified by the business as sharing the same group account or unique identifier.")

23. Cal. Civ. Code § 1798.140(o)(1)(G); *see generally* Symposium, *The Private Coast—Understanding the New California Consumer Privacy Act*, Loyola Law School Law Review (Feb. 20, 2020) (Jake Snow, Technology and Civil Liberties Attorney at the ACLU, discussing personal information.)

24. Cal. Civ. Code § 1798.140(o)(3).

25. Cal. Civ. Code § 1798.140(o)(2).

26. Cal. Civ. Code § 1798.140(o)(1).

27. Cal. Civ. Code § 1798.140(g).

28. Cal. Civ. Code § 1798.110(a)(5); *see also* 11 C.C.R. § 999.301(r)(1).

29. Cal. Civ. Code § 1798.140(o)(1)(G).

30. Cal. Civ. Code § 1798.140(o)(1)(I).

31. Cal. Civ. Code § 1798.140(o)(1)(A).

32. Cal. Civ. Code § 1798.110(b); *see also* 11 C.C.R. § 999.323(a); *see also* 11 C.C.R. § 999.324; *see also* 11 C.C.R. § 999.325.

33. 11 C.C.R. § 999.324(a).

34. 11 C.C.R. § 999.324(a).

35. Cal. Civ. Code § 1798.100(c); Cal. Civ. Code § 1798.130(a)(2).

36. 11 C.C.R. § 999.313(c)(6).

37. 11 C.C.R. § 999.313(c)(8).

38. Facebook's webpage, "How do I download a copy of my information on Facebook?," at https://www.facebook.com/help/212802592074644?helpref=search&sr=19&query=how%20do%20request%20personal%20information%20by%20a%20third%20party&search_session_id=acc4694d66eaeb6d0ad7b7a436596eb7 (last visited on Apr. 21, 2020).

39. *Carpenter v. U.S.*, 138 S. Ct. 2206, 2211 (2018) ("Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell cite. Most modern devices, such as smart phones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI).")

40. 8 C.F.R. § 1003.35(b), 1287.4; *see also* EOIR's Immigration Court Practice Manual, Chapter 4, § 4.20.

41. 11 C.C.R. § 999.301(c) ("'Authorized agent' means a natural person or a business entity registered with the Secretary of State to conduct business in California

that a consumer has authorized to act on their behalf subject to the requirements set forth in section 999.326"); 11 C.C.R. § 999.326.

42. 11 C.C.R. § 999.308(c)(5)a.

43. 11 C.C.R. § 999.326(d).

44. 11 C.C.R. § 999.326(b); *see also* Cal. Prob. Code §§ 4121-4130.

45. 11 C.C.R. § 999.326(a)(1).

46. 11 C.C.R. § 999.326(a)(2).

47. 11 C.C.R. § 999.326(a)(3).

48. 11 C.C.R. § 999.326(c).

49. Cal. Civ. Code § 1798.140(t)(1); *see also* Natasha Singer, *What Does California's New Data Privacy Law Mean? Nobody Agrees*, N.Y. Times, (Dec. 19, 2019), at https://www.nytimes.com/2019/12/29/technology/california-privacy-law.html ("For now, even the biggest tech companies have different interpretations of the law, especially over what it means to stop selling or sharing consumers' personal details."); *see also* Letter from Eric Goldman, Professor, Santa Clara University School of Law, to Toni Atkins, Senate President Pro Tempore, Patricia Bates, Senate Minority Leader, Anthony Rendon, Assembly Speaker, Marie Waldron, Assembly Republican Leader (Jan. 17, 2019), at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2886&context=historical ("The definition of 'sale' does not clarify when data transfers or sharing are done for 'valuable consideration,' a question of critical importance to many California businesses."); *see also* Alexandra Scott, Elizabeth Cantor, & Lindsay Tonsager, *"Sale" Under CCPA May Not Be as Scary as You Think*, IAPP The Privacy Advisor (Oct. 29, 2019), at https://iapp.org/news/a/sale-under-the-ccpa-may-not-be-as-scary-as-you-think/.

Hague Abduction Law for the Contemporary Immigrant Parent and Child

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Abstract: The article discusses the intersection of Hague Abduction Law and Immigration as it relates to contemporary immigration policies. By walking through the elements of the Hague Convention as they interplay with, and sometimes conflict with, immigration law and practice, the reader learns about how the Hague impacts children's immigration cases. The piece seeks to highlight how parent-child border separation can violate U.S. obligations under the Hague, such that the Hague might be retooled to curb family separation at the U.S.-Mexico border.

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction[1] entered into force on October 25, 1980. The document was designed to provide a forum to quickly remediate the unlawful taking or unlawful retention of a child from their country of last habitual residence. While the agreement is a product of private international law, it nonetheless creates ongoing state obligations to ensure the prompt return of children improperly taken under the Hague.[2] Though the document may have been created to address international parental kidnapping, it is, by operation, a document that serves to protect a parent from unlawful interference with their custodial rights. In light of the current immigration landscape, one in which custodial interests are routinely interfered with by the U.S. government, the Hague deserves to be re-evaluated with an eye toward the contemporary immigrant parent and child.

Increasingly, immigration practitioners are observing an intersection of family immigration and child custody issues. Forced family separation is one such example. These intersections can implicate U.S. obligations under the Hague. In certain circumstances, when children migrate to the United States with only one parent or where children are taken from their parents at the border, Hague considerations might be raised. Those considerations might intensify where separated parents are deported without their children. The spirit of the Hague may be breached when the Office of Refugee Resettlement releases a child to a parent in the United States without the permission of the parent exercising rights of guardianship and facing imminent deportation—often a de facto custody determination. Hague litigation is also complicated by children seeking asylum

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over the objection of a parent or where one parent is alleged to be the persecutor in the asylum case—an important intersection that deserves closer attention, but the details of which fall outside the scope of this particular piece.[3] Current trends in parent-child migration and anti-migration policies are creating an intersection between Hague abduction law and immigration practice that requires a closer look and the development of appropriate cross-training to ensure the best possible protection for the custodial interests of parents and for the safety and protection of the child.

Interpreting the Hague against the backdrop of contemporary immigration realities, nearly 40 years since its drafting, also requires consideration of the evolution of the rights of the child—the child being the object of the Hague litigation itself. The Hague, as originally conceived, was a document designed to protect a parent's interests or rights *to* the child. The result is that children are not party to Hague proceedings. The Hague was written before the completion of the Convention on the Rights of the Child (CRC) and its concomitant view that the child is a rights holder, not merely an extension of the parental interest. The child asylum seeker, for example, has a right to seek asylum under the Immigration and Nationality Act (INA) as a rights holder. Similarly, the paramount right enshrined in the CRC—the right of the child to have their best interests considered in any action affecting the child—is the single most universally adopted principle of the CRC.[4] The Hague, however, does not, on its face, account for such rights of the child. As a result, tensions emerge between the CRC and the Hague that are worth exploring. Certain practices in immigration proceedings may help protect the role the child plays in decisions resulting in their return.

The sections that follow are designed to provide an overview of the interplay between the Hague Convention on the Civil Aspects of International Child Abduction with contemporary immigration realities, through the lens of unaccompanied or separated children who have been placed in removal proceedings or are otherwise presenting themselves for an immigration benefit pursuant to the INA.[5] The purpose is to provide advocates and adjudicators with an understanding of the interplay between, and the framework behind, the various laws at play. Ideally, this information will help stakeholders think critically about decisions in any given case involving an immigrant child whose parent alleges an international abduction or whose parental rights have otherwise been interfered with, or where the child seeks permanency in the United States over the objection of a parent. As the intersection comes to the fore, practitioners are encouraged to seek out consultation and assistance in strategically moving these cases forward.[6]

What Is the Hague Convention on the Civil Aspects of International Child Abduction?

The Hague Convention on the Civil Aspects of International Child Abduction[7] can be summarized as "a treaty that governs proceedings for the prompt

return of children who have been wrongfully taken or kept away from their 'habitual residence.'"[8] In the United States, these cases are brought before federal or state courts of appropriate jurisdiction pursuant to the United States implementing legislation, the International Child Abduction Remedies Act (ICARA).[9] Juxtapose this setting with that of immigration proceedings, which are adjudicated in an administrative setting before the Department of Justice.[10] Federal district courts and state courts have no jurisdiction to decide matters of immigration relief, even when they directly conflict with the Hague.[11]

Hague hearings are designed merely to determine the proper venue for the settlement of child custody disputes (*i.e.*, the United States or a foreign jurisdiction). As a result, the only final remedy available under the Hague is to compel the return of a child to the appropriate foreign jurisdiction for resolution of the child custody dispute. Since there is no final adjudication of the underlying child custody case, Hague cases are often referred to as "provisional remedies."[12] Once a provisional remedy is issued, the individual or entity exercising actual, physical control over the child must comply with that order and return the child to the country of last habitual residence.

What Is the Purpose of the Hague Convention and ICARA?

Protecting the interests of children, including from the harmful effects of their wrongful removal from a custodial parent, is at the forefront of ICARA.[13] Among Congress's principal findings in passing ICARA was that "the international abduction or wrongful retention of children is harmful to [a child's] well-being."[14] To prevent compounding the harm caused to children, the Hague and ICARA are intended to create an efficient remedy to quickly restore the status quo prior to the abduction or wrongful retention.

Instead of engaging the parties in a protracted custody dispute, these complimentary laws are designed to ensure that a child is reunited with the appropriate parent expeditiously, so that questions related to custody can be settled in a jurisdiction involving the least amount of disruption to the child. The result is that U.S. courts are merely empowered to determine whether the removal or retention was wrongful, whether a defense applies, and, thus, whether to issue the provisional remedy (*i.e.*, the prompt return of the child to the country of last habitual residence).[15] As we see below, however, the provisional remedy can become complicated by intersections with the immigration regime. In theory, the Hague Convention itself is designed intentionally as a vehicle to protect the interests of children while matters relating to their custody are being resolved. The preambulatory language explains:

> The States signatory to the present Convention, Firmly convinced that *the interests of children are of paramount importance in matters*

> *relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention* and to establish procedures to ensure their prompt return to the State of their habitual residence . . . Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions . . .[16]

In light of the importance of protecting the well-being of the child, judicial supervision is imperative. Whether the case appears in federal or state court pursuant to a filing under the Hague or vis-à-vis immigration proceedings, it is critical to ensure the legal propriety of repatriating a child.[17]

How Provisional Is the Hague's Provisional Remedy?

In practice, particularly at the intersection of Hague and immigration cases post-relief, Hague cases can become extremely complicated, such that the transactional nature of the Hague is called into question. Take, for example, *Sanchez v. R.G.L.*, a case of first impression that grappled with the legal question of how a grant of asylum to the child can impact Hague litigation.[18] Here, the court held that a grant of asylum will not always foreclose return, but must be considered as part of the grave-risk assessment—a defense to return described in the section Defenses to Return & the Intersection of Immigration Law, *infra*.[19] The case demonstrates the complicated intersection of the asylum statute—post-relief—and the Hague Convention. Namely, it demonstrates that the Hague can sometimes entail complicated questions of fact that must be answered by a court.

It is important to note, however, that the federal judiciary and most Hague stakeholders are trained to view the Hague as strictly provisional and not the forum to settle factual disputes that bear upon the underlying custody determination. Consider the routine admonishment to the federal judiciary that

> . . . courts should bear in mind that "a Hague Convention case is not a child custody case." On the contrary, all relevant authorities caution courts not to become mired in the question of which parent is the "better" parent. A foundational premise of the Convention is that the courts of the child's habitual residence are best at determining questions regarding the child's custody.[20]

The result of this indoctrination is that courts are reluctant to settle questions of fact underlying a parent's fitness, reserving that discussion for the court of the child's last habitual residence. This complicates Hague proceedings in the context of children seeking asylum or other immigration relief pursuant to allegations of a parent's abuse. In theory, any parental abduction case that goes before a Hague court can allege domestic violence or child abuse. The

key to distinguishing immigration cases is to marry the provisional nature of the remedy with the legal process for asylum or other immigration benefit, such that findings of fact do not need to be made in the Hague context but rather imported from the procedurally robust immigration proceeding. That discussion is the subject of a forthcoming piece. The legal framework below merely touches upon these intersections but reserves a robust analysis of that intersection for another time.

How Does the Hague Convention Work in Practice Before Reaching Litigation?

Hague cases must first be raised in the country of the child's last habitual residence[21] with the "Central Authority" designated to resolve such issues pursuant to the Convention.[22] In the case of the United States, the proper authority is the U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues (OCI).[23] Each state party has designated a domestic Central Authority capable of raising Hague issues on behalf of their citizens.

Raising the case with the Central Authority formally commences the Hague Convention process for the prompt return of a child wrongfully taken to or retained in the United States. In a formal parental abduction case, the left-behind parent[24] would file an application with the Central Authority; each application process looks different depending on the country. Under a formal process, that application would be forwarded to the U.S. Central Authority, the OCI. OCI would engage in soft, informal advocacy to repatriate the child. In a Hague-related inquiry, in which the U.S.-based custodian is a government agency (*i.e.*, ORR), the Department of State engages in informal inquiries and outreach for advocacy around the child's repatriation. These government agencies assist in determining if it is appropriate or possible to achieve voluntary return of the child without formal legal action. If informal advocacy does not result in the voluntary return of the child or an agreement cannot otherwise be reached, the Hague process calls for legal action.

What Is the Legal Framework Under the Hague?

As set out above, the Hague provides for the provisional remedy—the prompt return of the child—so that the underlying questions related to custody can be settled in the appropriate state party's jurisdiction. This provisional remedy will be issued where the child is *wrongfully* removed to or retained within a contracting state.[25] Whether a provisional remedy can be ordered thus turns on the finding that the child was, in fact, wrongfully removed from the country of last habitual residence or wrongfully retained in the United States. The Hague defines wrongful removal or retention in the following way:

> The removal or the retention of a child is to be considered wrongful where—
>
> (a) *it is in breach of rights of custody attributed to a person*, an institution or any other body, either jointly or alone, *under the law of the State in which the child was habitually resident immediately before the* removal or *retention*; and (b) at the time of removal or retention those *rights were actually exercised*, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.[26]

The elements of a Hague claim under federal law are sourced from the Hague Convention's definition of wrongful. It is important to note that if the elements of the Hague are met, and thus the removal or retention of the child is considered wrongful, then the provisional remedy will be ordered unless a defense can be successfully raised.

Elements Establishing the Propriety of the Prompt Return of the Child and the Intersection with Immigration Law[27]

The elements of a Hague claim under federal law are set out in the Hague itself because ICARA incorporates the language of the Hague by reference.[28] The idea is to determine whether a child has been wrongfully removed or is being wrongfully retained such that the provisional remedy should be issued. The concepts of wrongful removal and wrongful retention are distinct, the latter being of greater concern for the contemporary immigrant parent whose custodial rights are interfered with by the U.S. government.

Generally, wrongful removal cases can be characterized as a unilateral parental abduction in which one parent takes the child from the last habitual residence without the permission of the left-behind parent.[29] Wrongful retention cases generally involve a child remaining with the abducting party "despite the clearly communicated desire of the left-behind parent to have the child returned."[30] Immigrant parents whose children have been taken from them at the border, however, may also assert unlawful retention, assuming the parent can meet the elements of a petition as laid out in the Hague.

A petitioning parent can establish a child was *wrongfully* removed to or retained in the United States by demonstrating by a preponderance of the evidence that:

> (1) the *habitual residence* of the child immediately before the date of the allegedly wrongful removal or retention was in the country to which return is sought;
>
> (2) the removal or *retention breached the petitioner's custody rights under the law of the child's habitual residence*;
>
> (3) the petitioner was actually exercising or would have been exercising custody rights of the child at the time of his or her removal or retention; and
>
> (4) the child has not attained the age of 16 years.[31]

Each element is nuanced and has been the subject of litigation.[32] The failure to demonstrate each element of the Hague will prevent a court from issuing the provisional remedy: return to country of last habitual residence. Indeed, the failure to establish certain elements (*i.e.*, habitual residence) has formed the basis for foreclosing Hague proceedings due to lack of subject matter jurisdiction.[33] A brief discussion of the interplay between these elements and the cases of unaccompanied or separated children in removal proceedings, as well as the defenses to a Hague return, follows.

For migrant children, when reviewing the elements, close attention should be paid to determining where the child last habitually resided, a legal term of art.[34] Habitual residence is not defined in the Hague, but the federal courts have articulated that "[i]n substance, the term refers to that place where a child has lived for a sufficient period of time for the child to have become settled."[35] The *intent* to create a place of habitual residence can influence the determination of whether residence can be found in any given case.[36] For example, if a parent intended for a migrant child to reside permanently in the United States, that intent will bear upon the final determination for habitual residence.[37] Since the Hague cannot be filed absent a determination that the parent seeks repatriation to the child's last habitual residence, time is of the essence in a Hague petition. The triggering event for determining habitual residence is the filing of a Hague petition.

The other notable element that may arise in cases of migrant children involves the petitioner's "custody rights." A parent must establish their custodial rights in order to assert them under the Hague. When defining "custody rights," it is often the case that a parent will have acquired those rights by operation of law.[38] This is true both for biological parents as well as non-traditional family units whereby a parent-child relationship is alleged to have been established. Consequently, one will likely need to evaluate the parental custody rights pursuant to the national law of the parent's country of origin (assuming this is the same as the country of last habitual residence). The Convention notes specifically that "[t]he rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[39] The left-behind

parent—or the parent who alleges their custodial rights are being interfered with—must establish by court order, by laws of legitimation, or by operation of law that they have the right to custody of the child.[40]

Defenses to Return and the Intersection of Immigration Law

Once the petitioner establishes the necessary elements, it is established that the removal or retention of the child is "wrongful." Once so found, the court reviewing the Hague petition must order that the child be returned to the country of last habitual residence *unless* the respondent can establish by a preponderance of evidence one or more of the following defenses:

1. the person having care of the child was not actually exercising the custody rights at the time of removal or retention and had *consented or subsequently acquiesced to the removal or retention*;
2. the proceedings were commenced *more than one year after the date of the wrongful removal or retention and the child is now settled in its new environment*;
3. *the child objects to being returned* and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or
4. *there is a grave risk* that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[41]

Like the elements required to establish a case under the Hague, the defense to a child's return are also heavily litigated.[42] As with the elements of the Hague, there are defenses that bear discussion for those interacting with migrant children in scenarios that implicate the Hague.

The first important defense is that of "resettlement."[43] While the term "settled" is the subject of much litigation,[44] it is widely understood to include cases where it can be demonstrated that a child has found "security, stability and permanence in [a] new environment."[45] A court is not bound to order the return of the child where more than a year has passed since the unlawful removal or retention *and* the child has now resettled in a new environment.[46] This defense may be a significant impediment to employing the Hague for children in immigration proceedings. The U.S. Supreme Court has held that equitable tolling is not available under the Hague Convention even where the child's location is concealed from the searching parent.[47] The lack of lawful immigration status does not foreclose a finding that a child has settled.[48] Conversely, the acquisition of immigration status will be considered in determining whether a child has firmly resettled.[49] Depending on the age of the child and

the attachments and stability developed over the course of time, the one-year deadline should be treated like a statute of limitation.[50]

The second defense important to cases of immigrant children in immigration proceedings is the "grave-risk" defense. The grave-risk defense will arise from the assertion that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation.[51] Grave risk must be proven by clear and convincing evidence.[52] Grave risk is determined along a spectrum wherein "serious physical abuse, sexual abuse, and extensive or serious domestic violence will constitute grave risk of harm, but neglect, poverty, and mere substandard parenting should not."[53] One court explains:

> At one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child's preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.[54]

Understanding the types of harm that give rise to the grave-risk defense is important because of their implications in a child's immigration legal case. Specifically, as most immigration practitioners are aware, allegations of abuse, abandonment, or neglect can give rise to eligibility for relief from deportation in the context of the Special Immigrant Juvenile Visa.[55] Similarly, this and other forms of grave risk—wherein there exists a grave risk to the child's physical or psychological well-being—could give rise to relief under the asylum statute,[56] withholding of removal[57] and pursuant to a deferral of removal under the Convention Against Torture.[58]

In a Hague petition, however, there is limited ability of a district or state court to review the merits of an asylum claim or other underlying immigration relief that is used to defend against the Hague as part of a "grave-risk" analysis.[59] There is conflicting case law on the utility of those claims, even as it relates to women and their children seeking asylum based on extensive domestic violence.[60] As of yet, asylum status alone does not establish the grave-risk defense.[61] In some jurisdictions, the movement of courts has been to establish a stricter interpretation of the grave-risk defense wherein the respondent must "demonstrate that the court in the country of habitual residence is unwilling or unable to protect that parent and child."[62]

This analysis, however, puts the Hague in conflict with the jus cogens principle of non-refoulement, at least as it relates to a child's right to seek asylum.[63] Specifically, under this interpretation, a child could be repatriated notwithstanding their request to pursue protection in the United States vis-à-vis the Refugee Act of 1980, the U.S. implementation of the Refugee Protocol.[64]

It is worth exploring an interpretation of the grave-risk defense that brings the asylum statute in harmony with ICARA. For example, assuming arguendo that a judicial determination granting asylum employs significant evidence of the risk of harm to the child, it may be worth evaluating if that legal proceeding can be meaningfully brought to bear on the grave-risk analysis without compromising the provisional nature of the remedy. While grave risk should not second guess the underlying asylum determination, the legal and evidentiary burdens met in an asylum proceeding could arguably be deemed sufficient to establish a rebuttable presumption of grave risk. As discussed above, this particular analysis is being developed in a separate piece, but it is important to note here that the Hague Convention, as interpreted, presents a conflict with the jus cogens principle of non-refoulement for children—a right that simply cannot be set aside.

The Hague Convention and the Role of the Contemporary Immigrant Child as a Rights Holder

The purpose and spirit of both the Hague Convention and ICARA is to ensure the well-being of the child.[65] However, children are not party to the Hague, and deep questions related to the child's best interests and express desires are not generally considered in Hague litigation.[66] The drafters of the Hague sought to reconcile the notion that a child could be returned against their will by rendering the Hague inapplicable to children 16 years of age and older and by including Article 13(2), the "age and maturity" defense.[67] This defense forecloses the return of the child where "the child objects to being returned and *has attained an age and degree of maturity at which it is appropriate to take account of the child's views*."[68] With respect to best interests, the Hague Convention has been construed as foreclosing any assessment of a child's best interests—a determination best left to the venue deciding the final child custody dispute.[69]

These principles, however, create a significant tension between the Hague Convention and the CRC, which considers the best interests of the child (including, as incorporated, an analysis of the child's express desires) as the paramount factor in judicial decisions affecting the child.[70] The CRC is largely considered the seminal framework for approaching decisions that impact a child. The document is arguably customary international law, being universally ratified[71] and widely implemented by state parties.[72] This begs the question: can Hague practice be adapted to meaningfully consider the child's wishes or best interests when Hague doctrine perceives of those concepts as only properly considered in a child custody hearing—which the Hague, decidedly, is not?

In theory, there should be room to honor both the normative rules for considering cases affecting the child and the principle that Hague litigation should be merely a vehicle for deciding the appropriate child custody forum. It also bears noting that a Hague decision can be a de facto child custody determination for certain undocumented immigrant parents, unable to leave the United States to pursue a child custody order abroad and forced to choose safety and stability over the right to family integrity.

Age and Maturity Defense

Historically, it has been emphasized that a child's objection alone does not automatically trigger the age and maturity defense.[73] U.S. law has noted that a "child's objection is not tantamount to 'the wishes of the child.' While the wishes or desires of a child may be appropriate for a court to consider in a custody case, they are not relevant in a Hague return case."[74] As a result, courts are required to

> distinguish between a child's objections as defined by the Hague Convention and the child's wishes as in a typical child custody case, the former being a 'stronger and more restrictive' standard than the latter. *Where the particularized objection is "born of rational comparison"* between a child's life in the country of wrongful retention and the country of habitual residence, the court may consider the child's objections to be *a mature objection worthy of consideration*.[75]

This approach to a child's express objection, however, is difficult to reconcile with the CRC. The language of the CRC was adopted approximately a decade after the Hague was drafted.[76] The CRC at Article 12 provides that state parties must "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given *due weight in accordance with the age and maturity of the child*."[77] In addition, the child must be "provided the opportunity to be heard in any judicial and administrative proceedings affecting the child."[78]

Where the Hague does not provide standing for children to participate in the case, the CRC demands that children be provided judicial opportunity to be heard. Moreover, the threshold for considering the objection appears to be much higher for Hague cases. Rather than giving weight to a child's view in accordance with their age and maturity, the child must demonstrate that their views are "born of a rational comparison" between life in the United States and their life abroad. In practice, this means that "[c]ourts have found the opinions of children as young as eight years old to be sufficiently mature, whereas other courts have found the opinions of fourteen- and fifteen-year-olds failed to meet this standard."[79]

Best Interests and the Grave-Risk Defense

Circuit Courts generally recognize that Hague petitions do not consider "best interests" as dispositive of a grave-risk or other defense.[80] Because Hague petitions are not designed to settle the child custody dispute—which would involve an in-depth analysis of a child's best interests—Courts are reluctant to engage in best interest determinations at all under the Hague.[81]

This position, however, is difficult to reconcile with the CRC.[82] The single most pervasively recognized article of the CRC concerns the use of a best interests standard in any decisions impacting the child.[83] The CRC states unequivocally that "[i]n all actions *concerning* children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[84] It is worth exploring ways in which the most pronounced CRC principles of best interests, including a child's safety and a child's right to be heard, can be carefully incorporated into the existing framework of the remedy without undermining the intentionally procedural design of the relief.

It is also worth noting again here that for some undocumented migrant parents, this provisional remedy will serve as a final decision on custodial rights because they are unable to leave the United States to pursue a child custody determination abroad. This forces parents, seeking asylum or otherwise seeking to normalize their legal or financial status, to choose between their children and their safety or the very ability to provide meaningfully for their child.

Reconciling the Child's Rights at the Intersection of Immigration and Hague Proceedings: The Potential Role of the Child Advocate

There is a way in which the rights of the child can be properly safeguarded in cases at the intersection of Hague and immigration proceedings. A migrant child in removal proceedings whose parent has alleged abduction, who is seeking an immigration benefit over the objection of the parent, or who was separated from their parents at the border should be referred for the appointment of an independent child advocate.[85] Child advocates serve a role similar to that of guardian ad litem in state court custody cases, and they are authorized by federal statute to advocate for the best interests of the child before various government stakeholders.[86] Appointment of a child advocate will also foster compliance with CRC guidance on unaccompanied and separated children. CRC General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin explains that "the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child."[87]

For certain eligible migrant children, the Trafficking Victim's Protection Act (TVPRA) authorizes the Department of Health and Human Services to appoint an independent child advocate—best interests guardian ad litem—to "child trafficking victims and other vulnerable unaccompanied alien children."[88] Pursuant to the TVPRA, child advocates provide recommendations to government stakeholders on a variety of decisions affecting the child, including, but not limited to, the ability of the child to safely repatriate to the caretaker (often, the left-behind or deported parent) in the child's country of origin (generally, the place of last habitual residence).[89] These appointees can be an extraordinarily useful tool in determining the propriety of ordering a Hague repatriation of a child in immigration proceedings.

The purpose and spirit of both the Hague Convention and ICARA is to ensure the well-being of the child.[90] There is no more direct process for protecting a child's well-being than to ensure that their best interests are considered, in a Hague appropriate manner. Any consideration of best interests by the child advocate will treat as paramount both the child's right to be heard and the child's right to safety (life, survival, and development).[91] A federally appointed child advocate for certain eligible children[92] will provide a mechanism for protecting the best interests of the child, including the child's expressed interests in immigration proceedings. This may be necessary because in some Hague cases (such as those cited under the age and maturity defense section "Elements Establishing the Propriety of the Prompt Return of the Child and the Intersection with Immigration Law," *supra*), children may not want to be repatriated to the left-behind parent. Indeed, in some instances, they may be eligible for relief from deportation because of abuse or neglect connected with the left-behind parent.[93]

While a federally appointed child advocate generally only makes recommendations to stakeholders in the immigration context (to the Office of Refugee Resettlement, the Department of Justice, or the Department of Homeland Security), he or she can certainly provide a benefit to cases in which either a formal or informal Hague process is undertaken beyond recommendations to the usual agencies. For example, the child advocate can offer feedback for Department of State inquiries on children in ORR custody. Similarly, a federally appointed child advocate can provide insight into and evidence of the dangers a child may face upon repatriation both at the hands of the parent, but also under the rubric of the grave-risk analysis.

While the Hague may not call for a formal best interests recommendation, a child advocate may nonetheless provide a thorough assessment of the child's ability to safely repatriate or provide evidence of whether there exists a grave risk to the child upon return. Given the constraints of the Hague and the clear mandate that the best interests of the child not dictate the outcome, any attempts to consider best interests would have to be carefully circumscribed so as not to run afoul of the mandates of the Convention.

Parent-Child Border Separations and the Case for Hague Considerations

Cases of parents and children involuntarily separated at the United States border present special considerations under the Hague Convention. When a child is removed from their parent's care at the U.S.-Mexico border, by virtue of the separation their custodial rights are called into question. This may not automatically trigger Hague considerations, but can lead to Hague-related inquiries to protect the separated child's well-being and the parent's Constitutionally protected right to custody of their child.[94]

Since the June 2018 injunction in Ms. L.,[95] the government has continued to separate thousands of parents and children at the border. By some advocate accounts, the average age of a separated child is 6.87 years old.[96] The basis for separation generally involves "child welfare concerns," but by most accounts "purported reasons for the separation were insufficient under child welfare laws to justify the children's separation and that the separations were contrary to the children's best interests."[97] These separations, as a practical matter, last several months—often during critical developmental periods for the child.[98]

As mentioned, the Hague Convention is triggered where a child is wrongfully taken to or *wrongfully retained in* the United States. In cases of parent-child border separation, a child is not wrongfully taken from their place of last habitual residence. Instead, as a general matter, the custodial parent travels willingly with their child to the United States and the other custodial parent consents to being left behind. However, once a child is separated from their parent and held by the U.S. government for an extended period of time (including beyond the parent's repatriation), the question of whether a child is being wrongfully retained in the United States emerges. Assuming the child and parents all agree on prompt reunification, this inquiry can be parsed into multiple parts to litigate a Hague case against the government for violating U.S. obligations under the Hague by unlawfully retaining a child in violation of a parent's custodial rights: (1) Who is wrongfully retaining the child? (2) When is wrongful retention triggered? 3) Must a custodial parent be repatriated to trigger the Hague?

Who Is Wrongfully Retaining the Child?

While the Hague has traditionally been employed to settle disputes between parents,[99] nothing in the Hague, nor its domestic implementing legislation, limits the scope of its application to private citizens or government entities. To the contrary, the Convention and ICARA clearly encompass institutions within the definition of those considered eligible for standing on either side of the equation.[100] As a result, the Hague can be interpreted to reach situations in which the child is being wrongfully retained by government

officials. Specifically, federal government entities exercising custody of the child have been the subject of litigation under past Hague cases involving unaccompanied minor children.[101]

Has the Parent Acquiesced to the Removal and Retention of the Child?

Parents may be placed in the position of consenting to the initial separation in order to pursue their claim for protection in the United States. As a result, the disruption of custodial rights at the border or port-of-entry may be perceived as being executed with the consent of the parent. It is critical to note here that many parents have reported the use of coercive measures to secure the separation, including threats of immediate deportation, lost immigration remedies, and permanent loss of custodial rights of their child.[102]

This perceived temporary consent or acquiescence to the separation ends with the parent's repatriation—assuming the parent does not agree to repatriation without their child. Legal practitioners have learned that ICE requires parents to sign a document consenting to their repatriation without their children. Without seeing this document, it is difficult to know the nature of the consent sought. However, this document is likely key to determining if and when U.S. obligations under the Hague are breached—*i.e.*, at the time of separation, upon repatriation or at a time thereafter.

Article 3 of the Hague expressly provides that a state is not bound to order the return of the child where the parent "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention."[103] Consent and acquiescence are distinct concepts applying to permission prior to removal versus permission after removal, respectively.[104] The Third Circuit explains that

> Article 3 proscribes wrongful removal and/or wrongful retention, as applicable. The inquiry does not necessarily end with the petitioner's consent to the child's removal. If the petitioner agrees to a removal under certain conditions or circumstances and contends those conditions have been breached, the court must also examine any wrongful retention claim . . .[105]

This construction of consent and acquiescence is particularly important for the parent who agreed to the separation at the border to pursue a protection-based claim before the immigration court. The Third Circuit has explained that ". . . the defense of acquiescence has been held to require 'an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.'"[106] The

general formulation for acquiescence "turns on the subjective intent of the parent who is claimed to have acquiesced."[107] Thus, if a mother agreed to place the child in federal custody pending a determination of her asylum claim, then this form of consent can only be evaluated with regard for the expectation that the separation would be limited in duration, rather than a renunciation of rights or a consistent attitude of acquiescence over time. Once a parent determines it is best to reassert custodial rights, that assertion should made in writing and delivered to the relevant authorities in possession of their child.

Must a Custodial Parent Repatriate to Trigger the Hague?

The purpose of the Hague is to create a remedy that promptly returns the child to the place of last habitual residence as expeditiously as possible. As a result, there is an argument that the Hague is triggered the moment the parent is seeking to reunify with the child in their home country. If the parent is facing deportation or voluntary departure, the Hague could be considered as a means of ensuring joint repatriation. If the parent is seeking custody of their child upon repatriation, and ICE declines to repatriate the pair simultaneously, it is possible that this gives rise to a breach of U.S. obligations under the Hague. While the structure of the Hague and ICARA contemplates diplomatic resolution prior to litigation, nothing in the Hague or ICARA prohibits a parent from proceeding straight to litigation to resolve a Hague-related matter.

Alternatively, when the parent is returned to the home country and the child's repatriation does not occur immediately thereafter, or the child is being moved into a permanency setting such as long-term foster care, there is a clear violation of U.S. obligations under the Hague. Specifically, if the parent agreed only to the initial separation, and to be repatriated ahead of the child, the failed immediate return of the child could trigger the unlawful retention provision of the Hague Convention. As with any case requiring Hague considerations, this does not require, nor should it result in, the automatic repatriation of the child. Instead, it should be adjudicated pursuant to the guidance above, including with an eye toward incorporating the rights of the child.

Finally, it is possible that the separated parent need not always be repatriated in order to trigger obligations under the Hague. In certain parent-child separation cases, where the separation will be decidedly protracted, and it is agreed by both parents that the child should be repatriated, the failure to promptly repatriate the child can give rise to a breach of U.S. obligations under the Hague. Take, for example, the case of a four-month-old infant in ORR custody—separated from his mother who was sentenced to 364 days in federal criminal custody. Both parents immediately agreed, upon the mother's sentencing, that the infant should be repatriated to the father who at all times exercised custodial rights.

The left-behind parent, in this instance, no longer consented to the child remaining in the United States. In this case, however, it took months for the authorities to calendar the infant for removal proceedings, insisting that the then-eight-month-old infant must appear and request voluntary departure. There were further delays in effectuating the voluntary departure order. In total, the infant was in custody from four months to ten months of age. The failure of ICE to promptly return the child should be viewed as a breach of U.S. obligations under the Hague. The Convention advocates for resolution of the legal case "within six weeks of initiation."[108] Indeed, "some courts treat the six-week mark as a deadline by which the case must be concluded."[109] The comparison makes evident the absurdity of ICE's timeline for repatriation of separated children.

Practical Considerations for Hague Cases That Intersect With Immigration Proceedings

Hague considerations may arise at different stages of an immigration process. For example, a child may be apprehended at the border upon initial entry into the United States, at which time the Department of Homeland Security may encounter an Interpol report on a child abduction. Other cases are not signaled as implicating U.S. obligations under the Hague until further down in the immigration process. For example, the left-behind parent may not file a formal legal Hague petition until after a child has applied for asylum. The goal of this section is to highlight practical considerations in handling Hague cases *at any point* during which there is interplay or conflict with the child's immigration proceedings.

Government Agencies and the Summary, Unilateral Return of a Child

The purpose of the Hague Convention is to ensure the prompt repatriation of a child who was wrongfully taken from the left-behind parent. At first glance, it may seem advantageous for government agencies to cancel the Notice to Appear, decline prosecution of the immigration case, and summarily repatriate a child to their country of origin where one parent alleges abduction. However, the determination of whether the child was, in fact, wrongfully taken or whether there is a defense to return is a nuanced legal interpretation. The rights of either parent, as well as those of the child, demand procedural due process protections to ensure these cases are not handled arbitrarily or in a manner adverse to the child. Judicial oversight is critical to any allegations of child abduction. Cancelling a Notice to Appear or otherwise unilaterally terminating judicial proceedings[110] may be inappropriate or may even violate

U.S. obligations under the Hague. As such, with few exceptions, judicial proceedings are generally the only mechanism through which to resolve the complex legal question around the propriety of returning or repatriating a child.[111]

Propriety of Consular Outreach

Pursuant to the Vienna Convention on Consular Relations, the United States is obliged to provide specific treatment to certain foreign nationals within the United States.[112] Specifically, certain foreign nationals, including those who have been detained or are in the process of appointment of a guardian, must be guaranteed access to their consular officials. That access must be provided except where the foreign national refuses such access.[113]

Access to the foreign national's consulate can be beneficial for a variety of reasons. Consulates are often able to quickly secure government records such as birth certificates or court orders from the country of last habitual residence. Similarly, Consulates are able to connect their foreign nationals to the legal services they may need to proceed under both the Hague and in immigration proceedings. Of course, where a parent or child has sought asylum from their country of nationality/last habitual residence, extreme caution must be exercised so as not to violate the confidentiality of those proceedings. The Code of Federal Regulations provides a detailed summary of the standard of care necessary for any information contained in or pertaining to an application for asylum.[114]

Stay of Child Custody Proceedings Relevant to Special Immigrant Juvenile Status

Children pursuing Special Immigrant Juvenile Status encounter special considerations in the wake of Hague proceedings. Specifically, the Hague contains a mandatory stay of child custody proceedings until merits of the Hague application can be resolved. Specifically, the Hague at Article 16 states that, once a Hague petition is filed, "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention."[115] This mandatory stay of custody proceedings may prevent a child from pursuing a predicate order necessary to acquire the Special Immigrant Juvenile Visa. If this happens, immigration practitioners are encouraged to consult with Hague experts capable of assisting in the case analysis to first resolve the Hague inquiry.

Resources Available for Separated, Detained Parents and Children

In order to protect the interests of all parties, parents separated from their children at the border should be directed to Hague-competent attorneys to provide advice regarding their custodial rights. This should occur at the time of separation or at any time thereafter after, including throughout the course of their detention. For example, where a parent faces repatriation without a child and is being asked by ICE to sign away their right to joint repatriation, that parent should be offered the advice of counsel. Similarly, when a parent faces custodial disruption, including separation at the border, the parent's consulate should be notified to provide them with advice and to assist in negotiations with ICE.

To connect children to their parents or otherwise ensure that the parent's concerns are being addressed, a child advocate may be requested for a separated child.[116] As a practical matter, child advocates work with all the various stakeholders in a separated child's case—personnel from ORR, DHS, DOJ, and the like. Child advocates can facilitate communication with the parent and child while both remain detained in separate facilities. Best interests advocacy generally offers full consideration of the parent's wishes for the child where those wishes coincide with the express desire of the child or where child is unable to express a desire (such as where the child is preverbal).[117]

Separated and left-behind parents should be made aware of U.S. obligations under the Hague process. Parents can learn about their rights and investigate Hague processes—including the resources they need to assert their rights—by connecting first with the Central Authority in their home country. These agencies can assist the left-behind parent to in determining whether it is appropriate to file a police report, in determining their eligibility to file a Hague complaint, and can provide attorney referral resources.

Conclusion

Many Hague practitioners are unfamiliar with the immigration landscape, and the implications of certain immigration practices on Hague obligations. Similarly, immigration practitioners are not necessarily versed in U.S. obligations under the Hague. As parental rights are increasingly interfered with by U.S. immigration officials, immigration practitioners should take a new look at the Hague Convention on Child Abduction to determine whether there are concrete mechanisms for enforcing U.S. obligations under the Hague. At the same time, practitioners are encouraged to ensure that the rights of children, as they have evolved, are properly observed through immigration proceedings, including those where the Hague Convention is implicated.

The Hague, as it is currently interpreted, can present significant tensions with U.S. obligations under the Refugee Protocol, as implemented through the Refugee Act of 1980. Moreover, the Hague presents conflicts with the Convention on the Rights of the Child—specifically, the right of a child to participate in a proceeding that affects their lives directly and to have their best interests considered. As these cases emerge, practitioners are encouraged to advance the rights of the contemporary immigrant parent and child through deliberate, careful, and creative advocacy strategies.

Notes

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1. *See generally*, Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501 [hereinafter "Hague Convention"]; Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

2. *Id.* The United States has implemented the Hague through the International Child Abduction Remedies Act (ICARA), see International Child Abduction Remedies Act, 42 U.S.C. § 16601(a)(1) [hereinafter ICARA].

3. This article is not meant to fully exhaust discussion of all areas where the Hague Convention may conflict with immigrants' rights. For example, the article raises—but doesn't engage in a robust analysis of—the interplay between the Hague and the right to seek asylum or related relief in the United States. In such situations, the courts have begun to wrestle with difficult questions produced by the contradictory nature of the two statutory schemes, ICARA, on the one hand, and the asylum statute, INA § 208 and related provisions, on the other. *See, e.g.*, Sanchez v. R.G.L., 761 F.3d 495 (5th Cir. 2014). In addition, because of the fact that the child is not a party to a Hague proceeding, it is important to consider the possibility that Hague courts could appoint guardians, under the appropriate circumstances, to represent the child's interests. In my future work, I will address these two important matters that are raised at the intersection of the Hague and child migration.

4. U.N. Children's Fund [UNICEF], Convention on the Rights of the Child: A study of legal implementation in 12 countries, published in conjunction with the Centre

for Children's Rights, Queen's University Belfast, at page 4, *available at* https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,368351,en.pdf.

5. For purposes of this article, "proceedings" is defined to include removal proceedings pursuant to INA § 240 as well as any other proceedings before the Department of Homeland Security, including § 235(b) expedited removal and any application for an immigration benefit before the Department of Homeland Security whether or not the applicant is in adversarial proceedings before the Department of Justice.

6. For consultation and technical assistance, please reach out to the author and/or other faculty at Loyola University Chicago's ChildLaw Center. Other subject matter experts can be found at the Young Center for Immigrant Children's Rights, UC Hastings' Center for Gender and Refugee Studies, and the University of Houston Law Center.

7. *See generally* Hague Convention, *supra* note 1; Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

8. Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, Federal Judicial Center International Litigation Guide (2d ed. 2015), *available at* https://www.fjc.gov/sites/default/files/2015/Hague%20Convention%20Guide.pdf [hereinafter Guide for Judges].

9. ICARA, *supra* note 2.

10. Immigration and Nationality Act (INA) § 240.

11. INA § 242.

12. *Id.* at ix (stating that "[a] Hague Convention case is not a child custody case. Rather, a Hague Convention case is more akin to a provisional remedy—to determine if the child was wrongfully removed or kept away from his or her habitual residence, and, if so, then to order the child returned to that nation"; the term "provisional remedy" will be used throughout this article to reference the final disposition of a Hague case in federal court.).

13. Sarah J. Diaz, *Parent-Child Border Separations Violate International Law: Why it matters and what can be done to protect children and families*, Geo. Hum. Rts. Inst., Perspectives in Human Rights No. 6 (Aug. 2018) [hereinafter Parent-Child Border Separations].

14. ICARA, *supra* note 2.

15. *Id.*

16. Hague Convention, *supra* note 1 (emphasis added).

17. There are rare circumstances in which a child could be repatriated absent a judicial proceeding; see *infra* note 111 for additional discussion.

18. Sanchez v. R.G.L., 761 F.3d 495, 508 (5th Cir. 2014).

19. *Id.*

20. Guide for Judges, *supra* note 8, at 6.

21. The legal term "last habitual residence" is defined and discussed below at the section Elements Establishing the Propriety of the Prompt Return of the Child & the Intersection with Immigration Law.

22. Hague Convention, *supra* note 1, art. 6.

23. ICARA § 2009, *supra* note 2.

24. This term is commonly used in negotiations and proceedings under the Hague Convention and refers to the parent seeking return to the country of last habitual residence. The legal term "last habitual residence" is defined and discussed below at the

section Elements Establishing the Propriety of the Prompt Return of the Child & the Intersection with Immigration Law.

25. Hague Convention, *supra* note 1, art. 1 (emphasis added).

26. Hague Convention, *supra* note 1, art. 3.

27. The purpose of laying out the elements is merely to acquaint the reader with the concepts entrenched in this treaty. It is not designed to be a comprehensive analysis of the legal elements of the Hague. For additional reading on the Hague Convention elements, see Guide for Judges, *supra* note 8.

28. ICARA *supra* note 2 ("providing under § 9003(e)(1) that [a] petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention."); *see also* Hague Convention, *supra* note 1, arts. 3 and 4.

29. Guide for Judges, *supra* note 8, at 27.

30. *Id.*

31. Hague Convention, *supra* note 1, arts. 3 and 4 (emphasis added).

32. For further reading on the interplay between these elements and immigration cases, see Parent-Child Border Separations, *supra* note 13.

33. Membreno Peralta v. Escobar Garay, No. H-17-1296 (S.D. Tex. Jan. 12, 2018).

34. Guide for Judges, *supra* note 8, at xiii.

35. *Id.*

36. Mozes v. Mozes, 239 F.3d 1067, 1078 (9th Cir. 2001) (*citing* C v. S (minor: abduction: illegitimate child), [1990] 2 All E.R. 961, 965 (Eng.H.L.)) (stating that "[w]hile the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone.... When the child moves to a new country accompanied by both parents, who take steps to set up a regular household together, the period need not be long.... On the other hand, when circumstances are such as to hinder acclimatization, even a lengthy period spent in this manner may not suffice.").

37. *Mozes*, 239 F.3d at 1080-81 (stating that "[t]he threshold test is whether both parents intended for the child to abandon the habitual residence left behind."); *see also* Guide for Judges at page xiv (explaining that "[t]here is a split among the circuit courts concerning the factors to look to in determining a child's habitual residence and, in particular, the role that the intent of the parents plays in the acquisition of a new habitual residence. An apparent majority of the circuits follow the rationale of the Ninth Circuit opinion in *Mozes v. Mozes*. That decision focuses on the question whether a child's habitual residence has changed based on whether the parents have demonstrated a shared intention to abandon the former habitual residence and, if so, whether there has been a change in the child's geographic location for a period of time that is sufficient for the child to become settled or acclimatized. Other circuits, such as the Third, Seventh, and Eighth Circuits, place the primary focus of determining habitual residence on the degree that the child has become settled in his or her new environment"); *see also* Membreno Peralta v. Escobar Garay, No. H-17-1296 (S.D. Tex. Jan. 12, 2018).

38. Hague Convention, *supra* note 1, art. 3(a) (stating that "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention ... The rights of custody mentioned in sub-paragraph a) above,

may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State").

39. *Id.* art. 3(b).

40. These cases might include, for example, a biological father who does not appear on a birth certificate and has failed to comply with the national laws of legitimation or a legitimated father who has no biological relationship to the child, does not appear on the birth certificate, and has failed to legally marry the child's mother.

41. Hague Convention, *supra* note 1, arts. 12 and 13 (emphasis added).

42. *See generally* Guide for Judges, *supra* note 8.

43. Hague Convention, *supra* note 1, arts. 12 and 13.

44. Guide for Judges, *supra* note 8, at 95.

45. Lozano v. Montoya-Alvarez, 697 F.3d 41, 56-57 (2d Cir. 2012). "[S]ettled" should be viewed to mean that the child has significant emotional and physical connections demonstrating security, stability, and permanence in its new environment." *See, e.g.*, In re N., [1990] 1 FLR 413 (Eng. High Court of Justice, Fam. Div.), *available at* www.hcch.net/incadat/fullcase/0106.htm. In making this determination, "a court may consider any factor relevant to a child's connection to his living arrangement." *Duarte*, 526 F.3d at 576. Such an approach is in line with the Convention's overarching focus on a child's practical well-being. Factors that courts consider should generally include: (1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly; (5) the respondent's employment and financial stability; (6) whether the child has friends and relatives in the new area; and (7) the immigration status of the child and the respondent.

46. Hague Convention, *supra* note 1, art. 12 ¶ 2.

47. Lozano v. Montoya-Alvarez, 133 S. Ct. 2851 (2013).

48. *Lozano v. Montoya-Alvarez*, 697 F.3d at 56.

49. Michael Singer, *Across the Border and Back Again: Immigration Status and the Article 12 "Well-Settled" Defense*, 81 Fordham L. Rev. 3693 (2013).

50. Parent-Child Border Separations, *supra* note 13.

51. Hague Convention, *supra* note 1, art. 13(b).

52. Guide for Judges, *supra* note 8, at 109 (*citing* Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013), Silverman v. Silverman (Silverman II), 338 F.3d 886, 896 (8th Cir. 2003); Baran v. Beaty, 526 F.3d 1340, 1342 (11th Cir. 2008); Norinder v. Fuentes, 657 F.3d 526 (7th Cir. 2011); Cuellar v. Joyce (Cuellar I), 596 F.3d 505, 509 (9th Cir. 2010); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007); Blondin v. Dubois (Blondin II), 238 F.3d 153 (2d Cir. 2001); Walsh v. Walsh, 21 F.3d 204 (1st Cir. 2000); In re Marriage of Eaddy, 144 Cal. Rptr. 4th 1202, 1212 (Cal. Ct. App. 2006)).

53. Jennifer Baum, *Ready, Set, Go to Federal Court: The Hague Child Abduction Treat, Demystified*, ABA Section Litigation, Children's Rights (July 2014), *available at* http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-ready-set-go-federal-court-hague-child-abduction-treaty-demystified.html.

54. *Id.* (*citing* *Blondin v. Dubois* 238 F.3d 153).

55. INA § 101(a)(27)(J).

56. INA § 208.

57. INA § 241(b)(3).

58. 8 C.F.R. § 208.17.

59. Sanchez v. R.G.L., 761 F.3d 495, 508 (5th Cir. 2014).

60. Katherine Norrise, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 Cal. L. Rev. (Feb. 2010).

61. *Id.*, *citing* Merle H. Weiner, Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 2008 Utah L. Rev. 221, 288 (2008).

62. *Id.* at 174.

63. *See generally* Comm. on the Rights of the Child, General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter "General Comment No. 6"] (stating that "States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.").

64. The United States chose to adhere to the guidance provided in the Refugee Convention when it ratified the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol"). The Refugee Act of 1980 indicated the United States' intention to conform to international standards. Indeed, the Refugee Act of 1980 contains nearly identical language to Article 1 of the Refugee Protocol. *Compare* U.N. Convention relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"]; Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 to Refugee Act, Pub. L. No. 96-212, 94 Stat. 102. (codified at 8 U.S.C. § 208) (1980).

65. *See* Hague Convention, *supra* note 1; *see also* ICARA, *supra* note 2.

66. *Sanchez v. R.G.L.*, 761 F.3d at 508.

67. *See* Elisa Pérez-Vera, Explanatory Report, in 3 Actes et Documents de la Quatorzième session (1982) ("The Pérez-Vera Report is the official commentary of the Reporter to the proceedings leading to the adoption of the 1980 Hague Convention by the Hague Conference on Private International Law.").

68. Hague Convention, *supra* note 1, art. 13 (emphasis added).

69. Guide for Judges, *supra* note 8.

70. United Nations Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 I.L.M. 1448, at art. 3(1) [hereinafter CRC].

71. The United States is the only country that has not ratified the CRC.

72. Research indicates tremendous success in the implementation of the central tenets of the convention. As of 2013, 70 nations incorporated child law statutes as part of legal reform efforts. Integration of the principles of the CRC were reported throughout the 12 nations analyzed in a 2012 UNICEF study of the CRC's legal implementation (UNICEF Study). The general principle most pervasively recognized across the analyzed countries was that of the best interests of the child, Article 3 of the CRC. *See generally*

U.N. Children's Fund [UNICEF], Convention on the Rights of the Child: A study of legal implementation in 12 countries, published in conjunction with the Centre for Children's Rights, Queen's University Belfast, at page 4, *available at* https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,368351,en.pdf. *See also* U.N. Children's Fund [UNICEF], Law Reform and Implementation of the Convention on the Rights of the Child, published by the UNICEF Innocenti Research Centre, https://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf.

73. *Id.*

74. Guide for Judges, *supra* note 8, at 120.

75. Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009) (emphasis added).

76. CRC, *supra* note 70.

77. *Id.* at art. 12 (emphasis added).

78. *Id.*

79. Guide for Judges, *supra* note 8, at 124 (*comparing* Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002)); Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957-58 (E.D. Mich. 2001) *with England*, 234 F.3d at 272-73 (finding fourteen-year-old child did not meet standard); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (returning a fifteen-and-a-half-year-old despite objection); Barrera Casimiro v. Pineda Chavez, No. Civ.A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. 2006) (unreported disposition) (finding fifteen-year-old failed to appreciate her immigration status as an incident of her nonreturn).).

80. Guide for Judges, *supra* note 8 (stating "As a result, evidence focusing on the child's 'best interests' or a choice between parents is not relevant."); *see also* Chafin v. Chafin, 133 S. Ct. 1027 (2013) (stating "In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests.").

81. *Chafin*, 133 S. Ct. 1027.

82. Hague expert, Bruce Boyer, Professor of Law and Social Justice and Director of the Civitas ChildLaw Clinic, argues, for example, that the Hague is a venue treaty that does not foreclose the analysis of best interests but instead offers a procedure whereby to determine where the best interests should be considered.

83. U.N. Children's Fund [UNICEF], *Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, published in conjunction with the Centre for Children's Rights, Queen's University Belfast, at page 4, *available at* https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Filetoupload,368351,en.pdf, (hereinafter "UNICEF Study").

84. CRC, art. 3, *supra* note 70 (emphasis added).

85. 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-231) (authorizing the Secretary of Health and Human Services "to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children").

86. *Id.*

87. General Comment No. 6, *supra* note 63.

88. 8 U.S.C. § 1232(c)(6) (Westlaw through Pub. L. No. 115-231). To refer a child for appointment of a child advocate, visit the Young Center for Immigrant Children's Rights referral portal, *available at* https://www.theyoungcenter.org/child-

advocate-program-young-center. If a child has not been designated an unaccompanied alien child (UAC), particularly vulnerable children may seek the appointment of a child advocate directly from the immigration court.

89. It is important to note that child advocates submit Best Interests Recommendations on a host of issues for children in custody—for example, release from custody, reunification with family in the United States, right to seek protection as a defense to removal.

90. *See* Hague Convention, *supra* note 1; *see also* ICARA, *supra* note 2.

91. *See* CRC, *supra* note 70; *see also* Comm. on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶ 76, U.N. Doc. CRC/C/GC/14 (May 29, 2013); *see also* Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, Framework for Considering the Best Interests of Unaccompanied Children 5, 9-11 (2016) [hereinafter Interagency Best Interests Framework].

92. 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-231).

93. *See Sanchez v. R.G.L.*, 761 F.3d at 508.

94. Ms. L., et al. v. Immigration & Customs Enforcement (ICE), 18cv0428 DMS (MDD) (S.D.C. June 26, 2018) (stating that "[family separation as described in the complaint] sufficiently describe government conduct that arbitrarily tears at the sacred bond between parent and child, and is emblematic of the 'exercise of power without any reasonable justification in the service of an otherwise legitimate governmental objective[.]' *Lewis*, 523 U.S. at 846. Such conduct, if true, as it is assumed to be on the present motion, is brutal, offensive, and fails to comport with traditional notions of fair play and decency. At a minimum, the facts alleged are sufficient to show the government conduct at issue 'shocks the conscience' and violates Plaintiffs' constitutional right to family integrity.").

95. *Id.*

96. Memorandum in Support of Motion to Enforce Preliminary Injunction, *Ms. L., et al., v. ICE*, 18cv0428 DMS (MDD).

97. *Id.* at 91.

98. The author has spent over 15 years practicing immigration law and policy with a focus on unaccompanied immigrant children. Having spent the last several years practicing with the sole government contractor providing best interests recommendations for children in immigration custody (The Young Center for Immigrant Children's Rights) where sources are unavailable, the author refers to her personal knowledge of these events.

99. Guide for Judges, *supra* note 8, at ix. (Stating that "[t]he most typical situation that will trigger operation of the convention occurs when one parent relocates with a child across an international border without the consent of the left-behind parent or without a court order permitting that relocation").

100. *Compare* Hague Convention Art. 8, *supra* note 1, stating that "[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child" with ICARA §§ 9002(4) and (5) stating that "(4) the term 'petitioner' means any person who, in accordance with this Act, files a petition in

court seeking relief under the Convention; (5) the term 'person' includes any individual, institution, or other legal entity or body."

101. *Sanchez v. R.G.L.*, 761 F.3d at 508.

102. Letter to John V. Kelly, Acting Inspector Gen., Dep't of Homeland Sec., *Re: The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children*, from the American Immigration Council (Aug. 23, 2018), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/the_use_of_coercion_by_u.s._department_of_homeland_security_officials_against_parents_who_were_forcibly_separated_from_their_children_public_fin_0.pdf.

103. Hague Convention, art. 3, *supra* note 1.

104. Guide for Judges, *supra* note 8, at 101.

105. Baxter v. Baxter, 423 F.3d 363, 371 (3rd Cir. 2005).

106. *Id.*

107. *Id.*

108. Baum, *supra* note 53.

109. *Id.*

110. *See, e.g.*, 8 C.F.R. §§ 239.2(a)(7), 239.2(c).

111. In rare cases, all parties may agree to the appropriate outcome for the child outside of formal judicial proceedings. In these cases, both parent's wishes are upheld and the child's best interests are represented by an independent federally appointed child advocate before the repatriation occurs. If there is consensus relating to the child's return, it obviates the need for formal proceedings of any kind and a child should repatriated to the parent in home country expeditiously to avoid inadvertently violating U.S. obligations under the Hague.

112. *See generally* Vienna Convention on Consular Relations, signed Apr. 24, 1963, 500 U.N.T.S. 95; 23 U.S.T. 3227.

113. *Id.* at art. 36 ("Communication and contact with nationals of the sending State. 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must

enable full effect to be given to the purposes for which the rights accorded under this article are intended.").

114. 8 C.F.R. § 208.6.

115. Hague Convention, art. 16, *supra* note 1.

116. To refer a child for appointment of a child advocate, visit the Young Center for Immigrant Children's Rights referral portal, *available at* https://www.theyoungcenter.org/child-advocate-program-young-center. If a child has not been designated a UAC, particularly vulnerable children may seek the appointment of a child advocate directly from the immigration court.

117. Interagency Best Interests Framework, *supra* note 91.

From Caravans to the Courts

A Practical Guide to *Matter of A–B–*'s Implication for Transgender Women on the Northern Triangle

Sarah Houston*

Abstract: On June 11, 2018, former Attorney General Jeff Sessions overruled the 2014 precedent decision, *Matter of A–R–C–G–*, which had opened the door to asylum claims based on domestic violence as a product of deeply entrenched patriarchal norms. In *Matter of A–B–*, Sessions held that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." This paper is a practical guide for attorneys representing transgender asylum seekers from the Northern Triangle after *Matter of A–B–*. In order to understand and address the new obstacles facing transgender women seeking safety in the United States, this paper examines the history of transgender asylum claims in the United States and then presents some of the most effective alternative arguments available for overcoming *A–B–*'s heightened standard.

If it is dangerous to be gay, it is almost always more dangerous to be transgender. Transgender women are uniquely vulnerable and subject to gender and racial profiling. They need decision-makers in our immigration system to understand their distinct struggles.

—Aaron Morris, Legal Director, Immigration Equality

Introduction: The Caravan of New Identity

In August 2017, the first trans/gay migrant caravan reached the U.S. border in Arizona, made up of 17 transgender[1] and gay asylum seekers who have come to be known as the "Rainbow 17."[2] The Rainbow 17 met in Mexico, where they began to organize collectively as a response to not only the persecution they had endured in their home countries of Guatemala, Honduras, and El Salvador, but also their subsequent denial of protection from Mexican authorities. When they crossed into the United States, LGBTQ+ activists and social justice organizations such as the Transgender Law Center met them with open arms and giant banners, offering support to the women as they turned themselves over to Immigration and Customs Enforcement (ICE). Groups on both sides of the border waited for news from authorities about their confinement, concerned that the women were being placed in a men's detention

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center.[3] When several of the transgender women were released from custody on parole six weeks later, they were hopeful that they would be able to establish successful asylum claims based on the past psychological and physical abuse they had suffered because of their gender identity.

The ability to raise such gender identity-based persecution claims is a relatively recent legal phenomenon. Starting in the late 1980s, immigration judges (IJs) began to use their discretion to recognize gender-based violence and gang violence claims as a cognizable foundation for asylum.[4] Central Americans from Guatemala, Honduras, and El Salvador fleeing gang and domestic violence targeted at them because of their gender identity have begun to travel northward in larger groups, hoping for safety in numbers as they journey in search of protection as a group. These groups have become known as "caravans." But for so many nonconforming individuals who crossed into the United States (including the transgender women of Rainbow 17, who have now all been released on parole), their valid asylum claims have been called into question following Attorney General (AG) Jeff Sessions's precedent-setting decision in *Matter of A–B–*.[5]

On June 11, 2018, Sessions issued his opinion in *Matter of A–B–* (*A–B–*), vacating the Board of Immigration Appeals' (BIA) decision to grant asylum to a Salvadorian woman who was a victim of unrelenting brutality at the hands of her husband. Sessions rejected the respondent's claim based on her membership in the particular social group (PSG), "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," stating that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[6] The AG overruled the 2014 precedent decision *Matter of A–R–C–G–* (*A–R–C–G–*), which created precedent for asylum claims based on domestic violence that was a product of deeply entrenched patriarchal norms.[7]

As an increasing number of transgender women from Central America cross the border as a result of humanitarian crises in the Northern Triangle,[8] they face a higher threshold for asylum as a result of Sessions's precedent-setting opinion. Before *A–B–*, transgender asylum seekers already faced the significant obstacle of establishing membership in a PSG based on their gender minority status without established precedent for such a distinction. However, because such a large proportion of transgender claims involve domestic violence, forced sex work, and forced sterilization (so-called "corrective rape"),[9] which fall under the category of gender or gang-based violence, *A–B–* makes it even more difficult for transgender women to meet the burden of establishing a well-founded fear of persecution on account of a protected ground.[10]

Even though Sessions's decision did not specifically address transgender asylum seekers, practitioners should be aware of the decision's impact on this vulnerable group and prepare to push back against *A–B–*'s application on their claims, even if they are based on sexual identity and not gender.[11] In order to understand and address the new obstacles facing transgender women seeking

safety in the United States, this paper first presents the history of transgender asylum claims in America. The second section then presents recent statistics that unveil the systemic violence facing transgender women in Honduras, Guatemala, and El Salvador. Finally, it qualifies the legal hurdles that this decision introduced while presenting alternative arguments available for meeting *A–B–*'s heightened standard.

To best represent transgender women from the Northern Triangle, our system must distinguish sexual orientation from gender identity in asylum law. But how can attorneys do this while being the best advocates for their clients? This practical guide for immigration lawyers argues that it is more important than ever for practitioners to put forth both a strong offense and defense. Offensively, advocates should push forward novel conceptions of the PSG and social visibility requirements that more accurately represent transgender women's lived experiences. Defensively, however, they must differentiate each of the facts in their case from *A–R–C–G–*.

History: Transgender Identity Misunderstood

PSG Mischaracterization

In 1990, U.S. asylum law first created the precedent that "sexual orientation" could act a PSG for LGBTQ+ asylum seekers.[12] In *Matter of Toboso-Alfonso*, the BIA rejected the INS's argument that the gay respondent should not be granted withholding of removal because his sexually deviant behavior violated U.S. law, clarifying that the respondent was subject to persecution because of his identity as a gay Cuban man and not because of his sexually deviant behavior.[13] Since then, numerous federal circuit and immigration courts have held that gay men can constitute a PSG.[14]

While claims based on sexual orientation are now widely accepted as valid grounds for asylum, courts have only recently begun to understand and recognize claims based on gender identity. IJs have routinely conflated sexual orientation and gender identity, often categorizing transgender asylum seekers as "gay men with female sexual identities."[15] In *Hernandez-Montiel*, the Ninth Circuit rejected the word "transgender" to describe the respondent even though she was taking hormones and had dressed in women's clothing from a young age.[16] Instead, the court chose to accept "gay men with female sexual identities" as the basis for her claim. This PSG became the standard that courts employed when analyzing all transgender claims, referring to them by male pronouns even though their gender identity was female.[17] It was not until 2015 in *Avendano-Hernandez* that the Ninth Circuit finally recognized the difference between sexual orientation and gender identity.[18] Unfortunately, although the decision referred to the petitioner as a transgender woman from Mexico, the court did not have the opportunity to decide if transgender people could

constitute a cognizable PSG.[19] No court has expressly recognized transgender people as a PSG since then.[20]

This gap in asylum case law is a consequence of the entrenched biases within the U.S. immigration system that institutionalize a particular view of homosexuality and race within the system, encouraging judges to use these stereotypical categories when making decisions while perpetuating rigid doctrinal obstacles that strengthen these stereotypes.[21] Deborah Morgan finds that the "facially neutral asylum process conceals the fact that immigration officials and IJs make decisions based on racialized sexual stereotypes and culturally specific notions of homosexuality."[22] In the aftermath of World War II as countless Europeans from Cold War countries fled, the drafters of the 1951 UN Convention Relating to the Status of Refugees designed protection laws with survivors of World War II in mind, forming a strong association between "refugee" and "war, masculinity, and political dissent" that has led to an enduring gender bias in asylum law.[23] The 1951 Convention also allowed signatories to exclude any non-European refugees from their borders without having to mention race.[24] The laws did not address the layered, multidimensional forms of racial, sexual, and gender oppression experienced by those outside the Western context.[25]

Judges unconsciously imbue their own "culturally specific white constructs of sexuality [as they] attempt to mold the various expressions of sexuality into a gay identity" with which Americans are familiar.[26] The American "substitutive model" of LGBTQ+ identity perpetuates a dangerous and fixed idea of sexual minority status based on upper-class white male norms that is supplanted onto transgender women, requiring public expression of private actions and ignoring the complex relationship between identity and conduct.[27] This model discounts the spectrum of ways in which transgender women express their "performative identity" at different stages in their transition process, when immutable biological traits are in flux.[28] It also ignores the reality that gender minorities are treated differently, and often more harshly, than gay men in patriarchal cultures (such as the ones in the Northern Triangle) because they not only represent an assault on the binaries that uphold the patriarchy, but destroy the conception of the woman as a passive sexual object defined by male desire.[29] These essentialist biases effectively force transgender people into an artificially constrained "sexual minorities" box that they can never fit, allowing IJs to conduct superficial analyses of their claims by erasing their true identities. For example, in three separate transgender appellate claims—Jeune (2016), Moiseev (2016), and Talipov (2014)—the court denied asylum because the claimants had not outwardly manifested their true gender identity until recently.[30] Because they did not begin hormone therapy or don make-up and women's clothing until later in their life, the claimants didn't meet the court's cis-trans binary. In other words, "rather than acknowledging the difficulties of the coming out and transition process, all three courts impose an imperative that transgender applicants come out from the start of their proceedings."

After studying contemporary transgender claims, Stefan Volger found that the more ambiguous cases, in which the narrative of transition is less clear cut, are much more likely to fail.[31] Under our current system, transgender claimants must prove their identity by outwardly exhibiting hyper-feminine or hyper-masculine identities to convince the courts they really are the gender they espouse.

But even if applicants have evidence of overt sexual acts that are in line with IJs' biases, it is often not enough. Courts have created an artificial distinction between LGBTQ+ activity and identity in their nexus analysis, denying relief to sexual and gender minority applicants based on a higher standard than other asylum applicants.[32] Under this artificial distinction, claims of persecution on account of sexual acts, rather than gay or trans status or identity, may be rejected. This status-versus-acts distinction ignores the fact that "merely being visible as a homosexual, intentionally or otherwise, is a homosexual act" and allows courts to conclude that there is no nexus between the PSG and the persecution even in light of systematic oppression by the government.[33] In *Maldonado v. Att'y Gen.*, the IJ held that the applicant was persecuted not because of his membership in a PSG, but because he frequented gay clubs. Although he was detained over 20 times by the Argentinian police, who told him that "faggots need to die," the court concluded that this persecution was not brought on because of his gay identity, but because of social preferences.[34] In *Kimumwe v. Gonzales*, the respondent was detained and expelled from school after he had sexual relations with another boy in his class. Even though he was told he was being detained because he was gay, the lower court concluded the imprisonment was the result of specific homosexual acts in which he "lured" another boy of the same age into a consensual same-sex encounter, not on account of his membership in a PSG.[35] It did not matter that local police chased him, his neighbors beat him and shocked him with electrical wires, or that President Mugabe had outlawed homosexuality. The court concluded that actions of his persecutors were not on account of his sexual orientation, but because of his prohibited sexual misconduct.[36] The BIA and Eighth Circuit upheld this denial of protection, ignoring the strong indicator that the respondent's partner, who identified as straight, was never detained.

These two cases illustrate the obstacles transgender clients face when they are forced to fit their identity into artificial homosexual categories such as "gay men with female tendencies." The malleable and discretionary nature of the distinction between acts and identity allows IJs to use their wide discretion and personal subjectivity in rejecting sexual minority claims. Paul O'Dwyer argues that, although the widespread view that federal courts are a more sympathetic venue for asylum claimants is usually true, "the lack of prescribed, objective standards allows judges to indulge their own prejudices and stereotypes regarding LGBT applicants," making the federal courts a hostile forum in which to bring sexual minority claims.[37] The wide divergence between circuits is evident when one compares the Ninth Circuit's 'flexible social-group test,'

which considers "voluntary associational relationships" in the PSG analysis, to the requirements in less friendly arenas.[38] This lack of uniformity disfavors transgender clients by allowing adjudicators' subjective opinions about sexual minorities, including whether some of the most intimate aspects of one's life are an important indicator of this identity, to color their decision about gender minorities without acknowledging the fundamental differences between the two categories.

Social Distinction and Particularity in Sexual Minority Claims

There has been considerable debate over the requirements of particularity and social distinction (formerly known as "social visibility") in PSG asylum applications of sexual minorities. Between 1985 and 2006, courts applied the internationally recognized *Acosta* "common, immutable" characteristic test when deciding if an applicant was a member of a PSG, ignoring external perceptions of the group.[39] In 2002, the United Nations Refugee Agency (UNHCR) put forward guidelines that embraced both the United States' "protected characteristic" and Australia's "social perception" tests as alternatives, recommending that the court first ask if the trait is immutable, and, if it is not, ask how society actually or probably perceives the group and if they perceive the applicant as a member. In 2006, the BIA purported to adopt the UNHCR guidelines, but replaced "social perception" with "social visibility" without acknowledging this "sudden, significant departure" from PSG precedent.[40] The social visibility test, which was renamed the "social distinction" test to clarify that the BIA did not mean "ocular visibility,"[41] asks if the relevant society perceives those with the characteristic in question as members of a distinct social entity.[42]

This heightened standard ignores the fact that, for members of the most marginalized groups, keeping their minority traits invisible from society may be the key to survival.[43] Many transgender or lesbian victims of abuse will take great pains to seem invisible or to pass as straight within society as a protection mechanism, especially because it is often easier to mask sexual orientation or gender than observable traits such as race or ethnicity. Furthermore, those in power will often purposefully negate the existence of socially unpopular groups to keep their power and preserve the existing social structure. The assumption underlying the social visibility requirement ignores "the ways in which power relations directly shape social identities and influence the relative visibility or invisibility of various groups."[44] In high-conflict settings, such as those in gang-run areas of the Northern Triangle, "socially marginalized groups often are stripped of social agency and denied the ability to define their own identities" because those in power view negating the minorities' existence as intrinsically linked to keeping the dominant group intact. Because those in

power decide if and when transgender and LGBTQ+ communities are seen, the social visibility test may not be the best indicator of asylum eligibility.[45]

With the shift to the social visibility test, adjudicators required actual visibility in society and began to conflate their understanding of LGBTQ+ communities in the United States with that of the home country, supplementing their own understanding of what membership in this subgroup should look like. The Ninth Circuit has warned against courts' propensity to insert "conjecture" when dealing with other cultures, stating that "[n]on-evidence based assumptions about conduct in the context of other cultures must be closely scrutinized," and concluding that "it [is] highly advisable to avoid assumptions regarding the way other societies operate."[46] Different cultures constrain fringe identities in various ways, making it much more difficult in some countries for a person to show any outward indications of group membership. But because the American system focuses on public displays of group membership and "malleable physical characteristics … [rather] than [on] testimony about same-sex relationships and persecution by government officials," transgender women who are from communities that do not recognize "transgender" as a real identity marker will have an insurmountable task when trying to prove social distinction. When your culture does not recognize your gender in language or in law, it is easy for society to ignore your membership in an unacknowledged social group. Not enough is done to account for these nuances in asylum proceedings.

Even if IJs do focus on the cultural perceptions in the petitioner's home country to determine that there is a cognizable group, they tend to require proof of knowledge of gay culture and participation in the applicant's country of origin to prove membership in that group. When deciding if an individual established membership, courts "focus more on knowledge of gay trivia than on actual experiences and culturally relevant identity markers."[47] This penalizes applicants who have actively decided not to participate in the community for fear of violence, ostracization, and death.[48] For applicants who cover their identity to survive or whose outward appearance does not fully match their true gender, they are not likely to meet the heightened standard of social distinction. As a result, "an applicant's inability to produce evidence of participation in the LGBT community leaves adjudicators to rely instead on evidence of harm, conflating the separate elements of persecution-based petitions."[49] This flawed, mixed analysis ignores the fact that a fear of future persecution does not vanish when someone avoids the outward appearance of being a member of a PSG. The BIA and the federal courts have not established a bright-line rule for what constitutes social distinction for trans and gay applicants, reflecting the larger theoretical dilemma of what it means to be a member of a PSG.[50] An applicant's credibility, and ultimate success, should not be based on a judge's level of comfort with nonbinary notions of gender. Better guidance on the social distinction tests for gender nonconforming asylum seekers would protect against some of the underlying biases IJs may hold. It is with these

current legal discrepancies in mind that this paper now offer a short analysis of the violence directed at gender minorities in the Northern Triangle region.

Conceptualizing Persecution in the Northern Triangle: Statistics and Reports

Transgender women in Central America are particularly vulnerable to sexual abuse and targeted gang violence. The Northern Triangle countries of Guatemala, Honduras, and El Salvador have some of the highest murder and impunity rates in the world.[51] Nonconforming LGBTQ+ and transgender individuals are particularly exposed to high rates of violence in these countries in light of patriarchal social norms. These norms produce targeted gang violence and employment discrimination, which force many transgender women to turn to sex work that places them in nightlife environments which breed crime and violence.[52] The Department of State's 2017 Human Rights Reports for all three countries concluded that transgender individuals were particularly subjugated in the employment and education spheres, faced targeted gang member and police violence, and were unable to obtain identification documents displaying their self-identifying gender.[53]

The last decade has been marked by a dramatic increase in this directed violence. In 2015, El Salvador was named the murder capital of the world, with over 6,600 registered homicides for a population of only 6.3 million.[54] From 2003 to 2015, the number of transgender women murdered annually in El Salvador increased 400 percent.[55] In 2015, the Salvadoran human rights organization Asociación Salvadoreña de Mujeres Trans (ASTRANS) found that of the 42 LGBTQ+ victims reported murdered in 2015, 32 were transgender women.[56] It is often the government that perpetuates the violence and harassment against nonconforming individuals.[57] A report by Inter-American Commission on Human Rights (IACHR) found that state police were the most frequent perpetrators of violence against the LGBTQ+ community, with trans women most vulnerable to abuse and arbitrary detention as a result of the laws of "morals and good customs," including the 2001 Police and Social Coexistence Act.[58]

Even when transgender women flee the rocketing levels of discrimination and gender-based violence in their home countries, they often cannot find safety in neighboring countries. In 2016, Amnesty International released *No Safe Place*, a report that illuminated the systematic and interlocking abuses awaiting the large portion of persecuted women who make the difficult decision to seek refuge in Mexico.[59] During the perilous journey and once in Mexico, nonconforming individuals are subjected to human rights abuses by Mexican immigration agents and police in processing and detention centers, where they are often placed in communal cells reserved for men.[60] The

risk of persecution from the gangs that threatened, attacked, and kidnapped them in their home countries does not disappear either, as these gangs have established integrated networks in Mexico.[61] In 2016-17, UNHCR found that two-thirds of LGBTI immigrants with whom they spoke had faced sexual and gender-based violence in Mexico after they crossed the border.[62] The Mexican government refuses to protect this defenseless population, as an estimated 99 percent of reports of abuse by security forces and Mexican migration services go unpunished.[63]

Transgender individuals in the Northern Triangle experience multiple forms of discrimination that intersect and are intrinsically linked to the patriarchal and highly religious cultures that prevail in the three countries. The Central American "machismo" culture that legitimizes men's dominance over women and those with feminine characteristics is embedded in state institutions and wider society, resulting in "human rights abuses against lesbian and bisexual women [that] are shaped and determined by particular gender prescriptions and standards."[64] The acute transphobia in Central America is apparent when you compare it to larger trends. Transgender Europe (TGEU) determined that between 2008 and 2016 an estimated 2,264 trans people were murdered in the Americas, but noted that "78% of homicides of transgender people were concentrated in Latin America, making evident the calcification of patriarchy and machismo in those societies."[65]

The patriarchal norms described above are often most apparent when one examines the gangs that control large territories within the region. Most gang claims coming from the Northern Triangle stem from persecution by Mara Salvatrucha (MS-13) and Calle 18, which have over 85,000 members in the region that allow the groups to thrive off of highly complicated and dispersed networks.[66] Because "Las Maras" survive off of respect and reputation, any resistance to recruitment or extortion usually "trigger[s] a violent and/or punitive response," especially toward nonconforming individuals, who are viewed as a direct threat to the gang's machismo ethos.[67] Gangs use threats and intimidation to control government actors and those who might testify against them, creating an environment in which convictions were achieved in only 5 percent of reported homicides in the Northern Triangle region.[68] Human Rights Watch (HRW) produced several reports chronicling the failure of the Honduran government to investigate or bring justice for transgender women who were shot, burned, and violently murdered in major cities.[69] In Guatemala, there are no laws in place that explicitly prohibit discrimination on the basis of gender or sexual orientation.[70] This makes it even more difficult for the government to prosecute gang members, even if they are motivated to do so. Increased monitoring and data collection from non-governmental organizations (NGOs) and watchdog groups would give transgender women a stronger foundation on which to bring both gender-based and gang-based claims.

Recommendations and Alternative Arguments to Fight Against *Matter of A–B–*

After analyzing legal inequities in U.S. asylum law and the targeted violence transgender women experience at the hands of government actors and gang members, it is necessary to chart a path forward so that transgender women from the Northern Triangle preserve their right to protection in U.S. courts. This section offers specific recommendations for addressing three of the elements for establishing eligibility for asylum—PSG, persecution, and nexus—to ensure Session' blending of these elements does not muddle the claims and defenses put forward by asylum practitioners.

While the AG's decision has cast doubt on gang and domestic violence claims generally, Sessions did not categorically foreclose these types of cases, as asylum claims are always supposed to be adjudicated on a case-by-case basis.[71] Attorneys should first emphasize this case-by-case adjudication requirement, highlighting the unique importance of fact and record-based inquiry for PSG claims in the U.S. immigration system. By applying the system's long-standing procedure for what constitutes binding precedent, it is evident that *A–B–* only barred the specific claims in *A–R–C–G–* based on the PSG of "married women in Guatemala who are unable to leave their relationship."[72]

Once attorneys establish the importance of case-specific adjudications, they must take great measure throughout the application and in court proceedings to distinguish every piece of the record from that in *A–R–C–G–*. Sessions's opinion closely, it stands for the idea that the BIA did not thoroughly analyze the record or fully present its reasoning when rejecting the lower court's assessment.[73] The AG relies on specific omissions or missteps by the court to craft a blanketed narrative that tries to simplify a very complex area of law that is under the purview of the BIA and federal courts.[74] The *A–B–* decision does tend to revert the legal landscape to pre-*A–R–C–G–* law, but, contrary to a superficial reading of the opinion, it does not place a full bar on these claims. Instead, it creates a legal world in which there is no definitive precedent. In this new world, immigration lawyers must view every case as a blank canvas, pushing for fact-specific due process hearings that are not muddied by pure dicta.

Particular Social Group

When articulating a PSG claim, it is imperative to argue that the social distinction test is applicable and to distinguish the rejection of the PSG in *A–R–C–G–* from your client's own. Sessions's rejection of *A–R–C–G–*'s social group was premised on insufficiency of analysis and is not a categorical bar to victims of private violence. The AG concluded that the BIA, when it accepted the Department of Homeland Security's concession that domestic violence can be a basis for a PSG, did not require sufficient evidence of particularity

or social distinction.[75] This does not change the established three-prong PSG framework of immutability, particularity, and social distinction, and attorneys should closely adhere to this structure.[76] For attorneys deciding what evidence is necessary to show particularity and social distinction, *Matter of M–E–V–G–* (*M–E–V–G–*), which replaced the "social visibility" standard with the more expansive "social distinction" test, is instructive. *M–E–V–G–* provides a list of evidence that will establish group cognizability, including country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies. This evidence may establish that a group exists and is perceived as "distinct" or "other" in a particular society.[77]

When selecting evidence, it is important to offer extensive documentation from the country of origin about how transgender women are viewed by society and if the women recognize this group themselves.[78] Attorneys should offer reports, such as the ones presented in the statistics section above, to demonstrate that transgender women are recognized as "other" and actively recognize their own membership in this othered group even as they try to hide it. Once practitioners obtain the necessary evidence, they must ensure that each piece of the record is linked to the elements of immutability, particularity, or social distinction. *A–B–* rejected the PSG analysis because the Board did not explicitly link particular pieces of evidence to the legal standard.

In the alternative, transgender applicants may be able to argue that they have had a PSG imputed upon them.[79] Courts have held that persecution still occurs when a persecutor attributes a certain identity marker, such as membership in a PSG, to the victim even if the victim is not in fact within that group.[80] Transgender women are often viewed by society as gay men with female tendencies or, in some cases, as lesbian women with masculine tendencies. These women often suffer persecution based on this artificial gay or lesbian identity because gangs and police officers incorrectly assume they are sexual minorities. What matters in this analysis is the subjective belief of the persecutors at the time, and whether or not they are acting on that belief. IJs apply a reasonableness test, asking if the persecutor could reasonably believe that the applicant possessed that characteristic in light of the specific circumstances.[81] Any verbal evidence of the persecutor's view, such as anti-gay slurs hurled against clients, is particularly helpful.[82] Instead of fighting the prevailing narrative rejecting transgender PSGs, attorneys may use it to their advantage while still being true to the client's identity through an imputed characteristic argument.[83]

Persecution

In *A–B–* the AG attempted to increase the difficulty of proving persecution by private actors when he conflated the elements of asylum analysis and introduced a new "complete helplessness" standard. Before attorneys attack this

"complete helplessness" standard, it is important to remember that persecutor analysis has not been altered by the opinion, and should still be measured by the severity of the harm requirement.[84] For transgender clients, it is helpful to use cumulative harm theory in court to meet this severity-of-the-harm test. It is often more challenging for transgender applicants to show that the government is "unable or unwilling" to protect the victim, as "[t]he added layer of sexual orientation and gender identity, identities routinely targeted in the private sphere and subject to culturally specific understanding, makes it all the more difficult for LGBTQ asylum-seekers to successfully gain refuge."[85] But cumulative-harm theory establishes that when a client experiences repeated acts of physical and psychological violence, these series of acts should be viewed in the aggregate to decide if the respondent meets the persecution bar.[86] This idea of cumulative harm will be particularly helpful for transgender women who are forced into sex work or gang activities that subject them to daily instances of physical and psychological abuse.[87]

Even after proving that a client's harm was sufficiently severe, attorneys must establish that the government was "unable or unwilling" to protect the client. Before *A–B–*, transgender clients had a stronger footing to argue claims based on persecution by private actors such as MS-13 gang members without having to argue that the government was directly involved in the persecution. But, instead of adhering to well-established "unwilling or unable" standards, the AG introduced a heightened "condoned or complete helpless" test without foundation. Under this new standard, the government must outright condone or be completely helpless to stop the actions against the applicant.[88] This dicta attempted to make it much more difficult for the applicant to show government unwillingness based on police unresponsiveness, as a refusal to assist is not enough unless there is evidence of active support from law enforcement. Attorneys should cite to the plain language of the Immigration and Nationality Act (INA) to reiterate that proof that the asylum seeker is "unable or unwilling to avail himself or herself of the protection of that country" is sufficient.[89] As early as 1964, in *Matter of Eusaph*,[90] the BIA recognized that private acts which a government was unwilling to control could constitute persecution. Sessions's standard would be akin to requiring a certainty of persecution, going against the Supreme Court's decision in *Cardoza-Fonseca*, which interpreted the "unwilling and unable" test broadly and declined to require a high probability of persecution.[91]

Further evidence that complete helplessness is not the prevailing standard can be found in the fact that applicants under both asylum and the Convention Against Torture (CAT) have met the recognized standard, even when there was evidence that the government *did* try to respond.[92] The requirement has never been complete helplessness, and Sessions based his elevated test on one Seventh Circuit case that has rarely been cited by other courts and did not use "complete helplessness" to supplant the existing standard.[93] Moving forward,

practitioners must first argue that this new standard is legally unsound and cannot supplant the long-held INA test. Then, to ensure coverage of both prongs of the original test, lawyers should offer separate documentation of the police's unwillingness to respond to reports from transgender clients and the government's inability to fully protect them. By clearly delineating the inability and unwillingness prongs of the test, attorneys can more effectively prove persecution.

Nexus

Transgender claimants are often persecuted for multiple reasons, so it is imperative to emphasize the permissibility of mixed motives in a client's nexus analysis. To have a successful nexus claim, transgender women must prove that they were persecuted on account of their nonconforming gender identity, but other factors that make them particularly vulnerable, such as their employment as sex workers or homeless status, do not hurt the causation claim. So long as an applicant's membership in the gender minority or imputed sexual minority PSG is "one central reason" for the persecution, the applicant will meet the nexus requirement.[94] The Fourth Circuit has produced several recent decisions that uphold the mixed-motives reasoning, including *Zavaleta-Policiano v. Sessions*, in which the court upheld the petitioner's gang-based claim even though the gang's threats were not "exclusively" motivated by her membership in a PSG.[95] Attorneys should cite these recent Fourth Circuit cases on nexus whenever possible.

One challenge that many transgender women from the Northern Triangle face is showing that their transness was one of the main reasons they were targeted by their persecutors.[96] To defend against any implications that the gang or gender-based violence against the transgender client is motivated by a personal vendetta and amounts to no more than private criminal activity, lawyers must develop a record that shows how the deeply entrenched patriarchal culture in the Northern Triangle targets transgender individuals because they represent an existential threat to the gender binaries that allow machismo to thrive. This record should include laws from the home country that prove both the complete lack of recognition for transgender human rights and the privileging of patriarchal norms through morality laws.[97] NGO and governmental reports that document the systematic targeting of gender and sexual minorities will also bolster the argument that the violence a client suffers is not random private criminality, but conscious instrumental violence. No matter what type of persecution a client is facing, it is imperative to couch the persecutor's motivation to overcome the client's nonconforming gender or imputed sexual identity in the context of widespread, deeply entrenched patriarchal norms.

Challenging the Heightened Discretionary Standard

One area that is harder to predict is how the courts will use their discretion after the AG suggested a more expansive approach to weighing negative factors. It has been generally accepted that IJs must do a full balancing test of negative and positive factors in a case and should not deny an applicant solely based on a finding of one negative factor unless it overcomes all other factors.[98] Departing from this tradition, Sessions seemed to be pushing IJs to deny asylum when he wrote that the discretion requirement "should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum," emphasizing the importance of considering negative factors such as manner of entry, circumvention of orderly refugee procedures, and passage through third countries. This impermissibly heightens the existing standards for exercising discretion.

To defend against Session's new discretionary standard, practitioners must argue that the facts involved in *A–B–* raised no issue about the exercise of discretion and nowhere in his opinion did Sessions explicitly overrule the foundational discretion framework in *Matter of Kasinga* and *Matter of Pula*. The AG erroneously cites *Pula* as his basis for an expansive discretion that refuses to mandate a full balancing test. In reality, the court in *Pula* rejected the argument that an applicant's use of fraudulent documents to illegally enter the country should bar them in all cases, mandating a totality-of-the-circumstances analysis that required balancing all positive and negative factors.[99] Practitioners should cite this and emphasize the totality-of-the-circumstances aspect of the discretion test.

If issues of credibility arise within a transgender claim, there is a risk that courts will choose to adopt Sessions's view that "[t]he existence of 'only a few' [omissions or inconsistent statements] can be sufficient to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution." Attorneys should argue that the congressional mandate under 8 U.S.C. § 1158 requires that IJs make credibility determinations by considering all relevant factors and circumstances.[100] Advocates must also ensure that their client has an opportunity to explain any inconsistencies that may arise as a result of their transition and their own society's unwillingness to recognize transgender identities.

Manner of entry is a common issue for transgender women who do not have access to accurate documentation that reflects their gender.[101] If an IJ seems to focus on an applicant's illegal manner of entry and use of fraudulent documents, advocates should focus on whether an applicant's entry "demonstrates ulterior motives for the illegal entry that are inconsistent with a valid asylum claim" and whether the entry was necessary to escape imminent harm.[102] Only the most egregious factors rise to the level that they can outweigh a severe risk of persecution. Practitioners should strongly emphasize positive elements, such as ties to U.S. citizens, evidence of good character,

and special humanitarian concerns and tie those to past cases that considered those factors. Practitioners should also continuously check for new case law in this area to bolster their arguments as to why illegal entry should not discredit their client.[103]

Finally, lawyers whose clients may be at risk of a negative credibility determination should always put forward strong withholding of removal (WOR) and CAT claims in the alternative. WOR and CAT act as an important safety net for those who are deemed ineligible for asylum. These two forms of protection have a higher burden of proof and offer less sweeping protection, but they may be the only option available for those who have credibility issues or miss the one-year asylum filing deadline.[104] Because transgender women very rarely report abuses by the government, lawyers should emphasize that the United States' codification of CAT allows for both knowledge or "willful blindness" from the government to meet the bar.[105] Although WOR and CAT claims are usually a last effort after asylum is denied, they should be fully developed to ensure that the applicant is not forced to return to the violence in her country or origin.

Conclusion: *Matter of A–B–* as an Opportunity

It is the duty of immigration lawyers who are committed to advancing the rights of their transgender clients to push the law forward. It is not mandated by any job description or legal responsibility, but by a shared belief among immigration advocates that the U.S. asylum system was created to offer protection to those who need it most.[106] As ideas about gender and sexual orientation evolve, it is up to progressive lawyers to ensure that long-established legal standards are interpreted in a way that reflects current international conflicts, natural disasters, and societal perceptions of the time. Some may argue that Sessions's goal in *A–B–* was to make it harder for victims of gender oppression to offer cognizable claims. Whether this is true or not, *A–B–* sparked a backlash in the legal community as advocates began to produce practice advisories and webinars, host panels, and mobilize in order to preserve the rights of victims of domestic and gang violence. If viewed from this angle, *A–B–* is an opportunity: an opportunity to present new and creative PSGs, to strengthen the analytical arguments as to why gender should be a basis in asylum law, and to convince IJs that Sessions's opinion did not categorically foreclose specific types of claims.

As the United States narrows the grounds under which one may apply for asylum in an attempt to deny protection to an influx of groups coming to the southern border, some advocates may be pessimistic about the future. However, there are recent proceedings that reaffirm the instrumental power of the law as a tool for social change. On December 19, 2018, U.S. District Judge Emmet G. Sullivan blocked several Trump policies that made it much harder

for victims of domestic and gang violence to seek asylum in his opinion in *Grace v. Whitaker*, concluding that these policies were "arbitrary and capricious and contrary to law."[107] On July 17, 2020, the D.C. Circuit Court of Appeals upheld the *Whitaker* ruling, holding that the rule did not prohibit gender or gang-based claims after the government had failed to satisfy the Administrative Procedures Act's (APA) "requirement of reasoned decision making."[108]

But such decisions are only possible when lawyers fight against misconceptions surrounding minority groups. This is the moment for lawyers to step up, by utilizing their creative analytical skills and working together in solidarity, for they are in the best position to ensure that asylum seekers like the members of Rainbow 17 are finally recognized for who they truly are: transgender women who deserve protection.

Notes

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1. For the purposes of this paper, I adopt Wayne's definition of transgender as "all people who do not exclusively identify with the sex that society assigned to them at birth." Adena L. Wayne, *Unique Identities and Vulnerabilities: The Case for Transgender Identity as a Basis for Asylum*, 102 Cornell L. Rev. 241, 270 (2016).

2. Sarah Aziza, *The First Trans-Gay Migrant Caravan Arrives at US Border Seeking Asylum*, Waging Nonviolence (Aug. 11, 2017), https://wagingnonviolence.org/2017/08/trans-gay-migrant-caravan-rainbow-16/.

3. The women were placed in Cibola Detention Center, which is currently being sued for the wrongful death of another transgender woman, Roxsana Hernandez Rodriguez. Eli Rosenberg, *Transgender Asylum Seeker Was Beaten Before Her Death, According to New Autopsy*, The Washington Post, Nov. 26, 2018. A recent report found that LGBTQ+ people are 97 times more likely to be sexually victimized while in ICE custody. Sharita Gruberg, *ICE's Rejection of Its Own Rules Is Placing LGBT Immigrants at Severe Risk of Sexual Abuse*, Center for Am. Progress (May 2018). A 2014 Fusion investigation found that about 1 in 500 people in detention are transgender, but they accounted for 20% of victims of sexual abuse in detention in 2013. Zsea Bowmani, *Queer Refugee: The Impacts of Homoantagonism and Racism in U.S. Asylum*, 18 Geo J. Gender & L. 1 (May 2017).

4. *E.g.*, Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987); Although *Matter of Acosta* laid the formal foundation for gender-based claims when it acknowledged sex as an innate characteristic potentially meriting asylum protection in 1985, "[f]rom the enactment of the Refugee Act of 1980 until the 1990s, asylum seekers fleeing gender-based violence were routinely denied protection and status in the United States." *See* Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States*, American Bar Association, 45 (2) Human Rights Magazine (2020).

5. Matter of A–B–, 27 I. & N. Dec. 316 (A.G. 2018) (hereinafter *A–B–*).

6. *Id.* at 320.

7. Matter of A–R–C–G–, 26 I. & N. Dec. 338 (B.I.A. 2014) (hereinafter *A–R–C–G–*).

8. In 2018, the UN High Commission for Refugees noted that trans migrants now made up a key component of the increasing flow of asylum seekers coming from Central America to the United States. Josefina Salomon, *The Deadly Dilemma Facing Trans Migrants*, OZY (2019), https://www.ozy.com/the-new-and-the-next/the-deadly-dilemma-facing-trans-migrants/95398/. El Salvador, Guatemala, and Honduras form the region known as "the Northern Triangle," which dealt with a series of civil wars in the 1980s that left the region plagued by corruption, gangs, and drug trafficking. Rocio Cara Labrador & Danielle Renwick, *Central America's Violent Northern Triangle*, Council on Foreign Relations (June 2018).

9. Nadine Nakamura & Matthew Skinta, *LGBTQ Asylum Seekers—How Clinicians Can Help*, American Psychological Association (APA) (2018), https://www.apa.org/pi/lgbt/resources/lgbtq-asylum-seekers.pdf (documenting the "forced sterilization or castration, so-called 'corrective rape,' domestic violence, forced sex work, institutionalized violence at the hands of the police, and death" that transgender asylum seekers routinely face).

10. UNHCR, *Women on the Run: First Hand Accounts of Women Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), https://www.unhcr.org/5630f24c6.pdf (finding "88% of LGBTI asylum seekers and refugees from the Northern Triangle … reported having suffered sexual and gender-based violence in their countries of origin").

11. Transgender applicants, unlike women, can argue they are part of a PSG based on their sexual identity if their gender claim is denied, which may cause some to discount the threat that *A–B–* represents for their claim.

12. Before 1990, gay and lesbian individuals were not legally allowed to immigrate to the United States. *See* INA § 212(a)(4); 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990).

13. Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 823 (B.I.A. 1990).

14. *See, e.g.*, Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007); Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005).

15. *See* Wayne, *supra* note 1, at 248.

16. Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000).

17. Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (although holding that transgender woman from El Salvador exhibited "transsexual behavior," referring to Reyes as a homosexual male, using male pronouns, and speaking of her "female sexual identity"); *see also* Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1054 (9th Cir. 2006).

18. Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1075 (9th Cir. 2015); Wayne, *supra* note 1, at 250 (describing how the earlier case of *Morales v. Gonzales* was the first to use "transsexual" to describe the petitioner, but ignoring the discrepancy between

sexual identity and gender when the IJ cited the acceptance of a gay pride parade in Mexico City as evidence that she did not have a well-founded fear).

19. *Id.* Avendano-Hernandez had been convicted of the serious offense of drunk driving, which made her ineligible for asylum. Instead, she was granted relief under CAT, which did not require any inquiry into PSG.

20. Wayne, *supra* note 1, at 251.

21. Bowmani, *supra* note 3, at 5 (arguing that "[s]ince the early colonial period, the boundaries of 'proper' and 'deviant' expressions of sexuality and gender have been deeply intertwined with race").

22. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 Law & Sex. 135 (2006).

23. Bowmani, *supra* note 3, at 15.

24. *Id.*

25. Morgan, *supra* note 22, at 149 (arguing that "white supremacist culture has assigned a battery of sexual stereotypes to each marginalized racial group [in the United States,]" which has led to entrenched racialized heterosexist subordination).

26. *Id.* at 150.

27. *Id.* at 152 (arguing that the substitutive model is based on the idea that homosexual identity is proven through homosexual conduct, ignoring that different cultures don't assign the same meanings to certain conduct, and observing that social commentators around the world have identified the "export" of the U.S. model of homosexuality as an identity as a form of cultural imperialism and have identified the concept of homosexuality as a "white disease").

28. Kenji Yoshino, *Covering*, 111 Yale L. J. 769, 849 (2002) (finding the performative theory "suggests that identity has a performative aspect, such that one's identity will be formed in part through one's acts and social situation, rather than being entirely guaranteed by some prediscursive substrate" such as sex organs or chromosomes). Courts are hesitant to extend protection to these characteristics.

29. Alison J. Murray, *Let Them Take Ecstasy: Class and Jakarta Lesbians*, in Female Desires: Same-Sex Relations and Transgender Practices Across Cultures 139, 145 (Evelyn Blackwood & Saskia E. Wieringa eds., 1999) (describing how "acknowledge[ing] lesbians would allow women an active sexuality that is not part of women's destiny").

30. Stefan Volger, *Adjudicating Gender Identity in U.S. Asylum Law*, 33(3) Gender & Soc. 439, 453 (2019) (arguing that "courts impose a requirement of consistent gender identity across the life course, tacitly enforcing the expectation that one's 'true' gender is fixed and essential").

31. *Id.* at 454 (describing *Jeune* as an ambiguous case in which the court denied the claim because he didn't seem woman enough, concluding that "being a gay man who dresses like a woman does not necessarily mean that one is also a transgender individual"); *see also* Jeune v. Attorney General, 810 F.3d 792 (11th Cir. 2016).

32. Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Claims Hear in the Wrong Court*, 52 N.Y.L. Sch. L. Rev. 185, 194 (2007) (describing "how the artificial distinction between homosexual status and homosexual identity, articulated even in the early cases granting protection, enables different outcomes in cases with analogous factual circumstances").

33. *Id.* at 196.

34. Maldonado v. U.S. Att'y Gen., 188 F. App'x 101 (3d Cir. 2006) (rejecting the IJ and BIA's conclusion that Maldonado was persecuted because of his social preferences rather than because of his membership in a PSG).

35. Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005).

36. *Id.* (finding "the actions of the Zimbabwean authorities in these instances were not based on Kimumwe's sexual orientation, but rather on Kimumwe's involvement in prohibited sexual conduct").

37. O'Dwyer, *supra* note 32, at 210.

38. *Id.* at 199.

39. Matter of Acosta, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985) (requiring that members of a PSG share characteristics that are innate (cannot be changed) or that are so fundamental to individual identity that such a change should not be required).

40. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Poly Rev. 47, 63 (2008) (describing the court's departure in Matter of C–A–, 23 I. & N. Dec. 951, 961 (B.I.A. 2006)). Later decisions have challenged this heightened visibility standard. *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) (holding, after the BIA rejected PSGs because there was no proof they were highly visible in *Matter of A–M–E– & J–G–U–* and *Matter of C–A–*, that the "social visibility" approach "makes no sense" and criticizing the BIA for its failure "to explain the reasoning behind the criterion of social visibility"); *see also* Matter of M–E–V–G–, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (concluding literal visibility is not needed for a group to be socially distinct).

41. Matter of M–E–V–G–, 26 I. & N. Dec. at 236 n.11 (B.I.A. 2014).

42. Matter of C–A–, 23 I. & N. Dec. 951, 961 (B.I.A. 2006).

43. Pamela Heller, *Challenges Facing LGBT Asylum-Seekers: The Role of Social Work in Correcting Oppressive Immigration Processes*, 21 (2-3) J. Gay & Lesbian Soc. Services, 294 (2009) (describing the "ways society forces oppressed groups to downplay or *cover* aspects of their identities"); Bill Fairbairn, *Gay Rights Are Human Rights: Gay Asylum Seekers in Canada*, in Passing Lines 237, 243-44 (Brad Epps et al. eds., 2005) (arguing that "the social stigma associated with homosexuality forces the majority of lesbians and gay men to hide their sexual orientation. . . . Secrecy, silence and invisibility are themselves contributing factors to the human rights violations suffered by lesbians and gay men.").

44. Marouf, *supra* note 40, at 105.

45. *Id.*

46. Lopez-Reyes v. INA, 79 F.3d 908, 912 (9th Cir. 1996).

47. Morgan, *supra* note 22, at 154-55.

48. Keith Southam, *Who Am I and Who Do You Want Me to Be: Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 Chi.-Kent L. Rev. 1363, 1375 (2011).

49. *Id.* at 1376.

50. In 2014, the BIA clarified that the social visibility test did not require ocular visibility by renaming it the "social distinction test." This new test opens up the possibility of protection for those who try to hide their membership, but there have been inconsistencies in its application as courts continue to reject *Acosta* reasoning and advocates have criticized it as only confusing PSG analysis even more. It is unclear

how this test would be applied to gender minorities. Benjamin Casper et al., *Matter of M–E–V–G– and the BIA's Confounding Legal Standard for "Membership in a Particular Social Group"*, Immigration Briefings (June 2014).

51. The 2017 Global Impunity Index, which ranks countries by their inability to bring perpetrators to justice, ranked Honduras as twelfth, El Salvador as thirteenth, and Guatemala as nineteenth in the world. Center of Studies on Impunity and Justice, *Global Impunity Dimensions* (2017), https://www.udlap.mx/cesij/files/IGI-2017_eng.pdf.

52. Amnesty Int'l, *No Safe Place* (Nov. 2017), https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf (describing how "[t]hey also face harassment and intimidation by the police and authorities because of their gender identity and/or their sexual orientation and, when crimes occur, they face serious obstacles to access justice from law enforcement officials who discriminate against them").

53. U.S. Dept. of State, Bureau of Democracy Human Rights, and Labor, *Country Reports on Human Rights Practices for 2017*, Washington: Government Printing Office, 2017.

54. James Carr, *Kill the Snitch: How Henriquez-Rivas Affects Asylum Eligibility for People Who Report Serious Gang Crimes to Law Enforcement*, 91 Wash. L. Rev. 1313 (Oct. 2015).

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69. *Id.*

70. OTRANS, Human Rights Committee, *Human Rights Violations Against Transgender Women in Guatemala* (2018), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GTM/INT_CCPR_CSS_GTM_30350_E.pdf.

71. Matter of L–E–A–, 27 I. & N. Dec. 40, 42 (B.I.A. 2017) (holding that "[a] determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis"); *see also* Crespin-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011).

72. In immigration courts, precedent is only established when the AG or BIA designates its decisions as such. Precedent is also meant to be read narrowly, applying only to similar cases. *See A–B–*, *supra* note 5, at 319.

73. Sessions rejected the way the BIA came to its conclusion, without fact findings from the record and by stipulation. Immigrant Legal Resource Center (ILRC), *Matter of A–B– Considerations: Practice Advisory* (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

74. Jason Boyd & Greg Chen, *AILA Policy Brief: USCIS Guidance on Matter of A–B– Blocks Protections for Vulnerable Asylum Seekers and Refugees* (July 23, 2018), AILA Doc. No. 18072308.

75. UC Hastings Center, *Matter of A–B–: Analysis and Strategies for Success Webinar* (June 20, 2018) (finding Sessions merely rejected particular pieces of evidence as opposed to the larger idea that private victims of violence cannot meet the particularity requirement).

76. Practitioners should still use the *Acosta* test to show that transgender women "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, *supra* note 39.

77. Matter of M–E–V–G–, 26 I. & N. Dec. 227 (B.I.A. 2014) (holding that the "social distinction" test focuses on the extent to which the group is understood to exist as a recognized component of the society in question. This covers those who try to hide their membership and not actually "seen," which may be applicable to transgender women.).

78. *Id.* at 242. ("We clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor .... The members of a [PSG] will generally understand their own affiliation with the grouping, as will other people in the particular society.").

79. Carr, *supra* note 54, at 1321 ("If the claim is based on a characteristic the applicant does not actually possess, so long as the persecutor believes the applicant possesses, the applicant can still prove a well-founded fear.").

80. *See* Singh v. Gonzales, 406 F.3d 191, 196-97 (3d Cir. 2005).

81. Carr, *supra* note 54.

82. Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual Orientation-Based Asylum Law*, 32 Fordham L. Rev. 101, 124 (2005) (finding "[m]any persecutors use slang terminology for transgender persons synonymous with derogatory terms like 'fag' or 'dyke,' demonstrating that, from the persecutor's perspective, transgender identity and homosexual identity are synonymous").

83. Even if the imputed argument is not accepted, attorneys can always argue both gender and sex discrimination together. The Eleventh Circuit has said that

"discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." Glenn v. Bumbry, 663 F.3d 1312, 1317 (11th Cir. 2011).

84. *A–B–*, *supra* note 5, at 337 (when defining "persecution," Sessions confusingly meshed severity of harm, nexus, and government protection analysis into this one inquiry).

85. Bowmani, *supra* note 3, at 16.

86. Matter of O–Z– & I–Z–, 22 I. & N. Dec. 23, 25-26 (B.I.A. 1998) (holding that several smaller acts of violence toward a Jewish Ukrainian man and his son was enough to "constitute more than mere discrimination and harassment").

87. If your case relies on gang violence, you must emphasize that *A–B–* had no analysis of a gang-based PSG and any mention of gangs in the opinion was pure dicta. Circuit courts have been split on gang claims, but there is no indication that any have concluded that a blanket rejection is warranted.

88. *Matter of A–B–*, *supra* note 5, at 337 (explaining that "[t]he applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims").

89. INA § 101(a)(42)(A).

90. 10 I. & N. Dec. 453 (B.I.A. 1964).

91. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (stating that "there is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening").

92. This is especially convincing under CAT case law because the CAT standard, which requires higher government consent or acquiescence in torture, is more rigorous than the asylum protection paradigm.

93. Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000).

94. Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017).

95. Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017); *see also* Oliva v. Lynch, 807 F.3d 53 (4th Cir. 2015); Hernandez-Avalos v. Lynch, 784 F.3d 944, 947 (4th Cir. 2015).

96. Nora Snyder, *Matter of A–B–, LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*, 114 Nw. U. L. Rev. 809, 849 (2019) (documenting the struggles that LGBTQ victims have faced when trying to prove that gang members targeted them because of their gender or sexual identity); *see, e.g.*, Martinez-Almendares v. Att'y Gen., 724 F. App'x 168, 171-72 (3d Cir.2018); Gonzalez-Posadas v. Att'y Gen., 781 F.3d 677, 686-87 (3d Cir. 2015).

97. IACHR, *supra* note 58.

98. *See* Matter of Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996); *see also* Matter of Pula, 19 I. & N. Dec. 467, 473 (B.I.A. 1987).

99. *Matter of Pula* at 473 (holding that fraudulent documents cannot be dispositive and "should not be considered in such a way that the practical effect is to deny relief in virtually all cases"); *see* AILA, *Practice Pointer: Matter of A–B– and Discretion* (Oct. 15, 2018), AILA Doc. No. 18101631.

100. 8 U.S.C. § 1158(b)(1)(iii) ("Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness.").

101. Wayne, *supra* note 1, at 262. Transgender clients are disproportionately burdened by the new requirements set forth in the REAL ID Act because their home

country refuses to provide them with IDs that reflect their true gender and most do not have medical records documenting any changes. IJs may view this lack of documentation as an indication that their claims are not credible.

102. Tahirih Justice Center, *USCIS Policy Guidance for Adjudicating Asylum Claims in Accordance with Matter of A–B–* 2 (July 2019), https://www.tahirih.org/pubs/.

103. *See* Hussam F. v. Sessions, 897 F.3d 707 (6th Cir. 2018).

104. Sexual and gender minority applicants often have a harder time meeting this one-year deadline than other asylum applicants. *See* Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. City Law Rev. 233 (2006).

105. Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (The congressional record surrounding the 1998 ratification of CAT with new conditions makes it clear that both actual knowledge and willful blindness fall into the definition.).

106. Cyrus Mehta, *The Role of the Immigration Lawyer in the Age of Trump*, The Insightful Immigration Blog (Nov. 12, 2017), http://blog.cyrusmehta.com/2016/11/the-role-of-the-immigration-lawyer-in-the-age-of-trump.html.

107. Matt Zopotsky, *Judge Strikes Down Trump Administration Effort to Deny Asylum for Migrants Fleeing Gang Violence, Domestic Abuse*, The Washington Post, Dec. 19, 2018; Grace v. Whitaker, No. 18-cv-01853 (EGS), 2018 WL 6628081 (D.D.C. Dec. 19, 2018) (holding that *Matter of A–B–* "create[d] a general rule against [domestic and/or gang violence] claims at the credible fear stage" and that the rule was "not a permissible interpretation of the statute").

108. Grace v. Barr, No. 19-5013 (D.C. Cir. 2020).

The Effect of States' Legalization of Marijuana on Good Moral Character and Eligibility for U.S. Citizenship

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Abstract: The article sheds light on USCIS's unjust April 2019 Marijuana Policy, which encourages immigration officers to deny U.S. citizenship to immigrants employed in legal marijuana enterprises for lack of good moral character. The article raises several arguments for practitioners to challenge the policy, both as it is applied to individual clients and on its face. However, the piece ultimately concludes that the USCIS Marijuana Policy would likely survive judicial review because it is consistent with the congressional intent behind the Immigration and Nationality Act. Given the futility of the federal courts with respect to the issue, the article argues that public policy demands a congressional amendment to the good moral character statute that would exempt marijuana-related conduct that complies with state law from triggering a statutory bar to good moral character for purposes of naturalization.

Introduction

Over the past decade, the United States has seen a marked increase in the number of states that have legalized or decriminalized marijuana, despite the fact that marijuana remains a controlled substance under federal law.[1] This increase followed policy guidance released by the Obama administration, which effectively authorized states to regulate marijuana as they see fit.[2] A Department of Justice (DOJ) memorandum promulgated by President Obama's deputy attorney general advised U.S. Attorneys to exercise prosecutorial discretion with regard to businesses engaged in the state-sanctioned production and sale of marijuana, particularly where the state has implemented its own "strong and effective" regulatory system.[3]

Relying on President Obama's policy guidance, numerous states created thriving economies based on the production and sale of marijuana.[4] All the while, marijuana has remained a Schedule I controlled substance under the federal Controlled Substances Act (CSA).[5] This conflict between state and federal law has created uncertainty regarding the immigration consequences of marijuana-related conduct for legal permanent residents seeking U.S. citizenship in states where marijuana is legal.[6] Most naturalization applicants must prove the following by a preponderance of the evidence: (1) they are a lawfully admitted permanent resident for at least five years (present in the United

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States for at least half of that time), (2) they have resided continuously within the United States from the date of application up to the time citizenship is granted, and (3) they are a person of "good moral character" (GMC).[7] This article focuses on the effect of states' legalization of marijuana on the latter requirement within the narrow context of naturalization.

Congress has provided little guidance about what it means for a person to possess GMC.[8] However, Congress clearly stated that an applicant who has violated the CSA within five years of his application date cannot prove the requisite GMC for naturalization.[9] On April 19, 2019, United States Citizenship and Immigration Services (USCIS) issued a Policy Alert (hereinafter "the USCIS Marijuana Policy") clarifying that "violation of federal controlled substance law, including for marijuana, remains a conditional bar to establishing good moral character for naturalization, even where that conduct would not be an offense under state law."[10] If naturalization applicants admit to the essential elements of a CSA violation, they can be found to lack GMC even if they were never "formally charged, indicted, arrested, or convicted."[11]

Before President Trump took office, USCIS only enforced immigration penalties related to legal marijuana in certain regions.[12] Since the USCIS Marijuana Policy was issued, however, a number of immigrants employed in the legal marijuana industry have been denied U.S. citizenship for lack of GMC after admitting to immigration officers the essential elements of a CSA violation.[13] In Colorado, a state where marijuana has been legal for almost a decade, immigrants who are otherwise eligible for citizenship have been denied naturalization for lack of GMC based solely on their employment in the legal marijuana industry.[14] USCIS denial notices are not publicly accessible, but the following is language from a denial notice issued to a permanent resident who worked at a dispensary in Colorado:

> The record reflects that during the statutory period of April 3, 2013, to the present, you admit to having committed an unlawful act. In a sworn statement, the Immigration Services Officer confirmed that you worked at a marijuana dispensary .... The Officer asked if you were involved in the exchange of money for marijuana while employed at the dispensary. You replied, "correct." The Officer also asked if you knew that under 21 U.S.C. Section 812, marijuana is listed as a controlled substance. You replied, "I was aware." You were asked if you knowingly and intentionally delivered or dispensed marijuana. You replied that you had knowingly and intentionally dispensed and delivered marijuana while employed at the marijuana dispensary .... Because of your admission regarding a controlled substance violation during the statutory period you are unable to demonstrate that you are a person of good moral character; therefore, you are ineligible for naturalization at this time.[15]

USCIS's policy of inducing noncitizen employees of the legal marijuana industry to admit a CSA violation has far-reaching impacts on an immigrant

applying for naturalization. An applicant who admits to the essential elements of a CSA violation is not only deemed ineligible for U.S. citizenship but also becomes inadmissible under the Immigration and Nationality Act (INA).[16] After a legal permanent resident is deemed inadmissible, they can be barred from reentering the country after traveling abroad.[17] If they manage to reenter the United States without issue, they become deportable under the INA for having entered the country when they were inadmissible.[18]

Immigration lawyers and government officials have spearheaded the movement to change the Trump administration's immigration policies and protect immigrants from suffering adverse immigration consequences because of their employment in the legal marijuana industry.[19] In the meantime, however, USCIS's current policy with regard to legal marijuana and GMC stands to jeopardize the status of immigrants employed lawfully within state-sanctioned marijuana enterprises.

Overview

This article analyzes the under-acknowledged nexus between federal naturalization law and state marijuana law as it pertains to immigrants' eligibility for U.S. citizenship. Marijuana-related conduct impacts numerous areas of immigration practice, but this article is not intended to be an overview of the broad range of issues involving marijuana and immigration. Rather, the article narrowly analyzes how states' legalization of marijuana triggers a statutory bar to immigrants' establishment of the requisite GMC for naturalization.[20]

The article begins with a brief overview of the GMC requirement for naturalization, including a discussion of both the statutory and discretionary prongs of GMC analysis undertaken by USCIS officers to adjudicate naturalization petitions.[21] The article then explores the federal courts' limited powers with respect to immigration policy and concludes that the judiciary is virtually powerless to change the USCIS Marijuana Policy because it is consistent with the congressional intent behind the INA.[22] The article then explains how marijuana-related conduct, despite its compliance with state law, violates the CSA and triggers a statutory bar to GMC that disqualifies immigrants from U.S. citizenship.

The article frankly acknowledges that, given the limited power of federal courts with respect to naturalization and the current state of the law, practitioners will not prevail in challenging the USCIS Marijuana Policy that precludes clients employed in legal marijuana enterprises from establishing the requisite GMC for naturalization. However, this article lays out several arguments that practitioners should raise to challenge the USCIS Marijuana Policy, both as it is applied to individual clients and on its face. The article posits that, when possible, practitioners should advise clients not to apply for citizenship until at least five years have passed since their involvement in

marijuana-related activities, at which time they will no longer be statutorily barred from establishing GMC.

Because the law grants USCIS officers the unfettered discretion to make GMC determinations, this article posits that the only way to remove states' legalization of marijuana as an obstacle to U.S. citizenship is for Congress to amend the INA to exempt legal marijuana-related conduct from triggering a statutory bar to GMC. The final part of this article argues that public policy, as well as principles of justice and fairness, demand a congressional amendment to the INA to that effect. The same policy considerations that support a congressional amendment to the INA should be raised by practitioners to bolster their arguments against the USCIS Marijuana Policy.

Overview of GMC as a Requirement for Naturalization

The GMC requirement for naturalization is set forth in 8 U.S.C. § 1427.[23] The statute does not affirmatively define GMC, but instructs that applicants possess it during the five years preceding their application date.[24] The statute that defines GMC, 8 U.S.C. § 1101(f) (the "GMC statute"), establishes two prongs of GMC analysis: statutory and discretionary.[25] USCIS first analyzes naturalization applicants' GMC under the statutory prong, which provides that applicants cannot establish GMC if they meet any of the conditions listed in the statute.[26] One such condition explicitly bars immigrants who have either been convicted of or admitted to violating the CSA from establishing GMC.[27]

The list of statutory bars to GMC is expanded by a Department of Homeland Security (DHS) regulation.[28] The regulation reiterates that any violation of a "law of the United States, any State, or any foreign country relating to a controlled substance" is a statutory bar to GMC.[29] If any of the statutory bars listed in 8 U.S.C. § 1101(f) or 8 C.F.R. § 316.10 apply to the applicant, and there were no extenuating circumstances, then GMC analysis ends there.[30] If none of the statutory bars apply, then the adjudicating officer proceeds to the discretionary prong of GMC analysis.[31] Under the discretionary prong, the adjudicating officer must "evaluate claims of good moral character on a case-by-case basis taking into account . . . the standards of the average citizen in the community of residence."[32]

Legal Considerations

The "Wait and See" Approach

Given the fact that any attempt to alter the USCIS Marijuana Policy in the courts may be futile, practitioners can best serve clients who have not yet applied for naturalization by advising them to cease employment in the

marijuana industry and wait five years before applying for naturalization. Although this approach only applies to legal permanent residents who have not yet applied for naturalization, practitioners should be aware that it is a viable option.

Marijuana-related conduct that violates the CSA is a conditional bar to GMC, which means that applicants employed in the marijuana industry can still be eligible for naturalization if they have not participated in the production or sale of marijuana within the five-year statutory period for naturalization.[33] Although USCIS may still consider conduct outside of the statutory period at its discretion, applicants will not be automatically barred from establishing GMC and thus will have a chance to convince a USCIS officer that they possess the requisite GMC for naturalization.[34]

The simple decision to wait until five years have passed since a client's involvement with a legal marijuana enterprise before applying for U.S. citizenship can make the difference between an approval and denial. While the "wait and see" approach does not challenge the USCIS Marijuana Policy, it may allow practitioners to circumvent the policy. Whereas a client's marijuana-related conduct would ordinarily warrant a statutory bar to GMC under the USCIS Marijuana Policy, the "wait and see" approach instead brings the client's GMC determination within the ambit of the discretionary prong. Although the adjudicating USCIS officer may still deny the client's petition for lack of GMC due to legal marijuana-related conduct, the discretionary prong of GMC analysis is far more forgiving than the statutory prong because it allows the USCIS officer to exclude such conduct from the GMC analysis.[35] Despite the fact that this approach only applies to the narrow class of immigrants who have not yet applied for naturalization, practitioners should be aware that utilizing this approach could make or break a client's case.

As-Applied Challenge to the USCIS Marijuana Policy

In cases where clients have been denied U.S. citizenship for lack of GMC because their employment at a legal marijuana enterprise gave rise to an admission of a CSA violation, the best way for practitioners to challenge the USCIS's unjust marijuana policy would be to challenge the validity of their clients' individual denials.

Even in the absence of conviction for a marijuana-related offense under the CSA, USCIS may find that a naturalization applicant lacks GMC, barring his eligibility for U.S. citizenship, if he admits all of the essential elements of an offense.[36] For an admission to be valid, the applicant must give it voluntarily, and the eliciting officer must first give the applicant "an adequate definition of the crime, including all of its essential elements."[37] The officer must explain each essential element in understandable terms, and the applicant must admit to each element separately.

The Board of Immigration Appeals (BIA) has held that it is not sufficient for an immigrant to admit the mere legal conclusion that they have committed a crime.[38] USCIS regularly obtains admissions by coaxing applicants to admit that they "knowingly and intentionally dispensed and delivered marijuana" despite being aware that "under 21 U.S.C. Section 812, marijuana is listed as a controlled substance."[39] Where USCIS obtains an admission using these boiler-plate statements, practitioners should argue that the admission is invalid because the officer did not define "controlled substance" or explain what 21 U.S.C. § 812 effectively says. The average person is likely familiar with neither the substantive provisions of the CSA nor the legal definition of "controlled substance." Without explaining the CSA's legal terminology in laypersons' terms, any admission of a CSA violation is arguably invalid because the eliciting USCIS officer did not establish that the applicant knowingly or intentionally violated the CSA.

Facial Challenge to the USCIS Marijuana Policy

Practitioners can challenge the USCIS Marijuana Policy on its face but will likely be unsuccessful because of the current state of the law and the limited powers of federal courts with respect to naturalization.[40] However, practitioners should vehemently argue that the legalization of marijuana-related conduct at the state level was not contemplated by Congress when the INA and CSA were enacted, thus necessitating the court to revisit its long-standing interpretation of the GMC statute.

The court is not the most effective venue to challenge the USCIS Marijuana Policy because the judiciary has extremely limited authority with regard to naturalization. The U.S. Constitution confers the sole power to "establish a uniform rule of naturalization . . ." upon Congress.[41] The Supreme Court has long acknowledged the limited powers of the court with regard to naturalization, holding, "[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will . . . ."[42] Congress, in turn, delegated the power over "the immigration and naturalization of aliens . . ." to the DHS, in addition to the authority to control USCIS and issue regulations to carry out that power.[43] DHS regulation, 8 C.F.R. § 335.3, directs USCIS to grant naturalization applications that comply with INA requirements and to deny those that do not.[44] Therefore, it is squarely within USCIS's authority to deny a legal permanent resident's application for naturalization upon the determination that they lack GMC.[45] Once USCIS finds that an applicant does not qualify for U.S. citizenship because they lack the requisite GMC, "the district court has no discretion to ignore the defect and grant citizenship."[46]

Unfortunately, there is a great deal of legal support behind USCIS's determination that employment in the legal marijuana industry bars naturalization

applicants from establishing GMC. Congress explicitly deemed marijuana-related conduct to bar an applicant from establishing GMC, and there is no provision anywhere in the law that provides an exception for marijuana-related activity that complies with state law.[47] Even in the unlikely event that a court finds that state-sanctioned participation in a marijuana enterprise does not trigger a statutory bar to GMC, the court must give effect to USCIS's discretionary findings regarding which acts demonstrate a lack of GMC in accordance with the broad discretion conferred upon USCIS by Congress.[48] USCIS has a blank check from Congress to find that a naturalization applicant lacks GMC for any reason, regardless of whether Congress intended for the specific conduct in question to adversely affect an immigrant's eligibility for U.S. citizenship.[49] Given the judiciary's limited powers with regard to naturalization and the high degree of deference afforded to USCIS with respect to making GMC determinations, federal courts are in no position to change the USCIS Marijuana Policy.[50]

The courts' powerlessness with regard to USCIS's policies around GMC is due, in part, to the separation of powers. The U.S. Supreme Court, in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, established the principle that the courts must afford great deference to executive agency policy, particularly where the policy in question derives from an agency interpretation of a statute under its charge.[51] Practitioners may argue that USCIS's policy of denying naturalization for lack of GMC to applicants employed in the legal marijuana industry is an unlawful interpretation of the GMC statute under the *Chevron* standard. However, USCIS's Marijuana Policy would almost certainly survive judicial review because it demonstrates an interpretation of the GMC statute that comports with Congress's clear intent for marijuana-related conduct to bar the establishment of GMC.

Chevron provides a framework by which courts determine whether an agency decision is entitled to deference upon judicial review.[52] *Chevron* analysis usually results in a grant of deference to the agency, and the Supreme Court has held that *Chevron* deference is especially appropriate for agency decisions involving immigration.[53] A court may only strike down an agency's interpretation of a statute if (1) it contradicts unambiguous congressional intent or, (2) in the event that congressional intent is unclear, the agency interpretation is not a "permissible construction of the statute."[54]

The first prong of *Chevron* analysis warrants a determination of whether Congress has directly spoken to "the precise question at issue," which here refers to whether employment within a state-legal marijuana industry constitutes a lack of GMC.[55] Under *Chevron*, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[56] To determine congressional intent, courts first look to the plain language of the INA.[57]

The INA clearly classifies those who have violated the CSA as lacking the requisite GMC for naturalization.[58] The statute provides:

> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 212(a)(2) [8 USCS § 1182(a)(2)] and subparagraph (C) thereof [of such section . . . .[59]

In short, Congress clearly expressed that any immigrant who partakes in the conduct described in 8 U.S.C. § 1182(a)(2)(A)(II) lacks the requisite GMC for naturalization.[60] The conduct described in 8 U.S.C. § 1182(a)(2)(A)(II) includes:

> [A]cts which constitute the essential elements of—. . . (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of . . . the United States . . . relating to a controlled substance . . .[61]

Therefore, the plain language of the INA suggests that Congress clearly intended for any violation of the CSA to be a statutory bar to GMC.[62]

Congress created the CSA in 1970 during President Nixon's "war on drugs."[63] The CSA renders it unlawful for "any person to knowingly or intentionally—(1) manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance . . . ."[64] The Act divides controlled substances into five "schedules" based on potential for abuse, existence of a current medical use, and potential for safe use under medical supervision.[65] Schedule I is reserved for the most heavily regulated substances.[66] At the time the CSA was enacted, Congress classified marijuana as a Schedule I controlled substance.[67] Therefore, Congress expressed a clear intent for marijuana-related conduct to bar findings of GMC under the INA.[68] For that reason, any finding by USCIS that an individual employed in the marijuana industry lacks GMC because they have violated the CSA is likely to survive judicial review.

Although marijuana-related conduct that violates the CSA is a clear-cut statutory bar to GMC based on the plain language of the INA, practitioners should argue that Congress did not intend for the bar to apply to employment in the legal marijuana industry because Congress did not contemplate the legality of marijuana at the time the CSA and INA were enacted. Thus, the issue of whether legal marijuana-related conduct triggers a statutory bar to GMC is one of first impression. Congress classified marijuana as a Schedule I controlled substance under the CSA because there was little scientific knowledge regarding the drug in 1970.[69] At that time, marijuana was illegal in the majority of states and its health effects were unknown. Scientific developments around the medicinal benefits of marijuana and the legalization of the substance by a growing number of states suggest that employment in the legal marijuana industry exceeds the scope of conduct originally contemplated

by Congress. By highlighting the uncertainty regarding the scope of conduct that Congress intended to disqualify a naturalization applicant from U.S. citizenship, practitioners can draw the courts' attention to the fact that states' legalization of marijuana is uncharted territory that warrants a new judicial interpretation of the GMC statute.

Policy Considerations

The courts may not be the proper avenue to challenge the USCIS Marijuana Policy due to their lack of power with respect to immigration policy. However, public policy demands that conduct involving legal marijuana be exempt from triggering a statutory bar to GMC under the INA. Practitioners should raise the policy considerations discussed in this section to bolster their arguments against the USCIS Marijuana Policy and advocate for legislation that protects noncitizen employees of legal marijuana enterprises from suffering adverse immigration consequences.

GMC was intended to reflect the modern ethical standards of society, which have largely shifted toward acceptance of marijuana.[70] USCIS officers are legally obligated to evaluate a naturalization applicant's GMC against "the standards of the average citizen in the community of residence."[71] That determination warrants analysis of whether the applicant's behavior would "outrage" the moral feelings "now prevalent in this country."[72] Thus, the definition of GMC must inevitably evolve along with society's shifting views of morality.[73]

If GMC is to evolve with society's views on morality, then marijuana-related conduct that complies with state law should not bar the establishment of GMC. One way that immigration authorities gauge the present day ethical standards of society is to examine how many states prohibit the conduct at issue under criminal law.[74] Where particular conduct is criminalized by a majority of states, the conduct likely goes against the moral standards of the "community" for purposes of GMC.[75] When the CSA was enacted in 1970, the use of marijuana was criminalized in all 50 states.[76] At that time, perhaps it could be said that the marijuana-related conduct "outraged" the "moral feelings of society."[77] However, the majority of states have legalized or decriminalized marijuana to some extent, which suggests that society no longer condemns its use and sale.

This conclusion is further supported by a Pew Research Center poll conducted in November of 2019, which shows that two-thirds of Americans believe that marijuana should be legal.[78] Fifty-nine percent of Americans favor the legalization of marijuana for any purpose, while an additional 32 percent favor the legalization of marijuana specifically for medical use.[79] The study notes that the number of Americans who generally opposed the legalization of marijuana has fallen from 52 percent to 32 percent since 2010, reflecting a "steady increase" in support for legalization over the past decade.[80] Today,

fewer than one in ten Americans believe that marijuana should remain illegal.[81] In light of the major shift in national public opinion toward marijuana, it cannot be said that its use and sale goes against the moral conscience of American society. The GMC statute should be amended to reflect society's current moral standards.

In addition, mere employment in the legal marijuana industry does not rise to the same level of immoral as participation in illicit drug-related activities. The statutory bars imposed by the GMC statute target two classes of people: (1) those who exhibit the willful intent to violate the law, and (2) those whose conduct is "of such character" that they must know it is "condemned by the general moral feelings of the community."[82] Perhaps it could be said that a drug dealer distributing marijuana in a state where it is illegal has reason to know that their behavior is condemned by the moral feelings of their community.[83] However, the same cannot be said for an individual lawfully employed at a state-sanctioned marijuana dispensary in a state where the substance is legal. Amending the INA to state that the statutory bar for violating the CSA does not apply to marijuana-related activity that complies with state law would not remove USCIS's discretion to find that an applicant lacks GMC.[84] It would, however, permit USCIS officers to evaluate the applicant's marijuana-related activity within the context of their other conduct.

The notion that GMC analysis could yield different results for a resident of Colorado than it would for a resident of Alabama under the law is neither far-fetched nor unworkable.[85] There have been several instances where geographical variations in criminal law have produced different results with regard to GMC. For example, in *Petition of Lee Wee*, the petitioner was found statutorily barred from establishing GMC because he was convicted of four gambling offenses pursuant to a Los Angeles city ordinance.[86] The petitioner argued that the result was unjust because his gambling would not have statutorily barred him from establishing GMC had he done it in a geographic area where gambling was legal.[87] The court upheld the denial of the petitioner's naturalization application, holding that "[a] person who lives in Gardena, California, where gambling is permitted, might be entitled to be naturalized, whereas the same acts committed in Los Angeles might result in lawful arrest and denial of citizenship."[88]

Similarly, in *Dickhoff v. Shaughnessy*, the U.S. District Court for the Southern District of New York addressed the effect of differences in state adultery laws that would have statutorily barred the plaintiff from establishing GMC in New York but not in New Jersey.[89] The plaintiff previously lived in New Jersey, where the crime of adultery was defined as extramarital sex with a married woman.[90] The plaintiff later moved to New York, where the crime of adultery broadly criminalized sexual intercourse where either individual was married.[91] The same conduct on the plaintiff's part was subject to a statutory bar to GMC in New York but not in New Jersey.[92]

The variations in state marijuana laws present a similar situation to those addressed in *Petition of Lee Wee* and *Dickhoff*.[93] Those cases demonstrate that, if involvement in a marijuana enterprise that complies with state law was exempted from the statutory bar to GMC set forth in 8 U.S.C. § 1101(f)(3), the GMC requirement could nonetheless be applied effectively. It would merely be the case that a Colorado resident who partakes in marijuana-related conduct in compliance with state law may be eligible for naturalization, whereas a resident of Alabama, where marijuana is illegal, would be barred from establishing GMC.[94] This result would give effect to the spirit of the GMC requirement, which is intended to measure an applicant's behavior against the standards of their community.[95]

Conclusion

Blocking the pathway to citizenship for lawful immigrants merely for working in the legal marijuana industry is unjust and is far removed from the principles of "fair play" and justice that the U.S. immigration system was built on.[96] The USCIS Marijuana Policy issued in April 2019 encourages agency officers to find that naturalization applicants lack GMC for conduct that their local governments have led them to believe is permissible.[97] The implementation of the USCIS Marijuana Policy can result in serious immigration consequences to affected individuals, including denial of U.S. citizenship, inadmissibility, and deportation.[98] This article seeks to draw attention to the injustice perpetuated by such an arcane policy.

Given the limited power of the courts with regard to naturalization, the legal recourse available to practitioners against a denial of naturalization for lack of GMC is limited. From a practical perspective, immigration attorneys can try to circumvent the USCIS Marijuana Policy by instructing clients not to apply for U.S. citizenship until five years have passed since they stopped working in the legal marijuana industry. Alternatively, practitioners can challenge the USCIS Marijuana Policy using the arguments outlined in this article. At an individual level, practitioners should challenge the validity of the admission that gave rise to USCIS's finding that the client is ineligible for U.S. citizenship for lack GMC due to their employment in the legal marijuana industry. The strongest challenge to the policy on its face is that the statutory bar to GMC for violations of the CSA was not intended to reach employees of the marijuana industry because Congress did not contemplate the legality of marijuana when it enacted the INA or CSA.

For the reasons detailed in this article, the legal arguments against the USCIS Marijuana Policy are weak and not likely to prevail. The issue of whether legal marijuana-related activity bears on an applicant's eligibility for U.S. citizenship is one that will be best addressed by a congressional amendment

to the INA, which would exempt applicants whose marijuana-related conduct complies with state law from being statutorily barred from establishing GMC.[99] USCIS officers are legally obligated to evaluate claims of GMC based on the "standards of the average citizen in the community of residence[,]" and the extent of society's shift in attitudes toward legalizing marijuana since its classification on Schedule I of the CSA cannot be understated.[100] To suggest that marijuana-related conduct goes against the modern ethical standards of a society where over two-thirds of the country supports such conduct flagrantly contradicts the spirit and purpose of the GMC requirement.

Notes

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1. *See* 21 U.S.C. § 812(c)(10).

2. *See* James M. Cole, Deputy Att'y General, U.S. Dep't of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

3. *See id.*

4. *Map of Marijuana Legality by State*, DISA (July 2020), https://disa.com/map-of-marijuana-legality-by-state.

5. 21 U.S.C. § 812(b)(1).

6. *See* Justin Wingerter, *Trump Administration Says Colorado Immigrants in Cannabis Industry Not Showing Good Moral Character*, The Denver Post, Apr. 22, 2019, https://www.denverpost.com/2019/04/22/trump-marijuana-denver-immigration-gardner/.

7. 8 U.S.C. § 1427. Most applicants naturalize under 8 U.S.C. § 1427, which requires five years of GMC, although there are several limited exceptions. *See, e.g.*, 8 U.S.C. § 1430 (requiring three years of GMC for certain spouses of U.S. citizens); 8 C.F.R. § 329.2(e) (requiring one year of GMC for certain members of the U.S. armed forces).

8. *See* 8 U.S.C. § 1101(f).

9. *See* 8 U.S.C. § 1101(f)(3).

10. USCIS, Policy Alert: Controlled Substance-Related Activity and Good Moral Character Determinations (Apr. 19, 2019), https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf.

11. *See* 8 C.F.R. § 316.10(b)(2)(iv).

12. Kathy Brady, *USCIS Policy Manual Penalizes Legalized Marijuana*, Immigrant Legal Resource Center Practice Alert (Aug. 2019), https://www.ilrc.org/sites/default/files/resources/uscis_marijuana_final-0815.pdf.

13. *See* Justin Wingerter, *Trump Administration Says Colorado Immigrants in Cannabis Industry Not Showing Good Moral Character*, The Denver Post, Apr. 22, 2019, https://www.denverpost.com/2019/04/22/trump-marijuana-denver-immigration-gardner/.
14. *See id.*
15. USCIS, Centennial, CO Field Office, Notice of Decision Re: N-400 Application for Naturalization (on file with author).
16. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).
17. *See* 8 U.S.C. § 1182(a).
18. *See* 8 U.S.C. § 1227(a)(1).
19. *See* Letter from Michael B. Hancock, Mayor of Denver, to William P. Barr, Att'y General (Apr. 3, 2019), https://www.denvergov.org/content/dam/denvergov/Portals/728/documents/Documents/Mayor_Hancock_letter_to_AG_Barr.pdf.
20. GMC appears in contexts other than naturalization, including cancellation of removal, continued residence of aliens, and certain licensing laws.
21. *See* 8 U.S.C. §§ 1427(a), 1101(f); 8 C.F.R. § 316.10.
22. *See* USCIS, Policy Alert: Controlled Substance-Related Activity and Good Moral Character Determinations (Apr. 19, 2019), https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf.
23. 8 U.S.C. § 1427(a).
24. *See id.*
25. *See* 8 U.S.C. § 1101(f).
26. *See id.*
27. 8 U.S.C. §§ 1182(a)(2)(A)(II), 1101(f)(3).
28. *See* 8 C.F.R. § 316.10(b).
29. *See* 8 C.F.R. § 316.10(b)(2)(iii).
30. *See* 8 U.S.C. § 1101(f)(3); 8 C.F.R. § 316.10(b)(2).
31. *See* 8 U.S.C. § 1101(f).
32. 8 C.F.R. § 316.10(a)(2).
33. *See* 8 U.S.C. § 1427(e).
34. *See id.*
35. *See id.*
36. *See Matter of K–*, 7 I. & N. Dec. 594, 597 (B.I.A. 1957).
37. *Id.*
38. *See id.*
39. *See* USCIS, Centennial, CO Field Office, Notice of Decision Re: N-400 Application for Naturalization (on file with author).
40. INS v. Pangilinan, 486 U.S. 875, 883 (1988).
41. U.S. Const. art. I, § 8.
42. United States v. Ginsberg, 243 U.S. 472, 474 (1917).
43. 8 U.S.C. § 1103(a)(1).
44. 8 C.F.R. § 335.3(a).
45. *See id.*
46. Fedorenko v. United States, 449 U.S. 490, 517 (1981).
47. *See* 8 U.S.C. § 1101(f)(3).
48. 8 U.S.C. § 1101(f).
49. *See* 8 U.S.C. § 1101(f); 8 C.F.R. § 316.10(a)(2).
50. *See* United States v. Ginsberg, 243 U.S. 472, 474 (1917).
51. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

52. *See id.* at 866.
53. INS v. Abudu, 485 U.S. 94, 110 (1988).
54. *Chevron*, 467 U.S. at 842-43.
55. *See id.* at 842.
56. *Id.* at 842-43.
57. *See id.* at 859.
58. *See* 8 U.S.C. § 1101(f)(3).
59. *Id.*
60. *See id.*
61. 8 U.S.C. § 1182(a)(2)(A)(i)(II).
62. *See id.*
63. Gonzales v. Raich, 545 U.S. 1, 10 (2005).
64. 21 U.S.C. § 841(a)(1).
65. *See* 21 U.S.C. § 812(b).
66. 21 U.S.C. § 812(b)(1).
67. 21 U.S.C. § 812(c)(10).
68. *See* 8 U.S.C. § 1101(f)(3); 8 U.S.C. § 1182(a)(2)(A)(i)(II).
69. H. R. Rep. No. 91-1444, pt. 2, at 61 (1970) (quoting letter from Roger E. Egeberg, M. D. to Hon. Harley O. Staggers (Aug. 14, 1970)).
70. *See* 8 C.F.R. § 316.10(a)(2).
71. *Id.*
72. United States v. Francioso, 164 F.2d 163, 163 (2d Cir. 1947).
73. *See* In re Spenser, 22 F. Cas. 921 (C.C.D. Or. 1878) (No. 13,234).
74. *See* Matter of Castillo-Perez, 27 I. & N. Dec. 664, 669-70 (A.G. 2019).
75. *See id.*
76. *See* Leslie Shapiro & Katie Mettler, *A History of Marijuana Laws in the United States*, The Washington Post, Apr. 20, 2018, https://www.washingtonpost.com/graphics/health/marijuana-laws-timeline/.
77. See Francioso, 164 F.2d at 163.
78. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, Pew Research Center (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/.
79. *Id.*
80. *Id.*
81. *Id.*
82. *See* Dickhoff v. Shaughnessy, 142 F. Supp. 535, 540 (S.D.N.Y. 1956); Kungys v. United States, 485 U.S. 759, 780 (1988).
83. *See* Dickhoff, 142 F. Supp. at 540; *Kungys*, 485 U.S. at 780.
84. *See* 8 U.S.C. § 1101(f); 8 C.F.R. § 316.10(a)(2).
85. *See Map of Marijuana Legality by State*, DISA (Apr. 2020), https://disa.com/map-of-marijuana-legality-by-state; Darling v. Berry, 13 F. 659, 667 (1882).
86. *See* Petition of Lee Wee, 143 F. Supp. 736, 737 (S.D. Cal. 1956); 8 U.S.C. § 1101(f)(5).
87. *Lee Wee*, 143 F. Supp. at 738.
88. *Id.*
89. *See* Dickhoff v. Shaughnessy, 142 F. Supp. 535, 540 (S.D.N.Y. 1956).
90. *Id.* at 539.
91. *Id.*

92. *See id.*

93. *See id.*; Petition of Lee Wee, 143 F. Supp. 736, 737 (S.D. Cal. 1956).

94. *See Map of Marijuana Legality by State*, DISA (Apr. 2020), https://disa.com/map-of-marijuana-legality-by-state.

95. *See* 8 C.F.R. § 316.10(a)(2).

96. *See Matter of K–*, 7 I. & N. Dec. 594, 597 (B.I.A. 1957).

97. *See* USCIS, Policy Alert: Controlled Substance-Related Activity and Good Moral Character Determinations (Apr. 19, 2019), https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf.

98. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C. § 1227(a)(1).

99. *See* A Bill to Amend the Immigration and Nationality Act to Provide an Exception from the Grounds of Inadmissibility for Participation in a Cannabis Business Operating in Compliance with State Law, S. 3097, 116th Cong. (2019).

100. 8 C.F.R. § 316.10(a)(2).

ITServe Alliance v. Cissna

A Victory—Perhaps Temporary—for H-1B Beneficiaries and Petitioners

Kaitlyn Box*

Abstract: The recent *ITServe Alliance v. Cissna* case overturned nearly 10 years of restrictions on H-1B employers, but obstacles remain for H-1B visa holders and their employers. This article provides an overview of the *ITServe Alliance v. Cissna* case, and argues that the decision is a temporary victory for H-1B employers, but emphasizes that USCIS should end its overreliance on subregulatory guidance and instead embrace notice-and-comment rule-making to ensure more stable and coherent policies going forward.

On March 10, 2020, the U.S. District Court for the District of Columbia issued a decision in *ITServe Alliance, Inc. v. Cissna* that invalidated nearly ten years of barriers for employers and individuals seeking H-1B visas. The court struck down several key provisions of two policy memoranda issued by the U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS) component tasked with adjudicating immigration-benefits requests: a USCIS 2010 memorandum, also known as the Neufeld Memo, on "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" and a USCIS 2018 policy memorandum on "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites." The court set aside these memoranda on the grounds that they unlawfully conflicted with existing regulations and improperly circumvented the notice-and-comment rule-making process under the Administrative Procedure Act (APA).[1] In the wake of numerous Trump administration policies aimed at curtailing the issuance of H-1B visas, *ITServe Alliance* represents a major victory for H-1B visa seekers. However, this article argues that the decision is only a temporary victory, and that burdensome and unclear USCIS guidance will continue to plague H-1B petitions until USCIS ends its reliance on subregulatory guidance and embraces the APA notice-and-comment rule-making process.

The article will proceed in three parts. First, it will provide an overview of the 2010 Neufeld Memo and the 2018 policy memorandum, and the litigation that challenged these memoranda prior to *ITServe Alliance*. Next, it will analyze the court's decision in *ITServe Alliance* and examine the impact the case may have going forward. Finally, the article will argue that USCIS

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should utilize the notice-and-comment rule-making process and move away from issuing problematic subregulatory guidance.

H-1B visas allow U.S. companies to temporarily employ highly skilled nonimmigrant workers in a "specialty occupation."[2] The U.S. employer has the burden of proving that the contemplated position qualifies as a "specialty occupation" under the Immigration and Nationality Act (INA).[3] The INA defines a "specialty occupation" as one that requires "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[4] Additionally, a specialty occupation must satisfy one of the following four regulatory criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.[5]

The H-1B beneficiary must:

> (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.[6]

Before filing an H-1B petition, U.S. employers must submit a Labor Condition Application (LCA) to the Department of Labor.[7] In an LCA, the employer confirms that it "will offer wages at the level for similarly situated domestic employees, will provide working conditions that will not adversely

affect these domestic employees, that there is not a labor dispute for this classification of employees, and that any bargaining representative has received notice of the LCA."[8]

The USCIS 2010 Memorandum (Neufeld Memo)

The background to *ITServe Alliance* begins with the USCIS 2010 memorandum entitled "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" that was issued by then-Associate Director of USCIS Service Center Operations Donald Neufeld on January 8, 2010. The so-called Neufeld Memo provides guidance on H-1B petitions, specifically outlining when a valid employee-employer relationship exists and how to determine whether that relationship will exist for the duration of the visa validity period.[9] The memo centers on the issue of whether the employer has a sufficient level of control over the timing, location, and manner of the beneficiary's performance of the job.[10] Relying on the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden*,[11] the memo lays out eleven new criteria that officers must weigh when determining whether a qualifying employer-employee relationship exists.[12] The memo also offered scenarios that would typically qualify as a sufficient employer-employee relationship, such as traditional employment where there was an exercise of actual control; temporary/occasional off-site employment where there was a right to control; long-term/permanent off-site employment where there was a right to control specified and actual control exercised; and long-term placement at a third-party work site where there was a right to control specified and actual control exercised.[13] Beneficiaries who were self-employed, employed as independent contractors, or assigned employment at third-party companies were unlikely to qualify.[14] Further, the memo provided examples of necessary evidence for initial and extension petitions.[15] Finally, the memo indicated that employers must prove that the requisite employer-employee relationship would continue for the entire three-year duration of the visa validity period.[16]

Commenters at the time sharply criticized the Neufeld Memo as "demanding, burdensome and commercially unreasonable."[17] The memo had a particularly negative effect on the information technology (IT) consulting industry, where firms typically place H-1B employees at third-party worksites.[18] The amount of evidence that employers were required to submit to prove that they would maintain the requisite employer-employee relationship with H-1B beneficiaries for the entire H-1B validity period was nearly impossible to gather. The burdensome impact of the evidentiary requirements is illustrated particularly well by the example of detailed itineraries. Because many IT consulting firms place H-1B employees at an end client to perform work during a long-term project, it is often extremely difficult for employers to estimate the employees' day-to-day assignments years into the future,

particularly when the end client, rather than the H-1B petitioner, sets the project goals and timeline.[19]

The USCIS 2018 Policy Memorandum

On February 22, 2018, USCIS issued an additional memorandum entitled "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" (2018 Memo) that imposed further requirements on H-1B petitioners who place beneficiaries at third-party worksites. The memo stated that third-party worksite placements made it more difficult for USCIS to ascertain whether the beneficiary would actually be employed in a specialty occupation, and whether the petitioner would maintain the requisite employer-employee relationship with the beneficiary for the duration of the visa validity period, particularly where intermediary vendors were involved.[20] To demonstrate that a beneficiary working at third-party worksite will have actual work in a specialty occupation and that the petitioner will maintain an employer-employee with the beneficiary for the duration of the validity period, the memo required petitioners to submit corroborating evidence, such as a contract between the petitioner and the client for the worksite.[21] Further, the memo stated that 8 CFR § 214.2(h)(2)(i)(B) required petitioners to file an itinerary with dates and locations of worksites whenever a beneficiary would be performing work at third-party locations.[22] The itinerary demonstrates that the beneficiary would have "specific and non-speculative qualifying assignments in a specialty occupation" for the duration of the visa validity period.[23] The itinerary cannot be a general description, but must include detailed information like the dates of each service or engagement; the names and addresses of the ultimate employer; the names, addresses, and telephone numbers of the locations where the services will be performed for the period of time requested; as well as corroborating evidence for each of these pieces of information.[24] Finally, the memo made clear that the prospective H-1B beneficiary must be placed in non-speculative specialty occupation work and maintain the requisite employer-employee relationship with the petitioner for the entire duration of the visa validity period.[25] The memo further stipulated that the petitioner must provide detailed corroborating evidence such as contracts or statements of work to support the petition.[26]

The 2018 Memo, like the Neufeld Memo, was criticized for the onerous burden it placed on firms that employ H-1B workers. The 2018 Memo was a particular source of confusion as it seemed, in some ways, to contradict the Neufeld Memo. While the Neufeld Memo made clear that it is the H-1B petitioner, not an end client, who must retain control over the beneficiary's employment, among the evidence required by the 2018 Memo was detailed documentation from end clients regarding the beneficiary's assignments and responsibilities.[27] Because end clients do not employ the H-1B beneficiaries

who are placed with them through an IT staffing firm, some may be reluctant to provide detailed documentation of assignments and responsibilities.[28] Even if end clients are willing to submit detailed itineraries and other documentation for H-1B beneficiaries, this requirement is problematic because it suggests that the end client, rather than the H-1B petitioner, controls the beneficiary's employment by setting the requirements of the employment.[29]

Litigation History

ITServe Alliance was not the first case to challenge USCIS's allegedly nonbinding memoranda concerning eligibility criteria for approval of H-1B petitions. Several months after the Neufeld Memo was issued, multiple technology companies that employed H-1B beneficiaries at third-party worksites challenged it in the D.C. Circuit.[30] The companies employed an argument similar to the one that ultimately prevailed in *ITServe Alliance*—the Neufeld Memo was not nonbinding, rather, it was facially and practically binding law, and USCIS should have followed the APA's notice-and-comment rule-making procedure.[31] However, the court dismissed the companies' arguments, holding that it was within USCIS's authority to issue nonbinding "policy statements and interpretive rules."[32] The court reasoned that the Neufeld Memo was nonbinding because its stated purpose was merely to provide guidance, not to create new binding rules, and because it used discretionary language.[33] The D.C. Circuit further focused on the Neufeld Memo's statement that USCIS would flexibly weigh all eleven of the relevant employer control factors when deciding whether to grant a petition, holding conclusively that USCIS's issuance of such memoranda was permissible.[34] The American Immigration Lawyers Association (AILA) also drafted a memorandum in response, arguing that the regulations already set out the requirements for an H-1B petition, and questioning the legitimacy of the new requirements that the Neufeld Memo imposed.[35]

ITServe Alliance v. Cissna

The *ITServe Alliance* case originated against a backdrop of Trump administration policies[36] designed to limit the number of H-1B visa petition approvals.[37] Statistics from a National Foundation for American Policy report, based on USCIS data, indicate that denial rates for H-1B petitions have risen from 6 percent in fiscal year 2015 to 32 percent in the first quarter of fiscal year 2019.[38] Roughly 60 percent of H-1B petitions resulted in a Request for Evidence (RFE) in the first quarter of fiscal year 2019.[39] IT companies, like ITServe Alliance, were impacted particularly heavily. Some IT companies' denial rates reached 50 percent or above in fiscal year 2018 and fiscal year

2019, compared to just 4 percent in previous years.[40] The heightened evidentiary requirements imposed by the 2018 Memo may have, at least in part, contributed to these unusually high denial rates. Several IT companies filed suit challenging the 2018 Memo, cases that were eventually consolidated into *ITServe Alliance*.

The plaintiffs challenged USCIS's "current interpretation and application of three different criteria to receive an H-1B visa: the revised employer-employee relationship requirement, the new non-speculative work requirement, and the newly-interpreted itinerary requirement."[41] The plaintiffs argued that no existing statute supported the new requirement to prove non-speculative work assignments for the entirety of the visa validity period as laid out in the 2018 Memo, and that USCIS had exceeded its authority in promulgating what amounted to a binding rule.[42] Further, the corporate plaintiffs argued that established law, in the form of the American Competitiveness and Workforce Improvement Act (ACWIA), allows employers to place H-1B beneficiaries in "non-productive status," as long as the employer still pays the individual the approved full-time wage.[43] Rather than requiring employers to prove that H-1B beneficiaries will have non-speculative work assignments for the entire three-year validity period, ACWIA evidences congressional intent to allow periods of non-working for H-1B beneficiaries.[44]

Authoring the opinion, Judge Rosemary Collyer held that USCIS's interpretation of an employer-employee relationship is "inconsistent with the regulation, was announced and applied without rulemaking, and cannot be enforced."[45] Further, the court held that the existing statute did not support requiring employers to provide proof of non-speculative work assignments for the entire visa validity period, and was arbitrary and capricious as applied to the plaintiffs.[46] The court held that the heightened requirements were promulgated without notice-and-comment rule-making procedures, and are unenforceable.[47] Additionally, Judge Collyer held that the ACWIA, which allowed employers to place H-1B beneficiaries in non-productive status, superseded USCIS's earlier itinerary requirements, rendering these requirements unenforceable.[48]

Judge Collyer reasoned that the 2018 Memo is a legislative rule that seeks to impose binding legal obligations on petitioners, as it "creates a new definition of employer, adds substantive requirements to the nature of the petitioning employer's relationship to the H-1B visa recipient, adds substantial new requirements to the descriptions of work to be performed by H-1B visa workers, and demands detailed itineraries from petitioners."[49] Additionally, the Neufeld Memo ignores the definition of an employer at 8 CFR § 214.2(h)(4)(ii), and instead focuses on the single common law element that defines an employer-employee relationship—the employer's control of the employee.[50] Judge Collyer concluded that USCIS's reliance on the common law definition contradicts the clear definition provided in the statute and is "an erroneous effort to substitute the agency's understanding of common law for the unambiguous text of the INS 1991 Regulation."[51]

The opinion next turned to USCIS's policy of requiring petitioners to submit proof of non-speculative work assignments for the entire visa validity period. Judge Collyer first concluded that Congress has already provided a clear definition of specialty occupation at 8 USC § 1184(i).[52] She further reasoned that no provision in the existing regulation would require petitioners to submit a detailed itinerary outlining the beneficiary's day-to-day assignments.[53] The court was unpersuaded by USCIS's contention that the 1991 regulation supports the itinerary requirement, in particular a provision at 8 CFR § 214.2(h)(4)(iii)(A) that states that "[t]he nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree."[54] Judge Collyer reasoned that this provision merely suggests one way to demonstrate that a beneficiary is employed in a specialty occupation, and is not a requirement that applies to all H-1B petitioners.[55]

USCIS also denied H-1B petitions on the grounds that the itineraries submitted by petitioners "did not include descriptions of non-speculative work assignments for the duration of the visa validity period."[56] Judge Collyer reiterated that the itinerary requirement is not found in the statute, and emphasized that USCIS had again misinterpreted the 1991 regulation, misconstruing a provision that required the "dates and locations" of the services to be provided to also require specific work assignments and the identity of the company that gives the assignments.[57] Judge Collyer held that USCIS's interpretation of the itinerary requirement was inconsistent with the statute and unenforceable as applied to the plaintiffs.[58]

The final question before the court was whether USCIS had the authority to issue partial denials and grant H-1B visas for less than three years.[59] Judge Collyer held that the plain language of the 1991 regulation does not require USCIS to grant or deny petitions for the entire validity period that is requested, and that the use of the phrase "up to three years" necessarily contemplates granting petitions for durations of less than three years.[60] However, Judge Collyer also noted that USCIS had "almost uniformly" granted H-1B visa petitions for the full three years until recently.[61] "The USCIS 2018 Policy Memo introduced a practice of granting visa petitions from IT consultants for less than three years, which represents a change after decades of past practice on which petitioning U.S. employers have come to rely," Judge Collyer observed.[62] USCIS is required to provide "legitimate reasons" for its denial of H-1B visa petitions, whether those denials are in whole or in part.[63] Because USCIS did not provide legitimate reasons for its denial of the plaintiffs' petitions, Judge Collyer held that the denials were arbitrary and capricious in violation of the APA.[64]

After the court's decision in *ITServe Alliance*, on May 16, 2020, the plaintiffs entered into a settlement agreement with USCIS. The settlement agreement requires USCIS to entirely rescind the 2018 Memo within 90 days of the agreement's effective date.[65] Additionally, USCIS agrees to "abstain from the application of the 1991 itinerary requirement, 8 C.F.R. § 214.2(h)(2)(i)(B),

in the limited instance of applicable H-1B adjudications until such time that the Department of Homeland Security or USCIS issue new adjudicative and/or regulatory guidance on this requirement."[66] Further, the agreement requires USCIS to reopen and re-adjudicate individual decisions that were the subject of the *ITServe Alliance* litigation within 90 days of the effective date of the agreement.[67] In re-adjudicating the cases, USCIS agreed that it will not apply the interpretation of the current regulatory language in 8 CFR § 214.2(h)(4)(ii), defining "United States employer" with an emphasis on an employer's control over the employee, and agreed to comply with the court's holding in *ITServe Alliance*.[68] USCIS also agreed that it would not approve the H-1B petitions subject to re-adjudication for less than the requested validity period without providing a "brief explanation as to why the validity period has been limited and in compliance with Judge Collyer's March 10, 2020, decision in *ITServe Alliance, Inc. v. Cissna*, Civil No. 18-2350 (D.D.C.)."[69]

Although *ITServe Alliance* has, perhaps, received the most attention out of several cases seeking to challenge the 2018 Memo, others have received similar results. The plaintiffs in *Serenity Info Tech et al. v. Kenneth T. Cuccinelli*, decided in the Northern District of Georgia, employed arguments that mirrored those in *ITServe Alliance*. The plaintiffs in *Serenity Info Tech* were also IT consulting firms that frequently submit H-1B petitions on behalf of employees. The beneficiaries who were the subject of the case had all had their H-1B petitions denied in 2019, either because Serenity failed to meet the definition of a "United States employer" or because USCIS had "determined that Serenity failed to meet its burden of showing services in a specialty occupation because it failed to 'demonstrate that [it has] specific and non-speculative qualifying assignments in a specialty occupation for the entire time requested on the petition.'"[70] Like *ITServe Alliance v. Cissna*, *Serenity Info Tech* also centered around USCIS's requirement that U.S. employers demonstrate actual control over H-1B beneficiaries to be considered employers, and detailed itinerary requirements.[71] Unlike Judge Collyer, the court instead treated the 2018 Memo as an interpretive rule, and turned to the issue of whether USCIS's interpretations were owed deference under *Auer v. Robbins*.[72] The court in *Serenity Info Tech* first addressed the so-called "actual control rule," holding that it contradicts the flexible definition of an employer already clearly articulated in the regulation.[73] Because the definition of an employer in the regulation was not ambiguous, the court held that USCIS's interpretation was not entitled to deference.[74] The court next turned to USCIS's itinerary requirement, holding that there is no statutory or regulatory basis for requiring petitioners to submit a detailed itinerary of the beneficiary's day-to-day assignments for the entire visa validity period.[75] Because the regulations were unambiguous on this point also, the court held that USCIS's interpretation was not entitled to *Auer* deference.[76]

The impact of *ITServe Alliance* and *Serenity Info Tech* on H-1B petitioners could be significant. The *ITServe Alliance* decision, taken together with the

settlement, invalidates the 2018 Memo entirely, easing the impossible burden that it had created for employers. With USCIS's interpretation invalidated, employers need no longer satisfy the "actual control" test or provide itineraries that track the beneficiary's assignments for an entire three-year period. On June 17, 2020, as a result of *ITServe Alliance* and *Serenity Info Tech*, USCIS rescinded both the 2018 Memo and the Neufeld Memo.[77] USCIS's rescission of the memoranda reinforces the idea that H-1B employers will no longer need to meet the burdensome evidentiary requirements that the memoranda laid out by submitting documents like client contracts and detailed itineraries.[78] Significantly, the *ITServe Alliance* settlement agreement places no responsibility on USCIS to overturn or amend previous denials or approvals of H-1B petitions for a shorter validity period than was requested.[79] Thus, employers may be forced to litigate to overturn denials or seek extension of petitions that were approved for only a short period.[80] However, USCIS's June 17 memo rescinding the memoranda states: "USCIS officers should not apply the above-listed memoranda to any pending or new requests for H-1B classification, including motions on and appeals of revocations and denials of H-1B classification," suggesting that it may be possible for H-1B petitioners to file a motion to reconsider a previous denial.[81]

Additionally, neither the court's decision in *ITServe Alliance* nor the settlement agreement prohibits the USCIS or DHS from issuing new guidance that could impose further restrictions on H-1B eligibility.[82] The Trump administration has indicated that it is currently considering additional policies to limit approval rates for H-1B petitions. The administration is reportedly considering a policy[83] that would limit H-1B eligibility to individuals who are paid a Level 4 wage, the highest bracket under the government's wage criteria.[84] Because few H-1B beneficiaries are paid a Level 4 wage, this policy would drastically limit the number of individuals who are eligible for H-1B status, as well as prevent talented entry-level employees from obtaining an H-1B visa.[85]

Notice-and-Comment Rule-Making as an Alternative to Subregulatory Guidance

While the *ITServe Alliance* decision and settlement agreement are significant victories for companies that employ H-1B employees, they may not provide a complete solution to USCIS guidance that unduly burdens employers, particularly as USCIS can always issue new guidance that imposes new restrictions. Guidance like the Neufeld Memo and the 2018 Memo indicate a broader problem with USCIS guidance—the issuance of allegedly nonbinding memos when formal notice-and-comment rule-making under the APA would be more appropriate.

Jill Family, Commonwealth Professor of Law and Government and Director of the Law and Government Institute at Widener Commonwealth Law

School, notes that USCIS has always had a somewhat complicated relationship with subregulatory rules. USCIS's Policy Manual,[86] which explains agency policy and procedures, offers an unclear explanation of subregulatory rules.[87] The Policy Manual designates statutes and regulations as policy documents, and states that some guidance documents, including certain memoranda, are binding rules, statements that are unclear and appear to contradict the APA.[88]

In addition to ambiguous internal policy on subregulatory rules, USCIS also relies on so-called nonbinding guidance when notice-and-comment rule-making would often be more appropriate. Jill Family notes that USCIS has always relied heavily on subregulatory rules.[89] This reliance is probably for good reason as the notice-and-comment process can be both costly and time consuming. However, there are important reasons to choose notice-and-comment rule-making over promulgating subregulatory rules. As illustrated by the Neufeld Memo and the 2018 Memo, even subregulatory guidance that USCIS suggests is nonbinding can carry particularly severe consequences for the parties that it impacts.[90] Notice-and-comment rule-making provides individuals who stand to be affected by a new proposed rule the opportunity to provide input on the proposed rule, a process that is absent when an agency issues nonbinding guidance. In the absence of notice-and-comment rule-making, there is also no notice of impending changes in agency policy.[91] Further, guidance documents like the Neufeld Memo and the 2018 Memo that are, allegedly nonbinding but, in fact, impose binding legal obligations create confusion and a string of ever-changing policies.[92] Nonbinding guidance that has a practical binding effect creates confusion for adjudicators, petitioners, and other impacted parties regarding whether to treat the guidance as a legally binding obligation, despite USCIS's assertions that it is not, or whether to treat the guidance as a mere suggestion, which results in an unclear legal standard.[93] As evidenced by *ITServe Alliance*, nonbinding guidance is also subject to rapid change, whether it is overturned in the courts or invalidated by subsequent agency guidance. The result is a lack of stable legal standards, and ever-evolving policies that are difficult for relevant parties to follow.[94]

Recent Supreme Court decisions further illustrate the detrimental impact of ever-changing agency guidance and recognize the importance of protecting reliance interests. In 2019, in *Kisor v. Wilkie*, the Supreme Court adopted a new framework for assessing an agency's interpretation of its own regulations that was more stringent than the *Auer* and *Chevron* standards, which accorded the agency great deference.[95] Under the test adopted in *Kisor*, courts must determine:

> (i) that the regulation is "genuinely ambiguous"—the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is genuinely ambiguous, whether the agency's interpretation is reasonable; and (iii) even if it is a reasonable interpretation, whether it meets the "minimum threshold" to

> grant *Auer* deference, requiring the court to conduct an "independent inquiry" into whether (a) it is an authoritative or official position of the agency; (b) it reflects the agency's substantive expertise; and (c) the agency's interpretation of the rule reflects "its fair and considered judgment."[96]

The court noted that deference "turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests."[97] The Supreme Court's recent decision on DACA also focused on the issue of reliance interests, stating that "when an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."'"[98] Ever-changing agency policies burden both H-1B beneficiaries and U.S. companies who rely on agency guidance to make crucial employment-related decisions.

While cases like *ITServe Alliance* are, no doubt, a victory for H-1B employers and employees, that victory may be temporary because USCIS can continue to issue similar guidance that imposes legal obligations with none of the procedural safeguards that are built into the notice-and-comment rule-making process. Despite its advantages, subregulatory guidance should not be overused. As the Neufeld Memo and the 2018 Memo demonstrate, subregulatory guidance can result in rapid and quickly evolving policy changes that heavily burden affected parties without affording them any involvement in the process. If USCIS wishes to promulgate the clearest and most stable regulations going forward, it should end its overreliance on subregulatory guidance and embrace notice-and-comment rule-making.

Notes

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1. ITServe Alliance, Inc. v. Cissna, No. CV 18-2350 (RMC), 2020 WL 1150186 (D.D.C. Mar. 10, 2020).
2. *Serenity Info Tech Inc. et al. v. Cuccinelli*, 1:20-cv-0647-AT, *3 (N.D. Ga. 2020); 8 U.S.C. § 1101(a)(15)(H)(i)(b), I.N.A. § 101.
3. *Serenity Info Tech Inc. et al.*, 1:20-cv-0647-AT, at *3 (*citing* Royal Siam Corp. v. Chertoff, 484 F.3d 139, 144 (1st Cir. 2000)).
4. *Id.* at *3; 8 U.S.C. § 1184(i)(1).
5. *Serenity Info Tech Inc. et al.*, 1:20-cv-0647-AT at *30-31; 8 C.F.R. § 214.2(h)(4)(iii)(A).
6. 8 C.F.R. § 214.2(h)(4)(iii)(C).
7. *Serenity Info Tech Inc. et al.*, 1:20-cv-0647-AT at *4; 8 U.S.C. § 1182(n).
8. *Serenity Info Tech Inc. et al.*, 1:20-cv-0647-AT at *4; 8 U.S.C. § 1182(n)(1), I.N.A. § 212.

9. Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations Directorate, U.S. Citizenship & Immigration Services (USCIS), "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf [hereinafter Neufeld Memo]; *see also* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 601-2 (2012); Tess Douglas, *Disrupting Immigration: How Administrative Rulemaking Could Transform the Landscape for Immigrant Entrepreneurs*, 44 Pepp. L. Rev. 199, 224 (2016).

10. Family, *supra* note 9, at 601; Neufeld Memo.

11. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

12. Family, *supra* note 9, at 601; Neufeld Memo; *see also* Douglas, *supra* note 9, at 225.

13. Neufeld Memo; Greenberg Traurig LLP, *Neufeld memo on employer-employee relationship*, Lexology (Dec. 2, 2011), *available at* https://www.lexology.com/library/detail.aspx?g=089bf432-0fb3-452d-a741-0540dabd0aa8.

14. Neufeld Memo; Family, *supra* note 9, at 602; Douglas, *supra* note 9, at 225; Greenberg Traurig, *supra* note 13.

15. Neufeld Memo; *see also* Douglas, *supra* note 9, at 225.

16. Neufeld Memo.

17. *See* Angelo A. Paparelli & Ted J. Chiappari, *New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms*, 15 Bender's Immigr. Bull. 641, 644 (2010); *see also* Family, *supra* note 9, at 565, 602.

18. Karen Jensen, *Barriers to H-1B Visa Sponsorship in the IT Consulting Industry: The Economic Incentive to Alter H-1B Policy*, 35 Fordham Int'l L. J. 1027, 1030 (2017), *available at* https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2592&context=ilj.

19. *Id.*

20. Policy Memorandum, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," USCIS, PM-602-0157 (Feb. 22, 2018), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Cyrus Mehta, *The Draconian Documentation Regime for Third Party Arrangements in H-1B Visa Petitions*, The Insightful Immigration Blog (Mar. 5, 2018), *available at* http://blog.cyrusmehta.com/2018/03/the-draconian-documentation-regime-for-third-party-arrangements-in-h-1b-visa-petitions.html.

29. *Id.*

30. *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 241 (D.D.C. 2010); *see also* Douglas, *supra* note 9, at 225-26; Family, *supra* note 9, at 603.

31. *Broadgate Inc.*, 730 F. Supp. 2d at 242. *See also* Douglas, *supra* note 9, at 225-26; Family, *supra* note 9, at 603.

32. Douglas, *supra* note 9, at 225-26; *Broadgate Inc.*, 730 F. Supp. 2d at 245-46; Family, *supra* note 9, at 603.

33. *Broadgate Inc.*, 730 F. Supp. 2d at 245-46; Douglas, *supra* note 9, at 199, 226; Family, *supra* note 9, at 603.

34. *Broadgate Inc.*, 730 F. Supp. 2d at 245; Douglas, *supra* note 9, at 199, 226; Family, *supra* note 9, at 603.

35. *See* Memorandum from the Am. Immigration Lawyers Ass'n to Alejandro Mayorkas, Director, USCIS, and Roxana Bacon, Chief Counsel, USCIS, 4-6 (Mar. 19, 2010), *available at* http://usavisanow.com/wp-content/uploads/2010/03/neufeld-aila-response-3-19-10.pdf.

36. The Buy American, Hire American executive order and its repercussions restricted the number of H-1B approvals. *See* Exec. Order 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

37. *See* Jacob Sapochnick, *H-1B Information Technology Workers Win Big Victory in Federal Court*, Visa Lawyer Blog (Apr. 2, 2020), *available at* https://www.visalawyerblog.com/h-1b-information-technology-workers-win-big-victory-in-federal-court/.

38. Policy Brief, *H-1B Denial Rates: Past and Present*, Nat'l Foundation for Am. Pol'y (Apr. 2019), *available at* https://nfap.com/wp-content/uploads/2019/04/H-1B-Denial-Rates-Past-and-Present.NFAP-Policy-Brief.April-2019.pdf; *see also* Stuart Anderson, *USCIS Documents Reveal the Sources of Trump H-1B Visa Restrictions*, Forbes (Sept. 9, 2019, 12:09 AM EDT), *available at* https://www.forbes.com/sites/stuartanderson/2019/09/19/uscis-documents-reveal-the-sources-of-trump-h-1b-visa-restrictions/#4416e1b12760.

39. Anderson, *supra* note 38.

40. *Id.*

41. *ITServe Alliance, Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *8 (D.D.C. Mar. 10, 2020).

42. *Id.*

43. *Id.* at *20.

44. *Id.*

45. *Id.* at 2; Cyrus Mehta & Sonal Sharma, *The Beneficial Impact of the Supreme Court's Decision in* Kisor v. Wilkie *on H-1B Denials*, Insightful Immigration Blog (May 28, 2020), *available at* http://blog.cyrusmehta.com/2020/05/the-beneficial-impact-of-the-supreme-courts-decision-in-kisor-v-wilkie-on-h-1b-denials.html.

46. Mehta & Sharma, *supra* note 45; *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *18-22.

47. Mehta & Sharma, *supra* note 45; *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *18-22.

48. Mehta & Sharma, *supra* note 45; *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *18-22.

49. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *14; Mehta & Sharma, *supra* note 45.

50. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *16; *see also* Mehta & Sharma, *supra* note 45.

51. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *17; Mehta & Sharma, *supra* note 45.

52. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *19.

53. *Id.*

54. 8 C.F.R. § 214.2(h)(4)(iii)(A); *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *19; Mehta & Sharma, *supra* note 45.

55. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *19.

56. *Id.* at *20.

57. *Id.*; 8 C.F.R. § 214.2(h)(2)(i)(B).

58. *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186 at *20.

59. *Id.* at *21.

60. *Id.*

61. *Id.* at *22.

62. *Id.*

63. *Id.*

64. *Id.*

65. Settlement Agreement, *ITServe Alliance, Inc.*, No. CV 18-2350 (RMC), 2020 WL 1150186, *available at* https://nfap.com/wp-content/uploads/2020/05/ITSERVE-SETTLEMENT-AGREEMENT-fully-executed_Redacted52020.pdf.

66. *Id.*

67. *Id.*; Mehta & Sharma, *supra* note 45.

68. Settlement Agreement, *supra* note 65.

69. *Id.*

70. *Serenity Info Tech Inc. et al. v. Cuccinelli*, No. 1:20-CV-0647-AT, 2020 WL 2544534 at *1 (N.D. Ga. May 20, 2020); Mehta & Sharma, *supra* note 45.

71. *See* Mehta & Sharma, *supra* note 45.

72. *Serenity Info Tech Inc. et al.*, No. 1:20-CV-0647-AT, 2020 WL 2544534 at *7; Mehta & Sharma, *supra* note 45.

73. *Serenity Info Tech Inc. et al.*, No. 1:20-CV-0647-AT, 2020 WL 2544534 at *10.

74. *Id.*

75. *Id.* at 15.

76. *Id.*

77. Policy Memorandum, Rescission of Policy Memorandum, USCIS (June 17, 2020), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf.

78. *See* Angelo Paparelli, *Litigation Victories Force USCIS to Rescind Restrictive H-1B Memoranda—Agency also Offers Unclear Guidance on H-1B "Nonproductive" Status*, Nation of Immigrators (June 22, 2020), *available at* https://www.nationofimmigrators.com/h-1b-visas/litigation-victories-force-uscis-to-rescind-restrictive-h-1b-memoranda-agency-also-offers-unclear-guidance-on-h-1b-nonproductive-status/.

79. *See* Stuart Anderson, *USCIS-ITServe Settlement Overturns 10 Years of H-1B Visa Policies*, Forbes (May 21, 2020), *available at* https://www.forbes.com/sites/stuartanderson/2020/05/21/uscis-itserve-settlement-overturns-10-years-of-h-1b-visa-policies/#2cfc16795bf4.

80. *Id.*

81. Policy Memorandum, Rescission of Policy Memorandum, USCIS, *supra* note 77.

82. *See* Lindsey Steinberg & Tom Quill, *USCIS Settlement a Win for Staffing Companies and H-1B Workers*, Nat'l. L. Rev. (May 26, 2020), *available at* https://www.natlawreview.com/article/uscis-settlement-win-staffing-companies-and-h-1b-workers.

83. *See* Proclamation 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020).

84. *See* Stuart Anderson, *Trump Minimum Wage for H-1B Visa Holders Could Reach $250,000 a Year*, Forbes (May 21, 2020), *available at* https://www.forbes.com/sites/stuartanderson/2020/05/21/trump-minimum-wage-for-h-1b-visa-holders-could-reach-250000-a-year/#431270231f1b.

85. *Id.*

86. In May 2020, USCIS replaced its Field Manual with the USCIS Policy Manual, "a centralized online repository for immigration policies." *See* Daniel Kowalski, *USCIS Retires the AFM; Crosswalk*, LexisNexis (May 22, 2020), https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/uscis-retires-the-afm.

87. Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 590 (2012).

88. *Id.* at 590-92.

89. *Id.* at 593.

90. *See, e.g.*, *id.* at 598.

91. *Id.* at 599.

92. *Id.* at 603.

93. *Id.*

94. *Id.* at 604.

95. *See* Mehta & Sharma, *supra* note 45; *Kisor v. Wilkie*, 588 U.S. ____ (2019).

96. Mehta & Sharma, *supra* note 45; *Kisor v. Wilkie*, 588 U.S. ____ (2019).

97. Kisor v. Wilkie, 588 U.S. ____, at *23.

98. Cyrus Mehta, *Reflecting on the Supreme Court DACA Decision in Comparison to Trump's Immigration Bans*, The Insightful Immigration Blog (June 22, 2020), *available at* http://blog.cyrusmehta.com/2020/06/reflecting-on-the-supreme-court-daca-decision-in-comparison-to-trumps-immigration-bans.html; *Dep't of Homeland Sec. v. Regents of California*, 591 U.S. ____, *23 (2020) (*citing Encino Motorcars, LLC v. Navarro*, 579 U.S. ____ (2016)).

He Loves Me . . . He Loves Me Not Anymore?!

How the Bona Fides of a Marriage for an Approved Spousal Petition Can Depend on Whether the Burden of Proof in Revocation Proceedings Under INA § 205 Is on USCIS or the Petitioner

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Abstract: Even though INA § 205 plainly states that USCIS must have "good and sufficient cause" to revoke the approval of an immigrant petition, USCIS, the BIA, and even some courts inexplicably place the burden of proof in revocation proceedings on the petitioner to prove that the beneficiary still qualifies for the immigration benefit sought, not on USCIS to prove that revocation of the previously approved benefit is justified. The consequences of this issue are perhaps most pronounced with spousal petitions, where the bona fides of the underlying marital relationship can depend on which party has the burden of proving (or disproving) this highly evidence-based question of fact. This article takes a deep look into all of the possible arguments/justifications for placing the burden of proof in revocation proceedings on the petitioner to "re-prove" a bona fide marriage and not on USCIS to prove a sham marriage.

The Problem: Placing the Burden of Proof on the Petitioner in Revocation Proceedings Goes Against Both the Plain and Administratively Interpreted Meaning of INA § 205

Semper necessitas probandi incumbit ei qui agit—The necessity of proof always lies with the person who lays charges.[1]

Actori incumbit onus probandi—The burden of proof rests on the party who advances a proposition affirmatively.[2]

Affirmati non neganti incumbit probatio—The burden of proof is upon him who affirms—not on him who denies.[3]

The basic legal principle of burden of proof (BOP) embodied in these Latin maxims—that the party claiming something to be true has the duty to

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persuade the decision maker with evidence[4]—is about as well settled as there is in the legal realm. As the Supreme Court has put it, "[T]he ordinary default rule [is] that . . . [t]he burden[] of . . . proof . . . should be assigned to the [party] who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure . . . ."[5]

Yet in *two* of the author's recent cases involving approved spousal petitions[6]—where a U.S. citizen-petitioner files an immigrant petition to classify his wife as an "immediate relative" under the Immigration and Nationality Act (INA) § 204, and upon approval the alien-beneficiary applies for a visa or adjustment of status—the United States Citizenship and Immigration Services (USCIS) initiated proceedings under INA § 205 to revoke such approval due to purported marriage fraud *but* stated in the Notices of Intent to Revoke (NOIR), "[T]he *petitioner* bears the burden in visa petition revocation proceedings of establishing that the beneficiary qualifies for the benefit sought under the immigration laws" (emphasis added). Since the petitioners had already proven the bona fides of their marriages to get the petitions approved originally, USCIS incorrectly shifted *its* burden of proving that the marriages are *fraudulent* to the *petitioners* to *re*-prove that their marriages are *real*.

USCIS's position on the BOP for revoking approved petitions is inconsistent with the BOP for revoking essentially every other immigration/nationality benefit under the INA:[7]

1. Deportation (i.e., revocation of admission) under INA § 237: "In the proceeding [USCIS] has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."
2. Termination of conditional permanent resident status under INA § 216(b) for improper qualifying marriage: "Any alien whose permanent resident status is terminated [for improper qualifying marriage] may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Secretary of Homeland Security to establish, by a preponderance of the evidence, that a condition [of such impropriety] is met."
3. Termination of conditional permanent resident status under INA § 216(c)(3) for untrue facts and information in the petition for removal of conditions: "Any alien whose permanent resident status is terminated [for untrue facts and information in the petition for removal of conditions] may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Secretary of Homeland Security to establish, by a preponderance of the evidence, that [such] facts and information . . . are not true with respect to the qualifying marriage."

4. Rescission of adjustment of status under INA § 246: "If … it shall appear to the satisfaction of the Attorney General that [a] person was not in fact eligible for … adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person …." The Third, Sixth, and Ninth Circuits and the Board of Immigration Appeals (BIA), at least, have interpreted this as placing the BOP on the U.S. government.[8]
5. Revocation of naturalization under INA § 340(a): "It shall be the duty of the United States attorney[] …, upon affidavit showing good cause therefor, to institute proceedings … for the purpose of revoking and setting aside the order admitting [the naturalized citizen] to citizenship … on the ground that such order [was] illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation …." As the Supreme Court has clarified, "[T]he Government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship. The evidence justifying revocation of citizenship must be clear, unequivocal, and convincing and not leave the issue in doubt."[9]
6. Loss of nationality under INA § 349: "Whenever the loss of United States nationality is put in issue …, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence."

More importantly, USCIS's position goes against the plain meaning of INA § 205, which states, "The Secretary of Homeland Security may, at any time, *for what he deems to be good and sufficient cause*, revoke the approval of any petition approved by him under [INA § 204]" (emphasis added). "For cause," of course, means that USCIS must have a justifiable reason for revoking an approved petition[10]—which with many spousal petitions means *USCIS* is claiming that the marriage is a sham.

Indeed, in *Matter of Tawfik*, the BIA interpreted "good and sufficient cause" (GSC) as referring only to affirmative evidence of a sham marriage, not a lack or absence of evidence of a bona fide marriage: "[T]here [must be] a substantial and probative evidentiary basis for a finding that [a] marriage was entered into for the purpose of evading the immigration laws …."[11] The BIA did *not* state that GSC exists when the *petitioner* has *failed* to prove that his marriage is bona fide.[12]

Furthermore, the rest of the operative words in INA § 205—"revoke the approval of any petition approved … under [INA § 204]"—are also clear.[13] "Revoke," of course, means to recall something that was granted previously,[14] as opposed to "deny," which means to refuse to grant.[15] And the word "approval" and past-tense phrase "approved … under [INA § 204]" confirm that revocation can only occur after approval. Therefore, INA § 205 clearly indicates that

USCIS initiates revocation proceedings to change the petition's status from approved to revoked, so the three Latin maxims above dictate that USCIS must bear the BOP.

Given the BIA's reasonable interpretation of GSC in *Matter of Tawfik*, how did USCIS come to embrace such a clear error of law? Indeed, even the Department of State (DOS), a different agency, recognizes the correct legal rule.[16] In a perhaps perfect example of "hard cases make bad law," a separate body of precedent seems to have arisen from two BIA cases that had odd fact patterns. Over time, the error became entrenched in petition-revocation jurisprudence when future BIA and even Ninth Circuit decisions cited these cases directly and indirectly.

But first, why does it even matter which party has the BOP in revocation proceedings? After all, each party gets one chance to present its evidence and arguments—USCIS lays out its reasons for revocation in the NOIR, then the petitioner must have a chance to respond[17]—before USCIS makes its decision based on the entire record. Therefore, the outcome would seem to depend solely on which party has the stronger arguments and evidence during these proceedings.

Significance of BOPs: BOPs Matter Most When Evidence Is Unavailable, and They also Help the Unburdened Party to Test the Strength of the Burdened Party's Arguments and Evidence

BOPs prescribe the default winner when the burdened party's evidence does not establish their alleged facts to the degree of clarity required for that type of case (i.e., the standard of proof)—substantial evidence, a preponderance in civil cases, beyond a reasonable doubt in criminal cases, and so forth. In civil cases—where the preponderance standard requires evidence showing more likely than not, or greater than 50 percent clearly, that the plaintiff's allegations are true—BOPs are referred to as "tiebreakers"[18] since the defendant will win by default if the evidence only shows a 50/50 likelihood that the plaintiff's claims are true.

The purpose of BOPs is to preserve the status quo of the parties' legal relationship unless there is clear enough evidence that it should change. In other words, the risk of losing the case is placed on the party seeking to change the current situation and away from the party who risks losing something.[19] The quintessential example is the BOP on the state in criminal proceedings, where the accused's liberty is at stake: The risk of error is on society so as to avoid convicting any innocent people, even at the expense of failing to convict some guilty ones.

During spousal petition revocation proceedings, if the BOP is purportedly on the petitioner, there is a greater risk of him losing his vested interest

in the approved petition[20]—USCIS's prior confirmation of his marital relationship with the beneficiary and his standing as a U.S. citizen to petition her.[21] Because the bona fides of a marriage is a question of fact[22] based on the totality of the evidence,[23] it is generally easier for the petitioner to rebut USCIS's evidence than to find and produce enough additional evidence to satisfy his purported own burden.

Compounding the risk is that USCIS will only consider documentary evidence. As the BIA has stated, "[I]t is incumbent upon the petitioner to resolve the inconsistencies [and ambiguities in the record] by independent objective evidence. Attempts to explain or reconcile . . . , absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."[24] Therefore, even affidavits or other sworn statements carry little if any weight since USCIS already believes that the couple is lying about the bona fides of their marriage.

Raising the stakes is INA § 204(c), which prohibits the approval of any subsequent petition involving an alien whom the Attorney General (AG) has determined committed marriage fraud. If USCIS's finding of sham marriage is affirmed on appeal by the BIA—which belongs to the Executive Office for Immigration Review (EOIR) within the AG's Department of Justice—the petitioner could not simply submit a new petition for the same beneficiary and therefore would be *permanently* unable to bring her to live with him in the United States.

There are many reasons why a petitioner might not be able to produce enough favorable evidence in revocation proceedings. He might have already submitted all the evidence he had with the petition originally. Evidence might be unavailable, e.g., destroyed, lost, forgotten. Or it might never have existed, e.g., the couple did not take any photos during one of their vacations together. In the most extreme case, the petitioner might have to prove a negative. For example, if USCIS receives a tip that Petitioner X agreed to "marry" the beneficiary and then sponsor her in exchange for $10,000 cash, what evidence would X possess that proves he never agreed to do such a thing? As another example, if Petitioner Y's vindictive ex-wife claims that his real relationship is with some woman other than the beneficiary, how could Y prove that he does not know the other woman and is not in such relationship? The only evidence these petitioners might be capable of producing could be written statements from them and/or their family members or friends, but USCIS considers such nondocumentary evidence to be biased and insufficient.

A related significance of BOPs is that it is easier to test the viability of the burdened party's factual claims. This is best illustrated with one of the author's cases for a client named "Jerome" and his wife, who had been together for over 12 years and legally married for over 5 years. Despite the over 1000 pages of relationship evidence submitted with the original petition and in response to the NOIR, USCIS revoked his approved petition.

But almost all of the substantial and probative evidence (SPE) that USCIS identified as indicating a sham marriage was either misconstrued, illogical, or fully explained by commonly known/available facts or other evidence already in the record. For example, USCIS claimed:

> Although, your passport, boarding passes and itineraries show that you traveled to [the beneficiary's country], the trips themselves are in no way directly related to the beneficiary. You indicated in your declaration that you have family that lives [there]. Therefore, it is safe to assume that you have other interests in [that country] warranting your travel [there].

Having already submitted all of the evidence from his trips to visit his wife—*including* photos with her—what new evidence could Jerome give to meet his purported burden of proving that his visitory purpose was to see his wife? But if USCIS has the BOP, on appeal before the BIA[25] it would have to defend its logic in light of all of the trip and other relationship evidence.

As another example, USCIS claimed:

> Your [professional] wedding photos show that you kissed the beneficiary on the forehead and the cheek as she looked away from you and the beneficiary kissed you on your cheek as you looked away from her, the pictures did not display the passion or love you claim to have for one another.

This argument was easy to rebut since a simple Google search produced countless wedding photos from around the world showing similar poses. Otherwise, having already submitted all of their wedding photos, other photos from the relationship, and other relationship evidence, what new evidence could Jerome give to meet his purported burden of proving his passionate feelings toward his wife? But if USCIS has the BOP, it would have to justify to the BIA its subjective interpretation of Jerome's pictorial feelings in light of all of the other relationship evidence.

This article will evaluate the following possible arguments for placing the BOP on the petitioner in revocation proceedings, followed by an analysis of the nine precedent cases that USCIS cited in the author's cases as supporting authority for this purported legal rule:

1. The immigration benefit requested via the I-130 petition is a visa.
2. If the benefit is not a visa, it is legal immigrant status through either admission or adjustment of status.
3. If the benefit is not a visa or legal immigrant status but is instead simply the immediate-relative classification verified via the I-130

petition alone, some sort of approval/denial decision is nevertheless made during revocation proceedings.

The Benefit Requested via the I-130 Petition Under 8 C.F.R. § 103.2(b)(1) Cannot Be a Visa, and Therefore INA § 224 and 22 C.F.R. § 42.41 Also Do Not Place the BOP on the Petitioner in Revocation Proceedings

The most reasonable argument is that the "requested benefit" of a visa petition is a visa, and therefore the petitioner has the BOP under 8 C.F.R. § 103.2(b)(1) until the beneficiary receives the visa from her local embassy. But this argument fails for two reasons. First, it is well settled that mere approval of a petition does not entitle the beneficiary to an immigrant visa.[26] While one might argue that a visa is not guaranteed simply because the beneficiary might not qualify for reasons unrelated to her eligibility for the relevant immigrant classification—namely, inadmissibility under INA § 212(a)—INA §§ 221(g) and 291 expressly require a visa applicant to be admissible *and* eligible for such classification. In fact, it is well settled that if the petitioner meets the criteria for the relevant classification, the I-130 petition should be approved *even if* the beneficiary is inadmissible.[27]

Second, 8 C.F.R. § 103.2(b)(1) only applies to benefit requests "submitted in a manner prescribed by DHS[/USCIS],"[28] but DOS—not USCIS—determines the submission requirements for visa applications.[29] Indeed, the respective processes for I-130 petitions and visa applications are completely different—different filing/interested party (petitioner vs. beneficiary), purpose (establish the petitioner's spousal relationship to the beneficiary and his standing to petition her vs. her admissibility and eligibility for the relevant immigrant classification), form (I-130 vs. DS-260), fee, and so forth.

While one might argue that DOS is simply USCIS's overseas agent delegated the authority to issue visas based on approved spousal petitions,[30] DOS does not make the ultimate decision on visa *petitions* for three reasons. First, it is well settled that before DOS grants visas, it must only *verify*—not readjudicate—USCIS's determination of the beneficiary's eligibility[31]—including in revocation proceedings—since USCIS has exclusive authority over the I-130 petition.[32] This is consistent with the terms used to describe approved petitions that survive revocation proceedings—"reaffirmed" or "revalidated"—because it would not make chronological sense that USCIS can *re*affirm or *re*validate a petition that purportedly is only approved by a different agency (DOS) in the *next* stage (the visa application). Second, the visa petition and visa application processes cannot be one and the same because the INA prescribes distinct provisions governing each, which invokes the canon of statutory construction against surplusage.[33] For example, there are separate provisions (and

therefore separate requirements) for revoking approved petitions and approved visas—INA §§ 205 and 221(i), respectively; similarly, petition revocations are appealable under the INA-derived 8 C.F.R. § 1003.1(b)(5), while visa revocations are not appealable due to consular nonreviewability under INA § 221(i). Third, stateside beneficiaries do not need and cannot get a visa[34]—since it is merely a travel document that allows overseas aliens to travel to the United States and apply for admission at a port of entry[35]—yet the I-130 petition is still required for such beneficiaries.

Therefore, the "requested benefit" of the I-130 petition under 8 C.F.R. § 103.2(b)(1) cannot be a visa. Accordingly, INA § 224 and 22 C.F.R. § 42.41 also do not place the BOP on the petitioner in revocation proceedings since they expressly apply only to visa applicants. But is it possible that the "requested benefit" is instead the visa *number*—which represents legal immigrant status—that is assigned to every beneficiary regardless of their location?

The Benefit Requested via the I-130 Petition Under 8 C.F.R. § 103.2(b)(1) Also Cannot Be Legal Immigrant Status, and Therefore INA § 291 Also Does Not Place the BOP on the Petitioner in Revocation Proceedings

Legal immigrant status starts upon adjustment of status for stateside beneficiaries[36] and upon admission for overseas beneficiaries,[37] but neither of these is the "requested benefit" of an I-130 petition under 8 C.F.R. § 103.2(b)(1) for three reasons. First, it is well settled that mere approval of a petition does not entitle the beneficiary to legal immigrant status, admission, or adjustment of status.[38]

Second, there are already separate provisions under the INA for reversing admission and adjustment of status—deportation under INA § 237 and rescission of adjustment of status under INA § 246, respectively—which would duplicate INA § 205 in violation of the canon of statutory construction against surplusage. This is supported by USCIS's policy that an approved petition, if not revoked, is valid indefinitely until the beneficiary immigrates or adjusts status,[39] after which it is subsumed in her legal immigrant status and is no longer revocable under INA § 205:

> Do not institute revocation proceedings if the beneficiary has already been adjusted or has been admitted to the United States with an immigrant visa. When the [approved] petition has been used, in effect, it no longer exists and the approval cannot be revoked. The appropriate course of action in that case is to institute deportation or rescission proceedings.[40]

Third, the respective processes for I-130 petitions, admission, and adjustment of status are almost completely different—different filing/interested party (petitioner vs. beneficiary vs. same), responsible agency (USCIS vs. CBP vs. USCIS), purpose (establish the petitioner's spousal relationship to the beneficiary and his standing to petition her vs. her admissibility and eligibility for the relevant immigrant classification vs. same), form (I-130 vs. none vs. I-485), fee, and so forth. In fact, the I-130 petition and the I-485 application, at least, are listed as separate "Immigration Benefit Request[s]" on USCIS's website.[41]

While one might argue that CBP is simply USCIS's agent delegated the authority to grant admission to overseas beneficiaries based on approved spousal petitions, CBP does not make the ultimate decision on visa petitions for two reasons. First, it is well settled that before CBP grants admission, it must only *verify*—not readjudicate—USCIS's determination of the beneficiary's eligibility[42] since USCIS has exclusive authority over the I-130 petition.[43] Second, it would not make logistical sense for CBP to decide petitions since it only receives the handful of the most vital paperwork (such as civil documents)[44] in a single sealed packet.[45] Even if CBP had access to the entire record—like with the recent Modernized Immigrant Visa (MIV) electronic cases[46]—CBP probably does not have the time, resources, or expertise necessary to examine all of the possibly hundreds or even thousands of pages of evidence for each case.

Therefore, the "requested benefit" of the I-130 petition under 8 C.F.R. § 103.2(b)(1) cannot be a visa or legal immigrant status. Accordingly, INA § 291 also does not place the BOP on the petitioner in revocation proceedings since it expressly applies only to visa applicants and applicants for admission.

Instead, the immigration benefit must be the immediate-relative classification itself. But notwithstanding the common operation of BOPs, the plain wording of INA § 205, and the BIA's interpretation of GSC in *Matter of Tawfik*, is it still possible that an approval/denial-like decision is made during revocation proceedings?

Approval Under INA § 204 Must Be Unconditional and the Sole Approval/Denial Decision, So Only the Separate Process of Revocation Under INA § 205 Can Reverse Such Approval

There are two ways that revocation proceedings are functionally a decision to approve or deny the petition: (1) the initial approval is conditional in some form, such that this *one* approval either is finalized in revocation proceedings should relevant conditions arise or converts automatically to absolute approval absent such conditions (i.e., when there is no basis for initiating revocation proceedings), or (2) the initial approval is unconditional, and the grounds

raised in the NOIR satisfy USCIS's BOP under INA § 205 and shift the BOP back to the petitioner for the rest of the revocation proceedings[47] (i.e., there are *two* approval/denial decisions).

First, the initial approval cannot be conditional because USCIS's policy is that approval of a petition is unconditional.[48] Specifically, an initial approval subject to condition precedent cannot convert automatically to absolute approval absent revocation proceedings because the initial approval would not have *any* effect since a right subject to such a condition can only exist *after* the future fact/event occurs or does not occur[49] (hence "precedent"). Therefore, revocation proceedings would have to occur in *every* case, when in reality only a fraction of cases goes through such proceedings.[50] Finally, an initial approval subject to condition *subsequent* could automatically convert to absolute approval absent revocation proceedings, but if USCIS were to invoke such a condition to end the petitioner's previously established right[51] through revocation proceedings, it is well settled that the party invoking a condition subsequent has the burden of proving that it is met.[52]

The second possibility is that the initial approval could be the unconditional first step of a burden-shifting process, which is when the BOP is split into its two parts: the burden of persuasion, which stays with the same party, and the burden of evidence production, which shifts between the parties.[53] First, a claimant must produce enough indirect evidence—called prima facie evidence—to create a presumption that his claim is valid, which can then be rebutted by the respondent producing enough evidence to create an overriding presumption that the claim is invalid.[54] Neither rebuttable presumption shifts the claimant's ultimate burden of persuasion.[55] Finally, the claimant has one more opportunity to produce more evidence to prove that his claim is valid despite the respondent's evidence.

But notwithstanding that INA §§ 204 and 205 only use terms like "approve," not like "prima facie," the initial approval cannot be unconditional as the prima facie first step of a burden-shifting process for two reasons. First, prima facie approval is conditional by definition because it is rebuttable, and therefore all of the reasons above refuting conditional approval apply. Second, the initial approval cannot be the first of two approval/denial decisions in revocation cases because the decision maker in a burden-shifting process only makes one decision on the merits after the third step.[56] Therefore, like with conditions precedent, revocation proceedings would have to occur in *every* case, which does not match reality.

If anything, a burden-shifting approach would support the BOP on USCIS in revocation proceedings because this approach matches the entire revocation process perfectly: USCIS must lay out its prima facie SPE in the NOIR to support its claim that the petitioner's marriage is a sham, then the petitioner can offer rebuttal evidence in his NOIR response, and finally USCIS must still identify SPE of a sham marriage within the whole record in order to revoke the petition.

All of the above establishes that (1) the benefit requested via the I-130 petition is the immediate-relative classification, not a visa or legal immigrant status, and (2) the prior approval must be unconditional and the sole approval/denial decision, so only the separate process of revocation can reverse such approval.[57] So now the only question remaining is whether the BIA and other precedents have some other valid reasoning that justifies placing the BOP on the petitioner in revocation proceedings.

None of the Nine Precedent Cases That USCIS Cited in the Author's Cases Supports Placing the BOP on the Petitioner in Revocation Proceedings

- Matter of Cheung, 12 I. & N. Dec. 715, 719 (BIA 1968): "The burden of proof rests upon the petitioner to establish eligibility for the benefit he seeks under the immigration laws on behalf of [the beneficiary]."

Matter of Cheung fails to establish that the BOP is on the petitioner in revocation proceedings for three reasons. First, the BIA did not cite *any* legal authority or otherwise provide any explanation to support its assertion.[58] Even though the BIA later cited *Amarante v. Rosenberg* for the principle that "[an] alien ha[s] not been granted a status when the visa petition is approved but only after the Consulate Officer acts favorably on the visa"[59]—which is true—this point is irrelevant to the issue because a petition is separate from a visa.

Second, the approval in *Matter of Cheung* was subject to a condition—probably a condition subsequent: "[T]he instant visa petition . . . was approved . . . on condition that any [further] investigation conducted does not disclose his relationship [to the beneficiary] is not as claimed . . . ."[60] However, the party invoking a condition subsequent to end the previous approval—USCIS—should have had the burden of proving that this condition was met.

Third, if the condition was a condition precedent instead—that is, the petition is *not* approved until future investigation fails to discover evidence disproving the relationship—the "approval" would have had no adjudicatory significance or effect since a right subject to condition precedent can only arise *after* the condition is met. And if there was no actual prior approval, the "revocation" proceedings were functionally *the* decision to approve or deny, in which case *Matter of Cheung* only stands for the well-settled principle that the petitioner has the BOP for the approval/denial decision, not in true revocation proceedings.

- Matter of Brantigan, 11 I. & N. Dec. 493, 494, 495 (BIA 1966): "The burden of proof never shifts from a petitioner . . . to the Government and the petitioner must by satisfactory evidence establish

> the validity of his marriage .... In visa petition proceedings, the burden of proof to establish eligibility sought for the benefit conferred by the immigration laws rests upon the petitioner."

Matter of Brantigan fails to establish that the BOP is on the petitioner in revocation proceedings for two reasons. First, even though the BIA did not state whether this appeal arose from a denial or a revocation, four indications point to a denial:

1. The regulations that the BIA discussed right after its main assertion above, 8 C.F.R. § 205.5(b) and 8 C.F.R. § 204.2(d)(2),[61] are just previous versions of the current 8 C.F.R. § 204.2(a)(2),[62] which applies to approval/denial decisions, not revocations (which are covered by 8 C.F.R. § 205.2). This is confirmed by the issue in this case: whether the presumption under California marriage law that a solemn wedding ceremony results in a legal marriage satisfies the immigration requirement of a marriage certificate[63]—a requirement that must be met *before* a petition can be approved under these regulations.[64] Therefore, the BIA's main assertion above only establishes that a petitioner cannot get a petition approved by raising this California marriage presumption as prima facie evidence of a legal marriage and shifting the burden to the United States Immigration and Naturalization Service (INS) to prove that his solemn wedding ceremony did not in fact result in a legal marriage.
2. The two citizenship cases that the BIA analogized to—*Petition of Sam Hoo* and *Petition of Lujan*—involved *denials* of naturalization applications.[65] If anything, these two cases would support placing the BOP on USCIS in I-130 revocation proceedings since the proper analogy is to *revocation* of naturalization, for which it is well settled that the BOP is on the U.S. government.[66]
3. The words "revoke" or "revocation" do not appear anywhere in the case. Instead, the way the BIA phrased the second sentence of its main assertion above is materially the same as 8 C.F.R. § 103.2(b)(1), which applies to approval/denial decisions, not revocations.
4. Based on the procedural timeline of the case, it probably could not have arisen from a revocation: The petitioner petitioned his wife based on their marriage of February 23, 1965, and the BIA's original decision on appeal was issued on October 28, 1965.[67] If this were a revocation case—even assuming that the petitioner had expeditiously prepared and filed the petition, NOIR response (if any), and appeal—the petition would had to have gone through three adjudicative processes—approval,

> revocation, and appeal—within a total of about eight months. Standard processing times from 1965 are not readily available, but in *Matter of Cheung*, which was decided in 1968, it took more than three *years* to go from just the approval to the BIA's decision on appeal of the "revocation"[68]—that is, not even counting INS's processing time for the filed petition. Therefore, it is much more likely that *Matter of Brantigan* was simply denied and then denied on appeal within the eight-month timeline.

Second, even if this case did in fact involve a revocation, the BIA did not cite any *applicable* legal authority or otherwise provide any explanation to support its main assertion above.[69]

- Matter of Estime, 19 I. & N. Dec. 450, 452 n.1 (BIA 1987): "In proceedings to revoke the approval of a visa petition, the burden of proof to establish eligibility for the benefit sought is on the petitioner."

Matter of Estime fails to establish that the BOP is on the petitioner in revocation proceedings because in support of its assertion, the BIA did not provide any explanation and only cited *Matter of Cheung* and *Matter of Brantigan* as legal authority[70]—which are both deficient as discussed.

The BIA did state the following elsewhere, but it did not cite any legal authority or otherwise provide any explanation to support this statement:

> In determining what is "good and sufficient cause" for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, *would have warranted* a denial based on the petitioner's failure to meet his or her burden of proof. . . . Similarly, with respect to a decision to revoke, we ask whether the evidence of record at the time the decision was issued (including any explanation, rebuttal, or evidence submitted by the petitioner pursuant to 8 C.F.R. §§ 103.2(b)(2) or 205.2(b) (1987)) warranted such a denial.[71]

If anything, this statement merely supports the well-settled BOP on the petitioner for the approval/denial decision because of the verb tense used. "Would have warranted" (italicized above) is a past modal verb, which is the verb tense used to describe some past result that hypothetically would have happened but did not actually happen.[72] In other words, the BIA is saying that GSC exists in current revocation proceedings if the same evidence that prompted the NOIR had been available when the petition was filed originally and would have resulted in the petition not being approved in the first place.[73] Therefore, the BOP mentioned is the petitioner's BOP for the prior approval/denial decision, not in revocation proceedings.

Interestingly, the BIA's actual analysis indicates the opposite of its main assertion: "Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, … revocation of the visa petition cannot be sustained, *even if the petitioner did not respond to the notice of intention to revoke*."[74] The BIA is implying that before an approved petition can be revoked, INS has to satisfy some burden with proof greater than unsupported statements and unstated presumptions—regardless of whether the petitioner even responds to the NOIR with rebuttal evidence—which is exactly how the BOP on USCIS works.

- Matter of Arias, 19 I. & N. Dec. 568, 569-70 (BIA 1988): "[A] notice of intention to revoke a visa petition is properly issued for 'good and sufficient cause' when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof."

Matter of Arias fails to establish that the BOP is on the petitioner in revocation proceedings for two reasons. First, in support of its assertion, the BIA did not provide any explanation and only cited *Matter of Estime* as legal authority[75]—which is deficient as discussed. Second, the BIA subtly misstated the past modal verb "would have warranted" in *Matter of Estime* as the present tense "would warrant," which inexplicably transfers the petitioner's BOP from approval/denial in *Matter of Estime* over to revocation proceedings.

Interestingly, the BIA's actual analysis indicates the opposite of its main assertion:

> We find that the reasons stated in the notice of intention to revoke did not provide "good and sufficient cause" for the issuance of the notice and cannot serve as the basis for revoking approval of the visa petition, *notwithstanding the petitioner's failure to respond in timely fashion to the notice*. … The observations made in the [Embassy's] memorandum are conclusory, speculative, equivocal, and, in at least one instance, … irrelevant to the issue of the bona fides of the petitioner's marriage to the beneficiary. … Specific, concrete facts are meaningful, not unsupported speculation and conjecture. Taken individually or collectively, the allegations as set forth in the memorandum did not provide a sufficient foundation for initiating revocation proceedings.[76]

The BIA is implying that before an approved petition can be revoked, INS has to satisfy some burden with proof greater than conclusory, speculative, equivocal, and irrelevant observations—regardless of whether the petitioner responds on time to the NOIR with rebuttal evidence—which is exactly how

the BOP on USCIS works and why the BIA reversed the revocation and reinstated the approved petition.[77]

- Matter of Tawfik, 20 I. & N. Dec. 166, 167 (BIA 1990): "A notice of intention to revoke a visa petition is properly issued for 'good and sufficient cause' when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof."

Matter of Tawfik fails to establish that the BOP is on the petitioner in revocation proceedings for two reasons. First, in support of its assertion, the BIA did not provide any explanation and only cited *Matter of Arias* and *Matter of Estime* as legal authority[78]—which are both deficient as discussed. Second, the BIA subtly misstated the past modal verb "would have warranted" in *Matter of Estime* as the present tense "would warrant," which inexplicably transfers the petitioner's BOP from approval/denial in *Matter of Estime* over to revocation proceedings.

Interestingly, the BIA's actual analysis indicates the opposite of its main assertion:

> [INS] noted that the record contained evidence, *which had not been rebutted*, "from which it [could] reasonably be inferred" that the beneficiary entered into a marriage for the primary purpose of obtaining immigration benefits. Such a reasonable inference does not rise to the [requisite] level of substantial and probative evidence . . . . In order to sustain [INS]'s revocation of the visa petition at issue here, it would be necessary to show that . . . [the] alien . . . attempted to enter into a marriage for the purpose of evading the immigration laws. . . . However, . . . [n]o such documentation is contained in the record before us, and, therefore, there is no basis to support [INS]'s conclusion that the beneficiary's prior marriage to a United States citizen was entered into for the purpose of evading the immigration laws.[79]

The BIA is implying that before an approved petition can be revoked, INS has to satisfy some burden with proof greater than reasonable-but-undocumented inferences—regardless of whether the petitioner produces any rebuttal evidence—which is exactly how the BOP on USCIS works and why the BIA reversed the revocation and reinstated the approved petition.[80]

- Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984): "An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued . . . . Despite the burden that § 205 places on the Government, a proceeding to revoke a visa

> petition, like the petition itself, is a part of the application process and falls under § 291 of the Act, 8 U.S.C. § 1361. Thus, once the INS has produced some evidence to show cause for revoking the petition, the alien still bears the ultimate burden of proving eligibility. The alien's burden is not discharged until the visa is issued."

Tongatapu fails to establish that the BOP is on the petitioner in revocation proceedings for three reasons. First, the Ninth Circuit did not cite *any* legal authority to support either its overall assertion or its specific assertion that INA § 291 applies to I-130 petitions[81] *at all*, let alone in revocation proceedings in particular.

Second, even though the Ninth Circuit explained its reasoning for the main assertion, it misunderstood and therefore misstated two points. Most importantly, the I-130 petition is a preliminary step in the overall *immigration* process, not the *visa application* process, so neither the petition nor the revocation proceeding is part of the latter. Also, since the petitioner alone files the I-130 petition, it is impossible for the beneficiary to have the BOP in petition proceedings—whether the approval/denial *or* revocation—because she has no direct involvement in such proceedings. Therefore, while it is well settled that an approved petition does not guarantee a visa and that the beneficiary's burden *for a visa* is not discharged until the visa is issued, these points are irrelevant to the issue of the BOP in petition revocation proceedings.

Third, the Ninth Circuit described the overall petition process as a burden-shifting process, which as discussed does not establish the BOP on the petitioner in revocation proceedings.

- Matter of Ho, 19 I. & N. Dec. 582, 588 (BIA 1988): "[T]he burden remains with the petitioner in revocation proceedings to establish that the beneficiary qualifies for the benefit sought under the immigration laws . . . ."

Matter of Ho fails to establish that the BOP is on the petitioner in revocation proceedings for two reasons. First, the BIA only cited *Matter of Cheung* and *Matter of Estime* as legal authority for its assertion[82]—which are both deficient as discussed.

Second, even though the BIA gave the following reasoning for its main assertion, such reasoning was quoted directly or otherwise derived from and cited to *Tongatapu* and *Matter of Cheung*, so it is deficient as discussed:

> [T]he approval of a visa petition vests no rights in the beneficiary of the petition. Approval of a visa petition is but a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. . . . As there is no right or

> entitlement to be lost, the burden of proof in visa petition revocation proceedings properly rests with the petitioner, just as it does in visa petition proceedings. *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; *Matter of Cheung*, *supra*. . . . In *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, the Ninth Circuit stated that, notwithstanding the burden section 205 places on the Government to show good and sufficient cause for the proposed revocation, "a proceeding to revoke a visa petition, like the petition itself, is a part of the application process and falls under § 291 of the Act, 8 U.S.C. § 1361." *Id.* at 1308. Accordingly, "once the INS has produced some evidence to show cause for revoking the petition, the alien still bears the ultimate burden of proving eligibility. The alien's burden is not discharged until the visa is issued." *Id.*[83]

And in addition to the two misstated points taken directly from the Ninth Circuit in *Tongatapu*, the BIA misunderstood and therefore misstated another point. Even though the BIA correctly stated that "the approval of a visa petition vests no rights in the beneficiary" and "the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status," there *is* in fact a "right or entitlement to be lost" since the *petitioner* has a vested interest once USCIS has classified the beneficiary as his immediate relative.

The BIA also stated the following later, but this came directly from and was cited to *Matter of Estime*, so it is also deficient as discussed:

> In *Matter of Estime*, *supra*, this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial. *Id.*[84]

Also, the BIA subtly misquoted the past modal verb "would have warranted" as the present tense "would warrant," which inexplicably transfers the petitioner's BOP from approval/denial in *Matter of Estime* over to revocation proceedings.

- Matter of Phillis, 15 I. & N. Dec. 385, 386 (BIA 1975): "The burden is on the petitioner to establish eligibility for the benefits sought."
- Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983): "In visa petition proceedings, the petitioner has the burden of establishing eligibility for the benefits sought."

Matter of Phillis and *Matter of Laureano* fail to establish that the BOP is on the petitioner in revocation proceedings for two reasons. First, in support of its assertions, the BIA did not provide any explanation and only cited *Matter of Brantigan* as legal authority[85]—which is deficient as discussed. Second, these cases involved denials,[86] not revocations.

Conclusion: How to Correct and Avoid Recommitting This Error of Law in the Future

To avoid placing the BOP incorrectly on the petitioner in revocation proceedings, the relevant parties must understand that the I-130 petition has a simple purpose distinct from a visa, admission, or adjustment of status—to classify the beneficiary as the petitioner's immediate relative by confirming his marital relationship to her and his standing as a U.S. citizen to petition her—so only the separate process of revocation can reverse any approval.[87] Furthermore, proper terminology should be used to avoid conflating the visa petition with the visa application since they are separate stages of the overall immigration process. Proper terminology should also be used to differentiate adjudications of the I-130 petition; for example, it is impossible to "deny" an approved petition under INA § 205.

Finally, the lineage of cases rooted in *Matter of Cheung*, *Matter of Brantigan*, and *Tongatapu* must be overruled. As the Supreme Court has explained, "Stare decisis is not . . . a universal, inexorable command . . . [or] inflexible."[88] Even though "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"[89] decisions that were erroneous[90] or poorly reasoned[91] can be overruled as exceptions to stare decisis.

The BOP is properly on USCIS to hold it to its relatively low obligation of identifying SPE of GSC for revocation. Anything less would allow USCIS to "get a second bite at the apple" of approval, so to speak, when it simply suspects but cannot produce SPE of marriage fraud.

Notes

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1. *Burden of Proof*, USLegal, https://civilprocedure.uslegal.com/trial/burden-of-proof/ (last visited Apr. 17, 2020).

2. *Actori incumbit onus proband*, Black's L. Dictionary, https://thelawdictionary.org/actori-incumbit-onus-proband/ (last visited Apr. 17, 2020).

3. *Affirmati Non Neganti Incumbit Probatio Law and Legal Definition*, USLegal, https://definitions.uslegal.com/a/affirmati-non-neganti-incumbit-probatio/ (last visited Apr. 17, 2020).

4. *Burden of Persuasion*, Free Dictionary, https://legal-dictionary.thefreedictionary.com/Burden+of+Persuasion (last visited Apr. 17, 2020).

5. Schaffer v. Weast, 546 U.S. 49, 56 (2005); *see also* Brian M. Hoffstadt, *"Go ahead then . . . prove it!"*, Daily J., https://www.dailyjournal.com/mcle/359-go-ahead-then-prove-it (last visited Apr. 17, 2020).

6. This article focuses on spousal immigrant petitions because the author has only encountered revocations with this issue for this type of petition. However, the principles discussed here should apply similarly to any approved petition subject to revocation under INA § 205.

7. The only four dissimilar situations are (1) revocation of a visa by DOS under INA § 221(i), which is completely discretionary and subject to consular nonreviewability anyway; (2) termination of conditional permanent resident status under INA § 216(c)(2) for failure to file a petition for removal of conditions or to have a personal interview, which is caused by the couple's failure to take such required action(s) before the beneficiary's temporary status expires on its second anniversary; (3) termination of parole under INA § 212(d)(5)(A) and 8 C.F.R. § 212.5(e), which is completely discretionary and simply ends a discretionarily granted lawful presence that was inherently temporary in purpose and/or time; and (4) voluntary renunciation of citizenship by a U.S. national under INA § 349(a)(5).

While one might argue that revocation proceedings under INA § 205 are analogous to exclusion/inadmissibility proceedings under INA §§ 240 and 291—where the BOP is on the alien—this argument fails for three reasons. First, aliens in exclusion proceedings are not at risk of losing any previously approved status since they have not yet been legally admitted to the United States (*e.g.*, paroled, allegedly entered without being admitted or paroled). 8 C.F.R. § 1240.8(b), (c). Naturally, such aliens have to prove that either they have a legal right to be admitted to the United States or they entered lawfully. 8 U.S.C. § 1229a(c)(2); 8 C.F.R. § 1240.8(b), (c). Second, exclusion proceedings involve an *alien* trying to establish lawful presence, while a petition is filed by a *U.S. citizen*, and the purpose of the petition is simply to establish his qualifying relationship with the beneficiary, not her eligibility for a visa. U.S. Citizenship & Immigration Servs., Instructions for Form I-130, Petition for Alien Relative, and Form I-130A, Supplemental Information for Spouse Beneficiary 1 (Feb. 13, 2019 version); 9 FAM 504.2-2(B), 504.6-6(A)(b). Third, INA §§ 240(c)(2) and 291 expressly place the BOP on the alien, whereas INA § 205 does not (on the petitioner), which indicates that Congress did not intend to do so for the latter. *See* Brown v. Gardner, 513 U.S. 115, 120 (1994).

8. Kim v. Meese, 810 F.2d 1494, 1496 (9th Cir. 1986); Yaldo v. INS, 424 F.2d 501, 503 (6th Cir. 1970); Rodrigues v. INS, 389 F.2d 129, 132 (3rd Cir. 1968); Matter of Suleiman, 15 I. & N. Dec. 784, 785 (BIA 1974).

9. Fedorenko v. United States, 449 U.S. 490, 505 (1981) (internal citations and quotation marks omitted). The use of the same root word "revoke" in both the title and text of both this section and INA § 205 invokes both the "presumption of consistent usage" and the "whole act canon"—which say that a word should be given the same

meaning/effect that is given to the same word elsewhere in the statute. The Writing Ctr., Georgetown Univ. Law Ctr., A Guide to Reading, Interpreting and Applying Statutes 7 (2017), *available at* https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf.

10. *For-cause*, Your Dictionary, https://www.yourdictionary.com/for-cause (last visited Apr. 17, 2020).

11. Matter of Tawfik, 20 I. & N. Dec. 166, 170 (BIA 1990); *see also* 9 FAM 504.2-2(B), 504.2-8(A)(2)(5), (C)(1)(a)(2); Colin Powell, U.S. Dep't of State, Cable No. 041682—SOP 61: Guidelines and Changes for Returning DHS/BCIS Approved IV and NIV Petitions para. 6 (Feb. 25, 2004); *cf.* 8 C.F.R. § 204.2(a)(1)(ii); Boansi v. Johnson, 118 F. Supp. 3d 875, 879-80 (E.D.N.C. 2015); Saleh v. Holder, 54 F. Supp. 3d 1163, 1169 (D. Nev. 2014).

12. It is also worth noting that the BIA equated GSC to the "substantial evidence" standard of proof, not the "preponderance" standard that the petitioner must meet for a filed petition to be approved. Matter of Martinez, 21 I. & N. Dec. 1035, 1036 (BIA 1997). In other words, even though it would be much easier and simpler for USCIS to revoke a petition based on the petitioner's purported failure to prove a bona fide marriage to the higher preponderance standard, the BIA still required USCIS to identify evidence of a sham marriage to the relatively low "substantial and probative evidence" standard.

13. *See also* 8 C.F.R. §§ 103.2(b)(5), 205.2(c), 1003.1(b)(5); USCIS Adjudicator's Field Manual §§ 10.3(b)(1), *available at* https://web.archive.org/web/20200113183450/https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html, 20.3(b)(2), *available at* https://web.archive.org/web/20200503112444/https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2872/0-0-0-3007.html, 21.2(h), *available at* https://web.archive.org/web/20190612220439/https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-3513.html (since superseded by the USCIS Policy Manual); 9 FAM 302.9-4(B)(8)(a); U.S. Citizenship & Immigration Servs., Instructions for Form I-824, Application for Action on an Approved Application or Petition 1 (Nov. 8, 2019 version); *Immigrant Visa Petitions Returned by the State Department Consular Offices*, USCIS.gov, https://www.uscis.gov/unassigned/immigrant-visa-petitions-returned-state-department-consular-offices (last updated July 15, 2011).

14. *Revoke*, Black's L. Dictionary, https://thelawdictionary.org/revoke/ (last visited Apr. 17, 2020).

15. *Deny*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/deny (last updated Apr. 12, 2020).

16. 9 FAM 504.2-8(B)(2)(b), (C)(1)(a)(1)(a), (b); U.S. Dep't of State, DOS Cable on Petitions Returned to INS by Post para. 4 (Apr. 1, 1995); Colin Powell, U.S. Dep't of State, Cable No. 121801—Guidance on Petition Revocations paras. 1, 3, 6 (July 13, 2001).

17. 8 C.F.R. § 205.2(a), (b).

18. Matter of Rivero-Diaz, 12 I. & N. Dec. 475, 476 (BIA 1967); Paul Roberts & Adrian Zuckerman, Criminal Evidence 224 (2010), *available at* https://books.google.com.kh/books?id=HUGcAQAAQBAJ&pg=PA224; Hoffstadt, *supra* note 5.

19. Hoffstadt, *supra* note 5.

20. Full Gospel Portland Church v. Thornburgh, 730 F. Supp. 441, 445 (D.D.C. 1989); USCIS Adjudicator's Field Manual § 20.2(a), *available at* https://web.archive.org/web/20200411010520/https://www.uscis.gov/ilink/docView/AFM/HTML/

AFM/0-0-0-1/0-0-0-2872/0-0-0-2977.html (since superseded by the USCIS Policy Manual); 9 FAM 504.2-2(B), .6-6(A)(b).

21. 8 C.F.R. § 204.2(h)(1); Matter of O–, 8 I. & N. Dec. 295, 297 (BIA 1959); USCIS Adjudicator's Field Manual §§ 21.2(c), (g)(2), *supra* note 13 (since superseded by the USCIS Policy Manual); U.S. Citizenship & Immigration Servs., *supra* note 7; 9 FAM 504.2-2(B), .6-6(A)(b).

22. Ayanbadejo v. Chertoff, 517 F.3d 273, 277 n.11 (5th Cir. 2008); Alvarado de Rodriguez v. Holder, 585 F.3d 227, 236 (5th Cir. 2009) (Owen, J., concurring).

23. Matter of Kumah, 19 I. & N. Dec. 290, 296 (BIA 1985); Matter of Oliveira, 13 I. & N. Dec. 503, 504-05 (BIA 1970); Matter of Kitsalis, 11 I. & N. Dec. 613, 614 (BIA 1966); *see also* 8 C.F.R. §§ 204.2(a)(1)(i)(B), (iii)(B), (c)(2)(vii), 1216.5(e)(2).

24. Matter of Ho, 19 I. & N. Dec. 582, 591-92 (BIA 1988).

25. Admittedly, this issue of law of which party has the BOP does not matter much at the administrative level because USCIS is not an impartial decisionmaker. Even if the petitioner can produce completely incontrovertible evidence to rebut USCIS's grounds for intended revocation, the agency is free to go ahead with revocation based on its preconceived belief about the petitioner's marriage.

Instead, the BOP becomes most important in the true adversarial setting—on appeal before the BIA—where USCIS would bear the risk of being unable to defend the SPE it identified as GSC for revocation. This is the exact reason for the fortunate outcome in Jerome's case—after USCIS received its copy of the BIA appeal, it reopened the case *sua sponte*, reconsidered its revocation decision, and reaffirmed the revoked petition!

26. 22 C.F.R. § 42.41; Joseph v. Landon, 679 F.2d 113, 115 (7th Cir. 1982); Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984); Firstland Int'l, Inc. v. INS, 377 F.3d 127, 129 n.3 (2d Cir. 2004); Matter of Ho, 19 I. & N. Dec. at 589; Matter of Rubino, 15 I. & N. Dec. 194, 195 (BIA 1975); USCIS Policy Manual § 7(6)(A) n.1. In fact, it is well settled that the beneficiary does not have any legally protected interest in the I-130 petition under the INA and therefore does not have any standing to challenge the merits of a denial or revocation. 8 C.F.R. §§ 103.2(a)(3), 103.3(a)(1)(iii)(B), 204.2(a)(3), 205.2; Pacheco Pereira v. INS, 342 F.2d 422, 423 (1st Cir. 1965); Matter of Sano, 19 I. & N. Dec. 299, 300-01 (BIA 1985); Matter of Dabaase, 16 I. & N. Dec. 720, 722 (BIA 1979); Matter of C–, 9 I. & N. Dec. 547, 547 (BIA 1962); Matter of Kurys, 11 I. & N. Dec. 315, 316 (BIA 1965); USCIS Policy Manual § 7(6)(A) n.1. *But cf.* Sanchez-Trujillo v. INS, 620 F. Supp. 1361, 1362-63 (W.D.N.C. 1985) (applying the Administrative Procedure Act); Ali v. INS, 661 F. Supp. 1234, 1242 n.5 (D. Mass. 1986) (dictum) (applying the Fifth Amendment of the United States Constitution).

27. Matter of O–, 8 I. & N. Dec. 295, 297 (BIA 1959); USCIS Adjudicator's Field Manual §§ 21.2(d), (g)(2), *supra* note 13 (since superseded by the USCIS Policy Manual); USCIS Operations Instructions § 204.6, *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP15; 9 FAM 504.2-3(C).

28. 8 C.F.R. § 1.2.

29. *See* Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended, 75 Fed. Reg. 45,475 (Aug. 3, 2010).

30. 8 U.S.C. §§ 1153(f), 1154(b); 8 C.F.R. § 204.2(a)(3); 22 C.F.R. §§ 42.21(a), 42.42; 9 FAM 501.2-2, 504.2-8(A)(a), (b), (B)(2)(a), 602.2-2(A)(1)(c)(1), (2)(c)(1).

31. 8 U.S.C. § 1201(g); 9 FAM 301.3-2(c), 504.2-2(B), 504.2-8(A)(a), (b); Powell, *supra* note 11, paras. 6-7; Powell, *supra* note 16, paras. 3, 6; U.S. Dep't of

State, *supra* note 16, para. 2; USCIS Operations Instructions § 204.5(d)(2), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP12.

32. 9 FAM 102.1-2, 302.9-4(B)(8)(a), 504.2-8(A)(a), (B)(4)(b), (C)(1), 602.2-2(A)(1)(c)(1), (2)(c)(1); USCIS Adjudicator's Field Manual § 21.2(a)(1), *supra* note 13 (since superseded by the USCIS Policy Manual); Powell, *supra* note 16, paras. 3, 6; Powell, *supra* note 11, paras. 6-7.

33. Nielsen v. Preap, 139 S. Ct. 954, 969 (2019).

34. *See Adjustment of Status*, USCIS.gov, https://www.uscis.gov/greencard/adjustment-of-status (last updated Jan. 11, 2018).

35. 9 FAM 102.1-1; *What Is a U.S. Visa?*, Travel.State.gov, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html (last visited Apr. 18, 2020).

36. *Adjustment of Status*, USCIS.gov, https://www.uscis.gov/greencard/adjustment-of-status (last updated Jan. 11, 2018).

37. *Consular Processing*, USCIS.gov, https://www.uscis.gov/greencard/consular-processing (last updated May 4, 2018).

38. 8 U.S.C. § 1154(e); Matter of Ho, 19 I. & N. Dec. 582, 589 (BIA 1988); Matter of Rubino, 15 I. & N. Dec. 194, 195 (BIA 1975); USCIS Policy Manual § 7(6)(A) n.1.

39. USCIS Adjudicator's Field Manual § 20.2(a), *supra* note 20 (since superseded by the USCIS Policy Manual).

40. USCIS Adjudicator's Field Manual § 20.3(b)(2), *supra* note 13 (since superseded by the USCIS Policy Manual); *see also* 8 C.F.R. § 205.1(a)(3).

41. *Our Fees*, USCIS.gov, https://www.uscis.gov/forms/our-fees (last updated Apr. 20, 2018).

42. CBP Inspector's Field Manual § 14.1, *available at* https://www.aila.org/File/Related/11120959A.pdf.

43. 9 FAM 102.1-2, 302.9-4(B)(8)(a), 504.2-8(A)(a), (B)(4)(b), (C)(1), 602.2-2(A)(1)(c)(1), (2)(c)(1); USCIS Adjudicator's Field Manual § 21.2(a)(1), *supra* note 13 (since superseded by the USCIS Policy Manual); Powell, *supra* note 16, paras. 3, 6; Powell, *supra* note 11, paras. 6-7.

44. 9 FAM 504.10-2(D)(1); *see* 9 FAM 504.10-2(D)(7)(a).

45. *USCIS Immigrant Fee*, USCIS.gov, https://www.uscis.gov/forms/uscis-immigrant-fee (last updated Sept. 14, 2018); *What to Expect After Your Visa is Approved and Issued*, U.S. Embassy in Argentina, https://ar.usembassy.gov/visas/what-to-expect-after-your-visa-is-approved-and-issued/ (last visited July 10, 2020).

46. 9 FAM 504.10-2(D)(7)(b).

47. *E.g.*, USCIS Adjudicator's Field Manual § 21.2(h)(2)(D), *supra* note 13 (since superseded by the USCIS Policy Manual).

48. USCIS Operations Instructions § 204.5(a), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP10.

49. *Condition Precedent*, Cornell L. Sch., https://www.law.cornell.edu/wex/condition_precedent (last visited Apr. 18, 2020).

50. USCIS does not release statistics on revocation of spousal petitions, *see, e.g.*, U.S. Citizenship & Immigration Servs., Number of Service-Wide Forms by Fiscal Year-to-Date, Quarter, and Form Status 2017 (2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q3.pdf,

but looking at statistics on the similar fiancé(e) petition for the 10-year period from fiscal years 2004 to 2013, the rate of revocation was less than 14% since DOS only returned 49,235 approved petitions to USCIS for possible revocation compared with the 371,076 approved petitions that USCIS forwarded to DOS for further processing, U.S. Dep't of State, FOIA Disclosure on I-129F Petitions and K-1 Visas by NVC and VO 2-25, 34-67 (Sept. 10, 2013), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0ahUKEwi3wra999bXAhWLUbwKHQV9A3gQFghSMAY&url=http%3A%2F%2Fwww.aila.org%2FFile%2FDownloadEmbeddedFile%2F44503&usg=AOvVaw3vwOKjyoYTCxkK0tJqMEno.

51. *Condition Subsequent*, Cornell L. Sch., https://www.law.cornell.edu/wex/condition_subsequent (last visited Apr. 18, 2020).

52. *Conditions*, L. Shelf, https://lawshelf.com/coursewarecontentview/conditions/ (last visited Apr. 18, 2020).

53. Celotex Corp. v. Catrett, 477 U.S. 317, 330-31 (1986) (Brennan, J., dissenting); *Burden of Persuasion*, *supra* note 4; *Shifting the Burden of Proof Law and Legal Definition*, USLegal, https://definitions.uslegal.com/s/shifting-the-burden-of-proof/ (last visited Apr. 18, 2020). The quintessential example is the McDonnell-Douglas burden-shifting framework used to decide motions for summary judgment in employment discrimination cases. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

54. *Celotex Corp.*, 477 U.S. at 330-31; *Prima facie*, Cornell L. Sch., https://www.law.cornell.edu/wex/prima_facie (last visited Apr. 18, 2020).

55. Fed. R. Evid. 301; USCIS Adjudicator's Field Manual § 11.1(c), *available at* https://web.archive.org/web/20190824012253/https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2061/0-0-0-2073.html (since superseded by the USCIS Policy Manual).

56. *Prima facie*, *supra* note 54; *Prima facie evidence*, Black's L. Dictionary, https://thelawdictionary.org/prima-facie-evidence/ (last visited June 12, 2019).

57. USCIS Adjudicator's Field Manual § 20.2(a), *supra* note 20 (since superseded by the USCIS Policy Manual); USCIS Operations Instructions § 204.5(d)(1), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP12; 9 FAM 504.6-6(A)(b).

58. Matter of Cheung, 12 I. & N. Dec. 715, 719 (BIA 1968).

59. *Id.*

60. *Id.* Of course, it is not clear if conditional approval was even allowed around 1968 since USCIS's policy that approval of a petition is unconditional is more recent. USCIS Operations Instructions § 204.5(a), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP10.

61. Matter of Brantigan, 11 I. & N. Dec. 493, 495 n.2 (BIA 1966).

62. *See* Implementation of Act of October 3, 1965, 30 Fed. Reg. 14,772, 14,774-76 (Nov. 30, 1965); Immigration Regulations, 30 Fed. Reg. 13,956, 13,958-60 (proposed Nov. 4, 1965).

63. *Matter of Brantigan*, 11 I. & N. Dec. at 493-95.

64. *See generally* 8 C.F.R. § 204.2(a)(2). It could not have been conditional approval pending the later submission of a marriage certificate since USCIS's policy is that approval is unconditional. USCIS Operations Instructions § 204.5(a), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP10.

65. Petition of Sam Hoo, 63 F. Supp. 439, 439-40 (N.D. Cal. 1945); *In re* Lujan's Petition, 144 F. Supp. 150, 150-51 (D. Guam 1956).

66. 8 U.S.C. § 1451(a); Fedorenko v. United States, 449 U.S. 490, 505 (1981).

67. Matter of Brantigan, 11 I. & N. Dec. at 493.

68. Matter of Cheung, 12 I. & N. Dec. 715, 715 (BIA 1968).

69. Matter of Brantigan, 11 I. & N. Dec. at 495.

70. Matter of Estime, 19 I. & N. Dec. 450, 452 n.1 (BIA 1987).

71. *Id.* at 451-52.

72. Adam Brock, *Everyday Grammar: Could Have, Would Have, and Should Have*, VOA Learning English (Feb. 8, 2018), https://learningenglish.voanews.com/a/everyday-grammar-could-have-should-have-would-have/3391128.html; *Past Modals: Should Have, Could Have, Would Have*, Espresso English, https://www.espressoenglish.net/past-modals-should-have-could-have-would-have/ (last visited Apr. 14, 2020); Britainy Sorenson, *What Are Past Modal Verbs?*, BKA Content (Aug. 23, 2019), https://www.bkacontent.com/past-modal-verbs/. Even though the BIA did not use the same past modal verb in the second sentence of its main assertion, the phrase "such a denial" refers back to the hypothetical retrospective outcome mentioned in the first sentence.

73. *See also* 9 FAM 504.2-8(A)(2)(4).

74. Matter of Estime, 19 I. & N. Dec. at 452 (emphasis added).

75. Matter of Arias, 19 I. & N. Dec. 568, 569-70 (BIA 1988).

76. *Id.* at 570-71 (emphasis added).

77. *Id.*

78. Matter of Tawfik, 20 I. & N. Dec. 166, 167 (BIA 1988).

79. *Id.* at 168, 170 (emphasis added).

80. *Id.* at 167-70.

81. Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984).

82. Matter of Ho, 19 I. & N. Dec. 582, 588 (BIA 1988).

83. *Id.* at 589 (some internal citations omitted).

84. *Id.* at 589-90 (some internal citations omitted).

85. Matter of Phillis, 15 I. & N. Dec. 385, 386 (BIA 1983); Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983).

86. Matter of Phillis, 15 I. & N. Dec. at 385; Matter of Laureano, 19 I. & N. Dec. at 1-2.

87. USCIS Adjudicator's Field Manual § 20.2(a), *supra* note 20 (since superseded by the USCIS Policy Manual); USCIS Operations Instructions § 204.5(d)(1), *available at* https://books.google.com.kh/books?id=i_YDOwmJ-CwC&pg=RA4-PP12; 9 FAM 504.6-6(A)(b).

88. Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

89. *Id.*

90. Hertz v. Woodman, 218 U.S. 205, 212-13 (1910); Smith v. Allwright, 321 U.S. 649, 665-66 (1944); *Coronado Oil Gas Co.*, 285 U.S. at 406-07 (Brandeis, J., dissenting).

91. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

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