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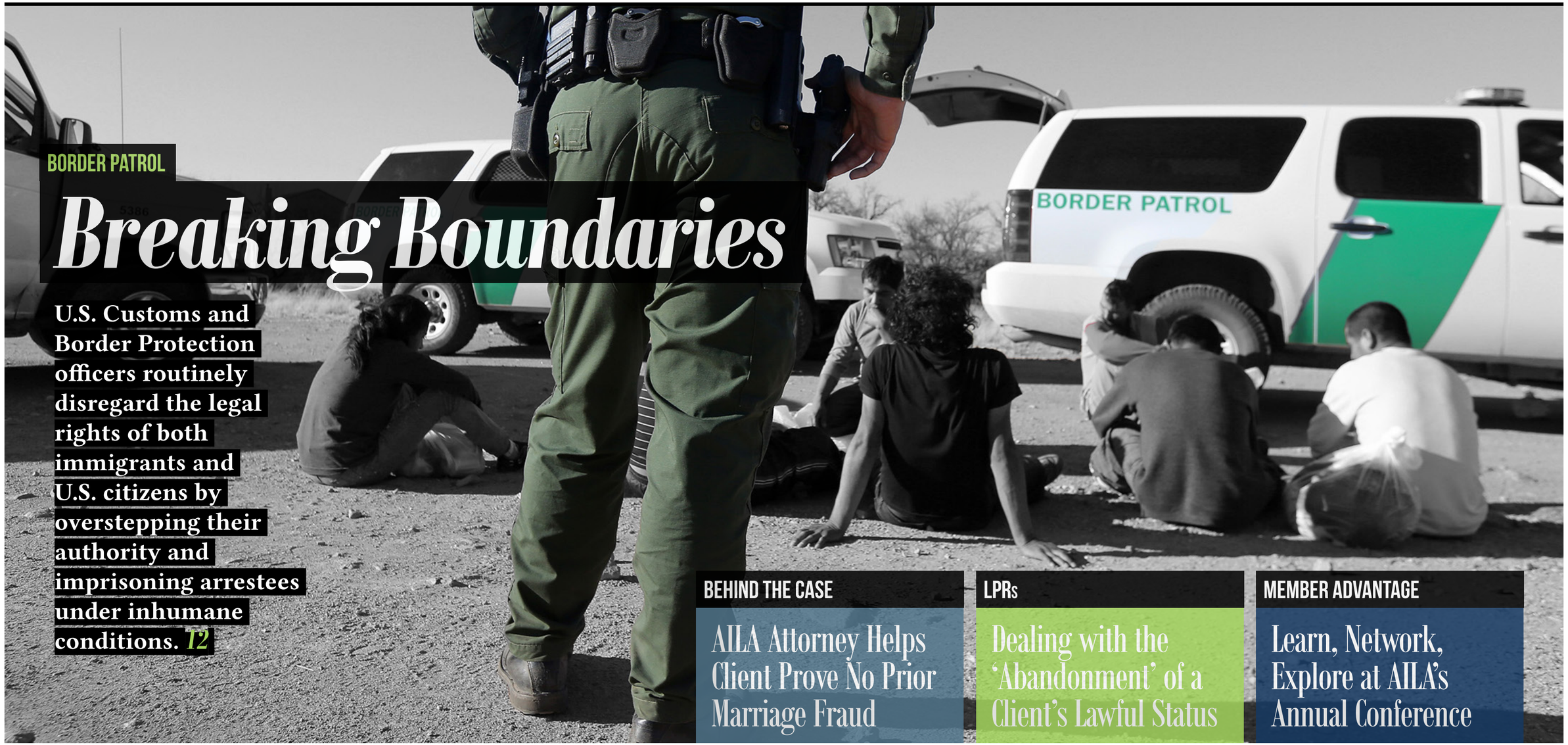

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A U.S. Border Patrol agent guards a group of Mexican immigrants caught after they crossed into the United States last March in Arizona. PHOTO BY JOHN MOORE/GETTY IMAGES

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One Year Later: The Impact of *Descamps*

by Mary E. Kramer

Is Descamps v. United States, 133 S. Ct. 2276 (2013), making a difference in your crimmigration practice? It should be. *Descamps* represents a recalibration of the categorical approach and, in most cases, will help noncitizens argue against removability or in favor of relief.

Matter of Lanferman Abrogated

Decided before *Descamps*, the Board of Immigration Appeals' (BIA) position on when a statute qualifies as divisible (leading to a modified categorical approach) is set forth in Matter of Lanferman, 25 I&N Dec. 721 (BIA 2012). If the BIA does not withdraw from *Lanferman* soon, the Second Circuit might do so itself. *Descamps* shows that the *Lanferman* panel got it wrong.

We know that the INA sets forth grounds of removability based on the classification of crimes, such as aggravated felonies, moral turpitude crimes, controlled substance violations, and firearm offenses. To determine whether a particular criminal conviction falls into a certain category, adjudicators employ a "categorical approach." That phrase refers to the classification of crimes according to their generic definition. This will be determined according to contemporary usage based on a survey of statutes of the 50 states, the federal code, and the Model Penal Code. Taylor v. United States, 495 U.S. 575, 592 (1990).

> **Practice Pointer:** A practitioner's goal in filing a motion to dismiss the charge—or memorandum in support of statutory eligibility for relief—is to argue that the conviction does not fall into the generic classification of the crime. By way of example, cancellation of removal for permanent residents under INA §240A(a) is not available if the noncitizen has an aggravated felony conviction, so the goal of a legal memorandum in support of eligibility would be to argue against aggravated felony classification.

Only if the statute of conviction is divisible will an adjudicator revert to the modified categorical approach. A modified approach is a tool for implementing the categorical approach: the judge or deciding official looks to the record of conviction to determine under which portion of the statute the foreign national was prosecuted. The record includes the charging document, plea documents, final judgment, and sentence. Shepard v. United States, 544 U.S. 13, 25 (2005). In *Matter of Lanferman*, the BIA took its cue from Lanferman v. Bd. of Immigration Appeals, 576 F.3d 84, 90–92 (2d Cir. 2009), and articulated three distinct approaches to defining divisibility:

1. Divisibility exists where alternative means of committing a violation are enumerated as discrete

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SCOTUS Sees Crime Through Categorical Lens

alternatives, either by use of disjunctives or subsections. Attorneys will note use of the term "means," not elements.

2. Divisibility exists where the criminal statute contains essential elements phrased in the disjunctive or otherwise divided into alternative versions of the crime. If the immigration removal ground refers to non-elemental facts, such as the amount of financial loss to a victim, the adjudicator may look to certain facts underlying the conviction.[1]

3. A statute is divisible where it contains at least one element or elements that would potentially qualify as either removable or non-removable conduct, even though the statute also encompasses non-removal conduct. In other words, the penal provision contains an element or elements broad enough to be satisfied by both removable and non-removable conduct. *Matter of Lanferman*, at 722.

The *Lanferman* panel chose door number 3: a statute is divisible if some—but not all—violations of the criminal provision give rise to grounds for removal or ineligibility for relief. Matter of Vargas, 23 I&N Dec. 651, 654 (BIA 2004). The Board concedes that this sort of statute is not really divisible at all, but still (from the agency's point-of-view) merits a modified categorical approach because of its breadth. *Matter of Lanferman*, at 727.

In *Descamps*, the U.S. Supreme Court rejects the Ninth Circuit's approach to divisibility. Instead, the Court clarifies that an overly broad statute will categorically not meet the definition of the generic crime. Likewise, a divisible statute does not set forth alternative means of committing the crime; the means of committing a crime are not synonymous with elements. Rather, a divisible statute is one that sets forth alternative versions of the offense in the disjunctive: discrete elements that a judge or jury must find in determining guilt or innocence. Thus, the *Descamps* Court designates the second approach for defining a divisible statute. Since June 2013, circuit courts, the BIA, and judges have relied on *Descamps*. It is clear that *Lanferman* is no longer controlling precedent.

> **Practice Pointer:** Simply reading a criminal provision may not readily indicate whether it is divisible. Lawyers should consult jury instructions, which break down the elements of a crime; state and federal case law interpreting the elements of the crime; and relevant excerpts of the Model Penal Code, all of which can be attached to motions and legal memoranda.

Case Law Since *Descamps*

In Rojas v. Attorney General, 728 F.3d 203 (3d Cir. 2013), the Third Circuit found that violation of Pennsylvania's paraphernalia statute does not trigger removability for a controlled substance violation because the state statute is not a categorical match to the federal Controlled Substances Act (CSA). In Ibarra v. Holder, 721 F.3d 1157 (10th Cir. 2013), the Tenth Circuit found that Colorado's child neglect statute was not a crime involving child abuse because most of the 50 states did not criminalize acts of negligence resulting in no injury. In Donawa v. U.S. Attorney General, 735 F.3d 1275 (11th Cir. 2013), the Eleventh Circuit held that Florida's controlled substance delivery statute is not a categorical match to the analogous provision in the federal CSA. The Florida statute lacks an equivalent mens rea: knowledge of the nature of the substance. Accordingly, possession with intent to deliver in Florida[2] is not an aggravated felony "drug trafficking crime." The *Donawa* analysis was followed in the Fifth Circuit in a case involving Florida's delivery statute, in Sarmientos v. Holder, No. 13-60086 (5th Cir. Feb. 12, 2014).

In an unpublished decision, Matter of Forvilus, A071 552 965 (BIA Jan. 28, 2014), the Board reversed an immigration judge, finding the Florida theft statute to be divisible and reverting to a modified categorical

approach, where—according to the BIA and in light of *Descamps*—reference to temporary and permanent takings or appropriations qualify as means, not discrete alternative elements.

In another interesting case, Bautista v. Attorney General, No. 11-3942 (3d Cir. Feb. 28, 2014), the Third Circuit overturned the BIA's decision in Matter of Bautista, 25 I&N Dec. 616 (BIA 2011), by finding that a conviction for violation of a state arson statute did not qualify as an aggravated felony under INA §101(a)(43)(E)—relating to certain federal firearms statutes—because 18 USC §844(i) (the crime referenced in the aggravated felony definition) contains the essential element of travel in interstate commerce, something the state statute lacks. At least in the Third Circuit, *Bautista* abrogates the Board's decision in Matter of Vasquez-Muniz, 23 I&N Dec. 207, 210 (BIA 2002), wherein the BIA found the various references to certain federal statutes throughout INA §101(a)(43) to be jurisdictional elements and not important under a categorical approach.

Accordingly, *Bautista* may be useful wherever the aggravated felony definition references a specific federal provision vis a vis the "described in" language. INA §§101(a)(43)(J), (H)–(L) use the "described in" language as opposed to "defined by" used in other subsections, and then cite to a specific federal statute. Under the Third Circuit's decision in *Bautista*, a similar state statute would never qualify as an aggravated felony under these provisions.

Still, not every decision is decided in the noncitizen's favor, and there remains confusion. For example, in Coronado v. Holder, No. 11-72121 (9th Cir. Mar. 14, 2014), the Ninth Circuit found that California's controlled substance statute is divisible by virtue of reference to schedules that significantly match the federal CSA. The court allowed reference to the criminal record documents to determine the drug in question to be methamphetamine, hence a removable offense. This author cautiously opines that the type of drug would be a "means," not an element. Whether the Supreme Court will again reverse the Ninth Circuit's course remains to be seen.

1 The Supreme Court ordained a "circumstance-specific approach" in Nijhawan v. Holder, 557 U.S. 29 (2009).

2 The Florida statute was amended in 2001. Practitioners are advised to read *Donawa* in full rather than relying on this brief summary.

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PERM Regulation via Smoke Signal Not Acceptable

by Jennifer A. Minear

Anyone whose practice includes PERM labor certification is familiar with the ever-shifting sands of the Department of Labor's (DOL) adjudicatory process. Rather than notifying the public of changes in policy through such quaint and old-fashioned methods as notice-and-comment rule making (or even an FAQ), changes in regulatory interpretation are more often "announced" by the sudden denial of applications that would have once been approved. News of the denial trend is then left to waft through the regulated community like smoke at a forest fire until, one by one, we all smell it and get out of the way, adapting our practices to conform with this new, previously unarticulated standard. Meanwhile, those whose applications served as the "smoke"—the denials that constituted DOL's announcement—are left to smolder in the long-lived embers of the appeals process.

Fortunately, there is reason to hope that DOL may have finally gotten the message that regulation via smoke signal is unacceptable. In December 2013, DOL reached a settlement in a series of Board of Alien Labor Certification Appeals (BALCA) cases filed by Microsoft Corporation in which DOL suddenly took issue with the manner in which Microsoft notified potentially qualified laid-off workers of PERM job openings, after years of having approved PERM applications filed using identical notification methods. Then, two months later, DOL actually released an FAQ informing the regulated public how it expects employers to notify laid-off U.S. workers of PERM job openings.

Section K Licensure Denials

And, now, DOL has backed away from an unannounced interpretation of its regulation regarding positions that require licensure. When an employer files a PERM application for a position that requires an occupational license (*e.g.*, physician, lawyer, teacher, etc.), the licensure requirement is noted in Section H.14 of the ETA Form 9089. Later, in Section K of the form, the employer must list the previous three years of employment history of the sponsored foreign national, as well as "any other experience that qualifies the alien for the job opportunity." Since the inception of the PERM program in 2005, DOL routinely approved PERM applications on behalf of licensed professionals that noted the licensure requirement in Section H.14 and described the foreign national's employment history in Section K.

Then, in early 2013, DOL began denying about 50 percent of PERM applications this author filed for licensed occupations. The rationale went something like this:

> *You indicate in Section H.14 that the position of physician requires a medical license. And you indicate in Section K that the foreign national is currently employed as a physician by the PERM sponsor. However, since you do not expressly state in Section K that the foreign national holds a medical license, we conclude that he does not and, since you hired the foreign national without a license to practice medicine, a medical license must not really be required for the position. Therefore, the position should have been advertised that way in order to give U.S. workers the opportunity to practice medicine without a license. So, case denied.*

One truly cannot make this stuff up. Stranger than the denials themselves was the inconsistency with which they occurred. This author filed applications for identical positions with the same employer, using identical recruitment, with identically drafted ETA

9089 forms resulting in one case being certified without audit and the other being denied. This, of course, led to those frustrating conversations we all have had with clients in which we attempt to explain the inexplicable arbitrariness of the federal immigration system.

This author filed motions to reconsider on all denied cases, each time providing evidence that the sponsored employee, in fact, held the required license and had done so since the date of hire. A number of other persuasive arguments were made: *e.g.*, Section K instructs one to list previous experience, not licenses; if Section K indicates that the sponsored employee is currently employed as a physician, then he or she must have a license because it's required by law; and, in any event, DOL should not have denied the application without giving the employer the opportunity to produce the required license upon audit. No matter. DOL swiftly forwarded all cases to BALCA with a cursory dismissal of this author's arguments.

Resolution for Already Denied Cases

After AILA members reported hundreds of these denials, and after repeated prodding by AILA's DOL liaison committee, as well as various congressional staffers, DOL finally agreed during the December 2013 AILA liaison meeting that an FAQ might be in order and stated it would "consider" providing such FAQs in the future in advance of implementing a policy change. Eureka!

Even more shocking, DOL has now begun to identify all pending BALCA cases denied solely on this issue and remanding them to the Atlanta National Processing Center for certification. Denied cases not yet sent to BALCA are being re-opened and certified in response to a motion to reconsider. AILA has issued a call for Section K PERM denial cases, in order to identify those applications that might fall through the cracks of DOL's new-found reasonableness.

Drafting Tips for Cases Not Yet Filed

While DOL has not yet issued its promised guidance on how to indicate licensure in Section K, we have the prior denials to give us an idea of what DOL will expect in the future. Any required licenses or certifications listed in Section H.14 also must be enumerated somewhere in Section K in order to show that the sponsored employee him- or herself holds the required license or certification.

In some scenarios, documenting this will be more straightforward than in others. For example, if the position requires a license and the foreign worker is currently employed with the sponsoring employer, the fact of the employee's licensure can simply be listed under the position description in Section K. However, if the foreign worker is not currently employed by the PERM sponsor in the offered position, it is less obvious where the requisite licensure or certification should be listed. Presumably, the license or certification should be listed as part of an unrelated description for another position. Suppose the foreign worker has not been employed at all during the previous three years and the position itself requires no employment experience. Where would the employer record the foreign worker's possession of any required certification or license in that event? In the absence of guidance, practitioners may only speculate.

Another option is to omit the licensure requirement entirely from the ETA Form 9089 in situations where the employer is willing to hire a worker without a license, with the understanding that the license will be obtained prior to commencement of employment. That approach has worked in the past but should be re-evaluated once the FAQ is issued.

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Transferring Personnel to the Land Down Under

by Noah Klug

As an immigration practitioner in Australia, this author often helps American companies with the process of establishing an entity here, obtaining the appropriate work visas, advising on relevant employment law issues, and serving as their general adviser in relation to any legal matters that may arise as they begin to do business here. This article will provide a basic overview of the various issues involved with transferring staff to Australia.

Before taking the first step in the process, this author recommends getting to know the business culture of the Australian market. Understanding the business culture is very important because superficial appearances can be deceiving. Clients should pretend as though they are opening an office in China and to make the necessary effort to learn the culture. The article, "Australia – Culture, Customs and Etiquette," is a good resource to help clients begin to understand the business cultural differences between the United States and Australia.

Establishing the Legal Entity

The first step involves establishing a legal entity in Australia. The process is not particularly difficult, and, unlike in America, there are not many structures from which to choose. In nearly all cases, the entity will simply be a proprietary limited company, or "Pty Ltd," for short. The company will need to obtain an Australian Business Number (ABN), which is the equivalent of the federal employer identification number (FEIN) in the United States.

If the business is family-owned, then a family trust structure may be an option. Potential tax benefits of using a family trust structure include the ability to arbitrage tax between family members.

At least one of the directors of the company must be a resident in Australia. He or she need not be a citizen. For example, an individual holding a 457 work visa would qualify.

Learning the Employment Laws

Employment law is much more regulated and proscriptive in Australia than in the United States. Employees almost always have lengthy, formal employment agreements, not just a simple offer letter, as is often the case in the United States. No "at-will employment" here! The government is generally very pro-employee, making it fairly easy for employees to bring claims against their employers for the "unfair dismissal" or "adverse action" that the employer may take against the employee for attempting to exercise a workplace right or because of an attribute of the employee, such as race, color, sex, sexual orientation, age, religion, political opinion, etc.

All employees are guaranteed the 10 National Employment Standards, which notably include, among other requirements: at least four weeks' annual leave per year, 10 days' paid personal/carer's leave, and a maximum 38-hour work week (plus additional reasonable hours).

There also is a requirement here that all employers

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Working in Trinidad and Tobago

pay a set amount, currently 9.25 percent, into all employees' superannuation (retirement) accounts. This percentage will increase gradually each year until it reaches 12 percent in 2019. Employers will often package this amount into the employee's total remuneration amount.

Work Visas

In almost all cases, the most appropriate work visa for staff will be a 457 work visa. The 457 visa program involves three distinct applications, as follows:

SPONSORSHIP: The company needs to apply for and be approved as a sponsor in order to bring in foreign workers on 457 visas. There are two basic requirements for the sponsorship application: (1) the company is lawfully operating in Australia; and (2) it satisfies the training requirement by either spending an amount at least equivalent to 1 percent of the total payroll on training its Australian staff, OR by donating an amount at least equivalent to 2 percent of total payroll to an approved training fund.

There are special considerations for companies that are new to Australia, defined as having operated here for less than 12 months:

- More evidence than usual is required to prove that the company is lawfully operating here, including a detailed business plan and evidence of office space
- The training requirements are waived initially and the company only needs to submit an auditable plan to meet these requirements in 12 months' time.
- Whereas the sponsorship is normally granted for a three-year period (or six years for certain "accredited" sponsors), new companies only receive a one-year sponsorship approval initially.

NOMINATION: The nomination application relates to the role that the employee will be occupying in the Australian office. Essentially, the company needs to show with the nomination application that (1) the role can be categorized as an occupation that is on the list of qualifying 457 occupations; and (2) the employee will be paid at or above the "market rate" for the occupation.

As of November 23, 2013, labor market testing (LMT) is a requirement of the nomination process. LMT is akin to the labor certification process in U.S. immigration law. In short, unless an exception applies, sponsors must now documentarily demonstrate that they have attempted, within the past 12 months, to recruit an Australian citizen or permanent resident (or certain Working Holiday visa holders) for the position before looking to foreign talent.

VISA APPLICATION: The visa application relates to the personal details of the employee applicant and his or her accompanying family members. It can be granted for up to four years and an indefinite number of renewals is permitted. The main requirements for the visa application are that the applicant (1) has the requisite skills, qualifications, and experience for the role; (2) he or she and his or her accompanying family members are of "good character" (this issue can arise if the applicant(s) has had criminal convictions, etc.); (3) he or she has competent English skills (generally a test is required, although there are various exceptions, including where the applicant holds a passport from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States); and (4) he or she holds qualifying health/travel insurance for Australia.

All three applications can be filed at the same time and current processing times are approximately eight to 12 weeks.

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Greater Missouri: 'Comply with LCA Program Rules'

by Adam J. Rosen

The H-1B visa program has become the subject of greater attention in recent years by the investigators of the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD). DOL investigations commonly start with a worker's complaint about an employer failing to pay wages. In Administrator v. Greater Missouri Medical Pro-Care Providers, Inc., ARB Case No. 12-015 (Jan. 29, 2014), the complainant lodged multiple claims against this provider of occupational and physical therapists. Although DOL was challenged at the Administrative Review Board (ARB), the agency prevailed with its power to investigate reaffirmed.

INA's Aggrieved Party Provision

Alena Gay Arat, an H-1B nonimmigrant employee, filed a complaint on June 22, 2006, alleging her employer, Greater Missouri, had failed to pay her wages required under its labor condition application (LCA) for time off due to a decision by the employer; had illegally made deductions from her wages; and had required her to pay an illegal penalty for ceasing employment prior to a date agreed upon by her and the employer.

After an investigation, the Administrator found that Greater Missouri had committed numerous LCA violations against Arat and other nonimmigrant employees—including failure to pay the required wages during nonproductive periods of employment, illegally deducting fees, and illegally collecting or attempting to collect penalties for early termination of employment—along with failure to maintain documentation as required by the regulations, and liability for ongoing violations. The Administrator ordered Greater Missouri to pay back-wages of more than $382,000 to 45 H-1B employees.

Greater Missouri notes that a WHD investigation of and findings against a company's treatment of multiple workers is authorized by INA §212(n)(2)(A). It also states that the congressional intent and design of the INA gives the Secretary of Labor authority and responsibility to design how the "aggrieved party" investigation is conducted. When WHD is looking for "reasonable cause," it is found based on a single H-1B worker's complaint. The ARB makes it clear that an investigation can include asking for evidence about other workers.

Employer Bears Burden of Proof

Greater Missouri also makes clear the employer's burden to prove its case. In review of the legal and factual determinations, Greater Missouri admitted to failing to submit any evidence rebutting DOL's claims. The employer has a legal duty to comply with the law or document why it is not in violation of the law, and the failure to establish compliance allows negative inferences to be drawn where reasonable.

The INA's implementing regulations are found at 20 CFR Part 655, Subparts H and I (2013). This case highlights the importance of careful compliance with LCA program rules given the considerable authority held by DOL to enforce these laws.

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Behind the Case: 'No Prior Marriage Fraud'

CASE: *In Re: Name Redacted* (Feb. 24, 2014)
ATTORNEY: Michael Friedberg, Friedberg & Trombi

by Sheeba Raj

A U.S. Citizenship and Immigration Services (USCIS) field office director erred when he revoked an approved visa petition on the basis of prior marriage fraud, as ruled by the Board of Immigration Appeals (BIA) upon finding no "substantial and probative" evidence of prior marriage fraud in the record.

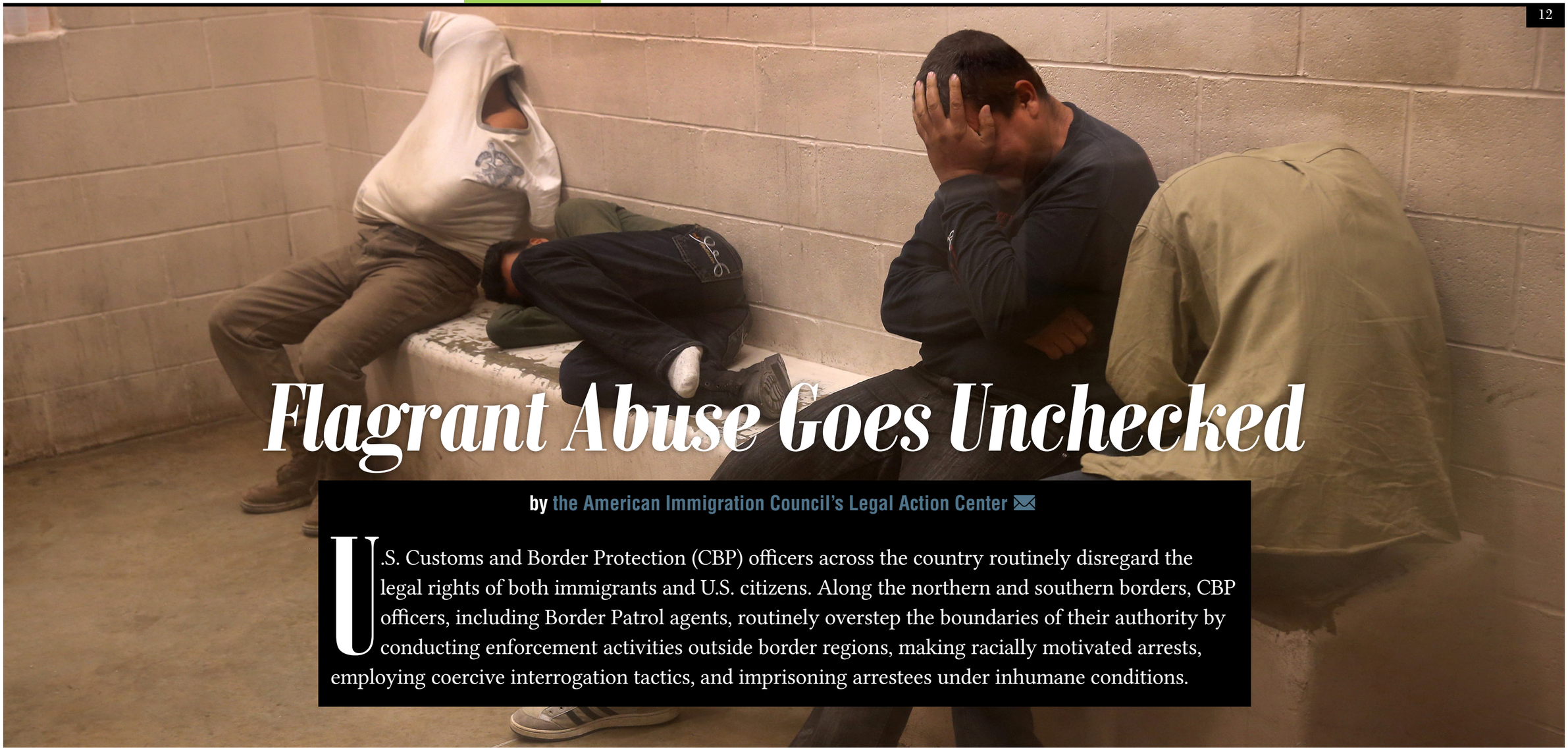
"[T]here must be substantial and probative evidence of such an attempt or conspiracy," wrote the Board, and that evidence "must be contained in the alien's file." The field office director had revoked the petition filed by the beneficiary's second (and current) husband even though the beneficiary and her ex-spouse submitted statements showing the bona fides of their former marriage, along with bank statements and photographs in support of the marriage. In its February 24, 2014, decision, the BIA sustained the appeal and remanded the case back to the director to continue processing the petition.

"[T]his has been nothing but a complete nightmare for this family," said Michael Friedberg, of Friedberg & Trombi in Los Angeles and the attorney of record. "When [USCIS] sent us the notice of revocation, [it] said we had 30 days to file an appeal," he added. "Well, if you look up [8 CFR §205.2(d)], it's actually a 15-day appeal period, so we got incorrect instructions from the government on how to appeal; but nonetheless, thank goodness we knew about it and we filed timely. And then about a month later, we filed our brief to the BIA [in April 2010], so essentially, we were done in terms of challenging the revocation." However, Friedberg said that the government didn't submit its response to the BIA until August 2013. "In the meantime, we had consistently said, 'We have never seen the file. We have never seen any of the adverse evidence. Why don't you send us the adverse evidence?' … So, this family is paying money to do an appeal, to do an appearance, to do this, to do that, fighting off [USCIS] until they're vindicated."

The next court hearing is scheduled for October 2014, but Friedberg said that he'll soon speak to his clients about filing motions to terminate.

When preparing I-130 petitions for couples, Friedberg emphasizes researching at the outset that the marriage is real. "Don't take any case just because they're there and they're willing to pay you," he said. Once an attorney determines that the marriage is real, he or she should submit documents supporting the bona fide nature of it, such as joint lease agreements, bank account statements, insurance papers, photographs, correspondence, etc. As for clients that already are charged with marriage fraud, Friedberg said that "you have to be very thorough in getting the story."

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



Flagrant Abuse Goes Unchecked

by the American Immigration Council's Legal Action Center

U.S. Customs and Border Protection (CBP) officers across the country routinely disregard the legal rights of both immigrants and U.S. citizens. Along the northern and southern borders, CBP officers, including Border Patrol agents, routinely overstep the boundaries of their authority by conducting enforcement activities outside border regions, making racially motivated arrests, employing coercive interrogation tactics, and imprisoning arrestees under inhumane conditions.

Undocumented immigrants sit in a holding cell at the U.S. Border Patrol detainee processing center on April 11, 2013, in McAllen, Texas. PHOTO BY JOHN MOORE/GETTY IMAGES

AILA InfoNet Doc. No. 14043041. (Posted 4/30/14)

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Last year, the American Immigration Council (AIC), the National Immigration Project of the National Lawyers Guild, the Northwest Immigrant Rights Project, and the American Civil Liberties Union of San Diego and Imperial Counties launched a national litigation effort to promote greater accountability by CBP. Through this effort, attorneys in states along the northern and southern borders filed individual complaints for damages on behalf of individuals who have suffered abuse at the hands of CBP agents. These cases exemplify the culture of impunity that exists within CBP and collectively emphasize the need to promote more effective oversight and accountability within the agency.

Abuse Suffered at the Hand of CBP

To build on the ongoing litigation campaign, last month, AIC and its partners launched HoldCBPAccountable.org, a website that catalogues lawsuits and administrative complaints filed against CBP. The lawsuits highlighted on the website reflect allegations of abuses by CBP officers and Border Patrol agents, including, among others, unlawful searches and seizures, removals based on coercion and misinformation, and the use of excessive force.

Some of the most egregious cases posted on the website concern custody conditions within CBP holding cells. In one Federal Tort Claims Act complaint against the United States, four women were apprehended at the U.S.-Mexico border by Border Patrol agents. They were then taken to what the agents called a *"hielera,"* which is Spanish for "icebox" or "icemaker." *Hieleras* are short-term holding cells that agents often keep at very low temperatures. The women all described cells in which dozens of detainees were crowded together. The cells had no beds, no chairs, and only a single toilet in plain view. The women were detained in the cells for as long as 13 days. All have filed administrative complaints for damages for the suffering they endured.

Detainees sleep on the floor in a holding cell at CBP's Brown Field Station in San Diego.

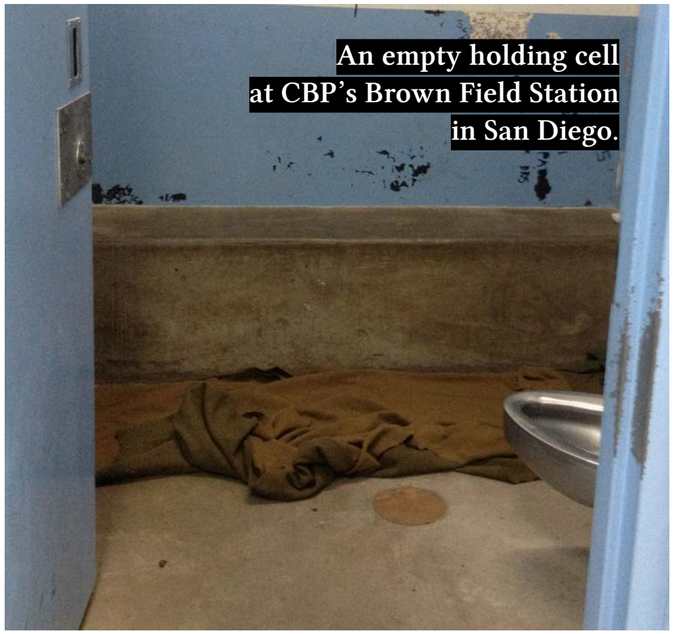
> "While these cases shed light on CBP misconduct, **there are hundreds more such incidents that go unreported**."

Other cases documented on HoldCBPAccountable.org relate to wrongful arrests or unlawful searches and seizures. While CBP, like all law enforcement agencies, is bound by the U.S. Constitution's Fourth Amendment, which prohibits "unreasonable searches and seizures," numerous reports indicate that CBP officers and Border Patrol agents search, interrogate, and arrest noncitizens without the requisite "reasonable suspicion" or "probable cause."

Instead, as reflected in Frias v. Torrez, et al., No. 3:12-CV-1296-B (N.D. Tex., filed Apr. 26, 2012), Border Patrol agents sometimes undertake enforcement action based on factors, such as race and ethnicity. The Border Patrol agent involved in the *Frias* case claimed that he stopped Daniel Frias on a highway outside Abilene, TX, because he saw body-like shapes

in the back seat of his pick-up truck, not because of any driving violation. When asked for identification, Frias produced his valid New Mexico driver's license, but was handcuffed almost immediately thereafter. Frias claimed that the stop was motivated solely by his Hispanic appearance and, thus, violated his Fourth Amendment rights. Because there was nothing in the back seat of the truck, the stop—which took place hundreds of miles from the border and involved no other suspicion of wrongdoing—would not have been justified under the Fourth Amendment. The District Court of the Northern District of Texas has denied the government's motion for summary judgment on false imprisonment and assault claims.

Furthermore, HoldCBPAccountable.org highlights cases alleging CBP's cooperation with local police. When Gustavo Vargas was stopped by the Anacortes, WA, police for allegedly failing to use his turn signal, he provided a valid license, registration, and proof of insurance. Despite this, the police officer called Border Patrol to check Vargas's immigration status. Although the Border Patrol agent who responded found no history of immigration or criminal violations, he instructed the police officer to detain Vargas and subsequently arrested him. Vargas was detained for almost 10 weeks. He has filed a complaint in the U.S. District Court for the Western District of Washington seeking damages for his unlawful detention.



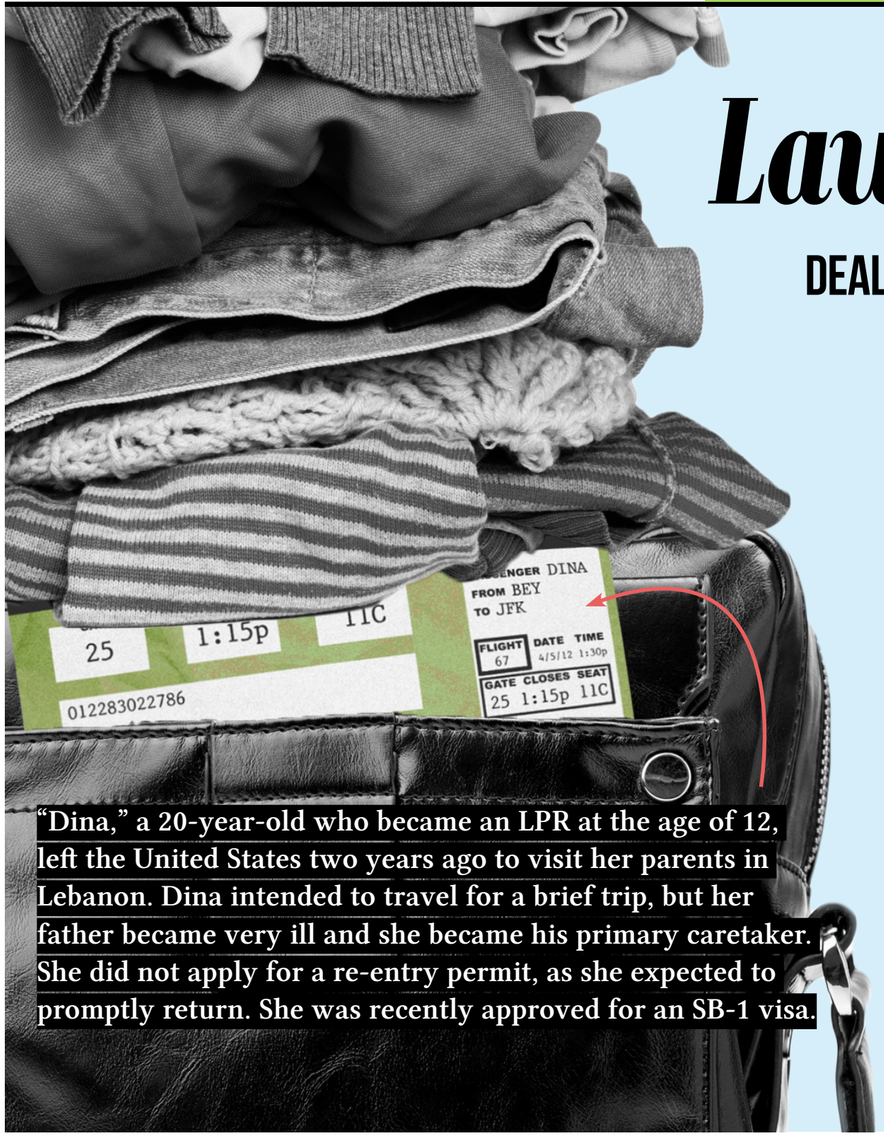
An empty holding cell at CBP's Brown Field Station in San Diego.

Maintaining a Close Watch

While these cases shed light on CBP misconduct, there are hundreds more such incidents that go unreported. At present, the website details cases and complaints arising from encounters with CBP in eight states across the country. As these cases progress and more are filed, the website will be updated with relevant information. The website also includes documents received through the Freedom of Information Act, agency documents regarding CBP policies and procedures, and reports detailing ongoing and widespread abuses along the border. Recently, AIC also issued two reports that further highlight abuses by CBP. These reports, which are part of a series entitled "Bordering on Criminal," were authored by scholars from the University of Arizona, George Washington University, and the University of Texas, El Paso. The first one focuses on the mistreatment of unauthorized migrants in U.S. custody; the second one examines U.S. authorities' confiscation of the belongings of repatriated migrants. A forthcoming report will address CBP's failure to take action in response to complaints filed with the agency. These scholarly contributions, combined with the ongoing litigation across the country, demonstrate the urgent need to establish accountability and transparency in one of the largest and fastest-growing law enforcement agencies in the United States.

THE LEGAL ACTION CENTER of the American Immigration Council uses litigation and advocacy as tools to protect the rights of noncitizens. It litigates in federal courts, focusing on cases that have a wide impact. It also advocates before the immigration agencies to help ensure that the immigration laws are applied properly.

AILA InfoNet Doc. No. 14043041. (Posted 4/30/14)



"Dina," a 20-year-old who became an LPR at the age of 12, left the United States two years ago to visit her parents in Lebanon. Dina intended to travel for a brief trip, but her father became very ill and she became his primary caretaker. She did not apply for a re-entry permit, as she expected to promptly return. She was recently approved for an SB-1 visa.

Lawful Status Lost

DEALING WITH THE 'ABANDONMENT' OF LPR STATUS

by Nadeen Aljijakli

Immigration attorneys often encounter a lawful permanent resident (LPR) who wants to return to the United States after spending considerable time in his or her home country. The person may have left with the intention to return promptly to the United States, but remained unexpectedly due to personal obligations or other circumstances. Generally, an LPR who has remained outside the United States for more than one year is presumed to have "abandoned" his or her LPR status and cannot re-enter the United States with a permanent resident card alone. *See* 8 CFR §211.1(a). The SB-1 visa, or "returning resident" special immigrant visa, which is obtained through consular processing, might allow your client to reclaim his or her LPR status, assuming that he or she is eligible.

Because of an unanticipated turn of events that may lead to an individual's lengthy stay, the individual often has not applied for a re-entry permit before leaving the United States, something that is required and shows proof of intent to maintain residence in the United States. *See id.* If the person attempts to return to the United States without taking further precautions, such as securing an SB-1 visa, he or she will likely be questioned at the airport by U.S. Customs and Border Protection (CBP). If CBP determines that the LPR has abandoned his or her residence, then the LPR will be issued a Notice to Appear and placed in removal proceedings. Typically, the person will be charged by the U.S. Department of Homeland Security (DHS) with being inadmissible at the time of entry under INA §237(a)(1)(A). Then he or she will have the opportunity to challenge the findings by DHS before an immigration judge. If the individual can show that there was no intent to abandon LPR status, then he or she will be allowed to retain LPR status and remain in the United States. However, the stress, legal fees, unpredictable outcome, and the lengthy process of removal proceedings make this an unattractive option for many. In some cases, at the port-of-entry, CBP may even attempt to have the returning LPR sign Form I-407, Abandonment of Lawful Permanent Resident Status, and deny his or her entry to the United States.

Oftentimes, attorneys hear from prospective clients in such situations after they already have been placed in removal proceedings, and, therefore, the course of action already has begun. However, there are fortunate occasions where the LPR may consult you from abroad before traveling back to the United States. In such cases, the SB-1 visa may be a more favorable option for qualifying candidates with compelling circumstances.

What Is the SB-1 Visa?

What exactly is a special immigrant for purposes of the SB-1 visa? INA §101(a)(27)(A) defines a "special immigrant" as an "immigrant, lawfully admitted for permanent residence, who is returning from a *temporary* visit abroad" (emphasis added). Specifically, a person qualifies as a special immigrant if the following conditions are met:

- The noncitizen had LPR status at the time of departure from the United States;
- The noncitizen left the United States with the intention of returning and has not abandoned this intention; and
- The noncitizen is returning to the United States from a temporary visit abroad, and, if the stay abroad was protracted, this was caused by reasons beyond his or her control and for which he or she was not responsible. *See* 22 CFR §42.22(a).

The Assessment Process

The first step in assessing whether your client has a strong case for an SB-1 visa is to identify his or her reasons for leaving the United States and the circumstances that led to the prolonged stay abroad. By way of example, this author's client, Dina (used as a pseudonym), was recently approved for an SB-1 visa. She is a 20-year-old who became an LPR at the age of 12 and lived in the United States until recently. She left the United States two years ago to visit her parents in Lebanon during the summer. Dina intended to travel for a brief trip, but her father became dramatically ill during her visit and she became his primary caretaker because no one else could. She did not apply for a re-entry permit before her departure from the United States, as she expected to return promptly after her visit. As part of her SB-1 visa application, Dina presented a detailed statement regarding her situation: evidence showing her established life in the United States before her departure, including college enrollment; evidence of her efforts to maintain her U.S. ties; evidence that she did not abandon her intention to return to the United States, including acceptance to a master's degree program; and, most importantly, documentation of her father's life-threatening medical condition and other evidence confirming that she was his primary caretaker. The author also submitted a detailed legal memorandum explaining her eligibility for the SB-1 visa. After her interview, Dina was granted the SB-1 visa and given a six-month period to re-enter the United States as an LPR.

Some consular officers will argue that taking care of an ill family member abroad is a choice, so it is not "beyond the control" of the applicant for purposes of meeting the special-immigrant-visa criteria. For this reason, it is essential to personalize the applicant's situation by giving context to the applicant's decision to remain abroad for a protracted period. In this case, Dina gave a detailed explanation as to why she was the only family member available to support her father, as well as the limited availability of professional caregivers in his area. She was able to show that her father's survival depended on her presence, which, in effect, made the decision to remain in her home country "beyond her control."

> **Practice Pointer:** It is important to note there is no requisite length of period for determining whether the applicant's visit abroad was "temporary." The Board of Immigration Appeals has held that "what is a temporary visit cannot be defined in terms of elapsed time alone," so the adjudicator will examine whether the visit abroad was expected to terminate within a relatively short period and fixed duration. *See* Matter of Huang, 19 I&N Dec. 749, 753 (BIA 1988); *see generally* Hana v. Gonzales, 400 F.3d 472 (6th Cir. 2005).

The adjudicator also will assess the applicant's family ties, employment, property ownership, and other financial obligations in the United States and in the applicant's home country. The applicant's intent and particular circumstances will control.

The Consular Process

The application process for the SB-1 visa varies from one U.S. embassy to another. It is important to review the particular U.S. consulate's website to determine any specific instructions for the application and to contact the appropriate officials in advance to confirm the process. Generally, the applicant will need to prepare the following materials:

- Form DS-117, Application to Determine Returning Resident Status;
- Application fee (currently $275);
- Original valid passport, permanent resident card, and re-entry permit (if applicable);
- Detailed statement explaining the reasons for the delayed return to the United States;
- Evidence that the applicant's stay outside the United States was for reasons beyond his or her control (*i.e.*, medical documentation, employment with a U.S. company, etc.); and
- Evidence of the applicant's ties to the United States and intention to return (*i.e.*, duration of the applicant's residence in the United States, tax returns, and evidence of economic, family, and social ties to the United States).

> "**The SB-1 visa is an attractive option** in cases where the applicant no longer has the option of re-applying for an immigrant visa based on the category through which he or she immigrated originally."

After submitting the application and supporting documentation, the applicant typically will have an initial interview, during which a consular officer will decide if the applicant is eligible to apply for the SB-1 visa. Once the officer determines the applicant's eligibility, the U.S. consulate will send the applicant an immigrant visa instruction packet and the applicant will wait for a second interview. Approval of the opportunity to apply for an SB-1 visa does not guarantee approval of the immigrant visa. SB-1 visa applicants are subject to the same application processing fees, documentary requirements, medical examination, and administrative processing that apply to all immigrant visa applicants. *See* 9 Foreign Affairs Manual 42.22 Notes. However, Form I-864, Affidavit of Support, is not required.

If the application is approved, a new permanent resident card will not be issued because the previous "A" number and card will remain valid, unless expired; if this is the case, Form I-90, Application to Replace Permanent Resident Card, will be required. The SB-1 visa will typically indicate that it serves as temporary proof of permanent resident status for a one-year-period.

The SB-1 process should be considerably faster than re-applying for an immigrant visa and could be completed in as little as one to two months, depending on the processing times of the particular U.S. consulate. The SB-1 visa is an attractive option in cases where the applicant no longer has the option of re-applying for an immigrant visa based on the category through which he or she immigrated originally (*i.e.*, the applicant has aged out, his or her marital status has changed, he or she has changed employers, etc.). If your prospective client has strong equitable factors in his or her favor to justify the prolonged and unanticipated stay abroad, then the SB-1 visa may provide a workable solution to your client's re-entry problem.

EXCERPT
Commuter Green Cards: A Strange Species (Free!)
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NADEEN ALJIJAKLI is a partner at Aljijakli & Kosseff, LLC, and specializes in family-based immigration, asylum, and complex removal defense. The author's views do not necessarily represent the views of AILA nor do they constitute legal advice or representation.

It's Never Too Late to Go Solo

by Jennifer Atkinson

For some reason, my decadal years have been marked by significant change. At 30, I graduated from law school, turned down an offer from a Boston law firm in order to move to Maine and join a nonprofit ocean conservation practice. At 40, my husband and I started our family through international adoption. Now at 50, I am in my first year as a solo, private immigration practitioner.

This last life-altering shift was preceded by a great deal of thought and preparation, as were the first two. And like those prior leaps, an immigration practice has felt like an undeniable calling: something I just have to find a way to do despite the odds.

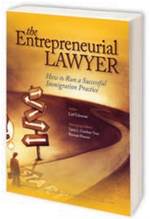
The conversion from ocean conservation to immigration law is not a common one, to the best of my knowledge. Perhaps somewhat less unusual is my shift from the nonprofit to the for-profit world. Combined, they've presented a steep learning curve. Add to this, however, is that I left the formal practice of law a number of years ago.

I can't deny that the experience of international adoption played a role in my return to lawyering. My husband and I adopted our second child from India during three stressful years. Yes, the process was awful and it unexpectedly dragged for so long. The only plus was that it afforded me the chance to reclaim my "inner lawyer."

Top left, clockwise: Jennifer, her daughter, and some of her orphanage "sisters and brothers" from India. Jennifer and her daughter. Jennifer's son and daughter at the Windsor Fair in Windsor, ME.

When I left the regular practice of law, I had been frustrated by its inability to resolve the environmental problems that I handled at the time. It didn't help that our solutions usually wreaked havoc on the people and communities surrounding me. So, I opted instead to pursue a community-based policy path, seeking a better integration between environmental and social needs. Without describing where this turn took me, trust me when I say that by the time I boarded my flight for India, my professional identity as an attorney was pretty clouded.

BOOK



The Entrepreneurial Lawyer

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"**My only comfort**, in the midst of this madness, was that I had performed well during the most stressful legal experience of my career. In fact, it compelled me to rethink my decision to leave lawyering."

My moment of renewed clarity came at a regional passport office in South India. It was the second day of my visit. The meeting with our new daughter had been postponed because, as luck would have it, her passport had not been issued. After a morning's wait among a crowd of other supplicants, my social workers and I cut in line to plead our case to the district clerk. Our bravado clearly displeased him. But what really enraged him was my ability to produce a document that was not in the original dossier. As he slammed down our papers and hurled accusations of fraud, my internal attorney woke up.

That day, as I was coached in the art of Indian advocacy by my social workers, I did everything I could to get us back on course. We didn't get the passport, and left many hours later under the shadow of a threatened police investigation of our scandal-free orphanage. Perhaps, we went overboard. My only comfort, in the midst of this madness, was that I had performed well during the most stressful legal experience of my career. In fact, it compelled me to rethink my decision to leave lawyering.

After I returned to the United States with our daughter a week later, I burrowed into family life while I did some hard, mid-life career thinking.

Soon, I started searching for a way to return to the practice of law that would not lead to the same frustrations as before. This time, I wanted to not only act on my convictions, but also make a positive difference in people's lives and livelihoods. I knew that the only issue that mattered to me as much as conservation was immigration. After researching and networking this practice area, the choice was obvious.

Based in rural Maine, I am the only immigration practitioner within a 60-mile radius for a pretty good reason. I don't need a market survey to know that building this business will take time. So for now, as I start out, I am content to have a small case load and treat each client as a low-paying, high-learning experience. As long as they keep calling, I'll keep climbing.

JENNIFER ATKINSON is a solo immigration attorney based in Friendship, ME.

Religion: Common Ground for Immigration Reform?

by Anastasia Tonello

The Catholic Church is no stranger to the headlines. As a Catholic, I am often disappointed by its focus in the media and its presentation and stance on many issues.

Pope Francis

However, since the selection and inauguration of Pope Francis, much of the conversation in and around the Catholic Church has changed. Last month, when the Pontiff met with President Barack Obama, immigration became the latest issue to make international headlines from the self-proclaimed "Pope of the Poor." Pope Francis highlighted the struggles of migrants and the often inhumane U.S. immigration policies and laws. A 10-year-old girl from Los Angeles, who was able to speak to the Pope, shared the story of her father whom she hadn't seen for two years because he was in detention. Shortly after the story broke, her father was released from detention. USCIS claimed the two events

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'AN EXCEPTIONALLY POWERFUL LAW'

With groups calling for Temporary Protected Status (TPS) for the Philippines, AILA member and immigration attorney Jim Austin shares advice on handling TPS cases. To learn more about TPS, visit AILA InfoNet's Featured Topics page and scroll down to see which countries' nationals are eligible.

"People of faith, like Pope Francis, see the universality of the human condition. He calls on all of us to show compassion for our fellow man. **Immigration reform done right would reflect that compassion.**"

were unrelated—perhaps it was the Pope's first miracle?

This time the Catholic Church is on the right side of the debate. Other recent efforts by the Church to draw attention to the need for reform include the Mass held at the border on April 1, 2014, led by Cardinal Sean O'Malley, which brought together family members on both sides of the border fence to remember those who had died trying to cross the border into the United States.

Across the country, many Catholic leaders, calling for immigration reform, are repeatedly and publicly enjoining their congregations to see immigrants as people first, as human beings who are imperfect, as we all are, most of them just trying to build a better life for themselves and their families.

These Catholic voices are joined by thousands of others of varying faiths. They are joined by Jewish leaders who recognize the relevance immigration has played in their religion's histories, teachings, and U.S. experiences. They are joined by Methodists who see the destruction that our current broken system brings to communities. They are joined by Muslim faith leaders who underscore the dignity of the human life and experience and the need for laws that respect that dignity.

Faith leaders, who may disagree on the finer details of dogma, agree that immigration is a moral issue and one that impacts those of all faiths. This has not gone unnoticed by President Obama, who, on April 15, met with faith leaders to discuss immigration with the hope of reaching consensus across party lines.

People of faith, like Pope Francis, see the universality of the human condition. He calls on all of us to show compassion for our fellow man. Immigration reform done right would reflect that compassion. Perhaps religion, which we too often see as a source of division, can this time serve as a bridge to unite us and serve as a basis and foundation for immigration reform.

ADVOCATE

AILA has released a new series of PSAs on immigration reform.

ANASTASIA TONELLO serves as secretary on AILA National's Executive Committee.

My Mom Is a Foreigner, But Not to Me

by Teresa A. Statler

My Mom Is a Foreigner, But Not to Me is a delightful and colorful book for children between the ages of 4 and 7 written by Hollywood star Julianne Moore and beautifully illustrated by Meilo So, a "foreign mom" herself. The focus is on the foreign moms, their kids, and their different skin colors and ethnicities. Some of the artwork is a bit stereotypical: the reader sees an Asian mom with a China-doll haircut with her light-skinned, blue-eyed daughter and an African-looking mom wearing *kente* clothing and large earrings being embraced by a boy of the same color. There is an Indian mom, and one wearing a Scandinavian-style sweater. All the children appear happy and are clearly receiving love and affection from their mothers—whether their skin colors are the same as their moms', or different.

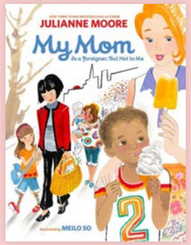
Along with the brightly colored illustrations of moms and kids, Moore gives us a sweetly rhyming text. She starts out by telling us that "My Mom is a foreigner, she's from another place. She came when she was ten years old, with only one suitcase." Cheerful, interior home scenes with obviously "foreign" art, such as cuckoo clocks, German-language wall hangings, and kimonos hanging in a closet, are meant to show children that "foreign" is not really exotic. In a scene with an Italian mom and grandmother making pasta with a machine, the narrator tells us, "We eat funny kinds of foods sometimes. I love it. It tastes gross. My Grandma made it, she taught my Mom. I put it on my toast." The admiring child in this illustration also is viewing some interesting-looking foods, such as squid, eggplant, and a plate of cheeses.

The book tells children that foreign moms and their kids may celebrate different holidays. The centerpiece of the book contains a colorful quiz, asking readers to match a holiday drawing with its corresponding "festival." These include Day of the Dead, St. Lucia Day, Kwanzaa, and the Chinese New Year.

Young readers (and their parents) are sure to relate to this heartwarming book, full of children of all colors and ethnicities doing things with their pretty "foreign Moms" that other children and mothers do. The book ends on a happy note: "She might seem kind of different, and you'd be right I guess, but compared to other Moms, I know that she's the best."

TERESA A. STATLER practices family-based immigration law, asylum, and removal defense in Portland, OR.

BOOK



My Mom Is a Foreigner, But Not to Me

Chronicle Books LLC, 2013
40 pages

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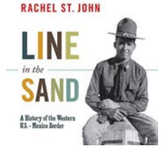


Review: Drawing a Line in the Sand

WHAT'S HAPPENING!

The Badmus Law Firm has merged with the Dallas law firm, Cowles & Thompson. **ANN MASSEY BADMUS** is now shareholder and head of its newly formed immigration practice section. **ANGELA M. LOPEZ** has joined the firm as shareholder, and **KATRINA M. MOORE** and **THU NGUYEN** as associates. All are Texas Chapter members.

Central Florida Chapter member **ELIZABETH M. RICCI** is writing a column called "American by Choice," in *Tallahasee Reports*, in which she interviews local immigrants about their contributions to the community. Her first profile was published in March 2014.

Learn, Network, Explore at AC

by Gayle Oshrin

AILA's annual conference (AC) draws approximately 4,000 people from around the world for four days of education, networking, and fun. Whatever your interests or educational needs, there is a track, so if you only attend one educational event this year, make sure it is AC.

Learning

Attendees will have the opportunity to choose from more than 100 sessions in business and family immigration law, removal defense, and law practice management. Sessions led by seasoned attorneys in immigration law, along with government speakers, will cover the latest news and hot topics. And if you're a newer practitioner, the fundamentals track offers a nuts-and-bolts overview of the entire practice area.

AILA FILE PHOTO

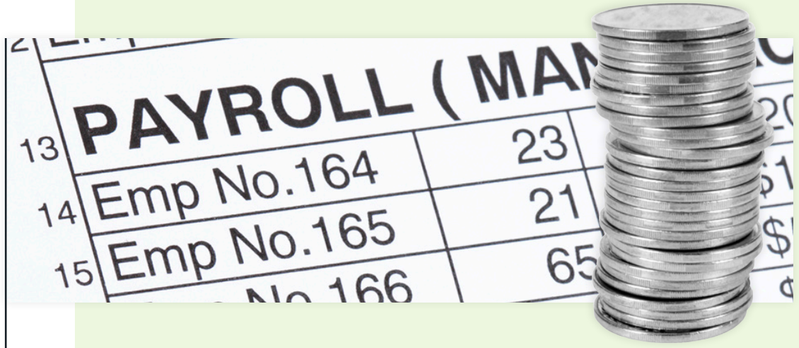
Networking

But remember to step outside the "classroom" to mingle with fellow attorneys before, in between, and after the sessions. Use the networking opportunities to share dilemmas and feedback with each other. These interactions may pay off down the road as you receive client referrals, as well as information for procedures in different jurisdictions or practice areas. And personal connections developed at the AC can last a lifetime.

Exploring

Of course, attending sessions and networking all day long can exhaust you, so rejuvenate yourself by indulging in many social activities offered by AILA. You can also venture out on your own and explore the tourist attractions of Boston, where this year's conference will take place. Every year, AC is held in a different city. But one thing's for sure—you'll return to your office with valuable knowledge, a wad of business cards, and great memories!

GAYLE OSHRIN is an associate with Wormser, Kiely, Galef & Jacobs LLP in New York City and serves as a director on the AILA Board of Governors. She currently serves on several national committees.



BEYONDPAY: PAYROLL MADE EASY

"In most instances, payroll is like a four-letter word," said Rick Brown, CEO of BeyondPay. But with 650 clients and a 98 percent retention rate, BeyondPay is well-equipped to help AILA members handle their payroll needs.

"[O]ver the last three, four years, [because of] the evolution of technology, our ideal client has become someone who realizes that they can no longer do 'business as usual,'" Brown said. "They need to take advantage of technology. They need to streamline operations. They need to become efficient. They need to become profitable." In that vein, if 100 percent of an employer's employees use direct deposit, BeyondPay can deliver a paperless payroll, which is more cost-efficient than paper delivery, he said. The money can be allocated among several accounts without additional charge. Also, the platform allows employers to see the check register, as well as reports, before finalizing the payroll. That is, they can determine how much cash they will need for a certain payroll and view actual pay stubs. Brown said that this preview should yield a payroll that's 100 percent accurate.

BeyondPay charges employers with a flat-rate fee of $75 a month for five employees or less, whether they want to run a weekly, biweekly, or semi-monthly payroll. For the sixth employee or more, the employer will be charged $1.50 per transaction involving generating a check or a direct deposit.

But BeyondPay's expertise is not limited to just payroll. For additional fees, AILA members can also opt for a platform that integrates payroll, time and attendance, HR, and workers' compensation.

Also, since it is a Web-based product, employers and employees can access it anywhere, even on iPads, iPhones, and Android phones. Nevertheless, security levels can be set up, so different people can have access to different data. Customer support is also available. Call 1-800-277-9904 or visit BeyondPay online to get free payroll for 30 days.

This article was originally published in the January/February 2013 issue of VOICE.

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ABOUT

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(Groups 9 & 11) $160 Million in EB-5 Funding

Former Texaco Headquarters - 2013
$31.5 Million in EB-5 Funding

Northpoint Crossing - 2014
(Adjacent to Texas A&M) $49.5 Million in EB-5 Funding

Great Wolf Lodge - 2014
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